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IN THE
COURT OF APPEALS OF INDIANA

Warriner Investments, LLC, Randy Warriner, and Delaine Warriner,

Appellants/Cross-Appellees-Defendants/Counterclaimants,

v.

Dynasty Homeowners Association, Inc.,

Appellee/Cross-Appellant-Plaintiff/Counter-Defendant

June 8, 2022

Court of Appeals Case No. 21A-PL-2405

Appeal from the Morgan Circuit Court

The Honorable Matthew G. Hanson, Judge

Trial Court Cause No. 55C01-2002-PL-407

Crone, Judge.

Case Summary

[1] Randy and Delaine Warriner erected a pole barn on the residential property where they lived without the required approval from their neighborhood homeowners association. As a result, the association sued them and their LLC that owns the property, seeking injunctive relief of removal of the barn as well as reimbursement for the expenses and costs incurred by the association in enforcing the violation of its covenants and restrictions. Following multiple counterclaims and cross-motions for partial summary judgment, the trial court granted summary judgment in favor of the homeowners association on all claims. The trial court subsequently held a damages hearing on all issues and entered an order awarding the association its attorney's fees of $25,205.51 but denying the association's request for injunctive relief to tear down the pole barn. Warriner Investments, LLC, Randy, and Delaine (the Warriner Parties) appeal the trial court's award of attorney's fees in favor of Dynasty Homeowners Association, Inc. (the HOA). The Warriner Parties further challenge the trial court's entry of partial summary judgment in favor of the HOA regarding their counterclaim for damages alleging an invalid lien against the property. The HOA cross-appeals the denial of injunctive relief. We affirm the trial court's judgment in all respects.

Facts and Procedural History[1]

[2] In early 2019, Randy and Delaine decided to have a 2,400-square-foot pole barn constructed on the residential property where they lived on Dynasty Ridge Road (the Warriner Property) in a Martinsville subdivision (Dynasty).[2] The HOA is a duly organized homeowners association that operates pursuant to the Covenants for Dynasty (the Covenants) and the Bylaws for Dynasty (the Bylaws). Article V, Section 2 of the Bylaws provides:

> No initial structural improvements to real property in Dynasty shall be commenced, erected or maintained without approval of the majority of property owners.

Appellants' App. Vol. 3 at 23. Randy and Delaine did not seek approval from the HOA prior to commencing the construction of the pole barn in April or May 2019. However, after construction began, on May 14, 2019, Randy and Delaine submitted a request to build the pole barn to the HOA. A majority of the property owners opposed the request, and Randy and Delaine were notified that their request was denied. On May 30, Randy and Delaine submitted a revised request offering, among other things, to install a stone front to the barn to help it blend with the surroundings. Again, a majority of the property owners

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[1] We remind appellate counsel for both parties that Indiana Appellate Rule 46(A)(6) limits the statement of facts to a narrative description of the relevant facts stated in accordance with the appropriate standard of review. *Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016). The statement of facts section of an appellate brief shall neither omit relevant facts nor contain subjective argument. *Id*. Here, both parties' statement of facts sections omit relevant facts, and are rife with irrelevant facts, and each contains subjective argument. Our appellate review was impeded due to both parties' disregard for our procedural rules.

[2] The record indicates that the construction costs for the barn totaled approximately $80,000.

voted to deny the request, and the HOA again informed Randy and Delaine that their request was denied.

[3] Despite the denial, Randy and Delaine continued with the construction and threatened the HOA with legal action. In June 2019, the HOA Board twice notified Randy and Delaine that construction of the barn violated the HOA's Covenants and Bylaws. On July 3, the HOA Board voted to obtain legal counsel and further notified property owners that a special meeting would be held to consider a special assessment to pay for the legal representation.

[4] On July 23, the HOA Board notified Randy and Delaine that it had passed a special assessment pursuant to Article IX, Section 2 of the Bylaws. Specifically, the HOA Board informed Randy and Delaine as follows:

> Yesterday, the Board unanimously approved special assessments requiring the Eugene Edward Warriner and Donna Dean Family Trust and/or you to reimburse the HOA for all expenses and costs necessary to correct a violation of the covenants and restrictions of the HOA relating to the construction of an accessory building on your property. These costs and expenses include, but are not limited to, attorney's fees and other legal costs and expenses incurred by the HOA. Thank you.

Id. at 78. On July 28, a quorum of the HOA members met and approved a special assessment of $800 per subdivision lot to fund the legal representation.

[5] On February 28, 2020, the HOA filed a one-count complaint against the Warriner Parties for "Enforcement of Covenant and Bylaws" seeking an order from the trial court for removal of the pole barn, damages, and reimbursement

to the HOA for all expenses and costs necessary to correct the violation of the Covenants and the Bylaws relating to construction of the pole barn, including but not limited to attorney's fees. Appellants' App. Vol. 2 at 28. On May 11, 2020, the Warriner Parties filed their answer and counterclaim for damages asserting that the HOA's conduct violated the provision of the Bylaws applicable to special assessments. The Warriner Parties also filed a motion to dismiss. On July 1, 2020, the Warriner Parties sought and were granted leave by the trial court to file supplemental counterclaims for breach of contract and breach of fiduciary duty.

[6] On July 27, 2020, the Warriner Parties filed a motion for partial summary judgment seeking judgment on the "validity of the special assessment passed by the Board of the [HOA] on July 22, 2019." *Id*. at 135. On February 15, 2021, the HOA filed its response and cross-motion for partial summary judgment on its case-in-chief. Then on February 19, the HOA filed a second cross-motion for summary judgment as to the Warriner Parties' counterclaims. On June 1, 2021, the trial court issued an order indicating that "[t]he court can and will rule on pending motions without the aid of argument which will do nothing more than supplement the already voluminous writings filed." Appellants' App. Vol. 7 at 229.

[7] On June 7, 2021, the trial court issued its "Order on Summary Judgment Motions." Appellants' App. Vol. 2 at 21-22. Specifically, the trial court: (1) granted the HOA's motion for partial summary judgment on its case-in-chief concluding that the Warriner Parties violated the Covenants and the Bylaws by

erecting the pole barn without prior approval by the HOA Board; (2) denied the Warriner Parties' motion for partial summary judgment regarding the special assessment and attorney fees; and (3) granted the HOA's motion for partial summary judgment on all counterclaims filed by the Warriner Parties. The trial court set the matter for subsequent damages hearing to consider "all issues, including removal of the pole barn, costs associated and assessed, attorney fees and all other possible remedies[.]" *Id.* at 22.

[8] The trial court held the damages hearing on October 5, 2021. Following the hearing, the trial court issued a judgment finding in relevant part:

> 21. That it is apparent in the documents provided to the court that attorney fees and costs to defend against violations such as these by [the Warriner Parties] are recoverable.
>
> ….
>
> 26. That here, [the Warriner Parties] will owe the costs, fees and attorney fees spent by the [HOA] in bringing this suit, defending the suit and for the damages hearing for their violations of the covenants/by-laws of the [HOA].
>
> ….
>
> 44. After weighing the impact of the injunction request against any ongoing/permanent damage being done to the [HOA] the court cannot find that the request to tear down the completed pole barn is warranted.
>
> ….
>
> 47. [The Warriner Parties] owe the plaintiffs the amount of

$25,205.51.[3]

….

49. The request for an injunction and order to tear down the pole barn is denied.

Id. at 24-27. This appeal ensued.

Discussion and Decision

Section 1 – The trial court properly awarded the HOA attorney's fees based on the special assessment.

[9] The Warriner Parties challenge the trial court's decision to award the HOA the $25,205.51 in attorney's fees it incurred in attempting to enforce an undisputed violation of the Covenants and the Bylaws.[4] It is well established that a restrictive covenant constitutes a compensable interest in land. *Crossmann Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002) (citing *Dible v. City of Lafayette*, 713 N.E.2d 269, 272 (Ind. 1999)). As such, the violation of restrictive covenants is necessarily subject to an economic assessment. *Id*.

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[3] The trial court deducted $1,800 from the HOA's claim "for the time spent in the grievance procedure" in accordance with Indiana Code Section 32-25.5-5-17. Appellants' App. Vol. 2 at 25.

[4] The Warriner Parties do not challenge the trial court's summary judgment determination that the erection of the pole barn on the Warriner Property without prior approval constituted a violation of the Covenants and the Bylaws. They solely challenge the validity of the monetary award to the HOA for its expenses in enforcing that violation. While they frame this issue as involving "fee-shifting" and "attorney fee recovery" within the context of the "American Rule," which provides that in general, a party must pay his own attorney's fees absent an agreement between the parties, a statute, or other rule to the contrary, *see* Appellants' Br. at 20 (citing *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 458 (Ind. 2012)), we disagree and choose to frame and address the issue quite differently.

[10] As the fee award was based on interpretation and application of the Covenants and the Bylaws, we apply a de novo standard of review. Covenants relating to real property are a species of express contract and are generally construed in the same manner as other written contracts. *Villas W. II of Willowridge Homeowners Ass'n, Inc. v. McGlothin*, 885 N.E.2d 1274, 1278 (Ind. 2008) (a restrictive covenant is an express contract between grantor and grantee that restrains the grantee's use of his land), *cert. denied* (2009). Moreover, the bylaws of a nonprofit corporation, such as an HOA, constitute a contract between the corporation and its members, and among the members themselves. *Vill. Pines at the Pines of Greenwood Homeowners' Ass'n, Inc. v. Pines of Greenwood, LLC*, 123 N.E.3d 145, 157 (Ind. Ct. App. 2019). If a contract's terms are clear and unambiguous, courts must give those terms their clear and ordinary meaning. *Jernas v. Gumz*, 53 N.E.3d 434, 444 (Ind. Ct. App. 2016)*, trans. denied*.

[11] To support the award of fees here, the HOA and the trial court rely upon certain provisions of the "governing documents of the community," which would include both the Covenants and the Bylaws. Appellants' App. Vol. 2 at 23.[5] The Covenants provide that the original developer of Dynasty would turn

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[5] Indiana Code Section 32-25.5-2-3, applicable to homeowners associations, provides that "Governing documents" includes the following:

> (1) The articles of incorporation and bylaws of a homeowners association and all adopted amendments to the articles of incorporation and bylaws.
>
> (2) Any applicable covenants filed with the office of the county recorder of the applicable county recorder, whether contained in a declaration of covenants, contained in conditions and restrictions (or similarly titled document), or contained within a plat.

control of the neighborhood over to an HOA, and the HOA would be responsible for collecting dues from property owners for purposes of road maintenance and snow removal. However, contrary to the Warriner Parties' assertion, road maintenance and snow removal are not the only responsibilities and/or powers specifically granted to the HOA by the Covenants. The Covenants grant the HOA the broad power of "Enforcement." Ex. Vol. 1 at 5. Specifically, that section provides in pertinent part:

> Enforcement of these covenants and restrictions is reserved to the Association and to the owners of real estate in Dynasty by injunction, together with the right to cause non-conforming or non-approved structures to be removed by process of law.

Id. Article IX, Section 2 of the Bylaws provides an express contractual mechanism for the HOA to fund its enforcement powers as follows:

> Special Assessments. The Board may propose special assessments to be made against all members. These assessments must be proposed and approved by a member vote in either the Annual Meeting or a Special Meeting. The Board shall present the proposed special expenditure at said meeting. A special assessment shall be valid and enforceable if approved by a majority vote of the total number of members in attendance. Following the meeting the Board shall notify Members of the amount of the approved special assessment at least (30) days prior to the date it is due. *The Board may make special assessments against a particular member to correct violations of covenants or restrictions as to use and occupancy*.

Ex. Vol. 1 at 15 (emphasis added). In this case, pursuant to Article IX, Section 2 of the Bylaws, the HOA levied a special assessment to reimburse the HOA for

the expenses and costs necessary to attempt to correct the Warriner Parties' blatant and continuing violation of the Covenants and the Bylaws, including but not limited to attorney's fees.[6]

[12] We find that the clear and unambiguous language of the Enforcement provision of the Restrictive Covenants, coupled with the clear and unambiguous language of the Special Assessments provision of the Bylaws, provided a valid basis for the HOA to levy a special assessment against the owners of the Warriner Property in this case. While it just so happens that the nature of the assessment here was attorney's fees, the nature of the assessment is not at issue. The assessment is for the expenses and costs incurred by the HOA to enforce the Covenants and the Bylaws and to "cause [a] non-conforming or non-approved structure[] to be removed by process of law." Ex. Vol. 1 at 5.[7] In other words, there is no reason that attorney's fees cannot be the expenses and costs that form the basis for a special assessment if those expenses and costs were incurred as a result of a violation of the Covenants and the Bylaws, which is indisputably the case here. Accordingly, we conclude that the trial court properly awarded

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[6] Although the Warriner Parties repeatedly suggest that the HOA lacked the authority to assess its membership for "anything beyond the scope of road maintenance and snow removal," *see* Appellants' Br. at 28, we find that suggestion incorrect. We will construe the governing documents here in harmony and so as not to render any terms ineffective or meaningless. *See Drenter v. Duitz*, 883 N.E.2d 1194, 1199 (Ind. Ct. App. 2008) (court will attempt to construe contractual provisions so as to harmonize the agreement and not render any terms ineffective or meaningless). We agree with the HOA that the governing documents would be rendered meaningless in their entirety absent an enforcement mechanism, provided in the Bylaws here, and we decline the invitation to render them meaningless.

[7] Contrary to the Warriner Parties' assertion, the fact that the HOA was unsuccessful in obtaining a mandatory injunction for removal of the pole barn is of no moment and does not somehow render the special assessment invalid.

the HOA its expenses and costs, i.e., attorney's fees, based on the HOA's clear and unambiguous authority to levy a special assessment under the circumstances presented.[8]

Section 2 – The trial court did not abuse its discretion in denying the HOA's request for a mandatory permanent injunction requiring removal of the pole barn.

[13] On cross-appeal, the HOA challenges the trial court's denial of its request for mandatory permanent injunctive relief requiring removal of the pole barn. The grant or denial of injunctive relief lies within the sound discretion of the trial court and will not be overturned unless it was arbitrary or amounted to an abuse of discretion. *Ferrell v. Dunescape Beach Club Condos. Phase I, Inc.*, 751 N.E.2d 702, 712 (Ind. Ct. App. 2001). Generally, the trial court considers four factors in determining the propriety of injunctive relief: (1) whether the plaintiff's remedies at law are inadequate; (2) whether the plaintiff can demonstrate a reasonable likelihood of success on the merits; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would

[8] Having determined that the special assessment for attorney's fees was not improper, we need not address the Warriner Parties' additional claim that the trial court erred in granting partial summary judgment in favor of the HOA on their counterclaim against the HOA for levying an improper "in rem" charge against the Warriner Property. Reply Br. at 20. We further note that the Warriner Parties direct us to the eleven transfers of title to the Warriner Property (between family members, a family trust, and a limited liability company) to challenge the enforcement of the Covenants and the Bylaws and/or the special assessment against them. To the extent that ownership of the Warriner Property at the time the special assessment was levied becomes an issue when attempting to enforce the trial court's judgment here, we note that a homeowners association assessment constitutes a lien against the real estate regardless of who the current owner of the property might be. *See* Ind. Code § 32-28-14-5; *see also* Ex. Vol. 1 at 15-16 (Article IX, Section 3 of Bylaws providing enforcement mechanism for HOA to file lien against property for failure to pay assessments).

be disserved by granting relief. *Id*. When the plaintiff is seeking a permanent injunction, as opposed to a preliminary injunction, the second of the four traditional factors is slightly modified, for the issue is not whether the plaintiff has demonstrated a reasonable likelihood of success on the merits, but whether he has in fact succeeded on the merits. *Id*. at 713. The burden is on the party seeking the injunction to demonstrate that certain and irreparable injury would result if the injunction were denied. *Crawley v. Oak Bend Ests. Homeowners Ass'n,* 753 N.E.2d 740, 744 (Ind. Ct. App. 2001), *trans. denied* (2002).

[14] An injunction which orders a party to take a specific action is referred to as a mandatory injunction. *Id*. The power of a court to issue a mandatory injunction as a means of enforcing restrictive covenants is well established. *Depeyster v. Town of Santa Claus*, 729 N.E.2d 183, 189 (Ind. Ct. App. 2000); *see Highland v. Williams*, 166 Ind. App. 492, 495, 336 N.E.2d 846, 847 (1975) (finding order for removal of home from lot not excessive where owner had actual and constructive notice of restrictive covenants); *see also Vogel v. Harlan*, 150 Ind. App. 426, 428, 277 N.E.2d 173, 174 (1971) (affirming injunction ordering removal of home that was being constructed in violation of restrictive covenants); *Schwartz v. Holycross*, 83 Ind. App. 658, 667, 149 N.E. 699, 702 (1925) ("It is well settled that a court of equity has the power ... to enjoin the violation of restrictive building covenants ..., and that a mandatory writ may be issued to compel the modification, or even the removal, of a building erected in violation of such covenants."). However, a mandatory injunction is an

extraordinary remedial process which is granted not as a matter of right but in the exercise of sound judicial discretion. *Depeyster*, 729 N.E.2d at 189.

[15] In considering the HOA's request for a mandatory permanent injunction requiring the Warriner Parties to tear down the pole barn, the trial court emphasized that the HOA failed to seek a preliminary injunction "to stop the pole barn from being erected and only began legal action after the structure was completed." Appellants' App. Vol. 2 at 23. The court noted that "it is with little doubt that any court would have granted an injunction preliminarily had the [HOA] stepped up when [the Warriner Parties] began to build or were building." *Id.* at 26.

[16] That being said, the trial court concentrated on whether the threatened injury to the HOA in leaving the pole barn in place outweighed the harm a grant of injunctive relief would occasion upon the Warriner Parties. In favor of the Warriner Parties, the trial court found that "both sides agree that the area in question … is very wooded[,]" "that structures such as a pole barn can be approved and placed at residences within the [neighborhood]" and that the Warriner Property "pole barn cannot be seen from the road that travels near the property nor can it be seen from any other property in the [neighborhood.]" *Id.* at 23. The court further found that the evidence indicates that there is no "direct ongoing harm or damage" being caused by the pole barn "as it is out of sight of anyone visiting the property or from anyone sitting on their individual property" and "there was no proof that the pole barn had damaged/was damaging property values" in the neighborhood. *Id.* at 24, 25. Moreover, the

court determined that "it is difficult to find that allowing the pole barn to remain will continue to injuriously interfere with the rights of other residents in the [neighborhood] moving forward." *Id.* at 26.

[17] In favor of the HOA, the trial court acknowledged that "there is merit in the belief that there needs to be a message sent to others within the [neighborhood] that the covenants and bylaws cannot be ignored or trampled upon with blatant disregard." *Id*. Further, "to permit the structure to stand and the [Warriner Parties] to 'win' by getting to keep their structure for the essential cost of $25,000.00 [the attorney fee award] might be something a future resident is willing to face." *Id*. However, the trial court ultimately concluded "[a]fter weighing the impact of the injunction request against any ongoing/permanent damage being done to the [HOA,] the court cannot find that the request to tear down the completed pole barn is warranted." *Id*.

[18] In other words, in balancing the equities, the trial court determined that the harm a grant of relief would occasion on the Warriner Parties outweighed the injury to the HOA in leaving the pole barn in place. Therefore, the trial court denied the HOA's request for a mandatory permanent injunction. We cannot say that this was arbitrary or an abuse of discretion under the circumstances presented. In sum, we affirm the trial court's judgment in all respects.

[19] Affirmed.

Vaidik, J., and Altice, J., concur.