Reversed and Remanded and Memorandum Opinion filed August 24, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00842-CV

DAVID M. SMITH AND CHERYL Y. SMITH, Appellants

V.

MARK LOWE, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 113376-CV

M E M O R A N D U M O P I N I O N

Is the appellants' home a "moved in house" or a "mobile home[]"? That is the question. Because we conclude that this question cannot be answered in the affirmative as a matter of law, we reverse the trial court's summary judgment and remand the case for further proceedings.

Appellants David M. Smith and Cheryl Y. Smith (together, the "Smiths") constructed a house on their property in Brazoria County. Appellee Mark Lowe sued the Smiths, alleging their house violated the applicable Deed Restrictions'

prohibition against "moved in house[s]" and ""mobile homes." Lowe filed a traditional motion for summary judgment, which the trial court granted in an order signed October 18, 2022. The Smiths subsequently filed this appeal.

BACKGROUND

The Smiths purchased real property in Manvel, Texas in October 2017. The Smiths purchased a manufactured home in 2019, which was affixed to their Manvel property that same year.

Lowe sued the Smiths in June 2021, asserting that their manufactured home violated the Deed Restrictions applicable to the Quail Valley Ranch Subdivision. In relevant part, the Deed Restrictions state as follows:

> 2. All houses erected on said property will be of new construction (no moved in houses) which shall contain a floor space area of not less than 1800 square feet, exclusive of garages or open porches.
>
> 3. No tents, shacks or other temporary buildings shall be placed or built upon said property for residential purchases, including NO mobile homes.

Lowe sought enforcement of these restrictive covenants "for removal of any mobile homes."

Lowe filed a traditional motion for summary judgment. *See* Tex. R. Civ. P. 166a(c). In his motion, Lowe asserted there was no genuine issue of material fact because the "undisputed facts" showed that the Smiths "knowingly moved in a mobile home or manufactured home" at their property in violation of the applicable Deed Restrictions.

The Smiths filed a response to Lowe's summary judgment motion and attached evidence. On October 18, 2022, the trial court signed an order granting Lowe's motion for summary judgment. The trial court also awarded Lowe

$11,500 in attorney's fees plus additional fees in the event of an appeal. The Smiths timely appealed.

ANALYSIS

On appeal, the Smiths raise four issues challenging the trial court's summary judgment on Lowe's claim:

1. the evidence raises issues of fact regarding whether the Smiths' home violates the Deed Restrictions;
2. Lowe failed to show as a matter of law that the Deed Restrictions apply to the Smiths' property;
3. the evidence raises an issue of fact regarding whether the Deed Restrictions were abandoned; and
4. the evidence of attorney's fees is insufficient to support the award.

We consider only the Smiths' first issue and, for the reasons below, reverse the trial court's order granting summary judgment on Lowe's claim.

I. Standard of Review and Governing Law

We review the trial court's grant of summary judgment *de novo*. *See, e.g.*, *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a traditional motion for summary judgment, a movant must prove entitlement to judgment as a matter of law on the issues pled and set out in the motion. Tex. R. Civ. P. 166a(c); *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 607 (Tex. 2013).

We consider all the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could do so and disregarding contrary evidence unless a reasonable factfinder could not do so. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). If the trial court grants summary judgment without specifying the

grounds, we affirm the judgment if any of the grounds presented are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

Restrictive covenants in a deed are analyzed under the general rules of contract interpretation. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 66 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). When reviewing a restrictive covenant, our primary goal is "to ascertain and give effect to the intent of its drafters, using the language of the instrument as our guide." *Wiese v. Heathlake Cmty. Ass'n, Inc.*, 384 S.W.3d 395, 400 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see also* Tex. Prop. Code Ann. § 202.003(a) ("A restrictive covenant shall be liberally construed to give effect to its purposes and intent."). Additionally, "[t]he words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched, or changed by construction." *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987). Thus, to validly limit a property owner's use, a covenant must plainly prohibit the use. *See, e.g.*, *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 281-92 (Tex. 2018).

We analyze the covenant as a whole in light of the circumstances present at the time it was written, and afford words and phrases their commonly accepted meanings unless the instrument shows them to be used in a technical or different sense. *Wilmoth*, 734 S.W.2d at 657-58; *Tanglewood Homes Ass'n, Inc.*, 436 S.W.3d at 66. We consider "the entire writing in an effort to harmonize and give effect to all the provisions . . . so that none will be rendered meaningless." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

Whether a restrictive covenant is ambiguous is a question of law for the court to decide. *Pilarcik*, 966 S.W.2d at 478; *Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429, 434 (Tex. App.—Houston [14th Dist.] 2012, no pet.). A

restrictive covenant is unambiguous if it can be given a definite or certain legal meaning. *Sanchez*, 367 S.W.3d at 434. In contrast, a covenant is ambiguous if its terms are susceptible to more than one reasonable interpretation. *Wiese*, 384 S.W.3d at 400. A covenant is not ambiguous simply because the parties disagree over its interpretation. *Id*. Similarly, parol evidence is not admissible for the purpose of creating an ambiguity. *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 258 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

II. Application

We apply these principles to the two restrictive covenants listed above.

A. "No Moved in Houses"

The covenant states as follows:

> All houses erected on said property will be of new construction (no moved in houses) which shall contain a floor space area of not less than 1800 square feet, exclusive of garages or open porches.

Because the relevant terms can be given a definite legal meaning, the covenant is not ambiguous and we interpret it as a matter of law. *See Wiese*, 384 S.W.3d at 400. All houses must be "of new construction." Black's Law Dictionary defines "new" as to "recently come into being." *New*, Black's Law Dictionary (11th ed. 2019). The covenant also prohibits "moved in houses." Webster's Dictionary defines "move in" to mean "to occupy a dwelling or place of work."[1]

The Smiths assert that the evidence raises an issue of fact as to whether their home violates this restrictive covenant. We agree.

Lowe included the following picture of the Smiths' home with his summary

[1] *See Move In*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/moved%20in?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited August 17, 2023).

judgment motion:

Lowe also attached as evidence the Smiths' "Affixation Affidavit Regarding Manufactured (and Factory Built) Housing Unit," which describes the Smiths' home as a 2020 "manufactured housing unit." In relevant part, the Affixation Affidavit states:

> 1) The manufactured housing unit . . . is affixed to a permanent foundation and will assume the characteristics of site-built housing.
>
> 2) The wheels, axle, towbar or hitch were removed when said manufactured housing unit was placed on its permanent site.
>
> * * *
>
> 7) The manufactured housing unit is permanently connected to a septic tank or sewage system and other utilities such as electricity, water and natural gas.
>
> * * *
>
> 12) If the land is being purchased, such purchase and said manufacturing housing unit represent a single real estate transaction under applicable law.

The Smiths included with their summary judgment response an affidavit from David Smith which states, in relevant part, as follows:

> 3. Cheryl and I bought a new home, and had it constructed on our property[.]
> 4. My home was constructed in 2019.
> 5. My home has never had a permanently attached chassis.
> 6. My home is permanently affixed to its foundation.
> 7. My home is not transportable.
>
> * * *
>
> 9. My home includes a separate slab for the air conditioner, and a pool which is separate from the house.
>
> * * *
>
> 12. My home is not a temporary structure.
> 27. My home has been insured as a permanently affixed home, and not as a mobile home, since its construction.

Considering this evidence in the light most favorable to the Smiths (*see Mack Trucks, Inc.*, 206 S.W.3d at 582), it fails to establish as a matter of law that the Smiths' home is either a "moved in house" or is not "new construction." In his affidavit, David Smith attested that the home was purchased "new" and was "constructed on [the Smiths'] property." David also states that his home includes parts separate from the manufactured housing unit, including a separate slab for the air conditioner and a pool. Similarly, the Affixation Affidavit states that the Smiths' home is a 2020 unit that was "affixed to a permanent foundation" and "assume[d] the characteristics of site-built housing."

Taken together, this evidence suggests the Smiths' home was fully completed and ready for occupation ***only*** when it was affixed to the Smiths' real property. Likewise, the evidence does not show that the home was or could have

been occupied before it was affixed to the Smiths' property. Therefore, this evidence raises issues of fact regarding whether the Smiths' home satisfies the Deed Restrictions' requirement that all homes be of "new construction" and its prohibition against "moved in houses."

A similar issue was analyzed in *Leake v. Campbell*, 352 S.W.3d 180 (Tex. App.—Fort Worth 2011, no pet.), in which the appellants challenged the trial court's order denying their traditional summary judgment motion. *Id*. at 187-88. There, the restrictive covenant at issue stated that "[n]o house, dwelling and/or other structure of any kind or character whatsoever may be moved into any lot carved out of the property described herein." *Id*. at 182. The appellants asserted that the evidence conclusively established a violation of this covenant because the appellees' cabana and shed "were preassembled off-site and moved onto the property." *Id*. at 188.

Rejecting this argument, the court pointed out that the appellees "presented affidavit evidence that the cabana and shed were both assembled and installed ***on*** the property." *Id*. at 189 (emphasis added). Accordingly, the appellees' evidence raised an issue of fact as to whether the cabana and shed violated the restrictive covenant. *Id*.

Here too, the evidence raises an issue of fact regarding whether the Smiths' home constitutes "new construction" or is an impermissible "moved in house." Therefore, this restrictive covenant and the relevant summary judgment evidence do not provide a basis to sustain the trial court's summary judgment on Lowe's claim. *See* Tex. R. Civ. P. 166a(c); *Masterson*, 422 S.W.3d at 607.

B. "No Mobile Homes"

The second covenant states as follows:

> No tents, shacks or other temporary buildings shall be placed or built upon said property for residential purposes, including NO mobile homes.

On appeal, the Smiths assert that the covenant's use of the phrase "mobile homes" is ambiguous and reasonably can be read to exclude manufactured homes. We disagree.

Construing the phrase as it was used during the time the Deed Restrictions were filed[2] (*Wilmoth*, 734 S.W.2d at 657-58), it is clear that "mobile home" was commonly understood to include a manufactured home like the Smiths'. In its 1987 decision in *Wilmoth*, the Texas Supreme Court held that the terms "mobile home" and "manufactured home" are interchangeable for purposes of deed restrictions, and a prohibition on one is a prohibition on the other. *See id*. at 658.

Specifically, the restrictive covenant at issue in that case prohibited "tents, house trailers or temporary structures"; the defendant asserted that her home was a "manufactured home" and thus outside the restrictions' reach. *Id*. at 657-58. Rejecting that argument, the court held that "the intent of the restrictive covenants . . . was to prohibit house trailers, mobile homes, and manufactured homes." *Id*. at 658; *see also Pebble Beach Prop. Owners' Ass'n v. Sherer*, 2 S.W.3d 283, 289 (Tex. App.—San Antonio 1999, pet. denied) (citing cases that "squarely affirm the proposition that manufactured homes are within the purview of restrictive covenants similar to the one at issue," which prohibited "mobile homes"); *Giese v. NCNB Tex. Forney Banking Ctr.*, 881 S.W.2d 776, 780 (Tex. App.—Dallas 1994, no writ) ("A mobile home is included in the definition of manufactured home."); *Dempsey v. Apache Shores Prop. Owners Ass'n, Inc.*, 737 S.W.2d 589, 594 (Tex. App.—Austin 1987, no writ) ("Our holding that a double-wide 'manufactured

[2] The Deed Restrictions were filed in the Brazoria County deed records on January 19, 1999.

home' or 'modular' home is a 'mobile home' within the meaning of the [] restrictive covenant has support in prior case law.").

But here, the covenant applies to more than just "mobile homes" standing alone; rather, it prohibits "tents, shacks or other ***temporary*** buildings . . . ***including*** NO mobile homes." (emphases added).

Words must be construed in the context in which they are used and we avoid construing contracts in a way that renders contractual language meaningless. *See Sundown Energy LP v. HJSA No. 3, L.P.*, 622 S.W.3d 884, 888 (Tex. 2021) (per curiam). Accordingly, our examination of the above-quoted section is subject to the rule of *ejusdem generis*, which provides that, when words of a general nature are used in connection with the designation of particular objects or classes of things, the meaning of the general words will be restricted to the particular designation. *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003); *see also R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011) ("under the principle of *ejusdem generis*, we have warned against expansively interpreting broad language where it is immediately preceded by narrow and specific terms").

Under this rule of construction, the covenant's reference to "mobile homes" reasonably may be read in connection with the covenant's designation of a particular class of structures, *i.e.*, those that are "temporary." *See R.R. Comm'n of Tex.*, 336 S.W.3d at 629; *Hilco Elec. Coop., Inc.*, 111 S.W.3d at 81. This construction of the covenant supports the interpretation that it prohibits only those mobile homes that are "temporary."

At the same time, the portion of the covenant following "including" explicitly states "NO mobile homes." This prepositional phrase — a complete prohibition in and of itself — reasonably may be read to prohibit ***all*** mobile homes,

regardless of whether or not they are of a temporary nature.

Considering the restrictive covenant as a whole, its terms are susceptible to more than one reasonable interpretation: it either prohibits ***all*** mobile homes or only those that are ***temporary***. Accordingly, the covenant cannot be given a definite legal meaning and is ambiguous. *See Wiese*, 384 S.W.3d at 400. Therefore, the covenant does not provide a basis to sustain the trial court's summary judgment on Lowe's claim. *See, e.g.*, *Cedar Oak Mesa, Inc. v. Altemate Real Estate, LLC*, No. 03-10-00067-CV, 2010 WL 3431703, at *4 (Tex. App.—Austin Aug. 31, 2010, no pet.) (mem. op.) ("[b]ecause [of] the ambiguous language of the Covenants . . . the language of the Covenants alone is insufficient to support the trial court's summary judgment").

We sustain the Smiths' first issue and conclude the trial court erred in granting summary judgment on Lowe's claims. Because of our disposition of this issue, we need not reach the Smiths' other issues on appeal.

CONCLUSION

We reverse the trial court's October 18, 2022 order granting Lowe's motion for summary judgment and remand the case for further proceedings.

/s/ Meagan Hassan
Justice

Panel consists of Justices Jewell, Hassan, and Wilson.