STATE OF MICHIGAN

COURT OF APPEALS

W. RANDALL DEAN,

Plaintiff-Counterdefendant-Appellant/Cross-Appellee,

v

SCOTT A. HANSON, PATRICIA A. HANSON, BRIAN J. HOXIE, and MICHELE HOXIE,

Defendants-Counterplaintiffs-Appellees/Cross-Appellants.

UNPUBLISHED
November 18, 2003

No. 241317
Washtenaw Circuit Court
LC No. 99-010739-CH

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a consent order that adopted a prior order denying him injunctive relief as to certain building and land use restrictions, declaring a common scheme or plan prevailed over his development, and entitling defendants Scott Hanson, Patricia Hanson, Brian Hoxie, and Michelle Hoxie rights in an area of common usage.[1] Defendants cross-appeal from the order. We affirm.

I.

This action arose after plaintiff subdivided a twenty-acre parcel of land located in Washtenaw County. To accomplish the subdivision, plaintiff recorded both a Building and Use Restrictions document and a Declaration of Private Road Easement applicable to all five parcels. Exhibit A to the building and use restrictions is a survey representing the five subdivided parcels, labeled A through E. Parcel A consisted of approximately 10.01 acres and the remaining lots B through E were approximately 2.5 acres each. Additionally, the survey showed part of parcel A contained a 6.94-acre easement for "common usage." Plaintiff was apparently contemplating the

[1] Although the parties stipulated to the terms of the consent order, the parties, specifically, reserved the right to appeal or cross-appeal the terms of a prior order of the trial court denying in part plaintiff's motion for summary disposition and granting in part defendants' motion for summary disposition, which is the basis of this appeal.

donation of the common usage easement to a non-profit nature conservancy. Exhibit B to the building and use restrictions stated the legal descriptions of the five parcels as well as three easements. Easement number three provided the metes and bounds description of the parcel A area of "common usage" easement.

Plaintiff sold parcels of the property, and defendants owned lots D and E within the subdivision. A dispute arose between the parties when plaintiff decided to further subdivide the remaining three parcels he owned. Defendants did not want plaintiff selling a lot in the area of Parcel A that was designated for "common usage" because they believed this area would be left undeveloped and accessible to them under the subdivision's overall scheme. In an effort to protect their perceived interest in the area of common usage, defendants recorded a claim of interest against this area. Plaintiff responded by filing his complaint. Plaintiff's count I sought, inter alia, injunctions and monetary damages against both defendants, alleging that defendants violated specific sections of the building use and restrictions by: 1) routinely leaving trash containers in plain sight on non-collection days; 2) storing recreational vehicles in places other than behind the rear of their homes, without hard-surfaced storage pads; 3) erecting garages with room for more than two cars; and 4) leaving portions of their property in unkempt condition. Count IV sought a declaratory judgment providing that defendants only have rights in the parcels they purchased, that plaintiff may further develop his remaining property and that plaintiff does not have to leave the area of common usage undeveloped as a nature preserve.

Defendants answered plaintiff's amended complaint, counterclaiming for a declaratory judgment providing that plaintiff be barred from permitting more than one residential structure on lots A, B and C, and barred from developing the area of common usage. Plaintiff, then, moved for partial summary disposition under MCR 2.116(C)(8),(9) and (10), arguing that defendants' counterclaim failed to state a claim upon which relief can be granted because none of the documents related to subdividing his property could be interpreted as establishing an easement on the area of common usage or restricting his ability to further develop this area. Defendants subsequently filed their own motion for summary disposition, seeking the dismissal of plaintiff's claims for injunctive relief as to the alleged violations of building and use restrictions. Defendants also sought summary disposition on their declaratory judgment counterclaim that a reciprocal negative easement existed over the area of common usage and that plaintiff was restricted from building more than one structure on Lots A, B and C based on the subdivision's common plan or scheme.

The trial court ruled that plaintiff could not further subdivide his remaining parcels and that defendants shared common rights in the area of "common usage" through the doctrine of reciprocal negative easements. The trial court granted defendants' summary disposition motion on plaintiff's claims for injunctive relief regarding alleged land use restriction violations.

II.

On appeal, plaintiff first argues that the trial court erred as a matter of law, when it determined that that the twenty-acre parcel plaintiff subdivided was developed in accordance with a common plan or scheme and that the doctrine of reciprocal negative easements granted all of the subdivided lot owners access to the area of "common usage" easement included in parcel A. Plaintiff argues the trial court erred in discerning a common plan or scheme from the building and use restrictions, survey, and property descriptions. We disagree. This Court reviews

summary disposition judgments de novo. *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 5; 658 NW2d 128 (2003).

In analyzing the Building and Use Restrictions document, the survey, property descriptions, Declaration of Private Road Easement and warranty deeds, the primary objective is to determine the intentions of the parties from the instruments themselves. *Pyne v Elliot*, 53 Mich App 419, 429; 220 NW2d 54 (1974), quoting *Thomas v Jewell*, 300 Mich 556, 558; 2 NW2d 501 (1942). A general plan or scheme of development must have been maintained from the property's inception and must have been understood, accepted, relied and acted on by all having interest in the subdivision. *Sanborn v McLean*, 233 Mich 227, 229; 206 NW 496 (1925); *French v White Star Refining Co*, 229 Mich 474, 476; 201 NW 444 (1924). We find, upon a de novo review, that the trial court properly determined that a common scheme or plan was intended from the recorded documents.

First, the building and use restriction document clearly states that restrictions are binding on all owners. The Private Road Easement, recorded in conjunction with the subdivision of plaintiff's property, also demonstrates plaintiff's intent on a common scheme or plan because it was created for the specific purpose of providing road access to the five parcels. Further evidence of the common scheme is present in the survey attached to the building and use restrictions document that was created before plaintiff ever sold a parcel. The survey described the five parcels and illustrated the area of "common usage" immediately adjacent to all five lots. Moreover, the metes and bounds legal descriptions attached as exhibit B to the building and use descriptions sets forth the plan of five separate parcels and three easements. Finally, the warranty deeds plaintiff provided to both defendants did not contain their own building and use restrictions. Instead, all the parcels were governed by the building and use restrictions document filed by plaintiff. We therefore conclude that there was ample demonstration of an "understood, accepted, relied and acted on" common scheme or plan. See *Sanborn, supra* at 229.

We also find, upon a de novo review, that under the doctrine of reciprocal negative easement, defendants have property rights in the area of "common usage" easement contained on parcel A. Initially, we note that a reciprocal negative easement is a valuable property right. *Webb v Smith (After Second Rem)*, 224 Mich App 203, 210; 568 NW2d 378 (1997), citing *Austin v Van Horn*, 245 Mich 344, 346; 222 NW 721 (1929). And when a parcel is developed in accordance with a common scheme or plan, the doctrine of reciprocal negative easements may subject all lots within the subdivision to the common plan or scheme, regardless of whether such lots are specifically burdened by restrictions in their chain of title. *Allen v Detroit*, 167 Mich 464, 469; 133 NW 317 (1911). Reciprocal negative easements must arise pursuant to a scheme of restriction by a common owner. *Golf View Improvement Ass'n v Uznis*, 342 Mich 128, 132; 68 NW2d 785 (1955). A party asserting the existence of a reciprocal negative easement has the burden of proof. *Denhardt v De Roo*, 295 Mich 223, 228; 294 NW 163 (1940), quoting *Fenwick v Leonard*, 255 Mich 85, 90; 237 NW 381 (1931). In *Sanborn, supra*, the seminal case regarding reciprocal negative easements, our Supreme Court noted:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of

> express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land subject to its affirmative or negative mandates. [*Sanborn, supra* at 229-230.]

Applying the above analysis regarding reciprocal negative easements, we find that the trial court properly determined that the area of "common usage" easement benefiting parcel A, also exists for the benefit of defendants' land. Plaintiff was owner of all the parcels at one time. The legal description of plaintiff's parcel A is clear that "[this property is] subject to and including an easement for common use more fully described in Easement #3." The easement is also clearly illustrated in the survey. Because the common usage area was a specific benefit for parcel A, and because parcel A is a part of a common scheme, the doctrine of reciprocal negative easements requires that the benefit of parcel A benefit all other parcels. In other words, because plaintiff, as common owner, retains a benefit on the land he owns, he cannot deny a benefit to other property owners within the common scheme or plan under the doctrine of reciprocal negative easements. *Sanborn, supra* at 230.

Plaintiff next argues that he can reconfigure the parcels already defined in the original survey in order to sell more lots.[2] Plaintiff planned to further divide parcels A, B and C, and to create a new parcel five in the area of common usage. But as defendants point out, in their brief, the building and use restrictions document contains an express restriction on the number of homes allowed on each defined parcel. Specifically, the building and use restrictions document provides, in relevant part, the following:

> 7. BUILDING AND USE RESTRICTIONS
>
> a. Land Use and Building Type. All land shall be used for single family residential purposes. No building or structure shall be erected, altered, placed or permitted to remain on any parcel of the subject property *other than one detached one-family dwelling*, not exceeding two stories in height, or what is commonly known as a tri-level or quad-level, and accessory building appropriate to single family dwellings such as garages or barns. [Emphasis added.]

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[2] Plaintiff argues that the Private Road Declaration entitles him to further subdivide the property he owns because it states:

> If additional parcels are credited [sic] by the division of the above five parcels, the cost of improving and maintaining the easement will be borne by the owners of the increased number of parcels, with the owner of an improved parcel paying one full share and the owner of an unimproved parcel paying one-half share.

As evidenced by this express restriction, and contrary to plaintiff's position, each defined parcel may only contain one house. Plaintiff is essentially attempting to amend the above restriction by arguing that he may reconfigure the subdivision and build more than one house on each parcel.

When questions arise as to the construction of restrictive covenants, such covenants are to be construed strictly against those creating them. *Sampson v Kaufman*, 345 Mich 48, 50; 75 NW2d 64 (1956). Moreover, a grantor of restrictions is not free to modify those restrictions once others have purchased a portion of the restricted property. *Murdock v Babcock*, 329 Mich 127, 134; 45 NW2d 1 (1950). As this Court stated in *McMillan v Iserman*, 120 Mich App 785, 792; 327 NW2d 559 (1982):

> Even with the knowledge that deed restrictions can be amended, lot owners have a right to rely on those restrictions in effect at the time they embark on a particular course of action regarding the use of their land, and subsequent amended deed restrictions should not be able to frustrate such action already begun.

For the above stated reasons, we hold, upon a de novo review, that the trial court did not err in finding that plaintiff could not unilaterally modify or amend his originally outlined parcel plan.

III.

Plaintiff next argues that he was entitled to summary disposition regarding the following restriction violations:

- Restriction 7(c), which restricts the building of anything but a 2-car garage, was violated when the Hanson defendants erected a 4-car garage and the Hoxie defendants erected a 3-car garage.

- Restriction 7(h), which requires all construction be done by a licensed builder, was violated by defendant Scott Hanson when he did the frame-work on his 4-car garage.

- Restriction 3, which requires trash to be kept out of sight, in closed containers, was violated by both defendants because they placed their trash out for pick-up on days where pick-up was not scheduled.

- Restriction 7(g), which requires lawn to be regularly mowed, was violated when the Hoxie defendants failed to mow parts of their lawn regularly.

Plaintiff also alleges that injunctive relief was appropriate regarding defendants' violations of section 2.4 of the Private Road Declaration, which prohibits defendants from performing maintenance on the private road.

As plaintiff correctly points out to this Court, the trial court erred by employing a "balancing test" of the harm to each party when it denied injunctive relief to plaintiff on the above restriction violations. And although it reached its decision for the wrong reason, the trial court's decision that injunctive relief was not appropriate was the correct result and will be affirmed. *Gleason v Dep't of Trans,* 256 Mich App 1, 3-4; 662 NW2d 822 (2003).

Balancing the economic harm to each party is not an analytical step courts take when it comes to enforcing property restrictions through an injunction. Rather, with the exception of the three equitable exceptions discussed, *infra*, Michigan courts generally enforce valid restrictions by injunction and typically do not consider the parties' respective damages when deciding whether to grant the injunction. *Webb, supra* at 211, citing *Cooper v Kovan,* 349 Mich 520, 530; 84 NW2d 859 (1957). This approach was recently confirmed by our Supreme Court in *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002), when it ruled that a restrictive covenant disallowing property owners to use their property for commercial purposes must be enforced against a "day-care" business that violated the covenant, even if the day-care brought no harm on other property. The Court explained:

> "[T]he plaintiff's right to maintain the restrictions is not affected by the extent of the damages he might suffer for their violation." This all comes down to the well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement. As this Court said in *Oosterhouse v Brummel,* 343 Mich 283, 289; 72 NW2d 6 (1955), "'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction.'" *Id.*

In making his argument that an injunction was proper regarding the restriction violations, plaintiff relies heavily on *Webb, supra,* where this Court required the defendants to demolish a second home they had built in violation of certain property restrictions, which limited purchasers to one house per lot. *Webb, supra* at 206. The *Webb* Court reasoned that the restrictions had been readily ascertainable and that requiring the defendant to tear down the house was proper under the prevailing law. *Id.* at 214. Plaintiff also relies on *Pietrowski v Dufrane,* 247 Wis 2d 232; 634 NW2d 109 (2001). In *Pietrowski, supra,* the restrictions at issue prevented property owners in the subdivision from erecting more than one family dwelling and one private garage on their land. The plaintiff asserted that because the defendants already had a house and an attached garage on their property, the construction of an additional garage violated the restrictive covenants. *Id.* at 237. The *Pietrowski* Court ordered defendant to remove the garage because it violated the restriction. *Id.* at 246.

Although strict enforcement of restrictions through an injunction is the general rule, Michigan courts have also fashioned three equitable exceptions to the strict enforcement of property restrictions: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches. *Webb, supra* at 211, citing *Cooper, supra* at 530. Also, restrictive covenants are to be strictly construed against the grantor and liberally in favor of the grantee. *Patterson v Butterfield,* 244 Mich 330, 335; 221 NW 293 (1928). All doubt should be resolved in favor of the free and unrestricted use of property and against restricted use. *Id.*

In the present case, we find an equitable exception applicable to all of the alleged restrictions violations. *Webb, supra* at 211. The *Webb* Court adopted the definition of *Camelot Citizens Ass'n v Stevens,* 329 So 2d 847, 850 (La App, 1976), which characterized a technical violation of a negative covenant as a "slight deviation" or a violation that "'can in no wise, we think, add to or take from the objects and purposes of the general scheme of development.'" *Webb, supra* at 212, quoting *Camelot Citizens Ass'n, supra* at 850 (omitting the citations from *Camelot Citizens Ass'n*). In *Webb, supra,* this Court determined that the construction of a second

house on the property *did* take away from the general scheme of development because the second home impaired the plaintiffs' view of a lake and resulted in over $5,500 in damages to plaintiffs' property. *Id*. at 212-213.

We first address the alleged two-car garage restriction violation. We find, applying equitable principles, even though defendants' construction of three and four car garages is in apparent violation of the two-car garage restriction, the doctrine of laches, the third equitable exception to the general rule of strict enforcement of property restrictions, supports the trial court's refusal to order defendants to remove part of their garages. See *Webb, supra* at 211. The record indicates that the trial court declined to enforce an injunction regarding the garages because plaintiff had indicated in a deposition that he was aware of the garage additions being built, well before instituting his complaint, but did nothing at that time. It was not until defendants filed a "claim of interest" in 1998 on the area of common usage that plaintiff asserted any violation of the garage restriction. And it was not until July 1999, that plaintiff filed a complaint alleging restriction violations. Laches applies when there has been an unexcused delay in commencing an action, which results in prejudice. *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). The prejudice is caused by the plaintiff's failure to do something which should have been done under the circumstances or failure to claim or enforce a right at the proper time. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990). Plaintiff's failure to bring an action or attempt to enforce the garage provision prior to defendant's claim of interest was filed, is unexcused and prejudiced defendants. Thus, we find, upon a de novo review, applying equitable principles and the doctrine of laches, the third equitable exception to the general rule of strict enforcement of property restrictions, supports the trial court's refusal to order defendants to remove part of their garages.[3] See *Webb, supra* at 211.

We find that the other alleged restriction violations fall under the "technical violations" exception. Regarding the trash removal violations alleged by plaintiff, defendants placed their trash cans out the evening before the next morning's scheduled pick-up in violation of the restriction. The alleged trash violations cannot be said to have caused plaintiff substantial harm. It is clearly a "technical violation" not requiring injunctive relief. See *Webb, supra* at 211.

The alleged violation of the Declaration of Private Road Easement is merely a technical violation. Plaintiff argues that defendants violated the restriction by performing maintenance on the private road without conducting a meeting regarding the maintenance to be performed. But the meeting requirement exists in section 2.4 of the Declaration because all parcel owners must share in the cost of the maintenance. A meeting is necessary to decide on the extent of the maintenance to be performed and to decide how the cost is to be allocated. But as was indicated by defendants' counsel at the motion hearing, defendants did not meet with plaintiff because he

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[3] In light of our resolution of this issue, we need not address the issue defendants raise on cross-appeal. We note that although it appears defendants did in fact violate the two-car garage restriction, the violation was excused by the laches exception to the rule requiring strict enforcement of building restrictions. Defendants violated the restriction and are not entitled to an alternative ruling stating that they did not violate the restriction.

was not asked to pay for any part of this road grading. The fact that defendants had a section of the road graded should be classified as a technical violation because it does not take away from the general scheme of the subdivision. See *Webb, supra* at 211.

Next, regarding the alleged "lawn mowing" violations, we find, upon a de novo review, this is also a technical violation of the building and use restriction document, not requiring injunctive relief. As the trial court pointed out, in 1998 and 1999, defendants had failed to mow certain back sections of their lawn, but it has not happened since. See *Webb, supra* at 211.

Additionally, the alleged violation of restriction 7(h) by the Hanson defendants is properly characterized as a technical violation because even though the restriction requires a licensed builder to do additional construction, the fact that Scott Hanson did the framing of the garage himself does not "take from the objects and purposes of the general scheme of development." See *Webb, supra* at 212.

Plaintiff next claims the trial court erred in granting defendants' motion for summary disposition as to the following restriction:

> 4(b). recreational vehicles: The *onsite storage* of only one recreational vehicle such as a camper, self-propelled motor home, snowmobile, all terrain vehicles, boat, and boat trailer which are licensed by the lot owner and in operative condition, shall be permitted if stored behind the rear line of the house and on a hard surface similar to the driveway. [Emphasis added.]

Plaintiff argues that a proper reading of the restriction dictates that only one recreational vehicle (RV) be allowed on defendants' property, regardless of who owns it. In support of his interpretation of the RV restriction, plaintiff cites *Borowski v Welch*, 117 Mich App 712; 324 NW2d 144 (1982). In *Borowski, supra,* this Court held that the defendant violated a RV restriction when he parked his mobile home in his driveway. The restriction stated:

> No house trailer, trailer, coach, tent or temporary shelter including fishing shanty, shall be parked, placed, erected or occupied on said premises, except an unoccupied trailer or fishing shanty may be totally stored in a garage thereon. [*Id.* at 713.]

The *Borowski* Court determined that the above restriction prohibited a mobile home from being parked in the defendant's driveway because the overall intent of the restriction was to prohibit the presence of large, unsightly vehicles. *Id.* at 717.

The problem with applying *Borowski, supra,* to this case is that unlike the defendant in *Borowski,* who owned the mobile home and stored it permanently on his property in violation of the restriction, defendants, in the present case, are not attempting to store multiple RVs, that they own, in violation of the restriction. Defendants are, also, not seeking to permanently store RVs on their property owned by their friends and family. Rather, on the occasion when visitors arrive in mobile homes, defendants have permitted them to park on defendants' property. In construing the scope of a restrictive covenant on property, all doubts must be resolved in favor of the free use of the property. *O'Connor v Resort Custom Builders, Inc,* 459 Mich 335, 341-342; 591 NW2d 216 (1999).

Therefore, construing the RV restriction in favor of the free use of the property, we find, upon a de novo review, that defendants did not violate the restriction by having friends and family visit with their RVs. Plaintiff's interpretation of the RV restriction is not consistent with the free use of property because it would prohibit defendants from ever entertaining guests that happen to bring an RV. Moreover, aside from the fact that defendants did not own these visiting RVs, they were not permanently stored on defendants' property.[4]

Next, plaintiff argues that the Hoxie defendants violated the RV restriction, individually, by not storing their motor home "behind the rear line of the house." Plaintiff insists that "behind the rear line of the house" meant entirely behind the house and out of sight. The record indicates that the Hoxie motor home was not stored directly behind their house but was stored on another part of the lot, behind a line that was parallel to their house. The trial court determined that "behind the rear line of the house" meant "behind a line drawn parallel to and along that part of the house furthest from the lot line."

We hold, upon a de novo review, that the trial court properly interpreted the restriction in favor of the free use of the property because there was simply no evidence presented by plaintiff that this restriction meant the mobile home was to be kept out of sight, entirely behind the Hoxie's home.[5]

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

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[4] Plaintiffs do not argue that defendants *did* own and store more than one RV on their property, but instead plaintiff argues that the trial court misinterpreted the wording of the RV restriction.

[5] We note that plaintiff also raises issue with the fact that defendants violated the twenty page brief limitation contained in MCR 2.119(A)(2) when they filed a forty-four page summary disposition brief. Plaintiff contends that he was "substantially prejudiced" by the undue length of defendants' brief. MCR 2.119(A)(2) states that the trial judge may permit briefs to go beyond the twenty page limit. As long as the opposing party to the lengthy brief has ample opportunity to respond, the page limitation is irrelevant. *People v Leonard*, 224 Mich App 569, 579; 569 NW2d 663 (1997). In the present case, the trial court acknowledged, at the summary disposition hearing, that defendants' brief was over twenty pages, but it also gave plaintiff the opportunity to do the same. The trial judge stated he would not rule immediately on the motion, in order to give plaintiff time to respond at-length if he desired. The record indicates plaintiff was given approximately sixty days to file an amended brief, and he did not do so. There was no evidence of "substantial prejudice" caused by the trial court permitting a forty-four page brief. Moreover, it was within the trial judge's discretion to permit the nonconforming brief.