2021 WL 4143046
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UNPUBLISHED
Court of Appeals of Michigan.

OK AUTO SALE, INC., doing business as OK AUTO MART, Plaintiff-Appellant,
V.
ARCADIS OF MICHIGAN, LLC, doing business as ARCADIS, Defendant-Appellee.

No. 353946
|
September 9, 2021

Ingham Circuit Court LC No. 19-000904-CB

Before: FORT HOOD, P.J., and MARKEY and GLEICHER, JJ.

Opinion

PER CURIAM.

***1** Plaintiff OK Auto Sale, Inc. (OK), appeals by right the trial court's order granting summary disposition in favor of defendant Arcadis of Michigan, LLC (Arcadis), under MCR 2.116(C)(7), (8), and (10). We affirm.

I. BACKGROUND

This case involves a dispute between OK, which operates a used car dealership, and Arcadis, which is an entity that provides environmental remediation services. OK's dealership is located on property that it leases from another entity, RLA Enterprises. OK and RLA share common ownership. Long before RLA purchased the property, and long before OK leased the property for its dealership, there were environmental contamination issues with respect to the property, resulting from leaking underground storage tanks due to the activities of a prior owner, Amoco Oil Company. In an agreement with the then-named Department of Environmental Quality (the Department), Amoco executed a restrictive covenant (the Covenant). The purpose of the Covenant was to allow for the implementation of a corrective action plan and environmental remediation of the property. Amoco subsequently sold the property to another entity, Paradise Motors, which in turn sold it to RLA.

As part of the corrective action plan, the original remediation company, Delta Environmental Consultants, constructed a shed on the property and housed equipment in it. This equipment included a groundwater pump and treatment system and a soil vapor extraction system. The groundwater pump and treatment system stopped being used by Delta in 2004, but the soil vapor extraction system remained in use up until at least 2010. Reports indicated that the groundwater pump and treatment system was removed in 2006, but OK asserts that it was not actually removed until 2019. Arcadis took over remediation efforts from Delta in 2009. Over the course of many years, Delta, and later Arcadis, engaged in remediation activities, which included groundwater and soil sampling. OK brought this action based on the presence of the shed and equipment therein, which it alleged took up valuable space on the property that could have otherwise been used for selling cars. OK essentially contended that because the shed and its equipment were no longer being used, the shed and equipment should have been removed. And, by failing to do so, Arcadis incurred liability, entitling OK to damages. The shed and equipment were removed in 2019 after OK's counsel contacted Arcadis and requested removal. OK's complaint sounded in claims of trespass, nuisance, various forms of fraud, interference with a business relationship or expectancy, breach of contract (third-party beneficiary theory), negligence, liability under MCL 324.21323k, and conversion. OK requested money damages.

With respect to the Covenant, it contained the following pertinent provisions:

> 1. The Titleholder [Amoco] shall restrict activities on the property that may interfere with corrective action, operation and maintenance, monitoring, or other measures necessary to assure the effectiveness and integrity of the corrective action.

***2** 2. The Titleholder shall restrict activities that may result in exposure to regulated substances above levels established in the corrective action plan.

* * *

4. The Titleholder shall grant to the Department of Environmental Quality (Department) and its designated representatives the right to enter the property at reasonable times for the purpose of determining and monitoring compliance with the corrective action plan, including but not limited to the right to take samples, inspect the operation of the corrective action measures, and inspect records.

Furthermore, the Covenant's restrictions were to

> run with the land and be binding to the titleholder's successors, assigns, and lessees or their authorized agents, employees or persons acting under their direction or control. The restrictions shall apply until the Department determines that regulated substances no longer present an unacceptable risk to the public health, safety or welfare or to the environment.

The Covenant could not be "amended, modified or terminated" without written agreement of the titleholder and the Department. There is no indication in the record of any amendment, modification, or termination of the Covenant.

Arcadis brought its motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Arcadis contended that the Covenant's plain language authorized the placement of the shed and equipment as part of the corrective action plan and remediation activities, that the Covenant contained no requirement for equipment or structures to be removed until the end of the entire remediation process, and that there was no evidence that the Department had determined that there was no longer an unacceptable risk to the public health, safety, or welfare, or to the environment. The trial court agreed and granted Arcadis's motion. OK now appeals.

II. ANALYSIS

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016). "[T]he interpretation of restrictive covenants is a question of law that this Court reviews de novo." *Thiel v Goyings*, 504 Mich 484, 495; 939 NW2d 152 (2019). The *Thiel* Court discussed restrictive covenants, observing as follows:

> Courts review restrictive covenants with a special focus on determining the restrictor's intent. We are not so much concerned with the rules of syntax or the strict letter of the words used as we are in arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. We determine the intended meaning of the chosen language by reading the covenants as a whole rather than from isolated words and must construe the language with reference to the present and prospective use of property. ... And we enforce unambiguous restrictions as written. Thus, we consider challenges to restrictive covenants in a contextualized, case-by-case manner.
>
> It is a bedrock principle in our law that a landowner's bundle of rights includes the broad freedom to make legal use of her property. Restrictive covenants are at once in tension with and complementary to this right: deed restrictions allow landowners to preserve the neighborhood's character. And the failure to enforce the deed restriction thus deprives the would-be enforcer of a valuable property right. But enforcing a restriction beyond the restrictor's intent deprives the landowner of an even more fundamental property right—his right to legal use of his own property.
>
> ***3** Weighty interests are at stake, but the balance tilts in favor of the right to control one's own land. Unambiguous covenants must, of course, be enforced as written, but any uncertainty or doubt must be resolved in favor of the free use of property. [*Id.* at 496-497 (quotation marks, citations, brackets, and ellipses omitted).]

Under the Covenant, RLA, as a successor titleholder, and OK, as the lessee of successor-titleholder RLA, were subject to restrictions with respect to their activities on the property, preventing them from interfering with corrective actions and remediation efforts. The Covenant also indicated that the Department and its designated representatives had the right to enter the property at reasonable times for purposes of engaging in and monitoring corrective actions and remediation efforts. This authority was necessarily granted by RLA and OK to the Department and its designated representatives under the runs-with-the-land provision in the Covenant. A covenant that runs with the land continues in perpetuity unless the creating document identifies an expiration date or until the events leading to the covenant no longer exist. See *Sanborn v McLean*, 233 Mich 227, 229-230; 206 NW 496 (1925). In this case, the restriction on activities so that corrective actions and remediation efforts could take place was to continue until the Department determined that regulated substances no longer presented an unacceptable risk to the public health, safety, and welfare. In OK's complaint, the theories of recovery—civil torts, statutory wrongs, and contractual breaches—all ultimately relied on the proposition that it was legally improper to keep the shed and its equipment in place beyond the date that the shed and equipment were being used or served a purpose in relation to corrective actions and remediation efforts. There is no dispute that the shed and the equipment were legally placed on the property and legally remained on the property for at least some period of time. And the shed and equipment were removed in March 2019 by Arcadis less than two months after OK requested removal; OK's complaint did not allege that there was an earlier request, nor is such an assertion made by OK in its brief on appeal.

We conclude that there is simply no basis for any liability in this case. First, there was no evidence that the Department had made a determination that regulated substances no longer presented an unacceptable risk to the public health, safety, or welfare, or to the environment. Accordingly, under the plain language of the Covenant, the restrictions continued to apply. Second, the Covenant does not contain language mandating the removal of remediation structures and equipment from the property as soon as use of those structures and equipment is discontinued when remediation has not been fully completed. Indeed, the Covenant does not provide that the selected remediation company has an affirmative duty to remove remediation-related structures. Third, while use of the shed and its equipment may have gone dormant, there was no evidence that the shed would definitively never be used again for purposes of remediation and before any signoff by the Department. Indeed, Arcadis reactivated the soil vapor evaporation system housed in the shed for additional remediation work after the system had sat idle for five years.

***4** Contrary to OK's assertion, the trial court's ruling did not mean that Arcadis was entitled to "carte blanche" access to and use of the property; rather, Arcadis's actions were limited to the activities authorized by the Covenant, i.e., remediation connected to the environmental contamination of the property. OK contends without record support that Arcadis was not a "designated representative" of the Department but was instead "a private contractor conducting commercial activity for another private commercial entity." Without support, this contention has no merit and is abandoned on appeal. See *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015). Regardless, the only entities authorized under the Covenant to perform the remediation were the Department and its representatives. There is no dispute that Arcadis is not the Department and that it provided remediation services for the better part of a decade. OK made no claim that Arcadis's actions in conducting remediation activities were unauthorized. OK contended *only* that the shed and equipment should have been removed, not that they were unauthorized in the first place. In other words, because the only entities authorized to perform remediation were the Department and its representatives, and because OK otherwise accepted every other remediation activity as being authorized, OK implicitly accepted that Arcadis was a designated representative under the Covenant.

OK wishes to read a "reasonable" requirement into the Covenant, but this is improper because of the Covenant's plain language and overall purpose to effectuate remediation. See *Thiel*, 504 Mich at 496-497. The Covenant makes no mention of a reasonableness requirement, except in relation to the timeframes during which the property can be entered to perform remediation activities. At several points in its brief, OK cites language in a covenant deed transferring the property from Amoco to Paradise Motors that precludes the grantor, Amoco, from unreasonably interfering with the use of the property by the grantee, Paradise Motors. We fail to see how this covenant deed applies to Arcadis's obligations to OK, and OK provides no explanation and simply replaces

references to the "grantee" with its own name. The argument is thus unavailing.

OK next points to the clause in the Covenant, quoted earlier, which provides that "[t]he Titleholder shall restrict activities on the property that may interfere with corrective action, operation and maintenance, monitoring, or other measures necessary to assure the effectiveness and integrity of the corrective action." OK argues that this provision warranted discovery of the "corrective action plan," as it may have shown that there were other restrictions or limitations relative to the remediation companies. The restrictive Covenant does incorporate the corrective action plan by reference and presentation of that plan would have completed the puzzle placed before the court. However, the language of the corrective action plan would not alter the Covenant's plain language providing that its "restrictions shall apply until the Department determines that regulated substances no longer present an unacceptable risk to the public health, safety or welfare or to the environment."

In sum, all of the causes of action raised by OK, whether in its original complaint or its first amended complaint, cannot overcome the language in the Covenant.

We affirm. Having fully prevailed on appeal, Arcadis may tax costs under MCR 7.219.

Jane E. Markey

Elizabeth L. Gleicher

Fort Hood, P.J., not participating.

All Citations

Not Reported in N.W. Rptr., 2021 WL 4143046