STATE OF MICHIGAN

COURT OF APPEALS

CAROL DRAKE and CLELLEN BURY,

Plaintiffs-Appellants,

v

CITY OF BENTON HARBOR and HARBOR SHORES COMMUNITY REDEVELOPMENT CORPORATION,

Defendants-Appellees.

UNPUBLISHED
January 21, 2010

No. 287502
Berrien Circuit Court
LC No. 2008-000247-CE

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court order granting summary disposition in defendants' favor. Because the unambiguous language in the property deed and consent judgment does not preclude the City of Benton Harbor from leasing a portion of Jean Klock Park to Harbor Shores Community Redevelopment Corp. for use of the same as a golf course open to the general public, and a golf course falls within the definition of a "park purpose" and/or "public purpose," we affirm.

In 1917, Mr. and Mrs. Klock gifted a 90-acre parcel of land with ½ mile of Lake Michigan frontage, known as Jean Klock Park, to the City of Benton Harbor ("Benton Harbor"). The deed to Benton Harbor specified that the property was conveyed upon:

> the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as the said City of Benton Harbor may make and adopt.

Until approximately 2003, Benton Harbor undisputedly used and maintained Jean Klock Park consistent with the deed, i.e. as public park and beach. In 2003, Benton Harbor announced its plan to sell part of the park to a private housing developer. Plaintiffs, along with a group of other Benton Harbor citizens, initiated a lawsuit against Benton Harbor challenging its right to convey the property under the assertion that such sale violated the covenants and restrictions in its deed. This prior lawsuit was settled between the parties and resulted in the entry of a consent

judgment on January 27, 2004. The consent judgment allowed for the sale of a portion of the property to the developer and also permanently enjoined Benton Harbor:

> from using any portion of the property depicted as "Jean Klock Park". . . for any purpose other than a bathing beach, park purposes, or other public purposes related to bathing beach or park use. . .

In 2005 Benton Harbor announced its intention to lease approximately 22 acres of the (now) 74-acre park to defendant Harbor Shores Community Redevelopment Corporation ("Harbor Shores") for the development and use of the land as a public golf course. Benton Harbor apparently signed a lease with Harbor Shores for this purpose. Plaintiffs thereafter initiated the instant action, alleging a breach of the parties' settlement agreement and violation of deed restrictions, and seeking an injunction.

In lieu of answering plaintiffs' complaint, Benton Harbor moved for summary disposition pursuant to MCR 2.116(C)(8). Benton Harbor contended that the lease of a portion of the park for use as a public golf course serves a public purpose and is a "park use" as a matter of law and as required by the 1917 deed and the parties' 2004 consent judgment. Harbor Shores, a non-profit corporation formed for the purpose of, among other things, fostering redevelopment and revitalization of blighted areas, also moved for summary disposition, essentially parroting the position held by Benton Harbor, but citing MCR 2.116(C)(10). The trial court granted defendants' motions for summary disposition and plaintiffs now appeal that decision.

We review a trial court's award of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the complaint alone. *Id*. at 119. In deciding a motion under this subrule, all factual allegations and reasonable inferences supporting a claim are accepted as true, and the court construes such allegations and inferences in favor of the nonmoving party. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A motion under subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In reviewing such a motion, the trial court reviews the record evidence to determine whether a genuine issue of material fact exists to warrant a trial. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

The interpretation of the language of a contract is an issue of law, which this Court reviews de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Deeds are contracts. *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279; 96 NW 468 (1903). An agreement to settle a lawsuit is also subject to the legal principles generally applied to contracts. *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994).

On appeal, plaintiffs first argue that the Benton Harbor's lease of part of Jean Klock Park to Harbor Shores violates the restriction that the property be "forever used" by Benton Harbor. According to plaintiffs, Benton Harbor is the only entity that may use the property, and the lease of a portion of the property to Harbor Shores necessarily means that Benton Harbor is no longer using that portion of the property as required in the deed. We disagree.

As our Supreme Court explained in *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005):

> In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of the parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable. [*Id.*, quoting *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 487-488; 67 NW2d 684 (1954).]

Where the terms of a contract are unambiguous, their construction is for the court to determine as a matter of law, and the plain meaning of the terms may not be impeached with extrinsic evidence. *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997). A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), or "when [a term] is equally susceptible to more than a single meaning," *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

When interpreting a restrictive covenant, the intent of the drafter controls, and where the language of a restriction is clear, the parties are confined to the language employed. *Moore v Kimball*, 291 Mich 455, 461; 289 NW 213 (1939). In addition, restrictions are generally construed against those attempting to enforce the restrictions, and all doubts are resolved in favor of the free use of the property. *Id.*

The deed states that the property is conveyed upon "the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose . . ." When read in context, it is clear that this phrase is a restriction on the use of the property--not a restriction on Benton Harbor's right to convey or otherwise assign its right to use the property. The phrase "used by said City of Benton Harbor" is followed by clear provisions as to what uses are allowed. In other words, as long as Benton Harbor owns the property, it must use it in the proscribed manner. Had the deed intended to limit Benton Harbor to being the only entity to ever use the property, there would have been a period after "used by said City of Benton Harbor" and a list of allowable uses could have followed in a separate sentence. However, there is no period following "used by City of Benton Harbor." Instead there is a phrase which immediately follows the quoted language which modifies *how* Benton Harbor may use the property.

Further, the deed clearly contemplated that someone other than Benton Harbor may have some right, title, or interest (and thus, perhaps, use) in the property. For example, a condition of the conveyance is that "said grantees, their heirs, legal representatives or assigns shall not allow, suffer, or permit any intoxicating liquors or drinks. . ." and that any violation of this condition may be enjoined "by said grantors by any court of competent jurisdiction without notice to the then owner of said premises, or any tenant thereof." The property was further conveyed:

> TO HAVE AND TO HOLD the said premises as above described, with the appurtenances unto the said party of the second part [Benton Harbor], *and to its assigns*, FOREVER. . .

Clearly, while the deed was granted to Benton Harbor, it was contemplated that Benton Harbor may, at some time, assign some, if not all, of its interest in the property to another. Had this not been contemplated, there would be no need to include language referencing Benton Harbor's "assigns, heirs or legal representatives" of the "then owner or any tenant."

We find no ambiguity in the deed language at issue and thus need not refer to extrinsic evidence in interpreting the deed restriction. *Zurich Ins Co*, 226 Mich App at 604. Here, the deed, when read as a whole, does not restrict the person or entity to use the property to Benton Harbor. As aptly noted by the trial court, "nothing in the deed or the consent judgment expressly prohibits the lease of part of the park to a private, nonprofit entity to carry out or implement a park purpose." Plaintiffs' assertion that the deed requires that the property be exclusively used by only Benton Harbor is without merit. Further, Benton Harbor is, in fact, using the property.

Because "use" as employed in the phrase "shall forever be used by said City of Benton Harbor" is not defined in the deed (or consent judgment), we may look to dictionaries to determine the plain, ordinary meaning of the word. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 472; 688 NW2d 523 (2004). Black's Law Dictionary (7th ed) defines "use" as "the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." The American Heritage Dictionary (4th ed.) defines "use" as "to put into service or apply for a purpose; employ."

Here, Benton Harbor derives monetary and other gain from leasing the property to Harbor Shores. Because Benton Harbor benefits from the property while still retaining title ownership of the same, it could be argued that Benton Harbor is putting the property into service and thus the lease is a "use" of the property as defined above. In *Linton v Howard*, 163 Mich 556, 562; 128 NW 793, 795 - 796 (1910) our Supreme Court noted that "use", as it applies to real property, "does not mean the thing itself, but means that the user is to enjoy, hold, occupy, and have the fruit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy, or cultivation, etc., or the rent which can be obtained for the same." See also, *In re Moor's Estate*, 163 Mich 353, 358; 128 NW 198 (1910). Rent obtained from real property having been unambiguously found by our courts to be a "use" of the real property, Benton Harbor's lease of the property for monetary gain is thus a use of the property.

According to plaintiffs, the deed also requires that property remain in public ownership, and the Harbor Shores lease allowing for it to operate a golf course on the property removes it

from public ownership. Plaintiffs cites *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 606; 761 NW2d 127 (2008) as being directly on point as to this issue.

In *City of Huntington Woods*, the Rackhams purchased a parcel of property, the deed to which contained the following provision: "It is part of the consideration hereof that the land transferred by this deed shall be used only as a public park or golf course or for other similar purpose." The Rackhams constructed an 18-hole golf course, with a clubhouse, on the property. In 1924, the Rackhams deeded the property, containing the golf course and the clubhouse, to the defendant. That deed included the following condition:

> FIRST: That the said premises shall be perpetually maintained by the said party of the second part exclusively as a public golf course for the use of the public under reasonable rules, regulations and charges to be established by second party.

Since 1924, the defendant continuously operated and maintained the property as a public golf course. Around 2006, however, the defendant solicited bids for the purchase of the golf course. Plaintiffs asserted that the use of the term "public", twice, within the deed restriction was indicative of the grantor's intent that the property must remain publicly owned, thereby precluding any conveyance to a private entity. A panel of this Court agreed, holding that:

> Given the unambiguous language used and the clearly stated intent of the grantors, we conclude that the Rackham deed contains an express covenant precluding the use of the subject property for any purpose other than a public golf course. . .[A]dditional restrictions requir[e] the golf course to remain *public* necessitat[ing] a further limitation on the type of entities to which defendant might convey the property. As a result, we determine that defendant may only sell the subject property to another public entity and not to a private entity, despite the retention of any conditions or assurances that the property would remain a golf course open to the public. *Id*. at 626.

The restriction in *Huntington Woods* was that the property be used as a "public golf course" with "public" appearing before "golf course." Here, however, the restriction is that "said lands" be used for "bathing beach, park purposes, or other public purpose and at all times shall be open for the use and benefit of the public." The placement of the word "public" before golf course in *Huntington Woods* could be construed as an indication of ownership concerning the golf course. In this case, the placement of the word "public" before the word "purpose" in the deed place restrictions only on the use of the property.

The case before this Court also differs from *Huntington Woods* in that there is no proposed *sale* of the park to a private entity. Instead, this case involves the *lease* of a portion of the park to be used as a public golf course. While plaintiffs contend that a lease valid for up to 105 years (such as the one at issue) is effectively a conveyance, plaintiffs have directed us to no binding Michigan law to support this position. Moreover, a provision in the lease provides that Harbor Shores acknowledges that its permitted use of the leased premises shall not be deemed an ownership interest, which remained with the Benton Harbor. Further, the degree of control retained by Benton Harbor clearly indicates that the lease was not an effective conveyance.

The lease provides, among other things, that Harbor Shores cannot use the property for any purpose other than that specified in the lease absent the written consent of Benton Harbor; that an oversight panel created by Benton Harbor and comprised of Benton Harbor city commissioners and residents must approve Harbor Shores proposed golf fees, determine whether Harbor Shores is in compliance with the agreement, and has the right to inspect the golf course and audit and review Harbor Shores' records at any time. In the lease, Benton Harbor also retains the right to access the leased property for winter recreation (thus not even granting Harbor Shores exclusive use of the premises), requires that Berrien County residents be given discount rates, requires that the course be available for local high school competitions, and requires that at least 40% of the golf course employees be Benton Harbor residents. Benton Harbor having retained significant control over the property, the lease is not in effect a conveyance.

Plaintiffs next contend that Benton Harbor's lease of a portion of Jean Klock Park to Harbor Shores violates the restriction that the property be used for "public" purposes or a "public park purpose" and be "open for the use and benefit of the public", as contemplated by the deed restrictions on the property (and the consent judgment). Again, we disagree.

Plaintiffs encourage us to review evidence outside of the deed to ascertain whether a golf course was an intended use of the property or whether, as plaintiffs contends, the property was intended for use as a passive use natural park. As required, though, we look first to the specific language in the deed to determine the meaning of the conveyance; only if the language is ambiguous do we look to extrinsic evidence. *Zurich Ins Co,* 226 Mich App at 604.

The deed restricts use of the property to "bathing beach, park purposes, or other public purpose." The deed does not define "park purpose" or "public purpose." "Park" is defined in the American Heritage Dictionary (4th ed.) as, among other things, "an area of land set aside for public use as [] a piece of land with few or no buildings within or adjoining a town, maintained for recreational and ornamental purposes." "Recreation" is defined as "refreshment of one's mind or body after work through activity that amuses or stimulates; play." "Public purpose" is defined in Black's Law Dictionary (7th ed.) as "An action by or at the direction of a government for the benefit of the community as a whole." Golf is generally referred to as a recreational activity, and a public golf course has been found by courts of our state to fall under the definition of both a "park" and a "public purpose."

In *City of Detroit v Oakland County*, 353 Mich 609, 613; 92 NW2d 47 (1958), our Supreme Court was called upon to determine whether a golf course would be exempt from taxation under the following statute.

> The following property shall be exempt from taxation:
>
> ***
>
> 'Third, Lands owned by any county, township, city, village or school district and buildings thereon, used for public purposes: * * *.

The Court, relying upon a Minnesota case, specifically held that, "the golf course in question comes within the definition of a public park. We agree with the factual determination of the trial chancellor that it is used continuously for public purposes." *Id.* at 617.

In *Golf Concepts v City of Rochester Hills*, 217 Mich App 21, 23; 550 NW2d 803 (1996), this Court addressed taxation issues with respect to property that the City of Rochester owned, but had leased to a private, for-profit corporation that operated a golf course on the property. In resolving the taxation issue, this Court affirmed the Tax Tribunal's determination that the golf course, though supported by user fees rather than tax monies, was equally available to all members of the public without discrimination and was designed for the benefit of the citizens of Rochester Hills. This Court concluded that "the golf course is thus within the definition of a public park." *Id.* at 25-26.

In the instant matter, Benton Harbor will lease a portion of the park to (non-profit) Harbor Shores for the operation of a golf course. Benton Harbor still owns the underlying property and retains significant control over the property, even sharing in its physical occupation during non-golf seasons. Benton Harbor also requires that the course be open to the public during reasonable hours, without discrimination of any kind, and receives the profits from the same for the benefit of the city. Based upon the cases cited and the specific facts in this case, the golf course falls within the meaning of both a public park and as serving a public purpose. Had the drafters of the deed intended that the park be used only in its passive, natural state, as claimed by plaintiffs, they could have placed such restrictions in the deed. They did not, and instead chose to employ broader language such as "park " and "public purpose." Because these terms have plain, ordinary meanings, we read and apply the deed as written. We do not find any ambiguity in the language employed in the deed, and thus need not review extrinsic evidence to determine the intent of the parties.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey