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August 5, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1020 Adam P. Goodman v. Chad J. Baumgartner, Michelle L. Baumgartner, Brendan Locke and Melissa Locke (L.C. #2016CV511)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Adam P. Goodman appeals from an order granting summary judgment in favor of Chad and Michelle Baumgartner and Brendan Locke[1] (the Defendants), denying Goodman's motion for summary judgment, and dismissing Goodman's complaint seeking a declaration of interest in certain real property pursuant to a restrictive covenant that had purportedly been terminated shortly after it was recorded. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] As we agree that the termination of the restrictive covenant was effective and that Goodman's property rights are derived from a metes and bounds description that does not include an interest in the real property at issue, we affirm the order of the circuit court.

In 1981, the Deer Park Estates Development Company (the Company) created a plan to develop a residential neighborhood on land it purchased in the Town of Polk in Washington County. In furtherance of that plan, the Company recorded a restrictive covenant titled "Declarations of Restrictions—Deer Park Estates" (the Declarations).[3] The Declarations divided the land into Lots 1-5, Outlot 1, and Outlot 2, collectively known as Deer Park Estates. The

[1] Melissa Locke, Locke's wife, was also a party to this dispute, but she passed away during this litigation.

[2] All references to the Wisconsin Statutes are to the 2017-18 version.

[3] Two Declarations were recorded, the first of which, document 435987, contains most of the relevant provisions.

Declarations also established the rights of current and future owners of the property and gave each lot owner a one-fifth fractional interest in Outlot 1, known as the Reserve Area, which was to be used for recreational purposes.[4]

In 1983, Mitchell Savings and Loan Association (Mitchell) obtained a foreclosure judgment against Deer Park Estates and later obtained full ownership of the property. No construction on the planned residential neighborhood development had ever taken place. In 1985, Mitchell recorded a "Termination of Declarations of Restrictions—Deer Park Estates" (the Termination), which purported to terminate the Declarations, including the provision pertaining to the interest in Outlot 1. Since the Termination, the property has changed hands multiple times over the years. Goodman and the Defendants currently own property in what was the former Deer Park Estates.[5]

Goodman filed this suit pursuant to WIS. STAT. § 841.01, seeking a declaration of interest confirming his ownership of a one-fifth interest in the former Outlot 1. Goodman admits that Mitchell obtained the entire Deer Park Estates property and that it recorded the termination documents, but he claims that the Termination was "void and invalid" as it was never agreed to

[4] Outlot 2 was also to be shared by the owners of Lots 1, 2, and 3, each with a one-third share.

[5] The Baumgartners own a portion of former Lot 4 as well as the majority of former Outlot 1. Locke owns a portion of the former Lot 1 and Outlot 1. Goodman owns the entirety of former Lots 3 and 5, the majority of Lot 2, nearly half of Lot 1, and a portion of Lot 4.

by the Town of Polk. After a year of discovery,[6] the parties filed cross-motions for summary judgment. The circuit court determined that the Termination was proper as the Declarations did not require the Town of Polk's approval for termination, and as a result, denied Goodman's motion and granted the Defendants' motions. The circuit court described Deer Park Estates as "a concept which never came to fruition" and observed that the lots "as contemplated under the original CSMs and declarations, have long since ceased to exist" and have "changed fundamentally in their character" as a result of the foreclosures, sales, and divisions of the property. The court also concluded that the fractional ownership of Outlot 1 was destroyed through the doctrine of merger. Goodman appeals.

This case comes before us on cross-motions for summary judgment. We independently review a grant of summary judgment utilizing the same methodology as the circuit court.[7] ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is

[6] The Baumgartners originally filed a motion for judgment on the pleadings pursuant to WIS. STAT. § 802.06(3), specifically arguing that the Termination abolished the Declarations, but the circuit court denied the motion and the case continued to the discovery phase.

[7] The Baumgartners argue that as this is a declaratory judgment action, *see* WIS. STAT. § 806.04(2), we should review the circuit court's decision on summary judgment in this case pursuant to a discretionary standard, *see* ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶35, 309 Wis. 2d 365, 749 N.W.2d 211. Goodman disagrees, arguing that the legal claim was filed under WIS. STAT. § 841.01 and that the determinative issue is whether the Declarations were terminated in 1985, which is a question of law that this court should review de novo. We address this issue no further as we conclude that regardless of which standard of review applies, we find that the circuit court did not err.

entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "When both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the [circuit] court to decide the case on the legal issues." ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996).

Goodman argues that the circuit court erred in granting summary judgment to the Defendants as the Declarations remain in full force and effect and, accordingly, he retains a fractional interest in Outlot 1. The Defendants argue that the Termination immediately abolished any Declarations running with what was formerly Deer Park Estates, and even if termination was improper, Goodman's interest in the land, as indicated in the metes and bounds description in his deed, does not include an interest in Outlot 1. We agree.

The circuit court properly concluded that the Declarations were terminated. The Declarations indicate that "[t]hese restrictions shall be in force for a period of thirty (30) years from the date of recording and shall be deemed to run with the land and shall bind the respective owners, heirs, successors, and assigns," but also provides that the restrictions "may be amended by the recording of an instrument executed by the owners of two-third (2/3) of the building sites subject to the restrictions." The Declarations further provide that "[u]pon expiration of the term of thirty (30) years, these restrictions and amendments thereto shall automatically be extended for successive ten (10) year periods unless an instrument signed by two-thirds (2/3) of the owners of building sites has been recorded agreeing to change or abolish the restrictions in whole or in part." In 1985, Mitchell was the sole owner of the entire property, and as sole owner, it

recorded the Termination with the Washington County Register of Deeds. The Declarations provided Mitchell that right. While the Declarations provided that "[a]ll *amendments* shall be consistent with the general plan of development as provided herein and shall be agreeable to the Town of Polk or its successors," the Town of Polk was not explicitly required to agree to a termination of the Declarations. (Emphasis added.) Goodman has presented no persuasive statutory or common law support for his argument to the contrary. The Termination was valid and effective.[8]

Wisconsin law also favors the validity of the Termination. Our case law recognizes that a property restriction can be released by the consent of all owners for whose benefits the restrictions were imposed. ***Genske v. Jensen***, 188 Wis. 17, 19-20, 205 N.W. 548 (1925). Furthermore, public policy favors the free use of property, not restrictive covenants. ***Forshee v. Neuschwander***, 2018 WI 62, ¶¶15-16, 381 Wis. 2d 757, 914 N.W.2d 643 ("Public policy of the State of Wisconsin 'favors the free and unrestricted use of property.'" (citation omitted)); ***McKinnon v. Benedict***, 38 Wis. 2d 607, 619, 157 N.W.2d 665 (1968) (discussing "the principle of public policy that restrictions on the use of land 'are not favored in the law'" (citation omitted)). If doubt exists as to the applicability of a restriction on land, we are to resolve that doubt in favor of the free use of property. ***McKinnon***, 38 Wis. 2d at 619. This public policy

[8] Even if we were to conclude that the Declarations were unable to terminate prior to the initial thirty years—which we do not—after the initial thirty-year-period, in 2011 and prior to Goodman purchasing his property, the Termination would without a doubt be valid as the Termination was signed by more than two-thirds of the property owners and was recorded. Under either interpretation, the Declarations have been terminated.

argument then serves as a backdrop for the changed-conditions doctrine. Pursuant to RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.10(1) (Am. Law Inst. 2000):

> (1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude.

The purpose of this doctrine is to ensure that obsolete covenants do not "interfere with desirable uses of land." ***Id.*** at cmt. a. In ***Ward v. Prospect Manor Corp.***, 188 Wis. 534, 544, 206 N.W. 856 (1926), our supreme court recognized that "[c]ourts 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. This may result from circumstances over which neither plaintiff, nor defendant, nor other residents of the community has any control."

Here, the original developers drafted the Declarations with the intent to develop the property into a residential community with an area to be shared for recreational activities, but, as the circuit court explained, "[t]he development that was contemplated by the agreements and declarations never happened." Since that time, Mitchell foreclosed on the property and became the sole owner, terminated the Declarations, and subsequently sold the property, which then proceeded through multiple resales, foreclosures, and was eventually divided into new parcels and sold to the current owners. Deer Park Estates never came to fruition, and the character and

purpose of the property has been altered to such an extent that it would be "impossible to accomplish the purposes intended by such covenants." ***Id.*** Accordingly, we must resolve any doubt about the operation of the Declarations in favor of termination.

The circuit court further concluded that Goodman was not entitled to a fractional interest in Outlot 1 as that property is not included in the metes and bounds description found in his deed. We agree. Goodman's property rights are derived from a special warranty deed after Associated Bank foreclosed on the property, which was based on a metes and bounds description that does not describe the original lots and does not include any fractional interest in what was once Outlot 1. According to the circuit court, "when the property was purchased at foreclosure, the buyer receives only the interest of the mortgagor," and Goodman's "interest did not include any reference to a fractional interest in what back in the day was Outlot 1" as the property "was covered by the new legal descriptions based on the new survey." Goodman does not dispute that his deed did not include a reference to an interest in Outlot 1. Thus, when Associated Bank conveyed its interest to Goodman, it conveyed only the legal metes and bounds description in the deed and not any additional rights to property, especially purported rights found in Declarations that were properly terminated. *See* ***Crowley v. Knapp***, 94 Wis. 2d 421, 438, 288 N.W.2d 815 (1980) ("It is contrary to the public policy of this state to impose a restriction upon the use of land when that restriction is not imposed by express terms.").

We also conclude that the doctrine of merger is applicable under the circumstances. The Declarations, by creating a one-fifth interest in Outlot 1 and reserving that area for recreation,

created an easement in Outlot 1 for the benefit of the future owners of Lots 1 through 5. "The doctrine of merger of title is based on the property law concept that 'no man can, technically, be said to have an easement in his own land. And the consequence is, that if the same person becomes owner in fee simple of both estates, the easement is extinguished.'" ***Anderson v. Quinn***, 2007 WI App 260, ¶11, 306 Wis. 2d 686, 743 N.W.2d 492 (citation omitted); *see also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5. When Mitchell foreclosed on the property it became the sole owner of the entire property, meaning the dominant and servient estates merged, thereby extinguishing the easement in Outlot 1. The circuit court properly found the doctrine of merger applied.

The circuit court properly granted summary judgment to the Defendants.[9]

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[9] To the extent we have not addressed one of Goodman's arguments, that argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on appeal.").

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals