

STATE OF MICHIGAN
COURT OF APPEALS

OLIVER WENDELL HOMES INC.,

Plaintiff-Appellant,

v

JEFFREY HALL and JANET HALL,

Defendants-Appellees.

UNPUBLISHED

September 16, 2003

No. 240487

Oakland Circuit Court

LC No. 01-034692-CH

Before: Owens, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, an adjacent property owner to defendants, brought this action to enforce a provision in a "Declaration of Covenants, Conditions and Restrictions" governing their property use. In particular, plaintiff claimed that defendants violated a covenant that prohibited the erection of a "Structure" when they planted, near the property line, a row of seven white pine trees that were approximately five to seven feet tall. A "Structure" is defined in the governing document as "any building, driveway, parking area, structure, dwelling, garage, shed, outbuilding, fence, wall, hedge" Plaintiff sought an injunction and damages for breach of the covenant claiming that the row of trees was a "hedge" and, hence, a prohibited structure within the contemplation of the governing document. Defendants filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), arguing that the row of evergreen trees was not a "hedge" and, thus, not prohibited. The trial court agreed with defendants, holding that the trees did not constitute a "hedge" and that the deed restrictions did not apply to trees.

On appeal, plaintiff argues that the trial court erred in granting summary disposition in defendants' favor because the "evergreen hedge" was prohibited by the restrictive covenants as determined by the Architectural Control Committee which was designated by the governing document as the sole authority regarding the restrictive covenants. We disagree. This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and is properly granted when, considering the documentary evidence in a light most favorable to the nonmoving party, there is

no genuine issue of disputed material fact. *Ottaco, Inc v Gauze*, 226 Mich App 646, 650; 574 NW2d 393 (1997).

Article II (Approval of Structure) of the Declaration of Covenants, Conditions, and Restrictions document provides:

A. No Structure may be erected, installed, or placed upon any Lot unless the Lot Owner of such Lot has submitted the following documentation to Declarant and Declarant has approved all of such documentation in writing:

1. A topographical survey of the Lot . . . ;
2. Construction and architectural plans . . . ;
3. Specifications for each Structure . . . ;
4. A landscaping plan of the Lot . . . ; and
5. A construction schedule

* * *

C. Declarant intends and desires that all Structures within the Property be architecturally harmonious and architecturally pleasing and that the design and location of such structures take into account the preservation of trees and the natural environment of the Subdivision. In order to insure that such goals are accomplished, Declarant shall, in Declarant's sole discretion, have the right to approve or disapprove the appearance, construction, materials, proposed location, design, specifications, or any other attribute of any Structure.

Article III (Building Restrictions) of the Declaration of Covenants, Conditions, and Restrictions document provides:

A. The restrictions, conditions, and requirements set forth herein shall apply to each and every Lot. No Structure shall be constructed, installed, or placed on any Lot in violation of the following restrictions, conditions, and requirements, unless approved in writing by Declarant (or the Architectural Control Committee, if in existence), in accordance with Article II, hereof.

* * *

K. No fence, wall or hedge of any kind shall be erected or maintained on any Lot without the prior written approval of Declarant. . . .

L. Large trees measuring six (6) inches or more in diameter at ground level may not be removed, by anyone other than declarant, without the written approval of Declarant. Prior to the commencement of construction, each Lot owner shall submit to Declarant a plan for the preservation of trees in connection with the construction process. . . .

As previously noted, “Structure” is defined in the document as “any building, driveway, parking area, structure, dwelling, garage, shed, outbuilding, fence, wall, hedge, in ground swimming pool, or any other improvement of a permanent or substantial nature.” Consequently, these provisions, including the provisions mandating prior approval before any structure is “erected, installed, or placed,” are applicable here only if the trees that defendants planted are deemed a “Structure.”

Courts interpreting restrictive covenants give effect to the instrument as a whole where the intent of the parties is clearly ascertainable. *Cooper v Kovan*, 349 Mich 520, 527; 84 NW2d 859 (1957). However, “where the intent and meaning of restrictions are not clear, they may be construed in the light of surrounding circumstances and general plan under which the restrictive district was platted and developed.” *Ottawa Shores Home Owner’s Ass’n, Inc v Lechlak*, 344 Mich 366, 373; 73 NW2d 840 (1955). Nevertheless, where ambiguity exists restrictive covenants are construed strictly against “those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property.” *O’Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341-342; 591 NW2d 216 (1999). Further, words used in covenants must be given their ordinary and generally understood meaning. *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982).

Here, even construing “the covenants as a whole, giving effect to their underlying purpose” as plaintiff requests, the evergreen trees defendants planted were not prohibited by the restrictive covenants and, thus, neither approval nor consent were required before the trees were planted. The evergreen trees simply do not constitute a “Structure” within the contemplation of the governing document. Considering the words “fence,” “wall,” and “hedge” as they are ordinarily and generally understood, “trees” are none of them. That “trees” are distinguishable from a “Structure” is apparent from the document itself in that it references “trees” several times throughout the document. Consequently, reading the document as a whole, it is clear that the parties did not intend that the planting of trees be considered a “Structure” that is “erected, installed, or placed” for which a topographical survey, construction and architectural plans, specifications, a landscaping plan, and a construction schedule were required. Further, the expressed intent of the restrictions was to ensure that the proposed “Structures” were “architecturally harmonious and architecturally pleasing and that the design and location of such structures take into account the preservation of trees and the natural environment of the Subdivision.” The planting of trees was not contrary to that intention. Accordingly, the trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter