STATE OF MICHIGAN

COURT OF APPEALS

DON DARNELL and KRISTIN DARNELL,

Plaintiffs-Appellants,

V

GARETT R. KERN CONSTRUCTION, INC. and 770 TAYLOR LLC,

Defendants/Third-Party Plaintiffs-Appellees,

and

FELIX WEBER,

Defendant/Third Party Plaintiff,

and

CHELSEA STATE BANK,

Defendants-Appellees

and

REAL ESTATE VENTURES OF WASHTENAW COUNTY and CONNIE WOODRUFF,

Defendants,

and

PHILIP F. CONLIN,

Defendant/Third Party Defendant,

and

PEGGY D. CONLIN,

UNPUBLISHED
May 16, 2006

No. 257277
Washtenaw Circuit Court
LC No. 02-001145-CH

Third Party Defendant.

DON DARNELL and KRISTIN DARNELL,

Plaintiffs-Appellants,

V

No. 257310
Washtenaw Circuit Court
LC No. 02-001361-CH

GARETT R. KERN CONSTRUCTION, INC.,

Defendant/Cross-Defendant-Appellee,

and

MICHAEL DODGE, LISA DODGE and PHILIP F. CONLIN,

Defendants/Cross-Plaintiffs,

and

ABN AMRO MORTGAGE GROUP, INC.,

Defendant.

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right the trial court's granting of summary disposition to defendants Garett R. Kern Construction (Kern Construction), 770 Taylor LLC (770 Taylor), and Chelsea State Bank.[1] We affirm.

This case involves two homes that were built in plaintiffs' subdivision, which plaintiffs allege violated certain negative restrictions. The lots in the subdivision contained building and use restrictions including the following:

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[1] At oral argument, counsel advised the Court that 770 Taylor is the only remaining defendant in this case. However, there is no order in the record which closes the case as to Kern Construction or Chelsea State Bank.

4. BUILDING AND USE RESTRICTIONS.

a. LAND USE AND BUILDING TYPE. All land shall be used for single family residential purposes, No building or structure shall be erected, altered, placed, or permitted to remain on any parcel of the subject property other than one detached single family dwelling and accessory buildings appropriate to single family dwellings.

* * *

e. TYPE OF CONSTRUCTION. Exterior materials to be used must be approved by the Developer. Plywood siding is prohibited and the use of all vinyl or aluminum siding shall be prohibited, however, vinyl and aluminum siding may be used with other building materials upon approval by the Developer.. [sic]

All chimneys that are on the outside front, sides or rear of home must be masonry, unless otherwise approved by the Developer, all other chimneys must have a decorative or ornamental top approved by the Developer.

Manufactured and modular homes are not allowed. Panelized construction is acceptable.

* * *

5. BUILDING APPROVAL. No dwelling, structure, swimming pool, fence, TV dish, permanent sports type outdoor court or facility, out building, or other development shall be permitted upon any parcel, nor shall any grade be changed on any parcel or other constructions work done, unless Developer's written approval is obtained in advance as follows:

> . . . Developer shall not give its approval to the proposal unless in its sole and absolute opinion such construction and development will comply in all respects with the building and use restrictions set forth in the document; nor shall Developer give its approval unless the external design, materials and location of the proposed construction shall be in harmony with the character of adjacent parcels as they develop and with the topography and grade elevations both of the parcel upon which the proposed construction is to take place, and the neighboring parcels in the development.

Plaintiffs stated that they relied on these restrictions when purchasing their lot and building their home.

Defendant 770 Taylor, through their real estate agent, spoke with the developer of the subdivision, Philip Conlin, about purchasing a lot and building a home. The real estate agent inquired whether modular homes could be built in the subdivision and Conlin informed her that they were not allowed. Conlin was presented with a purchase agreement that contained language

about building a modular home, which Conlin indicated he could not accept. The real estate agent and Conlin then discussed the home that 770 Taylor intended to have built and "systems built home" was inserted in the purchase agreement where modular home had been. Conlin also was given a copy of the building plans for the home 770 Taylor intended to build and approved those plans. Defendant Kern Construction built the home.

Plaintiffs filed suit after seeing four square boxes on trailers on 770 Taylor's lot. Plaintiffs alleged that defendants violated the restrictions against building a modular home and alleged counts of civil conspiracy and concert of action, claiming that defendants conspired to defraud Conlin into approving plans for a modular home. Plaintiff filed a second suit against Kern Construction when they built another home similar to the home 770 Taylor had built on another lot in the subdivision. The trial court granted defendants summary disposition, concluding that plaintiffs' only claims were against Conlin for his approval of the building plans.

Plaintiffs first argue that the trial court erred in concluding that they had no cause of action for a violation of the building restrictions. We disagree. This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on a motion for summary disposition under MCR 2.116(C)(10), the trial court is to consider the pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence does not establish a genuine issue of material fact, the moving party is entitled to a judgment as a matter of law. *Id*.

A restrictive covenant is created with "the intention of enhancing the value of property and is a valuable property right." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). "Negative covenants . . . are grounded in contract. In an action to enforce such a covenant, the intent of the drafter controls. The provisions are to be strictly constructed against the would-be enforcer." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). Generally, all doubts concerning restrictive covenants "are resolved in favor of the free use of property." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341; 591 NW2d 216 (1999). Further,

> [i]n placing the proper construction on restrictions, if there can be said to be any doubt about their exact meaning, the courts must have in mind the subdivider's intention and purpose. The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed. In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. [*Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982) (citations omitted).]

Plaintiffs are correct in that the restrictions do state that modular homes are prohibited. However, the restrictions also give the developer "sole and absolute" authority to approve

construction plans and determination of whether the plans fit within the restrictions. Defendants did exactly what the restrictions required them to do; they submitted their building plans to Conlin for approval. Conlin gave his approval and indicated that he believed the homes were not what he intended as a "modular home." The language of the restrictions prohibits plaintiffs from filing a cause of action against any defendant except Conlin. As the trial court stated, plaintiff's only cause of action was against Conlin for allegedly approving a building that was contrary to the restrictions.

Plaintiffs next argue that defendant should not have relied on Conlin's approval because their homes were clearly modular homes. The term "modular home" was not defined in the restrictions. Conlin discussed with defendants what exactly Kern Construction would be building and Conlin came to the conclusion that it did not fit his intended definition of a modular home and approved the plans. When attempting to enforce a restrictive covenant, the intent of the drafter controls. *Stuart*, *supra* at 210. Because Conlin informed defendants that their plans did not fit under his intended definition of a modular home and because Conlin approved defendants' building plans as was required under the restrictions, defendants were entitled to rely on Conlin's approval as an affirmation that their building plans complied with the restrictions.

Lastly, plaintiffs also argue that the trial court erred in dismissing their claims for civil conspiracy and concert of action. "'[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.'" *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), quoting *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). Additionally, a claim for concert of action requires proof that all defendants "'acted tortiously pursuant to a common design.'" *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985), quoting *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). As discussed above, plaintiffs failed to present evidence that defendants violated the restricted covenants. As such, plaintiffs have not presented evidence of an underlying tort to support their claim for civil conspiracy or evidence of defendants "acting tortiously" for a claim of concert of action.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder