

STATE OF MICHIGAN
COURT OF APPEALS

POINTE ROSA HOMEOWNERS
ASSOCIATION, INC.,

UNPUBLISHED
September 5, 2006

Plaintiff-Appellee,

v

No. 267101
Macomb Circuit Court
LC No. 05-000592-CK

JULIO CICCHINI,

Defendant-Appellant.

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition to plaintiff and from the order awarding costs and attorney fees to plaintiff. We affirm the trial court's grant of summary disposition and its award of costs, but we reverse the award of attorney fees. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 2002, defendant purchased a lot located in the Seaway Island Subdivision in Macomb County. The subdivision is subject to a series of restrictive covenants enforced by plaintiff. In 2003, defendant installed three pilings in the canal leading to Lake St. Clair that runs alongside his lot. Plaintiff filed suit, alleging that the pilings violate the subdivision covenants and seeking a mandatory injunction requiring defendant to remove them. The trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (10), ordering defendant to remove the pilings and enjoining him from installing additional structures in the canal. Further, the trial court granted plaintiff's motion seeking an award of \$8,674.50 in attorney fees and \$431.65 in costs.

On appeal, defendant first asserts that the trial court erred in granting plaintiff's motion for summary disposition.

The decision to grant or deny summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A trial court properly grants summary disposition under MCR 2.116(C)(9) if "the opposing party has failed to state a valid defense to the claim asserted against it." *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997). "The test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly

deny a plaintiff's right to recovery." *Id.* Further, summary disposition is appropriate under MCR 2.116(C)(10) when there is "no genuine issue as to any material fact." A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Negative covenants restricting land use are grounded in contract. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). A covenant constitutes "a contract created with the intention of enhancing the value of property, and, as such, it is a 'valuable property right.'" *Terrien v Zwit*, 467 Mich 56, 71-72; 648 NW2d 602 (2002). Generally, such agreements, when voluntarily and fairly made, "shall be held valid and enforced in the courts." *Id.*, 71.

In an action to enforce a restrictive covenant, the intent of the drafter controls. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). "The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed." *Mable Cleary Trust, supra*, 505, quoting *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982). The enforcing court must strictly construe all provisions of the covenant "against the would-be enforcer," resolving all doubts "in favor of free use of the property." *Stuart, supra*, 210. However, if it can clearly ascertain the intent of the parties, the court is required to "give effect to the instrument as a whole." *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515-516; 686 NW2d 506 (2004).

In the instant case, the pertinent provisions of the restrictive covenants cited by plaintiff provide:

17. No boat shall be parked, moored, or tied to any boat well landing, pier, or any other landing place in such a manner as will interfere with the free and unobstructed passage of other boats through and across any canal or harbor, and no boat shall be stored on land unless a residence has previously been erected. No boat shall be moored permanently which will project into the canal more than five (5) feet.

* * *

19. Before construction is started, all boat house plans shall be approved in writing by the Board of Directors of the Pointe Rosa Homeowner's Association. Approval shall include architectural and general appearance, in addition to the restrictions contained herein.

The covenants as a whole clearly permit residents of the subdivision to moor boats on the canal. Provision 17 grants landowners permission to tie watercraft up to any landing place as long as it does not interfere with other boats passing through the waterway. However, it prohibits residents from permanently mooring boats so that they project more than five feet into the canal. Here, defendant testified that he installed the pilings in question ten to twelve feet from the edge of the canal and that their purpose was to provide a mooring place to dock

watercraft. Consequently, any boat moored to the pilings in accord with defendant's stated intent would project more than five feet into the canal and violate provision 17.

Additionally, provision 19 states that, before beginning construction of a boathouse, residents must submit their plans and obtain written approval from plaintiff. Defendant concedes that he installed the three pilings without seeking approval from plaintiff. He contends, however, that the provision merely refers to boathouses and did not require him to obtain approval for the pilings.

The restrictive covenants do not provide a definition for the term "boathouse." However, the failure to define a term does not necessarily render a contractual provision ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Courts can interpret a term in accord with its commonly used meaning. *Id.* Further, courts may "refer to dictionary definitions when appropriate when ascertaining the precise meaning of a particular term." *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

The *American Heritage Dictionary* (3rd ed, 1996) defines a boathouse as "a building at the water's edge in which boats are kept." Also, it states that a "building" constitutes "something that is built for human habitation; a structure." Similarly, *Merriam-Webster's Collegiate Dictionary* (10th ed, 2001) defines a boathouse as "a building to house and protect boats." It further defines "building" as a "usually roofed and walled structure built for permanent use (as for a dwelling)."

Defendant testified that the installation of the three pilings constituted the first step in the construction of a larger structure consisting of a total of fourteen pilings. Although defendant stated that he did not intend to build a cover over the pilings, he planned to use them for watercraft storage. We conclude that such a structure, a permanent storage facility for boats placed along the edge of a waterway, falls within the common meaning of the term "boathouse." Consequently, defendant violated provision 19 of the restrictive covenants by beginning construction of the structure without first obtaining written approval from plaintiff.

No genuine issue of material fact exists regarding whether defendant violated provisions of the subdivision's restrictive covenants. Defendant's assertion that the pilings do not block traffic through the canal does not constitute a valid defense to such a violation. Thus, the trial court did not err in granting plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (10). We therefore affirm its order requiring defendant to remove the pilings and enjoining him from installing any further structures in violation of the covenants.

In the second issue on appeal, defendant asserts that the trial court erred in awarding attorney fees to plaintiff because no statute or court rule provided it with authority to do so.

Generally, we review an award of attorney fees for an abuse of discretion. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). However, "any questions of law that affect the determination are reviewed de novo." *Id.*

Under MCR 2.625, a prevailing party is generally entitled to recover certain costs of litigation. *Lavene v Winnebago Industries*, 266 Mich App 470, 475; 702 NW2d 652 (2005). “Michigan follows the ‘American rule’ with respect to the payment of attorney fees.” *Haliw v Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). Consequently, a prevailing party cannot generally recover attorney fees from the losing party “in the absence of an exception set forth in a statute or court rule expressly authorizing such an award.” *Id.*, 707; MCL 600.2405(6). Nevertheless, the parties to a contract may include a provision requiring a breaching party “to pay the other side’s attorney fees and such provisions are judicially enforceable.” *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

In the instant case, plaintiff does not cite a statute or a court rule justifying its request for attorney fees. Rather, it correctly asserts that the restrictive covenants create a contractual relationship. *Terrien, supra*, 71-72. Plaintiff further contends that the terms of the covenants grant it the right to recover attorney fees. Specifically, it cites the following provisions:

20. The violation of any of the restrictions or conditions, or breach of any of the covenants hereby established, shall also give to the owner, or its successors in interest, the right to enter upon, after due notice, the property as to which such violation or breach exists, and to summarily abate and remove, at the expense of the owner thereof, any erection, object, or condition which may be or exists thereon contrary to the intent and meaning of the provisions hereof, and the owner shall not be deemed guilty of any manner of trespass for such entry, abatement or removal, any expense incurred by the owner to abate or remove such violation, or violations, not paid within thirty (30) days from the date of incurring said expense, shall also be accepted by the grantee as a claim of lien.

21. In the event of a violation or breach of any of these restrictions by any person or concern claiming by, through, or under the owner, or by virtue of any judicial proceedings, the owner and the lot owners, or any of them, jointly and severally, shall have the right to proceed at law or in equity to complete a compliance with the terms hereof, or to prevent any violation or breach of any of them. In addition to the foregoing right, the owner shall have the right, whenever there shall have been built on any lot in the subdivisions, any structure which is in violation of these restrictions, to enter upon the property where such violation exists and summarily abate or remove the same at the expense of the owner of said lot. . . .

An examination of the plain language of these provisions shows that they do not provide an adequate basis for an award of attorney fees. Provision 20 merely states that the successors to the original owner have the right to enter a resident’s lot in order to remedy a covenant violation and that the lot owner shall be liable for the costs of such an action. It does not contain any reference to litigation or attorney fees. Provision 21 states that property owners in the subdivision have the right to sue other lot owners over a breach of the covenants. In addition to the right to enforce the covenants through litigation, it also grants lot owners the right to enter the property of a fellow resident who has violated the covenants and remedy the violation at that resident’s expense. However, like provision 20, it fails to state that violators shall be liable for

the attorney fees of a party attempting to enforce the covenants. Contrary to plaintiff's argument, neither of the two provisions can be read to require an award of attorney fees in the event of litigation. Although the trial court properly awarded costs to plaintiff, it erred in granting plaintiff's motion for attorney fees. Consequently, we reverse the court's order to the extent it awarded plaintiff \$8,674.50 in attorney fees but affirm the order awarding plaintiff \$431.65 in costs.

Affirmed in part and reversed in part.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter