

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT KAMPHAUS, DONNA KAMPHAUS,
MICHAEL CIUCHNA, KRISTY CIUCHNA,
GERALD RYNKOWSKI, and VIRGINIA
RYNKOWSKI,

UNPUBLISHED
August 23, 2005

Plaintiffs-Appellants,

v

No. 261586
Macomb Circuit Court
LC No. 03-005067-CZ

DAVID A. BURNS, JOHN DOE and MARY
ROE,

Defendants-Appellees.

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

PER CURIAM.

In this action to enforce building and use restrictions alleged to encumber defendants' property, plaintiffs appeal as of right from the trial court's opinion and order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse and remand.

I. Basic Facts and Procedural History

The parties are each owners of property within the Ardmore Park subdivision, a residential neighborhood consisting of ninety lots platted by Emil Nelson in 1943 near the shore of Lake St. Claire. It is not disputed that within the duly recorded deeds initially conveying title to at least eighty of these lots, Nelson included a number of restrictions regarding the size and placement of the single family dwelling to which construction on those lots was expressly limited. It is similarly not disputed that, with respect to the duration, force, and effect of those restrictions, each deed also provided:

These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 1975, at which time the covenants shall be automatically extended for successive periods of ten years unless by a vote of the majority [of] the then owners of the lots it is agreed to change the said covenants in whole or in part.

Despite this provision, amended restrictions decreasing the setback requirements for homes constructed within the subdivision were recorded with the county register of deeds in

March 1947. Like those contained in the original deeds of conveyance, these amended restrictions, which purport to have been acceded to by “all the owners of the lots” in the Ardmore Park subdivision, again provided that “all parties and all persons claiming under them” would be bound by the restrictions until January 1, 1975, at which time the restrictions were to be automatically extended for successive ten-year periods unless altered “by a vote of the majority [of] the then owners of the lots” Consistent with this provision, the amended restrictions remained in effect until February 1975, when expanded restrictions signed by what professes to have been a majority of the lot owners on January 1, 1975, were recorded with the register of deeds. Although retaining the two-story height limitation found in both the 1943 and 1947 restrictions, and the decreased setback requirement of the 1947 restrictions, the 1975 restrictions added, among other things, a prohibition against “obstruction of the lakeward view of . . . abutting property owners” by outbuildings, privacy screens, fences, or swimming pools. The 1975 restrictions also require that each lot owner within the subdivision be a member of the Ardmore Park Subdivision Association, the stated purpose of which is to “represent the interests of the property owners in the subdivision and . . . carry out the dictates of the restrictions and covenants running with the land.”

By quitclaim deed dated August 7, 2002, defendants acquired title to Lot 47 of the Ardmore Park subdivision and, after razing an existing structure, began construction of a home on that lot. Plaintiffs, who own lots abutting Lot 47, subsequently filed the instant suit alleging that the manner in which defendants were constructing the home violated the subdivision’s building restrictions as amended and recorded in 1975. Specifically, plaintiffs alleged that defendants had failed to obtain approval of their construction plans from the Ardmore Park Subdivision Association, as required by the association bylaws. Plaintiffs further alleged that the home, as constructed, violated the prohibition against obstruction of the lakeward view of abutting property owners, as well as the two-story height limitation and five-foot setback requirements of the 1975 restrictions.

Defendants moved for summary disposition of plaintiffs’ claims, arguing that because ten of the ninety lots within the Ardmore Park subdivision could not be affirmatively shown to have originated from a common grantor, i.e., Nelson, the 1943 deed restrictions were not valid as reciprocal negative easements and, therefore, were without any force or effect. Defendants further argued that, as amendments to the invalid deed restrictions, the 1947 and 1975 restrictions were equally invalid. Alternatively, defendants asserted that even if the 1943 deed restrictions were valid, amendment of the 1943 deed restrictions before January 1, 1975 was expressly prohibited and, therefore, the 1975 restrictions, as amendments to the improperly promulgated 1947 restrictions, remained invalid nonetheless.

Finding that, under either theory advanced by defendants, the 1975 restrictions on which plaintiffs relied to bring suit were invalid and, therefore, unenforceable against defendants, the trial court granted summary disposition of plaintiffs’ claims in favor of defendants. This appeal followed.

II. Analysis

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 278. When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine if there is a genuine issue of material fact for trial. *Id.* A genuine issue 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 could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Applicability of the Doctrine of Reciprocal Negative Easements

Because we find it to be inapplicable to the facts of this case, we first address the trial court's reliance on the doctrine of reciprocal negative easements to invalidate the 1943 deed restrictions and, in turn, the 1975 restrictions on which plaintiffs' found their complaint. As explained in 20 Am Jur 2d, Covenants, § 157, p 571:

An implied restrictive agreement or reciprocal negative easement has been defined as a covenant which equity raises and fastens upon the title of a lot or lots carved out of a tract that will prevent their use in a manner detrimental to the enjoyment and value of neighboring lots sold with express restrictions in their conveyance. The essential elements for proof of reciprocal negative easements are a common grantor, a general plan or scheme of restriction, and restrictive covenants running with the land in accordance with such plan or scheme and within the plan or scheme area in deeds granted by the common grantor.

See also, *Sanborn v McLean*, 233 Mich 227, 229-230; 206 NW 496 (1925) (recognizing reciprocal negative easements as a valid equitable doctrine). In finding the 1943 deed restrictions to be invalid, the trial court relied on the absence of evidence affirmatively showing a common grantor for all lots within the Ardmore Park subdivision to conclude that the 1943 restrictions failed to establish reciprocal negative easements enforceable against defendants. However, it is not disputed that the 1943 restrictions at issue here were expressly included in the duly recorded deed from Nelson, as the plattor of the Ardmore Park subdivision, to the initial grantee of Lot 47, and are thus contained within defendants' chain of title. Consequently, we do not deal here with the doctrine of reciprocal negative easements, which provides that restrictions on the use of property not found in a party's chain of title may nonetheless arise "by implication . . . where the owner of two or more lots situated near one another conveys one of the lots with express . . . restrictions applying thereto, in favor of the land retained by the grantor." *Moore v Kimball*, 291 Mich 455, 459; 289 NW 213 (1939) (emphasis added), citing *Sanborn, supra*.¹

¹ See also *Clark v Murphy*, 16 Mich App 299, 304; 167 NW2d 860 (1969) ("[w]here there is no (continued...)

Rather, we deal here with deed restrictions expressly establishing a covenant running with the land, i.e., a contract created with the intention of enhancing the value of property, *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), which, until terminated or otherwise validly modified, is enforceable against all subsequent owners of the land who have notice of the restriction. See, e.g., *Smith v First United Presbyterian Church*, 333 Mich 1, 6; 52 NW2d 568 (1952); see also, generally, *Sun Oil Co v Trent Auto Wash, Inc*, 379 Mich 182; 150 NW2d 818 (1967). Accordingly, rather than by application of the doctrine of reciprocal negative easements, the question whether and to what extent defendants are bound by the restrictions established by these covenants must be determined by inquiry into the requirement of notice, and reference to the language of the covenants and the validity of the subsequent amendments thereto. See, e.g., *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491-492; 686 NW2d 770 (2004); see also *Borowski v Welch*, 117 Mich App 712, 716-718; 324 NW2d 144 (1982).

C. Validity and Enforceability of Restrictions

1. Notice

With respect to the requirement of notice, the record indicates that the quitclaim deed by which defendants acquired title to Lot 47 bore no reference to any restrictions of record. However, defendants have proffered evidence showing that the original deed conveying title to Lot 47, which, as previously noted contained express restrictions regarding the use of that lot, was duly recorded. Thus, defendants are charged with notice of the restrictions contained within that initial grant of title despite the absence of any reference to such restrictions in the deed by which they acquired ownership of that lot. See *Cook v Bandeen*, 356 Mich 328, 335; 96 NW2d 743 (1959) (“[t]he record of a deed from persons platting a subdivision containing restrictions as to the size and kind of buildings to be erected on the lots, is notice to a subsequent purchaser through an instrument of conveyance having no restrictions”), citing *Schadt v Brill*, 173 Mich 647; 139 NW 878 (1913). As such, unless validly terminated or otherwise modified, defendants are bound by the restrictions contained within the initial grant of title to Lot 47.

2. Amendment of Restrictions

As previously noted, the covenants contained within the initial deed of conveyance for Lot 47 expressly provided that the restrictions cited therein would bind “all parties and all persons claiming under them until January 1, 1975,” at which time the restrictions were to be automatically extended for successive ten-year periods unless altered “by a vote of the majority [of] the then owners of the lots” Relying on this language, as well as this Court’s holding in *Lake Isabella Prop Owners Ass’n/Architectural Control Committe v Lake Isabella Development, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 11,

(...continued)

express restriction in the chain of title of the particular lot the use of which is sought to be restricted, there must be proof of a ‘scheme of restrictions’ originating from a common owner”); Cf. *Doxtator-Nash Civic Ass’n v Cherry Hill, Inc*, 12 Mich App 468, 471-474; 163 NW2d 262 (1968) (applying the “theory” of reciprocal negative easements only after concluding that the “[d]efendants’ chain of title [was] free from any mutual covenants imposing building restrictions between defendants or their predecessors in title and any property owners in the subdivision”).

1998 (Docket No. 204954), that substantially identical language prevented amendment of the restrictions at issue there before the date expressly set forth in those restrictions,² the trial court found the attempt to modify the original deed restrictions in 1947, and thus, as a subsequent amendment thereto, the 1975 amendments, invalid. However, unlike *Lake Isabella*, the 1947 amendments at issue here purport to have been acceded to by “all the owners of the lots” in the Ardmore Park subdivision at that time. Because “[n]egative covenants restricting land use are grounded in contract,” see *Mable Cleary Trust, supra* at 491, the parties thereto are free to mutually modify or even terminate such covenants so long as there is mutuality of agreement by all those involved. See 2 Cameron, Michigan Real Property Law (3 ed), § 22.25, p 1271 (“[b]uilding, use, and occupancy restrictions may . . . be terminated by the mutual agreement of all persons interested in them”); see also, e.g., *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003) (so long as there is mutuality of agreement, the freedom to contract permits parties to a contract to “waive or modify their contract notwithstanding a written modification or anti-waiver clause”). Consequently, contrary to the trial court’s conclusion, the attempt to modify the original deed restriction in 1947 was not per se invalid.

We note, however, that although the document setting forth the restrictions as sought to be amended in 1947 purports to have been signed by all lots owners, defendants have put forth evidence suggesting that less than all lot owners in fact acceded to the 1947 amendments. Because that evidence was not developed below, however, the validity of the 1947 amendments cannot be determined on the present record. Nonetheless, even assuming that the 1947 amendments were invalidly promulgated by less than all lot owners, such fact merely serves to render the 1947 amendments void and, therefore, unenforceable in and of themselves. The invalidity of the 1947 amendments does not serve to invalidate the 1943 deed restrictions, which defendants do not dispute could be validly amended by vote of a majority of the lot owners after January 1, 1975, and, in the absence of such a vote, would themselves continue to bind the owners of lots within the Ardmore Park Subdivision for successive ten-year periods.³ Thus, regardless whether the attempts at amendment in 1947 or 1975 were proper, the 1943 deed restrictions remain valid and enforceable against all those who purchased property within the subdivision with notice of those restrictions, including defendants.

² The provision at issue in *Lake Isabella, supra*, slip op at 1, n 1, read as follows:

These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

³ In so concluding, we note that although the 1975 restrictions are self-identified as the “Amended Ardmore Park Building and Use Restrictions,” there is nothing within those restrictions expressly indicating that the restrictions sought to be amended were those promulgated in March 1947.

With respect to the validity of the 1975 restrictions on which plaintiffs found their claim, however, the record presently before this Court is again insufficient. In particular, the record fails to disclose who were owners of lots within the Ardmore Park subdivision on January 1, 1975. As a result, whether the 1975 amendments meet the requirement of an accord by a majority of the lot owners at that time cannot be determined on this record and remand is, therefore, necessary.⁴ Accordingly, we reverse the trial court's opinion and order granting summary disposition in favor of defendants and remand this matter for a determination whether, consistent with the reasoning employed in this opinion, the 1975 restrictions constitute valid modifications of the 1943 deed restrictions and are thus enforceable against defendants. If so, the trial court must further determine whether plaintiffs have presented evidence establishing a material issue of fact regarding breach of those restrictions by defendants, or whether defendants remain entitled to summary judgment pursuant to MCR 2.116(C)(10). We note further, however, that although plaintiffs base their claims on a violation of the 1975 restrictions, should the evidence on remand demonstrate that the 1975 restrictions do not meet the requirement of ratification by a majority of lot owners, inquiry into the validity of the 1947 amendments as the mutual will of all lot owners at that time will also be necessary in order to determine the scope of the restrictions currently in place in the Ardmore Park subdivision. As noted above, however, should either of these attempts at amendment be found to be invalid, the 1943 deed restrictions nonetheless remain valid and enforceable against all lot owners with notice.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

⁴ In reaching this conclusion we reject the assertion of the Ardmore Park Subdivision Association, as amicus curiae, that we are bound under the law of the case doctrine to uphold the validity of the 1975 restrictions based on this Court's decision in *Ardmore Park Subdivision Ass'n, Inc v Simon*, 117 Mich App 57; 323 NW2d 591 (1982). The law of the case doctrine applies only to questions previously presented and decided in the same case between the same parties. See *Manistee v Manistee Firefighters Ass'n, Local 645, IAFF*, 174 Mich App 118, 125; 435 NW2d 778 (1989). Here, none of the parties involved were also parties to the dispute in *Ardmore Park, supra*, which concerned only the issue whether the 1975 restrictions could be enforced against a lot owner who did not join in approving the amendments. Although, in deciding that issue the panel remarked that "[t]he original deed restrictions [had been] duly amended in 1975," the validity of that amendment was never squarely presented or decided. *Ardmore Park, supra* at 59.

We similarly reject as abandoned, see *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003), plaintiffs' conclusory and unsupported assertion that defendant Robert Burns, through various correspondence with the residents of the Ardmore Park subdivision, has "pledged acceptance" of the 1975 restrictions and is, therefore, bound by those restrictions.