Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00214-CV

MISSION RIDGE P.U.D. HOMEOWNERS ASSOCIATION, INC.,
Appellant

v.

Robyn M. **HINES**,
Appellee

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2017-CI-11100
Honorable Karen H. Pozza, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: February 20, 2019

AFFIRMED

Mission Ridge P.U.D. Homeowners Association, Inc. (the HOA) appeals a take-nothing judgment the trial court rendered in favor of appellee Robyn Hines after a bench trial. The HOA argues the trial court erred by denying its request to post a supersedeas bond, by determining Hines did not violate the subdivision's restrictive covenants when she raised the roof of her garage, and by addressing irrelevant issues in its findings of fact and conclusions of law. We affirm the trial court's judgment.

BACKGROUND

Hines lives with her husband Lonnie, a disabled veteran, in the Mission Ridge subdivision in San Antonio. Houses in Mission Ridge are subject to numerous restrictive covenants, which the HOA is authorized to enforce. One restrictive covenant prohibits buildings and structures from exceeding forty feet in height, as measured from the top of the foundation.

The restrictive covenants also establish an Architectural Control Committee (or ACC). The ACC must approve an application with detailed plans and specifications before a building, structure, or improvement is built. If the ACC does not approve or disapprove such an application within thirty days, the proposed plans and specifications are deemed approved.

Hines applied three times to raise the roof of her garage. The ACC timely denied the first application. Hines submitted a second application dated February 9, 2017, seeking to add ten feet to the existing garage, which would have raised it to approximately twenty-three feet, and the ACC denied this application in a March 15, 2017 letter. Hines submitted a third application, requesting ACC approval to raise the roof to nineteen feet. The ACC timely approved Hines's third application.

Hines began construction to extend the height of the garage to approximately twenty-three feet because, as she and her husband explained, doing so was necessary to comply with city law and the Americans with Disabilities Act. After a neighbor complained, the HOA sent Hines a cease and desist letter. The HOA then sued Hines, seeking declaratory relief and an injunction against constructing the garage extension beyond the height approved by the ACC. The case proceeded to a bench trial.

The HOA sought to prove Hines violated the restrictive covenants by raising the roof higher than what the ACC had approved. One of Hines's arguments was that the ACC's denial of her first two applications was arbitrary and capricious. The evidence showed Hines was previously

a member of the ACC and the HOA board, and Hines suggested the denial of her application was retaliatory. Lonnie Hines, who is also a licensed general contractor, testified he measured the heights of numerous other structures in Mission Ridge and they exceeded twenty-three feet. It was undisputed at trial that the plans and specifications in Hines's applications did not exceed the maximum allowed under the restrictive covenants' express height limits.

The trial court rendered a take-nothing judgment on the HOA's claims against Hines. At the HOA's request, the trial court made findings of fact and conclusions of law. The trial court found Hines's construction did not violate the restrictive covenants. The trial court also found the ACC failed to timely approve or deny her second application and, among other findings, the HOA's denial of Hines's applications was arbitrary and capricious. The HOA filed a request for additional findings, a motion for new trial, and a timely notice of appeal. The record on appeal contains no further orders of the trial court.

MOTION ON SUPERSEDEAS BOND

The HOA argues the trial court erred by denying its motion to post a supersedeas bond, as reflected in the judge's notes. However, judge's notes form no part of the record. *First Nat'l Bank of Giddings, Tex. v. Birnbaum*, 826 S.W.2d 189, 190 (Tex. App.—Austin 1992, no writ) (per curiam) (op. on reh'g). The HOA also did not follow the proper procedure in this court for challenging the trial court's ruling. *See* TEX. R. APP. P. 24.4(a). We overrule this issue.

WHETHER HINES RAISED THE ROOF IN VIOLATION OF THE RESTRICTIVE COVENANTS

The HOA challenges the trial court's finding that Hines did not violate any restrictive covenants by raising the roof of her garage. A trial court's findings of fact may be challenged as not supported by legally and factually sufficient evidence. *Dodeka, L.L.C. v. Campos*, 377 S.W.3d 726, 729 (Tex. App.—San Antonio 2012, no pet.). As the party seeking affirmative relief in the trial court, specifically a declaratory judgment that Hines violated a restrictive covenant, the HOA

had the initial burden to prove Hines substantially breached a restrictive covenant. *See Garden Oaks Maint. Org. v. Chang*, 542 S.W.3d 117, 129 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Davis v. Estridge*, 85 S.W.3d 308, 310 n.2 (Tex. App.—Tyler 2001, pet. denied); *cf. Park v. Escalera Ranch Owners' Ass'n*, 457 S.W.3d 571, 600 (Tex. App.—Austin 2015, no pet.).[1] When, as in this case, a party challenges the legal sufficiency of an adverse finding on which it had the burden of proof, the evidence must conclusively establish all necessary facts in its favor. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). When a party attacks the factual sufficiency of an adverse finding on an issue on which it had the burden of proof, the adverse finding must be against the great weight and preponderance of the evidence. *See id.* at 242.

The HOA's arguments primarily suggest there is an absence of evidence and pleadings showing Hines's complied with the restrictive covenants. However, to obtain the affirmative relief it sought, the HOA had the initial burden to plead and present evidence establishing Hines violated the restrictive covenants. *See Chang*, 542 S.W.3d at 129; *Park*, 457 S.W.3d at 600; *Estridge*, 85 S.W.3d at 310 n.2. Through its legal and factual sufficiency challenges, the HOA may prevail only if either (a) it conclusively established Hines's construction violated an applicable restrictive covenant or (b) the trial court's finding is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. *See Dow Chem. Co.*, 46 S.W.3d at 241–42.

The HOA argues Hines raised the roof of her garage in violation of the restrictive covenants. However, it was undisputed at trial Hines's construction did not exceed the height maximum allowed by the restrictive covenants.[2] The sole restrictive covenant the HOA argues

[1] The HOA also states in its brief, "the initial . . . burden below is upon [the HOA] to demonstrate that it acted reasonably in the matters under litigation." Furthermore, this burden is inapplicable in this case because, with regard to the deemed approval of her second application, Hines is not challenging the HOA's exercise of discretionary authority, which would be presumed reasonable. *See* TEX. PROP CODE § 202.004(a).

[2] At trial, witnesses testified that the height limit was seventy-five feet, but the restrictive covenants appear to show the height limit is forty feet.

Hines violated is by not obtaining the ACC's approval to exceed nineteen feet. In a separate issue, the HOA attempts to cabin our review solely to Hines's third application, arguing Hines's pleadings do not request affirmative relief regarding the first or second applications. But to obtain the declaratory and injunctive relief it sought in the trial court, the HOA had the burden to prove Hines's construction exceeded what the ACC had approved. *See Chang*, 542 S.W.3d at 129; *Park*, 457 S.W.3d at 600; *Estridge*, 85 S.W.3d at 310 n.2. Furthermore, in reviewing the sufficiency of the evidence, we must consider all of the evidence admitted at trial. *See Dow Chem. Co.*, 46 S.W.3d at 241–42.

The evidence showed Hines submitted a second application on February 9, 2017, seeking to raise the roof of her garage by ten feet. Although the ACC denied the second application, it did not do so until March 15, 2017. The trial court found the ACC failed to timely approve or disapprove Hines's second application as per the restrictive covenants. Under the restrictive covenants, which were admitted into evidence, the second application was deemed approved due to no action taken by the ACC within 30 days. Other than challenging the trial court's finding that the second application is not supported by Hines's pleadings, the HOA does not argue that the evidence fails to support this finding. *See* TEX. R. APP. P. 38.1(i).

The HOA also does not argue Hines's construction on her garage exceeded the plans and specifications in the second application. *See id.* In her second application, Hines requested approval to raise the roof of her garage by ten feet. In an email sent to an HOA representative, Lonnie stated the first two applications requested approval to raise the roof of the garage to twenty-three feet. Lonnie testified the construction raised the roof of the garage to twenty-three feet. The HOA does not cite to any evidence conclusively establishing or showing by a great weight and preponderance of the evidence that Hines's garage construction exceeds the plans and specifications in Hines's second application.

In light of the evidence admitted at trial, and the issues and arguments the HOA has presented on appeal, we cannot say the evidence conclusively establishes that Hines violated any restrictive covenants by raising the roof on her garage. *See Dow Chem. Co.*, 46 S.W.3d at 241. We also cannot say the trial court's finding that Hines did not violate the restrictive covenants is against the great weight and preponderance of the evidence so as to be clearly wrong and manifestly unjust. *See id.* at 242. We overrule the HOA's legal and factual sufficiency challenges to the trial court's finding that Hines did not violate the restrictive covenants.

OTHER CHALLENGED FINDINGS

The HOA challenges other findings of fact, arguing they are not relevant or are relevant only to affirmative defenses not raised by Hines's pleadings.[3] Even if the trial court erred by making irrelevant or unsupported findings of fact, we cannot reverse the trial court's judgment unless these findings were harmful. *See* TEX. R. APP. P. 44.1(a). The trial court's take-nothing judgment on the HOA's claims for declaratory and injunctive relief, which were predicated on Hines violating the restrictive covenants, is independently supported by its finding that Hines did not violate any of the restrictive covenants. Thus, even if the trial court erred by making other findings that are irrelevant or not supported by Hines's pleadings, those findings are not harmful and do not justify reversal of the trial court's judgment. *See id.*; *see also Gulf Liquid Fertilizer Co.*

[3] The HOA challenges the trial court's finding that it acted arbitrarily and capriciously solely on the ground that Hines did not plead the issue. However, both sides presented evidence and argument on the issue at trial, and the HOA does not contend on appeal the issue was not tried by consent. *See Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018) ("Trial by consent can cure lack of pleading."); *Adeleye v. Driscal*, 544 S.W.3d 467, 484 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("[I]ssues not raised in the pleadings can be tried by express or implied consent of the parties."). The HOA also does not challenge the sufficiency of the evidence to support this finding. Thus, this finding alternatively supports affirming the trial court's judgment. *See* TEX. PROP. CODE § 202.004(a) (providing a property owners' association's exercise of discretionary authority is presumed reasonable unless shown to be arbitrary and capricious).

v. Titus, 163 Tex. 260, 270, 354 S.W.2d 378, 385 (1962) (stating a trial court's findings of fact need only be sufficient to support the judgment). We overrule the HOA's final issue.

CONCLUSION

We affirm the trial court's judgment.

Luz Elena D. Chapa, Justice