Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-200

DECEMBER TERM, 2007

Christopher Khamnei and Holly Zanes	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
	}	
Mara Coven	}	DOCKET NO. S0109-03 CnC
		Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal the superior court's order striking plaintiffs' response to defendant's motion for summary judgment and granting summary judgment to defendant. On appeal, plaintiffs contend that the court erroneously granted the motion to strike and that plaintiffs are entitled to summary judgment because defendant's home daycare is a business and as a matter of law violates a restrictive covenant limiting use to "residence purposes only." We affirm.

The following facts are not disputed. The parties are neighbors in the Overlake Park neighborhood. Defendant has lived in her home since 1991 and has operated a daycare from her home,[1] caring for up to six three- and four-year-old children each weekday morning. The daycare is inspired by the Waldorf style of teaching and is called a "morning garden" program. Deeds to the properties in the neighborhood, including both parties', contain seven covenants, one of which specifies that "The premises shall be occupied and used for residence purposes only and not otherwise."

In January 2003, plaintiffs brought an action to enjoin defendant from operating a daycare in her home, alleging that the restrictive covenant prohibited such activity. After the court denied early motions for summary judgment, the parties agreed to stipulate to a statement of facts. A year elapsed, and the parties could not agree on a joint statement of undisputed facts. Defendant filed a motion for summary judgment on January 20, 2006 with her own statement of undisputed facts. On May 4, 2006, the court ordered plaintiffs to file a response to defendant's

[1] The trial court's findings of fact erroneously state that defendant has operated a daycare in her home since 1991. Defendant asserts that she has been operating her daycare for nine years, whereas plaintiffs contend that the daycare began in 2003, when it was officially disclosed on a zoning application. The date defendant's business began is not material to our decision.

motion for summary judgment in two weeks. On May 22, 2006, plaintiffs filed a motion for summary judgment, and on June 20 defendant filed a response. On July 24, 2006, plaintiffs filed a supplemental memorandum and a response to defendant's motion for summary judgment. Defendant filed a motion to strike the July 24 pleading as untimely. On December 19, 2006, the trial court granted defendant's motion, concluding that plaintiffs' response was six weeks late.

Based on the rest of the pleadings, the court considered the merits, and concluded that defendant's daycare did not violate the covenant. The court found that defendant's program was a home daycare and not a school or a business. Further, the court concluded that, given the circumstances surrounding the creation of the restriction, the deed restriction was not intended to prohibit home instructional programs, such as music lessons, tutoring or home childcare. Consequently, the court concluded that a home daycare is consistent with the deed's requirement that the home be used for "residence purposes only and not otherwise," and granted defendant summary judgment.

On appeal, plaintiffs first contend that there was no basis to strike their July 24 pleading. The parties vigorously debate whether the court properly granted defendant's motion to strike. Plaintiffs contend that the court abused its discretion because there was no direct order to file a response to defendant's motion for summary judgment by a certain date, and their own motion for summary judgment satisfied the court's request. We conclude that it is not necessary to reach this issue because the factual disputes that plaintiffs present have no impact on our analysis of whether the deed covenant prohibits defendant from operating a daycare in her home.[2] Even if some facts are disputed, the material facts are not. See Kelly v. Town of Barnard, 155 Vt. 296, 306 n.7 (1990) (explaining that summary judgment appropriate if the determinative facts are uncontested). Thus, we turn to the question of whether the court properly granted defendant summary judgment.

On appeal, we review a motion for summary judgment using the same standard as the trial court and will grant the moving party judgment where there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. O'Donnell v. Bank of Vt., 166 Vt. 221, 224 (1997). We resolve all reasonable doubts and inferences in favor of the party opposing summary judgment. Id.

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[2] The differences between the parties' statements of undisputed facts center on the characterization of the connection between defendant's daycare and the Lake Champlain Waldorf School (LCWS). Defendant acknowledges that she is affiliated with LCWS in terms of marketing and administrative assistance. Defendant also agrees that her program adheres to the principles of Waldorf education. Plaintiffs do not dispute defendant's facts, but supplement the facts with additional information about the scope of defendant's business relationship with LCWS. **PC 31-32, 96-101.** Plaintiffs rely on these additional facts to argue that the home daycare is a school and a business. Even accepting plaintiffs' statement of facts, we find no basis to conclude that defendant's daycare is a school. The daycare is a part-time program for three- and four-year-olds and thus simply does not meet the statutory definition of school. See 16 V.S.A. § 11(a)(3), (7), (8) (defining school as providing elementary or secondary education, beginning with kindergarten).

The issue is whether defendant's daycare violates the restrictive covenant that her property "be occupied and used for residence purposes only and not otherwise." In construing a deed restriction, we first consider the language of the deed and when the language of a deed is unambiguous, we will give effect to the terms therein. Creed v. Clogston, 2004 VT 34, ¶ 13, 176 Vt. 436. The question of ambiguity is a matter of law, which we review de novo. Id. To determine if an ambiguity exists, it is appropriate "to consider the circumstances surrounding the making of the agreement. Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable." Isbrandtsen v. N. Branch Corp., 150 Vt. 575, 579 (1988).

Thus, we examine the language of the deed and the circumstances surrounding its creation. The deed expresses an unambiguous intent that defendant's property be used for "residence purposes only." It is undisputed that defendant resides in the home and uses it as a residence full time. The question is whether the additional use of operating a daycare is consistent with the deed's restriction that it be used "for residence purposes only." The covenant was created as part of a common-development scheme to create a family neighborhood. There is no indication that the restriction was intended to prohibit home instructional programs such as music lessons, tutoring or childcare. Operation of a small home daycare does not change the character of the neighborhood. Moreover, as defendant emphasizes, state and local zoning laws recognize in-home daycares as residential uses.[3] See 24 V.S.A. § 4412(5) (including home childcare as a permitted single-family residential use); Burlington Zoning Ordinance art. 30, § 30.1.2 (2004) (defining home daycare and permitting it as an accessory use to a residence). In addition, we are mindful that restrictive covenants in deeds are strictly construed against those claiming the right to enforce them and all doubts are resolved in favor of the free use of property. Clogston, 2004 VT 34, ¶ 17. Thus, we conclude that the restriction is not ambiguous and does not bar defendant from operating her daycare.

Plaintiffs argue that the second half of the covenant, which specifies that the property be for "residence purposes only and not otherwise," unambiguously bars a residence from also being used as a daycare. (Emphasis added.) Plaintiffs contend that this language was inserted for the specific purpose of prohibiting any use other than solely residential and in support rely on Terrien v. Zwit, 648 N.W.2d 602 (Mich. 2002). In Terrien, the Michigan Supreme Court considered whether a home daycare violated a covenant prohibiting any lot to be "used except of residential purposes," or for "any commercial, industrial, or business enterprises." Id. at 605. The court concluded that the daycare was inconsistent with the terms of the covenant. The court noted that a home daycare might be allowed if the restriction permitted only residential uses. Id.

[3] Plaintiffs argue that current statutes and ordinances permitting home daycares as residential uses are irrelevant to interpreting the covenant because they were not in effect when the covenant was created. Instead, plaintiffs contend that the most instructive regulations are those that existed at the time the deeds were created and that those regulations treated childcare as a business. **AA 20; PC 59, 67, 73**. While we agree with plaintiff that current regulations do not provide definitive evidence of the covenant's meaning, we find the regulations instructive as to the common understanding of whether a home daycare is consistent with a use for residential purposes. In addition, we conclude that none of the regulations plaintiffs cite applies to home childcare programs.

at 606 (citing Beverly Island Ass'n v. Zinger, 317 N.W.2d 611, 612 (1982) (holding that home daycare did not violate a covenant specifying that "No lot or building plot shall be used except for residential purposes")). The court explained, however, that a restriction prohibiting commercial and business uses is broader than one allowing only use for residential purposes, and thus the daycare violated the restriction against business uses. Id.

We conclude that Terrien is inapplicable to the present case. As explained, Terrien relied on the restriction prohibiting commercial and business uses and recognized that some uses for residential purposes are also commercial in nature and consistent with a covenant requiring residential use. Id. at 611. In the present case, the covenant does not prohibit all commercial and business uses; rather it requires use to be for "residence purposes only and not otherwise." There is nothing in the language of the deed or the context of the deed's creation to suggest that this restriction intended to prohibit all commercial and business uses. Thus, we conclude that the deed language does not prohibit defendant from operating a home daycare.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice