COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1103 **Cir. Ct. No. 01-CV-88**

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

RANDALL AND ROBERTA SPENCE,

PLAINTIFFS-RESPONDENTS,

V.

THOMAS AND DIANE KOLODZIENSKI,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Pierce County: DANE MOREY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas and Diane Kolodzienski appeal a summary judgment ruling that they violated the protective covenants of the Golfview Heights Addition to the City of River Falls. They argue (1) the restrictive covenants are ambiguous; (2) they did not violate them; (3) the record

discloses issues of material fact that preclude summary judgment; and (4) further discovery is required. We affirm the summary judgment.

BACKGROUND

¶2 This case originates from a controversy between the Kolodzienskis and their neighbors, Randall and Roberta Spence. Both parties own homes in the Golfview Heights subdivision subject to a restrictive covenant. The Kolodzienskis erected a storage building on their property that the Spences claimed violated the covenant. The Spences also complained that the Kolodzienskis failed to obtain the architectural control committee's approval to build the structure. The Spences brought this action seeking removal of the storage building and the trial court granted them the relief sought. The Kolodzienskis appeal the judgment.

¶3 The dispute centers on the interpretation of the covenant's language. The covenant provides:

> No buildings shall be erected, altered, placed or permitted to remain on any lot except a single-dwelling house designed for the accom[m]odation of one family only, together with a garage designed to accom[m]odate a minimum of two (2) automobiles, the exterior of which shall be constructed of the same material used, or to be used, on the exterior of the dwelling house.

It also requires approval by the architectural control committee for any kind of structure.[1]

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[1] The covenants read:

> ARTICLE I.
> Land Use and Building Type
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> No lot shall be used except for residential purposes. No buildings shall be erected, altered, placed or permitted to remain on any lot except a single-dwelling house designed for the accom[m]odation of one family only, together with a garage designed to accom[m]odate a minimum of two (2) automobiles, the exterior of which shall be constructed of the same material used, or to be used, on the exterior of the dwelling house. The ground floor of the main structure, exclusive of open porches and garages, shall be not less than one thousand two hundred and fifty square feet (1,250 sq. ft.) for a one-story dwelling, nor less than nine hundred square feet (900 sq. ft.) for the first floor and not less than one thousand eight hundred square feet (1,800 sq. ft.) for the entire structure for a dwelling of more than one story. No factory manufactured houses shall be permitted on any lot, nor shall any owner be permitted to move any previously constructed dwelling onto any lot.
>
> ….
>
> ARTICLE VIII.
> Architectural Control Committee
>
> Review by Committee. No building fence, wall, patio or other structure shall be commenced, erected or maintained upon such lot, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, colors, and location of the same shall have been submitted to and approved in writing as to harmony of external topography by an Architectural Control Committee composed of three (3) or more representatives appointed by Golfview Heights, Inc. In the event said committee fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article shall be deemed to have been fully complied with.

¶4 It is undisputed that the Kolodzienskis have a home and a garage on their lot and later, without the architectural control committee's approval, erected a 16' x 24' prefabricated storage building on a concrete foundation.

STANDARD OF REVIEW

¶5 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.

¶6 However, when the grant of summary judgment is based on an equitable right to enforce a restrictive covenant, we apply a two-tiered standard of review. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109. "The interpretation of a restrictive covenant is a question of law." ***Id.*** at ¶7. Although we review the legal issues de novo, the circuit court's decision to grant equitable relief is discretionary. ***Id.*** at ¶15. We affirm a discretionary decision if the record shows that the court exercised its discretion and there is a reasonable basis for its determination. ***State ex. rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 624, 511 N.W.2d 868 (1994). Discretion contemplates a reasoning process that depends on facts of record or facts reasonably derived from the record, and one that yields a conclusion based on logic and proper legal principles. ***Id.***

DISCUSSION

¶7 The Kolodzienskis argue that the trial court erred when it ruled that the restrictive covenant unambiguously prohibited a storage shed. We disagree.

In order to determine whether the circuit court properly exercised its discretion by granting equitable relief, we must first analyze the language of the restrictive covenant. ***Pietrowski***, 2001 WI App 175 at ¶7. Public policy favors the free and unrestricted use of property, and deed restrictions must be strictly construed to favor unencumbered use of property. ***Id.*** "When a land use is restricted by covenants, it must be expressed and unequivocal." ***Crowley v. Knapp***, 94 Wis. 2d 421, 440, 288 N.W.2d 815 (1980). Further, when the meaning of a restrictive covenant is doubtful, all doubt "should be resolved in favor of the free use thereof for all lawful purposes by the owner of the fee." ***Zinda v. Krause***, 191 Wis. 2d 154, 165, 528 N.W.2d 55 (Ct. App. 1995). However, a restrictive covenant need not expressly prohibit the specific activity in question in order to be enforceable. ***Id.*** at 166. If the intent of the restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. ***Id.*** at 166-67. The language in a restrictive covenant is ambiguous when it is capable of more than one reasonable interpretation. ***Id.*** at 165-66.

¶8 We conclude that the restrictive covenant is unambiguous and its purpose is evident. Article I of the restrictive covenant expressly states that no building shall be erected, on any lot except "a single-dwelling house designed for the accom[m]odation of one family only, together with a garage designed to accom[m]odate a minimum of two (2) automobiles." This language permits no conflicting interpretations. It unambiguously provides that only a dwelling house and garage may be built. Because the storage shed is not a dwelling house or garage, it is prohibited.

¶9 The Kolodzienskis contend, nonetheless, that Article I's reference to "garages" creates an ambiguity. Article I also provides: "The ground floor of the main structure, exclusive of open porches and garages, shall be not less than one

thousand two hundred and fifty square feet." They argue that the use of the plural indicates that the drafters never intended to limit lots to only one house and only one garage. We are unpersuaded. When interpreting covenants, we must take into account "the object which the restrictions were designed to accomplish." ***Zinda***, 191 Wis. 2d at 169. The language in question governs the minimum square footage of the residence. This provision ensures neighborhood consistency. We conclude the term "garages" refers not to the number of garages per lot, but rather to garages in the generic sense, to ensure that square footage calculations of the houses would not include garage space. We are satisfied that the use of the term "garages" does not result in any ambiguity.

¶10 The Kolodzienskis also argue that an ambiguity results when Article I is read together with Article VI, section 1. Article VI is entitled "Temporary Structures" and section 1 states: "No structure of a temporary character, trailer, basement, tent, garage, boathouse, barn or other outbuilding shall be used on any lot at any time as a residence, either temporarily or permanently." They contend that to read Article I as a ban of all buildings except residences and garages would render Article VI, section 1 meaningless, in contradiction to standard rules of interpretation. Again, we disagree. The preamble to the covenant provides that its purpose is to maintain "desireable, uniform and suitable" architectural design. Article VI's plain language evinces a purpose to ban temporary structures and prevent their use as residences to avoid Article I's strictures. To read Article VI as permission to build temporary structures as long as they are not used as dwellings would contradict the covenant's stated purpose and eviscerate the restrictions in Article I. Because the Kolodzienskis' proposed interpretation is unreasonable, we reject their contention.

¶11 Next, the Kolodzienskis argue that the record discloses issues of material fact that preclude summary judgment. Under this heading, they contend that "[n]o one disputes that the Architectural Control Committee has permitted storage outbuildings to be constructed on other Golfview Heights lots." They claim the committee's "approval of outbuildings is significant to [this] case" and the court erred because the "facts show that the Committee has approved outbuildings on other properties." We are unpersuaded.

¶12 The Kolodzienskis' argument fails to identify any factual dispute. Their argument admits other property owners obtained the architectural control committee's approval to erect outbuildings. It is undisputed the covenant requires approval of the architectural control committee and the Kolodzienskis failed to obtain approval. Because the facts are undisputed and do not give rise to any conflicting inferences, the Kolodzienskis fail to identify a material factual dispute. We therefore reject their claim that the court erroneously determined, as a matter of law, that they violated the covenant. *See* WIS. STAT. § 802.06.

¶13 Putting the best face on their argument requires us to interpret it as a challenge to the circuit court's exercise of discretion. Indeed, imbedded in their argument is the contention that the court need not order removal of a structure that violates a restrictive covenant, but has the discretion to do so. The Koldzienskis also claim that before the court may grant injunctive relief, the parties' competing interests must be reconciled and equity must favor injunctive relief.

¶14 The record discloses the court reasonably exercised its discretion. The court stated that giving credence to the Kolodzienskis' contentions "would leave all of the property owners in the subdivision without remedy absolutely contrary to the purpose and precise language of the restrictions and the reliance

upon them to which all the owners are entitled." It is well established that a covenant restricting land to residential use inures to the benefit of all the purchasers where it is inserted for the purpose of carrying out a general plan of development, and that it constitutes at least an equitable servitude upon the land, and constitutes a valuable property right that a court of equity will enforce in the absence of facts and circumstances making such enforcement unjust or inequitable. ***Crowley***, 94 Wis. 2d at 426.

¶15 The record supports the court's conclusion that enforcement of the restrictions is not inequitable. The Kolodzienskis admit that when they purchased their lot, they were told that Golfview Heights was subject to restrictive covenants. Although an employee of their building contractor told them that outbuildings were permissible if its exterior matched their house, they never obtained a copy of the covenants to ascertain the nature of the restrictions. Several years later, when they were preparing the site for the shed, the Spences objected to the proposed location. They gave the Kolodzienskis a copy of the covenant and advised that they needed the architectural control committee's approval. The committee later denied approval. Nonetheless, the Kolodzienskis proceeded with construction.

¶16 The only inference from these facts is that the Kolodzienskis proceeded with construction knowing that the covenants restricted the type of buildings that could be erected. The Kolodzienskis admit that the other property owners received committee approval for the structures. The court could find that blatant disregard of the restrictive covenants did not give rise to equitable relief.

¶17 Also, the Kolodzienskis could not claim that the Spences waived their right to enforce the restrictive covenant because the Spences failed to object to other restrictive covenant violations. Generally, a property owner does not

waive the right to enforce a restrictive covenant if one does not act on violations that do not affect him or her. ***Pietrowski***, 2001 WI App 175 at ¶10. Therefore, although the Spences did not enforce the restrictive covenant against the other homeowners in the subdivision who constructed sheds in violation of the covenant, because there is no claim that these other violations affected them, they did not waive the right to enforce the restrictive covenant against the Kolodzienskis.

¶18 In addition, the Kolodzienskis do not contend that the character of the subdivision has so changed that the covenants should not be enforced. "Courts of equity will not enforce such restrictive covenants where the character of the neighborhood has so changed as to make it impossible to accomplish the purposes intended by such covenants." ***Id.*** at ¶14 (citation omitted). Such changed conditions may result from a failure on the part of the property owners to observe or comply with the terms of the covenant. ***Id.*** Here, there is no contention that the proliferation of prohibited buildings throughout the neighborhood revealed intent to abandon the restrictive covenant. *See* ***id.*** at ¶¶14-15. Because the record fails to show facts and circumstances making enforcement of the covenant unjust or inequitable, we do not upset the trial court's exercise of discretion.

¶19 Finally, the Kolodzienskis argue that the trial court should have granted a continuance to permit them to conduct depositions. They argue that the court erred when it permitted a summary judgment proceeding before they completed their depositions, rendering them unable to fully respond the Spences' motion. They concede that this assignment of error would result in reversal only if the depositions would create material issues of fact. The Kolodzienskis, however, do not identify what material fact they hoped to discover through deposition testimony to enable them to defeat the summary judgment motion. Accordingly,

we are unpersuaded that the court erroneously denied their motion for continuance.

CONCLUSION

¶20 The trial court correctly ruled that the restrictive covenant was unambiguous and that the Kolodzienskis violated its terms when they built an outbuilding without committee approval. The record supports the trial court's discretionary decision to grant injunctive relief. In addition, the Kolodzienskis fail to demonstrate that the court committed reversible error by denying their motion for a continuance to conduct additional depositions.

By the Court.—Judgment affirmed.

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