IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CASTLEGATE COMMUNITY ASSOCIATION,
AN ARIZONA NON-PROFIT CORPORATION
Plaintiff/Appellee,

v.

KRISTA MOORE AND JOHN W. LEVITT,
Defendants/Appellants.

No. 2 CA-CV 2016-0005
Filed August 22, 2016

Appeal from the Superior Court in Pinal County
No. S1100CV201402353
The Honorable Stephen F. McCarville, Judge

AFFIRMED

COUNSEL

The Travis Law Firm, PLC, Phoenix
By Chandler W. Travis and Melissa S. Lavonier
Counsel for Plaintiff/Appellee

The Law Offices of J. Roger Wood, PLLC, Tempe
By J. Roger Wood and Erin S. Iungerich
Counsel for Defendants/Appellants

MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Appellants John W. Levitt and Krista Moore appeal the trial court's denial of their motion for new trial pursuant to Rule 59(a), Ariz. R. Civ. P. Appellants contend the court erroneously granted the underlying summary judgment, finding their new shed in violation of the governing Covenants, Conditions and Restrictions (the CC&Rs), because issues of fact remain and plaintiff Castlegate Community Association had approved their new shed by inaction. Because the court did not err, we affirm.

Factual and Procedural Background

¶2 When reviewing the trial court's ruling on a motion for new trial, "[w]e view the facts in the light most favorable to upholding the trial court's ruling." *Murray v. Farmers Ins. Co. of Ariz.*, 239 Ariz. 58, ¶ 2, 366 P.3d 117, 119 (App. 2016). However, when reviewing a grant of summary judgment, we "view the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Id.* ¶ 26.

¶3 Appellants own a home in the Castlegate community, and their property is subject to a recorded contract titled "Declarations of Covenants, Conditions and Restrictions." Those CC&Rs provide that a "Design Review Committee" (DRC) can adopt design guidelines intended to regulate the size and appearance of any improvements on the lots. They further provide that any owner must submit plans for any improvement to the DRC before any construction. If the DRC does not approve or disapprove the plans within forty-five days, the plans are deemed approved by operation of the CC&Rs.

¶4 The Guidelines relevant here require that all sheds[1] must be "lower than 7 feet in height" and the materials and colors must match the existing house. Appellants submitted to the DRC plans for a twelve-foot by twenty-foot by fourteen-foot shed, matching the colors of the house. The DRC did not respond within forty-five days. Appellants then constructed a ten-foot by twenty-foot by fourteen-foot shed on their property that did not utilize the same "materials and colors" as the house.[2] Castlegate responded by mailing a notice of violation to appellants, and then sued them, alleging the shed did not conform to the pre-approval provision (Article 3, Section 3.1) of the CC&Rs, and requesting injunctive relief to "enforce the provisions of the [CC&Rs]" and attorney fees and costs pursuant to a provision in the CC&Rs.

¶5 Both Castlegate and appellants moved for summary judgment. Castlegate argued that summary judgment in its favor was proper because the Guidelines indicate that sheds will only "be considered provided they are lower than 7 feet in height" and must be approved prior to being constructed, and appellants had nevertheless proposed and built a shed that was fourteen feet high without prior approval.

¶6 Appellants admitted the shed does not conform to the Design Guidelines and Castlegate never gave their express approval of the shed. But they argued their application was effectively approved by Castlegate's failure to respond within forty-five days, by reason of Article 3, Section 3.1, Paragraph 3 of the CC&Rs, which states: "In the event that the [DRC] fails to approve or disapprove a

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[1]The Guideline pertaining to sheds includes "any permanent addition to a home, including patio covers and other buildings." Appellants have alternately referred to the building as a "structure," "shed," or "garage." Because neither party has raised the issue, nor is it important to our analysis, we treat the structure as a shed for the purposes of this decision.

[2] Although the exhibits are inconclusive as to the exact material and color of the structure, the trial court noted this fact below and Castlegate restates it on appeal. Appellants have not disputed this fact below or on appeal.

complete application for approval within forty-five days after the application . . . approval will not be required and" the pre-approval requirement will be deemed to have been satisfied.

¶7 The trial court granted summary judgment in favor of Castlegate, adopting the argument that the association was not required to "consider" the application by appellants, and in any event, even had Paragraph 3 operated to effectuate an approval, appellants did not build the shed described in the application. Pursuant to Rule 59(a), Ariz. R. Civ. P., appellants moved for a new trial and for reconsideration, but the court restated its original position, denying the motion. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) and 12-2101(A)(5)(a).

Standard of Review

¶8 Appellants identified only the denial of the motion for new trial in their notice of appeal.[3] Therefore, we review only the decision on that motion. *See Wendling v. Sw. Sav. and Loan Ass'n*, 143 Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984) (where party appeals only from denial of motion for new trial and not underlying judgment, court's jurisdiction limited to review of the former); *see also* Ariz. R. Civ. App. P. 8(c) (notice of appeal "must . . . [d]esignate the judgment or portion of the judgment from which the party is appealing"). But, because appellants' motion for new trial raised the issue of whether the trial court properly granted summary judgment under Rule 59(a)(8),[4] we are required "to examine the

[3]Denial of a motion for reconsideration generally is not an appealable order, *In re Balcomb's Estate*, 114 Ariz. 519, 522, 562 P.2d 399, 402 (App. 1977), unless it qualifies as a special order after judgment, *see Engineers v. Sharpe*, 117 Ariz. 413, 416, 573 P.2d 487, 490 (1977). The denial here does not, but that does not affect the issues presented for review.

[4]Appellants' motion for new trial was principally based on Rule 59(a)(8), which provides for a new trial when "the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." "Rule 59(a)(8) . . . requires a review of the judgment and the evidence introduced in support thereof." *Wendling*, 143 Ariz. at 602, 694 P.2d at 1216.

propriety of the trial court's grant of summary judgment." *State v. Mecham*, 173 Ariz. 474, 477, 844 P.2d 641, 644 (App. 1992). "A trial court abuses its discretion if it commits an error of law reaching a discretionary conclusion; therefore we review de novo questions of law that were included in the motion for new trial." *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, ¶ 8, 322 P.3d 168, 172 (App. 2014).

Discussion

¶9 Appellants first argue that the trial court erred in denying their motion for a new trial under Rule 59(a), Ariz. R. Civ. P., because summary judgment was improper based on the court's "stunning admission" that disputed facts existed.[5] Castlegate does not contest the existence of disputed facts, but argues instead that they were immaterial, as expressly found by the court. A trial "court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any *material fact* and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a) (emphasis added); *see also Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 15, 83 P.3d 56, 60 (App. 2004). If the non-moving party can raise nothing more than "some scintilla of evidence, or some dispute over irrelevant or immaterial facts [that] might blossom into a real controversy in the midst of trial," summary judgment is warranted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990). Thus, summary judgment may be granted even if there are disputed facts, if those facts are immaterial to the ultimate disposition.

¶10 Appellants do not specifically list the facts they think were material and disputed, but instead refer to the trial court's ruling in which it stated:

[5]Appellants did not raise this precise issue in their motion for new trial and we could consider it waived. *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987) (arguments waived when not raised below). However, because they mentioned "a dispute of fact" in their motion, we will consider this issue.

> Although there are several facts in dispute which would otherwise preclude the granting of summary judgment . . . [,] several of the facts proposed by each party, such as when and how [appellants] gave notice that they submitted plans to the [DRC], or, whether [Castlegate] timely notified [appellants] of alleged violations, were unsupported by the record, or, controverted by the non-moving party. However, the court finds that there are no *material* facts in dispute which preclude the granting of summary judgment on two grounds. (Emphasis added.)

The court went on to identify those two grounds: 1) there was "no factual dispute that the structure erected by [appellants] is in violation of the Design Guideline," and 2) the structure "was not built in conformity to the design plans allegedly submitted." The court also expressly listed the "undisputed material facts." Thus, the court delineated facts it found material from those it did not.

¶11 The disputed facts that appellants raise do not bear on these issues and are consequently immaterial. Thus, notwithstanding a "dispute over irrelevant or immaterial facts," summary judgment would have been improperly denied on this ground. *Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010; *see* Ariz. R. Civ. P. 56(a).

¶12 Appellants next argue that Paragraph 3 effectuated an approval of their application when Castlegate failed to respond within forty-five days, and that they were entitled to defeat summary judgment on that ground.[6] To the extent the issues raised

[6]They further claim they were entitled to summary judgment on that ground. But the denial of summary judgment is not generally an appealable order, *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 4, 122 P.3d 6, 9 (App. 2005), and in any event, appellants did not appeal from the trial court's denial of their motion for summary judgment thereby depriving this court of jurisdiction to review the issue, *see Wendling*, 143 Ariz. at 602, 694 P.2d at 1216; *see also* Ariz. R. Civ. App. P. 8(c).

in the motion for new trial are of a legal nature, we review those issues de novo. *See Sandretto*, 234 Ariz. 351, ¶ 8, 322 P.3d at 172; *see also First Credit Union v. Courtney*, 233 Ariz. 105, ¶ 15, 309 P.3d 929, 933 (App. 2013) (contract interpretation reviewed de novo).

¶13 Paragraph 3 provides that once a property owner has submitted a complete application, the DRC has forty-five days to approve or disapprove the application. If the DRC has not acted at the end of the forty-five-day period, "approval will not be required and [Article 3.1's requirement for prior approval of applications] will be deemed to have been complied with by the Owner who requested approval." The paragraph continues, "The approval by the [DRC] of any Construction or Modification shall not be deemed a waiver of the [DRC's] right to withhold approval of any similar Construction or Modification subsequently submitted for approval."

¶14 Appellants claim they submitted an application, waited the forty-five-day period, and then began construction. They also claim they did not receive a response at any point during that time, and further, staff members responsible for approving the application noted they believed Paragraph 3 had gone into effect.

¶15 But, as the trial court concluded, appellants built a different shed than that proposed in the application. The structure detailed in the application is a twelve-foot by twenty-foot by fourteen-foot shed, matching the house colors. Appellants built a ten-foot by twenty-foot by fourteen-foot shed, not matching the house materials or colors. Paragraph 3 expressly states that, even if the DRC fails to respond in forty-five days, such approval "shall not be deemed a waiver of the [DRC's] right to withhold approval of any similar Construction or Modification subsequently submitted for approval." The shed that was built is in violation of the CC&Rs' seven-foot and color restrictions, and it is undisputed that appellants never submitted an application for it. *See Murray*, 239 Ariz. 58, ¶ 2, 366 P.3d at 119 (appellate court views facts in light most favorable to upholding trial court's order denying new trial).

¶16 Because Article 3.1 dictates that "no Construction or Modification shall be made or done without the prior written approval of the [DRC]," we can determine, based on undisputed facts, that the shed is in direct violation of the CC&Rs as a matter of

law. Therefore, because the shed that was built was distinct from the shed in the application, the automatic approval of that application by the CC&Rs is irrelevant to our analysis.

¶17 Further, although both the trial court and Castlegate raised this issue, appellants did not address it in their opening brief and failed to file a reply brief contesting the point.

> [W]here, as here, appellant[s'] opening brief failed to address itself to substantial and determinative issues clearly developed and defined in the trial court, and these issues are again brought forth in the appellee['s] answering brief filed in this Court, a failure by the appellant[s] to file a reply brief leaves this Court without any assistance in analyzing and deciding the difficult issues upon which the trial court's decision could have been based and upon which appellant[s'] hopes for reversal must depend. . . . [I]n our opinion, the foregoing would constitute a sufficient basis for summary affirmance of the trial court's judgment.

Turf Irrigation & Waterworks Supply v. Mountain States Tel. & Tel. Co., 24 Ariz. App. 537, 541, 540 P.2d 156, 160 (1975). Therefore, summary judgment was proper, and the trial court did not abuse its discretion in denying the motion for new trial on those grounds.[7]

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[7]Appellants further argue the trial court erred by not viewing their evidence in the light most favorable, as required on summary judgment. And they additionally contend the Design Guidelines are not a part of the CC&Rs, and are also in conflict with the express terms of the CC&Rs. Appellants did not raise these arguments in their response to Castlegate's motion for summary judgment or in their motion for a new trial. They thus have waived them. *Hawkins*, 152 Ariz. at 503, 733 P.2d at 1086; *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17, 160 P.3d 223, 228 (App. 2007).

Attorney Fees

¶18 Castlegate has requested attorney fees pursuant to A.R.S. § 12-341.01(A), as well as a contractual provision found in Article 11, Section 11.1 of the CC&Rs, relying on *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 1, 165 P.3d 667, 668 (App. 2007) (finding that community association was entitled to receive all non-excessive attorney fees based on provision in CC&Rs). The provision in the CC&Rs reads: "If any lawsuit is filed by the Association . . . to enforce the provisions of the [CC&Rs,] . . . the prevailing party in such action shall be entitled to recover from the other party all attorney fees incurred by the prevailing party in the action." Because Castlegate is the prevailing party, based on both A.R.S. § 12-341.01(A) and Article 11, Section 11.1 of the CC&Rs, we award its reasonable attorney fees, upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶19 Based on the foregoing reasons, the judgment of the trial court is affirmed.