STATE OF MICHIGAN

COURT OF APPEALS

A2C2 PARTNERSHIP, LLC,

Plaintiff/Counterdefendant-Appellee,

v

LOCH ALPINE IMPROVEMENT ASSOCIATION,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellant,

and

LEW WHALEY,

Third-Party Defendant-Appellee.

UNPUBLISHED
April 16, 2019

No. 342743
Washtenaw Circuit Court
LC No. 16-001182-CB

Before: JANSEN, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

A2C2 Partnership, LLC owns a tract of land in the Loch Alpine Subdivision that was operated as a golf course until 2015. A2C2 now wants to redevelop the golf course for residential use but the Loch Alpine Improvement Association (LAIA) denied the request based on the subdivision's deed restrictions. The parties filed competing complaints urging opposing interpretations of the relevant deed restrictions, and the circuit court summarily ruled in A2C2's favor. We vacate in part that judgment as the relevant restriction is ambiguous and its interpretation should be left to the trier of fact, and we remand for further proceedings.

I. BACKGROUND

The Loch Alpine Subdivision was created in 1929. It includes spacious lots with large homes surrounded by natural areas. Restrictions in the 1929 deed designated lots 465 through 470 as "recreation lots" and provided that the land vendors would develop a golf course and club

house at which subdivision owners could become members. Over the years, the owners of these lots developed an 18-hole golf course, club house, pool, and other amenities and service buildings. The club became the Ann Arbor Country Club. In 2010, A2C2 purchased the golf club mortgage from the underwriting bank. The Country Club defaulted on its loan; A2C2 foreclosed and was the successful bidder at a 2013 sheriff's sale. It operated the Country Club until the end of 2015, when it permanently shuttered its doors.

A2C2 asserted that changing economic times made it impossible to turn a profit at the Country Club. It sought to redevelop the land for residential use. Residential development clearly would have been permitted by a Restriction Agreement entered in 1957, which provided, "In the event the golf lots are employed for residential purposes, all restrictions herein contained affecting residential lots shall apply thereto or to any re-subdivisions of said lots into lots of a size similar to other building lots contained in this subdivision." The 1957 RA also granted the subdivision owners an option to purchase the golf lots and, "[i]n the event [the residents] shall fail to exercise its option to purchase as herein provided, . . . said golf lots may be employed for residence purposes."

In 1975, however, 75% of the members of the LAIA voted to adopt a new agreement—the 1975 RA—which vacated and set aside the 1957 agreement. Paragraph (a) of the 1975 RA provides:

> Residences: No building other than one detached, private, single family dwelling house shall be erected on any one lot within this subdivision; no lot shall be used except for residential purposes . . ., and no building shall be erected on any site less than one lot. . . . Lots 465 through 470, now platted as a golf course, shall be known as golf lots. No use shall be made of the golf lots other than the operation of a private or semi-public golf course. All lot owners in Loch Alpine shall be deemed eligible for membership in any golf club operating the golf lots, but membership or use may be extended also to others.
>
> The employment of Lots 465 through 470 as a golf course, shall be the only use alternative to residential use and in that event no structures shall be erected on such lots except such as are used in conjunction with the golf course . . . . These lots may also be employed for park or recreational purposes for the benefit of the entire subdivision, anything to the contrary herein provided not withstanding.
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> Restrictions relating to set-back, square foot area, fencing, landscaping, and signs shall not pertain to any structures erected on the golf lots for golf course purposes.
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> All or any of Lots 320 to 330, inclusive, 342 to 346[,] inclusive, and 382 to 387[,] inclusive, may be employed in conjunction with the golf lots for the erection of structures as above described, used in conjunction with the golf course, and for parking. In the event any or all of said lots are not so employed, all restrictions pertinent to residential lots shall apply.

The LAIA denied A2C2's application to redevelop a 39-acre area of the 119-acre golf lots as a 100-home residential development, in relevant part, because the 1975 RA decreed that "[n]o use shall be made of the golf lots other than the operation of a private or semi-public golf course." A2C2 filed suit, seeking a declaratory judgment that residential use was permitted on the golf lots under the 1975 RA. The LAIA filed a counter-complaint against A2C2 and a third-party complaint against Lew Whaley, A2C2's sole shareholder, arguing that the 1975 RA limited use of the golf lots as a golf course, park, or other recreational use benefitting the entire subdivision.[1]

The circuit court ultimately dismissed the LAIA's complaint in its entirety and entered a summary declaratory judgment that the 1975 RA permitted residential use of the golf lots. At the hearing, the court lamented, "I'm probably stating the obvious when I say this Court is as frustrated probably as Counsel is trying to interpret the grammar in some of these documents and the . . . inartful manner in which they were drafted." Yet, the court did not state in its opinion that the 1975 RA was ambiguous. Even so, the court first considered the language of the 1957 RA, finding that it "was not intended to prohibit residential use" and "clear[ly] . . . indicate[d] that residential use is a permitted use of the Subject Property (the golf lots), with a golf course being the only alternative permitted use to residential use."

The court noted that except for the removal of an expired option provision, the 1975 RA "remain[ed] unchanged." The circuit court interpreted the 1975 RA as providing "that: (1) Single family residential use is the only permitted use in Loch Alpine Subdivision; and (2) as related to the Subject Property (the 'golf lots') the use of those lots as a golf course shall be the only permitted use alternative to residential use." Based on this language, the court concluded, "there is no issue of material fact that residential use is a permitted use of the Subject Property." Further, the court ruled that the 1975 RA did "not require the continuous operation of a golf course on the Subject Property."

II. ANALYSIS

> We review a trial court's decision on a motion for summary disposition de novo. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted. We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery.

[1] Both parties raised additional counts in their complaints. The circuit court did not reach A2C2's other challenges in granting summary disposition. The LAIA raised several challenges in its complaint, all of which were summarily dismissed. On appeal, the LAIA challenges only the dismissal of its counts for breach of the 1975 RA and equitable servitude.

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. 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. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (cleaned up).[2]]

We also review de novo underlying issues of contract interpretation, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003), and "[t]he scope of a deed restriction." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212; 761 NW2d 127 (2007).

The Supreme Court noted in *Bloomfield Estates*, 479 Mich at 212, that "[a] deed restriction represents a contract between the buyer and the seller of property." As with any other contract, the buyer and seller are free to enter such restrictions.

> Because of this Court's regard for parties' freedom to contract, we have consistently supported the right of property owners to create and enforce covenants affecting their own property. Such deed restrictions generally constitute a property right of distinct worth. Deed restrictions preserve not only monetary value, but aesthetic characteristics considered to be essential constituents of a family environment. 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, because enforcement of such restrictions grants the people of Michigan the freedom freely to arrange their affairs by the formation of contracts to determine the use of land. [*Bloomfield Estates*, 479 Mich at 214 (cleaned up).]

As stated in *Eager v Peasley*, 322 Mich App 174, 180-181; 911 NW2d 470 (2017):

> In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. Where the restrictions are unambiguous, they must be enforced as written. The language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be

[2] This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon.

Only when a deed restriction is ambiguous may a court stray from the document's four corners to ascertain its meaning. An ambiguity can be resolved with witness testimony, *Grosse Pointe Park v Mich Municipal Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005), or with other extrinsic evidence. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). A contract is ambiguous if it is "equally susceptible to more than a single meaning." *Stone v Williamson*, 482 Mich 144, 150-151; 753 NW2d 106 (2008). A contract is also ambiguous "when its provisions are capable of conflicting interpretations." *Klapp*, 468 Mich at 457 (cleaned up). "[C]ourts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity. Instead, contracts must be construed so as to give effect to every word or phrase as far as practicable." *Id*. (cleaned up).

Contrary to the circuit court's opinion and order, the 1975 RA is ambiguous because it is internally inconsistent. Accordingly, the interpretation of the 1975 RA must go to trial and summary dismissal of A2C2's claim for declaratory relief regarding the meaning of the 1975 RA and the LAIA's claims for breach of the RA and equitable servitude was improper.

The 1975 RA provides that "no lot shall be used except for residential purposes." A plain reading of this clause means that all the land in the subdivision is limited to residential use. The RA also states that "[t]he employment of Lots 465 through 470 as a golf course, shall be the only use alternative to residential use and in that event no structures shall be erected on such lots except such as are used in conjunction with the golf course." A golf course is an "alternative" to the otherwise required residential use. But it is only an "alternative" as evidenced by the phrase "in that event." This conveys that the golf lots may still be used for residential use; it is only in the event that the land is used for a golf course that construction on the land is limited to buildings related to a golf course.

However, ¶ (a) of the 1975 RA also provides, "No use shall be made of the golf lots other than the operation of a private or semi-public golf course" and "[t]hese lots may also be employed for park or recreational purposes for the benefit of the entire subdivision." The first sentence is mandatory—"[n]o use shall be made" other than a golf course of either the private or semi-public variety, and the second provides for potential use of the land as a park or some other recreational use in the event a golf course is not developed. See *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) ("A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole. . . . Thus, the presumption is that 'shall' is mandatory."). This is inconsistent with the clauses discussed above, which provide that residential use is mandatory with an optional alternative on the golf lots for a golf course.

These provisions make use of the golf lots as a golf course both mandatory and optional. The language in this case is much less clear than the language in the main cases cited by the LAIA.

The deed restriction in *Bloomfield Estates*, 479 Mich at 214, provided that all lots "shall be used for strictly residential purposes only." At issue was whether a dog park could be considered a "residential purpose." "By using the terms 'strictly' and 'only,' the deed restriction seeks to underscore or emphasize that restricted land may only be used for this purpose," the Supreme Court found. *Id*. at 215. That conclusion was

> bolstered by the remaining language in the deed restriction, which states that "no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots." This language indicates that when the deed restriction refers to "residential purposes," the intended use is as a "single dwelling house" and immediately related purposes. The only exceptions listed—"that Lot 1 may be used for four dwelling houses and the necessary out-buildings, and that three houses may be erected on Lots 40 and 41"—further clarify that the term "residential" refers to a "single dwelling house." Neither of the two listed exceptions allows for use of Lot 52 as a park. Therefore, the phrase "strictly residential purposes only" precludes use of Lot 52 as a park and such use violated the deed restriction. [*Id*. at 215-216.]

In *Huntington Woods v Detroit*, 279 Mich App 603, 606-607; 761 NW2d 127 (2008), the Rackham family transferred ownership of a golf course they developed to the city of Detroit in a deed that stated, "That the said premises shall be perpetually maintained by [the city of Detroit] exclusively as a public golf course for the use of the public. . . ." The city of Detroit operated the golf course from 1924 until 2006, when it desired to sell its interest to Premium Golf, LLC, a private entity. *Id*. at 607. The proposed sale agreement provided that Premium Golf would pay the city additional compensation if the entity "were successful in removing the use conditions and was able to develop the property for residential construction." *Id*. at 608. The city of Huntington Woods then submitted an unsolicited bid to purchase the golf course to use as a public golf course. *Id.* Huntington Woods, joined by private citizens, filed suit seeking a declaration that the deed restrictions required that the land remain a public golf course. *Id*. at 609. This Court agreed with the plaintiffs "that the use of the term 'public' twice within" the relevant provision in the Rackham deed was "indicative of the grantor's intent that the property must remain publicly owned, thereby precluding any conveyance to a private entity." *Id*. at 624. "Use of the term 'public' before golf course," this Court stated, "indicates nonprivate ownership, with the further limitation the property also is designated specifically 'for the use of the public. . . .' " *Id*. at 624-625.

Both *Bloomfield Estates* and *Huntington Woods* involved deed restrictions without equivocation about the use of the land. There were no inconsistent provisions requiring conflicting land uses. The drafters even added words to emphasize the singular use allowed: "strictly", "only", and "perpetually." Comparing the language in those deed restrictions supports that the 1975 RA is ambiguous.

The circuit court in this case did not expressly state that it found the 1975 RA ambiguous. The court implied this ruling by resorting to evidence beyond the four corners of the document to ascertain its meaning, specifically the 1957 RA. The circuit court could not resolve the ambiguity on summary disposition, however. "It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp*, 468 Mich at

469. "[W]here [a contract's] meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions." *Id*. (cleaned up). This issue should have been submitted to trial.

Accordingly, we vacate in part the circuit court's opinion and order to the extent it grants summary disposition in A2C2's favor on Count 1 of its complaint, and against the LAIA on Counts 1 and 5 of its counter/third-party complaint. We remand for further proceedings but do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher