STATE OF MICHIGAN

COURT OF APPEALS

AMERICOR MANAGEMENT SERVICES, L.L.C.,

Plaintiff/Counterdefendant-Cross-Appellee,

and

GUY W. SMITH,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

JOHN S. SAMMOND, Trustee, and DIANE DENHOLM SAMMOND, Successor Trustee of the JOHN S. SAMMOND REVOCABLE TRUST OF 1999,

Defendants/Third-Party Plaintiffs/Counterplaintiffs,

and

FIRST AMERICAN TITLE INSURANCE COMPANY and SECLUDED LAND COMPANY, L.L.C.,

Defendants,

and

MAGGIE LAKES OWNERS ASSOCIATION, INC.,

Intervening Defendant-Appellee/Cross-Appellant,

and

UNPUBLISHED
July 14, 2009

No. 284926
Iron Circuit Court
LC No. 06-003449-CH

LIGHTHOUSE LAND COMPANY, d/b/a LOON LAKE REALTY,

Third-Party Defendant,

and

DAVID M. DELANEY,

Intervening Plaintiff.

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Plaintiff Guy Smith[1] appeals as of right, challenging the circuit court's June 2007 order granting partial summary disposition to intervening defendant Maggie Lakes Owners Association, Inc. (the association), pursuant to MCR 2.116(C)(8) and (10), and denying plaintiff's cross-motion for summary disposition. On cross appeal, the association contests the circuit court's February 2008 order denying its motion for summary disposition of its counterclaims under MCR 2.116(C)(9), and granting Americor Management Services, L.L.C. summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

This case concerns the applicability of protective covenants to the Kalla Walla Lodge property, which is comprised of about 16 acres of land between Maggie Lake and West Maggie Lake in Iron County. Americor acquired the property in 2004. The appeal also involves whether Americor must become a dues paying member of the Maggie Lakes Owners Association and comply with the association's rules. The circuit court determined that the protective covenants at issue applied to the Kalla Walla property under the doctrine of reciprocal negative easements and, therefore, granted the association's motion for summary disposition on this issue and denied Americor's cross-motion for summary disposition. With respect to the association's counterclaims, the court found that Americor's purchase agreement only required Americor to join the "Maggie Lakes Road Maintenance Association," not the "Maggie Lakes Owners Association." The circuit court also rejected the association's claim that Americor was liable for the association's attorney fees pursuant to a special assessment that the association sought to levy against Americor.

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[1] In this case, Americor was originally named as the plaintiff. After this appeal was filed, the Court granted Smith's motion for substitution in place of Americor, but left Americor in the appeal as a cross-appellee. *Americor Mgt Services, LLC v Sammond*, unpublished order of the Court of Appeals, entered September 8, 2008 (Docket No. 284926).

I. Applicability of Protective Covenants to the Kalla Walla Property

Plaintiff first contends that the circuit court erred in granting the association's motion for summary disposition, and denying Americor's cross-motion, with respect to whether the protective covenants applied to the Kalla Walla property. We review de novo a circuit court's summary disposition ruling. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The circuit court granted the association's motion under both MCR 2.116(C)(8) and (10). A motion brought under subrule (C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id*. at 119; *Stopera v DiMarco*, 218 Mich App 565, 567; 554 NW2d 379 (1996). Here, the association sought judgment on its own claim, and did not argue that Americor's claims were untenable as a matter of law. Furthermore, the circuit court considered evidence beyond the pleadings in reviewing the association's motion. Consequently, the circuit court erred to the extent that it invoked subrule (C)(8) as a basis for summary disposition regarding the association's negative reciprocal easement claim.

However, we find that summary disposition was appropriate under subrule (C)(10). When reviewing a motion brought under subrule (C)(10), this Court must examine the documentary evidence presented to the circuit court and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists to warrant a trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Only "the substantively admissible evidence actually proffered" may be considered. *Maiden*, *supra* at 121; MCR 2.116(G)(6).

In *Sanborn v McLean*, 233 Mich 227, 229-230; 206 NW 496 (1925), our Supreme Court explained the doctrine of reciprocal negative easements as follows:

> 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. It originates for mutual benefit and exists with vigor sufficient to work its ends. It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan. If a reciprocal negative easement attached to defendants' lot it was fastened thereto while in the hands of the common owner of

> it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it.

The essential elements of the doctrine include "(1) a common grantor; (2) a general plan; and (3) restrictive covenants running with the land in accordance with the plan and within the plan area in deeds granted by the common grantor." *Cook v Bandeen*, 356 Mich 328, 337; 96 NW2d 743 (1959); see also *Civic Ass'n of Hammond Lake v Hammond Lake Estates No 3 Lots 126-135*, 271 Mich App 130, 137; 721 NW2d 801 (2006). It is an equitable doctrine "based upon the fairness inherent in placing uniform restrictions upon the use of all lots similarly situated." *Id*. (internal quotation omitted). Negative easements and restrictive covenants constitute valuable property rights. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210-211; 568 NW2d 378 (1997).

Plaintiff maintains that the doctrine of reciprocal negative easements does not apply because the properties in this case did not have a common grantor. He points out that Americor acquired the Kalla Walla property from the John S. Sammond Revocable Trust of 1999, whereas the Secluded Land Company acquired its property from the Sammond Family Limited Partnership. Plaintiff also avers that Secluded initially created the protective restrictions, not the Sammond partnership or trust.

The evidence submitted by the parties establishes that Sammond exercised control over the Sammond Family Limited Partnership and two trusts, the John S. Sammond Revocable Trusts of 1995 and 1999, respectively, and that Sammond transferred various properties from one entity to another at will. The evidence also shows that Sammond coauthored the protective covenants, and that he incorporated them into each of three purchase agreements with Secluded that governed the residential development of most of the properties owned by the Sammond entities. Sammond included the protective covenants in the February 1999 agreement between the 1999 Sammond trust and Secluded that gave Secluded a potential option to purchase the Kalla Walla property. Sammond additionally referenced the protective covenants in the May 2000 and January 2001 Sammond Family Limited Partnership deeds to Secluded, which covered the many properties in Secluded residential development phases two and three. The scheme of restrictions thus arose from a common owner, despite that Secluded first recorded documentation containing the protective covenants. The protective covenants run with the land purchased and developed by Secluded, and the Secluded parcels and the Kalla Walla property both come within the same geographical area occupied by Sammond's general plan of development. With respect to Americor's actual or constructive notice of the restrictions, the affidavit of Smith, Americor's president and managing member, reflects his awareness of the protective covenants, which were attached to the Kalla Walla property purchase offer that Americor made to the Sammond 1999 trust. Furthermore, Smith expressly acknowledged that he viewed the protective covenants as important to preserving the "value, peace and enjoyment of the Kalla Walla" property.

We concur in the circuit court's assessment that no question of material fact exists tending to disprove that the Kalla Walla property and the Secluded properties had a common grantor, Sammond, that Sammond promulgated a general plan of development, or that the protective covenants ran with the land in accordance with Sammond's plan in deeds to property located within the plan area. Furthermore, Americor concededly had notice of the restrictions, which benefited its land. Consequently, the circuit court correctly decided as a matter of law that

the protective covenants applied to the Kalla Walla property, and properly granted the association summary disposition in this regard under subrule (C)(10).

Contrary to plaintiff's argument, the circuit court need not have limited its consideration of this issue to the four corners of Americor's deed. Under the doctrine of reciprocal negative easements, restrictions may apply to land even though the restrictions do not appear in a particular recorded deed. See *Cook, supra* at 334-337; *Sanborn, supra* at 230-233; *Civic Ass'n of Hammond Lake, supra* at 132-133, 136-138. As these authorities recognize, if the protective covenants appeared in the deeds for all parcels in an area of property development, there would be no need to address the doctrine of reciprocal negative easements. Therefore, we find groundless plaintiff's argument that the circuit court erred in going beyond the four corners of the deed.

Plaintiff also insists that the circuit court erroneously relied on inadmissible evidence in granting the association's motion for summary disposition. When a court reviews a motion for summary disposition under subrule (C)(10), it may consider only "the substantively admissible evidence actually proffered." *Maiden, supra* at 121; MCR 2.116(G)(6). This requirement means that "only evidence whose *content or substance* is admissible can" be considered in reviewing a motion for summary disposition under subrule (C)(10). *Maiden, supra* at 123 (emphasis added). As explained in *Maiden*,

> The evidence need not be in admissible form; affidavits are ordinarily not admissible evidence at trial. But it must be admissible in content. . . . Occasional statements in cases that the party opposing summary judgment must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission. [*Id.* at 124 n 6, quoting *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994).]

Plaintiff fails to identify any specific, allegedly inadmissible evidence that the circuit court improperly considered. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). The circuit court stated that it was relying only on evidence properly before the court. Because plaintiff does not dispute this pronouncement by identifying any evidence that he believes the court improperly considered, he has abandoned this issue. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

In summary, we affirm the circuit court's decision granting the association's motion for summary disposition pursuant to subrule (C)(10), and denying Americor's cross-motion for summary disposition, with respect to the applicability of the protective covenants to the Kalla Walla property.

II. Membership in Maggie Lakes Owners Association

The association submits in its cross appeal that the circuit court should have granted its motion for summary disposition under MCR 2.116(C)(9), and should have denied Americor summary disposition under MCR 2.116(C)(10), regarding the association's claim that Americor had to join the association as a dues paying member and comply with the association's rules.

We initially observe that the circuit court did not err in denying the association's motion premised on subrule (C)(9). "When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). In this case, the association did not limit its motion to the pleadings, but made arguments based on its interpretation of Americor's purchase agreement. Summary disposition thus was inappropriate under subrule (C)(9).

However, we agree with the association that the circuit court erred in granting Americor's motion for summary disposition under subrule (C)(10) concerning its membership obligations. The July 2004 purchase agreement for the Kalla Walla property contains the following relevant provision: "This conveyance is made along with and subject to membership in the *Maggie Lakes Road* Maintenance Association, and Buyer agrees to the provisions and rules thereof. Buyer is aware of an annual association fee of $75.00." (Italicized material is handwritten.). The circuit court found this language clear and unambiguous on its face, that the language made no mention of the Maggie Lakes Owners Association or that association's rules, and that the language fairly admitted but one interpretation, i.e., that Americor only agreed to become a dues paying member of the "Maggie Lakes Road Maintenance Association" and to comply with that association's rules.

In *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005) (opinion by Cavanagh, J.), our Supreme Court reaffirmed the well-settled rule that a contract must be enforced as written, and that courts may not create an ambiguity in a contract when the terms of a contract are clear. The Supreme Court then distinguished between a *patent* ambiguity, which appears on the face of a document, and a *latent* ambiguity, which is not readily apparent from the language of a contract, "but instead arises from a collateral matter when the document's terms are applied or executed." *Id*. (citation omitted). The Supreme Court explained that "[b]ecause the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *Id*. (internal quotations and citation omitted). "In other words, where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." *Id*. (citation omitted); see also *In re Kramek Estate*, 268 Mich App 565, 574; 710 NW2d 753 (2005).

The clear and unambiguous language of the July 2004 purchase agreement states that Americor must become a dues paying member of the "Maggie Lakes Road Maintenance Association" and comply with "the provisions and rules thereof." However, the evidence agreed that no such organization ever existed. The protective covenants attached to the July 2004 purchase agreement refer to "the Maggie Lakes Owners' Association," not the Maggie Lakes Road Maintenance Association. The association also presented evidence that the purchase agreement referenced the Maggie Lakes Road Maintenance Association by mistake.

We find a latent ambiguity arising from the attempt to enforce the requirement that Americor join the Maggie Lakes Road Maintenance Association because the evidence shows that no such organization ever existed. The circuit court recognized that a factual dispute existed concerning whether the two associations were one and the same. But the court determined that

because the agreement clearly and unambiguously referred to the Maggie Lakes Road Maintenance Association, the factual dispute was rendered immaterial. The factual dispute is material because if the reference to Maggie Lakes Road Maintenance Association intended to refer to the association, then Americor contractually agreed to become a dues paying member of the association and comply with its rules. We conclude that the circuit court erred in granting Americor summary disposition under subrule (C)(10) regarding whether it agreed to join the association, pay dues, and comply with association rules.

III. Attorney Fees

The association lastly asserts that the circuit court erred in finding no contractual basis for its request for attorney fees.[2] Assuming that Americor has to join the association, the association argues that it properly may recover its attorney fees incurred in this litigation because its rules allow it to assess members for damages to roads, lakes, and common areas. The rules also allow it to adjust a member's pro rata share of the annual budget "to reflect a particular member's extraordinary use of the roadways(s), common area(s) and/or lakes." We agree with the circuit court that neither of these provisions authorize the association to levy or collect attorney fees. Therefore, the court correctly denied the association's motion for summary disposition on its request for attorney fees.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher

[2] The association does not argue that any statute or court rule authorized the attorney fees.