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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GATEWAY TRIANGLE DEVELOPMENT, LLC, a California limited
liability company, *Plaintiff/Appellee*,

v.

JABEL HOLDINGS, LLC, a California limited liability company,
Defendant/Appellant.

No. 1 CA-CV 15-0558
FILED 4-6-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-009379
The Honorable Christopher Whitten, Judge

REVERSED AND REMANDED

COUNSEL

Jennings, Strouss & Salmon, PLC, Phoenix
By Eric D. Gere
Counsel for Plaintiff/Appellee

Gallagher & Kennedy, PA, Phoenix
By Peter J. Moolenaar
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 The superior court entered summary judgment against Jabbel Holdings, LLC, holding it liable for its pro rata share of shopping center common area maintenance costs (“CAM fees”). Jabbel appeals. Because there exists a genuine dispute of fact concerning whether the purchaser of the shopping center was on inquiry notice that its predecessor had waived Jabbel’s liability, we reverse and remand.

FACTS AND PROCEDUAL HISTORY

¶2 The Lakeview Village Shopping Center (the “Center”) is subject to easements, covenants, and restrictions (the “Declaration”). The Center was originally divided into two parcels, Val Vista Lakes Development’s “developer parcel” and Dillon Real Estate Co.’s “Dillon parcel.” Under the Declaration, the owner of the developer parcel (the “Developer”) is responsible for maintaining the common areas but has the right to receive a pro rata share of the CAM fees from owners of other parcels.

¶3 Though the parties dispute the exact chain of title, they agree that Lakeview Village Corporation (“LVC”) eventually became the Developer. In 1997, LVC sold part of its interest in the Center to Sunnyvale Business Square (the “LVC-Sunnyvale contract”), keeping lots 5, 8, 9, and 16-25 (the “Jabbel lots”) and making Sunnyvale the Developer. The LVC-Sunnyvale contract states that it is binding on the “successors, agents, representatives and assigns of the parties” and provided that “no CAM fees will be charged to the owner of [the Jabbel] lots until a structure is completed and a Certificate of Occupancy has been received from the City of Gilbert.”

¶4 In 2011, LVC conveyed the Jabbel lots to Jabbel. The next year, Sunnyvale’s interest was foreclosed upon, and eventually Gateway Triangle Development, LLC bought the interest on Auction.com. Gateway then sent Jabbel an assessment of its pro rata share of the CAM fees. Jabbel

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replied that it was not liable for the fees under the LVC-Sunnyvale contract. Gateway then sued Jabel to recover over \$295,500 in CAM fees accrued from July 2013 through 2014 and estimated for 2015. Both parties moved for summary judgment. After oral argument, the superior court granted Gateway's motion for summary judgment and denied Jabel's. After the superior court summarily denied its motion for reconsideration, Jabel appealed.

DISCUSSION

¶5 Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). We review motions for summary judgment de novo. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15 (App. 2007). We view the facts and make any inference in favor of the party against whom summary judgment was granted. *Id.*

¶6 Gateway first argues that the LVC-Sunnyvale contract is not a waiver but a modification of Jabel's rights and obligations that is invalid because it was not recorded as an amendment to the Declaration. We disagree. In interpreting covenants, such as the Declaration, we give effect to the parties' intentions "as determined from the language of the document in its entirety and the purpose for which the covenants were created." *Powell v. Washburn*, 211 Ariz. 553, 554, ¶ 1 (2006). By its terms, the Declaration contemplates waivers that need *not* be recorded. The Declaration requires all waivers to be in writing and states that "[n]o . . . waiver of any default shall affect any other default or cover any other period of time other than any default and/or period of time specified . . ." It further provides that waivers do not affect other obligations under the Declaration. The clear purpose of this provision is to allow the Developer to manage the property without needing to formally record every detail of the governance of the Center – a process that requires the consent of all the parties to the Declaration. Consistent with the Declaration, the LVC-Sunnyvale contract did not waive CAM fees indefinitely – it specifies a definite condition precedent to their collection – and does not alter the underlying obligation to pay CAM fees. No formal amendment was required.

¶7 We next determine whether Gateway had inquiry notice of the waiver in the LVC-Sunnyvale contract. Gateway argues that Jabel did not raise the issue of inquiry notice until its motion for reconsideration of the summary judgment ruling, and that it is therefore waived. But Jabel's

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response to Gateway's motion for summary judgment included the following argument:

Gateway took its property (and the role of Developer) subject to the Waiver and longstanding history of owners of undeveloped parcels not being charged CAM fees. "Unrecorded instruments, as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall be valid and binding." A.R.S. § 33-412; see *Warren v. Whitehall Income Fund*, 170 Ariz. 241, 243, 823 P.2d 689, 691 (Ariz. Ct. App. 1991) (discussing that constructive and actual notice have the same effect and when the purchaser of land has notice of a prior claim, he takes it subject to that claim and therefore is not a bona fide purchaser).¹

(Emphasis added.) Gateway's reply dismissed *Warren* as irrelevant because it did not concern a "private covenant that contradicts the express terms of a previously recorded declaration" and contended that any waiver was "null and void." "Constructive notice includes both information available through recorded documents and knowledge of facts that impose a duty to inquire." *Hall v. World Savings & Loan Ass'n*, 189 Ariz. 495, 500 (App. 1997) (citations omitted). By raising constructive notice, Jabelle raised the issue of inquiry notice, and the argument is not waived.

¶8 Gateway nevertheless argues that because inquiry notice was not fully argued until the motion for reconsideration and because that motion included additional exhibits not presented in the motions for summary judgment, we should review the summary denial for abuse of discretion. There is neither authority nor logic to support this argument. The trial court is not in a superior position to evaluate a motion for summary judgment. And a judgment that is legally flawed must be reversed, so long as the court had notice of the ground for reversal before appeal. The fact that an argument is amplified in a motion for reconsideration confers no discretion to enter an erroneous judgment, and we reject Gateway's argument.

¶9 Gateway further contends that the issue cannot be considered on appeal because it was never given an opportunity to respond as required by Arizona Rule of Civil Procedure 7.1(e). When, as here, a motion for reconsideration is summarily denied, no response is required and we can

¹ Jabelle's motion for summary judgment included almost identical language.

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reverse that determination without remanding it for reconsideration so long as both parties have a full and fair opportunity to brief the issue on appeal. Gateway fully addressed inquiry notice at oral argument and in its briefs on appeal. The issue is properly before us.

¶10 There is a genuine issue of material fact as to whether Gateway was on inquiry notice of the waiver.² “Notice of facts and circumstances which would put a [person] of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose.” *3502 Lending, LLC v. CTC Real Estate Serv.*, 224 Ariz. 274, 277, ¶ 16 (App. 2010) (citation omitted).

¶11 Gateway downloaded due diligence documents from Auction.com in “early May 2013.” Those documents included estimates of CAM costs from 2012 and 2013. Both estimates stated that the Jabbel lots “do[] not participate in CAM.” Gateway admits that at some point it reviewed those documents and was aware that Jabbel was not paying CAM fees. On May 28, Jabbel asked Auction.com to include a copy of page 6 of the LVC-Sunnyvale contract, the portion that contained the waiver, in the due diligence documents. The due diligence documents produced by Auction.com during discovery included the waiver. The general practice of Auction.com is to email bidders when a document is added to the due diligence file, but Gateway stated that it did not receive an email notification that the page 6 was added to the due diligence paperwork. Gateway was confirmed as the successful bidder on May 30, 2013.

¶12 On this record, there exists a genuine issue of material fact as to whether Gateway had inquiry notice of the waiver. Gateway admits that it knew Jabbel did not pay CAM fees when it purchased the property, but nonetheless maintains the reasonableness of its belief, based only on the Declaration, that it was required to pay them. In view of the fact that the Declaration included a provision that specifically contemplated waivers, we cannot say as a matter of law that Gateway’s apparent disregard of the due diligence documents entitles it to a superior position than that of its predecessor with regard to the CAM fees.

² For the purposes of argument only, we assume without deciding that Jabbel had to pay CAM fees under the Declaration and that the waiver was a conveyance under the recording statute. See A.R.S. § 33-412 (requiring that “bargains, sales and other conveyances whatever of lands, tenements and hereditaments” be recorded or else are void as to subsequent bona fide purchasers).

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¶13 Gateway relies on *Neal v. Hunt*, 112 Ariz. 307 (1975), for the proposition that inquiry notice demanded nothing more than a review of the recorded declaration. The reliance is misplaced. In *Neal*, the defendant sold his interest in land to a buyer but in an unrecorded instrument reserved some of the property’s water rights. *Id.* at 309. Eventually, the land was sold and the seller told the buyer that the defendant had reserved water rights. *Id.* at 309–10. The supreme court held that inquiry notice required only a search of the public record: “absent other notice, a search of the record was sufficient under the facts in this case.” *Id.* at 311. *Neal* did not articulate a categorical rule that inquiry notice does not extend beyond the public record – it qualified its holding with the language “absent some other notice” and “under the facts of this case.” In this case, there was ample written notice available that a waiver permitted by the Declaration itself existed. In these circumstances, the question of notice must be decided as a matter of fact, not law.

CONCLUSION

¶14 For the foregoing reasons, we reverse and remand for further proceedings. As the prevailing party on appeal, we grant Jabbell’s request for attorney’s fees, upon its compliance with ARCAP 21, and deny Gateway’s request.



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