COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP2963-FT **Cir. Ct. No. 2006CV236**

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

BRIAN FINGER, BOBBI FINGER AND TERRY WESTPHAL,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT DASKAM AND JUNE DASKAM,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert and June Daskam appeal a judgment granting their neighbors Brian Finger, Bobbi Finger, and Terry Westphal

(collectively, the Fingers) a permanent injunction barring construction of the Daskams' home.[1] The Daskams argue the court erred in concluding their home is prohibited by the subdivision's restrictive covenant. We disagree and affirm the judgment.

BACKGROUND

¶2 The parties own lots in a subdivision called Daskam's Lakeview Estates. The Daskams are the subdivision developers as well as the owners of a number of the lots. When the Daskams subdivided the property, they made all of the lots subject to a restrictive covenant. The first of the covenant's thirty-seven terms states, "No pre-fab, manufactured, or trailer-type house shall be moved onto any lot or lots." The covenant does not define "pre-fab" or "manufactured."

¶3 On July 25, 2006, the Fingers filed suit against the Daskams. In their complaint, they alleged the Daskams had begun construction of a manufactured home on their lot, and requested an injunction barring any further construction by the Daskams. The court granted a temporary injunction halting construction pending resolution of the matter.

¶4 The parties filed cross motions for summary judgment. In their summary judgment submissions, the parties agreed that the Daskams' house was a modular home built in two halves in a factory. The halves were placed on a foundation on the Daskams' lot. A certain amount of finish work, including

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

connecting heating and electrical service and constructing the garage, was to take place on site after the home was delivered.

¶5 The Daskams argued the covenant referred only to so-called mobile homes, which are self-contained, built on a steel chassis and have wheels permanently attached, not to homes built to Uniform Dwelling Code specifications. The Fingers argued it was irrelevant what specifications the house was built to. They contended the terms "pre-fab" and "manufactured" referred to any house built primarily in a factory, as opposed to a home "stick built" on site.[2]

¶6 At the conclusion of the hearing, the court granted summary judgment to the Fingers. The court concluded that

> it seems completely obvious to me that the very first covenant in this declaration of restrictive covenants was put in there for the purpose and intention of requiring that people stick build their homes. It doesn't say that, but … I think it's very understandable to the common person [that] they don't want anything brought on to these lots that has been built somewhere other than on the lot….

The court went to on to conclude the Daskams' house was both a "pre-fab" house and a "manufactured" house, and was prohibited by the restrictive covenant. The court therefore granted the Fingers a permanent injunction requiring the Daskams to remove the home from their lot.

[2] At the summary judgment hearing, the court also took evidence, apparently to clarify the relevant building codes and the use of the terms "manufactured" and "pre-fab" in the construction industry. The evidence presented was substantially undisputed, and neither party objected to the procedure. It appears the circuit court treated the undisputed testimony presented at the hearing as a supplement to the summary judgment submissions.

STANDARD OF REVIEW

¶7 We review summary judgments without deference to the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Here, the facts are undisputed, and the only questions presented involve the interpretation of a restrictive covenant and whether it is enforceable. Both are questions of law reviewed without deference to the circuit court. ***Diamondback Funding, LLC v. Chili's of Wisconsin, Inc.***, 2004 WI App 161, ¶6, 276 Wis. 2d 81, 687 N.W.2d 89.

DISCUSSION

¶8 A covenant is enforceable only if its intent can be clearly ascertained from its language. ***Zinda v. Krause***, 191 Wis. 2d 154, 166-67, 528 N.W.2d 55 (Ct. App. 1995). The intent of a covenant refers to the "scope and purpose of the covenant as manifest by the language used," not the subjective intent of the drafter. ***Id.*** at 166. If the purpose of a covenant can be ascertained from its language, we then determine whether the actions in question violate the covenant. ***Id.*** at 170.

¶9 In this case, the circuit court concluded the term stating that no "pre-fab, manufactured, or trailer-type house shall be moved onto any lot or lots" was "put in there for the purpose and intention of requiring that people stick build their homes." We agree.

¶10 WEBSTER'S defines "prefabricate" as "to fabricate all or most of the parts of (as a house) at a factory so that construction consists mainly of assembling and uniting standardized parts." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1787 (unabr. 1993). In other words, the term "prefabricate" refers to

a process in which most of the home is built, or fabricated, in a factory prior to construction on site.

¶11 That is precisely what occurred here. The Daskams' house was built in two halves at a factory. The halves were then transported to the job site. Had construction continued, the construction would have consisted "mainly of assembling or uniting" the two halves and attaching some utilities.

¶12 In addition, the phrase "moved onto any lot or lots" is consistent with a requirement that lot owners "stick build" their homes. A home built in a factory can be "moved onto" a lot. While parts of a "stick built" home, such as roof trusses, can be moved onto a lot, a "stick built" house itself is not "moved onto" a lot in any meaningful sense. For these reasons, we conclude the "pre-fab" term in the restrictive covenant evinces a clear purpose that homes in Daskam's Lakeview Estates be "stick built" rather than prefabricated in a factory. Because the Daskams' house was prefabricated, not "stick built," it is prohibited by the restrictive covenant.

¶13 The Daskams make three arguments in response. First, they argue their house is not a "manufactured home" as defined in the Wisconsin Statutes. *See* WIS. STAT. § 101.91(2). However, they admit their home is a "manufactured dwelling" as defined in the Uniform Dwelling Code. *See* WIS. ADMIN. CODE § COMM 20.07(52) (Dec. 2006). The Daskams do not explain why the statutory definition of "manufactured home" is more relevant to the meaning of the covenant than a similar Administrative Code definition. In addition, the statutory definition of "manufactured home" does nothing to explain why their home is not a "pre-fab" prohibited by the covenant. Section 101.91(2) therefore does not support the Daskams' position.

¶14 The Daskams next contend that cases from other jurisdictions support their position, primarily ***Werner v. Sofios Constr. Co.***, 176 N.E.2d 870, 870-71 (Ohio Com. Pl. 1961).[3] In ***Werner***, the Ohio Court of Common Pleas concluded a restrictive covenant prohibiting erection of any "prefabricated house" did not apply to a custom built home constructed off site in fourteen sections.

¶15 We do not find ***Werner*** persuasive, for two reasons. First, the Ohio Court of Common Pleas is an Ohio circuit court, which makes ***Werner*** a forty-five year old written Ohio trial court opinion.[4] We find our own circuit court's contemporary analysis of this issue more persuasive than that in ***Werner***. Second, the ***Werner*** opinion was based in large part on the court's perception that applying the restriction would be "unreasonable" because the house in question was "of the same or better quality materials and workmanship" as any other house. ***Id.*** at 871. As discussed below, we are unwilling to invalidate the restriction here as "unreasonable" when the parties have entered into a contract that clearly reflects the opposite view.

¶16 Finally, the Daskams argue prohibiting their home is contrary to public policy because "the materials and methods used to build [it] are comparable or even superior … to that of a stick built home." They argue public policy disfavors "outdated and needlessly restrictive and expensive building requirements" in restrictive covenants. *See* ***Crowley v. Knapp***, 94 Wis. 2d 421,

[3] The Daskams also rely on ***Ussery Investments v. Canon & Carpenter, Inc.***, 663 S.W.2d 591, 594 (Tex. App. 1983), and ***Kennedy v. Classic Designs, Inc.***, 722 P.2d 504, 509 (Kan. 1986). Those cases hinged on the meaning of the terms "structure" and "building," not on what constitutes a prefabricated or manufactured home.

[4] *See* http://www.sconet.state.oh.us/introduction/structure/default.asp (last visited March 22, 2007).

434, 288 N.W.2d 815 (1980) (in general, public policy favors free use of property).

¶17 This argument ignores the Fingers' legitimate interest in protecting their property values. While covenants without a clear purpose are unenforceable for public policy reasons, covenants with a clear purpose serve homeowners by allowing them to contractually restrict uses of adjacent property they perceive as a threat to their property values. *See* ***Pertzsch v. Upper Oconomowoc Lake Ass'n***, 2001 WI App 232, ¶¶21-22, 248 Wis. 2d 219, 635 N.W.2d 829 (Anderson, J., concurring) (court decisions on whether to enforce a restrictive covenant balance public interest in free use of property against protection of homeowners' contractual rights). The Fingers' choice to purchase a lot with a restrictive covenant—and the Daskams' choice to create the covenant in the first place—reflected their belief that the restrictions found in the covenant were necessary to preserve their property values. We will not disturb that contractual arrangement based on the Daskams' newfound conclusion that the covenant is "outdated and needless" or too expensive or restrictive.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.