STATE OF MICHIGAN

COURT OF APPEALS

JOHN H. BAUCKHAM TRUST, JOHN H. BAUCKHAM, Trustee of the John H. Bauckham Trust, BRUCE BRANDON, KATHY BRANDON, ROBERT BROUWER, SHARON BROUWER, CLARK REVOCABLE TRUST, SARAH J. CLARK, Trustee of the Clark Revocable Trust, WILLIAM COLE, SANDRA COLE, ROBERT & SHARON CURTIS TRUST, ROBERT CURTIS, Co-trustee of the Robert & Sharon Curtis Trust, SHARON CURTIS, Co-trustee of the Robert & Sharon Curtis Trust, TIMOTHY ISAACSON, JENNIFER ISAACSON, KEVIN MUNTTER, LAURIE MUNTTER, JOHN SHKOR, KERRY SHKOR, BOB SMITH, DIANE SMITH, CHARLES ZELLER, and PAMELA ZELLER,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

v

MATTHEW PETTER, CONSTANCE PETTER, BERNARD T. DOHERTY, JOAN M. DOHERTY, KEVIN BOODY, JANALYN BOODY, PATRICK DOHERTY, and ANDREW T. SCHOFIELD,

Defendants,

and

JAMES SKARIN, LINDA SKARIN, HENKEL VACATIONS, LLC, DANIEL MOESCH, HEATHER MOESCH, MELISSA K. LOEW TRUST, and MELISSA K. LOEW, Trustee of the Melissa K. Loew Trust,

Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
September 19, 2017

No. 332643
Allegan Circuit Court
LC No. 15-054455-CH

Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

PER CURIAM.

Defendants James Skarin, Linda Skarin, Henkel Vacations, LLC, Daniel Moesch, Heather Moesch, Melissa K. Loew Trust, and Melissa K. Loew as trustee of the Melissa K. Loew Trust (collectively referred to as defendants[1]) appeal as of right an opinion and final order enforcing deed restrictions that prohibit use of restricted lots for commercial purposes. Plaintiffs cross-appeal the same order. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

This mater involves a dispute among the owners of several lots in the Sunset Shores Subdivision in Casco Township concerning the rental activities taking place on lots owned by defendants. Defendants purchased their respective lots subject to the following deed restrictions:

> 1. No building shall be erected or maintained on any lot in Sunset Shore, sold by the grantor herein, other than a private residence and a private garage for the sole use of the owner or occupant, except those lots designated as Commercial on the plat map.
>
> * * *
>
> 3. No part of said premises shall be used for commercial or manufacturing purposes, except those lots designated as Commercial on the plat map.[2]

In 2015, plaintiffs filed suit against defendants, seeking a declaratory judgment and injunctive relief prohibiting defendants from engaging in short-term rental activity, which plaintiffs alleged violated the above deed restrictions. Plaintiffs also alleged that defendants' short-term rental practices constituted a nuisance per se because they violated Casco Township's zoning ordinances concerning permissible uses in districts zoned for low-density residential use.

Defendants raised several equitable defenses to plaintiffs' claims, arguing that short-term renting was a common and long-accepted practice in Sunset Shores. Defendants presented evidence demonstrating that a number of plaintiffs had acquiesced to or engaged in similar rental activity over the years, and that the neighborhood's voluntary homeowners association promulgated rules recognizing that vacation renters were welcome in the neighborhood. Defendants also asserted counter-claims regarding several plaintiffs' improper use of a parcel (the "Beach Parcel") jointly owned as tenants in common by the owners of all lots within Sunset Shores.

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[1] The remaining defendants named in plaintiffs' original complaint were dismissed before trial and are not relevant to this appeal.

[2] There are no lots designated as commercial on the plat map produced by the parties.

After discovery, the trial court granted partial summary disposition in plaintiffs' favor, finding that there was no material dispute concerning the following facts:

> a. The defendants admitted in deposition to having constructive of actual knowledge of the deed restrictions when they purchased their lots.
>
> b. On the internet, the Defendants advertise their properties to the public for short term rentals year round for a fee. Nightly occupancy rates range from between $250.00 per night and $400.00 per night.
>
> c. Three of the Defendants have received a combined $140,000 in fees for short term rental of their subdivision properties during 2014.
>
> d. Two of the Defendant's [sic] are Illinois residents, according to their deposition testimony.
>
> e. Two of the Defendants admitted in their depositions that they spent less than two weeks on their subdivision lots in year 2014.
>
> f. None of the Defendants make significant personal use of the property[.]
>
> g. None of the Defendant's [sic] were present on the property when their licensees/customers were using the property.
>
> h. Two Defendants employ 3rd party enterprises to provide "concierge" services and maid service, clear up after guests and perform grounds maintenance.
>
> i. The Defendants collect and pay Michigan's 6% state use tax governing public accommodations in the nature of "hotel, motel and vacation rentals."[3]

In light of these findings, the trial court concluded that defendants were not using their respective properties as private residences and were instead engaging in commercial activity, i.e., renting the lots to the public for a fee, contrary to the deed restrictions. However, the court also found that material questions of fact existed concerning defendants' equitable defenses and plaintiffs' alternative nuisance theory. These issues, as well as defendants' counterclaims, proceeded to trial. The parties do not challenge the court's findings or conclusions of law regarding plaintiffs' dispositive motion.

Following a three-day bench trial, the court issued a written opinion and order rejecting defendants' equitable defenses and agreeing that defendants' rental activities violated the Casco Township zoning ordinance barring commercial activity in low-density districts. Based on its

[3] Footnote omitted.

findings, the court entered an order prohibiting all rental activity within Sunset Shores. With respect to defendants' counterclaims, the court found that certain plaintiffs had installed fixtures on the commonly owned Beach Parcel, including stairs, decks, a motorized tram, and a storage outbuilding. These plaintiffs also took steps to preclude other cotenants from using the encroaching structures, thereby interfering with the other cotenants' right to use and enjoy the entire Beach Parcel. To remedy the problem, the court ordered that the existing structures be made available for the use and benefit of all cotenants and placed restrictions on the continued maintenance of those structures.

I. DEFENDANTS' EQUITABLE DEFENSES

On appeal, defendants contend that the trial court erred by rejecting their equitable defenses to enforcement of the deed restrictions. Plaintiffs, on the other hand, argue that we should not consider this issue because the limited scope of defendants' claim of appeal renders the issue moot. We agree with plaintiffs and decline to consider the merits of defendants' argument.

"Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues."[4] An issue is moot if its resolution in the aggrieved party's favor "cannot for any reason have a practical effect on the existing controversy."[5] As noted by plaintiffs, the trial court enjoined all further rental activity for two, independent reasons: (1) defendants' rental activities violated the deed restrictions banning use of defendants' lots for commercial purposes; and (2) defendants' rental activities amounted to a nuisance per se because they violated the Casco Township zoning ordinances. Despite the court's conclusion that there were two bases for granting injunctive relief, defendants explicitly excluded the trial court's ruling regarding the zoning violation from the scope of this Court's review, stating that they intended to seek modification of the ordinance through the legislative process. However, there is no indication that defendants' proposed amendments will be adopted by Casco Township. Thus, even if this Court were to agree that the trial court erred by rejecting defendants' equitable defenses to enforcement of the deed restrictions, reversal of that portion of the trial court's order would not have a practical effect on defendants' ability to resume their short-term rental practices, which would continue to be enjoined as a nuisance per se. Accordingly, this issue is moot and does not warrant further consideration.[6]

II. SCOPE OF INJUNCTION

Next, defendants argue that the trial court erred by enjoining all rental activity. We disagree.

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[4] *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013).

[5] *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

[6] *Id*.

Matters involving the interpretation of restrictive covenants involve questions of law that this Court reviews de novo.[7] A trial court's decision to grant injunctive relief is reviewed for an abuse of discretion, which occurs when "the court's decision falls outside the range of reasonable and principled outcomes."[8] This Court reviews a trial court's factual findings for clear error.[9] "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[10]

When the construction of a restrictive covenant is clear, "the mere circumstances of the breach of the covenant affords sufficient grounds for the court to interfere by injunction."[11] In this case, the court determined before trial that the restrictive covenants at issue unambiguously restricted use of the lots within Sunset Shores to residential purposes and categorically barred *all* commercial uses of the restricted lots. The court construed the term "commercial" to mean "able or likely to yield a profit," and found that defendants' practice of renting their lots to the public for a fee constituted a prohibited commercial use. The court's reasoning was consistent with caselaw construing similar restrictions on commercial uses[12] and supported by the record. While defendants maintain that the trial court should not have enforced the deed restrictions because of the equities involved, they do not seriously dispute the trial court's findings or rationale regarding their breach of the deed restrictions.

Instead, defendants take issue with the scope of the injunctive relief granted by the court, arguing that the court erred by prohibiting *all* rental activity, including long-term renting,[13] because the controversy at issue in the case related only to short-term rentals to vacationers. Defendants are correct in their contention that plaintiffs' request for relief was limited to enjoining continued operation of "vacation rentals," and that the parties did not present evidence concerning long-term renting at trial. However, MCR 2.601(A) provides that a court may grant any relief to which a party is entitled, "even if the party has not demanded that relief . . . ." As such, that the court's injunction exceeded the scope of the relief sought by plaintiffs is not dispositive.

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[7] *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008).

[8] *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32-33; 896 NW2d 39 (2016).

[9] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[10] *Id*.

[11] *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002) (citation omitted).

[12] See, e.g., *id.* at 64.

[13] Although the court did not explicitly ban long-term renting, we agree that the court's unequivocal prohibition against "all rental activity for a fee" is not limited to the short-term rental activity that plaintiffs' complained of below.

Defendants' argument is unpersuasive because the court's rationale concerning defendants' short-term rental practices is equally applicable to rentals of any length, regardless of whether long-term renting was challenged by plaintiffs. As the trial court observed,

> "Commercial" is commonly defined as "able or likely to yield a profit." Random House Webster's College Dictionary (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." *Id*.[14]

The act of renting property to a third-party for any length of time involves a commercial use because the property owner is likely to yield a profit from the activity. Restrictions barring commercial uses of property proscribe a wide variety of activities, even activities that are residential in nature, such as renting to residential tenants for extended periods of time.[15] As such, the trial court's decision to bar "all rental activity for a fee" was not outside the range of principled outcomes because the court was authorized to "interfere by injunction" as a result of defendants' breach of the deed restrictions, and the restrictions clearly barred any commercial activity from occurring on defendants' lots.[16]

III. DEFENDANTS' TRESPASS AND WASTE COUNTER-CLAIMS

Next, defendants argue that the trial court erred by rejecting their counterclaims against the Smith and Bauckham plaintiffs. We disagree.

This Court reviews a trial court's factual findings for clear error.[17] "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[18] Conclusions of law are reviewed de novo.[19]

In their first amended complaint, defendants brought a claim of trespass against several plaintiffs, alleging that

> Plaintiffs/Counter-Defendants Bauckham, Brouwer, Cole, Smith, Shkor and Zeller have trespassed upon the beach parcel owned in common . . . by i.) placing

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[14] *Terrien*, 467 Mich at 64.

[15] *Id*. at 62-63.

[16] Plaintiffs' did not respond to this issue in their brief on appeal. If plaintiffs are similarly dissatisfied by the extended scope of the court's injunction, there is nothing to prevent the parties from negotiating a more narrow remedy for the trial court's consideration.

[17] *Alan Custom Homes, Inc*, 256 Mich App at 512.

[18] *Id*.

[19] *Id*.

> personal property and installing real fixtures on the beach parcel, in such manner and with the intent and effect of excluding other co-owners from using that portion of the commonly owned beach parcel and ii.) cutting trees and removing natural vegetation beneficial to the natural beauty and stability of the dune and placing such at great risk of erosion, without first obtaining the unanimous consent and permission of all common owners.

Later, defendants clarified that their trespass claim against the Smiths involved an erosion control system commissioned by the Smiths, which purportedly caused an unnatural amount of surface water to flow from the Smith lot onto the Beach Parcel. The trial court rejected defendants' trespass claim reasoning that, as a matter of law, a cotenant cannot trespass on a commonly owned parcel. It also reasoned that defendants' water-trespass theory lacked merit because the erosion control system was installed with proper permits and there was no evidence that the project harmed the interest of any cotenant.

On appeal, defendants argue that the trial court erred by focusing on the Smiths' mitigating measures, rather than the technical trespass. In Michigan, an action for trespass requires "proof of an unauthorized direct or immediate intrusion of a physical, tangible object *onto land over which the plaintiff has a right of exclusive possession*."[20] Thus, while defendants are correct that the focus of a trespass claim must be on the challenged intrusion upon real property, their claim must fail because the trial court correctly concluded that the Smiths, as cotenants of the Beach Parcel, could not trespass upon their own property. One of the hallmark features of tenancy in common is that each cotenant is entitled to possession of the whole property.[21] Because the Smiths, like all cotenants of the Beach Parcel, have a possessory interest in the land, they did not cause a physical intrusion onto land that defendants had an exclusive right of possession over. This is not to say that cotenants are left without a legal or equitable remedy when faced with misuse of commonly owned property, as other theories of liability may support a similar claim. However, a trespass claim is not the appropriate vehicle for defendants' complaints concerning the erosion control system. The trial court did not err by rejecting defendants' trespass claim as pled.

Defendants also argue that the trial court erred by failing to rule upon their claim regarding the dilapidated stairs leading from the Bauckham lot, the remains of which encroach upon the Beach Parcel. On appeal, defendants characterize the presence of the remaining materials as an act of trespass and waste. The presence of the stair remnants could arguably fit into the broad scope of defendants' trespass claim, as pled in their amended complaint, because it involves the placement of personal property on the Beach Parcel. However, to the extent that this claim sounds in trespass, it must fail for the same reason: the Bauckham plaintiffs are also cotenants holding a possessory interest in the Beach Parcel.

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[20] *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (emphasis added).

[21] *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 441; 731 NW2d 777 (2007).

Defendants' alternative characterization of their claim as one for waste is at odds with their amended complaint. Defendants alleged a separate count for common law waste against "certain owners who own property adjacent to the Beach Parcel," alleging that these owners "have from time to time removed timber and brush from the Beach Parcel, thus committing waste and damaging the property as detailed above." Notably, the trial court *did* dispose of defendants' waste claim *as pled*, by finding that defendants failed to present sufficient credible testimony concerning the improper removal of trees or resulting damages, and defendants do not challenge this finding on appeal. We find no error in the trial court's failure to address a theory that was not properly pled or argued in a clear manner.

IV. EFFECT OF SETTLEMENT STIPULATION

On cross-appeal, plaintiffs argue that the trial court erred by failing to give effect to the parties' partial settlement stipulation placed on the record at trial. We conclude that the stipulation is ambiguous and the record requires further factual development.

Courts interpret a stipulation that "embod[ies] all the essential characteristics of a contract" like a contract.[22] Courts interpret contracts according to the parties' intent, so long as their intent is clear.[23] Accordingly, courts must determine if the stipulation is clear and unambiguous.[24] A stipulation is unambiguous "if it fairly admits of but one interpretation."[25] If the stipulation is unambiguous, "construction of the [stipulation] is a question of law for the court."[26] This Court reviews questions of law de novo.[27] A stipulation is ambiguous if "its language can be reasonably understood in different ways,"[28] or "a term is equally susceptible to more than a single meaning."[29] If ambiguous, "factual development is necessary to determine the intent of the parties"[30] and a court may consult relevant extrinsic evidence to determine the stipulation's meaning.[31] This Court reviews a trial court's factual findings for clear error.[32] "A

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[22] *Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994) (quotations and citation omitted).

[23] *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

[24] See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206; 476 NW2d 392 (1991).

[25] See *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003).

[26] See *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 76; 854 NW2d 521 (2014) (quotations and citations omitted).

[27] *Id*. at 75.

[28] See *Steinmann*, 258 Mich App at 154.

[29] See *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 8; 792 NW2d 372 (2010) (quotations, emphasis, alteration, and citation omitted).

[30] See *Klein*, 306 Mich App at 76 (quotations and citations omitted).

[31] See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003).

[32] *Alan Custom Homes, Inc*, 256 Mich App at 512.

finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[33]

In this case, the trial court found that a number of plaintiffs had constructed fixtures on the Beach Parcel, including stairs, decks, a motorized tram system, and at least one outbuilding, and that use of these structures was limited by locks, gates, and "no trespassing" signs. The parties discussed a stipulation that defendants agreed to withdraw their request that fixtures already situated on the Beach Parcel be removed and, in exchange, defendants could introduce four late-filed surveys of various Sunset Shores lots. Defense counsel explained the stipulation. Then, plaintiffs' counsel stated,

> I understand that what we agreed on is that there wouldn't be destruction, demolition or removal. So I mean if they're trying to hide something from me please let me know now, but the idea is the stuff that's been on the beach parcel gets to stay on the beach parcel. The requested relief I'm assuming is going to be limited now to they want to be able to use it. We don't agree to that, but we're not looking at a case where they're asking for the removal or the destruction or demolition of those structures that have been in place.

Further, plaintiffs' counsel opined that contribution should be required if the court ordered that the structures be made available for use by all cotenants, but cautioned that some plaintiffs might prefer to remove the structures if forced to make them open for common use.

The trial court ordered:

> As to the parts of the structures which encroach on the Beach Parcel, minimal repairs may be performed on them in the future, but only to preserve the current function of the structure and not to expand the encroachment or extend the structures useful life. Once the structure has surpassed its useful life, the ultimate removal of any structure will be done at the expense of the owner of the parcel adjoining the Beach Parcel and no contribution will be had from any other cotenant. If the encroaching structures are damaged by catastrophic acts of God the encroaching structure cannot be replaced.

To the extent that these structures remain in place, the trial court ruled that the exclusion of other cotenants from the portions of the parcel occupied by these structures was inconsistent with the remaining cotenants' rights. To remedy the problem, the court ordered the removal of locks, gates, and exclusionary signage within 90 days and declared that the structures would be available for the use and benefit of all cotenants thereafter.

On cross-appeal, plaintiffs argue that the trial court's order is inconsistent with the parties' stipulation because the parties intended that the existing structures would be allowed to remain on the Beach Parcel indefinitely. We agree. We conclude that the language in the

[33] *Id*.

stipulation is ambiguous because it can be reasonably understood in different ways. Determining the parties' intent requires further factual development. Therefore, we vacate the portions of the trial court's order discussed in this section and remand for an evidentiary hearing to determine the parties' intent in making the stipulation.[34] On remand, the trial court is free to resolve the ambiguities in the stipulation based on the proofs presented at the evidentiary hearing. Alternatively, the parties may reach a new stipulation and submit the new stipulation to the trial court. In all other respects, the balance of the trial court's decision is affirmed.

We affirm in part, vacate in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Thomas C. Cameron

[34] See MCR 7.216(A)(5).