IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HOWARD R. STANDAGE, *Plaintiff/Appellant*,

v.

WHITE MOUNTAIN VACATION VILLAGE SUBDIVISION ASSOCIATION, an Arizona corporation, *Defendant/Appellee*.

No. 1 CA-CV 13-0075
FILED 12-26-2013

Appeal from the Superior Court in Maricopa County
No. CV2010-093375
The Honorable Emmet J. Ronan, Judge

AFFIRMED

COUNSEL

Fuller & Stowell, P.C., Mesa
By Donald O. Fuller

Counsel for Plaintiff/Appellant

Jones, Skelton & Hochuli, P.L.C., Phoenix
By J. Gary Linder, Eileen Dennis GilBride, & Heather E. Bushor

Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Michael J. Brown joined.

K E S S L E R, Judge:

¶1 Howard R. Standage appeals from the trial court's entry of partial judgment dismissing his claims for declaratory judgment and injunctive relief. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2003, Standage purchased a lot in White Mountain Vacation Village subject to the subdivision's 2002 Conditions, Covenants, and Restrictions ("the 2002 CC&R's"). Section 3.1 of the 2002 CC&R's limited the use of the lots to "Recreational Vehicles" and provided that "no mobile home, dwelling house, or any other unit intended as permanent living quarters may be placed on any Lot."

¶3 Standage filed a complaint in 2010 alleging that the White Mountain Vacation Village Home Owners Association ("the HOA") had breached its duty to properly enforce the 2002 CC&R's by approving the installation of Park Model Homes, retaining walls, fences, landscaping, and impermeable improvements. Standage's complaint included claims for declaratory judgment, injunctive relief, and breach of contract. In addition, Standage alleged that as a result of the approvals given by the HOA, improvements to the lot adjoining his property resulted in additional water flow onto and damage to his property.

¶4 In response, the HOA filed an amended set of CC&R's ("the 2010 CC&R's") expanding the definition of "Recreational Vehicles" to include Park Model Homes, vehicles not intended to be moved on a regular basis, and vehicles primarily used to provide permanent living quarters. The HOA then filed a motion to dismiss alleging the allegations in Standage's complaint were rendered moot in light of the 2010 CC&R's. The trial court denied the HOA's motion.

¶5 The parties filed briefs on the issues to be litigated and the remedies requested. The HOA argued that the only issues which could be litigated were if it breached the CC&R's and if so, any damages to

Standage, but that the other claims affected the rights of other lot owners and could not proceed without Standage naming them as parties. Standage argued that no other homeowners' rights would be affected, but if they were, the HOA had to add them. The trial court dismissed Standage's claims for declaratory judgment and injunctive relief because it would affect other lot owners in the subdivision who were not parties to the lawsuit. The court found that ordering such relief would violate due process requirements, and the interest of non-party lot owners would not be adequately represented by Standage or the HOA.

¶6 Standage timely appealed.[1] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1), (5)(b) (Supp. 2013).

DISCUSSION

¶7 Standage argues that the trial court erred in dismissing his claims for declaratory judgment and injunctive relief. We review the dismissal of a complaint *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012).

I. The 2002 CC&R's do not provide Standage with an absolute right to relief.

¶8 Standage argues that the 2002 CC&R's afford him an absolute contractual right to enforce the provisions of the CC&R's against the HOA. Consequently, in dismissing his claims, Standage argues that the trial court denied him his contractually bargained-for rights. "We have long held that we will give effect to a contract as written where the

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[1] Generally, before granting a motion to dismiss on the pleadings, a court should give the defendant a chance to amend the complaint if that would cure the defect. *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶¶ 26-27, 990 P.2d 26, 33 (App. 1999). However, given Standage's position below that if parties had to be added the HOA should add them, we construe that position as meaning he would not seek to amend the complaint to add the other homeowners, thus making dismissal with prejudice appropriate. *Id.*; *see also Jung v. K. & D. Mining Co.*, 356 U.S. 335, 337 (1958) (stating order dismissing complaint after plaintiff refused to amend the complaint was final judgment); *Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3rd Cir. 1976) (stating that order dismissing complaint without prejudice is final if plaintiff declares his intent not to amend).

terms of the contract are clear and unambiguous." *Mining Inv. Grp., LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 117 P.3d 1207, 1211 (App. 2008).

¶9 Section 11.2 of the 2002 CC&R's provides that the restrictive covenants may be enforced by certain parties, including the HOA and any lot owner:

> These restrictions may be enforced by the Association through its Board (which shall have the right and duty to enforce this Declaration and to expend Association funds for this purpose), the Declarant, any Owner of any Lot within the Property, and the holder of any encumbrance upon or security interest in any portion of the Property. Violation of any one or more of the provisions of this Declaration may [be] restrained or enforced by any court of competent jurisdiction and/or [damages] may be awarded against any such violator. Breach of any one or more of these covenants shall not affect the lien of any mortgage, deed of trust, lien or security interest now or hereafter of record, but this Declaration may be enforced by injunctive relief or otherwise against a security holder, a mortgagee, or beneficiary of a deed of trust as well as against any title Owner. Nothing herein shall be construed as meaning that damages are an adequate remedy where equitable relief is sought.

The express terms of Section 11.2 give Standage the *option* to seek enforcement of the restrictive covenants. It provides that the restrictions *may* be enforced by a lot owner, the violations *may* be addressed by a proper court, damages *may* be awarded against a violator, and the provisions *may* be enforced by injunctive relief. In contrast, it also provides that breach of any covenant *shall* not affect the lien of any mortgage, deed of trust, or security interest. "[U]se of the word 'may' generally indicates permissive intent, while 'shall' generally indicates a mandatory provision." *Walter v. Wilkinson*, 198 Ariz. 431, 432, ¶ 7, 10 P.3d 1218, 1219 (App. 2000) (internal citations omitted). Where both mandatory and permissive terms are used in the same provision, it is fair to infer that each term is meant to carry its ordinary meaning. *Id*. Consequently, although this provision provides Standage with a potential means for enforcing the CC&R's, it does not give him an absolute right to relief. Any suit is still subject to the rules of civil procedure, including the need to join indispensable parties. The court's dismissal, in light of Standage's failure to join other homeowners who would be affected by

any injunctive relief sought, does not violate any right Standage had under the CC&R's to seek to enforce the CC&R's.

¶10 Standage's reliance on the 2002 CC&R's waiver provision is equally misplaced. Section 11.4 provides that "[t]he failure of the [HOA] or an Owner to enforce any provision of this Declaration shall in no event be deemed a waiver of the right to do so thereafter." Generally, "where frequent violations of restrictions have been permitted, the restrictions will be considered abandoned and unenforceable." *Riley v. Stoves*, 22 Ariz. App. 223, 229-30, 526 P.2d 747, 753-54 (1974). "The non-waiver provision, by its plain language, is intended to prevent a waiver based on prior inaction in enforcing the [r]estrictions." *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 398, ¶ 22, 87 P.3d 81, 86 (App. 2004); *cf. College Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 539, ¶ 18, 241 P.3d 897, 903 (App. 2010) ("But when [CC&R's] contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations did not constitute a 'complete abandonment' of the [CC&R's]." (citation omitted)). As a result, Section 11.4 protects the right to enforce the CC&R's despite the apparent acceptance of repeated prior violations. It does not, however, provide an explicit right to relief.

II. The trial court did not err in finding the alleged offending lot owners were indispensable parties.

¶11 Standage argues that his requests for declaratory and injunctive relief do not affect the rights of other landowners, and as a result, there is no need to join them as parties in this litigation. The HOA, on the other hand, states that ordering relief that adjudicates the rights of third-party landowners would violate the due process requirements of the Fifth and Fourteenth Amendments. "Parties to an action are divided into three classes: Proper, necessary, and indispensable." *Oglesby v. Chandler*, 37 Ariz. 1, 17, 288 P. 1034, 1040 (1930); *see* note to Ariz. R. Civ. P. 19. The indispensability of parties is a question of law which we review *de novo*. *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 19, 960 P.2d 55, 60 (App. 1998). In

resolving this matter, we look to Arizona Rule of Civil Procedure ("Rule") 19 for guidance.[2]

¶12 Indispensable parties are "those without whom the action cannot proceed, and necessary parties are those who have an interest in the controversy but whose interests are separable and will not be directly affected by a decree rendered in their absence, which does full justice between the parties before the court." *Siler v. Superior Court*, 83 Ariz. 49, 54, 316 P.2d 296, 299 (1957); *see also* Ariz. R. Civ. P. 19. In Arizona, the test of indispensability "is whether the absent person's interest in the controversy is such that no final judgment or decree could be entered, doing justice between the parties actually before the court and without injuriously affecting the rights of others not brought into the action." *Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549, 490 P.2d 551, 555 (1971).

¶13 Based on the design guidelines and use restrictions contained in Article 3 of the 2002 CC&R's, the HOA created an Architectural Review Committee to approve site and improvement plans within the community. In his complaint, Standage alleged that the HOA, either directly or through the Architectural Review Committee, permitted improvements in direct violation of the CC&R's. If the trial court were to grant Standage's requests for declaratory and injunctive relief, those lot owners who had previously received approval from the HOA would be required to remove the alleged offending improvements. As a result, the judgment would injuriously affect the rights of those lot owners not joined in the litigation, and the court did not err in dismissing the request for declaratory and injunctive relief.[3]

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[2] Rule 19 and the joinder of indispensable parties arise from the concept of due process. *See R.J. Williams Co. v. Fort Belknap Housing Authority*, 92 F.R.D. 17, 21 (D. Mont. 1981) ("[A] court must protect the interests of the parties not before it to avoid possible prejudicial effect; failure of a court to protect those interests by joinder may amount to a violation of due process."); *Fletcher Aircraft Co. v. Bond*, 77 F.R.D. 47, 51 (C.D. Cal 1977) ("It is a firmly established procedural maxim that a judgment which substantially affects the rights of a party who is not joined violates due process.").

[3] Standage settled with his upstream neighbors whose improvements he alleged had caused water damage to Standage's property. Standage did not name his neighbors as parties in this case to seek injunctive relief.

¶14 Standage relies on cases from other jurisdictions to argue it is only necessary to join other lot owners in an action to abrogate and not to enforce CC&R's.[4] *See Karner v. Roy White Flowers, Inc.*, 527 S.E.2d 40, 44 (N.C. 2000) (stating that all property owners affected by a restrictive covenant were necessary parties to an action to invalidate that covenant); *Wright v. Incline Vill. Gen. Improvement Dist.*, 597 F. Supp. 2d 1191, 1207 (D. Nev. 2009) ("[I]n an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." (citation omitted)). Although those cases conclude that all property owners are indispensable parties in an action to invalidate a covenant, they do not explicitly provide that joinder is unnecessary when enforcing a restrictive covenant. In addition, the fact that the HOA approved the improvements under Article 3 distinguishes this case from those relied upon by Standage. Accordingly, we find those cases to be unpersuasive. [5]

III. The HOA is entitled to its attorneys' fees and costs on appeal.

¶15 According to Section 11.3 of the 2002 CC&R's, "[i]f the [HOA], or any other party bound by this Declaration, commences an action arising out of or in connection with this Declaration, the prevailing

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[4] Standage also cites to unpublished cases from different jurisdictions, in violation of Arizona Rule of Civil Appellate Procedure 28(c). This rule applies to unpublished decisions issued by other jurisdictions. *Walden Books Co. v. Dep't of Revenue,* 198 Ariz. 584, 589, ¶ 23, 12 P.3d 809, 814 (App. 2000). Accordingly, we will not consider those decisions.

[5] Standage further argues that the HOA has the burden to join the violating lot owners in the litigation. Standage cites no legal authority supporting this argument and fails to develop it in any substantial way. Accordingly, we find he has waived this issue and do not address the merits. *See* ARCAP 13(a)(6) (stating the appellant's brief must contain an argument with citations to relevant authority); *In re U.S. Currency in the Amount of $26,980.00*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) ("This bald assertion is offered without elaboration or citation to any constitutional provisions or legal authority. We will not consider it.").

party shall be entitled to have and recover from the losing party reasonable [attorneys'] fees and costs of suit." Because the HOA is the prevailing party, we award it its attorneys' fees and costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶16 For the foregoing reasons, we affirm.

Ruth A. Willingham · Clerk of the Court
FILED: mjt