IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ILONA HILDENBRANDT, *Plaintiff/Counter-Defendant/Appellee*,

v.

PHYLLIS KRASNER, *et al.*, *Defendants/Counter-Claimants/Appellants*.

No. 1 CA-CV 16-0466
FILED 10-10-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-009410
The Honorable Lori Horn Bustamante, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Phyllis Krasner and Charles Mollica appeal from the superior court's summary judgment quieting title to certain real property (invalidating asserted deed restrictions) in favor of Ilona Hildenbrandt.[1] For reasons that follow, we conclude that the superior court erred by granting Hildenbrandt summary judgment as to the 1990 Deed Restrictions and thus reverse in part and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case concerns deed restrictions constraining use of a single lot ("Lot 8") in the Ballantrae Ridge subdivision of Troon Village in Scottsdale. The property is subject to the master covenants, conditions, and restrictions governing Troon Village ("Troon CC&Rs"), as well as the CC&Rs for the Ballantrae Ridge subdivision ("BR CC&Rs"). A recorded tract declaration under the Troon CC&Rs restricts all lots "to single-family residential use."

¶3 In 1985, the declarant/developer of Troon Village conveyed a parcel—including Lot 8 and the neighboring lots involved in this case—to Ballantrae Ridge Ltd., the developer of the Ballantrae Ridge subdivision. The warranty deed conveyed the real property to Ballantrae Ridge "together with all rights and privileges appurtenant thereto," and "[s]ubject to . . . covenants, conditions, restrictions . . . as may appear of record."

¶4 In 1989, Ballantrae Ridge conveyed Lot 8 to the owners of six neighboring lots as joint tenants. The warranty deed conveying the

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[1] Each of the individual parties appeared in the capacity of trustee of each individual's respective trust: Krasner as trustee of the Phyllis Krasner Family Trust, Mollica as trustee of The Charles Joseph Mollica Revocable Trust, and Hildenbrandt as trustee of the Josef and Ilona Hildenbrandt Revocable Living Trust.

property included a use restriction (the "1989 Deed Restriction"): "The real property is being conveyed herein is restricted against building of a residence on subject property."

¶5 The next year, the six neighbors conveyed Lot 8 to a third-party purchaser, and they modified and added use restrictions to the warranty deed conveying the property (the "1990 Deed Restrictions"): "The real property being conveyed herein is restricted against building of a residence on subject property. The real property being conveyed herein is further restricted against any structure of any nature being constructed or placed on the subject property and that the property is to remain vacant." As described in later affidavits, the sellers—owners of the six neighboring lots—intended to prohibit any building on Lot 8 in perpetuity so as to preserve the open space near their houses and retain better views of the nearby golf course. The buyer understood that any building was prohibited and that the restriction would run with the land, but wished to purchase the property to secure a golf membership in the Troon Country Club, which at the time was available only to individuals who owned land in Troon Village.

¶6 Lot 8 was again conveyed in 1994, but the 1994 deed did not explicitly recite or reference the use restrictions described in the 1989 and 1990 Deed Restrictions, although it was made "[s]ubject to . . . all . . . covenants, conditions, restrictions, obligations and liabilities as may appear of record."

¶7 Hildenbrandt and her husband purchased Lot 8 in 2005. Like the 1994 deed, the warranty deed conveying Lot 8 to the Hildenbrandts made no direct reference to the use restrictions reflected in the 1989 and 1990 Deed Restrictions, but included a recitation that the property was "Subject To: Existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record." The Hildenbrandts, who intended to build a home on Lot 8, denied any actual knowledge of the recorded 1989 and 1990 Deed Restrictions at the time of purchase, although they learned of the restrictions later that year.[2]

¶8 In 2014 (after a delay largely attributable to Hildenbrandt's husband's extended illness and death), Hildenbrandt sued to quiet title to Lot 8, seeking a declaration that the property is not subject to the 1989 and

[2] In 2008, Troon Country Club removed the requirement of lot ownership and began to sell golf memberships directly to the public, diminishing the value of Lot 8 as a gateway to golf membership.

1990 Deed Restrictions and an injunction against enforcement of the Deed Restrictions. Krasner and Mollica (the "Neighbors") each own a home on lots neighboring Lot 8 and are successors in interest to the owners of two of the lots involved in purchasing Lot 8 in 1989 and selling Lot 8 in 1990. They opposed Hildenbrandt's attempt to quiet title, asserting that the 1989 and 1990 Deed Restrictions run with the land and prohibit construction of a residence or any other structure on Lot 8, benefitting their lots by preserving their nearby open space and golf-course views.

¶9 The opposing sides filed cross-motions for summary judgment, and the superior court ruled in favor of Hildenbrandt. The court discerned no indication in the 1989 and 1990 Deed Restrictions that the restrictions would run with the land, and thus considered them personal covenants binding only the parties to the 1989 and 1990 conveyances respectively, not their successors in interest. Further noting that it would "resolve the ambiguity and existence of the restrictive covenant against the restriction and in favor of the free use and enjoyment of the property," the court ruled the Deed Restrictions unenforceable. The court granted Hildenbrandt an award of attorney's fees and entered judgment in her favor.

¶10 The Neighbors timely appealed, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).[3]

DISCUSSION

¶11 The Neighbors argue that the superior court misapplied the law in granting summary judgment in favor of Hildenbrandt, and that in any event, issues of fact precluded summary judgment. We review the grant of summary judgment de novo, viewing the facts in the light most favorable to the party against whom judgment was entered. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012). We similarly review de novo the superior court's interpretation of restrictive covenants. *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 537, ¶ 11 (App. 2010).

¶12 Summary judgment is proper only if 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); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). We may affirm summary judgment if correct on any basis

[3] Absent material revisions after the relevant date, we cite a statute's current version.

supported by the record, even if not the basis on which the superior court relied. *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162, ¶ 8 (App. 2006). Although we affirm the court's ruling granting summary judgment in favor of Hildenbrandt as to the 1989 Deed Restriction, we reverse the court's ruling regarding the 1990 Deed Restriction.

I. 1989 Deed Restriction.

¶13 The 1989 Deed Restriction reflects a unique use restriction for a single lot imposed by Ballantrae Ridge Ltd., the developer of the subdivision, as grantor of Lot 8. But unless authorized to do so by the applicable CC&Rs—and only to the extent so authorized—a developer cannot use private deed restrictions to alter uniformly applicable covenants and restrictions. *Multari v. Gress*, 214 Ariz. 557, 559, ¶ 16 (App. 2007). "Permitting developers to use private deed restrictions to bypass the formal amendment process would destroy the right to rely on restrictive covenants and completely upset the orderly plan of the subdivision." *Id.* (quotation omitted).

¶14 The Neighbors do not contend that Ballantrae Ridge Ltd. formally amended the governing CC&Rs to impose the Lot 8 restriction. Rather, they argue that the Troon CC&Rs authorized Ballantrae Ridge Ltd. to impose additional use restrictions for portions of the subdivision by recording a tract declaration, and that the 1989 Deed Restriction in the recorded warranty deed conveying Lot 8 constituted such a tract declaration.

¶15 Section 2.1 of the Troon CC&Rs allows the declarant to record additional use restrictions ("Tract Declarations") for portions of Troon Village, expressly including "restrictions and conditions . . . in addition to those contained in the [Troon CC&Rs]." As to property owned by the declarant, the declarant retains an "unrestricted and absolute right, without the consent of any other Owner," to record additional Tract Declarations. The "declarant" of the Troon CC&Rs is defined as "Desert Foothills Developers . . . and any successor or assign of Declarant's rights and powers [under the Troon CC&Rs] to which such rights and powers have been assigned by a recorded instrument."

¶16 The Neighbors' argument fails because the parties presented no evidence that Ballantrae Ridge Ltd. received an assignment of the Troon declarant's rights and powers, and thus Ballantrae Ridge Ltd. never became declarant of the *Troon* CC&Rs (even though it was the declarant of the BR CC&Rs) as necessary to independently record a tract declaration. The

Neighbors rely on language in the warranty deed from Desert Foothills (the Troon declarant at the time) to Ballantrae Ridge Ltd. conveying real property (which formed the Ballantrae Ridge subdivision) "together with all rights and privileges appurtenant thereto." But nothing in the Troon CC&Rs ties the declarant's rights to ownership of a particular parcel of land; rather the declarant's rights stem from its role in developing the planned community as granted contractually in the Troon CC&Rs. *Cf.* Restatement (Third) of Property: Servitudes ("Restatement") § 1.5(1) (2000) ("'Appurtenant' means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land."). And to interpret the language otherwise would be nonsensical, as in that case every individual owner purchasing a lot (which, by definition, includes all appurtenant rights and restrictions) would thereby become the declarant.

¶17 Accordingly, Ballantrae Ridge Ltd. lacked authority to record a private deed restriction imposing additional use restrictions on Lot 8, so the 1989 Deed Restriction fails as a matter of law.

II. 1990 Deed Restrictions.

¶18 Unless prohibited by existing covenants or CC&Rs, an owner of real property may enter a private covenant regarding that land. A.R.S. § 33-440(A)(1). Such restrictive covenants are effectively contracts, interpreted to give effect to the parties' intent by reference to the language of the covenant, the surrounding circumstances, and the purpose of the covenant. *See Powell v. Washburn*, 211 Ariz. 553, 555–57, ¶¶ 8, 13–14 (2006) (adopting Restatement § 4.1 to govern interpretation of servitudes); *see also Palermo v. Allen*, 91 Ariz. 57, 64–65 (1962); *O'Malley v. Cent. Methodist Church*, 67 Ariz. 245, 247, 254–55 (1948) (interpreting existence and meaning of deed restrictions based on the intent of the parties and in light of the deeds' language and surrounding circumstances). Although many factors may bear on this interpretation,[4] the Restatement places "heavy emphasis" on the language of the writing itself because, to the extent intended to bind successors in interest, the recorded covenant "is often the primary source of information available to a prospective purchaser of the land" and thus

[4] "Their intention is ascertained from the servitude's language interpreted in light of all the circumstances. Relevant circumstances include the location and character of the properties burdened and benefited by the servitude, the use made of the properties before and after creation of the servitude, the character of the surrounding area, the existence and contours of any general plan of development for the area, and the consideration paid for the servitude." Restatement § 4.1 cmt. d.

"should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it in the context of the parcels of land involved." Restatement § 4.1 cmt. d; *see also Powell*, 211 Ariz. at 558–59, ¶ 19, 23, 25 (interpreting scope of restrictive covenant based primarily on the language of the CC&Rs themselves).

¶19 Here, the language of the 1990 Deed Restrictions is at least susceptible to interpretation as an appurtenant covenant running with the land rather than, as the superior court held, a personal covenant binding only the immediate parties to the 1990 deed. The covenant states that Lot 8 "is restricted" against any building, suggesting a permanent characteristic of the property rather than a personal obligation of a single owner. It mandates that the property "remain vacant," further suggesting an obligation extending into the future.

¶20 Moreover, although affidavits from the parties to the 1990 deed cannot vary the express terms of the covenant, they may provide context for the circumstances and purpose of the restrictions. *Cf. Taylor v. State Farm Mut. Auto. Ins.*, 175 Ariz. 148, 154 (1993) (holding that, for purposes of contract interpretation, the court may consider extrinsic evidence to determine the intended meaning of contractual language if the language is "reasonably susceptible" to the proposed interpretation). An affidavit from one of the 1990 grantors reflected that the purpose of the covenant—which is better served by a covenant that runs with the land rather than a personal covenant—was to ensure nearby open space and better views for the benefitted lots. *See* Restatement § 4.5(1)(a), (3)(a) (determining whether a servitude is appurtenant or personal based in part on which interpretation would best effectuate the purpose of the servitude).

¶21 Hildenbrandt correctly points out that the language of the 1990 Deed Restrictions lacked many of the characteristics that would have made clear whether the restriction runs with the land. The covenant does not expressly state that it runs with the land or that it binds successors in interest. It includes no clear statement of duration, and it does not specify which parcels are benefitted (although that is perhaps implicit in the lot numbers of the six grantors). But under the circumstances presented, the absence of this information does not establish as a matter of law that the 1990 Deed Restrictions were merely personal covenants, and instead simply shows a dispute of material fact precluding summary judgment.

¶22 The superior court resolved this "ambiguity" by interpreting the Deed Restrictions "against the restriction and in favor of the free use and enjoyment of the property." In adopting Restatement § 4.1, *Powell*

displaced this principle of strict construction of restrictive covenants in favor of the Restatement's interpretive approach in which the court "give[s] effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." 211 Ariz. at 557, ¶ 13 (citations omitted). *Powell* thus reaffirmed the "long-standing Arizona case law holding that enforcing the intent of the parties is the 'cardinal principle' in interpreting restrictive covenants" by disavowing the dicta that had previously suggested a "policy of construing restrictive covenants strictly and in favor of free use of land." *Id.* at ¶¶ 14–15. Accordingly, the superior court erred under *Powell* by applying an interpretive tool disfavoring servitudes, and erred by granting summary judgment for Hildenbrandt as to the 1990 Deed Restrictions.

III. Changed Circumstances.

¶23 Hildenbrandt suggests that the use restrictions on Lot 8 are nevertheless unenforceable due to changed circumstances. A "fundamental change in circumstances" that defeats the original purpose of the restriction, makes it impossible to secure the anticipated benefit to a substantial degree, or harms the burdened parcel without substantially benefitting the benefitted parcel may render the restriction unenforceable. *Lacer v. Navajo County*, 141 Ariz. 396, 403 (App. 1983); *see also* Restatement § 7.10 ("Modification and Termination of a Servitude Because of Changed Conditions").

¶24 Hildenbrandt notes that, although one asserted purpose of the 1990 Deed Restrictions was to preserve the Neighbors' views of the golf course, other houses have been built in the subdivision that, at least to some extent, obstruct the Neighbors' views. But the record does not establish to what extent the views are obstructed, and in any event the record supports the continuing viability of nearby open space as an achievable purpose served by the Deed Restrictions.

¶25 Hildenbrandt further notes that as of 2008, membership in Troon Country Club could be purchased directly (without owning a lot in Troon Village), so Lot 8 no longer has any utility it once had as a golf membership. The record does not, however, show whether Lot 8 retains some value as a golf membership (for instance, depending on the relative price of membership purchased directly versus acquired by lot ownership) or whether Lot 8 has some alternative utility.

¶26 Accordingly, based on this record, we cannot conclude as a matter of law that changed circumstances render the 1990 Deed Restrictions modifiable or unenforceable. We thus reverse summary judgment on the 1990 Deed Restrictions and remand for further proceedings, including if appropriate a trial on the nature of the covenant. *See Pasco Indus., Inc. v. Talco Recycling, Inc.*, 195 Ariz. 50, 62, ¶¶ 51–52 (App. 1998) (noting that, although determining whether a contract is ambiguous is a question of law for the court, the final interpretation of an ambiguous contract is a question of fact for the factfinder).

IV. Attorney's Fees in Superior Court.

¶27 The superior court awarded Hildenbrandt her attorney's fees under A.R.S. § 12-341.01, which allows an award of attorney's fees to the successful party in an action arising out of contract, and A.R.S. § 12-1103(B), which allows an award of attorney's fees against a party in a quiet title action who refused to execute a quit claim deed to the disputed property. Because we reverse summary judgement regarding the 1990 Deed Restrictions, we vacate the award of attorney's fees.

CONCLUSION

¶28 For the foregoing reasons, we affirm the superior court's ruling holding the 1989 Deed Restrictions void and unenforceable, reverse the summary judgment ruling regarding the 1990 Deed Restrictions, vacate the award of attorney's fees, and remand for further proceedings consistent with this decision.

¶29 Both sides request an award of attorney's fees on appeal. In light of our resolution of the appeal, we deny Hildenbrandt's request. In an exercise of our discretion, we deny the Neighbors' request, noting that our denial under A.R.S. § 12-341.01 is without prejudice to seeking such fees in superior court if appropriate as part of the remanded proceedings. As the prevailing parties, the Neighbors are entitled to an award of costs upon compliance with ARCAP 21.

COURT OF APPEALS
STATE OF ARIZONA

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