STATE OF MICHIGAN

COURT OF APPEALS

NEWBERRY ESTATES HOMEOWNERS ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED March 15, 2011
v	No. 295468 Wayne Circuit Court LC No. 09-007262-CH
JEFFREY A. COOK and THERESA M. COOK, Defendants-Appellants.	

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this restrictive covenant action, defendants, Jeffrey A. Cook and Theresa M. Cook, appeal as of right the trial court's order granting summary disposition in favor of plaintiff, Newberry Estates Homeowners Association. Because the trial court did not err in finding defendants' structure in violation of a restrictive covenant and in awarding plaintiff attorney fees; and because defendants waived any challenge to the service of process they received regarding plaintiff's motion for summary disposition, we affirm.

I. BASIC FACTS & PROCEDURAL BACKGROUND

This case concerns whether a structure defendants built on their lot of land in the Newberry Estates Subdivision (Subdivision) in Westland was in compliance with a restrictive covenant related to their lot. The Subdivision was developed in 2005, and plaintiff was established in conjunction with the new development. In February 2005, plaintiff developed its Building and Use Restrictions, a restrictive covenant, for the Subdivision. In paragraph two, the Building and Use Restrictions limit use of the land to residential purposes and prohibit the erection of any building other than a single-family dwelling with an attached garage on the lot. However, in paragraph 14, the Building and Use Restrictions allow the construction of "[a]ccessory structures" as long as they are less than 200 square feet in size. On March 8, 2005, plaintiff declared multiple easements, covenants, conditions and restrictions (Declaration) for the Subdivision, allowing, among other things, plaintiff to take legal action if an owner violates the Building and Use Restrictions or any other covenants related to the Subdivision.

Defendants purchased lot 21 of the Subdivision on December 19, 2005. On June 23, 2006, defendants made a request to plaintiff to alter lot 21 by building a 12 foot by 16 foot "shed" – totaling 192 square feet – on it. Plaintiff approved defendants' request "subject to the

community's governing documents." In May or July 2008, defendants filed for a permit from the city of Westland, and the city approved the request. On July 20, 2008, defendants began construction on the structure. After construction began, plaintiff received more than one complaint regarding defendants' structure and, on July 27, 2008, plaintiff asked defendants if they could inspect the structure. On August 1, 2008, plaintiff informed defendants that the structure was not in compliance with the Building and Use Restrictions. Plaintiff asked defendants to stop construction on the structure or otherwise comply with the Building and Use Restrictions.

On March 27, 2009, plaintiff filed a complaint against defendants, alleging that, in erecting the structure, defendants were in breach of the Building and Use Restrictions and the Declaration and asking the trial court to order defendants to remove the structure. Defendants filed an answer and affirmative defenses in response to plaintiff's complaint on May 28, 2009, denying they were breaching the Building and Use Restrictions.

On October 6, 2009, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). Plaintiff argued that defendants failed to state a valid defense to plaintiff's claim that they were in breach of the Building and Use Restrictions. Plaintiff also contended that there was no genuine issue of material fact and plaintiff was entitled to judgment as a matter of law because defendants built "a two story outbuilding clearly in violation of the Subdivision's restrictive covenants." Plaintiff further posited that it was entitled to attorney fees under contractual provisions in the Declaration.

On October 30, 2009, defendants also filed a motion for summary disposition. Defendants argued that plaintiff's claim was barred by "estoppel, misrepresentation, lack of clean hands, and negligent inducement[,]" and defendants were entitled to summary disposition under MCR 2.116(C)(7). Defendants further contended that they were entitled to summary disposition pursuant to MCR 2.116(C)(8) because plaintiff failed to state a claim upon which relief could be granted. Finally, defendants posited that, under MCR 2.116(C)(10), there was no genuine issue of material fact and they were entitled to judgment as a matter of law because the structure they built conformed to plaintiff's Building and Use Restrictions.

On November 6, 2009, a hearing was held on plaintiff's motion for summary disposition. At the hearing, defendants informed the trial court that they had not received service of process of plaintiff's motion for summary disposition and so did not have sufficient notice regarding the hearing on the motion. Still, defendants asked the trial court to treat their motion for summary disposition as a response to plaintiff's motion for summary disposition and proceed with the hearing. The trial court agreed. At the end of the hearing, the trial court concluded that defendants' structure violated paragraphs two, six, and 14 of the Building and Use Restrictions and granted plaintiff's motion for summary disposition. The trial court ordered defendants to pay $2,700 in attorney fees and $294.66 in costs. On November 23, 2009, the trial court issued a written order granting plaintiff's motion for summary disposition and ordered defendants to remove the structure within 30 days. If defendants failed to remove the structure with 30 days, the trial court granted plaintiff permission to abate or remove the structure at defendants' expense. Defendants now appeal.

II. RESTRICTIVE COVENANT

Defendants contend that the trial court erred in granting plaintiff's motion for summary disposition because the structure defendants built was in compliance with the Building and Use Restrictions of the Subdivision and plaintiff is estopped from claiming a breach of the Building and Use Restrictions since plaintiff granted defendants permission to build the structure. We disagree.

We review de novo a motion for summary disposition and view the evidence with regard to each issue in the light most favorable to the nonmoving party. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Since the trial court relied upon evidence not available in the pleadings, we review the trial court's decision under MCR 2.116(C)(10). *Silberstein v Pro-Golf of American, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). A motion brought pursuant to MCR 2.116(C)(10) should be granted when, considering the affidavits, pleadings, depositions, admissions, and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, "leaves open an issue upon which reasonable minds might differ." *West v GMC*, 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 is a contract created with the intention of enhancing the value of property and is a valuable property right." *Id.* When interpreting a restrictive covenant, if the intent of the parties is clearly ascertainable, a court must give effect to the instrument as a whole. *Brown v Martin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289030, issued July 15, 2010), slip op, p 3. If clearly established by proper instruments, restrictions for residential purposes are favored and will be vigorously enforced. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999).

The trial court concluded that, in building their structure, defendants were in violation of sections two, six, and 14 of the Subdivision's restrictive covenant, the Building and Use Restrictions, which read:

> 2. No lot shall be used except for residential purposes. *No building shall be erected, altered, placed or permitted to remain on any lot* other than one detached single-family dwelling not to exceed two (2) stories in height with a private attached garage for not more than three (3) cars.
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> 6. No structure of a temporary character, trailer, tent, shack, barn or other outbuildings shall be placed on any lot at any time, either temporarily or permanently, except a structure to be used by builders for storage of materials

> during the construction period or for a sales trailer for marketing purposes during the construction and sales period. This provision shall not be deemed to prohibit the storage of trailers or other vehicles within garages in conformance with paragraph 14 below.
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> 14. No inoperative vehicles, commercial vehicles, house trailers or mobile trailers, boats or boat trailers shall be permitted to be parked or stored on any lot in said subdivision unless such vehicles are parked or stored in a garage on said lot which conforms to the requirements pertaining to the construction of garages as set forth above in paragraph 2. *Accessory structures shall be permitted, but not greater than 200 square feet in size* . . . . [Emphasis added.]

Defendants argue that their structure is a permitted "accessory structure" under section 14 because the structure was less than 200 square feet in size. We disagree. Defendants are correct that accessory structures are permitted under section 14 as long as they are smaller than 200 square feet, but only with respect to the type of vehicles contained in section14. However, an accessory structure must also comply with the other provisions of the Building and Use Restrictions. Section two prohibits the erection of buildings, other than one single family dwelling on each of the lots, and section six forbids the construction of outbuildings of a temporary character. Even viewing the evidence in the light most favorable to defendants, we conclude that defendants' structure was a building, which was prohibited under section two of the Building and Use Restrictions, rather than merely an accessory structure. Although the structure was less than 200 square feet, it was two stories tall and, as evidenced by defendants' neighbor's affidavit and photographs, interfered with the neighbor's enjoyment of her property. Moreover, there was no evidence that it was used to store vehicles as set forth in section 14. To protect the property values in the Subdivision, plaintiff's Building and Use Restrictions clearly disallow the structure defendants built. As a result, we conclude that there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law. The trial court did not err in granting plaintiff's motion for summary disposition.

Moreover, defendants' argument that plaintiff is estopped from claiming a breach of the Building and Use Restrictions because it granted defendants permission to build the structure is without merit. Plaintiff's approval of defendants' structure was conditional upon the work being "performed in accordance with [the] community's governing documents[.]" Defendants' violation of section two of the Building and Use Restrictions contravened the conditional acceptance. Additionally, plaintiff approved a structure that was very different from the structure defendants built. Defendants indicated to plaintiff that they intended to build a 12 by 16 foot "shed" that was seven feet tall and made by Heartland. In reality, defendants built a 12 by 16 foot two story building, built by another company. As a result, defendants may not now rely upon that conditional acceptance as a defense.

III. ATTORNEY FEES

Defendants further posit that the trial court erred in awarding plaintiff attorney fees and costs. We disagree. We review the award of attorney fees for an abuse of discretion. *Ypsilanti*

Charter Twp v Kircher, 281 Mich App 251, 286; 761 NW2d 761 (2008). Questions of fact underlying the award of attorney fees are reviewed for clear error and questions of law are reviewed de novo. *Id.* "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.*

Generally, absent a statute, rule or contractual provision providing for the payment of attorney fees, attorney fees are not awardable. *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996). On the other hand, "[t]he parties to a contract may include a provision that the breaching party will be required to pay the other side's attorney fees and such provisions are judicially enforceable." *Zeeland Farm Servs, Inc, v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Nonetheless, recovery is limited to reasonable, rather than actual, attorney fees. *Id.* at 195-196.

The trial court awarded plaintiff attorney fees as a result of a contractual obligation in the Declaration. Article V of the Subdivision's Declaration reads:

> **Section 1. Remedies for Violations.** For a violation or breach of any of these reservations, covenants, conditions, restrictions, and rules and regulations of this Declaration or *any of the provisions set forth in the above referenced Building and Use Restrictions*, the Declarant, the Association, or any member of the Association, shall have the right to proceed at law or in equity to compel a compliance with the terms hereof or to prevent or obtain damages for the violation or breach of any provision hereof or to seek relief as follows:
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> > **a. Legal Action.** Failure to comply with any of the terms or provisions of this Declaration or *the Building and Use Restrictions* shall be grounds for relief, which may include, without intending to limit the same, an action to recover sums due for damages, *injunctive relief*, foreclosure of lien (if there exists a default in payment of assessments) or any combination thereof, and such relief may be sought by the Declarant or the Association.
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> > **b. Recovery of Costs.** In any proceeding which arises because of any alleged default under this Declaration or the Building and Use Restrictions, then the Declarant, the Association or the member of the Association seeking enforcement, if successful, shall be entitled to recover the costs of the proceeding and *such reasonable attorney's fees* (not limited to statutory fees) as may be determined by the court.
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> > **c. Abatement.** The violation of any of the provisions of this Declaration, the Building and Use Restrictions, or rules and regulations duly adopted by the Association shall also give the Declarant or the Association the right, in addition to the rights set forth above, to enter upon any Assessment Unit, or any of the Common areas, where reasonably necessary, and summarily remove, abate or rectify, at the expense of the person or entity committing the infraction, any structure,

> thing or condition maintained contrary to the provisions of this Declaration. [Emphasis added.]

The trial court did not abuse its discretion in awarding plaintiff attorney fees. Defendants are right that plaintiff was not entitled to attorney fees under a statute or a court rule. However, the Declaration clearly provides that plaintiff is contractually assured attorney fees because defendants violated the Building and Use Restrictions. Accordingly, the award of attorney fees was not outside the range of principled outcomes.

Defendants contend that they are not required to pay attorney fees to plaintiff because the Building and Use Restrictions and the Declaration were not recorded until August 8, 2005, after defendants obtained equitable title to the property on April 3, 2005, and consequently, the restrictive covenants do not apply to them. Defendants cite to no legal authority that a restrictive covenant must be recorded prior to the acquisition of equitable title to be effective. As a result, this issue has been abandoned. *Hughes v Almena Twp*, 284 Mich App 50, 72; 771 NW2d 453 (2009) ("The failure to cite sufficient authority results in the abandonment of the issue on appeal").[1] Consequently, we need not address defendants' argument and cannot conclude that the trial court erred in awarding plaintiff attorney fees.

IV. NOTICE

Finally, defendants contend that the trial court erred in hearing plaintiff's motion for summary disposition because plaintiff failed to timely serve defendants with the motion and, as a result, defendants lacked notice of the hearing on the motion. We need not address this issue because defendants waived it at the hearing on plaintiff's motion for summary disposition. A waiver is "an intentional relinquishment of a known right[,]" usually accomplished "by acts which indicate an intent to relinquish it." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254; 776 NW2d 145 (2009) (internal quotation marks omitted). At the hearing, defense counsel indicated that defendants did not receive plaintiff's motion for summary disposition in a timely manner, but they were willing to proceed with the hearing on plaintiff's motion anyway. Such a concession amounted to a waiver, and defendants may not now claim that they lacked notice.

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[1] Moreover, the corporate warranty deed, attached to defendants' brief on appeal and relied upon by defendants to support their contention that they had equitable title on April 3, 2005, was not submitted to the trial court and, as a result, may not be considered here. Appellate review is limited to the record filed with the trial court. MCR 7.210(A); *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000). A party may not enlarge the record on appeal by submitting documents not presented to the trial court. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause