STATE OF MICHIGAN

COURT OF APPEALS

OLGA M. BROCK,

Plaintiff-Appellant,

v

WINDING CREEK HOMEOWNERS ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
December 4, 2014

No. 317666
Macomb Circuit Court
LC No. 2012-002424-CH

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Olga M. Brock, appeals as of right an opinion and order granting in part and denying in part plaintiff's and defendant Winding Creek Homeowners Association's motions for summary disposition and granting plaintiff's motion for sanctions, entered on August 2, 2013. On appeal, plaintiff argues the trial court erred in granting in part defendant's motion for summary disposition, denying in part plaintiff's motion for summary disposition, and in its award of sanctions to plaintiff. We affirm.

This case arises from a dispute over plaintiff's desire to build a fence in her backyard enclosing her swimming pool. Plaintiff resides in Winding Creek subdivision. Defendant is the homeowners association for the subdivision. In 2008, plaintiff built a six-foot privacy fence, and defendant initiated court action, claiming that plaintiff erected the fence without defendant's approval. A bench trial was held, and the trial court found that the subdivision was subject to the "Declaration of Covenants, Conditions, and Restrictions," (hereinafter referred to as the Covenants), and that plaintiff's fence was erected in violation of the Covenants.[1] On February 5, 2010, the trial court issued an injunction that ordered plaintiff to remove the fence at her expense. Plaintiff was also ordered to pay defendant's attorney fees and costs.

In 2012, plaintiff filed a petition for a six-foot privacy fence with defendant and was denied. Plaintiff initiated this case, arguing that the 2010 injunction was based on fraudulent

[1] The Covenants authorized the creation of defendant homeowners association and established the initial rules for the subdivision's development, maintenance, operation, and membership.

statements made by defendant in the prior court case. Specifically, plaintiff argued that the trial court relied on defendant's false statements that the Covenants had been amended to limit fences in the subdivision to four-foot black ornamental iron or aluminum. Plaintiff claimed that the amendment was never valid, and that defendant defrauded plaintiff and the court. In addition, plaintiff asserted that defendant did not have the authority under the Covenants to deny her 2012 petition because the amendment was never added to the Covenants. Defendant denied plaintiff's allegations and moved for summary disposition, arguing that defendant had the authority pursuant to the Covenants to deny plaintiff's petition, without or without the invalid amendment.

The court ordered the parties to engage in alternative dispute resolution, which was ultimately unsuccessful. There were multiple mediations and settlement conferences scheduled in the case during this time. Defendant missed a March 2013 status conference and a May 2013 status conference. Plaintiff filed a motion for sanctions, requesting expenses for attending those court dates. Plaintiff also requested sanctions because defendant allegedly failed to attend mediation. Plaintiff claimed that all members of defendant's board of directors were required to attend mediation pursuant to court orders. Defendant asserted that its attorney was able to represent its interest at mediation, and all board members were not required to be present. Moreover, defendant asserted that it did not attend the March 2013 status conference because it believed it was going to be adjourned. In addition to the motion for sanctions, plaintiff also filed a motion for summary disposition on the merits of her claim.

On August 2, 2013, the trial court entered an opinion and order on both motions for summary disposition and the motion for sanctions. The trial court granted in part defendant's motion for summary disposition in regard to plaintiff's request to vacate the 2010 injunction. The trial court denied in part plaintiff's motion for summary judgment, finding that defendant was able to deny plaintiff's fence petition for aesthetic reasons, but granted plaintiff's motion in part, holding that "to the extent necessary to comply with state and local laws and ordinances, black ornamental or iron perimeter fences shall be permitted to enclose pools, at the minimum height necessary to satisfy state and local ordinances, laws and regulations." The trial court also granted plaintiff $200 in sanctions.

Plaintiff first argues that the trial court erred in granting in part defendant's motion for summary disposition and refusing to vacate the 2010 injunction against plaintiff because the injunction was based on fraudulent statements by defendant. We disagree.

Plaintiff asserts that the 2010 injunction should be set aside because defendant committed fraud. Plaintiff claims that she did not know, nor could she have known, of the fraud before 2012. Defendant lied to the court in an affidavit, and the court based its issuance of the injunction on defendant's fraudulent statement. The trial court found that the injunction was not based on the alleged fraudulent statement by defendant, and that plaintiff was collaterally estoppel from asserting her claim. On appeal, defendant agrees with the trial court that the doctrine of collateral estoppel precludes plaintiff's argument.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). A trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.

Liparoto Constr, Inc v Gen Shale Brick, Inc, 284 Mich App 25, 29; 772 NW2d 801 (2009). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. The court reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

The trial court did not err in refusing to vacate the 2010 injunction. First, we agree with defendant and the trial court that the doctrine of collateral estoppel precludes plaintiff's claim. "Generally, for collateral estoppel to apply three elements must be satisfied: (1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.' " *Monat v State Farm Ins Co*, 469 Mich 679, 683-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). Here, plaintiff was a party to the 2008 action. Plaintiff's husband filed a motion for relief from judgment pursuant to MCR 2.612(C), alleging fraud by defendant. MCR 2.612(C) provides the grounds for relief from judgment. Pursuant to MCR 2.612(C)(1)(c), the court may relieve a party from a final judgment, order, or proceeding on the grounds of fraud (intrinsic or extrinsic). The motion must be made within one year of the judgment. MCR 2.612(C)(2). The trial court denied plaintiff's motion because it was untimely.[2] Therefore, this issue has been previously litigated between plaintiff and defendant, and plaintiff is collaterally estopped from asserting the issue again in this case.

Plaintiff asserts, however, that she is able to bring an independent action for fraud outside of the previous claim. We disagree. MCR 2.612(C)(3) provides that the court rule governing motions for relief from judgment "does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding." Therefore, generally, the time constraints of MCR 2.612(C)(2) do not apply to independent actions for fraud. *Kiefer v Kiefer*, 212 Mich App 176, 182; 536 NW2d 873 (1995). However, MCR 2.612(C)(3) only applies to a judgment procured by extrinsic fraud. *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995). Extrinsic fraud is fraud outside the facts of the case which actually prevents the losing party from having an adversarial trial. *Id.* at 313. Extrinsic fraud is distinguishable from intrinsic fraud, which is a fraud within the case. *Id.* at 314. Although perjury constitutes fraud in obtaining a judgment, it does not prevent a party from having an adversarial trial and rebutting the perjured testimony through his own case. *Sprague*, 213 Mich App at 313-314; *Rogoski v Muskegon*, 107 Mich App 730, 737; 309 NW2d 718 (1981). For that reason, perjury is a form of intrinsic fraud. *Sprague*, 213 Mich App at 314; *Rogoski*, 107 Mich App at 737. "This does not

[2] MCR 2.612(C)(2) specifically limits the time period to bring a motion for relief from judgment on the basis of fraud to one year.

mean that a litigant is never entitled to relief from a judgment obtained by intrinsic fraud. However, this relief cannot be by independent action but, rather, must be by motion in the case in which the adverse judgment was rendered." *Rogoski*, 107 Mich App at 737 (interpreting an earlier version of the court rule). Plaintiff's claim relates to false statements made to the court by defendant in a sworn affidavit and during a bench trial. Defendant's alleged misrepresentation or perjury is intrinsic fraud. See *Sprague*, 213 Mich App at 314; *Rogoski*, 107 Mich App at 737. Therefore, plaintiff's exclusive remedy was a motion for relief from judgment pursuant to MCR 2.612, not an independent action for fraud. *Sprague*, 213 Mich App at 314.

Even assuming plaintiff's claim was not barred for the above-stated reasons, we agree with the trial court that the language in the injunction does not establish that the court relied on defendant's allegedly fraudulent statements in reaching its decision. "[F]raud which warrants equity in interfering with a judgment must be fraud in obtaining the judgment." *Brachman v Hyman*, 298 Mich 344, 350; 299 NW 101 (1941).[3] In the 2010 injunction, the court stated that plaintiff was "further enjoined from erecting any fence on their premises . . . without prior Board approval pursuant to [defendant's] *recorded restrictions*." (Emphasis added.) The recorded restrictions are included in the Covenants, and provide that no fence will be erected without approval in order to "promote an attractive, harmonious residential development." Here, the restrictions require approval for aesthetic reasons. Therefore, the trial court did not base its judgment on the allegedly fraudulent statements, but on the restrictions, which were a valid part of the Covenants. Plaintiff asserts that because the trial court referred to plaintiff's 2008 fence as "noncomplying," the trial court obviously relied on the amendment. We disagree. The fact that plaintiff's fence was not approved by defendant, alone, made the fence noncompliant regardless of the amendment.[4]

Plaintiff next argues that the trial court erred in denying her motion for summary disposition in part because the trial court erroneously enforced a restriction that is not a valid part of the Covenants. We disagree. Again, we review a trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co*, 491 Mich at 553.

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[3] Generally, the elements of actionable fraud are: "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Titan Ins Co*, 491 Mich at 555 (citation omitted).

[4] In addition, plaintiff raises several alleged errors with the trial court's opinion and order, which she claimed influenced the court's decision and showed the court's impartiality. We have reviewed all plaintiff's argument, and hold that the additional arguments lack merit, especially in light of our disposition.

"Under Michigan law, a covenant constitutes a contract, created by the parties with the intent to enhance the value of property." *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). When interpreting restrictive covenants, courts must give effect to the instrument as a whole. *Id*. at 515-516. "In reviewing the language of restrictive covenants, this Court recognizes that '[b]uilding and use restrictions in residential deeds are favored by public policy.' " *Brown v Martin*, 288 Mich App 727, 731; 794 NW2d 857 (2010), quoting *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). "Judicial policy requires that we seek to protect property values as well as 'aesthetic characteristics considered to be essential constituents of a family environment.' " *Brown*, 288 Mich App at 731-32, quoting *Webb v. Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997).

We agree with the trial court's analysis that *Hickory Pointe Homeowners Ass'n v Smyk* is comparable to the current case. In that case, the restrictive covenants applicable to the defendant homeowners required that the defendants obtain approval before constructing a deck around their pool. *Hickory Pointe*, 262 Mich App at 513-516. The defendant built the deck without obtaining approval. *Id*. at 513-516. This Court found in favor of the plaintiff homeowner's association. *Id*. at 513, 516. In that case, the restrictive covenant provided:

> Developer shall have sole authority to review, approve or disapprove the plans or specifications and/or any part thereof. Developer shall have the right to refuse to approve any plans or specifications or grading plans, or portions thereof, which are not suitable or desirable in the sole discretion of Developer, for aesthetic or other reasons. In considering such plans and specifications, Developer shall have the right to take into consideration compatibility of the proposed building or other structures with the surroundings and the effect of the building or other structure on the view from adjacent or neighboring properties. It is desired that the natural landscape and trees be left in their natural state as much as possible or practical. *Id*. at 514.

This Court held:

> In the present case, the intent of sections 7.01 and 7.02 of the subdivision covenants is clear. Architectural controls were established "to promote an attractive, harmonious residential development having continuing appeal," and, to that end, no structures were to be erected within the subdivision without the prior submission and approval of plans for such construction by the association. Thus, the trial court correctly found that [the] defendants were in breach of the covenants. *Id*. at 516.

The current case is similar to *Hickory Pointe*. Here, article 7, Section 7.2 of the Covenants provides:

> Developer shall have *sole authority* to review, approve, or disprove the plans, specifications, and related materials, or parts thereof. Developer shall have the right to refuse or approve the proposed plans, specifications, and related materials, or grading plans, or portions thereof, which are not suitable or desirable in the

> *sole discretion* of the Developer, for aesthetic reasons. In its review of the plans, specifications, and related materials, Developer may consider compatibility of the proposed building, fence, wall or other structures with the surrounding area and the view from adjacent or neighboring properties. [Emphasis added.]

This language is analogous to the language from *Hickory Pointe*. The Covenants require that plaintiff obtain approval for "aesthetic reasons," in order to "promote an attractive, harmonious residential development." Therefore, no fence may be erected in the subdivision without defendant's approval. In other words, it was within defendant's power under the Covenants to decide to approve only fences which were black aluminum or iron for "aesthetic reasons."

Plaintiff asserts that because the type of fence she requested was not specifically prohibited by the Covenants, defendant abused its power in denying her fence petition. In so arguing, plaintiff focuses on the failed amendment that defendant tried to pass, which would specifically endorse 48-inch black ornamental aluminum or iron fences. Plaintiff refuses to understand the discretionary power defendant holds pursuant to the Covenants, which she agreed to when she purchased her property. Plaintiff's only response to defendant's ability to deny her fence petition for aesthetic reasons is to state that aesthetic reasons are "not a genuine reason but merely an excuse to abuse homeowners." Plaintiff further asserts that "aesthetic reasons" are ambiguous and subjective, but such provisions have been upheld by Michigan courts. *Hickory Pointe*, 262 Mich App at 513, 516. The purpose of such clauses is to enhance property values, and values can be protected by maintaining aesthetic characteristics. *Id*. at 515; *Brown*, 288 Mich App at 731-732. Plaintiff asserts that pursuant to the Covenants, her fence would be allowed, but for the denial based on aesthetic reasons. However, plaintiff fails to accept that aesthetics are a legitimate basis for the denial, and plaintiff has failed to show that defendant is unable to deny her fence petition based on the language in the Covenants as written.

Plaintiff raises several specific alleged errors with the trial court's opinion, all of which lack merit. For instance, the trial court found that plaintiff had not shown that her fence complied with all local and state requirements, and cited, specifically, that plaintiff had not shown that her neighbors approved of her proposed fence. Plaintiff asserts that her fence petition, which included proof of neighbor approval, was attached to her complaint. However, plaintiff did not attach her petition to her motion for summary disposition, or in her response to defendant's motion for summary disposition. In determining whether a factual dispute exists, the court need not independently search the entire record, but must consider the documentary evidence identified by the parties in contesting the motion. *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 377; 775 NW2d 618 (2009). Moreover, even if plaintiff did show that her neighbors approved, she did not show that "she can observe 4 [feet] from the property line without violating a municipal easement" or that "her solid fence design will allow between at least 3 [inches] between each board as required by the township but not more than 4 [inches] as required by the Michigan Residential Building Code," which werealso requirements cited by the Court. Therefore, we fail to see how plaintiff's assertion, even if true, impacts the trial court's opinion and order.

We also reject plaintiff's argument that the trial court ignored evidence that plaintiff needed to erect a six-foot fence, as the trial court held that plaintiff should be permitted to erect a six-foot fence to the extent necessary to comply with state and local laws. Finally, plaintiff takes

issue with the court's discussion of whether vinyl is an approved material for a fence, and, specifically, the trial court's statement that "the only building material specifically favored [for a swimming pool barrier] [in Section 6.21] is an evergreen hedge." Section 6.21 of the Covenants states, "Swimming pools, tennis courts, whirlpools, hot tubs and other similar recreational structure shall be screened from any street lying entirely within the Subdivision by wall, solid fence, evergreen hedge or other visual barrier." Here, the trial court stated that the only *specific building material* favored was an evergreen hedge because no specific material was mentioned in regard to a wall, solid fence, or other visual barrier. This was not error, as plaintiff vehemently argues, and was stated in regard to the trial court's explanation that vinyl is not a material specifically allowed by the Covenants. All other arguments raised in plaintiff's brief relating to this issue were reviewed, and lack merit.

Plaintiff next argues that the trial court erred in granting only $200 in sanctions to plaintiff where plaintiff requested $2,900 in sanctions. We disagree.

The trial court granted sanctions pursuant to MCR 2.401(G). This Court reviews for an abuse of discretion the trial court's decision to impose sanctions under MCR 2.401(G). *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court ordered $200 in sanctions against defendant. The court stated:

> It must be noted that this Court has endeavored to provide these parties opportunities to reach a mutually agreeable resolution. This Court has ordered the parties to participate in numbers mediations and settlement conferences, and [defendant] has missed no less than two of them. [Defendant's] brief attempts to explain the absences, but falls short of establishing that the "failure was not due to the culpable negligence of the party." MCR 2.401(G). Plaintiff's [sic] is awarded $200.00 in sanctions payable within 7 days of the date of this Opinion and Order. [Emphasis in original.]

MCR 2.401(G)(2) provides:

> (2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that
>
> (a) entry of an order of default or dismissal would cause manifest injustice; or
>
> (b) the failure was not due to the culpable negligence of the party or the party's attorney.
>
> The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

MCR 2.313(B)(2) provides that reasonable expenses include attorney fees.

The trial court did not err in awarding $200 in sanctions. In its response to plaintiff's motion for sanctions, defendant admitted to missing a settlement conference in March 2013 under the mistaken belief that the conferences had been adjourned. An order of the court reveals

that defendant also missed a status conference on May 16, 2013. Defendant did not explain this absence. The trial court did not abuse its discretion in awarding plaintiff expenses for those two dates. Also, it was within the court's discretion to award expenses for the mediations. The trial court declined to award those fees, presumably finding that defendant showed that any alleged failure to attend was not due to the culpable negligence of defendant or defendant's attorney. That finding was not an abuse of discretion. Defendant asserted that it genuinely believed that defendant's attorney could represent defendant's interests at mediation, and when the court specifically ordered the entire board of directors to attend, they complied.[5]

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[5] Plaintiff also challenges the trial court's refusal to award attorney fees pursuant to MCR 2.114, MCR 2.625(A), and MCL 600.2591. We reject plaintiff's claim as meritless. Defendant correctly prevailed in the trial court, and, thus, the claim was not frivolous pursuant to MCL 600.2591.