[Cite as *Reinsmith v. Curtis*, 2015-Ohio-573.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

VIRGIL L. REINSMITH, et al.,	:	
		CASE NO. CA2014-05-008
Plaintiffs-Appellants,	:	
		O P I N I O N
	:	2/17/2015
- vs -		
	:	
CRAIG CURTIS, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVH20130365

Rose & Dobyns Co., LPA, Blaise Underwood, 97 North South Street, Wilmington, Ohio 45177, for plaintiffs-appellants

Mike Daugherty LLC, Michael T. Daugherty, Sr., 202 West Locust Street, Wilmington, Ohio 45177, for defendants-appellees

M. POWELL, J.

{¶ 1} Plaintiffs-appellants, Virgil and Charlotte Reinsmith, appeal a decision of the Clinton County Court of Common Pleas granting summary judgment to defendants-appellees, Craig and Gail Curtis, in a case involving a restrictive covenant.

{¶ 2} In the early 1990s, Virgil Reinsmith, a real estate developer and builder, began developing farm land on Mitchell Road, in Clinton County, Ohio for residential purposes. Over the course of a few years, Reinsmith bought several parcels of land on both the west

and east sides of Mitchell Road, subdivided the land into lots, and built houses on the lots. Specifically, in 1995, Reinsmith developed and recorded a platted subdivision consisting of four residential lots on the west side of Mitchell Road known as Deerfield Estates. The four lots in Deerfield Estates are governed by several restrictions which provide, in part, that in the event the restrictions are violated by any person, "any lot owner in said Deerfield Estates shall have the right to prosecute * * * such person[.]" Appellants do not own any of the four lots in Deerfield Estates.

{¶ 3} Subsequently, Reinsmith developed a parcel of land on the east side of Mitchell Road and subdivided the land into five residential lots. Those east-side lots are not part of Deerfield Estates. Appellants and the Curtises each own one of the east-side lots; the remaining three east-side lots are owned by others. Reinsmith testified he originally intended the east-side lots to be included in Deerfield Estates as phase two of an overall development. However, he was unable to do so for financial reasons and simply developed those lots as "county lots."

{¶ 4} The east-side lots owned by the Curtises and the other three property owners are governed by a restrictive covenant; appellants' east-side lot is not. As relevant to this case, Paragraph 1 of the restrictive covenant provides that any building, structure, or additions on the east-side lots (appellants' lot excluded) must be first approved in writing by Reinsmith as the developer. Paragraph 7 provides that the "developer reserves easements and rights-of-way for the installation and maintenance" of telephone and electric poles, sewers, gas and/or water mains, or for "any other similar facility deemed convenient or necessary by the developer for the service of the premises[.]"

{¶ 5} Paragraphs 18 and 19 provide that:

> 18. The covenants and restrictions hereinabove enumerated are for the benefit of the owners of all lots in the subdivision to be hereafter known as "Deerfield Estates" and shall run with the land until January 2, 2020, at which time the same shall be

> automatically extended for successive periods of ten years, unless by a vote of the majority of the then lot owners of said Deerfield Estates, the same shall be terminated or changed in whole or in part.
>
> 19. In the event that any person violates or attempts to violate any of the covenants and restrictions hereinabove enumerated, any lot owner in said Deerfield Estates shall have the right to prosecute any proceedings at law or in equity against such person or persons, either to enjoin such violation or to recover damages for the same.

{¶ 6} After purchasing their east-side lot in 2013, the Curtises decided to build a garage on their property. The Curtises asked Reinsmith, as a builder, for a quote for the garage construction. Reinsmith advised them they were not allowed to build the garage without his approval. Unable to obtain Reinsmith's approval and/or disagreeing with him, the Curtises contracted with someone else to build the garage. Consequently, on June 17, 2013, appellants filed a complaint against the Curtises seeking to enforce the provisions of the restrictive covenant. The complaint alleged that under the restrictive covenant, the garage could not be built without Reinsmith's approval and sought to enjoin the Curtises from building the garage.

{¶ 7} The Curtises moved to dismiss the complaint on the ground, inter alia, that appellants lacked standing to enforce the restrictive covenant. The trial court converted the Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment. Appellants filed a response to the converted motion for summary judgment. Attached to the response was an affidavit of Robert Peelle, the drafter of the restrictive covenant, which stated that the restrictive covenant was "enacted for and w[as] intended to be for the benefit of * * * Reinsmith and [his wife] as well as for others." The response also referred to Reinsmith's deposition which had been filed earlier with the trial court.

{¶ 8} On May 2, 2014, the trial court granted summary judgment to the Curtises on the ground appellants lacked standing to enforce the restrictive covenant. Specifically, the

trial court found that:

> Based upon a simple reading of the unambiguous paragraphs 18 and 19 of the restrictive covenants * * *, [appellants], who do not own property in Deerfield Estates, do not have standing to "prosecute any proceedings at law or in equity against such person or persons, either to enjoin such violation or to recover damages for the same." The right to take any such actions is clearly and unambiguously limited to lot owners in Deerfield Estates. This court is without power to write into the restrictive covenants additional provisions based upon what the original declarants [appellants] may now wish they had included.

{¶ 9} Appellants appeal, raising one assignment of error:

{¶ 10} THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT.

{¶ 11} Appellants argue the trial court erred in granting summary judgment to the Curtises on the ground appellants lack standing to enforce the restrictive covenant because they do not own property in Deerfield Estates. Appellants argue the trial court improperly focused solely on Paragraphs 18 and 19 of the covenant and erred in ignoring Paragraphs 1 and 7. Appellants argue that in light of Paragraphs 1 and 7 of the covenant, and because the restrictive covenant was intended to benefit appellants, the latter are entitled to enforce the covenant and have standing to do so, regardless of whether they own property in Deerfield Estates. Appellants cite *Berger v. Van Sweringen Co.*, 6 Ohio St.2d 100 (1966), in support of their argument.

{¶ 12} Summary judgment is proper when (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once this burden is met, the nonmoving party has a reciprocal

burden to set forth specific facts showing there is some genuine issue of material fact yet remaining for the trial court to resolve. *Id.* In determining whether a genuine issue of material fact exists, the evidence must be construed in favor of the nonmoving party. *Walters v. Middletown Properties Co.*, 12th Dist. Butler No. CA2001-10-249, 2002-Ohio-3730, ¶ 10. An appellate court reviews a trial court's decision to grant or deny summary judgment de novo, without any deference to the trial court's judgment. *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶ 9 (12th Dist.).

{¶ 13} "Restrictive covenants are covenants running with the land, intended to limit the grantee's use of the land to specified purposes, with the object of protecting the interests of all landowners in the same allotment or community." *Fettro v. Rombach Ctr., LLC*, 12th Dist. Clinton No. CA2012-07-018, 2013-Ohio-2279, ¶ 11. In determining who may enforce a restrictive covenant, the Ohio Supreme Court held that :

> [T]he answer to this question lies not in the ascertainment of artificial and arbitrary lines drawn upon a plat book but in the determination of the intention of the parties to be gained from the language of the instrument and the surrounding circumstances. The question to be asked is: For whose benefit was the restriction imposed?
>
> If the restrictive covenant was enacted for the benefit of the one seeking to enforce it, he may do so, but the burden is upon him to show that such covenant restricting the use of the lands of another was intended to be for his benefit, and that he has an equitable interest in the other person's adherence to the covenant.

Berger, 6 Ohio St.2d at 102.

{¶ 14} Restrictions on land use are disfavored in Ohio and are to be strictly construed. *Driscoll v. Austintown Associates*, 42 Ohio St.2d 263, 276-277 (1975); *Paterniti v. Zuber*, 8th Dist. Cuyahoga No. 71817, 1997 WL 723405, *2 (Nov. 20, 1997). Ordinary rules of contract construction are used to construe a restrictive covenant. *Summit Pointe Home Owners Assn., Inc. v. Neslen*, 12th Dist. Warren No. CA2012-11-111, 2013-Ohio-2643, ¶ 14. Thus,

covenants should be construed consistent with the parties' intent. *Id.* To determine such intent, courts must look to the language of the covenant itself. *Id.*

{¶ 15} The language should be given its common, ordinary meaning in light of the circumstances surrounding the creation of the covenant. *Id.* If the language is unambiguous, the restriction must be enforced as written. *Todd Dev. Co., Inc. v. Morgan*, 12th Dist. Warren No. CA2005-11-124, 2006-Ohio-4825, ¶ 32. While a court has the authority to interpret the language of a restrictive covenant to determine the intent of the drafters, it cannot rewrite a covenant to create new restrictions. *Woodcreek Assn., Inc. v. Bingle*, 73 Ohio App.3d 506, 508-509 (12th Dist.1991).

{¶ 16} After reviewing the evidence submitted by the parties, we find appellants lack standing to enforce the restrictive covenant. Appellants argue they have standing under *Berger* to enforce the restrictive covenant because the covenant was intended to benefit them when drafted; any construction on an east-side lot requires Reinsmith's approval as the developer pursuant to Paragraph 1; and appellants maintain easements and rights-of-way as to the east-side lots under Paragraph 7. The fact that Paragraph 1 mandates Reinsmith's approval, that appellants maintain easements and rights-of-way on the east-side lots under Paragraph 7, and that appellants intended to include the east-side lots into Deerfield Estates but ultimately never did, does not give appellants standing to enforce the provisions of the restrictive covenant. While Reinsmith, as the developer, has a variety of rights and responsibilities under the restrictive covenant regarding the overall development of the east-side lots, neither he nor his wife have standing to enforce the covenant.

{¶ 17} Rather, under the restrictive covenant, only a lot owner in Deerfield Estates has standing to enforce the covenant. As Paragraph 19 clearly states, in the event a person violates or attempts to violate the covenant, "*any lot owner in said Deerfield Estates shall have the right to prosecute* any proceedings at law or in equity against such person or

persons, either to enjoin such violation or to recover damages for the same." (Emphasis added.) It is undisputed appellants do not own any property in Deerfield Estates.

{¶ 18} Our holding is further supported by Paragraph 18 of the covenant which plainly provides that "[t]he covenants and restrictions hereinabove enumerated are for the benefit of the owners of all lots in the subdivision to be hereafter known as 'Deerfield Estates.'" The language of Paragraphs 18 and 19 is clear and unambiguous. It simply means exactly what is written and cannot be interpreted to mean anything else. *See Neslen*, 2013-Ohio-2643 at ¶ 16.

{¶ 19} We further find that the supreme court's decision in *Berger* does not support appellants' position and instead supports our holding. The issue in *Berger* was whether plaintiffs, homeowners who were not in the same allotment or subdivision as the defendants, were entitled to enforce a restrictive covenant covering defendants' land against the defendants.

{¶ 20} The supreme court held that plaintiffs could enforce the covenant against the defendants because the former were adjacent property owners, and more importantly, they were clearly intended to be the beneficiaries of the covenant as set forth in the following paragraph of the covenant:

> The herein enumerated restrictions, rights, reservations, limitations, agreements, covenants and conditions shall be deemed as covenants and not as conditions hereof, and shall run with the land, and shall bind the owner until the first day of May, 2026, in any event, and continuously thereafter, unless and until any proposed change shall have been approved in writing *by the owners of the legal title to all the land on both sides of the highway within the block in which is located the property*, the use of which is sought to be altered by said proposed change.

(Emphasis sic.) *Berger*, 6 Ohio St.2d at 103. The supreme court noted that under the foregoing paragraph, "the owner is absolutely bound by the covenants until 2026 and, after that time, may secure a release of those covenants only by obtaining the consent of

surrounding property owners." *Id.* Consequently, "[t]he fact that such property owners are given eventual control over such change of use indicates that they were intended to benefit from the covenants restricting the use of defendants' property." *Id.* at 103-104. In the case at bar, Paragraph 18 of the restrictive covenant clearly states that only lot owners in Deerfield Estates are intended to benefit from the covenant and only lot owners in Deerfield Estates are given eventual control of terminating or changing the covenant.

{¶ 21} The trial court found that it was without power to "write into the restrictive covenants additional provisions based upon what [appellants] may now wish they had included." Likewise, this court is without power to rewrite the restrictive covenant governing the east-side lots on Mitchell Road. If appellants wished to grant standing to enforce the covenant solely to themselves, or in the alternative, to themselves and to any property owner on Mitchell Road who has purchased a lot from appellants, they should have done so in unambiguous language in the covenant. *See Driscoll*, 42 Ohio St.2d at 277 (finding that if the grantors of the deeds which contained the restrictive covenants desired to limit development of the property affected by the restrictions to single-family residences, they should have done so in unambiguous language); *Fettro*, 2013-Ohio-2279.

{¶ 22} Having failed to do so, and because they do not own property in Deerfield Estates, we find appellants lack standing to enforce the restrictive covenant. Thus, the trial court did not err in granting summary judgment to the Curtises.

{¶ 23} Appellants' assignment of error is overruled.

{¶ 24} Judgment affirmed.

PIPER, P.J., and RINGLAND, J., concur.