STATE OF MICHIGAN

COURT OF APPEALS

35160 JEFFERSON AVENUE, L.L.C.,

Plaintiff-Appellee/Counter Defendant-Appellant,

v

CHARTER TOWNSHIP OF HARRISON, and BOARD OF MACOMB COUNTY ROAD COMMISSIONERS,

Defendants,

and

IVAN DOVERSPIKE and KIMBERLY F. DOVERSPIKE,

Defendants/Counter Plaintiffs-Appellees.

UNPUBLISHED
August 7, 2012

No. 303152
Macomb Circuit Court
LC No. 2010-000420-CH

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Plaintiff/counter defendant-appellant 35160 Jefferson Avenue LLC (Jefferson), appeals as of right the trial court's declaratory judgment in favor of defendants/counter plaintiffs-appellees Ivan Doverspike and Kimberly F. Doverspike (Doverspikes) holding that all four lots of the Edward Tuma Subdivision in Harrison Township are encumbered by a deed restriction limiting use and development of the properties to single-family residences that conform to certain setback requirements. For the reasons set forth in this opinion, we vacate the trial court's order in part and affirm the order in part.

I. FACTUAL BACKGROUND

The Edward Tuma Subdivision is located in Harrison Township and it abuts Lake St. Clair to the east. The subdivision plat has four lots and two private drives: Drive A and Drive B. Lots 2 and 3 are the two "front lots" that abut Lake St. Clair to the east. Lot 2 is located directly to the north of Lot 3. Lots 1 and 4 are the "back lots" and are located directly behind or to the west of Lots 2 and 3. At present, all four lots are vacant. Jefferson owns Lot 2. The

Doverspikes together own Lots 3 and 4; and Ivan owns Lot 1. The following includes an overview of the chain of title of the four lots:

On April 9, 1960, Edward and Doris Tuma and Jerry and Rita Totzka recorded the Tuma Subdivision Plat. On July 20, 1960, the Totzkas conveyed their interest in the subdivision to the Tumas. Shortly thereafter, the Tumas built a home on Lot 2. Then, on August 8, 1963, the Tumas conveyed Lot 3 to Fred and Ursula Cernuto via a warranty deed; the deed was recorded at Liber 1438 page 22 of the Macomb County Records and it contained the following restriction:

> Purchasers further agree that a single residence only may be erected upon the premises with a minimum living area of not less than 1500 sq. ft. and of brick veneer construction; also, the front building line of the structure shall not extend beyond a line 180 ft. East of the West line of said Lot 3 Edward Tuma Sub. The front building line is construed as the side facing Lake St. Clair.

On June 17, 1982, Carola Tuma, as personal representative of the Edward Tuma Estate, conveyed a one-half interest in Lots 1, 2 and 4 and Private Drives A and B to Karen Russell Corace, as Trustee of the Karen Russell Corace Living Trust. On August 9, 1982, Doris conveyed the other one-half interest in Lots 1, 2, and 4, and Private Drives A and B to Corace; Doris included the following language in the warranty deed: "subject to Building and use restrictions contained in instrument recorded in Liber 1438, page 22." Liber 1438 page 22 is the Tuma-Cernuto deed, which contained the use restriction that is set forth above.

About four years later, on January 14, 1986, Karen Russell Corace conveyed Lots 1 and 2 and Private Drives A and B to Oscar Kaplan and Greg Hauler "subject to building and use restrictions and easements of record." On March 24, 1989, Kaplan and Greg Hauler, conveyed Lot 2 and Private Drives A and B to Michael Hauler via a quitclaim deed. Sometime thereafter, Standard Federal Bank obtained title to Lots 1 and 2 and Private Drives A and B. On October 21, 1999, Standard Federal conveyed Lots 1 and 2 and Private Drives A and B to Matthew M. Hauler "[s]ubject to all restrictions and easements of record, if any." After obtaining title, in 2004 Matthew M. Hauler declared bankruptcy and Jefferson obtained title to Lot 2 and Private Drives A and B in the bankruptcy proceedings. Meanwhile, at some point, the Doverspikes obtained Lots 1, 3, and 4.

After acquiring Lot 2, Jefferson planned to construct a multi-unit development on the property. Jefferson submitted several site plans to the Harrison Township Planning Commission, and the Harrison Township Zoning Board of Appeals (ZBA). The Doverspikes contested the proposals and Jefferson's site plans were rejected. Jefferson and the Township were involved in a circuit court case in 2006 regarding the site plan. The circuit court allowed the Doverspikes to intervene in that case only to participate in settlement negotiations.

On January 29, 2010, Jefferson filed a complaint for declaratory judgment or mandamus and for damages in this case. Jefferson alleged that defendant Charter Township of Harrison

(Township) and defendant Board of County Road Commissioners (Road Commission)[1] had a legal duty to approve aspects of its proposed development plan. Jefferson also alleged that Ivan's[2] "frivolous objections" caused it to incur significant monetary damages and it raised due process and equal protection arguments.

Thereafter, Jefferson moved for summary disposition. However, before the trial court addressed the motion, the Doverspikes filed a counter-complaint wherein they alleged that the Tuma-Cernuto deed restriction applied to Lot 2 and limited Jefferson to construction of a single-family residence. The Doverspikes alleged that the restriction applied to Lot 2 because, when Doris conveyed her interest in Lots 1, 2, and 4 and Private Drives A and B to Corace, she conveyed the property subject to "building and use restrictions contained in instrument recorded in Liber 1438, page 22." The Doverspikes requested that the trial court enter a judgment declaring that use of Lot 2 was restricted to the construction of a single residence as set forth in the Tuma-Cernuto deed restriction and requested an injunction enjoining Jefferson from otherwise developing the property.

Jefferson filed an answer to the counter-complaint and asserted that the Tuma-Cernuto deed restriction was limited to Lot 3 in part because the original proprietors of the plat did not place any restrictions on the property. Jefferson also argued that the Doverspikes' argument with respect to the deed restriction was barred by laches.

On October 21, 2010, the trial court entered an opinion and order holding that the Tuma-Cernuto deed restriction applied to all of the lots in the Tuma Subdivision. After denying Jefferson's motion for rehearing or reconsideration, on March 2, 2011, the trial court entered a declaratory judgment holding that all four lots of the Tuma Subdivision are encumbered by the deed restriction and it dismissed all of Jefferson's claims. This appeal ensued.

II. LAW AND ANALYSIS

Jefferson contends that the trial court erred in holding that the deed restriction applies to Lots 1, 2, and 4 of the Tuma Subdivision. In entering its declaratory judgment, the trial court necessarily denied Jefferson's motion for summary disposition; we review de novo a trial court's decision on a motion for summary disposition in an action for declaratory judgment. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43; 742 NW2d 624 (2007). Where the record presented to the trial court was not limited to the pleadings, we review the trial court's decision pursuant to MCR 2.116(C)(10). *Id*. "A motion under MCR 2.116(C)(10) tests the factual support for a claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id*. at 43-44 (quotation omitted). However, a trial court may enter a judgment in favor of the opposing party pursuant to MCR 2.116(I)(2) where it appears the opposing party is entitled to such judgment. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "The scope of a deed restriction is

[1] The Road Commission and the Township were eventually dismissed from the action.

[2] Jefferson later filed an amended complaint and added Kimberly Doverspike to the action.

a question of law that is reviewed de novo." *Bloomfield Estates Improvement Ass'n, Inc, v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007).

"A deed restriction represents a contract between the buyer and the seller of property." *Id*. A restriction that is embedded in the chain of title is binding on landowners. See *Canada Creek Ranch Ass'n, Inc, v Montmorency Twp*, 206 Mich App 498, 505-506; 522 NW2d 690 (1994). "As with any instrument, a deed must be read as a whole in order to ascertain the grantor's intent." *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 621; 761 NW2d 127 (2008). "If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations. . . ." *Bloomfield Estates*, 479 Mich at 214.

In this case, the deed restriction is embedded in the chain of title to Lots 1, 2 and 4 by the August 9, 1982 conveyance of Doris wherein she conveyed her interest in the properties to Corace, "subject to Building and use restrictions contained in instrument recorded in Liber 1438, page 22." Jefferson does not dispute this conveyance but maintains that the restriction does not encumber Lots 1, 2 and 4 because the restriction cannot physically apply to those lots. Hence, Jefferson argues the restriction is ambiguous and inapplicable.

There are two types of ambiguities that can arise when interpreting a deed: "[a] patent ambiguity is one apparent upon the face of the instrument. . . ." *Twp of Zilwaukee v Saginaw-Bay City Ry Co*, 213 Mich 61, 69; 181 NW 37 (1921). In contrast, "a latent ambiguity has been described as one that arises not upon the words of the will, deed or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe." *Shay v Aldrich*, 487 Mich 648, 671-672; 790 NW2d 629 (2010) (quotation omitted). "To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation." *Id*. at 668. "Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue." *Id*. Additionally, "inaccuracy of language should not be allowed to defeat the manifest intent of the parties." *Stamp v Steele*, 209 Mich 205, 213; 176 NW 464 (1920); instead, a deed should be construed "so as to render it valid and effectual, rather than void." *Id*. at 210. Moreover, as noted above, a deed restriction is a contract, *Bloomfield Estates*, 479 Mich at 212, and "[t]he failure of a distinct part of a contract does not void valid, severable provisions." *Samuel D. Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 641; 534 NW2d 217 (1995). The intent of the parties is the primary consideration in determining where part of a contract is severable. *Id*.

In this case, there are aspects of the deed restriction that are unambiguous and must be applied as plainly written. Essentially the Tuma-Cernuto deed restriction contains two distinct parts: the first part limits construction to a single residence of brick-veneer construction with a minimum living area of 1,500 square-feet; second, the restriction contains a setback requirement, which mandates that the front of any such residence "shall not extend beyond a line 180-feet [e]ast of the [w]est line" of Lot 3. The first part of the restriction is unambiguous. It plainly limits construction on the property to a single residence of no less than 1,500 square feet of brick-veneer construction. Similarly, the second part of the restriction is unambiguous on its

face; however, when the set-back requirement is applied to the ground, it is ambiguous in that it cannot be equally applied to Lots 1, 2, and 4.

Lots 1 and 4 are situated directly behind the western border of Lots 2 and 3; therefore, unless the owner of Lots 1 and 4 also owned Lots 2 and 3, he or she could not build a residential structure within 180-feet east of the west line of Lot 3. Such structures would necessarily overlap Lots 2 and 3's western border and encroach on those lots. Thus, the setback provision cannot be applied to Lots 1 and 4 and the trial court erred in holding otherwise. Thus, we vacate that portion of the trial court's order pertaining to application of the setback provision as applied to lots 1 and 4. However, even though the setback provision fails with respect to Lots 1 and 4, such failure does not render the entire deed restriction void. As noted above, a deed restriction is a contract, *Bloomfield Estates*, 479 Mich at 212, and, "[t]he failure of a distinct part of a contract does not void valid, several provisions." *Samuel D. Begola Servs, Inc*., 210 Mich App at 641.

Here, the setback provision can be applied to Lot 2. The setback restricts a residence from extending beyond 180-feet east of the west line of Lot 3. Lot 2 is directly north of Lot 3, and Lot 2's western border is essentially a continuation of Lot 3's western border. Thus, a hypothetical line that extends 180-feet east from Lot 3's western-most border will transect Lot 2 if such line is extended north. Therefore, the set-back requirement can be applied to Lot 2. Moreover, even if the set-back provision did not apply to Lot 2, this would not render the first part of the restriction void. *Bloomfield Estates*, 479 Mich at 212; *Samuel D. Begola Servs, Inc*., 210 Mich App at 641. Here, the first part of the restriction concerns the type of structure (residence), the size of the structure (minimum 1,500 square feet) and the appearance of the structure (brick veneer). The language in this sentence is plainly written without any ambiguity and is set apart from the setback provision by a semicolon. Nothing in the plain language of the deed suggests that this aspect of the restriction is dependent on compliance with the setback provision. As such, this provision of the deed restriction is valid and applicable to Lots 1, 2, and 4 irrespective of the setback requirement.

Jefferson argues that the deed is inapplicable to Lots 1, 2, and 4 because Doris did not clarify how the restriction applied to her interest in the property, and did not articulate how to apply the setback provision. Regardless of whether Doris provided any instructions or clarification, the plain language of the restriction clearly limits owners of the lots from building anything other than a single residence of brick veneer construction with a minimum of 1,500 square-feet of living space. This type of deed restriction essentially preserves the "aesthetic characteristics" of the property and was specifically contemplated in *Bloomfield Estates*, 479 Mich at 214. "Deed restrictions 'preserve not only monetary value, but aesthetic characteristic considered to be essential constituents of a family environment.'" Quoting *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). Additionally, the setback provision is not difficult to apply to Lot 2, the lot that Jefferson owns, hence, this plain language must be applied as it is written regardless of whether the grantor included instructions. *Bloomfield Estates*, 479 Mich at 214.

Jefferson also argues that the deed restriction is invalid because when Doris conveyed the property, her residence on Lot 2 was in violation of the restriction. This argument is devoid of merit as there is no evidence in the record to support the proposition that the Tumas' former residence violated the deed restriction. Specifically, after acquiring Lot 2, Jefferson razed the

residence. When Jefferson moved for rehearing or reconsideration, it attached an aerial photograph of the residence to its motion that purported to show a line 180-feet from Lot 3's western border that extended north through Lot 2. The Tuma's residence extended beyond the line. At a motion hearing, counsel for Jefferson agreed that the line was not a formal survey, but rather was hand-drawn by counsel based on an estimate. This evidence amounts to nothing more than speculation, and as such, it does support Jefferson's argument that the Tuma's residence violated the deed restriction.

Next, Jefferson argues that the trial court erred when it held that the Doverspikes' argument concerning the deed restriction was not barred by laches. The defense of laches is an equitable defense; we review a trial court's equitable decisions de novo. *Twp of Yankee Springs v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). However, we review a trial court's findings of fact in support of its equitable decision for clear error. *Id*. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed. . . ." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

"The doctrine of laches is concerned with unreasonable delay that results in circumstances that would render inequitable any grant of relief to the dilatory plaintiff." *Twp of Yankee Springs*, 264 Mich App at 611 (quotation omitted). "Laches does not apply unless the delay of one party has resulted in prejudice to the other party." *Id*. "The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant." *Id*. (citations omitted).

In this case, Jefferson maintains that the Doverspikes' argument concerning the deed restriction should be barred by laches because the Doverspikes failed to raise the issue when they first objected to Jefferson's site plans in 2005 and 2006. The trial court rejected Jefferson's laches defense on grounds that the Doverspikes were only permitted to participate in settlement talks during the 2006 circuit court proceeding.

We conclude that the trial court did not err in rejecting Jefferson's laches defense. Here, the trial court did not clearly err in finding that the Doverspikes possessed only a limited ability to participate in the 2006 circuit court proceedings. The record shows that the Doverspikes were permitted to intervene in settlement talks only. Hence, their ability to raise legal arguments was, at most, limited. Moreover, Jefferson cannot show that it suffered any prejudice because of the Doverspikes' failure to raise the deed restriction where Jefferson had constructive notice of the restriction because it was in Lot 2's chain of title. See *Houseman v Gerken*, 231 Mich 253, 255; 203 NW 841 (1925) ("[e]verybody taking a conveyance of, or a lien upon, land, takes it with constructive notice of whatever appears in the conveyances which constitute his chain of title") (quotation omitted); *Twp of Yankee Springs*, 264 Mich App at 613-614 (the defendant could not show prejudice for laches defense where he had, at minimum, constructive notice of restrictions in the plaintiff's ordinance).

In sum, although the deed restriction contains a setback provision that is inapplicable to Lots 1 and 4, the trial court did not err in holding that construction on all four of the lots in the Tuma Subdivision are subject to the building restrictions and the court did not err in holding that the setback provision applies to Lot 2. Accordingly, judgment in favor of the Doverspikes was proper. MCR 2.116(I)(2); *Walgreen Co*, 280 Mich App at 62.

Affirmed in part and vacated in part consistent with this opinion. We do not retain jurisdiction. No costs are awarded to either party. MCR 7.219.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello