STATE OF MICHIGAN

COURT OF APPEALS

PERRY SEDLAR and TATYANA SEDLAR, Plaintiffs-Appellants, v GLENMAR PLACE SUBDIVISION HOMEOWNERS ASSOCIATION, Defendant-Appellee.	UNPUBLISHED March 16, 2006 No. 257188 Macomb Circuit Court LC No. 2003-005161-CZ
DAVID FREDERICK and SHERRY FREDERICK, Plaintiffs-Appellants, v GLENMAR PLACE SUBDIVISION HOMEOWNERS ASSOCIATION, Defendant-Appellee.	No. 257241 Macomb Circuit Court LC No. 2003-005080-CZ

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

In these consolidated appeals involving an alleged violation of a subdivision's deed restrictions, plaintiffs appeal as of right from an order granting summary disposition in favor of defendant, Glenmar Place Subdivision Homeowners Association. We affirm in part, reverse in part, and remand.

Plaintiffs are homeowners in the Glenmar Place Subdivision in Harrison Township, Michigan. Defendant denied plaintiffs' requests to install ornamental fences on their properties. The Sedlar plaintiffs and Frederick plaintiffs subsequently brought separate actions, alleging that defendant improperly denied their requests for an ornamental fence, contrary to the subdivisions deed restrictions. The parties filed cross-motions for summary disposition. The trial court granted defendant's motion, concluding that defendant properly exercised its discretion to deny approval for a fence, as permitted by the deed restrictions.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). It is apparent that the trial court granted defendant's motion under MCR 2.116(C)(10) because it looked beyond the pleadings. A motion under MCR 2.116(C)(10) tests the factual support for a claim. In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Article IV of the Declaration for Glenmar Place Subdivision provides, in pertinent part:

> Section 5. Fences. Fences, including perimeter fences, shall not be permitted. Notwithstanding the foregoing, ornamental fences, garden walls and similar improvements may be installed after plans and specifications therefor have been approved in writing in accordance with the procedure set forth in Section 9 below. Under no circumstance shall fences exceeding four feet in height be permitted, nor shall any fence extend into the front of a Lot beyond the rear line of the Home located on the lot. Fences for dog runs shall also be subject to approval in the manner as set forth in Section 9 below.
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> Section 9. Alterations, Improvements and Additional Structures. No buildings, (including, without limitation, all garages and storage sheds), fences, walls or other structures shall be commenced, erected or maintained upon the Premises, nor shall any exterior addition to, change (including changes in exterior paint or stain color) or alteration to any Home or other structure or improvement now or hereafter located within the Premises be made, until plans and specifications showing the nature, kind, shape, height, materials, color and location of the same have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Declarant, or if applicable, the Architectural Control Committee. In the event the Declarant, or the designated Architectural Control Committee, fails to approve or disapprove such design and location within 30 days after the required plans and specifications have been submitted to it, express approval will not be required and compliance with this Section will be deemed to have been fully effected.
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> In addition to the approval requirement set forth above, each Owner must obtain a building permit, if required by Harrison Township, before construction of any improvements.

As this Court stated in *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157-158; 336 NW2d 778 (1983):

> When interpreting a restrictive covenant, courts must give effect to the instrument as a whole. If there is any doubt as to the exact meaning of the

> restrictions, the court must consider the subdivider's intention and purpose. Furthermore, the restrictions must be construed in light of the general plan under which the area subject to those restrictions was platted and developed. On the other hand, restrictive covenants are to be construed strictly against those seeking enforcement and all doubts are to be resolved in favor of the free use of property. A court of equity will not enlarge the scope of deed restrictions beyond the clear meaning of the language employed. [Citations omitted.]

We conclude that § 5, considered in its entirety, gave defendant discretion to deny plaintiffs' requests to install an ornamental fence. Interpreting § 5 in the manner urged by plaintiffs, to mean that homeowners are entitled to install ornamental fences, would render the first sentence of § 5 meaningless. Further, § 5 uses the word "may," which ordinarily designates a permissive provision. *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993). Thus, the use of the word "may" in § 5 reflects an intent that ornamental fences are allowed only if the association chooses to permit them. To the extent that § 5 may be considered ambiguous, the submitted evidence established that the developer intended that there be no fences in the subdivision, thereby supporting a conclusion that defendant was intended to have broad discretion under article IV, § 5, with regard to the approval of fences. This conclusion is further supported by article V, § 6, of the deed restrictions, which indicates that defendant is deemed to have broad discretion with regard to fences.

We reject plaintiffs' contention that defendant waived its right to prohibit the installation of the proposed fences because other fences exist in the subdivision. In *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955), the Court stated that "[a]bandonment of restrictions by permitted violations and resultant change of character of the neighborhood amounts to a waiver." In this case, however, plaintiffs' waiver argument fails for several reasons. First, the evidence established that there were only four properties in the subdivision without pools that had fences. This does not demonstrate a sufficient change of character justifying a finding of waiver. Second, there is no basis to conclude that defendant itself abandoned the restriction on fences, which were installed before defendant was formed. Third, article XII, § 2, of the deed restrictions specifically provides that

> [t]he failure to enforce any right, provision, covenant or condition which may be granted by this Declaration shall not constitute a waiver of the right of the Association, Declarant or of any Owner to enforce such right, provision, covenant or condition in the future.

Under these circumstances, there was no waiver of defendant's right to enforce the deed restrictions with respect to ornamental fences. Thus, the restriction is enforceable with respect to the Sedlar plaintiffs.

The Frederick plaintiffs, however, argue that their request to install a fence was deemed automatically approved because defendant did not respond to their request within 30 days. We agree.

As stated above, article IV, § 5, provides that "ornamental fences . . . may be installed after plans and specifications therefore have been approved in writing in accordance with the procedure set forth in Section 9 below." Section 9 provides that its requirements are deemed

fully complied with, and express approval is not required, if defendant "*fails to approve or disapprove*" plaintiff's plans and specifications within 30 days after they have been submitted. Defendant argues that the requirements of Section 9 have not been satisfied for two reasons, both of which we find unpersuasive.

First, defendant argues that the Frederick plaintiffs previously submitted a written request to the developer in May of 2002, which was timely denied on June 13, 2002. Our review of the record, however, indicates that the Fredericks' initial request in May 2002 does not qualify as a submission for approval under article V, § 1, because it did not contain the required specifications as set forth in that section. In fact, the request was so lacking in detail that G&V Properties did not "approve or disapprove" the Fredericks' request, but rather set forth the information it would need to "consider any approval." Thus, the Fredericks never submitted plans or specifications in May 2002, and G&V Properties never approved or disapproved the Fredericks' request.

Second, defendant argues that its September 12, 2003, rejection of the Fredericks' August 12, 2003, request was timely because the Declaration does not state that delivery to an individual board member starts the time period for acceptance or rejection. The Declaration, however, sets forth no procedure for submission and acceptance of requests for alterations, improvements, or additional structures. As "restrictive covenants are to be construed strictly against those seeking enforcement and all doubts are to be resolved in favor of the free use of property," *Rofe, supra* at 158, the lack of any statement in the Declaration mandating that requests be submitted to the entire board leads us to conclude that the Fredericks' delivery of their request to an individual board member was sufficient to effectuate a submission to the board, thus starting the time period for the board to approve or disapprove the request. Moreover, although no copy of the Fredericks' August 12, 2003, request was attached to the lower court record for us to determine whether it met the submission requirements of article V, § 1, the Frederick plaintiffs alleged in their complaint that they submitted their request, and defendant admitted this allegation in its answer. Thus, defendant's failure to approve or disapprove the Fredericks' plans and specifications within 30 days of their submission on August 12, 2003, results in full compliance with article IV, § 9, which in turn entitles the Fredericks to install the ornamental fence described in their request, pursuant to article IV, § 5.

The trial court's grant of summary disposition in favor of defendant with respect to the Sedlar plaintiffs is affirmed. The trial court's grant of summary disposition in favor of defendant with respect to the Frederick plaintiffs, however, is reversed and the matter is remanded to the trial court for entry of judgment in favor of the Frederick plaintiffs.

Affirmed in part, reversed in part, and remanded for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot