IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOHN MCGRATH, et al., *Plaintiffs/Appellants*,

v.

JUDSON COMMUNITY ASSOCIATION, *Defendant/Appellee*.

No. 1 CA-CV 20-0161
FILED 12-22-2020

Appeal from the Superior Court in Maricopa County
No. CV2018-010228
The Honorable James D. Smith, Judge

AFFIRMED

COUNSEL

Koeller, Nebeker, Carlson & Haluk, PLLC, Phoenix
By William A. Nebeker, Judith A. Downs, Wesley M. Cox
Counsel for Plaintiffs/Appellants

Jones, Skelton & Hochuli, P.L.C., Phoenix
By J. Gary Linder, Alejandro D. Barrientos, Nicole M. Prefontaine
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MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge David D. Weinzweig joined.

W I L L I A M S, Judge:

¶1 Appellants John and Kristal McGrath challenge the superior court's summary judgment ruling in favor of Appellee Judson Community Association ("Judson"). We affirm the court's conclusion that the McGraths violated Judson's covenants, conditions, and restrictions by installing artificial grass in their front yard without seeking or obtaining prior approval.

FACTUAL AND PROCEDURAL HISTORY

¶2 The McGraths are homeowners in a residential community managed by Judson. The community is governed by a "Declaration of Covenants, Conditions and Restrictions for Judson" executed and recorded in 2000 (the "CC&Rs").

¶3 In late 2017, the McGraths replaced the natural grass in their front yard with artificial grass without seeking prior approval from Judson's Architectural Review Committee ("ARC"). On December 15, 2017, Judson issued a "Notice of Violation" to the McGraths requesting that they "submit an Architectural Request Change form for the artificial turf in the front yard landscape as it is not permitted" under the CC&Rs. Eleven days later, Judson reiterated to the McGraths that (1) they had not secured ARC approval before installing the artificial grass, and (2) the ARC "has an established policy prohibiting artificial turf in front yards."

¶4 The McGraths requested a hearing before Judson's board, which took place in April 2018. The board determined the McGraths had violated the CC&Rs and asked them to "submit a plan . . . for modifications to (and reduction of) the artificial turf." When the McGraths declined to do so, Judson imposed a $500 fine. Judson also stated that it was "considering suspending the McGraths' gate entry devices."

¶5 The McGraths filed this case shortly thereafter to enjoin Judson from assessing fines or suspending their gate entry devices. After

discovery, on the parties' cross-motions for summary judgment, the superior court found the McGraths had to obtain prior ARC approval because the artificial grass constituted an "Improvement" under the CC&Rs and entered final judgment for Judson. The McGraths timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

DISCUSSION

¶6 In reviewing the superior court's rulings on cross-motions for summary judgment, we review questions of law de novo but review the facts in a light most favorable to the McGraths, against whom judgment was entered. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191 (App. 1994). The court should grant summary judgment only if it finds there are no genuine issues of material fact and that one party is entitled to judgment as a matter of law. *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118 (1978); Ariz. R. Civ. P. 56(a). "Summary judgment is inappropriate where the facts, even if undisputed, would allow reasonable minds to differ." *Nelson*, 181 Ariz. at 191.

I. The Superior Court Did Not Err in Interpreting the CC&Rs to Prohibit the McGraths' Installation of Artificial Grass Without Prior Written Approval.

¶7 The McGraths contend the CC&Rs did not prohibit the installation of artificial grass in their front yard, citing design guidelines from other homeowners' associations to suggest Judson "chose not to explicitly ban artificial grass." Arizona law considers CC&Rs to represent "a contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5 (App. 2000). We effectuate the parties' intention, as well as the purposes for which the CC&Rs were created, by looking to the plain language of the document as a whole. *Powell v. Washburn*, 211 Ariz. 553, 554, ¶ 1 (2006). If the terms are clear and unambiguous, we give effect to them as written. *Town of Marana v. Pima Cnty.*, 230 Ariz. 142, 147, ¶ 21 (App. 2012). We review the superior court's interpretation of the CC&Rs de novo. *Swain v. Bixby Vill. Golf Course Inc.*, 247 Ariz. 405, 410, ¶ 19 (App. 2019).

¶8 As relevant here, section 3.1.2 provides that "[n]o Improvement which would be Visible From Neighboring Property at the time it is constructed or would be Visible From Neighboring Property with the passage of time . . . shall be constructed or installed on any Lot without

the prior written approval of the [ARC]." And section 1.21 defines "Improvement" broadly to include:

> [A]ny Residential Unit, guest house, building, fence, wall or other structure . . . , and any swimming pool, tennis court, sport court, road, driveway, parking area (paved or unpaved) and any trees, plants, shrubs, grass and other landscaping improvements of every type and kind.

Even if artificial grass falls within the CC&Rs definition of "grass," which we need not address, the McGraths needed ARC approval to make "landscaping improvements of every type and kind."

¶9 As noted above, the McGraths did not seek or obtain ARC approval before installing the artificial grass. They contend they did not need to do so because the artificial grass served the "general purpose of requiring homeowners to maintain neat and aesthetically pleasing homes" evinced by section 7 of the CC&Rs, and because it did not change the footprint of the grassy area. Even assuming this is true, it has no bearing on whether the McGraths violated section 3.1.2.

¶10 The McGraths also rely on *Greenberg v. McGowan*, 1 CA-CV 19-0061, 2019 WL 7176321 (Ariz. App. Dec. 24, 2019) (mem. decision). There, we determined a restriction that prohibited "poultry, fowl, and swine" but allowed horses did not bar a property owner from keeping donkeys. *Id.* at *2–3, ¶ 12. But that provision did not "purport to identify all permissible livestock . . . that can be kept on the property," and the CC&Rs in that case did not "include a catch-all stating that [the provision] lists all permissible animals or any general principle for what kinds of animals are prohibited." *Id.* at *3, ¶ 12. The CC&Rs include a catch-all prohibiting the installation of "landscaping improvements of every type and kind" without prior written approval.

¶11 The McGraths also contend the superior court did not address whether the definition of "Improvement" was clear and unambiguous. Words in a contract are ambiguous only if they can be reasonably construed to have more than one meaning. *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207 (1992). The McGraths did not propose any other reasonable meaning; they only testified that they believed artificial grass "was not prohibited." A disagreement among the parties about a contract's meaning does not establish an ambiguity. *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292, ¶ 21 (App. 2010). Moreover, the McGraths only argue on appeal that section 3.1.2 does not specifically list artificial grass, which they assert is not

a "plant." But again, the definition of "Improvements" includes "landscaping improvements of every type and kind." There is no record evidence to suggest the McGraths' artificial grass is not a "landscaping improvement." *See Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449 (App. 1993) ("[I]t is well settled that a covenant should not be read in such a way that defeats the plain and obvious meaning of the restriction.").

¶12 The McGraths also rely on parol evidence of the design guidelines used in other HOA communities. But Arizona courts will not consider parol evidence when interpreting a contract unless the contract's terms are "reasonably susceptible" to the movant's alternative interpretation. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154 (1993). As discussed above, the CC&Rs here are plain, unambiguous and do not support McGraths' urged interpretation.

II. Attorneys' Fees and Costs on Appeal.

¶13 Both parties request their attorneys' fees and costs incurred in this appeal under section 9.1 of the CC&Rs:

> If any lawsuit is filed by the Association or any Owner to enforce the provisions of the Project Documents or in any manner arising out of the Project Documents or the operations of the Association, the prevailing party in such action shall be entitled to recover from the other party all attorney fees incurred by the prevailing party in the action.

Generally, we enforce a contractual attorneys' fees provision according to its terms. *Harle v. Williams*, 246 Ariz. 330, 333, ¶ 10 (App. 2019). We will not, however, enforce a contract that calls for an award of unreasonable or obviously excessive fees. *McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, 270, ¶¶ 16–18 (App. 2007).

¶14 Judson may apply to recover its attorneys' fees and taxable costs under Arizona Rule of Civil Appellate Procedure 21. The McGraths would bear the burden of showing Judson's claimed fees are unreasonably excessive. *See id.* at 271, ¶¶ 20–21.

CONCLUSION

¶15 We affirm the judgment.

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