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IN THE COURT OF APPEALS OF INDIANA

Geist Lake Forest Property Owners' Association, Inc.,

Appellant-Plaintiff/Counterclaim-Defendant,

v.

Taso's Toys, LLC,

Appellee-Defendant/Counterclaim-Plaintiff.

Taso's Toys, LLC,

Appellee-Defendant/Counterclaim-Plaintiff,

v.

Geist Lake Forest Property Owners' Association, Inc., and RREF II RB-IN VM, LLC,

June 8, 2022

Court of Appeals Case No. 21A-PL-2021

Appeal from the Hamilton Superior Court

The Honorable David K. Najjar, Special Judge

The Honorable P. Chadwick Hill, Magistrate

Trial Court Cause No. 29D05-2009-PL-6725

Appellants-Plaintiffs/Counterclaim-Defendants.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff/Counterclaim-Defendant, Geist Lake Forest Property Owners' Association, Inc. (the Association), and Appellant/Counterclaim-Defendant, RREF II RB-IN VM, LLC (RREF), appeal the trial court's grant of summary judgment in favor of Appellee-Defendant/Counterclaim-Plaintiff, Taso's Toys, LLC (TT).

[2] We affirm in part, reverse in part, and enter summary judgment for the Association and RREF.

ISSUES

[3] The Association and RREF present this court with four issues, which we restate as:

(1) Whether a declaration pertaining to the real estate at issue was valid after a second declaration pertaining to the same real estate was subsequently recorded;

(2) Whether RREF had the authority to form the Association;

(3) Whether certain real estate was exempted from covenants; and

(4) Whether a building on certain real estate violated covenants.

FACTS AND PROCEDURAL HISTORY

[4] The following facts are not in dispute. Prior to June 12, 2006, Vasilis Makris (Makris) became the owner of six separate contiguous parcels of real estate, namely, Lots 1 through 6, (collectively, the Development), east of Florida Road near Geist Reservoir in Hamilton County, Indiana. On June 12, 2006, Makris, as "Developer", executed the Declaration of Covenants, Conditions and Restrictions of Geist Lake Forest Subdivision (2006 Declaration) providing certain restrictions on the use of the land in the Development, including the type of structures permitted to be built on the Lots. (Appellants' App. Vol. II, p. 42). The 2006 Declaration also provided for the formation of a homeowners association. Attached to the 2006 Declaration as Exhibit A were documents purporting to describe the real estate comprising the Development. On June 14, 2006, the 2006 Declaration was recorded with the Hamilton County Recorder's Office.

[5] On April 5, 2007, Makris executed a second Declaration of Covenants, Conditions and Restrictions of Geist Lake Forest Subdivision (2007 Declaration) which was materially the same as the 2006 Declaration except that different documents describing the real estate comprising the Development were appended to it as Exhibit A. On April 23, 2007, the 2007 Declaration was recorded with the Hamilton County Recorder's Office.

[6] In September of 2009, when Makris still owned all the Lots in the Development, he constructed a building on Lot 4 (the Building) which is a free-standing outbuilding made of steel, has a steel roof, and is not a residence. On some date which is unclear from the record, Makris mortgaged all the Lots. After recording a partial release of Lot 4 from the holder of the mortgages, on January 27, 2012, Makris sold Lot 4 and its improvements to TT, an Indiana limited liability company, and conveyed the lot to TT via a special warranty deed which was recorded on February 22, 2012. Anastasios Nikou (Nikou) is the sole member of TT, which was incorporated on January 11, 2012.

[7] On February 7, 2013, the holder of the mortgages on Lots 1, 2, 3, 5, and 6 filed a foreclosure action against Makris. On October 14, 2013, while the foreclosure action was pending, Makris and Nikou, as representative of TT, executed the "First Amendment to Declaration of Covenants, Conditions, and Restrictions of Giese [sic] Lake Forest Subdivision: Exemption of Lot 4" (First Amendment) which identified the 2007 Declaration and provided that the 2007 Declaration governed all the Lots. (Appellants' App. Vol. II, p. 162). The First Amendment identified TT as the owner of Lot 4 and Makris as Developer and owner of the remaining Lots. Makris and TT acknowledged and confirmed that Lot 4 had "multiple preexisting nonconforming improvements, which improvements are in technical violation of the Declaratio[n]" and that "[i]n light of the foregoing, the undersigned agree and now declare that Lot 4 of the [Development] shall be exempt from any constraints of the Declaration." (Appellants' App. Vol. II, p. 162). The First Amendment further provided that "the Developer", Makris,

declared Lot 4 exempt from the Declaration. (Appellants' App. Vol. II, p. 162). On October 21, 2013, the First Amendment was recorded with the Hamilton County Recorder's Office.[1]

[8] Makris never incorporated the homeowners association contemplated by either the 2006 Declaration or the 2007 Declaration. On November 17, 2016, as a result of the foreclosure action, all the Lots except Lot 4 were sold at a sheriff's sale to RREF's predecessor in interest. On June 29, 2017, RREF's predecessor in interest quitclaimed its Lots to RREF. Thereafter, RREF was the owner of all the Lots in the Development except Lot 4.

[9] On February 5, 2020, RREF formed the Association. Neither Makris nor TT took part in the formation of the Association. Starting in February 2020, the Association's legal counsel began sending letters to TT identifying the Association as "the homeowners association for [the Development]," claiming to have the authority to enforce the 2006 Declaration and demanding that TT rectify what the Association contended were TT's violations of the 2006 Declaration. (Appellants' App. Vol. II, p. 19). TT did not respond to or satisfy the Association's demands.

[10] On September 24, 2020, the Association filed its Complaint, alleging that TT had violated the 2006 Declaration by, among other things, having a free-standing building on Lot 4 that was non-residential, made of prohibited materials, and had

[1] On November 5, 2013, and November 10, 2016, Makris recorded two additional versions of the First Amendment. Neither party bases any appellate arguments on these subsequent versions.

prohibited roofing. The Association sought a declaratory judgment that Lot 4 is bound by the 2006 Declaration, damages for breach of the 2006 Declaration, and permanent injunctive relief enjoining TT's further violation of the 2006 Declaration and requiring TT to remedy its violations. In its answer to the Association's Complaint, TT generally denied the Association's allegations and raised the affirmative defense that the Association lacked standing to bring suit, alleging that the Association was not validly formed under the 2007 Declaration or Indiana law. In addition, TT counterclaimed against the Association and RREF, seeking a declaratory judgment that TT was exempt from the 2006 and 2007 Declarations and that the Association was not validly formed under Indiana law or the 2006 and 2007 Declarations.

[11] On January 22, 2021, the Association and RREF filed a motion for partial summary judgment, memorandum in support, and designation of evidence, arguing that no genuine issues of material fact existed that the 2006 Declaration applied to Lot 4 and the First Amendment was invalid; the Building on Lot 4 violated the 2006 Declaration; and that RREF had validly formed the Association. On April 19, 2021, TT filed its motion in opposition to the Association's summary judgment motion, a cross-motion for partial summary judgment on its own behalf, a memorandum in support, and a designation of evidence. TT argued that no genuine issues of material fact existed that the First Amendment exempted Lot 4 from the 2007 Declaration, which had superseded the 2006 Declaration; the Building on Lot 4 did not violate the 2007 Declaration; and the Association was not validly formed. After additional briefing by the parties, on August 20, 2021,

the trial court held a hearing on the parties' cross-motions for partial summary judgment. The parties submitted proposed findings of fact and conclusions thereon.

[12] On September 8, 2021, the trial court issued its order, finding that no genuine issues of material fact existed, concluding that there was no just reason for delay, denying the Association's motion for partial summary judgment, and granting partial summary judgment in favor of TT. The trial court found that the 2007 Declaration had superseded the 2006 Declaration "in accordance with [] Makris' intention" and concluded that the First Amendment validly exempted Lot 4 from the 2007 Declaration because Makris and TT, the only parties whose consent was required, had both assented to the exemption. (Appellants' App. Vol. II, p. 13). Regarding the issue of RREF's authority to form the Association, the trial court found that

> [b]ecause Lot 4 was permanently exempted from the restrictive covenants on the Lots effective October 21, 2013, TT lacks standing to challenge whether [the Association] constitutes a validly incorporated "Association" for the Lots under the 2006 [sic] Declaration given that [the Association] was not incorporated until 2020; and [the Association's] competing motions for summary judgment on that issue are both denied.

(Appellants' App. Vol. II, pp. 17-18). The trial court entered final judgment against the Association on all its requests for relief asserted in its Complaint.

[13] The Association and RREF now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[14] The Association and RREF appeal the trial court's grant of partial summary judgment in favor of TT. Summary judgment is appropriate if the designated evidence "shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). We review both the grant or denial of summary judgment de novo and apply the same standard as the trial court. *Kerr v. City of South Bend*, 48 N.E.3d 348, 352 (Ind. Ct. App. 2015). The party moving for summary judgment bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Sargent v. State*, 27 N.E.3d 729, 731 (Ind. 2015). "Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact." *Id.* at 731-32. "All disputed facts and doubts as to the existence of material facts must be resolved in favor of the non-moving party." *Kerr*, 48 N.E.3d at 352. If the facts are undisputed, we determine the law applicable to those facts, and whether the trial court correctly applied it. *King v. Ebrens*, 804 N.E.2d 821, 825 (Ind. Ct. App. 2004). Here, the parties submitted cross-motions for summary judgment. Cross-motions for summary judgment do not affect our standard of review, and we simply construe the facts most favorably to the non-moving party in each instance. *Alexander v. Linkmeyer Dev. II, LLC*, 119 N.E.3d 603, 612 (Ind. Ct. App. 2019).

[15] The trial court adopted TT's proposed findings of fact and conclusions verbatim. TT's proposed order, and thus the trial court's order on summary judgment, did not contain any citation to legal authority. Although the wholesale adoption of one party's proposed order by the trial court is not prohibited, this court has recognized that the practice tends to weaken our confidence as an appellate court that the trial court's findings and conclusions are the result of its considered judgment. *Chubb Custom Ins. Co. v. Standard Fusee Corp.*, 2 N.E.3d 752, 758 n.2 (Ind. Ct. App. 2014). However, we have also recognized that those concerns are diminished where, as here, our standard of review is de novo. *Id*.

II. *2006 Declaration versus 2007 Declaration*

[16] We first address a threshold matter of whether the 2006 Declaration was still in effect after Makris executed and recorded the 2007 Declaration. This issue underpinned one of the Association's summary judgment arguments that the First Amendment did not effectively exempt Lot 4 from the restrictive covenants at issue because the First Amendment only purported to exempt Lot 4 from the 2007 Declaration. As a result, the Association argued below that Lot 4 was still subject to the covenants contained in the 2006 Declaration. The trial court concluded that the 2007 Declaration controlled based on Makris' intent that it had superseded or replaced the 2006 Declaration. Although we agree with the trial court that the 2007 Declaration applies to the instant dispute, we do so on a different basis.

[17] A valid legal description of the property to be burdened by a restrictive covenant is an essential term of an enforceable covenant. *See Kosciusko Cnty. Cmty. Fair, Inc. v. Clemens*, 116 N.E.3d 1131 (Ind. Ct. App. 2018) (rejecting the Fair's argument that

the restrictive covenant at issue was unenforceable for failing to have a legal description of the benefiting properties, where the covenant clearly identified the burdened party and included a legal description of the burdened real estate). Here, Makris had appended a variety of documents to the 2006 Declaration as Exhibit A purporting to describe the real estate in the Development to which the Declaration, including its covenants, applied. Makris designated evidence in his summary judgment pleadings that he believed Exhibit A to the 2006 Declaration to be a legally insufficient description of the Development's real estate which led him to record the 2007 Declaration, which was identical to the 2006 Declaration except for the documents appended as Exhibit A comprising legal descriptions of Lots 1 through 6. Although the Association and RREF sought enforcement of the 2006 Declaration, they have never disputed the legal deficiency of the documents attached to the 2006 Declaration or the legal sufficiency of the documents attached to the 2007 Declaration for purposes of establishing an enforceable covenant. We conclude, therefore, that there is no genuine issue of material fact that the 2006 Declaration was invalid and unenforceable, and we affirm the trial court's summary judgment that the 2007 Declaration controlled here. *See Nat'l Wine & Spirits, Inc. v. Ernst & Young*, 976 N.E.2d 699, 703 (Ind. 2012) ("If the trial court's summary judgment can be sustained on any basis in the record, we affirm."). All subsequent references to the Declaration are to the 2007 Declaration.

III. *Formation of the Association*

[18] We next address another threshold issue: whether RREF had the authority to form the Association after Makris failed to do so. TT contends that this court does

not have jurisdiction to consider the validity of the formation of the Association because the trial court did not enter final judgment on the issue. However, both parties moved for summary judgment on RREF's authority to form the Association, and the issue was fully briefed and argued by the parties. Where the parties file cross-motions for summary judgment, "we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *Hamilton v. Hamilton*, 132 N.E.3d 428, 434 (Ind. Ct. App. 2019). We observe that, as a result of its conclusion that Lot 4 was validly exempted from the Declaration, the trial court found that TT lacked standing to challenge the validity of the Association, and, therefore, the trial court did not reach the merits of TT's motion for summary judgment on the issue. However, the trial court denied the Association's and RREF's motion and expressly entered final judgment against them on this issue as well as on all the claims brought in the Association's Complaint. Therefore, the issue is squarely before us. *See* Ind. Trial Rule 56(C) (providing that a summary judgment on less than all the issues or claims is interlocutory unless the trial court expressly and in writing determines that there is no reason for delay and enters judgment); Ind. Appellate Rule 5(A) (providing that this court has jurisdiction in all appeals from final judgments). The trial court's failure to enter findings and conclusions regarding its denial of summary judgment to the Association and RREF on this issue should not be confused with a failure to enter a final reviewable judgment. Moreover, the trial court's failure to enter findings and conclusions regarding its denial of the Association's and RREF's motion on the issue does not preclude our review. *See AutoXchange.com. Inc. v. Dreyer and Reinbold, Inc.*, 816 N.E.2d 40, 48 (Ind. Ct. App. 2004) (holding that,

while special findings offer this court valuable insight into the trial court's rationale for its review and facilitate appellate review, they are not required); *see also King*, 804 N.E.2d at 825-31 (reviewing the issue of homeowners' standing to enforce covenants after entry of an order that their cross-motion for summary judgment was simply "denied"). Accordingly, we will address the merits of the Association's and RREF's claim.

A. *Declaration Provisions*

[19] The relevant portions of the Declaration pertaining to the formation of the homeowners association were as follows:

> RECITALS
>
> * * *
>
> 4. Developer further desires the creation of an organization to which shall be assigned the responsibility for maintaining and administering the common areas and certain other areas of the Real Estate and of administering and enforcing the covenants and restrictions contained in this Declaration as hereafter recorded in the office of the Recorder of Hamilton County, Indiana and of collecting and disbursing assessments and charges as herein provided.
>
> * * *
>
> DEFINITIONS
>
> * * *

> 1.1 "Association" means the Geist Lake Forest Property Owners' Association, Inc., an Indiana not-for-profit corporation, which Developer has caused or will hereafter cause to be incorporated, and its successors and assigns.
>
> * * *
>
> 1.5 "Developer" means [] Makris, and any successors or assigns whom he designates in one or more written recorded instruments to have the rights of Developer hereunder.

(Appellants' App. Vol. III, pp. 194-96).

B. *Analysis*

[20] Relying on extra-jurisdictional authority and the Third Restatement of Property, the Association argues that we should hold as a matter of first impression that, where a declaration provides authority to a developer to create a homeowners association but the developer fails to do so, subsequent property owners may validly form the association. TT counters that we should apply the plain language of Section 1.1 cited above and hold that Makris, as Developer, was the only entity entitled to incorporate the Association. It is undisputed that the Declaration provided authority for the creation of a homeowners association. We interpret declarations containing covenants as we do other forms of written contracts, namely, as a pure question of law which we review de novo. *Village Pines at the Pines of Greenwood Homeowners' Assn., Inc., v. Pines of Greenwood*, *LLC*, 123 N.E.3d 145, 156 (Ind. Ct. App. 2019). The goal is to ascertain the intent of the parties, which we determine by looking within the four corners of the document. *Id*. As a general matter of contract interpretation, we do not construe clear and

unambiguous provisions, and we give the contract's clear and unambiguous language its ordinary meaning. *Lake Imaging, LLC v. Franciscan Alliance, Inc.*, 182 N.E.3d 203, 211 (Ind. 2022).

[21] Here, we need not reach the larger question of whether subsequent property owners may always create a homeowners association if the developer failed to do so, because we conclude that the clear and unambiguous language of the Declaration at issue here and the deed conveying Lots 1, 2, 3, 5, and 6 to RREF's predecessor in interest provided RREF with the authority to form the Association. Section 1.1 of the Declaration defines the Association as one "which Developer has caused or will hereafter cause to be incorporated[,]" thus providing the Developer with the authority to form the entity. (Appellants' App. Vol. III, p. 195). Section 1.5 defines the Developer as "Makris, and any successors or assigns whom he designates in one or more written recorded instruments to have the rights of Developer hereunder[,]" thus expanding the definition of 'Developer' to Makris' successors and assigns to whom he designates his rights. (Appellants' App. Vol. III, p. 196). As part of its summary judgment filings, the Association designated the Sheriff's Deed that conveyed Lots 1, 2, 3, 5, and 6 to RREF's predecessor in interest

> [t]o have and to hold the interest in the premises aforesaid transferred herein with the privileges and appurtenances to said Purchaser, its grantee and assigns, forever, in full and ample manner with all rights, title, and interest held or claimed by [Makris.]

(Appellants' App. Vol. III, p. 244). The Association also designated a copy of RREF's predecessor's quitclaim deed conveying those Lots and "all right, title, and interest Grantor may have" in that real estate to RREF. (Appellants' App. Vol. III, p. 245). We conclude that this evidence showed that there was no genuine issue of material fact that RREF had procured all of Makris' interests in Lots 1, 2, 3, 5, and 6, including his right to form the Association.

[22] On appeal, TT does not directly address section 1.5's clear and unambiguous language expanding the definition of 'Developer' to Makris' successors and assigns or the legal sufficiency of the transfer of Makris' rights as Developer to RREF. Rather, TT argues that it "is also the Developer's successor and assign given that TT received its deed to Lot 4 from [] Makris" and that it could, therefore, also incorporate a competing association, as could any other number of subsequent owners. (Appellee's Br. p. 43). We find this argument unpersuasive for at least two reasons. Although the Special Warranty Deed conveying Lot 4 from Makris to TT provided that the conveyance was subject to all "covenants, conditions, restrictions, and other matters of record[,]" it did not contain any provision specifically transferring all of Makris' rights and interests in Lot 4 to TT. (Appellants' App. Vol. III, p. 66). Therefore, it is not clear that Makris' interest in Lot 4 as Developer was conveyed to TT via the Special Warranty Deed in the same manner that it was conveyed to RREF through the Sheriff's Deed. In addition, whether TT and/or any other subsequent property owners also have the authority to form a homeowners association is a separate and distinct issue that is outside the confines of the question before us on review of these summary

judgment proceedings, which is whether RREF had the authority to form the Association. We also reject TT's argument that, in order for the Association to be validly formed, RREF was required to provide TT with notice and hold a formal vote on the matter. TT does not support its argument with any reference to the Declaration, and we do not find any provision in the Declaration that mandates notice and a hearing prior to the formation of an association. Concluding that RREF had the requisite authority to form the Association under the Declaration, we reverse the trial court's denial of the Association's and RREF's motion for summary judgment on that issue.

IV. *Validity of the First Amendment*

[23] RREF also challenges the trial court's determination that the First Amendment validly exempted Lot 4 from the Declaration.

A. *Declaration Provisions*

[24] The relevant provisions of the Declaration pertaining to amendments are as follows:

> AMENDMENTS
>
> 11.1 By the Association. Except as otherwise provided in this Declaration, amendments to this Declaration shall be proposed and adopted in the following manner:
>
> (i) Notice. Notice of the subject matter of any proposed amendment shall be included in the notice of the meeting of the members of the Association at which the proposed amendment is to be considered.

(ii) Resolution. A resolution to adopt a proposed amendment may be proposed by the Board of Directors or Owners having in the aggregate at least a majority of votes of all Owners.

(iii) Meeting. The resolution concerning a proposed amendment must by adopted by the vote required by subparagraph (iv) below at a meeting of the members of the Association duly called and held in accordance with the provisions of the Association's By-Laws.

(iv) Adoption. Any proposed amendments to this Declaration must be approved by a vote of not less than seventy-five percent (75%) of such votes. In any case, provided, however, that any such amendment shall require the prior written approval of the Developer so long as Developer or any entity related to Developer owns any Lot or Residence Unit within the Real Estate. In the event any Residence Unit is subject to a first mortgage, the Mortgagee shall be notified of the meeting and the proposed amendment in the same manner as an Owner provided the Mortgagee has given prior notice of its mortgage interest to the Board of Directors of the Association in accordance with the provisions of the foregoing sub-section 10.2

11.2 By the Developer. Developer hereby reserves the right, so long as Developer or any entity related to Developer owns any Lot or Residence Unit within and upon the Real Estate, to make any *technical amendments* to this Declaration, without the approval of any other person or entity, for any purpose reasonably deemed necessary or appropriate by the Developer, including without limitation: to bring Developer or this Declaration into compliance with the requirement of any statute, ordinance, regulation or order of any public agency having jurisdiction thereof, to conform with zoning covenants and conditions; to comply with the requirements of the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage

> Corporation, the Department of Housing and Urban Development, the Veterans Administration or any other governmental agency or to induce any of such agencies to make, purchase, sell, insure or guarantee first mortgages, *or to correct clerical or typographical errors in this Declaration or any amendment or supplement hereto*; provided, however, that in no event shall Developer be entitled to make any amendment which has a material adverse effect on the rights of any Mortgagee, or which substantially impairs the rights granted by this Declaration to any Owner or substantially increases the obligations imposed by this Declaration on any Owner.

(Appellants' App. Vol. III, pp. 222-23) (emphasis added). The Declaration, therefore, set out two avenues for modification of its terms: either by the Association (Section 11.1) or by the Developer (Section 11.2).

B. Analysis

[25] It is undisputed that, when Makris conveyed Lot 4 to TT, Lot 4 became subject to the covenants at issue. In concluding that the First Amendment exempted Lot 4 from the covenants, the trial court found that

> 6. Section 11.1(iv) of the 2007 Declaration provides that "[a]ny proposed amendments require approval of not less than 75% of the owners, and shall require approval of the Developer so long as Developer owns any property in the [Development.]

(Appellants' App. Vol. II, p. 14) (no end quote in the original). Section 11.1(iv) provides authority for changes by the homeowners association. However, it is undisputed that the Association did not exist at the time Makris and TT executed the First Amendment, and, therefore, Section 11.1(iv) could not have

provided the authority for Makris and TT to execute and record the First Amendment.

[26] We turn to the second possible avenue for the valid exemption of Lot 4 via the First Amendment: Section 11.2 pertaining to modifications by the Developer. Neither party has identified any ambiguity in Section 11.2, and we do not find it to contain any. Therefore, we will not construe the provision, and we give the provision's clear and unambiguous language its ordinary meaning. *See Lake Imaging, LLC*, 182 N.E.3d at 211. Section 11.2 contains four parameters for modification of the Declaration by the Developer which could be relevant for our purposes: (1) Developer may make "technical amendments" to the Declaration for any purpose the Developer deems reasonably necessary, including the correction of clerical or typographical errors; (2) the Developer may not make amendments that have a material adverse effect on the rights of any Mortgagee; (3) the Developer may not make amendments that substantially impair the rights granted to any Owner by the Declaration; and (4) the Developer may not make amendments that substantially increase the obligations imposed on any Owner by the Declaration. (Appellants' App. Vol. III, p. 223). As such, the Declaration authorizes the Developer to make only those 'technical amendments' that do not materially adversely affect the rights of Mortgagees, substantially impair the rights of Owners, or substantially increase the obligations imposed on Owners.

[27] In *Village Pines*, a developer and builder of a residential community attempted to exempt themselves from their obligations under a duly-recorded declaration to pay assessments to the homeowners association by amending the declaration to

exclude themselves from the definition of 'Owners' required to pay assessments. *Village Pines*, 123 N.E.3d at 151-52. The developer and builder purported to affect the amendment under the following provision of the declaration:

> 12.3 By Declarant. Notwithstanding anything herein to the contrary, Declarant hereby reserves the right until the expiration of the Development Period to make such amendments to this Declaration as may be deemed necessary or appropriate by Declarant, without the approval of any other person or entity, in order to bring Declarant into compliance with the requirements of any statute ordinance, regulation or order of any public agency having jurisdiction thereof, or to correct clerical or typographical errors in this Declaration or any amendment or supplement hereto; provided that Declarant shall not be entitled to make any amendment which has a materially adverse effect on the rights of any Mortgagee, nor substantially impairs the benefits of this Declaration to any Owner or substantially increases the obligations imposed by this Declaration on any Owner.

Id. at 150. The homeowner's association challenged the amendment to the declaration as part of its complaint alleging breach of contract and fiduciary duties on the part of the developer and the builder. *Id*. at 152-53. This court held that the developer and builder had breached the declaration's amendment process because an amendment purporting to exclude the developer and builder from the definition of 'Owners' was not one which merely corrected clerical or typographical errors. *Id*. at 157. We also concluded that, because the declaration provided for the assessment obligations to be shared equally among association members and their lots, including the builder, we were not persuaded that the amendment had not increased any burden on any

homeowner or had not substantively changed any homeowner's rights or obligations within the meaning of the declaration's amendment provision. *Id*. Due to these breaches of the declaration's amendment provision, we reversed the trial court's entry of judgment in favor of the developer and builder. *Id*. at 157-58.

[28] In light of *Village Pines*, we conclude that Makris and TT exceeded the limits of their authority under the Declaration and breached the Declaration's amendment process when they executed the First Amendment. An amendment that purports to exclude one of six tracts from a declaration materially changes the declaration and cannot be characterized as a 'technical amendment' or the correction of a clerical or typographical error. Because the First Amendment did not even meet the first hurdle under the Declaration of being a 'technical amendment', we need not consider whether there was an absence of genuine issue of material fact regarding whether the First Amendment materially adversely affected the rights of Mortgagees, substantially impaired the rights of Owners, or substantially increased the obligations imposed on Owners.

[29] TT essentially argues, as it did below, that because TT and Makris represented 100% of the property owners of the real estate comprising the Development at the time they executed the First Amendment, they were free to ignore the Declaration and amend it at will. Quoting *Wischmeyer v. Finch*, 231 Ind. 282, 285, 107 N.E.2d 661, 663 (Ind. 1952), TT contends that "'[t]he general rule is that so long as the owner of land on which building restrictions have been established continues to own the entire tract, he may modify the restrictions in any manner he sees fit.'"

Apart from the fact that Makris was not the only owner at the time he and TT executed the First Amendment, *Wischmeyer* is not persuasive here because it did not involve covenants which were part of a larger declaration that imposed express limits on its amendment. *Id*. (covenants at issue contained in a simple deed). We also reject TT's other authority, holding that owners of land subject to a covenant may not modify the covenant unless all the owners agree to do so, for the same reason: the case TT cites did not involve a scenario wherein the declaration setting out the covenant also contained express provisions limiting the modification of the declaration itself. *See Adult Grp. Props., Ltd. v. Imler*, 505 N.E.2d 459, 461 (Ind. Ct. App. 1987) (plat for subdivision provided that no buildings could be constructed without preapproval of the Board, but opinion is silent regarding any processes contained in plat for amendment to plat itself)*, trans. denied*.

[30] Neither are we persuaded by TT's reliance on the general principle of contract law that parties to a contract may voluntarily modify that contract. Matters involving restrictive covenants touch on issues of contract and real property. *See*, *e.g.*, *Columbia Club, Inc. v. American Fletcher Realty Corp.*, 720 N.E.2d 411, 417 (Ind. Ct. App. 1999) (acknowledging that "the law of contracts and property may both be implicated in a breach of contract action, especially when a contract concerns the promises in instruments relating to real estate, which are known as covenants"), *trans. denied*. In the absence of any legal authority directly supporting TT's position, we cannot agree that TT and Makris, whose own Lots were without dispute still subject to mortgages which were in the process of being foreclosed upon, could simply ignore the Declaration's amendment provisions and exempt

Lot 4 based only on their mutual assent. Accordingly, we conclude that Lot 4 was not validly exempted from the Declaration by the First Amendment.

V. *Violations of the Declaration*

[31] Due to our previous conclusions, we address the Association's and RREF's claim that the trial court improperly denied their motion for summary judgment on the issue of whether the Building violated the Declaration.

A. *Declaration Provisions*

[32] The Association and RREF moved for summary judgment based on the following provisions of the Declaration:

> USE RESTRICTIONS
>
> * * *
>
> 4.5 Other Restrictions
>
> * * *
>
> c. Exterior Construction. The finished exterior of every building constructed or placed on any Lot in the Development shall be of brick, stone or stucco building material exclusive of windows, doors and vents.
>
> * * *
>
> l. Outbuildings. No freestanding detached outbuilding will be permitted, including but not limited to, storage sheds, mini-barns or garages.

> * * *
>
> n. In General. [] All numbered Lots in the Development shall be sued [sic] for residential purposes only.
>
> * * *
>
> y. Roof Pitch and Roof Shingles. Only dimensioned shingles or equivalents shall be allowed with the type and design to be approved by the Committee.

(Appellants' App. Vol. III, pp. 203-04, 206, 208).

[33] TT relies on the following provisions of the Declaration:

> 3.9 Sales and Construction Offices: Notwithstanding anything to the contrary contained in this Declaration, Developer, any entity related to Developer and any other person or entity with the prior written consent of Developer, *during the Development Period*, shall be entitled to construct, install, erect and maintain such facilities upon any portion of the Real Estate owned by Developer, the Association or such person or entity as, in the sole opinion of Developer, may be reasonably required or convenient or incidental to the development of the Real Estate or the sale of Lots and the construction or sale of Residence Units thereon. Such facilities may include, without limitation, storage areas or tanks, parking areas, signs, model residences, construction offices or trailers and sales offices or trailers.
>
> 3.10 Signs. [] The Developer and its designees shall also have the right to construct or change any building, improvement, or landscaping on the Real Estate without obtaining the approval of the Architectural Review Committee at any time *during the Development Period*.

(Appellants' App. Vol. III, p. 202) (emphasis added).

B. *Analysis*

[34] The Association and RREF designated evidence that the Building was constructed of metal, is a free-standing, detached outbuilding, is not used for a residential purpose, and has a metal roof, not dimensioned shingles. On appeal, TT does not contend that it designated evidence which created a factual dispute concerning the physical properties of the Building or its current non-residential use. Rather, TT contends that the Declaration permitted Makris as Developer to construct the Building and that nothing in the Declaration required the Developer to remove the non-conforming Building after the Development Period expired. Neither party has identified any ambiguity in the provisions cited by TT. Therefore, we will not construe the provisions and will apply the provisions' clear and unambiguous language. *See Lake Imaging, LLC*, 182 N.E.3d at 211.

[35] Sections 3.9 and 3.10 provide that the Developer is entitled to construct, install, erect, change, and maintain facilities upon real estate in the Development. These entitlements are limited by the express wording of the provisions to the Development Period, which is defined in the Declaration as

> the period of time commencing with the date of recordation of this Declaration and ending on the date Developer or its affiliates no longer own any Lot within the Real Estate, but in no event shall the Development Period extend beyond the date (7) years after the date this Declaration is recorded.

(Appellants' App. Vol. III, p. 196). The parties do not dispute that the Declaration was recorded on April 23, 2007, and, therefore, we conclude as a matter of law that the Development Period expired at the latest on April 23, 2014. In light of the unambiguous wording of the Declaration, we conclude that any right Makris had as Developer and/or conveyed to TT to maintain the Building expired at the latest on April 23, 2014. After that date, no genuine issue of material fact exists that the Building was in violation of the Declaration.[2]

CONCLUSION

[36] Based on the foregoing, we conclude that the 2007 Declaration was valid, and we affirm the trial court's summary judgment on that issue. We further conclude that the Association and RREF were entitled to summary judgment as a matter of law that the Association was validly formed, the First Amendment did not exempt Lot 4 from the Declaration, and the Building violated the Declaration.

[37] Affirmed in part, reversed in part, and summary judgment entered in favor of the Association and RREF.

[38] May, J. and Tavitas, J. concur

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[2] We do not address TT's argument that the principles of laches, waiver, acquiescence, and estoppel bar the Association's claims for injunctive relief and removal of the Building, as the Association and RREF did not move for summary judgment on the issue of remedies.