COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1575 **Cir. Ct. No. 2004CV99**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ENERGIZER, LLC AND FERMANICH FUEL CO., INC.,

PLAINTIFFS-RESPONDENTS,

V.

PREMIUM PROPERTIES LIMITED PARTNERSHIP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Premium Properties Limited Partnership appeals a partial summary judgment in favor of Energizer, LLC holding a restrictive covenant precluded Premium Properties from selling fireworks on Premium's property. Premium Properties argues the court erred in granting summary

judgment because the covenant is ambiguous, it does not apply to successor interests, and it is an unreasonable restraint on trade. We disagree and affirm the judgment.

BACKGROUND

¶2 This dispute arises from the use of a parcel of land along Highway 51 near Merrill, Wisconsin. The parcel has been sold through various related entities and divided into two lots. Fermanich Fuel Co., Inc. owned both lots. In 1996, Fermanich sold Lot One and placed various restrictive covenants on Lot Two to protect the business operations on Lot One.

¶3 In 2004, Lot Two was sold to John J. Schoone Construction, Inc. with additional restrictive covenants, including a restriction on the sale of fireworks, to protect the ongoing truck stop business located on Lot One. This restrictive covenant reads in relevant part: "Grantee is prohibited from selling petroleum products at retail or fireworks without the written consent of the owner and tenant of Lot #1 of CSM #938."

¶4 Schoone divided Lot Two in half and sold the northern half to Premium Properties. Premium Properties began leasing the property to Victory Fireworks, Inc., which operates a retail fireworks store on the property.

¶5 Currently, Energizer, LLC owns Lot One and leases it to Highway 51 Truck Stop, Inc. In addition to operating a truck stop on Lot One, Highway 51 leases part of Lot One to two firework vendors who sell fireworks out of tents. The current owner of northern half of Lot Two is Premium Properties, which leases it to Victory Fireworks. The current owner of the southern half of Lot Two is Schoone.

¶6 On May 4, 2005, Energizer sued Premium Properties for violating the restrictive covenant prohibiting the sale of fireworks. Energizer made a motion for partial summary judgment on the issue of whether the restrictive covenant preventing the sale of fireworks from Lot Two applied to Premium Properties. The court granted the motion for summary judgment, but has not yet determined the issue of damages. The court reasoned:

> [Premium] does not provide any facts to dispute these intentions or to dispute the intertwined ownership interest between Fermanich, Great White, Energizer, etc., or the intention of Great White that the restriction would run with the land or that this was all part of a plan for Lot 1. Rather, [Premium] argues that the Court can not go beyond the four corners of the deed to Schoone that only spoke of "grantee." The Court agrees that parol evidence should not be used for purposes of contradicting the expressed intention of the deed. However, in this case there is no question as to whether or not Schoone was to be bound by the restriction and certainly was by the use of the word "grantee." The parol evidence in this case and facts, etc., bear upon the question of whether the deed should be construed solely to limit the restriction to Schoone, and on the question of the presence of a general scheme or plan and on the issue as to whether or not others in addition to Schoone as grantee were intended to be covered.

The court then looked at a counter-offer to confirm the parties' intent that the covenant runs with the land and applies to Premium Properties' successor interest.

DISCUSSION

¶7 The interpretation of a restrictive covenant is a question of law we review independently of the trial court. ***Bubolz v. Dane County***, 159 Wis. 2d 284, 291-92, 464 N.W.2d 67 (Ct. App. 1990). Whether the language of a restrictive covenant is ambiguous is also a question of law. *See* ***Lamb v. Manning***, 145 Wis. 2d 619, 627, 427 N.W.2d 437 (Ct. App. 1988). The language in a restrictive covenant is ambiguous if it is susceptible to more than one reasonable

interpretation. *See* ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). However, if the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. ***Voyager Village Prop. Owners Ass'n v. Johnson***, 97 Wis. 2d 747, 749, 295 N.W.2d 14 (Ct. App. 1980). By intent we do not mean the subjective intent of the drafter, but the scope and purpose of the covenant as manifest by the language used. *See* ***Hall v. Church of the Open Bible***, 4 Wis. 2d 246, 248, 89 N.W.2d 789 (1958).

I. Whether the Term "Grantee" includes Premium Properties' Successor Interest

¶8 Premium Properties argues the restrictive covenant does not apply to its successor interest because the term "grantee" only includes the initial purchaser, Schoone, and the court erred in considering parol evidence to determine the meaning of "grantee." While we might agree with the court's characterization and consideration of parol evidence, we need not decide whether it was an error to consider such evidence.

¶9 WISCONSIN STAT. ch. 706,[1] subject to certain enumerated exceptions not relevant here, "govern[s] every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity." WIS. STAT. § 706.001(1). WISCONSIN STAT. § 706.01 contains statutory definitions of terms involving land transactions. A grantee "means the person to whom the interest in land passes. Whenever consistent with the context, reference to the interest of a party includes the interest of the party's heirs, successors, personal representatives and assigns." WIS. STAT. § 706.01(6). Although we

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

agree that grantee may have alternative meanings, when read in context the purpose of the covenant is to restrict the use of the property by successors to protect the on-going business interests of Lot One.

¶10 The context of the covenant at issue is to protect the business operations of Energizer, specifically, its sale of fireworks. As Energizer points out, logic requires that this covenant should be enforceable against subsequent purchasers. For example, X and Y own neighboring properties. X's deed has a restriction prohibiting it from building or running a business competitive to Y on its lot. Subsequently, X transfers its property to Z. Under Premium Properties' argument, Z is not prohibited from operating a business which competes with Y's business because the restriction does not involve the physical use of Z's property. If Premium Properties is correct, then X could avoid the deed restriction by setting up a shell corporation and transferring the parcel to that shell corporation.

¶11 This result defies logic and is inconsistent with the clear intent of the restrictive covenant. Therefore, we conclude the use of "grantee" includes successor interests.

II. Whether the Covenant Should Be Strictly Construed Against Energizer

¶12 Premium Properties' argument for a strict construction of the covenant against Energizer is two-fold. Premium Properties asserts the covenant's terms are ambiguous. Alternatively, Premium Properties asserts the covenant's use restriction is unreasonable. We are not persuaded.

¶13 Covenant terms are ambiguous if they are subject to more than one reasonable interpretation. *See* ***Borchardt***, 156 Wis. 2d at 427. However, where the intent of a covenant can be clearly ascertained from the covenant itself, the

restrictions will be enforced. ***Voyager Village***, 97 Wis. 2d at 749. Here, Premium Properties argues "selling" and "fireworks" are ambiguous terms because both terms include various types of sales or fireworks. However, a phrase is not ambiguous because it is general or broad. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶16, 266 Wis. 2d 124, 667 N.W.2d 751.

¶14 Selling is commonly defined as "the act, process, or art of offering goods for sale." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2062 (unabr. 1993). Fireworks is commonly defined as "a device for producing a striking display … by the combustion of explosive or flammable compositions." ***Id.*** at 856. We conclude these terms are not ambiguous merely because they are broad and, therefore, the covenant is enforceable.

¶15 In addition to being unambiguous, a covenant must also be reasonable to be enforceable. When determining whether a use restriction is reasonable, courts look to whether the covenant is "for the protection of the legitimate interests of the party in whose favor it is imposed, and reasonable between parties." ***Le Febvre v. Osterndorf***, 87 Wis. 2d 525, 533, 275 N.W.2d 154 (Ct. App. 1979). Premium Properties asserts the interest must be "substantial." The case cited by Premium Properties does not support its contention.[2]

¶16 Here, the restriction protects the legitimate interest Energizer has in using a portion of its land to sell fireworks without direct competition adjacent to

[2] The portion of ***Le Febvre*** Premium Properties relies upon does not support its contention. In ***Le Febvre***, this court held restrictions on a condominium owner's renting of units were reasonable use restrictions because renting units affected the nature of the community and the owner was aware of the restrictions. ***Le Febvre v. Osterndorf***, 87 Wis. 2d 525, 534-35, 275 N.W.2d 154 (Ct. App. 1979). The court concluded the interest was substantial and reasonable but not that a substantial interest is required for a restraint to be reasonable. *See* ***id.*** at 534.

it. Additionally, Premium Properties knew of this restriction before it purchased the property. Furthermore, Premium Properties could operate another business on the land, just not a business in direct competition with Energizer. Therefore, the use restriction is reasonable.

III. Whether the Covenant Is an Unreasonable Restraint on Trade/Use of the Land

¶17 Finally, Premium Properties argues the covenant is an unreasonable restraint on trade rendering the covenant unenforceable. We disagree. A trade restraint or restriction is unreasonable only if it is "greater than is required for the protection of the person for whose benefit the restraint is imposed," or if it "imposes undue hardship upon the person restricted." ***Journal Co. v. Bundy***, 254 Wis. 390, 395, 37 N.W.2d 89 (1949).

¶18 Premium Properties does not assert how this restriction is greater than what is necessary to protect Energizer's fireworks business.[3] The restriction does not preclude any kind of business from operating on the property. Rather, the restriction applies only to a fireworks or petroleum business which would be in direct competition with Energizer. Furthermore, it is possible this covenant was not meant to benefit only one property at the expense of another, but rather, was intended to benefit all properties equally by insuring that each would have its own unique operation. Therefore, we conclude the restraint on selling fireworks is not unreasonable.

[3] Premium Properties suggests that because the covenant had no time limitations, it could be unreasonable because it would continue on into perpetuity. We note valid use restrictions are not restraints on alienation, and do not implicate the rule against perpetuities. ***Le Febvre***, 87 Wis. 2d at 531-32.

By the Court.—Judgment affirmed.

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