STATE OF MICHIGAN

COURT OF APPEALS

OAKWOOD MEADOWS HOMEOWNERS ASSOCIATION, Plaintiff-Appellant,	UNPUBLISHED June 26, 2014
v	No. 316193 Livingston Circuit Court
FRANK URBAN and CAROL URBAN, Defendants-Appellees.	LC No. 12-026511-CH

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In this case involving subdivision construction restrictions, plaintiff appeals as of right from the trial court's order dismissing plaintiff's complaint after a bench trial. Plaintiff sought enforcement of the restrictions with respect to a "pump house" built by defendants on their property. We reverse and remand.

Plaintiff, a Michigan non-profit corporation, is the homeowners' association for a subdivision known as Oakwood Meadows Subdivision No. 2 in Green Oak Township. The declaration of restrictions and easements of Oakland Meadows grants plaintiff the power to enforce the covenants and restrictions imposed by the declaration on properties in the subdivision. Defendants are the owners of record of a property in the subdivision commonly known as 9770 Daleview Drive. Paragraph 1 of the "Land use and building type" restrictions states as follows:

> No building or structure shall be erected, altered, placed, or permitted to remain upon any lot other than one detached one family dwelling not exceeding two stories in height. . . . No outbuildings, sheds, detached garages or the like shall be erected, placed or permitted to remain upon any lot.

When defendants purchased their home in 1984, the property had an in-ground swimming pool with a concrete pool deck. The pool was surrounded by a fence and had an electric water pump and natural-gas water heater. In 2008, defendants hired a contractor to build a "pump house" to protect the pump and heater from the elements. The pump house is a small word-frame structure occupying a corner of the fenced-in area surrounding the pool. The roof is shingled and rises a few feet above the fence. The total cost of construction was $5,800. At a homeowners' association board meeting in January 2011, defendants were asked to explain why

they had not sought approval from the board of review before building the pump house. On November 8, plaintiff's attorneys sent defendants a letter stating, "[Y]ou are in violation of the Restrictions and Easements of Oakwood Meadows Subdivision in that you have erected a shed on your property." The letter demands that defendants remove the offending structure within 21 days to avoid further legal action.

Defendants did not comply and plaintiff filed suit, seeking injunctive relief. Plaintiff alleged that defendants had violated the terms of the restrictions by "erecting and maintaining a shed on their property without Association approval." Following a bench trial, the trial court concluded as follows:

> [W]hat we have here is a case where you have deed restrictions that say that you can't have a shed. And on the other hand you have deed restrictions that say that . . . the swimming pool's a permitted use. It further does say that you can have and should have, and the law requires, a fence around a pool. . . . I recognize that a shed standing on its own does not appear to be permitted and I can certainly understand that. That the deed restrictions that say that you can have a house with an attached garage and no shed, they're valid, and they work, and it'll be enforced.
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> Now, if you expand a little bit more and you look and say you can have a swimming pool, and it's a use in your property and it can be fenced in. And I think if I read the restrictions right, they even want a little privacy fence around that pool. So I think what goes inside of that fence to service that pool within is allowed and I don't think that it causes irreparable injury to the neighborhood.

The trial court also held that if the shed were a violation of the deed restrictions, it was only a slight or technical violation. The trial court cited this Court's decision in *Webb v Smith* (*After Second Remand*), 224 Mich App 203, 211; 568 NW2d 378 (1997), which the court indicated provides a "technical violation[] and substantial injury" exception to the general rule that deed restrictions can be enforced by injunction. The trial court also held that laches and promissory estoppel both apply and bar plaintiff from enforcing the restrictions. The trial court stated, "So for all those reasons I am going to dismiss the Plaintiff's Complaint and permit the pool house to remain in existence so long as it is maintained, keeps painted and trimmed along with the house, and so long as that pool is in existence."

Plaintiff immediately made an oral motion to amend the complaint to conform to the evidence. Plaintiff argued that the evidence showed that the pump house violated the subdivision's setback requirements. The defense countered that no witness had testified about a measurement of lineal feet from the lot line. The court denied the motion.

We will first consider whether it was error for the trial court to deny plaintiff's motion to amend the complaint. "[T]his Court reviews for an abuse of discretion a trial court's decision to grant or deny leave to amend a pleading . . ." *Jackson v Detroit Med Ctr*, 278 Mich App 532, 539; 753 NW2d 635 (2008). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Amendments to pleadings are governed by MCR 2.118, which states:

> (A) Amendments.
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> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
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> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.
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> * * *
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> (C) Amendments to Conform to the Evidence.
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> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

Plaintiff argued that the evidence showed that the pump house violated the subdivision's setback requirements. Plaintiff's counsel stated in argument below that the pump house was six feet from a lot line and the requirement was ten feet. The parties did not expressly or impliedly consent to try the issue, so MCL 2.118(C)(1) does not apply. In *Leavenworth v Michigan Nat'l Bank*, 59 Mich App 309, 314; 229 NW2d 429 (1975), this Court held, "Plaintiff at the beginning of the trial announced her intention to prove a contract involving the life insurance proceeds. Although noting the absence of this claim in the pleadings, defendant in no way indicated an unwillingness to try the issue." Here, as in *Leavenworth*, plaintiff's counsel addressed the ten-foot setback in opening argument. However, no evidence was presented indicating a measurement of distance from the shed to the lot line. The defense never addressed the issue of the setback requirement. The trial court did not abuse its discretion when it denied plaintiff's motion to amend its complaint to conform to the evidence.

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

There is no dispute that the language in the declaration created an enforceable restrictive covenant that runs with the land to bind the current owners. See *Terrien v Zwit*, 467 Mich 56, 70-71; 648 NW2d 602 (2002) (recognizing a strong public policy supporting right of property owners to create and enforce restrictive covenants). "A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a valuable property right." *Id.* at 71 (citation and internal quotation marks omitted). "Further, public policy favors use restrictions in residential deeds." *Webb*, 224 Mich App at 210. "The judiciary's policy is to protect property owners who have complied with the deed restrictions." *Id.* at 210-211. Although defendants

argue that the restrictions have become unenforceable through waiver, laches, and promissory estoppel, defendants do not contest that the deed restrictions were validly created.

Again, the restriction in issue states as follows:

> No building or structure shall be erected, altered, placed, or permitted to remain upon any lot other than one detached one family dwelling not exceeding two stories in height. . . . No outbuildings, sheds, detached garages or the like shall be erected, placed or permitted to remain upon any lot. . . .

The trial court stated that the pump house "was a stand alone shed that served no other purpose than to house lawn furniture, lawn tools, tractors, maybe even a car, at that point . . . I would be inclined to order that structure be removed because it served no purpose that is not contemplated for or ancillary to that which is permitted in the deed restrictions." The court further stated, "I just don't see how the pool shed—or pool house being ancillary to the swimming pool is damaging to the . . . other homeowners."

Defendants rely on *Johnson v Fred L Kircher Co*, 327 Mich 377, 382; 42 NW2d 117 (1950), for the proposition that "a negative use restriction, which states specifically what cannot be on the property, should be strictly limited to the items enumerated and all other uses should be permitted." Defendants argue that because pump houses are not specifically enumerated in the restriction, the use is permitted. Defendants, in essence, argue that the principle *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) should apply. However, the restrictions state that sheds, outbuildings, *and the like* are prohibited. Therefore, the principle of *ejustdem generis* (of the same kind, class, or nature) applies, and the prohibition applies not only to the enumerated items but also to items that are of like character.

Here, the enumerated items are small, free-standing buildings that are not used as a dwelling. Further, the restriction on sheds, outbuildings, and the like is stated as a corollary to the first two sentences of paragraph 1 which provide that "[n]o building or structure . . . other than one detached one family dwelling" with an attached garage is permitted. The court reasoned that the enumerated items function as storage structures, which was not the purpose of the pump house. However, the goal of the restriction is one of aesthetics, i.e., it recognizes the necessity of a dwelling, but restricts the construction of other structures of the property to promote an aesthetic purpose. Moreover, even if the third sentence of paragraph 1 were omitted entirely, the language in the first two sentences clearly states that no buildings other than the dwelling and attached garage are permitted.

Defendants also argue that any ambiguity in the restrictions should be construed in favor of free use of the property. There are, however, no ambiguities in the restrictions. Defendants' pump house violates the express terms of the restrictions.

Given that the pump house violates the terms of the restrictions, the question of the proper remedy arises. "[A] breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Terrien*, 467 Mich at 61. However, certain "equitable exceptions" to enforcement were recognized by the Michigan Supreme Court in *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957), and later by this Court in *Webb*.

The recognized exceptions are "(1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches." *Webb*, 224 Mich App at 211, citing *Cooper*, 349 Mich at 530. These are exceptions to the rule that "Michigan courts generally enforce valid restrictions by injunction." *Id.* Exceptions (1) and (3) are at issue in this case.

Webb defined a technical violation of a covenant as "a slight deviation or a violation that can in no wise . . . add to or take from the objects and purposes of the general scheme of development." *Webb*, 224 Mich App at 212 (citations and internal quotation marks omitted). In *Webb*, defendants built a house on a "half lot," and the subdivision deed restrictions only allowed one house per lot. *Id.* at 206. The *Webb* Court held, "Defendants' house, built on a half-lot where no house was allowed, presents more than a 'slight deviation' from the terms of the covenants." *Id.* at 212. "The restriction clearly permits only one dwelling per lot. Defendants' house detracted from the covenants' stated purposes of regulating construction to guarantee a level of privacy and aesthetic enjoyment to the subdivision's landowners." *Id.* In *Cooper*, the Court held that a proposed shopping center in a residential subdivision was not a technical violation. *Cooper*, 349 Mich at 530. The Court stated, "The violation contemplated here is far from technical and we cannot hold from the facts recited that the injury feared would be unsubstantial. The conversion of a large portion of a residential subdivision to business in direct violation of a contrary covenant undoubtedly affects every home therein." *Id.*

In *Gamble v Hannigan*, 38 Mich App 500, 505; 196 NW2d 807 (1972), however, this Court held that a porch that extended over setback lines was a mere technical violation and should not be enjoined because it would not block other residents' view of a lake and substantial construction had already taken place.

The restrictions at issue here expressly forbid sheds and outbuildings, and the pump house violates that restriction. The general scheme of development in this subdivision contemplates a neighborhood free of sheds and outbuildings. The existence of a shed clearly takes away from the purpose of the general scheme of development.

The third *Webb* exception—limitations and laches—was also raised below and on appeal. The trial court stated that it was "concerned with the issue of . . . laches or promissory estoppel." "I think the issue of laches, in that it's the equitable statute of limitations . . . would be a defense that the Defendants have," the court reasoned. "And further, the estoppel issue of . . . the Homeowners Association being aware of it going up and not ordering . . . that the structure be stopped before more money went into it."

Promissory estoppel does not apply to the facts of this case. "Promissory estoppel arises in equity when (1) there is a promise (2) that the promisor should have reasonably expected to induce action of a definite and substantial character on the part of the promisee (3) which in fact produces reliance or forbearance of that nature (4) under circumstances such that the promise must be enforced if injustice is to be avoided." *Barber v SMH (US), Inc*, 202 Mich App 366, 375-376; 509 NW2d 791 (1993). Promissory estoppel would only arise in this situation if plaintiff had promised not to take legal action against defendants to have the offending structure removed. There was no evidence that plaintiff made such a promise, express or implied, and thus no evidence of detrimental reliance.

Laches is an equitable defense analogous to a legal statute of limitations. *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). However,

> [l]aches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time. Instead, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay. As a general rule, where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot be recognized. . . . [*Id.* (citations and internal quotation marks omitted).]

"For laches to apply, [a defendant] must prove (1) a lack of diligence on plaintiff['s] part and (2) prejudice to the defendant." *Regents of Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 734; 650 NW2d 129 (2002).

The evidence does not demonstrate a lack of due diligence by plaintiff. The pool pump house was built in June 2008. The testimony of plaintiff's witnesses suggests that plaintiff became aware of the pump house in late 2010 and immediately contacted defendants requesting that they come to a board meeting to explain their actions. When defendants refused to comply, plaintiff's attorney sent defendants a demand letter in November of 2011. Plaintiff filed suit in January 2012. As plaintiff pointed out in argument below, "the Association is not a . . . police authority. . . . It doesn't go around looking for violations. It . . . reacts to violations that are reported." Once the violation was brought to plaintiff's attention, plaintiff promptly began addressing it.

Even if the delay between the shed being constructed and plaintiff filing suit were considered unreasonable, the facts do not indicate that defendants were prejudiced by this delay. The trial court is correct that if plaintiff had sought to enjoin defendants before the shed was constructed, defendants would not now be faced with the prospect of having to tear down a building that cost $5,800 to construct. However, in the two-and-a-half years between the time the shed was built and the time plaintiff first contacted defendants, the positions of the parties did not change. If plaintiff had sued to enjoin defendants the day after the shed was built, they would have faced just as much economic waste as they would have if plaintiffs had waited ten years to sue. Indeed, as plaintiff argues, defendants have benefited because they enjoyed the use of the offending structure for longer than they would have had plaintiff discovered the violation sooner.

In sum, the doctrine of laches does not apply because there has been no unreasonable delay and no prejudice to defendants.

Defendants argue that a mandatory injunction ordering them to tear down their pump house requires a balancing of the equities and that the trial court correctly ruled in their favor because plaintiff did not prove any damages to the neighborhood. The law of restrictive covenants does not require or permit the "balancing of equities" in the way defendants suggest.

Defendants cite two pre-*Cooper* Michigan Supreme Court cases, *Lemmon v Wineland*, 255 Mich 90; 237 NW 527 (1931), and *Davison v Taylor*, 196 Mich 605; 162 NW 1033 (1917),

for the proposition that a balancing of the equities is required. In *Lemmon*, Detroit took by condemnation a significant portion of four lots in a subdivision. *Lemmon*, 255 Mich at 92. The lots were deeded for single-family use. *Id.* The deed restrictions also contained setbacks. *Id.* In allowing the construction of a gas station on the lots, the Court held that the city had made it impracticable to use the lots for residential purposes given the setback requirements. *Id.* at 93. The Court stated, "Enforcement of the restrictions against defendants under the facts established by the record, would be oppressive and inequitable, and is therefore declined." *Id.* at 95. In *Rofe v Robinson*, 415 Mich 345, 353 n 13; 329 NW2d 704 (1982), the Michigan Supreme Court discussed *Lemmon* and indicated that it only applies to its specific facts where an act of condemnation makes it physically impossible to use the lots for residential purposes.

Davison also does not support defendants' assertion that a balancing of equities is required. Regarding deed restrictions, the *Davison* Court states, "But their enforcement in a court of equity is not a matter of absolute right, and is governed by the same general rules which control equitable relief by specific performance." *Davison*, 196 Mich at 611. For this proposition the Court cites to its opinion in *Moore v Curry*, 176 Mich 456, 462; 142 NW 839 (1913). Neither *Moore* nor *Davison*, however, engage in a balancing of the equities as defendant urges this Court to do in this case. *Moore* affirmed the enforcement of a deed restriction on the grounds that conditions in the neighborhood had not sufficiently changed to make enforcement inequitable. *Id.* at 464. *Davison* was decided (in favor of enforcement) on a waiver or estoppel theory. *Davison*, 196 Mich at 616.

Defendants also cite this Court's opinion in *DeMarco v Palazzolo*, 47 Mich App 444; 209 NW2d 540 (1973). In *DeMarco*, the trial court declared certain land use restrictions void because of changed conditions in the surrounding neighborhood. *Id*. at 446. This Court affirmed stating, "We . . . balance the competing and valid interests of the parties, who, on one side seek to assert their right to maximize the use of their land, and on the other, assert their right to quiet enjoyment of their land." *Id.* at 448. *DeMarco* does not support defendants' position, however, because it is merely an example of the application of the changed conditions doctrine—one of the equitable exceptions expressed in *Webb*. *DeMarco* does not stand for the proposition that the court must balance the equities before a deed restriction can be enforced.

Defendants urge this Court to take account of the hardship they will endure if forced to remove the pump house. Not only will their $5,800 investment be wasted, but they will lose the benefit of protecting their pool equipment from the elements. Defendants also assert that their immediate neighbors will lose the benefit of the noise-reducing effect of the pump house. Defendants argue that plaintiff, on the other hand, has no interest in having the pump house removed because it has failed to demonstrate how the neighborhood is harmed by the pump house. The law is clear that this consideration of relative harm is not appropriate. *Webb* balances the equities by providing exceptions to enforcement that prevent an inequitable result. If none of the equitable exceptions apply, the restriction is enforced, and the trial court is not required, nor permitted, to engage in a balancing of relative harm. As the Michigan Supreme Court stated in *Terrien*, "This all comes down to the well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Terrien*, 467 Mich at 65.

Defendants also assert that they cannot be faulted for not presenting their plans to the "review committee" because there was no evidence that such a committee existed at the time. They cite to *Stuart v Chawney*, 454 Mich 200; 560 NW2d 336 (1997). In *Stuart*, the defendants allegedly violated a restrictive covenant when they failed to submit architectural plans to a review committee. *Stuart*, 454 Mich at 207. That the review committee was never properly constituted was relevant to the question whether the defendants violated the restriction. *Id.* at 212. Here, however defendants' shed violates paragraph 1 of the declaration of restrictions and easements. Whether defendants also violated paragraph 24 by failing to submit their plans to a review committee is irrelevant to the issue of whether the shed violated, and continues to violate, the terms of paragraph 1.

We reverse the judgment of the trial court dismissing plaintiff's complaint and remand to the trial court for entry of an order requiring defendants to bring their property into compliance with deed restrictions contained in the declaration of restrictions and easements of the Oakwood Meadows Subdivision No. 2. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood