IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-603

Filed 20 February 2024

Avery County, No. 21 CVS 256

MILEVIEW LLC, A FLORIDA LIMITED LIABILITY COMPANY; ERNEST WAYNE AUTRY, MARRIED; STEVEN BOWEN AND MICHAEL GIBSON; CHARLES P. DAWSON; JAMES J. LAFLEUR AND MAUREEN L. LAFLEUR, CO-TRUSTEES OF THE LAFLEUR JOINT REVOCABLE TRUST DATED MARCH 19, 2018; JOHN PETTY AND WIFE AMANDA PETTY; RYAN C. SMITH AND WIFE, TIFFANIE M. SMITH; ELIAS H. WETTENSTEIN AND WIFE, ARLENE D. WETTENSTEIN; MICHAEL A. HURLEY AND WIFE, PATRICIA T. POOL; JOHN L. HENSHAW AND WIFE, JANE R. HENSHAW; AND RICHARD KLASSMAN AND WIFE, BEVERLY KLASSMAN, Plaintiffs,

v.

THE RESERVE II AT SUGAR MOUNTAIN CONDOMINIUM OWNER'S ASSOCIATION, A NON-PROFIT CORPORATION, Defendant.

Appeal by Defendant from order entered 17 March 2023 by Judge R. Gregory Horne in Avery County Superior Court. Appeal by Plaintiff from order entered 2 May 2023 in Avery County Superior Court. Heard in the Court of Appeals 23 January 2024.

Jeffery M. Hedrick for plaintiffs-appellees/cross-appellants.

Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for defendant-appellant/cross-appellee.

MURPHY, Judge.

Our Supreme Court has held that an amendment to a covenant in a homeowner's associations' declaration must be reasonable to be valid. To be reasonable, an amendment must preserve the original nature of the bargain by remaining faithful to the purpose of the original declaration. Here, the trial court correctly ruled that an amendment to a condominium association's declaration which contained a prohibition on short-term rentals was unreasonable where the original declaration expressly contemplated the units being rented and contained no other prohibitions consistent with those in the amendment.

Furthermore, an order is void for want of jurisdiction if the trial court enters it during the pendency of an appeal in the same case and the order is affected by the order appealed from. As the trial court in this case ruled upon a motion for attorney fees after appeal was taken that depended on the underlying action being "successful," the trial court was without jurisdiction to rule on the motion while a dispositive motion on the underlying action was pending.

BACKGROUND

On 4 October 2021, Plaintiff filed a complaint in Superior Court alleging Defendant, The Reserve II at Sugar Mountain Condominium Association, wrongfully amended the Restrictions, Conditions and Covenants section of its declaration on or about 27 July 2021. The amendment stated the following in pertinent part:

> 2. Amendments. Section 5.3 of the Declaration is hereby amended to add the following subpart (f) immediately following the existing subpart (e):

> "(f) From [1 November] of each calendar year through [31 March] of each calendar year, the Short-Term Rental of Units is prohibited. The Term "Short-Term Rental" means any lease (including subleases, licenses, and other possessory interests, whether oral or written) of one or more Units (or a portion thereof), for which the intended occupancy of the Unit is for a period or periods of less than thirty (30) days, irrespective of the stated term of the lease (including subleases, licenses, and other possessory interests, whether oral or written)."

In accordance with this allegation, Plaintiffs sought declaratory judgment, as well as a temporary restraining order and preliminary injunction.

Both Plaintiffs and Defendant made motions for summary judgment; and, on 17 March 2023, the trial court granted summary judgment on behalf of Plaintiffs. In doing so, the trial court relied primarily on *Armstrong v. Ledges Homeowners Association, Inc.* in determining that the amendment was unreasonable:

> THE COURT, based upon a review of the pleadings together with the attachments, affidavits as contained within the court file, Plaintiff's Exhibit 1 as tendered at the hearing, arguments of counsel and applicable law concludes that there are no genuine issues of material fact and that Plaintiffs are entitled to judgment as a matter of law. This Court concludes that the North Carolina Supreme Court's holding in *Armstrong v. Ledges Homeowners Association, Inc.*, 360 N.C. 547 (2006) is controlling in this matter, and that having applied the factors set forth in that opinion this Court concludes that the purported Amendment to Declaration of Condominium for The Reserve II at Sugar Mountain Condominium recorded on [2 August] 2021, at Book 563, Page 2197 (the "Amendment"), is not reasonable.

After Defendant appealed from the trial court's summary judgment order on 17 April 2023, Plaintiffs filed a motion for attorney fees under N.C.G.S. § 55A-7-40, a statute governing shareholder derivative actions. The trial court denied the motion on 2 May 2023 on the basis that "Plaintiffs[] do not allege injury to the Association[,] nor do they seek recovery on behalf of the association." Plaintiffs appealed from this ruling on 10 May 2023.

ANALYSIS

On appeal, Defendant argues the trial court erred in granting Plaintiffs' motion for summary judgment. Plaintiffs, meanwhile, argue in their cross-appeal that the trial court improperly denied their motion for attorney fees in that it improperly ruled their action was non-derivative.

A. Amendment

Defendant specifically challenges the trial court's ruling on summary judgment on the basis that its amendment was reasonable. "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573 (2008).

In determining whether an amendment to a homeowners association's declaration is reasonable, we look to the standards exposited in detail by our Supreme Court in *Armstrong v. Ledges Homeowners Association, Inc.*:

> Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the *original* intent of the parties; however,

covenants are strictly construed in favor of the *free use of land* whenever strict construction does not contradict the plain and obvious purpose of the contracting parties. *Long v. Branham,* 271 N.C. 264, 268[] . . . (1967) ("[T]he fundamental rule is that the intention of the parties governs" construction of real covenants.). *But see* [*Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 404 (2003)] (When a covenant infringes on common law property rights, " '[a]ny doubt or ambiguity will be resolved against the validity of the restriction.' " (quoting [*Cummings v. Dosam, Inc.,* 273 N.C. 28, 32 (1968)]); [*J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 71 (1981)] ("The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent."). Moreover, the North Carolina Court of Appeals has held that affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application." *Beech Mountain Prop. Owners' Ass'n v. Seifart,* 48 N.C. App. 286, 288, 295-96[] . . . (1980) (concluding that covenants requiring an assessment for "'road maintenance and maintenance of the trails and recreational areas,'" "'road maintenance, recreational fees, and other charges assessed by the Association,'" and "'all dues, fees, charges, and assessments made by that organization, but not limited to charges for road maintenance, fire protection, and security services'" were not sufficiently definite and certain to be enforceable); *see also Allen v. Sea Gate Ass'n,* 119 N.C. App. 761, 764-65[] . . . (1995) (holding that a covenant requiring an assessment "'for the maintenance, upkeep and operations of the various areas and facilities by Sea Gate Association, Inc.'" was void because there was no standard by which a court could assess how the Association chooses the properties to maintain); *Snug Harbor Prop. Owners Ass'n v. Curran,* 55 N.C. App. 199, 203-04[] . . . (1981) (holding that covenants requiring owners to pay an annual fee for the "'[m]aintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas

and parks'" and "'[f]or the maintenance of the recreation area and park'" were not enforceable because there was "no standard by which the maintenance [was] to be judged"), *disc. rev. denied,* 305 N.C. 302[] . . . (1982). *But see Figure Eight Beach Homeowners' Ass'n v. Parker,* 62 N.C. App. 367, 371, 377[] . . . (concluding that a covenant authorizing an assessment for "'[m]aintaining, operating and improving the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; maintenance and improvement of the streets, roads, drives, rights of way, community land and facilities, tennis courts, marsh and waterways; employing watchmen; enforcing these restrictions; and, in addition, doing any other things necessary or desirable in the opinion of the Company to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island'" was enforceable because the purpose of the assessment was described with sufficient particularity), *disc. rev. denied,* 309 N.C. 320[] . . . (1983). The existence of definite and certain assessment provisions in a declaration does not imply that subsequent additional assessments were contemplated by the parties, and courts are "'not inclined'" to read covenants into deeds when the parties have left them out. *See Wise,* 357 N.C. at 407[.]

Developers of subdivisions and other common interest communities establish and maintain the character of a community, in part, by recording a declaration listing multiple covenants to which all community residents agree to abide. *See generally* Law of Associations, § 2.4 (discussing servitudes and the subdivision declaration). Lot owners take their property subject to the recorded declaration, as well as any additional covenants contained in their deeds. Because covenants impose continuing obligations on the lot owners, the recorded declaration usually provides for the creation of a homeowners' association to enforce the declaration of covenants and manage land for the common benefit of all lot owners, thereby preserving the character of the community and neighborhood property values. *Id.* § 3.1 (discussing

distinguishing characteristics of the property owners' association). In a community that is not subject to the North Carolina Planned Community Act, the powers of a homeowners' association are contractual and are limited to those powers granted to it by the declaration. *Wise,* 357 N.C. at 401[] . . . ("[U]nder the common law, developers and lot purchasers were free to create almost any permutation of homeowners association the parties desired."). *Cf.* N.C.G.S. § 47F-3-102 (2005) (enumerating the powers of a planned community's homeowners association); *id.* § 47F-1-102, N.C. cmt. (2005) (naming powers that may apply retroactively to planned communities created before the effective date of the Act). Although individual lot owners may voluntarily undertake additional responsibilities that are not set forth in the declaration, or undertake additional responsibilities by mistake, lot owners are not *contractually bound* to perform or continue to perform such tasks.

Declarations of covenants that are intended to govern communities over long periods of time are necessarily unable to resolve every question or community concern that may arise during the term of years. *See* 2 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 18-10, at 858 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed.1999) (noting that a homeowners' association often takes over service and maintenance responsibilities from the developer in a planned transfer to ensure continuation of these operations in the future). This is especially true for luxury communities in which residents enjoy multiple common areas, private roads, gates, and other amenities, many of which are staffed and maintained by third parties. *See Patrick K. Hetrick, Wise v. Harrington GroveCommunity Association, Inc.: A Pickwickian Critique: The North Carolina Planned Community Act Revisited,* 27 Campbell L. Rev. 139, 171-73 (2005) (comparing the administrative and legal needs of a modest subdivided hypothetical neighborhood, "Homeplace Acres," with those of a hypothetical "upscale residential land development," "Sweet Auburn Acres"). For this reason, most declarations

> contain specific provisions authorizing the homeowners' association to amend the covenants contained therein.
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> The term amend means to improve, make right, remedy, correct an error, or repair. *See generally Black's* at 80; *Heritage* at 44; *Webster's* at 59. Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain. *See Wise,* 357 N.C. at 401[] . . . ("A court will generally enforce [real] covenants "'to the same extent that it would lend judicial sanction to any other valid contractual relationship.'"") . . . ; *see also* 2 Restatement (Third) of Property: Servitudes § 6 Introductory Note at 71 (2000) ("The law should facilitate the operation of common interest communities at the same time as it protects their long-term attractiveness by *protecting the legitimate expectations of their members.*") (emphasis added). In the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, an amendment should not exceed the purpose of the original declaration.

Armstrong v. Ledges Homeowners Ass'n, Inc., 360 N.C. 547, 555-58 (2006). In other words, when examining the permissibility of an amendment to an association's declaration, we must determine whether the amendment "preserv[es] the original nature of the[] bargain" by remaining faithful to the "purpose of the original declaration." *Id.* at 558. To make this determination, we "ascertain [the] reasonableness [of the amendment] from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding

the parties' bargain, including the nature and character of the community." *Id.* at 559.

In applying *Armstrong* to the facts of this case, we are cognizant that, although technically dicta as to the holding proper, our Supreme Court presented an extended hypothetical to demonstrate the principles it outlined with a striking degree of similarity to the case at bar:

> For example, it may be relevant that a particular geographic area is known for its resort, retirement, or seasonal "snowbird" population. Thus, it may not be reasonable to retroactively prohibit rentals in a mountain community during ski season or in a beach community during the summer. Similarly, it may not be reasonable to continually raise assessments in a retirement community where residents live primarily on a fixed income.
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> . . . .
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> Correspondingly, restrictions are generally enforceable when clearly set forth in the original declaration. Thus, rentals may be prohibited by the original declaration. In this way, the declaration may prevent a simple majority of association members from turning established non-rental property into a rental complex, and vice-versa.

Id. at 559-60. This hypothetical, while not controlling, makes plain that our Supreme Court intended our review of an amendment's reasonableness to place great emphasis on the character of the community and read the obligations and restrictions in the original declaration narrowly.

In this case, the relevant portion of the declaration, section 5.3, reads as follows:

> 5.3 Use Restricted: Use by Declarant
> (a) The Units shall be occupied and used by Unit Owners and Occupants for residential purposes only.
> (b) No "For Sale" or "For Rent" signs or other window displays or advertising shall be maintained or permitted by any Unit Owner or Occupant on any part of the Condominium without the prior written consent of the Board.
> (c) The foregoing provisions of this Section or any other provision of this Declaration or the Bylaws notwithstanding, Declarant may maintain sales offices for sale of Units in the Condominium and models in any Unit created by and subject to this Declaration.
> Declarant shall have the right to relocate, from time to time, and to discontinue and re-establish, from time to time, within the Condominium until all of the Units have been conveyed to a Unit Owner other than a Declarant, any one or more of such offices or models. Declarant also shall have the right to change the use or combination of uses of such offices or models, provided that such offices or models shall be used only for sales offices or models.
> (d) Declarant also may maintain signs on the Common Elements advertising the Condominium until all of the Units have been conveyed to Unit Owners other than a Declarant. Declarant shall remove all such signs not later than thirty (30) days after all of the units have been conveyed to unit owners other than Declarant and shall repair or pay the repair of all damage done by removal of such signs.
> (e) The foregoing provisions of this Section or any other provision of this Declaration or the Bylaws notwithstanding, the Association may maintain an office in the Condominium for management of the Condominium.

By the terms of the section, restrictions are placed upon advertising the rent or sale of units in part (b), with exceptions for the Association in parts (c) through (e). Meanwhile, part (a) specifies that "[t]he Units shall be occupied and used by Unit Owners and Occupants for residential purposes only."

Ordinarily, "only" is intended to modify the word or phrase nearest to it in a sentence. *See Garner's Dictionary of Legal Usage* 635 (3d ed. 2011) ("[The] best placement [of 'only'] is precisely before the words intended to be limited. The more words separating *only* from its correct position, the more awkward the sentence; and such a separation can lead to ambiguities."). Here, the positioning of "only" at the end of the sentence suggests that section 5.3(a) of the declaration, in dictating that "[t]he Units shall be occupied and used by Unit Owners and Occupants for residential purposes only[,]" is placing the use restriction upon purposes—residential—not upon proper occupants. This reading is reinforced by the declaration's definition of "Occupant," which includes "Unit Owners, the family members, lessees, guests and invitees of such person or persons, and family members, guests, and invitees of such lessees." In other words, not only does the original declaration not restrict owners' ability to lease the property in section 5.3(a), but its definition of "Occupant" expressly contemplates that rentals will occur through its reference to lessees.

Given the language of the original declaration, taken together with uncontroverted evidence on the record that short-term rentals were commonplace at the complex, the trial court correctly ruled that the amendment was unreasonable in the context of the original declaration under *Armstrong*.

B. Attorney Fees

Next, Plaintiffs argue the trial court erred in denying their motion for attorney fees pursuant to N.C.G.S. § 55A-7-40. Under N.C.G.S. § 55A-7-40, in a derivative action,

> [i]f the action on behalf of the corporation is successful, in whole or in part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorney[] fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

N.C.G.S. § 55A-7-40(e) (2023). Plaintiffs' primary argument, therefore, is that the trial court erred in denying their motion for attorney fees in that the trial court deemed the action non-derivative.

However, at the threshold, we note that Plaintiffs did not make—nor, consequently, did the trial court rule upon—their motion for attorney fees until after Defendant filed its notice of appeal.[1] "When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure[.]" N.C.G.S. § 1-294 (2023); *see also Romulus v. Romulus*, 216 N.C. App. 28, 33 (2011) (citation omitted) ("An appeal is not 'perfected' until it is docketed in the

[1] Plaintiffs did request attorney fees as an item of relief in their complaint. However, we observe separately that this issue remaining outstanding at the time Defendant filed its notice of appeal did not render the appeal interlocutory. *See Duncan v. Duncan*, 366 N.C. 544, 546 (2013) ("An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs.").

appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction."). However, "the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." N.C.G.S. § 1-294 (2023).

In *Hailey v. Tropic Leisure Corp.*, we held that, where a motion for attorney fees depends on a party's success on the merits of the underlying action, the issue of attorney fees is affected by the judgment appealed from for purposes of N.C.G.S. § 1-294:

> Generally, "timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *McClure v. County of Jackson*, 185 N.C. App. 462, 469[] . . . (2007) (citation and quotation marks omitted). [N.C.G.S.] § 1-294 provides an exception for matters "not affected by the judgment appealed from." [N.C.G.S.] § 1-294 (2019). However, "[w]hen, as in the instant case, the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings, the exception set forth in [N.C.G.S.] § 1-294 is not applicable." *McClure*, 185 N.C. App. at 471[] . . . .
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> Accordingly, the trial court was divested of jurisdiction to enter the Fees Order when Defendants filed their first Notice of Appeal. This Court has expressly held the exception provided by [N.C.G.S.] § 1-294 is inapplicable in cases like the present where the decision to grant or deny awards of attorney's fees is based on a party's status as the "prevailing party." *See id.* Because it was entered without jurisdiction, we vacate the Fees Order and remand the matter to the trial court to reconsider the award, including any fees and costs incurred on appeal claimed by Plaintiff. *C.f. Fungaroli v. Fungaroli,* 53 N.C. App. 270, 273[] . . .

> (1981) (affirming a trial court's award of appellate attorney's fees, noting "an award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met"); *Vasquez v. Fleming*, 617 F.2d 334, 336 (3d Cir. 1980) ("[A]ttorney fees may be awarded to the prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, by a court of appeals for a successful appeal.").

Hailey v. Tropic Leisure Corp., 275 N.C. App. 485, 504-05 (2020).

Here, the plain language of N.C.G.S. § 55A-7-40(e) dictates that a ruling on a motion for attorney fees in a derivative action depends on there being a "successful" action by the entity on behalf of whom the plaintiffs bring suit. N.C.G.S. § 55A-7-40(e) (2023). Based on our reasoning in *Hailey*, therefore, a motion for attorney fees under N.C.G.S. § 55A-7-40(e) is necessarily "affected by the judgment appealed from[,]" as the success or failure of the action depends on whether the trial court's ruling on the dispositive motion was proper. N.C.G.S. § 1-294 (2023). Accordingly, the trial court's ruling on Plaintiff's motion for attorney fees was void for want of jurisdiction. *Swilling v. Swilling*, 329 N.C. 219, 225 (1991); *see also Hailey*, 275 N.C. App. at 504 ("[T]he trial court was divested of jurisdiction to enter the Fees Order when Defendants filed their first Notice of Appeal.").

CONCLUSION

The trial court correctly held that the amendment to the declaration was unreasonable and therefore granted Plaintiffs' motion for summary judgment. However, the trial court acted without jurisdiction by ruling upon Plaintiffs' motion

for attorney fees during the pendency of this appeal.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).