IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

VISTA GRANDE TOWNHOUSES ASSOCIATION, INC., AN ARIZONA NONPROFIT CORPORATION,
Plaintiff/Appellee,

v.

VAN M. SARKISS AND NORMA SARKISS, HUSBAND AND WIFE,
Defendants/Appellants.

No. 2 CA-CV 2015-0097
Filed April 12, 2016

Appeal from the Superior Court in Pima County
No. C20124605
The Honorable D. Douglas Metcalf, Judge
The Honorable Ted B. Borek, Judge

AFFIRMED

COUNSEL

Carpenter Hazlewood Delgado & Bolen, PLC, Tucson
By Jason E. Smith
Counsel for Plaintiff/Appellee

The Law Office of Charles M. Giles, Tucson
Charles M. Giles
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 In this appeal arising from an alleged violation of their community's covenants, conditions, and restrictions (CC&Rs), Van and Norma Sarkiss argue the trial court erred in granting partial summary judgment and a permanent injunction in favor of appellee Vista Grande Townhouses Association, Inc. (Vista Grande). They also contend Vista Grande's failure "to [c]omply with A.R.S. § 33-1803(D) [p]reclude[d it from] [f]iling" its lawsuit. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party opposing the motion for summary judgment. *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). The Sarkisses own and reside in a townhouse located within the Vista Grande Homeowner's Association. The townhouses share common side walls with their neighbors and have separate front and back walls, with separate entrances in the front and private patio areas in the rear. Vista Grande is governed by amended CC&Rs, which contain the procedures governing lot modifications. The CC&Rs provide that "[n]o building, fence, wall, . . . or other structure can be completed, erected or maintained on any Lot" without prior approval from the Board. Further, "[n]o change or deviation from the approved plans and specifications can be made without the prior written consent of the Board or the [Architectural] Committee."

¶3 In mid-2011, the Sarkisses hired a contractor to construct a covered patio in their backyard. In July 2011, someone working on behalf of the contractor sent a request for approval to Vista Grande's board of directors (the Board) along with drawings

of the project and a project description. The Board requested additional information and more specific plans, which were provided. In October, the Board approved the submitted plans but admonished that "covered patio areas are not to be walled in or used for storage."

¶4 The Sarkisses began constructing the patio soon after receiving the approval letter. In December 2011, after inspection, the Sarkisses obtained final approval from the City of Tucson. The Sarkisses then continued to make changes to the structure, and by the time it was completed in February 2012, it had stucco and brick walls, doors, windows, wrought iron, and electricity.

¶5 In July 2012, Vista Grande filed a complaint against the Sarkisses for injunctive relief, alleging they had violated the CC&Rs by constructing an enclosed patio that substantially deviated from the submitted plans. The Sarkisses answered and counterclaimed. In April 2013, Vista Grande filed a motion for partial summary judgment, arguing that the uncontested facts established that the Sarkisses had "breached the terms of the CC&Rs," entitling Vista Grande to judgment as a matter of law as to that issue. The trial court granted Vista Grande's motion "with regards to the violation of the CC&R provisions."

¶6 The parties later resolved all remaining disputes with the exception of determining what form of relief Vista Grande was entitled to as a result of the Sarkisses' CC&R violations; that issue was the subject of a trial to the court. After weighing the evidence, the trial court found the Sarkisses' failure to seek Board "approval for the larger structure outweigh[ed] the[ir] hardship" and granted the permanent injunction in part, ordering the Sarkisses to "remove the security screen and door, and the interior walls in the patio area." The Sarkisses timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1) & (A)(5)(b).

Summary Judgment

¶7 The Sarkisses first assert the trial court erred in granting Vista Grande's partial summary judgment motion. They argue that

"[s]ince the . . . court could not have reviewed the approved [site] plans," which was "absolutely essential" in ruling on the motion, and "since [Vista Grande's expert] report was not in any way verified, Vista Grande totally failed to meet the 'heavy burden' placed upon them" to obtain summary judgment. We review the trial court's grant of summary judgment de novo. *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13, 122 P.3d 6, 11 (App. 2005).

¶8 Summary judgment is appropriate if there are no genuine issues of material fact and, on the basis of those undisputed facts, the moving party is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(a). To obtain relief, a plaintiff seeking summary judgment "must submit 'undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim.'" *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, ¶ 18, 292 P.3d 195, 199 (App. 2012), *quoting Comerica Bank v. Mahmoodi*, 224 Ariz. 289, ¶ 20, 229 P.3d 1031, 1035 (App. 2010). If this burden is met, the defendant must provide the court with evidence demonstrating a genuine factual issue for trial, *see Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 12, 180 P.3d 977, 980 (App. 2008), rather than merely relying on allegations or denials in its own answer, *see* Ariz. R. Civ. P. 56(e)(4).

¶9 Vista Grande's motion for partial summary judgment contended the undisputed evidence showed the Sarkisses had "constructed a structure . . . totally outside of the scope of the plans approved by the [Board] and in violation of Sections 7.2 and 7.4 of the [CC&Rs]" and entitled it to judgment as a matter of law on that issue. Section 7.2 of the CC&Rs provides in relevant part:

> Requirement of Approval by the Board. No building, fence, wall, pool[,] barbeque pit, or other structure can be completed, erected or maintained on any Lot, nor is any exterior addition to or change or alteration permitted unless the plans and specifications showing the nature, kind, shape, height, color, materials, and

> location, have been submitted to and approved in writing by the Board.

And pursuant to section 7.4, "[n]o change or deviation from the approved plans and specifications can be made without the prior written consent of the Board or the [Architectural] Committee."

¶10 In support of its motion, Vista Grande attached several exhibits to its statement of facts, including the CC&Rs and several deposition transcripts, among other documents. It also included an unverified report from an "expert witness," which the trial court later found inadmissible.[1] It did not, however, attach the site plan, which the Sarkisses contend "was absolutely essential for [the] court to determine whether or not the approved plans had been violated in any significant way."[2] They argue that without the site plan, Vista Grande relied on an unverified report, and "totally failed to meet the 'heavy burden' placed upon [it]" in seeking summary judgment. *See Allen*, 231 Ariz. 209, ¶ 18, 292 P.2d at 199 (plaintiff seeking summary judgment must submit undisputed admissible evidence in support of its motion).

¶11 In response, Vista Grande asserts "the approved plans, while one form of evidence for the trial court to consider, w[ere] not

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[1] The trial judge who ruled on the motion for summary judgment did not make an admissibility finding, and it is unclear from the record whether he considered the report in making his ruling. The case was later reassigned, and the newly assigned judge ruled the report inadmissible as hearsay.

[2] We note it appears from the record that Vista Grande did submit some form of plans with its statement of facts and in its response to the Sarkisses' Rule 56(f) supplemental briefing. Nevertheless, because Vista Grande does not refute the Sarkisses' contention that it failed to submit the site plans, and because the court received enough additional evidence to grant summary judgment, we assume it was not the actual site plan and treat it as if it were never received by the court.

the only evidence to prove [the Sarkisses] non-compliance with [Vista Grande]'s governing documents," and argues the court had before it "sufficient evidence for the court to rule on the motion." We agree. In addition to the unverified report, Vista Grande submitted deposition testimony from "the contractor [who] construct[ed] the enclosed patio area, the person who was hired by the [Sarkisses] to obtain architectural approval . . . , and the person who was hired . . . to draft the plans," all of whom testified that "what was depicted on the [site] plans and . . . approved by the [Board]" was not reflected in the completed patio.

¶12 For example, the drafter of the plans testified that they had depicted "an open porch" with "a roof structure and . . . beams holding [it] up," and when shown photographs of the Sarkisses' completed structure, he testified that it "[wa]s not on [his] plans." When asked to elaborate on the specific aspects of the completed project that did not conform with his plans, he stated "all the wrought iron . . . between the posts," "th[]e windows," "[t]he door," "electrical," and "the wall that was constructed with stucco over it [with] a brick trim on the top." And it appears another witness responsible for presenting the plans to the Board testified that "per th[e] plan," the structure was supposed to have been a "covered [patio]—a concrete slab with a covered roof," and was not "going to be walled in."[3]

¶13 The trial court also received the plans submitted to the City of Tucson, a permit and letter of approval issued by the city, and a list of city code violations associated with the property. One of the violations was dated January 2012, a month after the permit was issued, and the associated notes read:

[3] Although this deposition testimony was quoted in Vista Grande's statement of facts, this portion of the deposition itself does not appear to have been made a part of the record. Both parties, however, referred to other portions of that deposition, and the Sarkisses do not refute its accuracy.

> Met w[ith] owner at property. Reviewed plans submitted to the city. Owner added wall approx[imately] 5 ft high, metal screening on top of the wall and electrical circuits. Advised owner he needs to submit for a revision to the plan he had submitted to the city showing the additional work.

¶14 Thus, even without the site plans or the unverified report, Vista Grande established through its statement of facts and competent evidence that the Sarkisses' completed patio varied significantly from the approved plans, in violation of Sections 7.2 and 7.4 of the CC&Rs. Once it established a prima facie showing of those violations, the burden shifted to the Sarkisses to produce competent evidence contradicting that showing. *See Thruston*, 218 Ariz. 112, ¶ 12, 180 P.3d at 979-80 (once prima facie case made, burden of production shifts to non-moving party).

¶15 The Sarkisses timely responded to Vista Grande's motion, but offered no evidence contradicting Vista Grande's prima facie showing that they had violated the CC&Rs. Instead, they claimed Vista Grande had unfairly targeted them and violated its duty to treat all members fairly, offering as evidence photographs depicting additions to other residences. *See id.* ¶ 26 ("The non-moving party may not rest on its pleadings; it must go beyond simply cataloging its defenses."). The Sarkisses did not, however, dispute that they had continued construction on their property after obtaining final city approval and without permission from the Board. Because they failed to refute Vista Grande's prima facie showing of the CC&R violations, partial summary judgment was appropriate. *See id.* ¶ 12.

Injunctive Relief

¶16 The Sarkisses also argue the evidence presented and legal conclusions reached by the trial court did not "permit" granting Vista Grande injunctive relief. The law, however, is otherwise. CC&Rs constitute a contract between a community's

owners collectively and the individual lot owners. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). Such restrictions may be enforced by injunctive relief. *See Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App. 1977). In reviewing a decision to grant injunctive relief, to the extent we are confronted with questions of fact, we will not disturb a trial court's factual findings unless they are clearly erroneous. *See Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d at 1279 (we are bound by trial court's factual findings unless clearly erroneous). And we review the decision to grant injunctive relief for an abuse of discretion. *See id.*

¶17 An injunction is an equitable remedy that allows the trial court to structure a remedy to promote equity between the parties. *Id.* ¶ 9. Enforcement of restrictive covenants by injunction "is not a matter of right, but is governed by equitable principles." *Id.* Such considerations include the relative hardships and injustice, public interest concerns, misconduct of the parties, delay on the part of the party seeking the injunction, and the adequacy of other remedies. *Id.*

¶18 The trial court issued a detailed under advisement ruling, discussing each factor set forth in *Turner* separately before weighing all the elements. In doing so, the court noted that while the "relative hardship of granting an injunction weigh[ed] more heavily on [the Sarkisses]," they were aware their construction "exceeded the size of the structure the Board had approved." It also considered that "the Board did not object to the size of the structure, as built, until after construction was completed," but noted the delay had been "caused by the Board's attorney, not the Board," and found no "bad motive in the Board's conduct." The court additionally found that the Sarkisses had "failed to seek approval for the larger structure because the[y were] concerned that the Board would not approve it," a decision which "deprived the Board of the ability to consider the request in a reasonable manner, or work with [the Sarkisses] to arrive at a reasonable resolution."

¶19 After weighing those factors, the trial court determined that the Sarkisses' "failure to return to the Board to seek approval

for the larger structure outweigh[ed] the hardship . . . of expending funds on the structure because [they] could have avoided wasting those funds by seeking approval," and it concluded that a partial injunction was appropriate. Moreover, as Vista Grande pointed out below, a monetary penalty would not "cure" the violation, and allowing the structure to remain would "undermine[] . . . the role of the covenants in the community." *Cf. Turner*, 196 Ariz. 631, ¶ 19, 2 P.3d at 1281 (party seeking to enforce valid deed restriction may demonstrate adequate harm by proving that tolerating violation would diminish protection provided to all homeowners by deed restrictions). And requiring the Sarkisses to comply with the community documents properly "vindicate[s] and preserve[s] the [B]oard's future authority to enforce the subdivision's CC & Rs and Guidelines." *Id.* The evidence supports the trial court's findings and conclusions, and we find no abuse of its discretion in granting Vista Grande injunctive relief.

Section 33-1803(D), A.R.S.

¶20 The Sarkisses further contend Vista Grande failed to comply with A.R.S. § 33-1803(D)'s notice requirements and such failure precluded it from initiating any enforcement actions against them. Vista Grande responds that the Sarkisses "incorrectly assign a mandatory duty under A.R.S. §[]33-1803 that does not exist." We review issues involving statutory interpretation de novo. *See First Credit Union v. Courtney*, 233 Ariz. 105, ¶ 15, 309 P.3d 929, 933 (App. 2013).

¶21 Section 33-1803(C) provides:

> A member who receives a written notice that the condition of the property owned by the member is in violation of the community documents without regard to whether a monetary penalty is imposed by the notice may provide the association with a written response by sending the response by certified mail within ten business days after the day of the notice.

If the property owner submits a response in accordance with § 33-1803(C), the association "[w]ithin ten business days after receipt of the certified mail[ing of] the response from the member . . . shall respond to the member with a written explanation" regarding the "provision of the [CC&Rs] that has allegedly been violated," the "date of the violation," the name of the "person[] who observed the violation," and the "process the member must follow to contest the notice." § 33-1803(D). Unless the association's procedure for contesting the notice is provided in the original notice of violation, "the association shall not proceed with any action to enforce the community documents . . . before or during the time prescribed by subsection D of this section regarding the exchange of information between the association and the member." § 33-1803(E).

¶22 The Sarkisses acknowledge they received a letter from Vista Grande's attorney in April 2012 notifying them of the CC&R violations, but contend Vista Grande was "precluded from proceeding with any action to enforce the community documents" because the letter did not comply with § 33-1803(D). They, however, ignore the threshold requirement of § 33-1803(C). Vista Grande was not required to provide the Sarkisses with a written explanation in accordance with § 33-1803(D) unless or until the Sarkisses submitted a written response to Vista Grande's initial letter in accordance with subsection C. *See* § 33-1803(C), (D). The Sarkisses do not contend, nor does the record suggest, that they submitted any response to Vista Grande's letter, let alone that they did so "by certified mail within ten business days after the date of the notice." § 33-1803(C). Accordingly, § 33-1803 is inapplicable.

Attorney Fees

¶23 Finally, both parties request attorney fees on appeal. As the prevailing party, Vista Grande is entitled to reasonable attorney fees pursuant to Section 12.12.1 of the CC&Rs. *See Geller v. Lesk*, 230 Ariz. 624, ¶¶ 9-10, 285 P.3d 972, 975 (App. 2012) (contractual provision, rather than fee-shifting statute, governs award of attorney fees where parties contractually provide for circumstances under which fees are awarded); *see also* A.R.S. § 12-341.01(A). It is also

entitled to its taxable costs on appeal, upon timely compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶24 For the foregoing reasons, the trial court's judgment is affirmed.