DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GARY and ELAINE SHOWERS, a married couple, Plaintiffs/Appellants, v. EXECUTIVE TOWERS ASSOCIATION, an Arizona non-profit corporation, Defendant/Appellee.	1 CA-CV 10-0248 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-019364

The Honorable Sam J. Myers, Judge

REVERSED AND REMANDED

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B A R K E R, Judge

¶1 Plaintiffs/Appellants Gary and Elaine Showers appeal the superior court's judgment as a matter of law for

Defendant/Appellee Executive Towers Association. For the following reasons, we reverse and remand for a new trial.

Factual and Procedural Background

¶2 The Showers purchased two adjoining condominium units, which had previously been combined into one unit, in the Executive Towers building. At the time of their purchase, the Showers' unit contained a clothes washer, which was connected to a kitchen sink sewer, and a dryer. The Showers desired to remodel the unit to remove the existing washer and dryer, add a laundry room, and install a new washer and dryer.

¶3 The Executive Towers Association is the homeowners' association for the condominiums. The Association prohibits the use of clothes washers and dryers in the individual condominium units due to plumbing and ventilation concerns. Nevertheless, the Association had allowed other owners to install washers and dryers in their units when medical conditions prevented them from washing their laundry in the common area laundry facilities.

¶4 Shortly after their purchase, the Showers requested a variance from the Association's prohibition on washers and dryers in individual units. They described their plans to remodel their unit to create a laundry room, and explained that they intended to install a washer that would discharge significantly less water in the sewage system than the existing

washer. They also planned to install a dryer that was self-venting and would not vent into the common chases. At the request of the Association's Board of Directors, the Showers provided product literature for the washer and dryer they intended to install.

¶5 The Association's property manager, Michael D. Hogue, informed the Showers that the Board had approved their request for a variance. Shortly thereafter, a Board member acknowledged the Board's approval of the variance while introducing the Showers to other residents. During construction, the building's maintenance worker supervised the Showers' alteration of the plumbing and electrical systems in their unit, which was necessary to install the new appliances, and never told the Showers they were not allowed to have a washer and dryer.

¶6 The following year, when the Showers learned Mr. Hogue was leaving his employment with the Association, they asked him for copies of the Board minutes approving the variance. Mr. Hogue told the Showers there were no minutes of the action, but wrote a letter confirming that the Board had voted to grant the variance.

¶7 In 2006, the Showers contracted to sell their unit to Leroy and Frances Paller. The contract stated that the washer and dryer approvals the Showers had received from the Association "shall be transferable" to the Pallers. The

Association notified the escrow agent that the Showers' washer and dryer were not allowed and must be removed. The Association claimed it could not find any record that it had granted the Showers a variance to install the washer and dryer and refused to approve the Pallers' use of the machines in the unit.

¶8 The Showers filed this action seeking a declaratory judgment that the Association granted them a variance to install the washer and dryer and that the variance applies to all subsequent purchasers of the unit. They also alleged the Association had breached the parties' agreement and the covenant of good faith and fair dealing implied therein and sought damages.[1]

¶9 After the Showers presented their case in chief at trial, the court granted the Association's motion for judgment as a matter of law, ruling that although the Showers had put forth sufficient evidence to create a jury question regarding whether the Board granted them a variance, there was no evidence that the parties had agreed the variance would be transferable. The court denied the Showers' motion for new trial and entered

[1] The Showers subsequently completed the sale of their unit to the Pallers. They assigned their claims in this action to the Pallers, who agreed to pay all further litigation expenses, but retained an interest in the litigation relating to the attorneys' fees they had already incurred. The Association did not argue in the trial court, and does not argue on appeal, that the Showers are not real parties in interest.

judgment for the Association, including an award of attorneys' fees and costs. The Showers timely appealed.

¶10 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Issue

¶11 The Showers argue the superior court erred in granting judgment as a matter of law (JMOL) for the Association because a material question of fact exists regarding whether the parties intended the variance to be transferable.

Discussion

¶12 The superior court ruled that although the Showers put forth enough evidence to create a jury question regarding whether the Association granted them a variance to install laundry machines in their unit, reasonable jurors could not find that any such variance was transferable because they had not presented any evidence that the Association agreed or promised that it would be transferable. The Showers contend this was error because the jury could have inferred from the evidence that the parties intended that the variance be transferable and run with the property.

¶13 A court properly grants JMOL "only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). We

review the trial court's grant of JMOL de novo, viewing the evidence in the light most favorable to the party opposing the motion. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996).[2]

A. The Jury Could Infer from the Evidence that the Parties Intended the Variance to Be Transferable

¶14 The Showers asserted two claims in their complaint: (1) a claim for a declaratory judgment that they obtained a variance to install and use a washer and dryer in their unit and that the variance applies to all subsequent purchasers of the property, and (2) a claim for breach of contract and breach of the implied covenant of good faith and fair dealing arising out of the Association's failure to acknowledge the variance and allow the Showers and their purchasers to use a washer and dryer in the unit.

¶15 In support of their claims, the Showers offered the testimony of Mr. Showers that he requested and obtained a variance from the Association's prohibition on washers and dryers in individual units and expected that the variance was transferable to subsequent owners because it was "part of [his]

[2] The 1996 amendments to Arizona Rule of Civil Procedure 50 replaced the term "directed verdict" with "judgment as a matter of law." Arizona courts use the terms interchangeably, as "[t]he tests for granting a directed verdict and a JMOL motion are the same." *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 127 n.4, ¶ 8, 180 P.3d 986, 992 n.4 (App. 2008) (citation omitted).

home." The Showers based their variance request on their plans to remodel the unit to create a laundry room and informed the Board that they intended to install a washer that would discharge significantly less water in the sewage system than the existing washer and a dryer that was self-venting and would not vent into the common chases. To accommodate these appliances, the Showers altered the plumbing and electrical systems in their unit with the supervision of the building's maintenance worker. Thus, the variance was tied to a structural modification of the Showers' unit that would remain in the unit even if it was sold to subsequent purchasers. A reasonable jury could infer from this evidence that the Association and the Showers intended that the variance be a transferable variance that "ran with" the property to subsequent owners. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985) ("The very essence of the jury's function is to select from among conflicting inferences and conclusions that which it considers most reasonable.") (citation omitted).

¶16 The superior court erred in granting JMOL for the Association on the grounds that the Showers did not present any evidence from which a jury could find that the variance was transferable to subsequent owners of the Showers' unit.

B. The JMOL Cannot Be Affirmed on Alternative Grounds

¶17 The Association argues the superior court's JMOL was correct for the alternative reasons that the Showers did not present any evidence that they had filed an application for a variance or entered a contract with the Association, and it urges us to affirm the judgment on that basis. *See Wertheim v. Pima Cty.*, 211 Ariz. 422, 424, ¶ 10, 122 P.3d 1, 3 (App. 2005) ("We may affirm a trial court's ruling if it is correct for any reason.").

¶18 The Association argues that the Showers failed to present any evidence that they filed an application for a variance to install a washer and dryer and therefore no reasonable jury could conclude that the Association granted them a variance. Mr. Showers testified that he and his architect, James Garrison, prepared a letter to the Association's Board of Directors to request the variance and a follow-up letter with additional information in response to the Board's request. Mr. Showers testified he believed Mr. Garrison had mailed or delivered the letters to the Board. Mr. Garrison testified he did not send the letters to the Board, but gave them to Mr. Showers. Citing this testimony, the Association argues that the Showers failed to show that they applied to the Association for a variance and therefore no reasonable jury could find that the Association granted a variance. In response, the Showers contend the jury could infer the following: (1) that the

Association received the letters from Mr. Showers' testimony that the Board asked for additional information, (2) that Mr. Hogue later informed Mr. Showers that the Board had granted the variance, and (3) that a Board member acknowledged the information the Showers provided about the laundry machines they intended to install. Viewing the evidence in the light most favorable to the Showers, *Gemstar Ltd.*, 185 Ariz. at 505, 917 P.2d at 234, we agree with the trial court that they offered sufficient evidence from which a reasonable jury could conclude that the Association granted them a variance to install a washer and dryer.

¶19 Similarly, we reject the Association's argument that the Showers failed to present any evidence of a contract between themselves and the Association. The Showers offered evidence that the Association agreed to allow them to install a washer and dryer and, in reliance on that promise, they remodeled their condominium unit by altering the plumbing and electrical systems to accommodate the appliances. The Association knew about the Showers' reliance because the building's maintenance worker inspected the alterations and he never advised that they were not allowed to install the washer and dryer. This evidence of a promise by the Association and reliance by the Showers in the form of expensive structural modifications to the condominium unit may support the Showers' claim under a theory of promissory

estoppel. *See Chewning v. Palmer*, 133 Ariz. 136, 138, 650 P.2d 438, 440 (1982) (stating Arizona has adopted the theory of promissory estoppel set forth in the Restatement (Second) of Contracts § 90(1) (1981), which states: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise"); *Double AA Builders, Ltd. v. Grand State Const. L.L.C.*, 210 Ariz. 503, 507, ¶ 19, 114 P.3d 835, 839 (App. 2005) (stating elements of promissory estoppel in the context of general contractor and subcontractor).

¶20 Accordingly, we decline to affirm the JMOL on the alternative grounds raised by the Association.

Conclusion

¶21 For the foregoing reasons, we reverse the superior court's judgment and remand for a new trial.

¶22 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003). When the superior court determines the prevailing party in this action, it is authorized to consider the fees incurred by that party on appeal in determining whether and how much to award as reasonable attorneys' fees. We will award the Showers the costs they have incurred in this appeal upon their compliance with Rule 21(a) of the Arizona Rules of Civil Appellate Procedure.

/s/
_____
DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
MICHAEL J. BROWN, Judge