STATE OF MICHIGAN

COURT OF APPEALS

LOTTIVUE IMPROVEMENT ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED August 26, 2014
v	No. 316275 Macomb Circuit Court
YOUNG JONG KIM and SUN HEE KIM, Defendants-Appellants.	LC No. 12-001872-CK

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendants appeal as of right an order granting summary disposition in favor of plaintiff. Because there is no factual question that defendants' constructed dock violates at least one deed restriction, we affirm.

I. BASIC FACTS

Defendants own a residence located at 49750 Goulette Pointe Drive in Chesterfield Township in the Lottivue Subdivision. Specifically, defendants' lot is located within Lottivue Subdivision No. 1. There are ten such individual subdivisions contained within the entire Lottivue area, and each has its own bylaws and deed restrictions. The east side of defendants' lot abuts up to Lake St. Clair, and the west side abuts to a boat canal. Plaintiff is a homeowner association that is empowered to enforce the subdivision's deed restrictions.

In the spring or summer of 2010, defendant Young Jong Kim ("Kim") decided to construct a dock on the east side of the property, facing Lake St. Clair. Kim contracted with MarineOne Construction ("MarineOne") to perform the work. Larry Rekowski, who was the owner of MarineOne, was the person who Kim dealt with. Kim relied on Rekowski to handle all aspects of constructing the dock, including getting all the necessary approvals and permits.

Rekowski contacted Marc Ott, who was one of the five directors in plaintiff's organization and was in charge of building and maintenance. The two spoke by phone on July 29, 2010. Both testified that during the course of their conversation, reference was made to three existing piers that were located at 49500, 49536, and 49560 Goulette Pointe. Rekowski testified

that after his conversation with Ott, he faxed a plan view of the proposed dock construction to Ott.[1] The fax purportedly showed the proposed dock being located 44 feet north of the southern property line and extending 24 feet into Lake St. Clair. It also showed that the dock had ice clusters, pilings, and a 6,000-pound boat lift. Ott denied that any plan or drawing was ever sent. Instead, he believed that because those three specific piers were referenced in the conversation, the proposed dock would simply look similar to those. Ott described these other piers as being small, fishing piers that were level with the top of the seawall, which made them "virtually invisible" when viewing out to the lake, and only extended into the lake four or five feet. After their conversation, Ott sent a letter of approval to Rekowski, which stated, "Regarding your proposed pier on lakefront, the association has no objection as long as you obtain local building dept and DEQ approval."

After Ott submitted his letter of approval, but before construction began, Kim decided to alter the plans for the dock. Kim wanted to move the location of the dock 28 feet north, so that it now was located 72 feet from the southern property boarder, and Kim wanted to increase the length of the dock from 24 feet to 36 feet. Rekowski contacted both the DEQ and the Army Corps of Engineers in order to obtain approval for the modified plans. Rekowski stated that he received verbal authorization for the modified plan from the DEQ. But the Army Corps of Engineers never gave approval for the modification. It also is undisputed that the modified plans were never submitted to Ott or anyone else associated with plaintiff. Regardless, Rekowski proceeded with the construction and completed it in August 2010.

In mid-August, while the dock was being constructed, Ott had noticed that the scope of the construction was much larger than he anticipated. He called Rekowski, voiced his displeasure, and told him, "You can't build that out there." Ott also placed a few notes in Kim's mailbox for Kim to call him back, but he was never able to talk to Kim. On September 21, 2010, Ott wrote a letter to Kim, asserting that the construction "far exceeded" the scope of a small fishing pier and was therefore unauthorized.

In a letter sent to Kim, dated March 2, 2011, the Army Corps of Engineers noted that because it had never approved any modification to the original plan and because of plaintiff's claim that it has not and will not approve the modification, the Corps considered the "work to be unauthorized." As a result, the Corps "expect[s] [Kim] to remove the unauthorized structure from Lake St. Clair and, if [he] wish[es], re-install them in Lake St. Clair per the location/dimensions in our July 1, 2010 permit verification." The letter, however, continued, "We understand [plaintiff] may not provide their authorization for the work depicted in the enclosed drawings and may restrict the size and/or type of structure you may install in Lake St. Claire off of the Lake St. Clair side of your property. If this is the case, please send us drawings of the work [plaintiff] is willing to authorize so that we may evaluate it and render a permit decision."

[1] Rekowski also admitted that he was unable to produce any documentary evidence to support his claim, such as a fax log, fax cover page, etc.

Subsequently, Rekowski removed some of the pilings, the boat hoist, and the 12-foot extension in order to bring it closer into compliance with the original plans. But the location remained unchanged, which was 72 feet from the southern property line.

On April 24, 2012, plaintiff filed the instant lawsuit, alleging, in relevant part, that the dock construction was in violation of the deed restrictions and needed to be removed.

Both sides filed competing motions for summary disposition. Plaintiff argued that the dock violated deed restriction No. 9(f), which placed absolute restrictions on disturbing the bottom of Lake St. Clair, and that no authorization was ever given for such a structure, either in its current location or for the present scope at the original location. Plaintiff further argued that defendants violated deed restriction No. 6 when they failed to provide plans and drawings before receiving any approval from plaintiff. Defendants argued that Ott's fax, showing approval for the dock, waived any claims and that their detrimental reliance on the fax estopped plaintiff from raising any claim. Defendants also asserted that plaintiff's "unclean hands" prevented it from getting any equitable relief.

The trial court noted that while it does not condone how Ott initially granted approval without first inspecting any detailed plans, the overriding fact remains that the deck, as currently constructed, violated the deed restrictions. Consequently, the trial court granted plaintiff's motion for summary disposition and denied defendants' motion.

II. ANALYSIS

Defendants argue that the trial court erred when it granted plaintiff's motion for summary disposition. Because there is no question that the current dock construction violates the deed restrictions, we disagree.

Plaintiff moved for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a complaint. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). When deciding a motion for summary disposition under this subrule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

When reviewing the language of restrictive covenants, we recognize 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) (quotation marks omitted). Further,

> "[w]hen interpreting a restrictive covenant, courts must give effect to the instrument as a whole where the intent of the parties is clearly ascertainable. Where the intent is clear from the whole document, there is no ambiguous restriction to interpret and the rules pertaining to the resolution of doubts in favor of the free use of property are therefore not applicable. In placing the proper construction on restrictions, if there can be said to be any doubt about their exact

> meaning, the courts must have in mind the subdivider's intention and purpose. The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed. In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. Moreover, the language employed instating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon. Covenants are to be construed with reference to the present and prospective use of property as well as to the specific language employed and upon the reading as a whole rather than from isolated words." [*Id.* at 731-732, quoting *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982).]

In the present case, the deed restrictions for Lottivue Subdivision No. 1 include, in pertinent part, the following:

> 6. No building, fence, wall, sea wall, piling, or other structure shall be commenced, erected, or maintained nor shall any addition to or change or alteration therein be made, except interior alterations, until the plans and specifications showing the nature, kind, shape, height and materials, color scheme, location on lot and approximate cost of such structure and the grading plan . . . of the lot to be built upon, which have been submitted to and approved in writing by [plaintiff] or its duly authorized agent and a copy thereof, as finally approved, lodged permanently with [plaintiff]. . . . .
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> 9. In addition to the foregoing restrictions, the following specific restrictions and requirements shall apply . . . :
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> (f) The present natural bottom of Lake St. Clair extending lake-ward from the lots in Lottivue Subdivision that possess Lake St. Clair frontage shall not be removed or disturbed in any way whatsoever.

There is no question that defendants violated restriction No. 6 when they built the *current* dock without receiving approval from plaintiff for that design. While it is clear that Ott did initially approve the construction of a dock, the evidence establishes that he did not approve the dock as constructed. Specifically, even when viewed in a light most favorable to defendants, Rekowski testified that he faxed the original plan to Ott, but he never submitted any plans to

plaintiff or sought any approval from plaintiff *for the modified dock design*.[2] This modified design extended the length by 12 feet and, more importantly for our analysis, moved its location. Rekowski only provided the modified plans to the DEQ and to the Army Corps of Engineers. Thus, there was no question of fact that the constructed dock was never approved by plaintiff, which was necessary under restriction No. 6.

Similarly, the current dock is in violation of restriction No. 9(f). Restriction 9(f) provides that the bottom of Lake St. Clair "shall not be removed or disturbed in any way whatsoever." Rekowski testified that, for the constructed dock, he extended the pilings 15 feet below the floor of the lake, which necessarily disturbed the lake's bottom. Thus, it is clear that the construction violates this restriction as well.

Defendants argue that Ott's initial approval of the dock/pier construction means that defendants' design necessarily is in compliance with the deed restrictions. We disagree. First, as previously noted, there is no question that the design that Ott allegedly approved was not the design that was built, which diminishes the significance of that approval. Second, the case defendants rely on, *Sedlar v Glenmar Place Subdivision Homeowners Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2006 (Docket Nos. 257188, 257241), has no bearing in the present matter. *Sedlar* addressed how a request to build an ornamental fence is automatically considered approved after 30 days, even if the homeowner association fails to respond, because the bylaws specifically provide that in such a situation, "express approval will not be required and compliance . . . will be deemed to have been fully effected." *Id.* at 2-3. *Sedlar* did not hold, as defendants suggest, that an association's approval of a project means that the project inherently complies with all other restrictions and requirements.

Defendants also argue that plaintiff was estopped from asserting a violation of the deed restrictions. The elements of estoppel are:

> (1) a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party will be prejudiced if the first party is allowed to deny the existence of those facts. [*Mich Nat Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 23; 566 NW2d 7 (1997).]

However, defendants do not identify how these elements were satisfied. Presumably, defendants suggest that Ott's approval letter induced them to construct the dock. Defendants claim in their brief on appeal that "[i]t was not until after Ott issued his written approval that construction of the Dock began." But, defendants fail to recognize that the design that Ott allegedly approved was not the design that was ultimately built. Thus, in no way can Ott's approval be construed as

[2] We acknowledge that there is a question of fact whether Ott actually received and viewed any plans. However, that fact is not dispositive because if he did view a plan, there is no dispute that such a plan differed from what ultimately was constructed.

an inducement to build the modified design of the dock. Thus, defendants cannot show how plaintiff was estopped from enforcing the restrictions.

Defendants next argue that plaintiff waived its right to assert a violation of the deed restrictions. Deed restrictions will be enforced "as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007). Here, defendants cite no other prior violations that plaintiff allegedly acquiesced to. Instead, defendants merely state, with no citation to authority, that "[t]here can be no more definite waiver of a deed restriction by acquiescence than written approval." Such cursory treatment of an issue results in it being abandoned. *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Moreover, as we have established, the dock, as constructed, was not in compliance with Ott's "written approval," so defendants' position is undercut. In any event, defendants misconstrue the concept of "waiver by acquiescence." The general rule for this doctrine is that "if a plaintiff has not challenged previous violations of a deed restriction, the restriction does not thereby become void and unenforceable when a violation of a *more serious and damaging degree occurs*." *Bloomfield Estates*, 479 Mich at 219 (quotation marks omitted). In *Bloomfield Estates*, the plaintiff was not precluded from contesting the use of the subject land as a *dog park*, even though it never contested the prior, but less serious, impermissible use as a *general park* before. *Id.* at 216, 221. Here, defendants do not cite to any prior deed violations. Accordingly, it cannot be said that plaintiff waived by acquiescence.[3]

Defendants lastly argue that the doctrine of "unclean hands" prevents plaintiff from prevailing in its action. "It is well settled that one who seeks equitable relief must do so with clean hands." *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010). To determine whether a party comes before the court with clean hands, the primary consideration is whether the party sought to mislead or deceive the other, not whether the other party relied upon the misrepresentations. *Stachnik v Winkel*, 394 Mich 375, 387; 230 NW2d 529 (1975). Here, defendants argue on appeal that plaintiff's failure to take any action to prevent the construction of the dock until after it was built constituted unclean hands. We disagree. First, what defendants describe is more of a laches defense, which deals with a plaintiff's undue delay in asserting a claim. See *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537-539; ___ NW2d ___ (2014). Regardless, defendants' position is not supported by the record. Ott testified that when he saw the scope of the in-progress construction in mid-August, he talked to Rekowski to have the construction halted. Further, Ott stated that he left multiple notes for Kim to call him back, but Kim never responded. Accordingly, defendants have failed to establish the factual predicate for their claim of unclean hands.

[3] Although defendants do not argue so, we note that assuming arguendo that the three other small fishing piers in the subdivision violate the deed restrictions in some manner, plaintiff would not have been precluded from contesting defendants' dock because this dock introduces other features, such as the scope, size, presence of ice clusters, height, etc., that clearly make it a more serious and damaging violation.

In sum, there is no question of fact that the construction of the dock violates the restriction No. 6 because, at a minimum, it was constructed in accordance with a plan that never was approved by plaintiff. Further, there is no question of fact that the construction of the dock disturbs the bottom of Lake St. Clair, which violates restriction No. 9(f). And nearly all of defendants' defenses rely in some manner on the written approval that Ott provided, but there is no question that the approval was not based on the present dock design because Rekowski has admitted that he never submitted those modified plans to plaintiff.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra