STATE OF MICHIGAN

COURT OF APPEALS

NIKOLAI RACHMANINOFF and KEIKO RACHMANINOFF,

Plaintiffs-Appellants/Cross-Appellees,

v

SVM DEVELOPMENT CORPORATION, MICHAEL T. ZAMBRICKI, CHRISTINE S. ZAMBRICKI, JOHN J. DAVEY, MARY L. DAVEY, GHOUSE M. SYED, SHAZIA A. SYED, ASIRUDDIN AHMAD, JANE AHMAD, MARJORIE A. SATTERLUND, VICTOR M. KUFFLER, and ANN E. KUFFLER,

Defendants-Appellees/Cross-Appellants,

and

RICHARD O. DYE and NORMA E. DYE,

Defendants.

UNPUBLISHED
February 9, 2006

No. 257394
Oakland Circuit Court
LC No. 2003-048049-CH

Before: Sawyer, P.J., and Wilder and H. Hood[*], JJ.

PER CURIAM.

In this declaratory judgment action, plaintiffs appeal and defendants cross appeal as of right from the trial court's order granting summary disposition in favor of defendants with respect to the merits of plaintiffs' claim regarding the validity of certain deed restrictions, but denying defendants' motion for summary disposition based on their alternative statute of limitations and laches defenses.[1] We affirm.

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] Defendants Richard and Norma Dye were dismissed from the action before the trial court decided the summary disposition motion. References to "defendants" in this opinion excludes defendants Richard and Norma Dye.

I. Facts and Procedural Background

This case involves the validity of deed restrictions for lots 20 and 21 in a residential subdivision, Hillwood Estates No. 1, in the city of Bloomfield Hills. The 1947 plat for Hillwood Estates No. 1 had 25 lots, which were numbered 16 to 40. The plat was executed by Frederick Hammond and his wife, Elizabeth Hammond, and by John Hammond and his wife, Lillian Hammond, as proprietors. Another subdivision known as Hillwood Estates is located next to Hillwood Estates No. 1.

On December 8, 1949, the Hammonds executed two deeds. In one deed (hereafter "1949 John Hammond deed"), John and Lillian Hammond conveyed a number of lots in Hillwood Estates No. 1 and Hillwood Estates to Frederick and Elizabeth Hammond. The conveyance was subject to a number of building and use restrictions, including that "[s]aid lots shall be used for residence purposes only, and except as to lot sixteen (16), not more than one single private residence and the necessary accessory buildings shall be erected on any lot." In the other deed (hereafter "1949 Frederick Hammond deed"), Frederick and Elizabeth Hammond conveyed a number of lots in the same two subdivisions, including lots 19, 20, and 21 in Hillwood Estates No. 1, to John Hammond. The 1949 Frederick Hammond deed, like the 1949 John Hammond deed, contained building and use restrictions limiting the specified lots to residence purposes:

> Said lots shall be used for residence purposes only, and except as to lots twenty (20) and twenty-one (21), not more than one single private residence and the necessary accessory buildings shall be erected on any lot. Two (2) single private residences and the necessary accessory buildings may be erected on each of lots twenty (20) and twenty-one (21), in which event one such residence and the necessary accessory buildings shall be erected on the front one-half of the lot, and the other such residence and the necessary accessory buildings shall be erected on the rear one-half of the lot, and both residences shall face Hillwood Drive. . . .
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> * * *
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> Lots one (1), thirty-one (31), thirty-two (32) and thirty-three (33) shall be deemed to front on Vhay Lake, lots five (5) and fourteen (14) on Hammond Court, lots nineteen (19), twenty (20), twenty-one (21) and twenty-five (25) on Hillwood Drive and lots twenty-six (26) and twenty-seven (27) on Oak Court.
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> * * *
>
> If more than one lot is developed as a unit, all restrictions herein contained shall apply thereto as to a single lot.

On July 25, 1957, John and Lillian Hammond conveyed lots 19, 20, and 21, to Mary Walbridge Fulton. The deed (hereafter the "1957 John Hammond deed") included building and use restrictions for lots 19, 20, and 21, but, unlike the 1949 Frederick Hammond deed, only permitted one single private residence on lots 20 and 21:

> Said lots shall be used for residence purposes only, not more than one single private residence and the necessary accessory buildings shall be erected on any lot. . . .
>
> * * *
>
> If more than one lot is developed as a unit, all restrictions herein contained shall apply thereto as to a single lot.

In 1967, plaintiff Nikolai Rachmaninoff obtained title to lot 21 and the northern half of lot 20. The deed was subject to "easements and building and use restrictions of record." In 1985, the city of Bloomfield Hills approved a lot split of the property into two parcels, subject to the plaintiffs granting an easement to provide the rear parcel access to Hillwood Drive. Both parcels included land from lots 21 and the northern half of lot 20. Plaintiffs, Nikolai and his wife, Keiko Rachmaninoff, then had a home on the front parcel, which fronted onto Hillwood Drive. Their residential structure was situated on both lot 21 and the northern half of lot 20. In 1986, plaintiffs conveyed the front parcel to defendants Michael and Christine Zambricki. Plaintiffs retained the rear parcel.

In March 2003, plaintiffs filed the instant declaratory action against the Zambrickis and other property owners to determine if the deed restrictions for lots 20 and 21 precluded construction of a residence on their back parcel. The parties thereafter filed cross-motions for summary disposition. The trial court granted summary disposition for defendants, concluding that the "one single private residence" restriction for lots 20 and 21 in the 1957 John Hammond deed was valid and precluded the construction of a second residence on plaintiffs' back parcel. The court denied defendants' motion for summary disposition grounded on the statute of limitations and laches.

II. Standard of Review

We review de novo a trial court's decision regarding a motion for summary disposition in a declaratory judgment action. *Farmers Ins Exch v Kurzmann,* 257 Mich App 412, 416; 668 NW2d 199 (2003). A trial court's grant of a declaratory judgment is discretionary. *City of Lake Angelus v Aeronautics Comm,* 260 Mich App 371, 377; 676 NW2d 642 (2004). Our review is limited to the record submitted to the trial court. *Amorello v Monsanto Corp,* 186 Mich App 324, 330; 463 NW2d 487 (1990).

III. Plaintiffs' Appeal

Plaintiffs argue that the trial court erred in determining that the "one single private residence" restriction for lots 20 and 21 in the 1957 John Hammond deed was valid. Although the trial court cited both MCR 2.116(C)(8) and (10) when granting summary disposition in favor of defendants, the court's decision indicates that it considered evidence beyond the pleadings when deciding this issue. Hence, we review the trial court's decision under MCR 2.116(C)(10). *Spiek v Dep't of Transportation,* 456 Mich at 331, 338 n 9; 572 NW2d 201 (1998). "[A] motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Farmers Ins Exch, supra* at 417. The evidence offered in support

of or in opposition to the motion must be substantively admissible as evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

We agree with plaintiffs that effect must be given to the restrictions in the 1949 Frederick Hammond deed. Restrictive covenants in deeds are valuable property rights when created by parties with an intent to enhance property value. *Livonia v Dep't of Social Services*, 423 Mich 466, 525; 378 NW2d 402 (1985); *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). Such covenants are grounded in contract. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). Restrictions that are clear on their face, reasonable in scope, and do not violate public policy will be upheld. *Livonia, supra* at 525.

Nonetheless, plaintiffs' reliance on principles concerning how a deed restriction might be amended are inapplicable to this case. Further, we reject plaintiffs' claim that the pertinent restrictions in the 1949 Frederick Hammond deed and the 1957 John Hammond deed for lots 20 and 21 conflict.

In general, a court's objective when construing a deed is to give effect to the parties' intent, as manifested in the language of the deed. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005). Under the clear and unambiguous language of the 1949 Frederick Hammond deed, an owner of lots 20 and 21 "may" construct two single private residences on lot 20 and two single private residences on lot 21. The ordinary and accepted meaning of the word "may" generally designates discretion, while the word "shall" means mandatory action. *Murphy v Sears, Roebuck & Co*, 190 Mich App 384, 386-387; 476 NW2d 639 (1991). A court interprets undefined terms in a contract in accordance with the commonly used meaning. *Terrien, supra* at 76-77. Hence, giving effect to the restrictive provision as a whole, *Hickory Pointe Homeowners Ass'n, supra* at 515-516, it is apparent that the grantee, John Hammond, remained free to construct only one single private residence on each lot. In any event, if lots 20 and 21 were developed as a unit, the maximum permissible single private residences would be two because the lots would be treated as a single lot for purposes of the restrictions.

John Hammond and his wife, Lillian Hammond, further restricted lots 20 and 21 to only one single private family residence each in the 1957 John Hammond deed, subject to the same restriction in the 1949 Frederick Hammond deed that "[i]f more than one lot is developed as a unit, all restrictions herein contained shall apply thereto as to a single lot." Because a grantee's compliance with this restriction would also satisfy the restriction in the 1957 John Hammond deed, the restrictions do not conflict. Because meaning can be given to both sets of restrictions, the restriction in the 1957 John Hammond deed is valid. Cf. *Murdock v Babcock*, 329 Mich 127; 45 NW2d 1 (1950) (the making of two sets of restrictions for property should not render the first set of restrictions meaningless). To hold otherwise would contravene the general rule that competent persons have the utmost liberty of contracting, and that agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Terrien, supra* at 71. Therefore, to the extent that the trial court granted summary disposition under MCR 2.116(C)(10) in favor of defendants with regard to the validity of the 1957 John Hammond deed restriction, we affirm its decision.

In light of our holding that the "one single private residence" restriction for lots 20 and 21 in the 1957 John Hammond deed is valid, we find it unnecessary to address plaintiffs' claim that they should be able to build a home on their vacant land under the 1949 Frederick Hammond deed. Further, we hold that plaintiffs have not demonstrated any ambiguity in the use of the word "lot" in the 1957 John Hammond deed so as to preclude summary disposition under MCR 2.116(C)(10) in favor of defendants with respect to whether the construction of a residence on their retained property would violate the "one single private residence" restriction.

In general, ambiguity in a contract creates a question of fact to be decided by the trier of fact. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 469; 663 NW2d 447 (2003). But "[i]t is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Henderson v State Farm Fire & Cas Co,* 460 Mich 348, 353; 596 NW2d 190 (1999). With regard to deed restrictions specifically, "[w]here the intent is clear from the whole document, there is no ambiguous restriction to interpret . . . ." *Borowski v Welch,* 117 Mich App 712, 716; 324 NW2d 144 (1982).

Here, the fact that the word "lot" is undefined in the 1957 John Hammond deed does not create an ambiguity. An undefined word is construed in accordance with its commonly used meaning. *Terrien, supra* at 76-77. Also, we must give contextual meaning to a phrase to determine what it conveys to those familiar with our language and its contemporary usage. *Henderson, supra* at 356.

Among the commonly understood meanings of "lot" are "6. a distinct piece of land: *a building lot*. 7. a piece of land forming part of a district, city, or other community. 8. a piece of land having a specified use: *a parking lot*. . . . 15. to divide, as land, into lots." *Random House Webster's College Dictionary* (1997), p 778 (emphasis in original). But in the 1957 John Hammond deed, "lot" is used to identify the land conveyed, with reference to its number in the plat for Hillwood Estates No. 1. Examined in context, it is apparent that "lot" is defined as set forth in the plat. Lots 20 and 21 are the pieces or parcels of land in the plat.

The use of the word "lot" in the actual building and use restrictions is consistent with this plain meaning beginning with the provision, "Said lots shall be used for residence purposes only, not more than one single private residence . . . shall be erected on any lot." Other restrictions include dimensions for constructing a building and set backs, such as "[b]uildings shall be set back at least forty feet from the front lot line." Examined in context, they clearly apply to the numbered lots established by the plat.

Contrary to plaintiffs' argument on appeal, the phrase "[i]f more than one lot is developed as a unit, all restrictions herein contained shall apply thereto as to a single lot," does not create ambiguity. Examined in context, the clear intent of this provision is to treat multiple lots (defined by number) as a single lot, for purposes of applying restrictions, when developed as a unit. If we were to accept plaintiffs' strained interpretation of the word "lot" in this provision, such as to permit a property owner to split the land into multiple "lots," the "one single private residence" restriction would be rendered a nullity. Rather, subject to any applicable governmental regulation, the criteria for building would be whether the placement of the building

satisfies dimensional, setback, and other requirements in the restrictions defined by whatever lot line the owner may set within the boundaries of his or her property. Cf. *Webb v Smith (After Remand),* 204 Mich App 564, 570-571; 516 NW2d 124 (1994) (in construing the phrase "not more than one building shall be used for dwelling purposes on each lot," rejecting a construction that would permit "lot" to be defined as referring to the parcel conveyed by the developer).

The evidence that the city of Bloomfield Hills approved plaintiffs' request for a lot split of their property in 1985 is not relevant. Lot splits are approved by a municipality under a regulatory scheme in the Land Division Act (LDA), formerly the Subdivision Control Act, MCL 560.101 *et seq.*, which was enacted by 1967 PA 288, effective January 1, 1968. The LDA regulates land division by imposing platting and other building and assessment requirements. *Sotelo v Grant Twp,* 470 Mich 95, 97; 680 NW2d 381 (2004).

In the context of zoning ordinances, it is well settled that "[z]oning laws determine property owners' obligations to the community at large but do not determine the rights and obligations of parties to a private contract." *Rofe v Robinson,* 415 Mich 345, 351; 329 NW2d 704 (1982). We find this same reasoning applicable to a municipality's approval of a lot split under the LDA. Thus, the city of Bloomfield Hills' approval of a lot split in 1985 says nothing about how a "lot" is defined under the 1957 John Hammond deed. Looking solely to the obligations created by the 1957 John Hammond deed, the use of the word "lot" in the deed restriction is clear. Plaintiffs were not entitled to build a second residence on lot 21 or any combination of lot 21 and the northern half of lot 20. Hence, we affirm the trial court's grant of summary disposition in favor of defendants regarding this issue.

IV. Defendants' Cross Appeal

Defendants argue that the trial court should also have precluded plaintiffs from constructing a second residence on their property based on the doctrine of reciprocal negative easements. Because the trial court did not decide this issue, it was not preserved for appeal. *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 555; 672 NW2d 513 (2003). Further, defendants have not established any basis for overlooking preservation requirements. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Defendants' argument regarding the actual development of Hillwood Estates No. 1 and various deeds of conveyance of property in this subdivision lacks citation to factual support in the record. As the party moving for summary disposition under MCR 2.116(C)(10), it was incumbent upon defendants to present substantively admissible evidence in support of their position. MCR 2.116(G)(4) and (6); *Maiden, supra* at 120-121. Further, a party may not leave it to this Court to search the record for factual support for their claim. *Derderian v Genesys Health Care Systems,* 263 Mich App 364, 388; 689 NW2d 145 (2004).

As a matter of law, defendants' reliance on the doctrine of reciprocal negative easement as an alternative basis for affirmance is misplaced because this doctrine is concerned with the proper party for enforcing a deed restriction. *Kiskadden v Berman,* 244 Mich 473, 478-479; 221 NW 632 (1928). The doctrine generally applies to circumstances in which a conveyance was made by an owner, who retained some land unburdened by restrictions of record. See *Lanski v Montealegre,* 361 Mich 44, 47; 104 NW2d 772 (1960); *Webb, supra* at 572. Essential elements

of the doctrine are notice and a common grantor. *Lanski supra* at 47; *Buckley v Mooney*, 339 Mich 398; 63 NW2d 655 (1954); *Webb, supra* at 572. But a common grantor is not precluded from varying restrictions. As the Court observed in *Carey v Lauhoff*, 301 Mich 168, 173; 3 NW2d 67 (1942), "[t]he rule in this State is that restrictions need not be uniform nor follow a general plan to the extreme; the common grantor can release certain lots and vary the restrictions."

Because the issues raised by plaintiffs on appeal are directed at the validity of the "one single private residence" restriction in the 1957 John Hammond deed, not at who may enforce it, defendants' claim would not afford an alternative basis for relief. It presents a distinct issue that we decline to address because it is not necessary to a proper resolution of this appeal. *Steward, supra* at 554. We also deem this issue abandoned because neither party has sufficiently briefed the question of the proper party or parties who may enforce the "one single private residence" restriction for lots 20 and 21 in the 1957 John Hammond deed. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Next, while defendants' challenge to the trial court's denial of their motion for summary disposition based on the statute of limitations is properly before us, we hold that defendants have not established any basis for disturbing the trial court's ruling. Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. The contents of the complaint are accepted as true unless contradicted by the movant's documentation. *Maiden, supra* at 119.

Here, although we do not fully agree with the trial court's reasoning, we conclude that it reached the right result in rejecting defendants' statute of limitations defense. This Court will not reverse when the trial court reaches the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

The trial court incorrectly relied on the equitable nature of plaintiffs' claim to reject the statute of limitations defense. The Revised Judicature Act, MCL 600.5815, states that "[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought." Under this statute, the periods of limitation under the Revised Judicature Act apply to equitable actions by their own force. *Carpenter v Mumby*, 86 Mich App 739, 746; 273 NW2d 605 (1978).

But the trial court reached the right result because the particular statute on which defendants rely applies to actions to "recover damages or sums due for breach of contract, or to enforce the specific performance of any contract." MCL 600.5807. The prescribed period of limitations is ten years after the claim accrues for an action founded upon a covenant in a deed. MCL 600.5807(4). A party may not use declaratory relief to avoid the statute of limitations for substantive relief. *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 129; 537 NW2d 596 (1995). But because defendants failed to establish that plaintiffs' claim was derived from any claim for contract damages or specific performance of a contract, MCL 600.5807(4) does not apply directly or by analogy. Defendants' mere characterization of plaintiffs' claim as one grounded in specific performance is insufficient to invoke appellate review. This Court need not address an issue given only cursory treatment by an appellant, with little or no citation of supporting authority. *Peterson Novelties, Inc, supra* at 14.

In passing, we note that specific performance is a purely equitable remedy for a breach of contract. See *Rowry v Univ of Michigan*, 441 Mich 1, 9; 490 NW2d 305 (1992). Although a trial court may grant other necessary or proper relief in a declaratory judgment action, MCR 2.605(F), plaintiffs' complaint in this case provides no basis for concluding that they sought to have any defendant perform a covenant under a deed. Rather, the declaration sought by plaintiffs concerned their own future conduct. A declaratory judgment is appropriate when it is necessary to guide a plaintiff's future conduct in order to preserve his or her legal rights. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 126; 693 NW2d 374 (2005).

Finally, defendants have not established any basis for disturbing the trial court's denial of their summary disposition motion based on their laches defense. Like a statute of limitations, laches is an affirmative defense to an action. See *Rowry, supra* at 10-11. But prejudice occasioned by the delay is an essential element of laches. *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992). The trial court did not err in finding no evidence of the necessary prejudice in this case.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood