2013 IL App (2d) 120432-U
No. 2-12-0432
Order filed March 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAVE FARRIS,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-MR-159
	)	
THE ESTATES OF MILLBROOK	)	
HOMEOWNERS ASSOCIATION, INC.,	)	Honorable
	)	Timothy J. McCann,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Because plaintiffs acknowledged an obligation to pay assessments to the Association in their purchase contracts and at their closings; acknowledged in their mortgages that their properties were subject to the Association; and have since paid assessments to the Association, the trial court's finding that plaintiffs' properties were bound by and subject to the terms of the declaration of covenants and restrictions was not contrary to law or against the manifest weight of the evidence. The trial court properly granted summary judgment in favor of the Association on the question of whether plaintiffs were bound by the provisions of the Declaration. We affirmed the judgment of the trial court.

¶ 2 Plaintiffs, Dave Farris, Anthony Robinson, and Robert Lamphere purchased certain lots of real estate situated in Section Four of the Estates of Millbrook, located in Kendall County. On

December 4, 2009, plaintiff Farris initiated a two-count complaint against defendant, the Estates of Millbrook Homeowners Association, Inc. (the Association), seeking declaratory judgment and quiet title. On July 28, 2010, the Association filed its affirmative defenses and counterclaim for declaratory relief. On December 29, 2011, the trial court granted the Association's motion for summary judgment and on March 29, 2012, the trial court denied plaintiffs' motion to reconsider. Thereafter, plaintiffs filed a timely notice of appeal.

¶ 3 This appeal involves certain conditions, covenants, and restrictions that were properly recorded for sections one and two of the Estates of Millbrook, but were not properly recorded for sections three and four. As a preliminary matter, we note that only plaintiff Farris's name appears on plaintiffs' brief, although plaintiffs subsequently filed an amended notice of appeal, identifying plaintiffs Robinson and Lamphere. Plaintiffs' brief also references the lots purchased by plaintiffs Robinson and Lamphere. The circumstances surrounding the three referenced plaintiffs are identical for the purposes of our analysis and we will therefore proceed as though plaintiffs Robinson and Lamphere were properly included in this appeal.

¶ 4 The record reflects that, on April 3, 2000, the owner and developer of the Estates of Millbrook, Marye's Heights, LLC (the developer), platted sections one and two. At that time, the developer also recorded a Declaration of Covenants and Restrictions (the Declaration) with the legal descriptions of sections one and two. The Declaration, recorded as Document 0003660, created general land and building use restrictions, well and sewage treatment regulations, and an architectural review committee to maintain the restrictions and regulations. The Declaration also created the Association itself, further setting forth the duties and responsibilities of the Association, including the Association's collection of maintenance assessments.

¶ 5 In August 2004, the developer platted sections three and four of the Estates of Millbrook. The Plats of Subdivision for sections one, two, three and four reference "the covenants conditions and restrictions recorded contemporaneously with this plat." However, the Declaration was not contemporaneously re-recorded to include the legal descriptions of sections three and four.

¶ 6 Plaintiffs subsequently purchased their section four lots in 2005 and 2006. The record reflects that plaintiffs' warranty deeds stated that the lots were being conveyed subject to, "*** building, building line and use or occupancy restrictions, conditions, and covenants of record; ***." The title insurance for each of these lots also includes a paragraph excluding from coverage any "COVENANTS AND RESTRICTIONS *** RELATING IN PART TO ASSOCIATION, ASSESSMENTS, AND LIEN THEREFOR, CONTAINED IN THE DOCUMENT RECORDED APRIL 3, 2000 AS DOCUMENT NO. 0003660***."

¶ 7 In 2007, the developer divested itself of any further interest in the Estates of Millbrook. In 2008, the Association's board of directors became aware that the developer had failed to include the legal descriptions of sections three and four in the original recording of the Declaration. Accordingly, on February 10, 2009, the board recorded a "Resolution Regarding Correction of Scrivener's Error and Re-Recording of Declaration of Covenants, Conditions and Restrictions" which included the legal descriptions of sections three and four. The document stated that its general purpose was to, among other things, insure proper use and enjoyment of the Estates of Millbrook, protect the owners' property and property value, and maintain control over the erection of buildings and improvements.

¶ 8 The majority of the homeowners in sections three and four voluntarily signed waivers acknowledging the existence and applicability of the covenants and restrictions. However, plaintiffs

filed their complaint seeking a declaratory judgment that the re-recording was void and not applicable to their property. The Association answered the complaint with the affirmative defense of estoppel, arguing that plaintiffs acknowledged the covenants and restrictions when they purchased their lots and throughout the duration of their ownership.

¶ 9 In discovery, the Association tendered requests to admit facts and genuineness of documents, which went unanswered by plaintiffs and were deemed admitted by the trial court pursuant to Illinois Supreme Court Rule 216 (eff. Jan. 4, 2013). The record reflects that plaintiffs acknowledged an obligation to pay assessments to the Association in their purchase contracts and at their closings; acknowledged in their mortgages that their properties were subject to the Association; and have since paid assessments to the Association. The record further reflects that plaintiff Farris made applications to the Association for permission to erect improvements and add additional driveway space for the purpose of parking a motor home on his property. Finally, the record reflects that plaintiff Robinson served at one time as president of the Association's board of directors, and that plaintiff Farris ran for a position on that same board.

¶ 10 The trial court granted the Association's motion for summary judgment and found that plaintiffs' properties were bound by and subject to the terms of the Declaration. The trial court found that the evidence established plaintiffs "believed they were bound by the Conditions, Covenants and Restrictions by making payments to the homeowner's association which was created solely as a result of the Conditions, Covenants and Restrictions." The trial court concluded by finding that plaintiffs' argument failed because plaintiffs acknowledged the Association needed to exist for certain valid purposes, but attempted to challenge the Association's existence regarding those purposes it disfavored.

¶ 11 On appeal, plaintiffs contend that the trial court's finding that their properties were bound by and subject to the terms of the Declaration was contrary to law and against the manifest weight of the evidence. Plaintiffs' contention rests heavily on their argument that the covenants and restrictions were not in place when they purchased their respective lots and thus, were not enforceable against them. The Association counters that the Declaration was implied by references in the chain of title and was further enforceable due to plaintiffs' affirmative acts and constructive acceptance of its terms. We agree with the Association and affirm the trial court's judgment.

¶ 12 The general issue on appeal is whether the trial court erred when it granted summary judgment in favor of the Association. Summary judgment is proper when the pleadings, depositions, and affidavits on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 1038 (2009). In reviewing a grant of summary judgment, we must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009). Summary judgment is a drastic means of disposing of a case and should not be granted unless the movant's right to judgment is clear and free from doubt. *Id.* We review *de novo* an order granting summary judgment. *Nelson*, 391 Ill. App. 3d at 1038. We further note that this appeal involves a question of contract modification, requiring us to look to the law of contracts. Because the documents in question were admitted pursuant to Rule 216, the evidence is undisputed and we review *de novo* the question of the applicability of the re-recorded document. See *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 11 (2006) (holding that it was for the court to decide whether a modification to a revised arbitration

provision had been effected and reviewing the question of applicability *de novo* because the evidence was undisputed).

¶ 13 Initially, we reject plaintiffs' contention that the trial court's finding was against the manifest weight of the evidence. A trial court's findings of fact will not be disturbed on review unless those findings are against the manifest weight of the evidence. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Kendall County Board of Review v. Property Tax Appeal Board*, 337 Ill. App. 3d 735, 737 (2003). As noted above, the evidence in this case was admitted pursuant to Supreme Court Rule 216, due to Plaintiffs' failure to answer the Association's requests to admit facts and genuineness of documents. As also noted above, the evidence established that plaintiffs acknowledged the existence of the Declaration when they purchased their lots; paid assessments to the Association; made applications to the Association for permission to erect improvements; ran for positions on the Association's board of directors; and in one case, served as president of the board of directors. The trial court's only factual finding based on this evidence was that plaintiffs believed they were bound by the terms of the Declaration of Covenants and Restrictions; plaintiffs make no attempt to challenge the trial court's finding in this regard. Therefore, we conclude an opposite conclusion to the trial court's factual finding is not clearly evident, and the trial court's factual finding was not against the manifest weight of the evidence. See *id.*

¶ 14 The parties' briefs provide little guidance in resolving this issue. Plaintiffs' argument begins with a reiteration of facts aimed at reinforcing the notion that plaintiffs purchased their respective lots before the Declaration was corrected to include the legal descriptions of sections three and four. In support of their argument that the covenants and restrictions were not enforceable against them,

plaintiffs rely on two cases for their assertion that the trial court improperly allowed the alteration of covenants to reach a more equitable resolution. However, these cases are distinguishable to the facts surrounding the present case.

¶ 15 In *Fairways of County Lakes Townhouse Ass'n v. Shenandoah Development Corp.*, 113 Ill. App. 3d 932, 933-34 (1983), the developers of a town home development recorded declarations regarding two separate parcels for purposes similar to those of the Declaration in the present case. The declarations regarding the first parcel provided that the developer retained the right to annex additional areas of the development and that the right would run with the land. The developers later sold their remaining interests in the property to a purchaser, who subsequently recorded its own declaration for the second parcel. This declaration was similar in every aspect to the declarations of the first parcel, except that it did not reserve to the developer any right to annex additional property. The developers of the second parcel subsequently recorded a "Supplemental Declaration" purporting to annex the second parcel to the first parcel by way of the authority established by the terms of the declarations recorded in the first parcel. *Id.* at 934. The reviewing court held that the unilateral modification or revocation of restrictive covenants already imposed upon land by a developer was a personal covenant that could be exercised only by the one who imposed the restrictions. Therefore, that power could not be exercised by a subsequent developer, even though the declaration provided that the covenants were to run with the land. *Id.* at 935-36.

¶ 16 In *Lakeland Property Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 807 (1984), the defendant purchased a lot in a subdivision from the original developer by way of a deed similar to other deeds for land in the subdivision and subject to the same restrictions and covenants. The deed further stated that the covenants described therein would run with the land and be binding until

January 1, 1980, at which time the covenants would automatically extend for successive periods of 10 years unless changed by a vote of the majority of the subdivision's then lot owners. A voluntarily established property owners' association subsequently caused the adoption of revised restrictions in 1980 by a majority of the then lot owners, purporting to establish the association's right to assess and collect dues. *Id.* The reviewing court looked for guidance to *Levitt Homes, Inc. v. Old Farm Homeowners' Association*, 111 Ill. App. 3d 300, 308 (1982), which held the language employed by a deed permitting future alteration of restrictive covenants determines the extent and scope of that provision. Accordingly, the reviewing court held that the provision permitting the change of covenants found in the deed in *Lakeland Property Owners Ass'n* was directed only to changes of the existing covenants and did not permit the adding of new covenants which had no relation to the existing covenants. *Lakeland Property Owners Ass'n*, 121 Ill. App. 3d at 810.

¶ 17 Plaintiffs rely on the reviewing court's holding in *Fairways of County Lakes Townhouse Ass'n* for their assertion that the reserved powers to unilaterally modify the Declaration in the present case could be exercised only by the developer and could not be exercised by the Association because they did not run with the land. Plaintiffs further rely on the language contained in their deeds stating that they were "subject to the general real estate taxes for the current year and subsequent years; building line and use or occupancy restrictions, conditions, and covenants of records." Plaintiffs assert that the Association's attempt to correct a legal description undermines the intent of the developer by going beyond the scope of the Declaration and therefore impermissibly alters a restrictive covenant, as was disallowed by the court in *Lakeland Property Owners Ass'n*. The Association counters, albeit briefly, that the cases are distinguishable because they involved landowners' attempts to impose new and different covenants, whereas the Association's actions in

the present case served only to correct the public record to include facts as they already existed. In support, the Association asserts that plaintiffs acknowledged their properties were subject to the Declaration and acted accordingly. We agree with the Association.

¶ 18 Plaintiffs are correct in asserting that generally, covenants will be strictly construed so that they will not extend beyond that which is expressly stipulated and all doubts must be resolved in favor of the free use of property and against restrictions. *Fairways of County Lakes Townhouse Ass'n*, 113 Ill. App. 3d at 935. Plaintiffs also correctly observe that the paramount rule for construction of a covenant is to give effect to the actual intent of the parties as of the time the covenant was made as understood from the whole document construed under the circumstances surrounding its execution. *Id.* However, in *Fairways of County Lakes Townhouse Ass'n*, the reviewing court noted that it was not dealing with a covenant *per se*, but with the reservation of a future right to bring additional property within the terms of an original covenant. Conversely, the present case deals neither with the construction of a covenant *per se*, nor with the reservation of a future right, but rather with the very existence of the covenants in the first instance.

¶ 19 The Association's position is that plaintiffs' actions and acknowledgments of the Declaration preclude it from arguing that the Declaration did not exist. In support, the Association correctly asserts that a court may find the existence of an implied restrictive covenant where a general plan of development was instituted at the time of subdivision. *Pasulka v. Koob*, 170 Ill. App. 3d 191, 205 (1988); see also *Krueger v. Oberto*, 309 Ill. App. 3d 358, 370-71 (1999). A court may find that a general plan of development exists where a tract is subdivided into lots conveyed to separate purchasers subject to identical conditions designed to operate as inducements to the purchase of the lots and to create reciprocally enforceable rights in the nature of an "easement of incorporeal

hereditament" in the other lots of the subdivision. *Id.* In determining whether a general plan exists, a court should consider whether (1) the restrictions are included in all deeds to the subdivision; (2) the restrictions have been previously violated; (3) the burdens imposed are generally equal and for the mutual benefit and advantage of all lot owners; and (4) notice of the restrictions is given in the recorded plat of subdivision. However, a general plan will not be enforced where its enforcement "would be a great hardship on the owner and of no benefit to the plaintiff." *Id.*

¶ 20 In the present case, the facts reflect that all four of these considerations have been satisfied and thus, we conclude that a general plan existed. As discussed above, plaintiffs' deeds provided their lots were being conveyed subject to restrictions, conditions, and covenants of record. The title insurance for plaintiffs' lots further referenced the covenants and restrictions recorded in Document #0003660. Therefore, the restrictions contained in the Declaration were sufficiently included in the deeds. Regarding the second consideration, the record reflects no previous instances of the restrictions being violated, nor do plaintiffs offer any such instances. However, the record does reflect that the burdens imposed by the Declaration, such as the general land and building use restrictions and the well and sewage treatment regulations, were generally equal and for the mutual benefit and advantage of all lot owners. Finally, the Plats of Subdivision for all of the sections reference "the covenants conditions and restrictions recorded contemporaneously with this plat." Although it has been shown that the covenants, conditions and restrictions were not properly recorded contemporaneously with the plats for sections three and four, notice of the restrictions was nonetheless given in the recorded plats of subdivision. Therefore, we conclude that the facts in the present case were sufficient to establish the existence of a general plan of development and an implied restrictive covenant. We further note that the enforcement of the general plan will not be

a great hardship on plaintiffs because they have complied with the terms of the Declaration throughout the duration of their respective ownerships and will continue to benefit from the enforcement of the conditions and covenants listed therein. See *Krueger*, 309 Ill. App. 3d at 371. After construing the pleadings and evidence in the light most favorable to plaintiffs, we affirm the trial court's grant of summary judgment in favor of the Association.

¶ 21 Although Plaintiffs have not challenged the Association's re-recorded Declaration on the basis of contract law, we note that the re-recorded Declaration constituted the valid contractual modification. A modification of a contract introduces new elements into the contract, but leaves the general purpose and effect of the contract undisturbed. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 468 (2004). "[A] valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration." *Id.* The parties cannot modify the contract without each other's knowledge; therefore, mutual assent is a requisite element in effecting a contractual modification. *Id.* at 469. As discussed above, the re-recorded Declaration introduced a new element by adding the legal descriptions of sections three and four, but left the general purpose and effect of the Declaration undisturbed. Because plaintiffs accepted and benefitted from the terms of the Declaration, the offer, acceptance, and consideration were unaffected by the re-recorded Declaration and remained intact. Finally, plaintiffs' compliance with the terms of the Declarations, such as the payment of assessments and participation with the board of directors, shows mutual assent to the terms of the Declaration. See *Id.* at 468-69.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County.

¶ 23 Affirmed.