

STATE OF MICHIGAN  
COURT OF APPEALS

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GERALD THOM and AILEEN THOM,

Plaintiffs-Appellants,

and

LOCKWOOD HILLS ASSOCIATION,

Intervening Plaintiff,

v

SIMON PALUSHAJ and SACA PALUSHAJ,

Defendants-Appellees.

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UNPUBLISHED

August 23, 2007

No. 268074

Macomb Circuit Court

LC No. 2004-003383-CZ

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

O'CONNELL, J. (*concurring*).

I concur with the majority opinion that a violation of the restrictive agreement<sup>1</sup> has occurred. I write separately to state that while injunctive relief is always available to enforce restrictive covenants, there is a distinction between an injunction that prevents the breach and one that requires the breaching party to move (or remove) the structure to an area within the covenant's bounds. Therefore, recital of the general rule can sometimes distort the proper analysis.

The first type of injunctive relief prevents a defendant from building the offending structure in the first place. The second type of injunction is called a mandatory injunction and, according to 20 Am Jur 2d, § § 269-273, pp 797-800, courts are not as eager to impose this type of injunction. A trial court will usually only impose a mandatory injunction after it has thoroughly weighed the equities, including the degree to which the court must entangle itself to follow up on its orders. *Id.* Although mandatory injunctions have certainly been used to relocate encroaching buildings, "[t]he issuance of a mandatory injunction depends upon the equities

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<sup>1</sup> It appears what has been violated is a "Restriction Agreement of Lockwood Hills" recorded with the Macomb County Register of Deeds on May 7, 1954.

between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted.” *Id.* at § 269, p 797. Michigan has long held that the equitable relief of mandatory injunction, while available, is within the trial court’s discretion to impose. *Oosterhouse v Brummel*, 343 Mich 283, 290; 72 NW2d 6 (1955). Moreover, a plaintiff will generally be required to demonstrate some form of substantial damage or comparative hardship before the remedy of a mandatory injunction is employed to remedy a good-faith violation of a setback requirement. *Id.* at § 271, p 798; see *Grand Haven Twp v Brummel*, 87 Mich App 442, 446-447; 274 NW2d 814 (1978); see also *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211 n 3; 568 NW2d 378 (1997).

On remand, the trial court needs to balance the equities and determine what relief is available to plaintiffs and whether that relief will remedy the harm they have suffered. See *Kernen v Homestead Dev Co*, 232 Mich App 503, 514-515, 591 NW2d 369 (1998). I would also require the trial court, before issuing a mandatory injunction, to determine if plaintiffs have an adequate remedy at law.

/s/ Peter D. O’Connell