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IN THE COURT OF APPEALS OF INDIANA

Sandra A. King and
Danielle D. Benge,
Appellants-Defendants,

v.

Dan Dejanovic and
Alice Dejanovic,
Appellees-Plaintiffs

May 28, 2021

Court of Appeals Case No.
20A-PL-2366

Appeal from the
Morgan Superior Court

The Honorable
Brian H. Williams, Judge

Trial Court Cause No.
55D02-1811-PL-2248

Vaidik, Judge.

Case Summary

[1] Shortly after Sandra A. King and Danielle D. Benge ("Defendants") built a pole barn that violated a restrictive covenant in their subdivision, their next-door neighbors Dan and Alice Dejanovic ("Plaintiffs") filed a complaint for breach of covenant against them. Defendants raised as an affirmative defense that

Plaintiffs waived their right to enforce the covenant by not objecting to other violations in the subdivision. The trial court found Defendants failed to prove Plaintiffs waived their right to enforce the covenant and gave Defendants ninety days to remove or reduce the size of their pole barn.

[2] Defendants now appeal. Even though there are other violations in the subdivision, they are on the "other" side of the subdivision and "not practically within sight of" Plaintiffs' property. Plaintiffs' failure to object to the other violations does not deprive them of the right to enforce the covenant for a violation right next door that directly interferes with the use and enjoyment of their property. Accordingly, we affirm the trial court.

Facts and Procedural History

[3] Monrovia Place is a thirty-three-lot subdivision in Monrovia. It was originally platted in 1996 and 1997 as Bradshaw Subdivision, Section I and Section II. Plaintiffs have lived at 3576 Renee Court East (Lot 14) in the subdivision since October 2003. Defendants purchased 3608 Renee Court East (Lot 15), which is next door to Plaintiffs, in April 2018. Although the subdivision does not have a homeowners association, there are "Covenants and Restrictions," including the following provision governing land use and building type:

> 2. **Land Use and Building Type**: No lot shall be used except for one (l) single family residential structure per lot, no less than fifteen hundred (1,500) square feet of living quarters. No buildings shall be erected, altered, placed or permitted to remain on any lot other than one (l) single family dwelling not to exceed

> two (2) stor[i]es in height and private attached garage along with one (1) out building no greater than four hundred (400) square feet in size and of construction compatible with the residential use occupying the lot. All construction shall be of minimum eighty percent (80%) brick masonry balanced around all four (4) sides of the home.

Ex. 9.

[4] In October 2018, Defendants told Plaintiffs "they wanted to build a pole barn" on their lot. Tr. p. 198. Plaintiffs told Defendants about the restrictive covenants, but Defendants said they didn't apply to them. *Id.* at 199. Construction on the pole barn began on October 22 and ended on November 7. The pole barn is between Plaintiffs' and Defendants' homes and sits about twenty feet from the property line and thirty-five feet from Defendants' house. *See*, *e.g.*, Appellant's App. Vol. II pp. 16, 115-16 (color photos). The interior of the pole barn is 30x40 feet, and it has a 10x40 porch. The facade is metal, not brick.

[5] Shortly after the pole barn was completed, on November 27, Plaintiffs filed a complaint for breach of covenant against Defendants in Morgan Superior Court.[1] Specifically, they alleged Defendants' pole barn violates paragraph 2 of

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[1] The covenants provide that homeowners must enforce any violation:

> 10. **Violations**: Enforcement shall be by proceedings at law by any homeowner in this Subdivision for any violation with the violating homeowner to be responsible for Court costs and other costs of enforcement. All property owners are placed o[n] notice that they risk, through enforcement, the removal of any violation and the cost associated with the

the covenants because it "greatly exceeds" 400 square feet, does not consist of 80% brick masonry, and is not of "construction compatible with the residential use occupying the lot." *Id.* at 12. Defendants, who do not dispute their pole barn violates paragraph 2 of the covenants, *see* Appellant's Br. p. 6, alleged as an affirmative defense that Plaintiffs waived their right to enforce the covenant by not objecting to other violations in the subdivision.

[6] A bench trial on the affirmative defense of waiver was held in August 2020. Evidence was presented about other violations in the subdivision, including detached garages, utility sheds, and other pole barns. In December 2020, the trial court issued an order finding Plaintiffs did not waive their right to enforce the covenant because the other violations, which are on the "other" side of the subdivision, do not affect their property like Defendants' pole barn does. Appellant's App. Vol. II p. 145. The court gave Defendants "90 days to bring their property into conformance with the applicable covenants and restrictions, by removal or reducing the size of the structure." *Id.* at 147. The court also ordered Defendants to pay Plaintiffs $12,913.13 in attorney fees.

[7] Defendants now appeal.

> removal including Court costs, attorney fees and other costs of enforcement of these Covenants and Restrictions.

Ex. 9.

Discussion and Decision

[8] Defendants appeal the trial court's determination that Plaintiffs did not waive their right to enforce the restrictive covenant. Waiver, or acquiescence, is an affirmative defense to the enforcement of a restrictive covenant. *See Roberts v. Henson*, 72 N.E.3d 1019, 1030 (Ind. Ct. App. 2017); *Hrisomalos v. Smith*, 600 N.E.2d 1363, 1367 (Ind. Ct. App. 1992); *see also* 20 Am. Jur. 2d *Covenants* § 229 (May 2021 update) ("The right to enforce a restrictive covenant may be lost by waiver or acquiescence, and waiver is a long-recognized defense to the equitable enforcement of restrictive covenants." (footnote omitted)). Accordingly, Defendants bore the burden of proving by a preponderance of the evidence that Plaintiffs waived their right to enforce the restrictive covenant. *Cnty. of Lake v. Pahl*, 28 N.E.3d 1092, 1099 (Ind. Ct. App. 2015) ("[A] party pleading an affirmative defense has the burden of proving an affirmative defense by a preponderance of the evidence."), *reh'g denied, trans. denied*; 42 Am. Jur. Proof of Facts 3d 463 § 8 (Apr. 2021 update). "A party who had the burden of proof at trial appeals from a negative judgment and will prevail only if it establishes that the judgment is contrary to law." *Pahl*, 28 N.E.3d at 1099. A judgment is contrary to law only when the evidence is without conflict, and all reasonable inferences to be drawn from the evidence lead to only one conclusion, yet the trial court reached a different conclusion. *Id.* "Courts reviewing restrictive covenant cases have been reluctant to find that a waiver exists." 42 Am. Jur. Proof of Facts 3d 463 § 9 (April 2021 update).

[9] Whether the defense of acquiescence may be invoked "depends on the factual circumstances." *Roberts*, 72 N.E.3d at 1030 (quotation omitted). In *Hrisomalos*, this Court identified three factors helpful in determining whether a plaintiff has waived the right to enforce a restrictive covenant:

> 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.

600 N.E.2d at 1368. But "the focus is the effect of the alleged prior violations upon the ability of the [plaintiff] to enjoy the benefits of the covenant, compared to the potential abridgement of the [plaintiff's] enjoyment of the covenant's benefit caused by the violation sought to be enjoined." *Roberts*, 72 N.E.3d at 1030. In other words, a property owner's failure to object to a violation on a "remotely situated" lot does not deprive them of the right to enforce a covenant for a violation on a lot "in close proximity" that is "especially and directly injurious to [them]." 43 Am. Jur. Proof of Facts 3d 473 § 23 (April 2021 update). Holding otherwise

> would impose too great a burden on a landowner to have to police violations on lots located some distance from [their] property. Moreover, a violation on a distant street in the subdivision may not directly interfere with the landowner's use and enjoyment of [their] property. Thus, a subdivision lot owner who seeks to enjoin a violation on an adjacent or nearby parcel should not be estopped from enforcing the covenant restrictions

> simply because [they] did not contest a violation on a more distant lot or street in the subdivision.

Id.

[10] Here, there were nonconforming structures—detached garages, utility sheds, and pole barns—on eleven of the thirty-three lots when Defendants built their pole barn. *See* Ex. 10, p. 26; Ex. 28, p. 72. The trial court acknowledged there are "a large number" of violations in the subdivision. Appellant's App. Vol. II p. 144. The court also acknowledged there is no homeowners association and that the individual landowners had not been diligent in enforcing the covenants. However, the court found there were pole barns on only three other lots—Lots 23, 26, and 27—when Defendants built their pole barn, which represented about 10% of the lots.[2] In addition, the court found that although the pole barns are of "similar construction," Defendants' pole barn is 33% larger than the others. *See id.* at 146 (trial court's finding that the largest of the other three pole barns is "30x40" feet but that Defendants' pole barn, "with overhang," is "40x40" feet, thus "exceed[ing] the size of any previously tolerated non-conforming structure by 33% (400Sqft.)").

[2] The trial court noted that while this case was pending, a 2,500+ square-foot pole barn was built on Lot 22. The court said it was not considering this pole barn in its analysis since it did not exist when Defendants built their pole barn. *See* Appellant's App. Vol. II p. 145 n.2. The court was correct not to consider the pole barn on Lot 22.

[11] Moreover, the trial court found that the other pole barns are "all on the other (western) side of the subdivision" and "not practically within sight of" Plaintiffs' property, which "is on the eastern edge of the subdivision."[3] *Id.* at 145. The court explained how the other pole barns do not affect Plaintiffs' property like Defendants' pole barn does:

> Plaintiffs['] ingress and egress route does not place Lots 23, 26 and 27 in their visual path, and they would be unlikely to even see the structures except at a distance and in a cursory way. The location and proximi[]ty of the structure at issue is about as close as a building could be under the county development standards and is a few feet from the property line of the [P]laintiffs. It is now the promin[]ent feature that may be seen from the back porch of the Plaintiff[s'] home. **The non conforming uses in place prior had a minimal impact on the Plaintiffs['] enjoyment of the character of the neighborhood. The current structure created a significant change in the character of the neighborhood in the immediate area of the Plaintiff[s'] home.**

Id. (emphasis added).

[12] Defendants have failed to establish the trial court's judgment is contrary to law. Plaintiffs' failure to object to the other violations in the subdivision does not deprive them of their right to enforce the covenant for a violation right next door to them and "about as close as a building could be under the county

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[3] Besides the pole barns on Lots 23, 26, and 27, the following lots have detached garages and/or utility sheds: Lots 5, 8, 17, 21, 30, 31, and 33. Defendants do not tell us where these structures are in relation to Plaintiffs' house. However, according to a map of the subdivision, there are six lots on the street where Plaintiffs and Defendants live—Lots 11-16. *See* Ex. 13, p. 54.

development standards." As the trial court found, "[t]he non conforming uses in place prior had a minimal impact on the Plaintiffs['] enjoyment of the character of the neighborhood." The same cannot be said about Defendants' pole barn. *See*, *e.g.*, *id.* at 16, 115-16. Plaintiffs are not required to "police" violations in other parts of the subdivision that do not directly interfere with the use and enjoyment of their property. To hold otherwise would require Plaintiffs to use their own time and money to enforce covenants in areas that don't affect them to preserve their right to enforce covenants in areas that do. We therefore affirm the trial court.[4]

[13] Affirmed.

Bradford, C.J., and Brown, J., concur.

[4] Defendants argue *Ellis v. George Ryan Co.*, 424 N.E.2d 125 (Ind. Ct. App. 1981), controls this case. In *Ellis*, a restrictive covenant, which allowed only single-family dwellings, was signed in 1940 by "six of the eight property owners along Baker Avenue in Evansville." *Id.* at 126. A developer later bought one of the lots and intended to build a six-story condo on it. The developer filed a declaratory-judgment action to determine the validity of the covenant. The trial court found in favor of the developer on "two independent grounds": (1) the covenant wasn't legally enforceable because not all the property owners signed it in 1940 and (2) the property owners waived their right to enforce the covenant because there had been "repeated violations" over the years. *Id.* We find *Ellis* distinguishable for two reasons. First, in that case we affirmed the trial court's ruling in favor of the alleged violator, whereas here Defendants are appealing from a negative judgment. Second, in *Ellis*, all the property owners on the street were parties to the case, and there was no issue of proximity as there is here.