

STATE OF MICHIGAN
COURT OF APPEALS

LAUREN HILLS HOME OWNERS
IMPROVEMENT ASSOCIATION, MICHAEL
SOLAN, and DALE MCCANN,

UNPUBLISHED
April 26, 2005

Plaintiffs-Appellants,

v

TODD KOKKO,

No. 253523
Oakland Circuit Court
LC No. 03-050763-CH

Defendant-Appellee.

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We reverse and remand for entry of judgment in favor of plaintiffs.

I. Facts and Procedure

Defendant owns a home in the Lauren Hills subdivision of West Bloomfield Township. The subdivision is subject to the following property use restriction: "No building shall be erected on any site in Lauren Hills Subdivision except one single private dwelling, to be occupied by not more than one family for residence purposes only, with an attached garage, if desired, thereto." Nonetheless, when the subdivision was platted in 1965, most of the lots had small sheds. At the commencement of this suit, residents on twenty-four out of eighty-seven lots in the subdivision had detached buildings such as sheds and playhouses, which ranged from ten to twenty-four feet in length, 6½ to 14 feet in width, and six to fourteen feet in height.

Defendant submitted to the Lauren Hills Home Owners Improvement Association (the Association) a plan to build a two-car detached garage on his subdivision property. The design depicted a garage that would be twenty-seven feet in length, twenty-two feet in width, and just over nineteen feet in height.¹ In the past, the Association had consistently rejected proposals for

¹ The subdivision has a use restriction requiring approval before the construction of a dwelling or garage.

the construction of structures of similar size and type. The Association informed defendant that the deed restriction did not allow detached garages, but that he would be permitted to construct a smaller storage shed. Plaintiffs then filed suit seeking to enforce the use restriction and to permanently enjoin defendant from constructing the proposed garage unless he obtained approval from the Association.

When defendant nevertheless began work on constructing his planned garage, plaintiffs filed a motion to show cause why a preliminary injunction should not issue restraining defendant from continuing to build the proposed detached garage. The trial court denied plaintiff's motion, concluding, "Plaintiffs have waived their rights to enforce the deed restrictions against the Defendant by failing to restrain other lot owners in the subdivision from erecting similar structures." The court also noted, "While Plaintiffs seek to limit the size of Defendant's structure based on the average sizes of the structures they have allowed to be built thus far, there is nothing in the deed restriction that addresses size." Using the same reasoning, the trial court subsequently granted defendant's motion for summary disposition under MCR 2.116(C)(8) and (C)(10).² By the time the trial court granted defendant's motion for summary disposition, defendant had substantially completed construction of the garage.

II. Analysis

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition based on the conclusion that the Association waived its right to enforce the use restriction against defendant by allowing the construction of other detached structures. Plaintiffs further argue that the trial court should have granted summary disposition in their favor under MCR 2.116(I)(2).³ This Court reviews de novo a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Defendant moved for summary disposition under MCR 2.116(C)(8), arguing that plaintiffs had waived their right to enforce the deed restriction. Only the pleadings may be considered in deciding a motion for summary disposition under MCR 2.116(C)(8). MCR 2.16(G)(5). In opposing defendant's motion, plaintiffs submitted documentary evidence in support of their argument that they were instead entitled to summary disposition under MCR 2.116(I)(2). Here, although the trial court stated that it granted defendant's motion under both MCR 2.116(C)(8) and (C)(10), the court considered matters beyond the pleadings in reaching its decision. Therefore, we review the motion under MCR 2.116(C)(10), where we consider the pleadings and all documentary evidence presented by the parties. MCR 2.116(G)(5). Where the proffered evidence, viewed in the light most favorable to the nonmoving party, fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law under MCR 2.116(C)(10). *Corley, supra* at 278.

² The trial court also denied plaintiffs' request for summary disposition under MCR 2.116(I)(2).

³ MCR 2.116(I)(2) provides, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Defendant does not dispute that the construction of his garage violated the land use restriction prohibiting the construction of detached structures. The issue is whether the Association waived enforcement of the land use restriction against defendant by allowing other residents in the subdivision to construct smaller detached buildings such as sheds and playhouses. Whether a restriction has been waived is a question to be determined on the facts of each case presented. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 344; 591 NW2d 216 (1999). “[F]requent violations of a restriction, unobjected to, are indicative of an abandonment of such restrictions” *Taylor Ave Improvement Ass’n v Detroit Trust Co*, 283 Mich 304, 311; 278 NW 75 (1938). However, the sheer number of violations does not necessarily establish waiver of the restriction. See *Carey v Lauhoff*, 301 Mich 168, 174; 3 NW2d 67 (1942). “The character, as well as the number, of claimed violations must be considered in determining whether the complaining property owners have waived or forfeited the benefit of the restriction.” *Id.* The applicable rule is stated as follows: “[E]ven after one or more breaches, equity will grant relief if the restriction can be shown to be of value to complainant, and such breaches have not resulted in a subversion of the original scheme of development resulting in a substantial, if not entire, change in the neighborhood.” *Id.*, quoting *Misch v Lehman*, 178 Mich 225, 228; 144 NW 556 (1913); see also *Scott v Armstrong*, 330 Mich 504, 515; 47 NW2d 712 (1951).

Permitting a use that is “different in character” from a prohibited use “does not amount to a waiver of enforcement” of the restriction. *O'Connor*, *supra* at 346. In *O'Connor*, for example, the subdivision had a restriction allowing only private residences, but the defendants sought to sell timeshare ownership interests. *Id.* at 336. Our Supreme Court concluded that “short-term rentals” were “different in character” from timeshare agreements and, therefore, allowing such short-term rentals did not constitute a waiver of the residential use restriction as applied to the defendants. *Id.* at 346.

In *Carey*, *supra* at 171, the defendant operated a general rooming and boarding house in violation of a single-dwelling use restriction. The defendant argued that the restriction had been waived because there were or had been twenty-three other rooming houses in the 189-lot subdivision. *Id.* at 173-174. But our Supreme Court noted that the violations alleged by the defendant consisted of only two or three instances of residents on the defendant’s street renting a room or two. *Id.* at 175. The Court agreed with the trial court that the violations were not conspicuous or readily ascertainable, had not changed the residential character of the neighborhood, and were not of the scope and character of the defendant’s violation. *Id.* at 174-175. Additionally, “in the past plaintiffs or others have been somewhat active in instituting suits and in giving notices to persons who sought to violate the restrictions.” *Id.* at 174. The Court concluded that by allowing the previous violations, the plaintiff did not waive enforcement of the restriction against the defendant. *Id.* at 175.

Similarly, in *Boston-Edison Protective Ass’n v Goodlove*, 248 Mich 625, 628-629; 227 NW 772 (1929), a doctor sought to construct an office building at the rear of his home for his medical practice. The Supreme Court held that this was a clear violation of “both the letter and spirit” of a restriction permitting only single-family residences. *Id.* at 629. The Supreme Court also held that, although the plaintiff had allowed the defendant and another doctor to practice medicine out of their homes, it was “not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict

letter of such restrictions.” *Id.* “While it is true that by their acquiescence they may not be able to enjoin defendant from continuing to use his present home to the extent that it has been heretofore used as a doctor’s office, they are still in a position to stop the more serious violation of the restrictions that would result from the erection of a new or adjoining [office] building” *Id.* at 629-630.

Here, plaintiffs submitted affidavits stating that when the subdivision was platted in 1965, most of the homes had small sheds. At the time defendant built his detached garage, residents on twenty-four out of eighty-seven lots in the subdivision had smaller detached buildings such as sheds and playhouses. According to plaintiffs, the restriction was not intended to prohibit the construction of sheds that “did not exceed in size, character and scope that of the existing sheds.” The Association has permitted such sheds, but has consistently refused to allow the construction of larger detached garages such as defendant’s.⁴ We conclude that there is no support for the trial court’s determination that, by allowing sheds and playhouses, defendant was led to believe that the restriction would not be enforced with respect to his detached garage. Rather, it is undisputed that there are no other detached garages as large as defendant’s garage in the subdivision and that the Association consistently informed defendant that the construction of a detached garage of such size was prohibited by the use restriction. That the Association has, in the past, consistently refused to allow detached garages of this size weighs in favor of enforcing the restriction. See *Carey, supra* at 174.

Moreover, we agree with plaintiffs that sheds and playhouses are “different in character” from a clearly prohibited detached garage such as defendant’s and, therefore, permitting them does not amount to a waiver of enforcement of the restriction. See *O’Connor, supra* at 346. Defendant’s detached garage is twice as long, twice as wide, and twice as tall as the average measurements of the existing sheds in the subdivision. Thus, its size alone clearly shows that it is beyond the scope of any outbuilding permitted in the subdivision. See *Hansen v Facione*, 294 Mich 473, 478; 293 NW 723 (1940). Also, while substantial, the sheer number of sheds and playhouses allowed does not necessarily establish waiver. *Carey, supra* at 174. There is no evidence that permitting sheds and playhouses has subverted the original scheme of development resulting in a substantial change in the neighborhood. *Id.* Sheds and playhouses are “relatively temporary” structures and, therefore, “permitting them to remain will not be considered a waiver of the right to prevent the construction of permanent buildings” See *Taylor Ave Improvement Ass’n, supra* at 308. By contrast, defendant’s garage has footings and is admittedly a “permanent structure.” While plaintiffs, by their acquiescence to the construction of small sheds and playhouses, will not be able to enjoin defendant or others from building similar such structures in the future (provided they are of consistent size, scope, and character), plaintiffs “are still in a position to stop the more serious violation of the restrictions that would result from the erection of” a clearly prohibited detached garage. *Boston-Edison Protective Ass’n, supra* at 629-630. Plaintiffs can properly require that sheds be of the same character and scope as those previously permitted. Because plaintiffs did not waive the right to enforce the use restriction

⁴ Even plaintiff McCann was denied permission to construct a detached two-car garage on his property.

against defendant, the trial court erred in granting defendant's motion for summary disposition. The trial court should have entered a judgment in plaintiffs' favor under MCR 2.116(I)(2).⁵

Reversed and remanded for entry of an order requiring defendant to raze the detached garage. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens

⁵ Plaintiffs also argue that the trial court erred in denying their request for a preliminary injunction regarding defendant's construction of the detached garage. However, "[w]here the act that is sought to be enjoined has already been performed, an appeal is moot." *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 584; 609 NW2d 593 (2000), aff'd sub nom *Byrne v Michigan*, 463 Mich 652; 624 NW2d 906 (2001). Because defendant has substantially completed constructing the garage, this issue is moot. *Id.*