STATE OF MICHIGAN
IN THE 37TH CIRCUIT COURT FOR THE COUNTY OF CALHOUN

BATTLE CREEK REAL ESTATE DEVELOPMENT, L.L.C. a Michigan Limited Liability Company, TVC BATTLE CREEK CO., L.L.C., a Michigan Limited Liability Company, and PJD/ BC (d/b/a BECKER-DIETZ ASSOCIATES), a Michigan Limited Partnership.

Plaintiffs,

v

RITE AID OF MICHIGAN, INC., A Michigan Corporation, and PDS-1 MICHIGAN, INC., a Michigan Corporation.

Defendants.

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15-3449

Case No. 15-3449-CK

Hon. BRIAN K. KIRKHAM

OPINION Re: Motion for Reconsideration

This matter comes before the court pursuant to Defendants Motion for Reconsideration. The court allowed the Plaintiffs to file an answer which they have done.

The Defendants' Motion argues that the court "committed a palpable error by failing to consider and rule upon the rights of Defendants arising under the restrictions which affect the Plaintiff's Parcel contained in Exhibit B to the Warranty Deed dated 3-3-82". Defendants further argue that "the Court did not consider the Land Contract Restrictions".

A brief statement of the salient facts will assist in the understanding of the case.

The facts of the case are not disputed by the parties. On April 24, 1979 Donald F. Thompson (hereinafter referred to as "Thompson") purchased real property pursuant to a Land Contract from Battle Creek Plaza, a Michigan limited partnership. This parcel subsequently became identified as Parcel 1. Prior to the Land Contract purchase Thompson owned the property to the West of and adjoining Parcel 1. The adjoining property consists of Parcels 2A and 2B.

On the date the parties executed the Land Contract they also executed a Reciprocal Easement Agreement. The Reciprocal Easement Agreement was attached to the Warranty Deed as Exhibit C, recorded in liber 1248, pages 290-295. The Reciprocal Easement contains paragraph 6, which provides:

> "Notwithstanding the foregoing, Thompson reserves the right to construct a building within the boundaries marked in red on Exhibit C attached hereto and incorporated herein by reference, and such building, construction or erection shall act to fully and forever release the property upon which such building, construction or erection takes place from any claim or easement created herein, subject to the terms and conditions of a certain land contract executed simultaneously herewith by and between Battle Creek Plaza, as Seller, and Thompson, as Purchaser."

The Land Contract contained a Rider to Land Contract which was attached to the Warranty Deed as Exhibit B. A Warranty Deed was given in fulfillment of the Land Contract and executed on 3-3-1982.

The Rider to Land Contract expressly deals with maintaining the parking lot over the purchased property and the right of ingress and egress over the respective property of the Vendor and Vendee.

The Rider contains paragraph 8 which provides:

> "Purchaser shall not build, construct or erect any building,

structure or improvement on the land, except those as may be permitted by ordinance and restrictions, so long as, and only if, such are situated within the boundaries marked in red on Exhibit D attached hereto and incorporated herein by reference and nowhere else. Provided, further, any building, structure or improvement which purchaser builds, constructs or erects on the land (in accordance with the restrictions set forth in the preceding sentence) shall not be more than two stories in height, shall not contain more than five thousand (5,000) square feet on the ground floor thereof (excluding any basement floor area), and shall comply with all applicable governmental codes, ordinances and laws."

The referenced property "marked in red" consists of Parcel 1 as clarified in the Affidavit of Paul J. Dietz.

Some years later the parties executed an Amendment To Reciprocal Easement Agreement, dated Jan. 18, 2001, recorded at liber 2279 pages 709-715.

The Amendment to Reciprocal Easement Agreement reaffirms the easement across each of the party's respective property but, in paragraph 5 states:

"Notwithstanding the foregoing, Battle Creek Plaza LLC and Trust [Thompson] herein reserve the right to build, construct and erect any buildings, structures or improvements on any of their respective properties and such building, construction, or erections shall act to fully and forever release the property so constructed upon from any claim or easement herein created. All parties to this Agreement reserve the right to alter existing parking areas, service drives and curb cuts on their respective property, but will do so in such manner as to always allow ingress and egress rights across, over and through their respective property holdings as defined herein in 'Exhibits A,B and C' each of the parties shall at all times reserve the right to develop their property in such manner as they elect, but will continue the reciprocal easements set forth

> herein only over and across those lands which are set aside for parking, driveways, or other mutual ingress and egress easements over and across their respective properties as it would relate to the parties herein. The easements herein contained will be for the benefit of the respective parties to the Agreement as well as their business guests, invitees, tenants, customers successors and assigns. (Emphasis Added.)

The Amendment to Reciprocal Easement Agreement provides in paragraph 1:

> "The Reciprocal Easement Agreement recorded in Liber 1248 on Pages 290-295 is amended and replaced in total by this Agreement."

The Reciprocal Easement Agreement, pursuant to the Amendment thereto was extinguished by the parties "in total". The only surviving easement and thus restriction is the right of ingress and egress.

Michigan law supports "the right of property owners to create and enforce covenants affecting their own property." *Terrien v Zwit,*467 Mich 56, 71: 648 NW2d 602(2002). If such a covenant is unambiguous, it will be enforced as written. *Bloomfield Estates Improvement Ass'n, Inc.* 479 Mich at 214.

A motion for reconsideration is governed by MCR 2.119(F)(3) which provides: "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

The court has accepted the Black's Law Dictionary definition of "palpable" as "easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." Estate of Stanley Luckow, 291 Mich App 417 (2011).

"It is up to the moving party to show palpable error that would lead to different disposition in the case." UM Regents v. Titan Ins. Comp., 484 Mich 852 (2009).

As stated in People v Walters, 266 Mich App 341(2005) the "'palpable error' provision of MCR 2.119(F)(3) is not mandatory and only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration."

Additionally, as the court stated in Smith v. Sinai Hospital of Detroit, 152 Mich App 716, 723 (1986), "If a court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, ..."

In the oral ruling delivered from the bench the court could have more artfully and thoroughly explained the court's opinion. However on pages 30-32 of the transcript of the June 6, 2016 hearing the court specifically addressed the restrictions and the documents upon which the case relies. As set forth herein the court does more fully explain its previous ruling.

The Defendant's Motion For Reconsideration does not present any issues that were not considered and ruled on previously. Defendant's arguments simply attempt to put a new expression on the same face the court examined and ruled on previously. Further, the Defendant has not demonstrated "palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result".

The Defendant's Motion For Reconsideration is denied. Plaintiff shall prepare an Order Denying the Motion and present it pursuant to MCR 2.602(B)(3).

August 19,2016

HON. BRIAN K. KIRKHAM CIRCUIT JUDGE