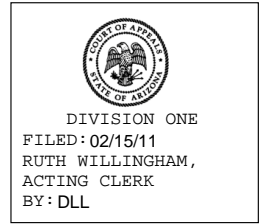


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



NEIGHBORHOOD PROPERTY OWNERS) 1 CA-CV 10-0339
ASSOCIATION OF FOUNTAIN HILLS,)
an Arizona non-profit) DEPARTMENT C
corporation,)
) **MEMORANDUM DECISION**
)
Plaintiffs/Appellants,)
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
)
SAMIR YONO and KHALIDA YONO,)
husband and wife,)
)
)
Defendants/Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-029363

The Honorable Eileen S. Willett, Judge

AFFIRMED

Combs Law Group, P.C. Phoenix
By Adam D. Martinez and Benjamin A. Skinner
Attorneys for Plaintiffs/Appellants

Zirbel Law Offices, P.C. Scottsdale
By Craig I. Zirbel
Attorney for Defendants/Appellees

B R O W N, Judge

¶1 The Neighborhood Property Owners Association of Fountain Hills (the "Association") appeals the trial court's order denying the Association injunctive relief against Samir and Khalida Yono. For the following reasons, we affirm.

BACKGROUND

¶2 A significant portion of the real estate parcels in the Town of Fountain Hills are subject to recorded covenants, conditions, and restrictions ("CC&Rs") that impose building and land use restrictions on each parcel. The Association is a non-profit corporation, formed to "provide a vehicle for appointment of committed members to the Committee of Architecture" (the "Committee"), the purpose of which is to maintain "a high standard of architecture and construction in such manner as to enhance the aesthetic values and structural soundness of the developed subdivision." Pursuant to its authority under the CC&Rs to adopt rules and regulations, the Committee adopted the "Neighborhood Development Guide" (referred to hereafter as the "Guidelines").

¶3 According to the Guidelines, the Committee "shall approve or disapprove of [building] plans . . . in accordance with the [CC&Rs and the Guidelines]." The Committee is also responsible for enforcement of the CC&Rs and the Guidelines. Additionally, the Guidelines provide that in the event of a conflict between the CC&Rs or Guidelines and any town, county,

or state law regulation, the most restrictive requirement governs.

¶14 Pursuant to the CC&Rs, “[f]ences, walls, hedges, or shrubs may be erected or planted in rear or side yards to a height not exceeding six (6) feet” and “incidental [pool] installation[s]” must be “located in other than the required front yard and screened from adjoining lots by a solid wall or protective fence of not less than four and one-half (4-1/2) feet in height nor more than six (6) feet in height.” According to the Guidelines, “[p]ool operating equipment . . . must be screened from public view . . . with a masonry wall.”

¶15 The Yonos own a residential lot that is subject to the CC&Rs and the Guidelines. Prior to constructing a home on their lot, the Yonos signed a letter in 2005 agreeing to the Committee’s requirements that “ground mounted pool equipment . . . walls are to be a maximum 6’ in height to screen from public view,” and “fencing and/or retaining walls . . . maximum height is 6 ft.”

¶16 As construction of the house neared completion, the Yonos created plans to build a swimming pool. Mr. Yono presented the plans to Vida Miran, the office manager of the Committee, for approval. In response, Miran informed him that the Committee did not approve pool plans but that so long as the Town of Fountain Hills approved his plans, “you’re done with

it." Yono then obtained the approval of the Town of Fountain Hills and built the pool in accordance with town requirements.

¶17 A neighbor complained to the town about the location of the Yonos' pool equipment. The town investigated the complaint and informed the Yonos that their pool met all town requirements with the exception that they needed to install a "wrought iron fence on top of [the] retaining wall," behind which the pool equipment was located. The Yonos complied with this request, but their pool equipment remained visible behind the wrought iron fence.

¶18 The neighbor then complained about the location of the Yonos' pool equipment to the Committee. The Committee sent the Yonos multiple notices, informing them that pursuant to the CC&Rs and the Guidelines, the Yonos' pool equipment "must be screened from public view . . . with a masonry wall." The Committee also told the Yonos that the pool equipment could not be located between two retaining walls and that the rear wall on their property exceeded the height limitation by almost two feet.¹ The Yonos declined to take either action, asserting that

¹ Apparently as part of a planned inspection to ensure compliance with the approved house construction plans, the Committee inspected the Yonos' premises and discovered that there were several walls that exceeded the six-foot limitation, including the rear wall at seven feet, ten inches. The Yonos were assessed a fine "for stone work which did not have Committee approval and for the height of the walls."

they had complied with all town requirements. The Committee responded that the CC&Rs and Guidelines were independent of the town requirements, and confirmed that the Yonos remained in violation of the restrictions pertaining both to pool equipment and the height of the rear wall.

¶19 When these conditions persisted, the Association filed suit, seeking injunctive relief to require the Yonos to bring the wall and pool equipment into compliance with both the CC&Rs and the Guidelines.² Following an evidentiary hearing, the trial court found that the Yonos "took reasonable, proactive steps to maintain compliance with the restrictions as set forth in the [CC&Rs] and Guidelines . . . regarding the construction of their pool, as well as the location of its pump/filtration equipment and protective fencing surrounding it." The trial court determined that the Association was estopped from obtaining injunctive relief against the Yonos on the pool equipment violation. As to the height of the rear wall, the court found that several mitigating circumstances existed: (1) due to the grade of the land, the cost of bringing the rear wall into compliance was cost prohibitive; (2) the rear wall height was of less concern to the Association than the pool equipment and no

² In its complaint, the Association also alleged a breach of contract claim, relating to the Yonos' failure to pay fines assessed by the Association for violations of the CC&Rs and the Guidelines. However, the Yonos eventually paid the fines.

complaints had been received; (3) the Yonos paid \$500 to the Association for the wall height violation; and (4) there was no evidence presented that the wall was aesthetically displeasing to the Association. The court therefore denied the Association's request for a permanent injunction and awarded attorneys' fees to the Yonos in the amount of \$4,572. The Association filed this timely appeal.

DISCUSSION

¶10 The grant or denial of injunctive relief is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Horton v. Mitchell*, 200 Ariz. 523, 526, ¶ 12, 29 P.3d 870, 873 (App. 2001). We defer to the trial court's findings of fact unless clearly erroneous, but we review de novo the court's legal conclusions. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9, 156 P.3d 1149, 1152 (App. 2007).

I. Pool Equipment Violation

¶11 The Association asserts that the trial court erred when it found that estoppel applied to bar the Association's claim for injunctive relief. We review a trial court's decision to apply estoppel for an abuse of discretion. *Flying Diamond*, 215 Ariz. at 50, ¶ 27, 156 P.3d at 1155. A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion or if "the record fails to provide

substantial evidence to support the trial court's finding." *Id.* (citation omitted). Because the Association does not argue that the trial court erred as a matter of law, our review is limited to determining whether substantial evidence supports the court's conclusion. *See id.*

¶12 Equitable estoppel consists of three elements: "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *Id.* at ¶ 28 (citations and quotations omitted). The resulting reliance must be justifiable. *Id.*

¶13 The trial court found that although the CC&Rs were applicable to the Yonos, Mr. Yono "sought approval of the construction plans for the pool, [and] was told that [the Association and the Committee] did not approve plans for pools and would accept the plans if the Town of Fountain Hills approved the pool plans."

¶14 Substantial evidence supports the trial court's conclusion. The Yonos provided evidence that Vida Miran, the office manager of the Committee,³ informed Mr. Yono that the Committee "do[esn't] take any plans for the pools. It's not our business." Miran told Mr. Yono to "take [the plans] to the

³ The Association has not asserted, either in the trial court or on appeal, that Miran was not an agent of the Committee.

[Town] of Fountain Hills. And if they are approved, you're done with it."⁴ Later, the Committee informed the Yonos that despite their compliance with the town's requirements, they were still in violation of the CC&Rs and the Guidelines. Thus, the Committee took an inconsistent position by initially informing the Yonos that compliance with the Town's requirements was sufficient, but later demanded compliance with the more restrictive requirements of the CC&Rs and the Guidelines.

¶15 The Yonos relied on Miran's assertions that they would be compliant with Committee requirements so long as they obtained approval from the town. Miran, as the office manager at the Committee of Architecture, should have been aware of Committee policies and procedures on pool plan approvals; thus, the Yonos' reliance was reasonable. Due to the Association's inconsistent statements to the Yonos, the Yonos installed a wrought iron fence to comply with town requirements, which was more expensive than building a masonry wall. Therefore, the Yonos were harmed by the Committee's repudiation of its prior conduct and estoppel was applicable to bar the Association's request for injunctive relief.

⁴ Testimony at the evidentiary hearing revealed that Miran did not recall whether she ever had a conversation with Yono about his pool plans. However, in a deposition, Miran stated that if she had, she would have sent him away because the Committee did not review pool plans at that time.

¶16 Although the Association argues that Miran's statements are not "substantially supported by the evidence," the trial court explicitly found that Mr. Yono's testimony on this issue was credible. See *Flying Diamond*, 215 Ariz. at 47, ¶ 9, 156 P.3d at 1152 (we defer to the trial court's finding of fact unless clearly erroneous); *Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971) (trial court is in the "best position to judge the credibility of the witnesses, the weight of the evidence, and also the reasonable inferences to be drawn therefrom"). Additionally, for reasons not clear from the record, Miran did not testify at the hearing nor did the Association ask the court to admit her deposition.

¶17 The Association also argues that this court's decision in *Flying Diamond* compels a different result. See *Flying Diamond*, 215 Ariz. 44, 156 P.3d 1149. In that case, Meienberg built an airplane hangar on his property that violated CC&R height restrictions. *Id.* at 46, ¶ 3, 156 P.3d at 1151. Prior to construction, Meienberg spoke with a member of the association's architecture committee, who informed him of the CC&R requirements, but the committee member did not approve or disapprove the plans. *Id.* ¶¶ 4-5. When the committee member discovered during construction that the hangar would violate the CC&R height restrictions, he informed Meienberg. *Id.* at ¶ 6. However, Meienberg continued construction and upon completion,

the association filed suit and sought an injunction from the trial court requiring Meienberg to bring the hangar into compliance. *Id.* at ¶¶ 6-7. Meienberg argued that the association was estopped from injunctive relief, but the trial court disagreed and granted the association's request for an injunction. *Id.* at ¶¶ 7-8.

¶18 On appeal, we affirmed, finding Meienberg was aware of the height restriction and did not receive approval from the committee or any committee member. *Id.* at 50-51, ¶¶ 30-31, 156 P.3d at 1155-56. Moreover, we found that the committee had no authority to approve or disapprove plans. *Id.* We therefore concluded that the association did not make any representation that would induce reliance, and Meienberg did not justifiably rely on any representation of the association; thus, we held that estoppel was inapplicable. *Id.* at 51, ¶ 31, 156 P.3d at 1156.

¶19 Here, the Association argues that, like Meienberg, the Yonos were aware of the CC&R pool equipment restrictions. However, although the Yonos were initially aware of the CC&Rs, they were later informed that compliance could be achieved merely by adherence to the town's requirements. Therefore, although the Yonos did not obtain official approval from the Committee, they received assurances that compliance with the town's requirements would be sufficient. Moreover, unlike

Flying Diamond, the Committee here made representations that would induce reliance, and the Yonos' reliance was reasonable. Therefore, *Flying Diamond* does not support the Association's position.

¶120 In sum, viewing the facts in the light most favorable to sustaining the trial court's judgment, we hold that substantial evidence supports the trial court's conclusion that estoppel applies to bar the Association's request to compel the Yonos to relocate their pool equipment.⁵

II. Wall Height Violation

¶121 The Association argues that the trial court improperly found that the Yonos were not obligated to comply with the height restriction for the rear wall because the Yonos' intentional conduct precluded the court's consideration of relative hardships.

¶122 "The enforcement of restrictive covenants through an injunction is not a matter of right, but is governed by

⁵ Because we affirm the trial court's application of estoppel on this basis, we do not address the Association's argument that the trial court erred when it found the Association was also equitably estopped because it had not uniformly enforced the pool equipment restrictions. See *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147, 152 n.10, 91 P.3d 99, 995 n.10 (2004) (an appellate court may affirm a superior court's judgment on any basis supported by the record). Nor do we address the Association's argument that the trial court erred when it took into consideration the Association's refusal to meet with the Yonos to discuss the expense of moving the pool equipment.

equitable principles." *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 635, ¶ 9, 2 P.3d 1276, 1280 (App. 2000). Equitable considerations include: "the relative hardships and injustice; the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other remedies." *Id.* However, "[e]quitable remedies are a matter of grace and not of right and equitable discretion should not be used to protect an intentional wrongdoer." *Decker v. Hendricks*, 97 Ariz. 36, 41-42, 396 P.2d 609, 612 (1964). Thus, a party may not claim hardship when it knows of a restriction, but nevertheless completes construction of an offending structure. *Flying Diamond*, 215 Ariz. at 48, 156 P.3d at 1153; *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 399, ¶ 29, 87 P.3d 81, 87 (App. 2004) (trial court erred by balancing hardships where party built structure knowing of restrictions and neighborhood opposition to structure); *Decker*, 97 Ariz. at 41, 396 P.2d at 612 (party could not claim hardship where he continued building an offending structure after learning it violated a restriction because he was an "intentional wrongdoer").

¶23 Even assuming the trial court erred in analyzing certain hardships,⁶ or mitigating circumstances, facing the

⁶ Although the Association also argues that a balance of hardships weighs in favor of the Association, this analysis is

Yonos, we conclude that the Association surrendered its right to demand compliance with the height restriction when it accepted the fine payment from the Yonos. See *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) (appellate court is obliged to affirm the judgment of the trial court if it is legally correct for any reason).

¶124 In response to the Association's discovery that the Yonos had exceeded the wall height limitation, the Association imposed a fine of \$500. In response, the Yonos submitted a check for \$500 to the Association. The check included the following notation: "This check if its [sic] cashed it's approval of the stone work, pool equipment location and walls [sic] height."⁷ Counsel for the Association replied that the notation on the check was unacceptable and that it was returning the check. Approximately two months later, however, the check was accepted by the Association, which issued a receipt noting

inapplicable when a party intentionally violates a restriction. See *Flying Diamond*, 215 Ariz. at 49 n.4, 156 P.3d at 1154 n.4. Similarly, this balancing test is inapplicable with respect to the pool equipment violations. See *Carlson v. Ariz. Dep't of Econ. Sec.*, 184 Ariz. 4, 6, 906 P.2d 61, 63 (App. 1995) ("Equitable estoppel is a rule of justice which, when all its elements are met, prevails over all other rules.").

⁷ The check indicates that it was also offered to pay for the pool equipment violations, but the record shows the Association's fine applied only to the stone work and wall height limitation. Therefore, the doctrine of accord and satisfaction is not applicable to bar the Association's request for injunctive relief as to the pool equipment violations.

that it was for a fine payment from the Yonos relating to "stone" and "wall height."

¶125 As recognized by this court, "[t]he general rule is that acceptance and use of a remittance by check which purports to be payment "in full," or which implies words of similar meaning, or is accompanied by a letter to that effect, constitutes an accord and satisfaction of the larger claim of the creditor, assuming the claim is unliquidated or disputed." *Baker v. Emmerson*, 153 Ariz. 4, 7, 734 P.2d 101, 104 (App. 1986) (citing *Mobilife Corp. v. Delta Inv. Corp.*, 121 Ariz. 586, 592 P.2d 782 (App. 1979)); 15 S. Williston, *A Treatise on the Law of Contracts* § 1854, at 542-46 (3rd ed. 1972); see also *Babbitt Bros. Trading Co. v. Steinfeld*, 28 Ariz. 403, 410, 237 P. 186, 188 (1925) ("To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition.") (citation omitted).

¶126 Here, the Association does not dispute that it was aware of the notation on the check made by the Yonos nor does it contend there was any ambiguity in the language used by the

Yonos. Instead, the only evidence before us is that the Yonos believed that payment of the fine would relieve them of the obligation to lower the height of their rear wall, which is consistent with the notation on the check. Indeed, counsel for the Association plainly recognized that the Yonos' decision to add additional language to the check was intended to persuade the Association that payment of the fine would resolve, *inter alia*, the wall height issue. Counsel thus stated the Association had no intention of waiving requirements, the notation was unacceptable, and the check was being returned; however, for reasons not explained in the record, the check was ultimately cashed by the Association. Under these unique circumstances, we conclude that acceptance of the check constituted an accord and satisfaction that prevents the Association from enforcing the wall height limitation against the Yonos.

CONCLUSION

¶127 Based on the foregoing, we affirm the judgment of the trial court. In our discretion, under Arizona Revised Statutes section 12-341.01 (2003), we grant the Yonos' request for reasonable attorneys' fees incurred on appeal upon their compliance with Arizona Rule of Appellate Procedure 21.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DANIEL A. BARKER, Presiding Judge

/s/

MARGARET H. DOWNIE, Judge