STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PLANNED PARENTHOOD MID AND SOUTH MICHIGAN,
Plaintiff,

v.

Case No. 11-119441-CH
Hon. James M. Alexander

SHRI SAI-KRISHNA GROUP, LLC,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on "Plaintiff's Renewed Motion for Partial Summary Disposition." This case is nothing more or less than a straightforward property dispute. The parties own adjacent properties on Opdyke Road in Auburn Hills. At one time, both properties were a single parcel. On September 8, 1998, the prior owner granted Defendant a restrictive covenant on Plaintiff's property that limits its use to "restaurant, retail or office usage." This interest was recorded on September 29, 1998.

While contemplating purchasing the property and in the course of a due diligence period, Plaintiff learned of the restrictive covenant and sought Defendant's confirmation that a "medical office" would be permitted use of the property within the "office" restriction. To that end, Plaintiff sent a letter to Defendant that stated:

> Our understanding of the Covenant is that use of the building for office purposes would include medical offices, and we would like to confirm that you agree with that interpretation.
> . . . [I]f you agree that use of the building at 1625 N. Opdyke, Auburn Hills, Michigan, for medical office purposes is an acceptable use under the terms of the aforementioned Covenant, I would ask that you provide your signature of agreement where indicated below.

In October 2010, Defendant's principal signed and returned the letter. Relying on this understanding, Plaintiff purchased the property in November 2010 for $733,150.

Plaintiff claims that it intends to use the property as a medical office that provides a variety of health care services to women, men, and teens. The property in question is zoned B-2, General Business – in which, medical offices and outpatient clinics are permitted.

After acquiring the property, Plaintiff received a letter from Defendant's attorney – objecting to Plaintiff's use of the property. At the same time, Defendant's attorney sent similar letters to various Auburn Hills and Oakland County officials.

Plaintiff then filed suit – seeking declaratory relief that Plaintiff's proposed use of the property does not violate Defendant's restrictive covenant, and on allegations of slander of title and violations of the Americans with Disabilities Act.

Plaintiff now seeks partial summary disposition under MCR 2.116(C)(10) – seeking a ruling on its declaratory count. When last here, the Court afforded Defendant the right to determine if there were differences in the regulatory scheme between a Medical Office and the use that Defendant believes Plaintiff will be doing.

A motion under MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

In support of its motion under (C)(10), Plaintiff attaches: (1) the buyer closing statement; (2) relevant portions of the Auburn Hills Zoning Ordinance; (3) a copy of the restrictive

covenant; (4) the October 2010 letter where Defendant's principal agreed that "medical office use" was acceptable; (5) the letters authored by Defendant's attorney; (6) the deposition of Lori Lamerand, Plaintiff's President and CEO; and (7) Defendant's Responses to Plaintiff's Discovery Requests.

Plaintiff argues that, because the restrictive covenant broadly permits any "office usage" of Plaintiff's property, Plaintiff's proposed medical office use is not barred by the restriction. Plaintiff continues, even if there was any ambiguity in the meaning of "office use," the ambiguity would have to be construed against Defendant, and Defendant's own admission that a medical office use was permissible is dispositive.

In response, Defendant argues that: (1) "office" does not include "medical office"; (2) the alleged waiver by Defendant is not dispositive; and (3) there is a question if Plaintiff's proposed use is actually "medical office," and not a freestanding outpatient surgical facility.

Plaintiff asserts that restrictive covenants are to be strictly construed against those creating them or claiming a right of enforcement because the imposition of the restriction on the use of a person's property results in the loss of valuable property rights. Additionally, the Michigan Supreme Court has held that restrictive covenants must be "enforced as written, and should not be extended by judicial construction." *Hill v Rabinowitch*, 210 Mich 220, 224; 177 NW2d 719 (1920).

Plaintiff also cites *Casterton v Plotkin*, 188 Mich 333; 154 NW 151 (1915), *Teagan v Keywell*, 212 Mich 649; 180 NW 454 (1920), and *City of Livonia v Dep't of Social Services*, 123 Mich App 1; 333 NW2d 151 (1983) for the proposition that the Appellate Courts "routinely refuse[] to restrict the use of land beyond that which is expressly provided in the deed, and have refused to exclude particular type of the uses that are expressly permitted where the deed restriction language provides no such exclusion."

In *Casterton*, the Michigan Supreme Court held that a restriction to "residence purposes solely" did not limit usage to a single family residence and allowed building of a 2 story, 14 family apartment building. Similarly, in *Teagan*, the Court held that the erection of the apartment house with enclosed porches did not violate the restrictive covenant that limited use to "residence purposes only." Finally, in *City of Livonia*, the Michigan Court of Appeals rejected a claim that a deed restriction to single-family use prohibited an adult foster care small group home.

Plaintiff also asserts that the property is zoned as B-2, General Business District. Although not binding, Plaintiff cites the City of Auburn Hills Zoning Ordinance that provides that "Office Districts" include "office buildings," "medical offices," and "outpatient clinics" – all of which are permitted use in B-2, General Business District.

In its Response, Defendant does not attempt to distinguish the cases cited by Plaintiff. Instead, it simply affirmatively states that "office use" does not include "medical office use" with no authority to support this position. Defendant does cite several commercial websites including "Loopnet.com" that appear to differentiate between general office and medical office for purposes of selling such properties. The Court, however, is not of the opinion that commercial-website organizational structure trumps Michigan Supreme Court jurisprudence. Defendant also cites *Bloomfield Estates Improvement Ass'n v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007) for the proposition that deed restrictions are enforced as written if unambiguous. The Court agrees.

Neither did Defendant provide any authority allowing this Court to determine if there are different regulatory requirements or schemes between the use alleged by Defendant and the Medical Office use proposed by Plaintiff. Defendant argues that there are different Federal Regulations dealing with waste; but that is not the basis of the Court's inquiry.

The Court finds that to exclude "medical offices" from the term used in the restriction would amount to extending the scope of the restrictive covenant. The covenant limits use to "restaurant, retail or office usage." The term "office" is a broad term – including many types of offices. A "medical office" is merely one of many types of "offices." In its Response, Defendant admits that "office" is defined very broadly. Defendant is the only entity in this courtroom that had the power to negotiate a narrower term. Neither the Court, nor Plaintiff had this power. Had Defendant wished to negotiate a narrower term for its restrictive covenant, it could have easily done so. It did not.

Plaintiff claims that its planned use is for a medical office. If the intention of the restrictive covenant had been to permit only non-medical office use, the instrument would have so provided. As a result, "medical office" use is permissible. This finding is required because of the Michigan Supreme Court's decisions in *Casterton* and *Teagan* and the Michigan Court of Appeals holding in *City of Livonia*. It is also consistent with the long-standing notion that "Restrictions in deeds will be construed strictly against the grantors and those claiming to enforce them, and all doubts resolved in favor of the free use of the property." *James v Irvine*, 141 Mich 376, 380; 104 NW 631 (1905).

Finally, it is apparent that Defendant does not welcome Plaintiff's presence on the adjacent property. But Defendant has failed to establish that Plaintiff has or would violate the restrictive covenant. Instead, Defendant simply makes assumptions and proposes facts not in evidence. The only legal issue before this Court is narrow – Is "medical office use" prohibited under the "office" deed restriction? For the reasons outlined above and based on the present state of the law, this Court must conclude not. Whether Plaintiff's actual use of the property ever violates City of Auburn Hills Zoning or Defendant's restrictive covenant is entirely another issue and not a part of the controversy presently before this Court.

The *Casterton* Court concluded with the following quote. "Courts 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." *Casterton*, *supra* at 344. In this case, Plaintiff has the legal right to use the property as a medical office. It is not for this Court to make moral judgments about the efficacy of that use. So long as it is allowed legally, this Court is bound to uphold the confines of the restriction.

Viewing the evidence in the light most favorable to Plaintiff, this Court concludes that there is no genuine issue of any material of fact, and Plaintiff is entitled to partial summary judgment as a matter of law. As a result, the Court declares that Defendant's restrictive covenant does not bar Plaintiff from using its property for "medical office" purposes.

IT IS SO ORDERED.

January 10, 2012____
Date

__/s/ James M. Alexander_____
Hon. James M. Alexander, Circuit Court Judge