IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

TURTLE ROCK III HOMEOWNERS ASSOCIATION, *Plaintiff/Appellee*,

v.

LYNNE A. FISHER, *Defendant/Appellant*.

No. 1 CA-CV 16-0455
FILED 10-26-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-095897
The Honorable David M. Talamante, Judge

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

The Law Offices of J. Roger Wood, PLLC, Tempe
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Counsel for Defendant/Appellant

Goodman Law Group, LLP, Mesa
By Clint G. Goodman, Ashely N. Moscarello, Maura A. Abernathy
Counsel for Plaintiff/Appellee

OPINION

Judge Jon W. Thompson delivered the Opinion of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 This matter involves a dispute between the Turtle Rock III Homeowners Association (HOA) and homeowner Lynne A. Fisher (Fisher). Fisher appeals from an injunction requiring her to clean up or repair certain parts of her property and from a judgment in favor of the HOA for penalties in the amount of $3850. The injunction is affirmed. The award of monetary penalties and attorneys' fees against Fisher below is reversed.

FACTUAL AND PROCEDURAL HISTORY

¶2 Fisher's home is in a planned community with recorded deed restrictions (CC&Rs). The CC&Rs require owners to maintain their property in a "clean and attractive condition." The CC&Rs provide that the failure to maintain the property in a manner satisfactory to the HOA Board will result in a notice specifying the nature of the violation and, in the event the violation is not cured within thirty days, the HOA has the right to fine the owner. The HOA sent Fisher many such notices and statements of fines being levied beginning in January 2014.

¶3 In November 2015, the HOA filed a complaint in superior court asserting breach of the CC&Rs and requesting an injunction after Fisher failed to keep up maintenance on her property. The HOA asserted that Fisher was using the home as a storage facility and she had allowed parts of the exterior to become broken, missing, or dilapidated. The HOA further asserted that Fisher had "excessive items within the home that can be viewed from neighboring property and/or constitute a health and safety hazard to the rest of the members in the community." It asserted that Fisher was accumulating fines at a rate of $25 per day.

¶4 An evidentiary hearing was scheduled to address both the monetary penalties and the ongoing maintenance violations. The HOA submitted a pretrial statement; Fisher did not. HOA officers attended the hearing with counsel; Fisher's counsel attended the hearing, but Fisher did not. The HOA presented one witness and five exhibits, including photographs of the property, a voluminous number of letters to Fisher from the HOA, a ledger of the accrued fines, and the HOA CC&Rs. The HOA did not provide the fine schedule. Fisher's counsel waived any presentation of testimony and did not introduce any evidence.

¶5 The trial court entered an order that stated there was no objection by Fisher to the HOA's requested exterior maintenance repairs or to the requested interior changes–namely, moving any interior items that prevent the blinds from closing properly and replacing the dilapidated blinds. On the issue of the monetary penalties, the court addressed Fisher's

counsel's apparent objection that there was no written fine schedule in evidence and that the HOA had deviated from the CC&Rs' requirement that a homeowner have thirty days' notice to cure any defect before the assessment of any fines. The court's order concluded the HOA had complied with the thirty day notice requirement and that the HOA's witness had presented sufficient testimony as to the fine assessment.

¶6 The trial court issued a judgment in favor of the HOA. It ordered all the requested maintenance, $10,839.70 in attorneys' fees, $3850 in penalties, and $474 in costs against Fisher. The order was signed and was issued pursuant to Arizona Rule of Civil Procedure 54(c). Fisher timely appealed.

DISCUSSION

¶7 On appeal, Fisher raises two issues: (1) whether the trial court erred in issuing an injunction requiring her to make changes to the interior of her property, and (2) whether the award of penalties against Fisher ignored the express language of the CC&Rs and Arizona law, and violated her due process rights.

¶8 The grant or denial of injunctive relief rests within the sound discretion of the trial court. *Fin. Assocs., Inc. v. Hub Props., Inc.*, 143 Ariz. 543, 545, 694 P.2d 831, 833 (App. 1984). The interpretation of deed restrictions is a question of law, which we resolve de novo. *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (1993) (upholding HOA's restrictions).

¶9 Fisher's argument about having to remedy the interior of her house is made for the first time on appeal. She filed no pretrial statement making this argument. She did not testify or present evidence at trial. And, below, the trial court noted she offered no objection as to the enumerated maintenance items, which specifically included the interior—although limited to items that interfered with the operation of blinds that can be seen from the exterior. "[A]rguments raised for the first time on appeal are untimely and deemed waived." *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007). Further, because the hearing transcript is missing, we must presume the missing transcript would have supported the trial court's ruling. *See Myrick v. Maloney*, 235 Ariz. 491, 495, ¶ 11, 333 P.3d 818, 822 (App. 2014). The trial court's injunction is affirmed as to the interior of Fisher's house.

¶10 Fisher next argues that the $3850 in penalties for maintenance violations were imposed without a contractual or legal basis, and before she

had proper notice and an opportunity to be heard.[1] She maintains that because there was no written schedule enumerating penalties in evidence, such charges were unreasonable and inconsistent with Arizona Revised Statutes (A.R.S.) § 33-1803(B) (2014)[2] which requires monetary penalties to be reasonable.[3] To this end she cites *Villas at Hidden Lakes Condos Assoc. v. Geupel Constr. Co.*, 174 Ariz. 72, 81, 847 P.2d 117, 126 (App. 1992) (finding it unreasonable for a HOA to impose late fees pursuant to a retroactively adopted fee schedule). Fisher further asserts that under the CC&Rs she

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[1] We reject the HOA's contention that because Fisher failed to appear at trial, all of her issues on appeal are waived. The case cited for this proposition, *Bloch v. Bentfield*, 1 Ariz. App. 412, 418, 403 P.2d 559, 565 (1965), is inapposite. *Bloch* was a matter where a party was representing himself and failed to appear for trial. In the instant matter, Fisher's counsel appeared and presented argument on the issue of penalties.

[2] Some of Fisher's citations regarding penalties are to A.R.S. § 33-1803(A) (relating to assessments), rather than to A.R.S. § 33-1803(B), which relates to penalties.

[3] Section 33-1803(B) provides:

> After notice and an opportunity to be heard, the board of directors may impose *reasonable* monetary penalties on members for violations of the declaration, bylaws and rules of the association. Notwithstanding any provision in the community documents, the board of directors shall not impose a charge for a late payment of a penalty that exceeds the greater of fifteen dollars or ten percent of the amount of the unpaid penalty. A payment is deemed late if it is unpaid fifteen or more days after its due date, unless the declaration, bylaws or rules of the association provide for a longer period. Any monies paid by a member for an unpaid penalty shall be applied first to the principal amount unpaid and then to the interest accrued. Notice pursuant to this subsection shall include information pertaining to the manner in which the penalty shall be enforced. (Emphasis added.)

Under A.R.S. § 33-1803(C) Fisher could have challenged any alleged violation within ten business days of such notice by certified mail, but she did not do so.

should have been entitled to a full thirty day opportunity to cure or object before any penalty was assessed, and because she was not given such an opportunity, the penalties were all invalid.[4] She further argues that a daily or weekly fine is akin to a punitive damage award and, to this end, cites *Kalenka v. Taylor*, 896 P.2d 222 (Alaska 1995) (addressing breach of contract construction penalties).

¶11 In response, the HOA asserts the penalties were reasonable and supported by the HOA's witness's uncontroverted testimony at trial. The HOA submitted a ledger detailing the charges. On appeal, the HOA did not respond to Fisher's citation to *Villas* for the proposition that there must be evidence in the record of a promulgated fee schedule for fines to be reasonable.

¶12 As to the thirty day argument, the HOA further insists Fisher had abundant notice and opportunity to be heard and failed to avail herself of those opportunities both before the HOA and before the trial court. In fact, Fisher received in the range of ninety separate notices between January 2014 and the time of trial notifying her that she was incurring escalating monetary penalties for her failure to cure those same few property violations. While the HOA admits the $25 fines were initially applied before the expiration of thirty days, it argues that fact does not invalidate any subsequent fines for the same violation--especially in light of the court awarding only the penalties that accrued after September 16, 2015, which was the date the HOA's lawyer finally wrote to Fisher.[5]

¶13 We view the evidence presented to the trial court in the light most favorable to upholding decision to award the HOA $3850 in penalties. *See Bell–Kilbourn v. Bell–Kilbourn*, 216 Ariz. 521, 522, n.1, 169 P.3d 111, 112, n.1 (App. 2007). The trial court enjoys broad discretion in its evaluation of

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[4] Specifically, Fisher asserts "The Association's habit was to send a second notice to Ms. Fisher prior to the expiration of the required 30 day notice. Then, at the time of the second notice (day 20 of the 30 day notice period), the fine would be imposed and added to her account ledger." In other words, the notices gave her ten days to cure or additional action would be taken under the Enforcement Policy. It also gave her ten days to request a hearing. Fisher argues "This consistent habit and practice did not comply with the law and the documents and should work to invalidate any and all such penalties."

[5] The trial court, sua sponte, reduced the penalties from the requested $9,165.25 to $3850.

evidence. *Conant v. Whitney*, 190 Ariz. 290, 292, 947 P.2d 864, 866 (App. 1997). However, we review issues of law de novo. *See Keenen v. Biles*, 199 Ariz. 266, 267, ¶ 4, 17 P.3d 111, 112 (App. 2001).

¶14 Monetary fines must be reasonable. *See* A.R.S. § 33-1803(B). Ad hoc fines are per se unreasonable. *Villas*, 174 Ariz. at 81, 847 P.2d at 126. *Villas* is dispositive on this issue. Under *Villas*, even where the HOA has the authority to levy fines, it must promulgate the schedule of fines prior to imposing the fines, and the failure to prove promulgation is fatal. *Id.*

¶15 As Fisher noted below, no fee schedule was introduced into evidence or presented to the trial court. There is a bare assertion in the HOA's briefs that it provided Fisher a copy of the "fine policy" after the hearing, however no evidence in the record corroborates this claim. The trial court did not make a finding that a promulgated fee schedule existed and we do not find the trial court's reference to Ms. Curtiss' testimony sufficient to establish that fact. Based on the way the trial court phrased its order, stating "the Court finds Ms. Curtiss' testimony sufficient under the circumstances to support as a matter of evidence the fine assessment of $25 per day," the witness could have been testifying to HOA policy or facts related to the violations.[6]

¶16 Next, the HOA argues that Fisher never provided evidence controverting that the fine schedule authorized reasonable monetary penalties. Fisher was not required to present evidence controverting the existence of the fee schedule. To bring an action for the breach of the contract, the plaintiff has the burden of proving the elements of the claim. *Clark v. Compania Ganadera de Cananea, S.A.*, 95 Ariz. 90, 94, 387 P.2d 235, 238 (1963). And, where a litigant seeks to prove the terms of a writing, the original document itself must be produced unless shown to be unavailable due to no fault of the litigant seeking to prove such terms. *Higgins v. Arizona Sav. and Loan Ass'n*, 90 Ariz. 55, 68, 365 P.2d 476, 486 (1961); *see also* Ariz. R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or an applicable statute provides otherwise.").

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[6] Fisher asserted in her opposition to monetary penalties that "No evidence of the reasonable nature of the fines was presented at trial and when asked, the Association's witness (board member) could not produce or recall that the Association's documents provided for such daily fines."

> When the contents of a writing are at issue, oral testimony as to the terms of the writing is subject to a greater risk of error than oral testimony as to events or other situations. The human memory is not often capable of reciting the precise terms of a writing, and when the terms are in dispute only the writing itself, or a true copy, provides reliable evidence. To summarize then, we observe that the importance of the precise terms of writings in the world of legal relations, the fallibility of the human memory as reliable evidence of the terms, and the hazards of inaccurate or incomplete duplication are the concerns addressed by the best evidence rule.

Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1986) (citing 5 Louisell & Mueller, Federal Evidence, § 550 at 283; McCormick on Evidence (3d ed. 1984) § 231 at 704; Cleary & Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L.Rev. 825, 828 (1966)).

¶17 There is also no support in the record for a determination that a fine of $25 per day, for any violation, is reasonable. A stipulated damages provision made in advance of a breach is a penalty, and is generally unenforceable. *Larson–Hegstrom & Assocs., Inc. v. Jeffries*, 145 Ariz. 329, 333, 701 P.2d 587, 591 (App. 1985). And, that the trial court attempted to remedy the HOA's overreach by slashing the assessed fines by 58% cannot establish the reasonableness of HOA's fine scheme. Rather, the exact opposite is true.

¶18 Therefore, although the HOA had the authority under state statutes and the CC&Rs to promulgate a fine schedule for monetary penalties, there is no competent evidence in the record before us that it did so. Without competent evidence of a fee schedule timely promulgated demonstrating the fine amounts and the appropriateness of such amounts, monetary penalties are per se unreasonable. Even if a fee schedule existed, the HOA had the burden to prove its damages. Given our resolution of this matter, we need not address Fisher's due process claim related to the required thirty day notice of a penalty. The trial court's award of monetary penalties is reversed and the attorneys' fees award below is reversed.

ATTORNEYS' FEES

¶19 Both parties request attorneys' fees on appeal. The HOA cites both the CC&Rs and A.R.S. § 12-341.01(2016) as the basis for its fees. We grant neither party their fees as neither party was wholly successful.

CONCLUSION

¶20 For the above stated reasons, the trial court's injunction is affirmed and the judgment for monetary penalties in the amount of $3850 is reversed.

AMY M. WOOD • Clerk of the Court
FILED: AA