IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

PRAIRIE LAKE PLAZA SOUTH V. F.A.A. PROPERTIES

PRAIRIE LAKE PLAZA SOUTH BUSINESS ASSOCIATION, INC.,
A NEBRASKA CORPORATION, APPELLANT,

V.

F.A.A. PROPERTIES, L.L.C., A NEBRASKA LIMITED
LIABILITY COMPANY, ET AL., APPELLEES.

Filed April 9, 2024. Nos. A-23-306, A-23-307.

Appeals from the District Court for Lancaster County: ANDREW R. JACOBSEN, Judge. Affirmed.

Trev E. Peterson and Charles E. Wilbrand, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Ryan G. Norman, of Norman Law, P.C., L.L.O., and Michael C. Moody, of O'Rourke & Moody, L.L.P., pro hac vice, for appellee.

MOORE, BISHOP, and ARTERBURN, Judges.

ARTERBURN, Judge.

INTRODUCTION

Prairie Lake Plaza South Business Association, Inc. (PLPS) appeals from an order of the district court for Lancaster County, which denied its request to foreclose on liens it held on real property owned by F.A.A. Properties, L.L.C. On appeal, PLPS challenges the district court's finding that it did not sufficiently prove the amount of the debt owed to it by F.A.A. Properties and that, as a result, lien foreclosure was not proper. Upon our review, we affirm the district court's decision denying PLPS' request to foreclose on the liens.

BACKGROUND

FACTUAL BACKGROUND

This case involves a commercial development on the south side of Highway 2, near 84th Street in Lincoln, Nebraska. The area, referred to as Prairie Lake Plaza South, was developed by Eiger Corporation. In 2004, Eiger Corporation filed the Prairie Lake Village Protective Covenants, which applied to the lots within Prairie Lake Plaza South. The protective covenants, among other things, define certain parts of Prairie Lake Plaza South as "Joint Maintenance Common Areas" (JMCA) and make the lot owners collectively responsible for the cost of maintaining these areas.

In 2008, PLPS was incorporated as a non-profit corporation. The articles of incorporation and the bylaws provide that every person or entity owning a lot in the development is a member of PLPS. Such document also provides that a board of directors should be voted in by the members and that the board should be responsible for managing the corporation's affairs. Such management includes levying and collecting annual assessments for the maintenance of the JMCA. A member's annual assessment is to be determined in accordance with the protective covenants.

The protective covenants indicate that an owner's share of the JMCA expenses should be calculated utilizing the number of "p.m. trips" assigned to each lot. P.M. trips initially were used by the city to measure whether there was proper infrastructure and engineering to support the new commercial development. Essentially, the city assigned the development as a whole a total number of p.m. trips which acted as a limitation on the amount of development permitted at Prairie Lake Plaza South. Eiger in turn assigned to each lot within the development a maximum amount of p.m. trips based on the size of the lot and the type of business employed, in order to keep the total development in line with the city's p.m. trip limitations.

Specifically, pursuant to the protective covenants, the computation of annual JMCA assessments is completed according to the following calculation:

> Each Lot owner's annual assessment for such Lot owner's share of the Total Annual JMCA Expenses shall be determined by multiplying the Total Annual JMCA Expenses by a fraction, the numerator of which shall be the Lot P.M. Trips for such Lot for which an occupancy permit has been issued, and the denominator of which shall be the Total P.M. Trips for all Lots located on the Real Estate for which occupancy permits have been issued.

The covenants provide definitions for lot p.m. trips as used in the above calculations. "Total P.M. Trips" is defined as

> [T]he total number of p.m. peak hour vehicle trips to the Real Estate, as calculated by the Developer in accordance with the rules, regulations and guidelines promulgated by the City based on the size of all buildings and other improvements located on any of the Lots, and the uses of such buildings and improvements.

"Lot P.M. Trips" is defined as

> [T]he total number of p.m. peak hour vehicle trips to a Lot, as calculated by the Developer in accordance with the rules, regulations and guidelines promulgated by the City, based on the size of all buildings and other improvements located on such Lot and the uses of such buildings and improvements on such Lot.

Finally, "Assigned Lot P.M. Trips" is defined as "[T]he maximum number of Lot P.M. Trips assigned to any Lot by the Developer at the time that a Lot is conveyed by the Developer to a Lot Owner, or as thereafter increased by the Developer in writing, or decreased by the Lot Owner and the Developer in writing."

If a member of PLPS did not timely pay its annual assessments, the protective covenants authorized the board of directors to assess late fees and interest on the unpaid amount. In addition, the board was permitted to place a lien on the member's property to satisfy the unpaid amount.

In 2015, F.A.A. Properties, formerly known as Good Life Fitness, purchased a lot in the development from Eiger. F.A.A. Properties and Eiger together executed a Shopping Center Rider which indicated that F.A.A. Properties planned to build an approximately 40,000 square foot "Recreational Work-Out facility" on the lot. Also noted in the Rider was that F.A.A. Properties' lot "shall not generate a total of more than 172 p.m. peak hour vehicle trips (as calculated by the City of Lincoln, Nebraska, in accordance with the Conditional Annexation and Zoning Agreement . . .) to the Real Estate."

In 2017, F.A.A. Properties received its first invoice for its annual assessment. F.A.A. Properties believed that the amount it was assessed for its portion of the JMCA expenses was much higher than it expected. It did not immediately pay the invoice. In 2018, F.A.A. Properties received its second invoice for the annual assessment. Again believing that the amount of the assessment was too high, F.A.A. Properties did not pay the assessment.

PROCEDURAL BACKGROUND IN CASE NO. A-23-307

In May 2018, PLPS filed a complaint in county court alleging that F.A.A. Properties had failed to pay its 2017 and 2018 annual assessments and owed the association $34,567.80, which included assessed interest. In response, F.A.A. Properties filed an answer and "cross-complaint," alleging that PLPS failed to accurately calculate the amount of assessment owed. Additionally, F.A.A. Properties sought injunctive relief requiring PLPS to comply with the appropriate method of calculating assessments as delineated in the protective covenants. F.A.A. Properties subsequently filed an amended answer and "cross-complaint" in September 2018. Therein, it alleged that it had paid the 2017 and 2018 assessments "under protest." F.A.A. Properties also asserted that it had overpaid its assessments for 2016, 2017, and 2018 and that, as a result, it was owed a total of more than $15,000. Because it believed that PLPS had failed to provide sufficient information regarding the calculation of the annual assessments, it asked for an accounting.

Ultimately, PLPS filed a motion to dismiss without prejudice the claim raised in its complaint. PLPS asserted that its claim was now moot because of F.A.A. Properties' payment of the 2017 and 2018 assessments. The county court granted the motion to dismiss; however, F.A.A. Properties' counterclaims for reimbursement for its overpayment and its request for an accounting remained pending.

While case No. A-23-307 was still pending in the county court, the parties agreed to transfer the case to the district court. The case was later consolidated with case No. A-23-306.

PROCEDURAL BACKGROUND IN CASE NO. A-23-306

In case No. A-23-306, PLPS filed a third amended complaint in November 2020. (Our record does not contain any pleadings filed prior to this time.) In the third amended complaint, PLPS indicated that it had filed liens against F.A.A. Properties' real property due to its failure to pay the 2019 and 2020 JMCA annual assessments. It asserted that F.A.A. Properties currently owed $53,644.53 to PLPS, including interest.

Our record contains copies of five liens filed by PLPS on F.A.A. Properties' lot in Prairie Lake Plaza South. Four of the liens were filed as a result of F.A.A. Properties' failure to pay annual assessments in 2019, 2020, 2021, and 2022. According to these liens, F.A.A. Properties owed PLPS $100,525.36 in unpaid assessments, with interest on this amount continuing to accrue. In addition, one lien indicated that F.A.A. Properties owed PLPS $134,586.89 in attorney fees for its efforts to collect the unpaid assessments.

In its complaint, PLPS requested that the district court foreclose on the liens. Additionally, PLPS requested the district court enter a declaratory judgment finding that its current board of directors is the "duly elected and serving board of directors and officers."

F.A.A. Properties filed an answer and counterclaim to PLPS' third amended complaint. It raised various affirmative defenses for its nonpayment of the 2019 and 2020 annual assessments, including unclean hands, the illegitimacy of certain board members, and breaches of the protective covenants. F.A.A. Properties also continued to allege that each of its annual assessments had not been properly calculated pursuant to the protective covenants. It indicated that the PLPS board members were improperly inflating the association's annual budget to increase the assessments. Finally, F.A.A. Properties challenged the election and, thus, the authority of PLPS board members. F.A.A. Properties' specific counterclaims alleged a breach of the covenants; breach of the duties of good faith and fair dealing; fraud; fraudulent concealment; negligent misrepresentation; accounting; quiet title and removal of PLPS' liens; rescission and/or reformation of the shopping center rider; tortious interference with business relationships; and declaratory judgment regarding the election of the current board members.

PLPS filed a motion for summary judgment as to all pending claims before the district court, including the claims in its third amended complaint and F.A.A. Properties' counterclaims, both in case Nos. A-23-306 and A-23-307. The district court largely overruled the summary judgment motion except as to F.A.A. Properties' counterclaims in case No. A-23-306 alleging breach of fiduciary duties by PLPS' board of directors, reformation and recission of the shopping center rider, and tortious interference of business relationships. The remaining claims were addressed at trial.

TRIAL

A three day trial was held beginning September 19, 2022. During the trial, the parties presented voluminous testimony and evidence. In our recitation of the facts, we focus on the evidence related to PLPS' claim regarding its lien foreclosures, as that is the only issue raised in this appeal.

PLPS' first witness was Kelvin Korver. Korver is the owner of Eiger, the developer of PLPS. In addition, he owns Prairie Lake Mobil, a member of PLPS, and his company K&L Technologies manages PLPS. Korver sits on the board of directors for PLPS. Korver explained

that as the owner of Eiger, he set the maximum amount of p.m. trips for each lot within PLPS. He and the purchaser of the lot agree to such number prior to the purchase agreement being signed. When determining the maximum amount of p.m. trips per lot, Korver testified that he relies on a formula found in an engineering book; however, he has the sole discretion to discount the number of p.m. trips allocated to any given lot. Korver also testified that the city of Lincoln has no rules, regulations, and guidelines on how he is to determine the maximum number of p.m. trips per lot for the purpose of levying annual assessments.

As to the 172 lot p.m. trips assigned to F.A.A. Properties, Korver explained that such number is based on the lot housing a 60,000 square foot health club. Kover admitted that the actual size of the health club was 40,000 square feet, but that F.A.A. Properties requested to be assessed at 60,000 square feet in case it later wanted to expand the building. Korver indicated that had the lot been assessed at 40,000 square feet, the maximum amount of lot p.m. trips assigned would have been less than 172 and, as such, F.A.A. Properties' annual assessment would have been lower. Korver stated that F.A.A. Properties fully understood the calculation of the maximum amount of lot p.m. trips prior to signing the shopping center rider.

Later on in his testimony, Korver changed his explanation of the calculation of the 172 lot p.m. trips for F.A.A. Properties' lot. Korver explained that the maximum number of p.m. trips was assessed based on a 40,000 square foot health club with "passer-by" discounts for the additional 20,000 square feet allocated for any potential expansion. He stated that despite whether a 40,000 square foot health club or a 60,000 square foot health club was on the lot, the maximum number of lot p.m. trips would be 172.

PLPS' next witness was Cindy Holden, its accountant. As the accountant, Holden is tasked with calculating the annual assessments for each member of the association. The calculation involves dividing the association's annual budget by the total lot p.m. trips of the occupied lots and multiplying the result by the maximum amount of lot p.m. trips assigned to the individual member. Holden explained that if a member does not timely pay the invoice for the annual assessment, the member is assessed a late charge of five percent of the assessment and interest of ten percent per annum. Additionally, the board of directors can vote to specially assess the member for any attorney fees incurred in obtaining payment. According to Holden, F.A.A. Properties had not paid any annual assessment since 2019. As a result, it had been assessed late fees, interest, and additional amounts for incurred attorney fees. Additionally, PLPS placed liens on F.A.A. Properties' lot due to the ongoing nonpayment.

John Hestermann, PLPS' next witness, is the current president of the board of directors. While he is not a member of the association because he does not own a lot within PLPS, various companies owned by him have previously been employed by PLPS doing snow removal and lawn care. During his testimony, Hestermann testified that the protective covenants provide that members can request an "audit" regarding the amount of their annual assessments. Hestermann testified that while F.A.A. Properties continuously brought up its dissatisfaction with a number of actions taken by the board, he did not remember F.A.A. Properties ever specifically requesting an audit of its annual assessments. F.A.A. Properties did, however, explicitly request to have access to the financial records of the association.

Brian Will, an employee of the city of Lincoln, also testified on behalf of PLPS. Will is a city planner familiar with the development of Prairie Lake Plaza South. He explained the city's

use of p.m. trips "to ensure that there is proper infrastructure and engineering around [a new] area as it's developed." Basically, the total number of p.m. trips assigned to a new development is a limitation on the amount of development permitted.

In the development process for Prairie Lake Plaza South, the city calculated the maximum number of p.m. trips assigned to the area based upon Eiger's submission of an engineering study and traffic study. Will noted that the city had stopped tracking and monitoring PLPS' use of p.m. trips in 2014 after Eiger satisfied the terms of its annexation agreement with the city. And, while the city had at one time utilized a table assigning a certain number of p.m. trips to each lot in PLPS, their use was for purposes other than the oversight of any specific management conducted by PLPS. Will explained that the city does not get involved in how a business or association might utilize lot p.m. trips to calculate annual assessments or voting rights. He also stated that the city does not have any rules, regulations, or guidelines regarding the use of p.m. trips by private entities.

After PLPS rested, F.A.A. Properties called Jason Auxier, an owner of F.A.A. Properties to testify. Auxier testified that F.A.A. Properties first received an invoice for its annual assessment from PLPS in 2018. This invoice was for its 2017 assessment. Auxier was surprised that the annual assessment totaled close to $30,000. The invoice for the 2018 assessment was similarly valued. Eventually, F.A.A. Properties paid the 2017 and 2018 assessments "in protest," meaning that included with their payments were written objections and questions. Auxier testified that F.A.A. Properties did not agree with the amount of either assessment, nor did it understand how the amounts were calculated. After paying the 2017 and 2018 assessments, F.A.A. Properties made repeated requests for more information from the board of directors, including requests for an explanation of how the assessments had been calculated. Two such requests were in writing. F.A.A. Properties never received any response from PLPS.

Auxier was elected as president of the PLPS board sometime after making the 2017 and 2018 assessment payments. While on the board, he assisted with reducing the annual expenditures of the association by more than $40,000. In addition, he and other board members obtained a better understanding of how annual assessments were calculated using lot p.m. trips. Auxier testified that this was the first time that the calculation was explained to anyone, even to board members. Ultimately, Auxier was removed from his position as board president after a special election was held. He testified to his belief that his removal was due to the disagreements he had with Korver regarding budgeting and assessments.

Auxier testified that based upon his understanding of the calculation of annual assessments, F.A.A. Properties was overcharged, in part, because the 172 lot p.m.'s assigned to it in the shopping center rider equated to the maximum number of lot p.m.'s it could use. However, the actual amount of lot p.m.'s used by its facility, rather than the maximum allowable amount, should be used to calculate annual assessments.

F.A.A. Properties recalled Korver to testify. During this additional testimony, Korver admitted that he had received notice from F.A.A. Properties in an email asking the board to audit the amount of its annual assessments. No audit was ever completed.

The final witness who testified at the trial was David Fiala, another owner of F.A.A. Properties. Fiala testified that when F.A.A. Properties purchased the lot in Prairie Lake Plaza South from Eiger in 2015, it informed Korver that the anticipated size of its building was 40,000 square feet. Fiala denied ever expressing an intention to expand the building to 60,000 square feet as

Korver testified to. He also denied ever telling Korver that F.A.A. Properties wanted to take on additional p.m. trips than what was necessary for its existing building.

Fiala testified that when F.A.A. Properties signed the shopping center rider with Eiger, his understanding of the 172 p.m. trips assigned to the lot was that this was the maximum number of p.m. trips allowed to F.A.A. Properties. He was never made aware that the 172 maximum p.m. trips would be utilized in calculating the annual assessment. In fact, when the shopping center rider was signed, Fiala's understanding of how the annual assessments were calculated was that the actual number of p.m. trips utilized by its lot would be used in conjunction with certain discounts, including a 15 percent passer-by discount and a 20 percent internal discount. Fiala testified that the 2017 annual assessment was much higher than he ever expected based upon his understanding of the calculations. After receiving this invoice, F.A.A. Properties attempted to uncover exactly how the assessment was calculated, but it was unsuccessful in obtaining the association's full financial records or in having an audit completed by the board of directors.

DECREE

After the close of the trial, the district court entered a lengthy decree. As is relevant to this appeal, the district court denied PLPS' claim for foreclosure of its liens due to F.A.A. Properties' nonpayment of annual assessments. The court found,

> [w]hile the evidence is clear that F.A.A. [Properties] owes assessments for 2019, 2020, 2021 and 2022, [PLPS] has not proved the amount of the assessments for each year. The failure to prove those amounts obviously places into question the amount of late charges and assessments in determining the amount of the judgments and liens.

Essentially, the court concluded that in the calculation of the annual assessments, lot p.m. trips were to be calculated according to the City's rules, regulations, and guidelines, but no such rules, regulations, or guidelines were provided by PLPS. As such, Eiger was given unlimited discretion to set lot trips, affecting both the amount of annual assessments and voting rights:

> [A] member's share of [JMCA] expenses determines that members voting power. If, as Prairie Lake argues, the developer and a member can agree to raise a member's lot trips, then they can effectively take over the board. Further, if as Prairie Lake argues, the developer and a member can agree to lower that member's lot trips, then the developer can favor some members over others by reducing their share of the assessments.

In the decree, the district court also found that PLPS' board of directors were duly elected and were authorized to act and make decisions on the association's behalf. It prohibited F.A.A. Properties from telling third parties otherwise. The court dismissed each of the counterclaims raised by F.A.A. Properties in case Nos. A-23-306 and A-23-307.

PLPS appeals from that portion of the decree which denied its request to foreclose on the liens it held on F.A.A. Properties' real property.

ASSIGNMENTS OF ERROR

Consolidated and restated, PLPS argues that the district court erred in finding that it had failed to sufficiently prove the amount of the debt owed to it by F.A.A. Properties. PLPS asserts that the district court should have foreclosed on the liens it held on F.A.A. Properties' real property.

STANDARD OF REVIEW

A real estate foreclosure action is an action in equity. *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015). On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations. *Id*. But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Id*.

ANALYSIS

A lien has been characterized in this jurisdiction as an obligation, tie, duty, or claim annexed to or attaching upon property by the common law, equity, contract, or statute. *West Town Homeowners Assn. v. Schneider*, 231 Neb. 100, 435 N.W.2d 645 (1989). A lien is perhaps most accurately described as a right afforded by law to have an obligation satisfied out of particular property. *Id*. The purpose of a foreclosure proceeding is not to create a lien but, rather, to enforce one already in existence, to ascertain the amount of the lien and its priority, and to obtain a decree directing the sale of the property. *Id*.

In a foreclosure action, the party trying to enforce a lien has the burden of proving every fact essential to establishing the lien. *Twin Towers Condo. Assn. v. Bel Fury Invest. Group, supra.* The amount of the debt owed to the lienholder is an essential fact. *Id*.

In this case, the district court found that F.A.A. Properties has not paid its annual assessment to PLPS since 2019, and that it owes an assessment payment for the years 2019, 2020, 2021, and 2022. However, the district court also found that PLPS had failed to demonstrate with sufficient particularity the amounts that F.A.A. Properties owes on the assessments. Essentially, the court found that PLPS did not demonstrate how it calculated the annual assessments and, perhaps more importantly, whether those calculations comported with the protective covenants and the shopping center rider signed by Eiger and F.A.A. Properties. We generally agree with the district court's finding that PLPS did not prove the amount of debt owed by F.A.A. Properties.

Upon our review, we find ambiguity in how annual assessments are to be calculated pursuant to the protective covenants. Specifically, there appears to be some uncertainty regarding whether the maximum lot p.m.'s assigned to each lot, or the actual lot p.m.'s utilized by each lot should be used in the calculation.

Restrictive covenants, like those found within the protective covenants for the development, are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants. *Estates at Prairie Ridge Homeowners Assn. v. Korth*, 298 Neb. 266, 904 N.W.2d 15 (2017). The language of restrictive covenants must be interpreted in its entirety. *Id*. Thus, as in the interpretation of a contract, a court must first determine, as a matter of law, whether the language of restrictive covenants is ambiguous. *Id*. Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but

conflicting interpretations or meanings. *Id*. However, because restrictive covenants are not favored in the law, if covenants are ambiguous they should be construed in a manner which allows the maximum unrestricted use of the property. *Id*.

As we stated above, the protective covenants provide that the annual assessment will be computed using "the Lot P.M. Trips for such Lot for which an occupancy permit has been issued." "Lot P.M. Trips" are defined elsewhere in the covenants as

> [T]he total number of p.m. peak hour vehicle trips to a Lot, as calculated by the Developer in accordance with the rules, regulations and guidelines promulgated by the City, based on the size of all buildings and other improvements located on such Lot and the uses of such buildings and improvements on such Lot.

However, "Assigned Lot P.M. Trips" is defined as "[T]he maximum number of Lot P.M. Trips assigned to any Lot by the Developer at the time that a Lot is conveyed by the Developer to a Lot Owner, or as thereafter increased by the Developer in writing, or decreased by the Lot Owner and the Developer in writing." It is not entirely clear from the language of these definitions if there is any meaningful or practical difference between lot p.m. trips and assigned lot p.m. trips as those terms have been used by PLPS. However, it is clear that the number of assigned lot p.m. trips could exceed the number of actual lot p.m. trips that were calculated in a traffic or engineering study.

According to the testimony of Auxier and Fiala, F.A.A. Properties understood that the actual amount of p.m. peak hour vehicle trips to any given lot during a certain time frame, would be utilized in calculating the annual assessment of each PLPS member. Such testimony suggests that Auxier and Fiala understood that F.A.A. Properties' lot p.m. trips, not its assigned lot p.m. trips, would be utilized in the calculation of annual assessments. Auxier and Fiala did not believe that F.A.A. Properties' lot p.m. trips were the same as its assigned lot p.m. trips of 172. However, they also did not provide the district court with any explanation of how F.A.A. Properties' lot p.m. trips were to be calculated or the precise number of its lot p.m. trips during relevant time periods. Additionally, PLPS presented opposing evidence that the maximum lot p.m. trips assigned to each lot in the shopping center riders were in fact intended to be used as the number of lot p.m. trips in calculating the annual assessments.

Regardless of whether lot p.m. trips or assigned lot p.m. trips are utilized in calculating annual assessments, it is clear that neither number was calculated pursuant to the parameters laid out in the protective covenants and the shopping center rider. The shopping center rider signed by F.A.A. Properties and Eiger clearly provides that F.A.A. Properties was allocated a maximum of "172 p.m. peak hour vehicle trips." The rider also clearly indicates that such maximum p.m. trips was calculated "by the City of Lincoln, Nebraska, in accordance with the Conditional Annexation and Zoning Agreement." Our record reveals that the 172 p.m. trips assigned to F.A.A. Properties' lot was not, in fact, calculated by the City of Lincoln, but was instead assigned by Eiger's owner, Korver. Korver explicitly testified that he was the one who set each lot's maximum p.m. trips. He also testified that he had sole discretion to provide discounts to lot owners to decrease the amount of p.m. trips, and thus decrease the amount of that owner's annual assessment. Korver's testimony indicates that the maximum number of lot p.m. trips allocated to F.A.A. Properties was not calculated in the manner provided by the shopping center rider, rather the allocation was entirely within Korver's control and discretion.

Additionally, as the district court found, there was no evidence presented at trial to demonstrate that the lot p.m. trips assigned to F.A.A. Properties pursuant to the protective covenants were calculated in accordance with the rules, regulations, and guidelines promulgated by the City of Lincoln. In fact, the evidence revealed that there were no such rules, regulations, or guidelines. As such, the protective covenants give the appearance that the lot p.m. trips, and by extension the annual assessments, are regulated and limited by certain rules and guidelines, when it is clear that no such limitations exist. Instead, the number of lot p.m. trips assigned to each lot appears to be subject to no objective guideline or measure whatsoever. While there was testimony about the protective covenants' formula to be utilized to determine an assessment, it is necessary to first determine the lot p.m. trips assessed against a lot owner (numerator) before it can be divided by the total p.m. trips for all lots for which occupancy permits had been issued (denominator). Since the evidence failed to demonstrate how these figures are generated, the amount of the assessment can be easily manipulated.

Given the ambiguity in the protective covenants, the conflicting extrinsic evidence presented by the parties as to precisely how the annual assessments were to be calculated, and the evidence which suggests that F.A.A. Properties' lot p.m. trips were not allocated according to the language of the protective covenants or the shopping center rider, we find a failure of proof on the issue of how much F.A.A. Properties owes to PLPS for its failure to pay its annual assessments. It was PLPS' burden, as the lienholder, to demonstrate the amount of debt owed to it. However, PLPS failed to offer sufficient evidence to demonstrate how the annual assessments are properly calculated pursuant to the protective covenants and the shopping center rider. Without such evidence, it was not possible for the district court or this court to definitively determine the amount of debt F.A.A. Properties owes.

CONCLUSION

Because PLPS did not sufficiently prove the amount of debt owed by F.A.A. Properties as a result of the nonpayment of its annual assessments, we affirm the decision of the district court denying PLPS' request to foreclose on the liens it held on F.A.A. Properties' real property.

AFFIRMED.