SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3763-21

MICHAEL J. ENOS and
CAROL J. ENOS,

Plaintiffs-Appellants,

v.

MADELINE ANACKER, JAMES DONN, RAYNA JAMES, JOHN J. FLEMING, LAURA FLEMING, ROBERT RESKER, ELIZABETH RESKER, JOHN A. GINER, MARIE PORCARO, KENNETH R. SARTE, RONALD L. REPMAN, ALBERT A. BLATTEL, ANN M. BLATTEL, MLA PROPERTIES LIMITED LIABILITY COMPANY, STEVEN L. MECHANIC, BARBARA MECHANIC, JOSEPH A. PRINZIVALLI, JR., LAUDELINA J. PRINZIVALLI, MICHAEL FITZPATRICK, PATRICIA VOWINKEL, CRISTIAN BOLLE, ANA C. BOLLE, DEBRA SIMON, NICHOLAS DUTKO, WILLIAM GILLERAN, JUDITH GILLERAN, VINCENT GUADAGNO, AMY A. KING-GUADAGNO, JOSHUA HAMPTON, CARYN HAMPTON,

MARCOS SAILLANT, MAGDA N. CINTRON-SAILLANT, BRUCE KEELE, ANNE M. DONOGHUE-KEELE, DAVID I. MCGEOWN, SUSAN L. MCGEOWN, JANNA SEREDA, JONATHAN A. KOCAY, PATRICIA C. KOCAY, NEIL ALEXANDER, JEAN ALEXANDER, CAMILLE W. HABERLE, ANDREW WEINSTEIN, ANNA RUSSO, GLORIA MARTINEZ, SMJ REALTY LLC, SIDNEY GRANETZ, SHARON GRANTEZ, JIANANG LI, JING LI, PHILIP WEISSMAN, CARRIE D. WEISSMAN, THERESA BRUECKI, MARYANN YIM, DARRYL ROBINSON, CRYSTAL ROBINSON, EDWARD C. SULLIVAN, EUGENE HAZEL, SANDRA HAZEL, LYN D. PSAK, JOHN R. TINGLEY, CHERYL D. TINGLEY, JONATHAN R. NESBITT, JOANNE NESBITT, JOHN A. MIKORENDA, JANE E. MIKORENDA, CHRISTOPHER PYRA, KAREN PYRA, HARRY S. BROCHINSKY, JILL H. BROCHINSKY, CHIH-WEI CHUANG, FANG-JU LIN, ANNA LUCZAK, WILLIAM A. BRADY, DAWN BRADY, ANTHONY ANGELOSANTE, KATHLEEN ANGELOSANTE, JAMES T. KEANE, IV, AMANDA M. KEANE, MOHAMMAD SHABBIR BASHIR, JILL ANN BASHIR, SANDRA ALEXANDER, EDWARD K. YUEN, PATRICIA M. WING, PETER W. CALDWELL, SHARON E. CALDWELL, GARY TORESCO, PAMELA TORESCO, GIRISH MALANGI, KUMAR MALANGI, STEPHEN H. FOWLER, JOHN PALUMBO,

JOANNE PALUMBO, THEODORE GROSS, SHEILA GROSS, ROBERT E. CRAIG, JR., KATHLEEN CHYLINSKI, MICHAEL J. ROMAN, BONNETTE C. ROMAN, MICHAEL J. ROMAN AND BONNETTE C. ROMAN, as Trustees of ROMAN LIVING TRUST, GREGORY M. LA GANA, MARIE-NOELLE LA GANA, AXEL O. VELDEN, MARGARET VELDEN, JOSEPH WING, THERESA WING, CHELSEA DECKER, ROGER QUINTANA, BRENDAN MEANY, and TOP TIER HOLDINGS, LLC,

Defendants,

and

MEGAN BOYLE and DAVID CURREN,

Defendants-Respondents.

Argued June 7, 2023 – Decided July 27, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. C-012023-21.

Stilianos M. Cambilis argued the cause for appellants (The Law Office of Rajeh A. Saadeh, LLC, attorneys; Rajeh A. Saadeh and Stilianos M. Cambilis, on the briefs).

Nicholas A. Duston argued the cause for respondents (Norris McLaughlin, PA, attorneys; Nicholas A. Duston, on the brief).

PER CURIAM

Plaintiffs Michael and Carol Enos appeal from the June 22, 2022 Chancery Division order dismissing their third amended complaint (TAC) with prejudice for failure to state a claim upon which relief can be granted, R. 4:6-2(e). The TAC sought a declaratory judgment terminating and declaring unenforceable a recreational use deed restriction that encumbered plaintiffs' property located at 22 Glenwood Terrace in the Township of Bridgewater (Township). We affirm.

Because this appeal comes to us on a Rule 4:6-2(e) motion, we begin with a summary of the facts pled in plaintiffs' TAC.

In 1958, Glenwood Terrace Homeowners Association, Inc. (HOA) obtained title by deed to 22 Glenwood Terrace, the subject property. The 1958 deed contained, in relevant part, the following recreational use restriction:

> The aforesaid property shall be used for recreation purposes only, . . . and the herein described property is conveyed solely for use as recreation purposes only for all of the homeowners of Glenwood Terrace presently in occupancy on property therein and for those who shall become occupants of property in the future as shown on certain maps of "Glenwood Terrace, Sections 1 and 2[."] No homeowner of the aforementioned tract shall be precluded from the aforementioned association upon application for membership properly submitted in accordance with [the b]y-[l]aws and no one shall be barred from the use of the pool because of race, creed or color, as long as

> he is a property owner in the development known as Glenwood Terrace.

For many years, the HOA operated a swimming pool on the subject property. To cover the pool's operating expenses and the land's property taxes, the HOA relied on "[m]embership dues, fees, and assessments." Although "[a]ll landowners of the Glenwood Terrace Subdivision [were] unconditionally eligible for [HOA] membership at any time," under the original and subsequently amended HOA by-laws, "HOA membership was not limited to property owners in Glenwood Terrace," and the by-laws did not require every property owner in the Glenwood Terrace development to become members of the HOA.[1] (First and second alterations in original). In fact, "numerous" property owners in the Glenwood Terrace development "refused membership of the HOA in favor of joining, patronizing, or utilizing other neighboring pools."

Due to "the HOA's persistent lack of membership and resulting inability . . . to meet its operating budget," tax lien certificates were issued

[1] The original 1958 by-laws stated that the purpose of the HOA was to "benefit . . . the residents of the area" and such benefits "shall not be limited to the residents of Glenwood Terrace but to those residents in and adjoining Glenwood Terrace." Similarly, the 1975 amended by-laws contemplated "[m]embers other than those residing in the Glenwood Terrace Development," and the 2019 amended by-laws spoke of "members, whether residing in the Glenwood Terrace Development or not."

against the property in 2012 and 2013. For the next seven years, the HOA "explored and proposed joint recreational use or transfer of title" to various public and private entities "capable of operating the pool or maintaining recreational use" for the subject property. This included proposals to sell the property to the Township "to maintain the [property] as parkland," to sell the property "to the Jewish Community Center . . . to use the [property] as a summer camp and/or pool," and to sell or donate the property to "[the] Martinsville Community Center . . . for recreational purposes or [to] maintain [the property] as unimproved natural land." These proposals, however, were either "rejected or ignored."

On March 15, 2020, "the HOA's Board of Trustees unanimously voted . . . to cease accepting new membership applications[and to] discontinue pool operations." After the Board's vote, the HOA continued to "explore selling the [property]," and received a single offer from a construction company "made contingent on the [HOA's] ability to remove the deed restriction." However, on May 3, 2020, the construction company withdrew its offer, presumably due to the HOA's failure to "secure the deed restriction's revocation prior to closing."

Soon thereafter, "the HOA elected to work with a realtor to assess market interest without any contingency for the deed restriction's removal." Plaintiffs

and one other party made competing offers for the property. Despite outbidding plaintiffs for the property, "the other potential buyer" ultimately withdrew its offer, and, on December 14, 2020, plaintiffs obtained title to the subject property. According to the TAC, "[i]ncident to [p]laintiffs' purchase," the HOA's Board of Trustees "executed a written instrument" prior to closing in which the HOA, "acting on its behalf and that of its members . . . [,] consent[ed] to the removal of the deed restriction and confirm[ed] its irrevocable closure of the pool."

Plaintiffs, whose family "were among the original members of the HOA and [had] remained active members through the HOA's dissolution," claim to have purchased the subject property "in the interest of maintaining the integrity of the [property] and surrounding community." Plaintiffs also admit that they "were willing to assume the risk of attempting to remove the deed restriction after closing." To that end, on March 5, 2022, plaintiffs filed their TAC[2] in the Chancery Division seeking a judgment terminating the deed restriction on the

[2] Plaintiffs originally commenced this action on June 18, 2021, by filing a two-count complaint solely against the HOA. Plaintiffs subsequently amended the complaint three times to join all parties who "own, either individually or as trustee, certain real estate as found on certain maps entitled, 'Glenwood Terrace, Section 1 . . . ' and '. . . Section 2,'" and to raise several new theories for termination of the restrictive covenant.

grounds of impossibility, ambiguity, abandonment, waiver, and changed circumstances.

The TAC contains six counts. In counts one and two, plaintiffs allege that the recreational use restriction should be "terminated" because "it has become impossible as a practical matter to accomplish the purpose for which the deed restriction was created." In count one, plaintiffs claim that "as private citizens," they "lack sufficient time, training, manpower, and relevant experience to safely and competently operate a publicly used pool or maintain the [p]remises for any other reasonable recreational purpose." In count two, plaintiffs claim "it has become impossible as a practical matter to accomplish the purpose for which the deed restriction was created" because "the intended beneficiaries," identified in "[t]he deed restriction" as HOA members, no longer exist with the dissolution of the HOA.

In counts three and four, plaintiffs allege that the deed restriction cannot be enforced because the covenant is ambiguous as to the "intended beneficiaries" and "the [property's] intended use." In count three, plaintiffs claim "[t]he deed restriction ambiguously uses the proper noun 'Glenwood Terrace' to identify intended beneficiaries as potentially either members of the [HOA] or owners of real estate located . . . [in] Glenwood Terrace based on the property maps

identified in the deed restriction." In count four, plaintiffs claim that the property's "intended use" is ambiguous because "[t]he deed restriction's language provides that the [property was] conveyed solely for unspecified recreation purposes" but "[e]lsewhere" references "a pool" as "a specific use."

In counts five and six, plaintiffs pled the doctrines of abandonment, waiver, and changed circumstances. In count five, plaintiffs allege that non-HOA property owners "abandoned the property interest arising from the deed restriction" by "refus[ing] membership of the HOA," "willfully reject[ing] . . . the interest created by the restriction," and "utilizing other neighboring pools" instead of the HOA's pool. In count six, plaintiffs claim that when the HOA's Board "permanently closed the pool," the HOA "expressly . . . waived . . . any and all right of its members to exercise or enforce [the] deed's restrictive covenant[]," and "[t]he HOA's irrevocable closure of the pool . . . constitute[d] changed circumstances defeating the deed restriction['s] original purpose."

Subsequently, defendant property owners Megan Boyle, David Curren, and David McGeown[3] moved to dismiss plaintiffs' TAC under Rule 4:6-2(e). Following oral argument, Judge Margaret Goodzeit entered an order on June 22,

[3] McGeown is not participating in the appeal.

2022, granting defendants' motions and dismissing plaintiffs' TAC with prejudice. In an accompanying statement of reasons, the judge first rejected the ambiguity claims. Applying principles of contract interpretation, the judge concluded that "[t]he language used in the deed [was] not vague or ambiguous." See Cooper River Plaza E., LLC v. Briad Grp., 359 N.J. Super. 518, 527 (App. Div. 2003) (explaining that the enforcement of a restrictive covenant contained in a deed "constitutes a contract right" and "must be analyzed in accordance with the principles of contract interpretation").

Specifically, the judge determined that the deed restriction "unequivocally" and "explicitly defined" the intended beneficiaries as "'all of the homeowners of Glenwood Terrace . . . as shown on certain maps of Glenwood Terrace, Section 1 and 2[,]' including future homeowners of Glenwood Terrace." (Alterations in original). Likewise, the judge rejected plaintiffs' contention that "only HOA members [were] the intended beneficiaries," explaining that by "referenc[ing] Glenwood Terrace maps – not HOA membership – . . . [,] the restriction's plain language provide[d] that the intended beneficiaries [were] a distinct group separate from [the] HOA and d[id] not specify that Glenwood Terrace homeowners must also be HOA members to be considered as intended beneficiaries."

In support of her interpretation that the covenant's "reference to HOA membership [was] unrelated to the intended beneficiaries of the deed restriction," the judge took judicial notice that the deed restriction was executed in 1958, when "swimming pools were routinely segregated." The judge explained that the language referencing HOA membership "was to prevent racial discrimination that was prevalent" at that time. See Jeff Wiltse, The Black-White Swimming Disparity in America: A Deadly Legacy of Swimming Pool Discrimination, 38 J. Sport & Soc. Issues 366, 368 (2014) ("Black Americans were systematically denied access to the tens of thousands of suburban swim clubs opened during the 1950s and 1960s.").

Similarly, the judge rejected plaintiffs' contention that "the intended purpose of the deed restriction [was] ambiguous." In support, the judge pointed to the deed restriction's unambiguous language that the property was "'conveyed solely for use as recreation purpose only.'" The judge explained that the deed's reference to "a pool" merely stated "the chosen recreation use of the [p]roperty at that time" and was intended "to prevent racial discrimination." Thus, the judge concluded that the mere reference to a pool did not "negate the fact that the intended use of the [p]roperty [was] for any recreation purpose, nor d[id] it create ambiguity." The judge also noted that even the HOA had "interpreted the

restriction unambiguously to include any recreation[al] use" when it "'actively explored and proposed joint recreational use[s]'" with "'various potential [buyers] . . . capable of . . . maintaining [the] recreational use for the [property].'"

Next, the judge addressed plaintiffs' claim of changed circumstances, explaining that relief under the doctrine of changed circumstances required plaintiffs to show that "'a change has taken place since the creation of [the] servitude that makes it impossible as a practicable matter to accomplish the purpose for which the servitude was created.'" See Restatement (Third) of Prop.: Servitudes § 7.10(1) (Am. Law Inst. 2000). The judge concluded "as a matter of law" that plaintiffs failed to offer a "factual basis . . . to support the essential requirement that it [was] impossible for the [p]roperty to be used for recreational purposes." Instead, according to the judge, plaintiffs merely "allege[d] their personal inability to maintain the prescribed use." The judge reasoned that "the pool could have been shut down and filled in, with the [p]roperty to be used as a park." Because plaintiffs "ignore[d] this possibility," the judge concluded that plaintiffs' changed circumstances claim was "futile."

Finally, the judge addressed plaintiffs' claim that "the intended beneficiaries of the deed restriction either abandoned . . . or waived . . . their right to enforce the restriction." First, the judge determined that plaintiffs' claim

that "non-HOA Glenwood Terrace homeowner[s] abandoned their rights to enforce the restriction . . . by not joining the HOA" was "nonsensical." The judge reiterated that "the intended benefits of the deed restriction [were] . . . based on ownership of Glenwood Terrace property and not HOA membership."

Turning to the issue of waiver, the judge acknowledged that the HOA "expressly and permanently waived . . . any and all right[s] of its members to exercise or enforce [the] deed's restrictive covenant[]" when the HOA "'consented'" to the removal of the recreational use restriction. However, the judge found that "plaintiffs [were] unable to establish that all intended beneficiaries waived their right to enforce the deed restriction" because "the intended beneficiaries include[d] all property owners of the Glenwood Terrace development," not just those who had joined the HOA. This appeal followed.

On appeal, plaintiffs argue the judge erred by granting defendants' motions to dismiss when plaintiffs pled sufficient facts to terminate and declare unenforceable the deed restriction on the following grounds: (1) ambiguity as to the intended beneficiaries and the intended use of the property; (2) changed circumstances preventing plaintiffs from operating a pool or maintaining the

property for recreational purposes; and (3) abandonment or waiver of the right to enforce the restrictive covenant by defendant homeowners.

We review de novo the trial court's grant of a motion to dismiss under Rule 4:6-2(e) and "owe[] no deference to the trial court's legal conclusions." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). Our review requires an examination of "'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (quoting Dimitrakopoulos, 237 N.J. at 107). See also Green v. Morgan Props., 215 N.J. 431, 452 (2013).

Rule 4:6-2(e) allows dismissal for "failure to state a claim upon which relief can be granted." In interpreting the Rule, our Supreme Court has explained that "the test for determining the adequacy of a pleading[is] whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Thus, the Court has directed judges to "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim,

opportunity being given to amend if necessary." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

The Court has also emphasized that motions to dismiss under Rule 4:6-2(e) "should be granted in only the rarest of instances" and generally "without prejudice to a plaintiff's filing of an amended complaint." Printing Mart-Morristown, 116 N.J. at 772. "As such, '[i]f a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.'" Smith v. SBC Commc'ns Inc., 178 N.J. 265, 282 (2004) (alteration in original) (quoting F.G. v. MacDonell, 150 N.J. 550, 556 (1997)).

Nonetheless, a complaint should be dismissed where it "states no claim that supports relief, and discovery will not give rise to such a claim." Dimitrakopoulos, 237 N.J. at 107. Indeed, "the essential facts supporting [the] plaintiff's cause of action must be presented in order for the claim to survive[, and] conclusory allegations are insufficient in that regard." Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012). Thus, "a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

Central to this dispute is the interpretation of a deed restriction. "Restrictions on the use to which land may be put are not favored in law because they impair alienability." Bruno v. Hanna, 63 N.J. Super. 282, 285 (App. Div. 1960). As a result, "'courts will not aid one person to restrict another in the use of his [or her] land unless the right to restrict is made manifest and clear in the restrictive covenant.'" Berger v. State, 71 N.J. 206, 215 (1976) (quoting Bruno, 63 N.J. Super. at 285).

Deed restrictions "are to be construed realistically in the light of the circumstances under which they were created," but "incursions on the use of property will not be enforced unless their meaning is clear and free from doubt." Caullett v. Stanley Stilwell & Sons, Inc., 67 N.J. Super. 111, 114-15 (App. Div. 1961). Thus, our "primary objective" in construing a restrictive covenant in a deed "is to determine the intent of the parties to the agreement," Bubis v. Kassin, 184 N.J. 612, 624 (2005) (quoting Lakes at Mercer Island Homeowners Ass'n v. Witrak, 810 P.2d 27, 28 (Wash. Ct. App. 1991)), and "strict construction [of a deed restriction] will not be applied to defeat the obvious purpose of [the] restriction," Bruno, 63 N.J. Super. at 287.

We analyze a deed restriction "in accordance with the principles of contract interpretation, which include a determination of the intention of the

parties as revealed by the language used by them." Cooper River Plaza, 359 N.J. Super. at 527; see also Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div. 1997) (explaining "[a] restrictive covenant [in a deed] is a contract" (first alteration in original) (quoting Weinstein v. Swartz, 3 N.J. 80, 86 (1949))). Where, as here, we are required to interpret a deed restriction intended to bind purchasers of property who are strangers to the transaction in which the restriction was imposed, "the intent of the restriction must manifest itself in the language of the document itself." Cooper River Plaza, 359 N.J. Super. at 527.

"An intention disguised by an ambiguity cannot bind a subsequent purchaser who, as the result of an absence of clarity in the instrument of conveyance, lacks notice of restrictions that the initial parties have attempted to place on the property . . . conveyed." Ibid. Ambiguity arises "'if the terms . . . are susceptible to at least two reasonable alternative interpretations.'" Id. at 528 (quoting Assisted Living Assocs. of Moorestown, L.L.C. v. Moorestown Township., 31 F. Supp. 2d 389, 398 (D.N.J. 1998)). However, we will not torture the language of a restrictive covenant to create ambiguity. See Stiefel v. Bayly, Martin & Fay of Conn., Inc., 242 N.J. Super. 643, 651 (App. Div. 1990) (instructing that a court "should not torture" the reading of a contract "to create [an] ambiguity").

Rather, we must interpret the deed restriction reasonably and in context to give effect to its plain language. See, e.g., Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (explaining interpretation of a contract requires consideration of "the document as a whole" and application of the plain and ordinary meaning of its terms). It is for the court to decide as a matter of law whether the terms are "clear or ambiguous." Ibid. (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)).

Courts "have the 'equitable power to modify or terminate'" restrictive covenants under certain circumstances, including changed circumstances. Am. Dream at Marlboro, L.L.C. v. Planning Bd. of Marlboro, 209 N.J. 161, 169 (2012) (quoting Citizens Voices Ass'n v. Collings Lakes Civic Ass'n, 396 N.J. Super. 432, 446 (App. Div. 2007)). As our Supreme Court observed in American Dream,

> The essential test that applies to such a claim of changed circumstances requires the applicant to demonstrate that it has become "'impossible as a practical matter to accomplish the purpose for which'" a servitude or restrictive covenant was created.
>
> The doctrine of changed circumstances is narrowly applied and "the test is stringent: relief is granted only if the purpose of the servitude can no longer be accomplished."

> [Id. at 169 (citations omitted) (quoting Citizens Voices Ass'n, 396 N.J. Super. at 446).]

A party seeking to set aside a deed restriction has a "heavy burden" to prove abandonment or modification. Steiger v. Lenoci, 323 N.J. Super. 529, 534 (App. Div. 1999). There must be "'a clear intent on the part of the property owners generally to abandon or modify the original plan.'" Ibid. (quoting Murphy v. Trapani, 255 N.J. Super. 65, 74 (App. Div. 1992)). As to waiver, it "'is the intentional relinquishment of a known right. It is a voluntary act, "and implies an election by the party to dispense with something of value, or to forego some advantage w[hich] he [or she] might at his [or her] option have demanded and insisted on."'" G.E. Cap. Mortg. Servs., Inc. v. Marilao, 352 N.J. Super. 274, 281 (App. Div. 2002) (quoting W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 152 (1958)); see also Knorr v. Smeal, 178 N.J. 169, 177 (2003) ("The party waiving a known right must do so clearly, unequivocally, and decisively.").

Guided by these principles, we affirm substantially for the sound reasons expressed by the judge in her comprehensive statement of reasons. The judge properly dismissed plaintiffs' complaint with prejudice because "'the factual allegations are palpably insufficient to support a claim upon which relief can be granted,' 'and discovery will not give rise to' one." Mueller v. Kean Univ., 474

N.J. Super. 272, 289-90 (App. Div. 2022) (citations omitted) (first quoting Rieder, 221 N.J. Super at 552; and then quoting Dimitrakopoulos, 237 N.J. at 107).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION