

STATE OF MICHIGAN
COURT OF APPEALS

E. RICHARD RANDOLPH and BETTY J.
RANDOLPH,

UNPUBLISHED
September 2, 2003

Plaintiffs-Appellants,

v

CLARENCE E. REISIG and MONICA REISIG,

No. 239666
Newaygo Circuit Court
LC No. 01-018281-CH

Defendants-Appellees.

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's final order granting summary disposition in favor of defendants. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs own property located on Houseman Lake. Defendants owned an adjacent parcel. In 1948 property owners on the lake, including the parties' predecessors in interest, formed a property owners' association to ensure that the property surrounding the lake would continue to be used for residential purposes only. The association agreement, dated October 15, 1949, contains provisions that are pertinent to this appeal. Paragraph D sets forth a right of first refusal, and requires property owners who desire to sell their property to first notify the other property owners, and to give the other owners the first opportunity to purchase the property. If the owners who wish to sell their property have received an offer from a non-association member, the notice must contain the terms of the offer. The notice would then serve as an option to the other property owners to purchase the property on the same terms. Paragraph E provides that property owners agree to sell their property to members of the Caucasian race only. Paragraph H provides that the invalidation of one or more of the covenants in the agreement shall not affect the remaining covenants, which shall continue in full force and effect.

Defendants notified the other property owners that they had sold their property to William and Debra Hinkley, who are not parties to this matter. Plaintiffs informed defendants that they were required to comply with ¶ D of the agreement and allow other property owners a right of first refusal. Defendants indicated that they had entered into an agreement with the Hinkleys, and would not entertain any other offers for their property. Plaintiffs notified defendants that they would purchase the property under the same terms agreed to by the Hinkleys. Defendants refused to sell their property to plaintiffs.

Plaintiffs filed a verified complaint seeking a determination that defendants were required to comply with ¶ D of the Agreement prior to selling their property and an injunction precluding defendants from selling the property. The parties filed cross motions for summary disposition. Plaintiffs, who moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), asserted that although the racial restriction in ¶ E was invalid under *Shelley v Kraemer*, 334 US 1; 68 S Ct 836; 92 L Ed 1161 (1948), the severability clause in ¶ H allowed the racial restriction to be discarded and the remaining covenants to be enforced. Defendants, who moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), contended that because the right of first refusal was intended to buttress the invalid racial restriction, the covenant granting the right of first refusal was also unenforceable.

The trial court granted defendants' motion and denied plaintiffs' motion. The court stated that it could not conclude that ¶ D bore no relationship to ¶ E. The court reasoned that property owners should have known about the decision in *Shelley, supra*, at the time they wrote the agreement. Given the property owners' knowledge of *Shelley*, the right of first refusal in ¶ D was suspect, and the property owners must have intended to use the right of first refusal to circumvent *Shelley*.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A covenant is a contract created with the intention of enhancing the value of property, and is a valuable property right. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). When interpreting a restrictive covenant, a court must give effect to the instrument as a whole where the intent of the parties is clearly ascertainable. *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982). If the intent is clear from the instrument as a whole no ambiguity exists, and judicial interpretation is neither necessary nor permitted. *Webb v Smith (After Remand)*, 204 Mich App 564, 572; 516 NW2d 124 (1994). The language of a restrictive covenant is to be taken in its ordinarily and generally understood meaning, and should not be subjected to an overly technical analysis. *Borowski, supra*, 716-717.

We reverse the trial court's decision granting summary disposition in favor of defendants and remand this matter for further proceedings consistent with this opinion. The racial restriction in ¶ E of the agreement is unenforceable. *Shelley, supra*. However, ¶ H of the agreement provides that if any covenant in the agreement is deemed to be invalid, the other covenants shall remain in full force and effect. The trial court incorrectly applied the principles set out in *Brideau v Grissom*, 369 Mich 661; 120 NW2d 829 (1963), to this case. In *Brideau, supra*, a covenant in the master deed covering lots in a subdivision provided both that the lots were to be used for residential purposes only, and that the premises could be leased or sold to persons of the Caucasian race only. The plaintiffs sought to enjoin the defendant from using her lots for commercial purposes. The Supreme Court found that the invalid racial restriction was severable from the remainder of the covenant because it bore no relation to and was entirely separate from the building and use restrictions. *Id.*, 668-669.

Here, the right of first refusal granted to property owners and the invalid racial restriction are contained in separate covenants. The right of first refusal makes no reference to the racial restriction. The trial court's conclusion that the drafters of the agreement inserted the right of first refusal in order to circumvent *Shelley, supra*, is not based on any record evidence, but

instead is grounded in speculation regarding the drafters' motives and what they must have known when the agreement was prepared. The court's conclusion that the right of first refusal in ¶ D is bound to the invalid racial restriction in ¶ E contradicts the plain language of ¶ H of the agreement. Judicial interpretation of the plain and unambiguous language of the agreement was neither necessary nor permitted. *Borowski, supra*, 716; *Webb, supra*. The trial court erred by concluding that the right of first refusal was unenforceable, *Brideau, supra*, and erred by granting summary disposition for defendants. However, on remand, if the trial court finds admissible evidence that the right of first refusal was improperly linked to the illegal covenant, then such a covenant to circumvent *Shelly* clearly would invalidate the right of first refusal.

Reversed and remanded for proceedings consistent with this opinion. We retain no further jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad