STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

NICHOLAS OWNBY,

Plaintiff,

vs. Case No. 2014-0657-CZ

BUCKINGHAM VILLAGE SUBDIVISION ASSOCIATION, a Michigan nonprofit corporation, KEN DOINAR, MATT MAZURCO, FRANK PELCZARSKI, MANFRED MAJER, and DAVE GERLACH,

Defendants.

_____/

OPINION AND ORDER

This matter is before the Court on the parties' cross motions for summary disposition.

I. Background

Plaintiff brought this action on February 20, 2014 as a resident of the Macomb Township subdivision known as Buckingham Village Number 2 ("BV2"). BV2 adjoins the subdivision known as Buckingham Village Number 1 ("BV1"). Defendant Buckingham Village Subdivision Association (the "Association") is the governing body for BV1. The named individuals are members of the Board of Directors (the "Board") for the Association.

BV1 and BV2 were both founded by the same developer/land grantor: GTR Builders ("GTR"). BV1 was founded on March 17, 2003 with the recording of a master deed and a "Declarations of Easements, Covenants, and Restrictions" ("Declaration"). BV2's master deed was recorded on March 18, 2005. However, instead of recording a second Declaration with BV2's master deed, GTR recorded a "First Amendment to the Declaration of Easements, Covenants, and Restrictions for Buckingham Village No. 1 For the Purpose of Annexing

Buckingham Village No. 2" ("Amendment").

In his complaint, Plaintiff alleges that, by amending the existing Declaration instead of recording a new one, GTR intended to include BV2 in BV1's Association. Plaintiff claims that BV1 has denied BV2 homeowners membership in the Association. Further, plaintiff claims BV1 has failed to maintain BV2's common areas, and has failed to enforce the restrictive covenants in BV2. Plaintiff seeks relief under both legal and equitable causes of action: breach of contract (Count I); breach of fiduciary duty (Count II); declaratory judgment (Count III); and injunctive relief (Count IV).

Defendants jointly answered with affirmative defenses on March 17, 2014. Therein, they deny that BV2 was intended to, or should, belong to the Association. They claim there is no breached contract and no fiduciary duty to plaintiff. Further, defendants assert that plaintiff is not entitled to equitable relief due in part to the equitable defense of laches. Defendants have moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(10).

Plaintiff has also filed a motion for partial summary disposition under MCR 2.116(C)(10) of his claim for declaratory relief. Further, in response to defendants' motion, plaintiff seeks summary disposition in his favor under MCR 2.116(I)(2).

II. Standard of Review

Both parties have motions under MCR 2.116(C)(10). Motions brought under this rule test the factual support of a claim. In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Smith v Globe Life Insurance Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff's second motion is brought under MCR 2.116(I)(2). Under this rule,

"[s]ummary disposition is properly granted to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." MCR 2.116(I)(2); *Sharper Image Corp v Department of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). The Court now considers the parties' motions in the order in which they were filed.

III. Party Arguments

To begin, the Court considers plaintiff's motion under MCR 2.116(C)(10) for a ruling on his Count III for declaratory judgment. In support of this motion, plaintiff asserts that he and his wife purchased their lot in BV2 on January 7, 2013. Plaintiff states that in June of 2012, before their home was built, they inquired about the homeowner's association and restrictive covenants for BV2. Plaintiff contends that the builder[1] represented that BV2 was governed by the Declaration and the BV1 Association. Plaintiff argues that he noticed certain BV2 common areas were not being maintained after living there for three months. Plaintiff asserts he tried contacting the Association to see why no services were being provided to BV2, and the Board told him that BV2 did not belong to the Association.

Plaintiff argues this is incorrect. Plaintiff argues that GTR reserved the right to amend the Declaration *in its sole discretion* to annex BV2, which it did on March 18, 2005 when GTR recorded the Amendment. In the Amendment, GTR replaces paragraphs 2.B and 13 with amended language that includes the maintenance responsibilities of areas common in both subdivisions collectively called the "Landscape Easement." Plaintiff argues that the Declaration and Amendment, as well as the Association's Articles of Incorporation ("Articles") and Bylaws are to be interpreted according to the principles of statutory construction.[2] As such, plaintiff contends the Court must discern and adhere to GTR's intent. Plaintiff avers GTR's intent to annex BV2 to the Association was clearly stated throughout these documents and must be given effect.

[1] GTR did not build plaintiff's home. Another builder had taken over the construction in BV2 some time after GTR recorded the Amendment to annex it to BV1.

[2] The Declaration controls if the Bylaws conflict. See Exhibit 4, Plaintiff's Motion for Partial Summary Disposition (Bylaws, Article X.) For this reason, the language of the Declaration is this Court's primary focus.

Thus, plaintiff asserts that there remains no genuine issue of material fact regarding his rights under these governing documents. He seeks a ruling declaring: that the 2005 Amendment to BV1's Declaration as a valid annexation of BV2; that he and all other BV2 lot owners are members of the Association; that defendants must manage and administrate the affairs of and maintain BV2; and that defendants have a duty to comply with and enforce the restrictions and covenants against all BV1 and BV2 lot owners as required by the Declaration and recorded Amendment thereto.

For their response to plaintiff's motion, defendants largely rely on their brief in support of their motion for summary disposition under MCR 2.116 (C)(10). Therefore, the Court will next address the arguments made in support of that motion.

There, defendants assert that GTR relinquished control over the Association on September 24, 2004 when the first Association meeting was held and the first Board was elected. Defendants assert that when the newly elected Board took control of the Association, GTR relinquished its right to amend the Declaration. Consequently, defendants argue that the Amendment is invalid and unenforceable.

Further, defendants argue that they had no notice of GVR's Amendment. They claim that GTR failed to inform the Board of the BV2 annexation even though GTR was aware that the Board had been exclusively managing the affairs of the Association for six months by the time it was recorded. They claim that they did not learn of the Amendment until 2011 when another (non-party) BV2 resident brought it to the Board's attention.

Moreover, defendants argue, GTR had tried to bill the BV1 Association for landscaping and maintenance fees for BV2 in 2006. Defendants contend that the Board, via defendant Ken Dolinar, responded to GTR's $8,000 bill by explaining that BV2 did not have enough residents to maintain *their* subdivision's common elements. According to defendants, only about 10 of the 180 lots in BV2 had been developed at that time. Therefore, the Board concluded, *those* BV2 residents would be assessed an Association fee of over $600 per year to maintain *their*

subdivision's landscaping and common elements. Defendants assert that GTR then backed off from collecting on the bill without ever mentioning the annexation Amendment. Defendants seem to argue that GTR's failure to directly notify them of the Amendment in 2006 estops plaintiff from relying on it now.

Finally, defendants contend that enforcing the Amendment now would create too many legal and financial difficulties. For one thing, defendants argue that the BV2 residents have failed to initiate their own homeowners association, leading defendants to conclude that the majority of residents do not want one. For another thing, defendants point out that many BV2 residents have built sheds, fences, pools and other things on their lots which would do not comply with the covenants. Defendants argue that enforcing the covenants now would require costly nuisance abatement that those residents likely do not want. Additionally, defendants argue that BV1 homeowners do not want to be saddled with the expense of ameliorating BV2s "dilapidated sprinkler system" and other waste that has occurred in the subdivision over nearly a decade of neglect. Defendants conclude that, due to the delay in enforcing the Amendment and the restrictive covenants, the doctrine of laches makes it inequitable to do so now. For these reasons, defendants assert there is no genuine issue of material fact for trial, and plaintiff's case should be dismissed.

Plaintiff responds by asserting he is entitled to judgment under MCR 2.116(I)(2), because defendants' motion only highlights the problems that would remain in these communities if the instant action is summarily dismissed. Plaintiff further argues that defendants should not be permitted to benefit from the equitable defenses asserted when it is their collective failure to act under the duty to maintain BV2, created by the Amendment, which caused BV2s deterioration.

IV. Law and Analysis

There is no dispute that GTR recorded the Amendment intending to annex BV2 to BV1 on March 18, 2005. Defendants also do not challenge the fact that, once recorded, the Amendment became a matter of public record. See *Piech v Beaty,* 298 Mich 535, 538; 299 NW

705 (1941) ("A recorded instrument serves as notice to all persons . . . .") Rather, defendants question GTR's authority to record the Amendment six months after BV1's Association had assumed the sub's management. Thus, the Court must determine whether the Amendment is valid before considering any of the equitable arguments regarding the enforcement of its provisions. This inquiry requires an examination of the covenants in the Declaration GTR recorded with master deed that established BV1.

Negative covenants restricting land use are grounded in contract. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). As such, the canons of contract interpretation apply, the foremost of which is that the intent of the drafter controls when it is clearly ascertainable from construing the document as a whole. *Id.; Brown v Martin*, 288 Mich App 727, 731; 794 NW2d 857 (2010) (citations omitted). "The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed . . . with reference to the present and prospective use of property." *Brown, supra at* 731-732.

"Moreover, the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon." *Id.* Where the drafter's intent is clear, there is no ambiguous restriction for the court to interpret. *Id.* Only when there are doubts as to the drafter's intent should the provisions be strictly construed against the would-be enforcer. *Stuart, supra.* In such cases, "doubts are resolved in favor of the free use of property. Courts will not grant equitable relief [to enforce a covenant] unless there is an obvious violation." *Id.* The Court thus turns to the language of the Declaration to discern GTR's intent.

> GTR first references BV2 in paragraph C on the first page of the Declarations. It states,
>
> Grantor is also the owner of a certain parcel of land located adjacent to and contiguous with the Subdivision (the "Adjacent Parcel") which Grantor may develop to be integrated with the Subdivision [Buckingham Village No.1]. [Exhibit 1, Plaintiff's Motion for Partial Summary Disposition.]

Next, in paragraph D, GTR states,

> [i]t is the intention of the Grantor to impose certain *additional* obligations on the Subdivision, all as more particularly hereinafter set forth, in order to (i) insure the most beneficial development of the Subdivision as a residential area, (ii) prevent any use thereof which might tend to diminish its valuable or pleasurable enjoyment, (iii) *assure the harmony, attractiveness, and utility thereof,* (iv) regulate the use thereof, and (v) establish or define certain rights relative to the Subdivision. [Emphasis added.]

Finally, in paragraph E, GTR states,

> [i]t is the purpose and intention of this Declaration that *all* of the Lots *shall* be conveyed by Grantor *subject to the reservations and use restrictions* set forth therein to (a) *establish a general plan of uniform restrictions* with respect to the Subdivision, (b) insure the purchasers of Lots the use of their Lots for attractive residential purposes, (c) secure to *each* Lot owner the *full* benefit and enjoyment of his home, and (d) *preserve the general character of the neighborhood.* [Emphasis added.]

These three paragraphs are all on the first page of the Declaration. To this Court, they indicate GTR's clear intent to maintain uniform aesthetics and utility throughout the Subdivision. They also indicate that what GTR envisioned as "the Subdivision" was subject to change at GTR's discretion with the possible, later addition of "the Adjacent Parcel," BV2.

GTR refers again to the "proposed Buckingham Village No. 2" (along with another potential development) in paragraph 15 where it addresses the Detention Basin Maintenance. GTR says that the "Lot owner in the subdivision shall be responsible for their proportionate share of the maintenance . . . ."[3]

GTR's intent to retain the option of adding BV2 to BV1 is reiterated in paragraph 16, of the Declaration, entitled "Possible Extension of Declaration to Incorporate Additional Properties." *Id.* at 12. There, GTR states,

> Grantor *may,* but shall not be obligated to, develop and/or subdivide additional lands located adjacent to and contiguous with the or in the vicinity of the Subdivision. Grantor further *may*, but shall not be obligated to, *subject additional lands to restrictions, covenants, and conditions* substantially in the form herein imposed upon the Subdivision, either by a separate declaration or *by an amendment to this Declaration*, so as to *incorporate such additional lands with*

[3] For this Court's purposes, the Detention Basin (or Detention Pond as it is sometimes called) is meant to be included when "common areas" or "the landscape easement" is referred to.

> *the Subdivision for the purpose of the interpretation and enforcement of this Declaration. Such additional lands may include common areas which may be conveyed to the Association.* [*Id.,* emphasis added.]

Paragraph 16 goes on to say that

> [s]uch *additional lands may be incorporated into and receive the benefits and be subject to the obligations of this Declaration upon the recording by the Grantor* at the Office of the Register of Deeds for Macomb County, Michigan [of] an appropriate instrument incorporation the terms hereof *in whole or in part*, and containing *such amendments hereto as Grantor, in its sole discretion, shall deem necessary or advisable*. [*Id.* at 12-13, emphasis added.]

Here, GTR reserves the sole right to decide two important things: (1) whether to annex BV2; and (2) whether to subject it to the same, if any, conditions that BV1 is subjected to under the Declarations. Contrary to defendants' assertions, GTR creates no requirement for either of these propositions to be subject to a vote by the Association or the Board.

It is true that, in paragraph 11(f), GTR limited the way in which *lot owners* could amend the declaration. The second half of paragraph 11(f) provides in part that "[o]nce the Subdivision Association has been turned over to the Lot owners . . . this Declaration *may* be amended by the affirmative vote . . . of 75% of all Owners of Lots within the Subdivision." *Id.* at 9 (emphasis added). However, GTR did not state that a vote was the *only* way the Declaration could be amended after the Association took over management of BV1 – it was merely *one* way that the Declaration could be amended. In fact, even if 75% of the existing lot owners approved the proposed amendment, GTR retained the right to refuse it until the last GTR lot was sold. *Id.*

Moreover, in the first half of paragraph 11(f), GTR reserved the exclusive right to amend the Declaration "*at any time without the prior approval* of any person . . . to make *other* such amendments as shall not materially increase or decrease the benefit or obligations, or *otherwise* materially affect, the rights of any person having an interest in the subdivision. . . ." *Id.* (emphasis added). Thus, GTR clearly intended to create more than one way to modify the Declaration.

Actually, defendants rely on this first part of 11(f) to support their argument that a lot

owner vote was necessary to ratify the Amendment. Yet, in so arguing, they ignore GTR's use of the words "other" and "otherwise" when interpreting it. The common meaning of the word "other" is "different or distinct from that or those referred to or implied." *Webster's New Universal Unabridged Dictionary* (1983). "Otherwise" is analogous, meaning something "else" that is "different in any respect." *Id.* It stands to reason that an amendment to incorporate adjoining land into BV1, which is specifically referred to throughout the Declarations, cannot be an "other" such amendment in this context. Something that *is* referred to or implied cannot also be *distinct from* that which is referred to or implied. Thus, by using the words "other" and "otherwise" in this paragraph, GTR clearly intended to distinguish between the (then potential) Amendment to incorporate BV2 that was referred to in paragraphs 3 and 16, and all future as-yet-unimagined amendments that might have been necessary to accomplish GTR's plan for the development after the Declaration was recorded.

Consequently, the extent to which the 2005 annexation of BV2 might "materially" affect the rights of BV1 lot owners now has no bearing on the *authority* that GTR had to record the 2005 Amendment effectuating it. The Amendment was validly recorded. BV2 was properly annexed to BV1 by the Amendment (which incorporates the Declaration by reference). BV2 lot owners are voting members of the Association. These things can be decided as a matter of law. As such, plaintiff's motion for partial summary disposition on his claim for declaratory judgment seeking a ruling to establish these things is hereby granted in part as to these things (which are paragraphs 1 – 3 of the motion's request for relief). Defendants' motion for summary disposition under MCR 2.116(C)(10) necessarily fails.

However, plaintiff's remaining requests for relief regarding the enforcement of the Amended Declarations require further consideration of the equitable issues that will naturally arise if the Association is immediately called upon to enforce all covenants against all lot owners. "Equity, by its very nature, requires the weighing of often competing interests to reach an outcome that is fair and just to all involved." *Pub Health Dep't v Rivergate Manor*, 452 Mich

495, 508; 550 NW2d 515 (1996). Defendants claim that plaintiff is among a minority of homeowners in BV2 who wish to see the restrictions enforced. They have asserted, albeit without admissible supporting evidence[4], that at least one BV2 homeowner has a non-compliant pool on his lot, and that numerous BV2 homeowners have non-compliant fences and/or mailboxes. Defendants pontificate that these homeowners would not like to have certain restrictions enforced against them be governed by the Association and be subject to the assessment of maintenance fees. This could be true.

It could also not be true. There is no way for the Court to know how the other BV2 homeowners feel about being members of the Association and subject to the Amended Declaration. They are not parties to this action. No one has interpleaded as an interested party, testified at a deposition, or even willingly identified him or herself as opposing plaintiff. See n 4, *infra*. It may be that many support sharing the maintenance costs in order to live in a more pleasant and safe neighborhood. Even if there are those who fear the economic repercussions of abating purported nuisances such as a non-compliant pool, fence or mailbox, they might feel differently about the restrictions as a whole if it is determined that laches prevents the Association from enforcing certain restrictions now. Laches would be a valid defense to the enforcement of a restriction against a homeowner's existing violation if is shown that the delay in enforcing the restriction prejudiced the party asserting the defense. See e.g., *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999); see also *Lothian v City of Detroit*, 414 Mich 160, 176-178; 324 NW2d 9 (1982).[5]

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[4] Defendants have included an Anonymous "Affidavit of Concerned Resident of Buckingham Village No. 2" as Exhibit 7 to their motion. Pursuant to MCR 2.116(G)(6), an affidavit "shall only be considered to the extent that the content or substance would be admissible as evidence . . . ." An out-of-court statement offered for the truth of the matter asserted, which is made by an unidentified witness and which is offered without any circumstantial guarantees of trustworthiness, is inadmissible hearsay. See MRE 801, 802 and 803(24). Accordingly, it is not considered.

[5] Although paragraph 15(b) of the Declaration precludes permanent waiver of a restriction, as in *Margolis v Wilson Oil Corp,* 342 Mich. 600, 602-603, 70 NW2d 811 (1955), "[c]ourts of equity do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear." *Denhardt v De Roo*, 295 Mich 223, 227-228; 294 NW 163 (1940) (citation and internal punctuation omitted). In situations where the doctrine of laches applies, the right to equitable aid is not clear, in which case "doubts are to be resolved in favor of the free use of property." *O'Connor, supra* at 341-342.

Be that as it may, enforcement issues are to be resolved on the facts of each specific case, *id.* at 344, and the facts of those potential cases are not presently before this Court. Consequently, the Court will not base its ruling here on speculation about how the other residents might feel about the Association.[6]

The case before the Court is plaintiff's case. The law is clear that "deed restrictions are property rights [and the] courts will protect those rights if they are of value to the property owner asserting the right and if the owner is not estopped from seeking enforcement." *Rofe v Robinson*, 415 Mich 345, 349; 329 NW2d 704 (1982). Here, plaintiff obviously finds value in the deed restrictions at issue. The record indicates that he and his wife bought their home in large part because they wanted to live in a restricted neighborhood. See Exhibits 7 – 10, Plaintiff's Motion for Partial Summary Disposition. These exhibits also indicate that plaintiff began trying to enforce the restrictions within three months of moving into his home, which belies estoppel. See *Lothian, supra,* where the Supreme Court ruled that, like laches, equitable estoppel, will prevent a party from prevailing if that party unjustifiably delayed in asserting his legal rights, and also intentionally or negligently misrepresented a material fact which resulted in prejudice to the other party. Defendants argue that plaintiff knew his lot was not included in the BV1 Association when he bought his house; however, the record does not support that contention. Having reviewed the materials presented, the Court finds no undue delay on plaintiff's part in enforcing his rights.

With regard to prejudice, defendants further argue that forcing the Association to manage and maintain BV2's common areas (the "landscape easement") now, after BV2 has been essentially ignored for 9 years, will create an economic hardship. However, this position is untenable because economic impracticability alone is insufficient justification for avoiding valid covenants. See *Rofe v Robinson*, 415 Mich 345, 350; 329 NW2d 704 (1982). Further, the

[6] By the same token, the Court will not presume that the BV2 homeowners were oblivious to the deed restrictions that run with their land simply because they might have been unsure if the Association would enforce them.

Declaration, at paragraph 11(c) empowers the Association to levy fees, dues or assessments *equally* upon *all* lot owners in *the* subdivision (singular, by virtue of the Amendment at paragraph 1.A.) to accomplish the maintenance and enforcement duties described therein. Consequently, any increase in expenses would be defrayed by the increased number of contributors, while concurrently allowing all homeowners to benefit from the restrictions and covenants which have long been found to enhance and preserve the value of residential real estate. *Lakes of the N Ass'n v TWIGA Ltd P'ship,* 241 Mich App 91, 99; 614 NW2d 682 (2000).

Moreover, under paragraph 13 of the Declaration, if the Association allows the landscape easement to stagnate, the township would be burdened with abating the resulting nuisances and hazards, in which case the township would inevitably assess liens upon the all the subdivision lots to recoup its costs. Therefore, deferring the BV2's common area maintenance expenses will not save the homeowners any money in the long run. Additionally, if the township does the maintenance, homeowners have will have less input into the care their neighborhood receives. Finally, permitting one portion of a development to fall further into disrepair deprives those lot owners the full benefit and enjoyment of their homes, which is contrary to GTR's intent.

For these reasons, the Court is inclined to grant some form of injunctive relief, at least to provide for the common area maintenance fees (including the snow plowing that BV1 currently enjoys). However, such relief – be it permanent or temporary – ordinarily cannot be ordered without a hearing, particularly where disputed questions of material fact remain, as they do here. MCR 3.310; see also *US v McGee*, 714 F2d 607, 613 (CA 6, 1983). Therefore, plaintiff's motion for summary disposition under MCR 2.116(I)(2) must be denied as to plaintiff's claim for injunctive relief (Count IV).

Similarly, defendants' contention that, in 2006, GTR backed down from enforcing the Amendment to collect over $8,000 for landscape easement maintenance precludes this Court from summarily ruling on plaintiff's claims for breach of contract (Count I) and breach of fiduciary duty (Count II). While the Association is deemed to have had constructive notice of

the Amendment by virtue of its recording, *Piech, supra*, it seems as though there were exchanges between the Association and the Grantor which might have misled the Association about the full extent of its duties. These events have not been developed in the materials for the instant motion. They are nonetheless material to the alleged breaches plaintiff asserts; and, to the affirmative defenses defendants assert. Therefore, the parties are left to their proofs on Counts II, III and IV of plaintiff's complaint at trial.

V. Conclusion

For the reasons set forth above, plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) is GRANTED IN PART as set stated herein. Defendants' motion for summary disposition under MCR 2.116(C)(10) is DENIED. Plaintiff's motion under MCR 2.116(I)(2) is also DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last remaining issue nor closes this case.

IT IS SO ORDERED.

MARK S. SWITALSKI
CIRCUIT JUDGE

Mark S. Switalski, Circuit Court Judge

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Dated: November 18, 2014

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