In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00478-CV

FOREST HILLS IMPROVEMENT ASSOCIATION, INC., Appellant

V.

RICHARD FLAIM, ET UX, Appellees

On Appeal from the 1A District Court
Jasper County, Texas
Trial Cause No. 33266

MEMORANDUM OPINION

Appellant, Forest Hills Improvement Association, Inc. (the "Association"), appeals the trial court's denial of its petition for declaratory judgment against the Appellees (the "Flaims"). We vacate and remand to the trial court.

I. Factual and Procedural Background

The Association is a corporation of property owners in the Forest Hills Subdivision, Sections Two and Three, of Jasper County, Texas (the "subdivision"),

organized under the deed restrictions governing the subdivision. The Flaims are property owners in the subdivision.

In September of 1997, a majority of the owners of the lots in the subdivision voted on and approved the deed restrictions, which were then filed and recorded in the Deed Records of the County Clerk of Jasper County, Texas. The deed restrictions require the Improvements Committee—defined in the restrictions as the Board of Directors of the Association—to pre-approve all new construction: "No lot shall be used for other than single family residential purposes. Single family homes shall be permitted on any lot, provided that site planning and architectural design are approved in advance of construction by the Improvement Committee and that setbacks and easements are observed." The restrictions further specify the process for making improvements to property located within the subdivision by granting the Improvement Committee the power to:

> [a]pprove or reject all plans and specifications for improvements to be constructed in said Subdivision. All plans and specifications for improvements must be submitted to the Committee for approval prior to the commencement of construction of any improvement. If the Committee fails to act within thirty (30) days after submission of plans and specifications, construction in accordance with these restrictions may begin.

The restrictions also include explicit setback requirements, including that "no building shall be located . . . nearer than ten (10) feet to the rear lot line . . . ." The

restrictions go on to provide that "the Improvement Committee may grant variances from compliance with the setback requirements . . . ." The restrictions do not further describe or mention "variances."

In 1997, the Flaims built a home on their property within the subdivision, and in 2001, the Flaims obtained approval from the Association to pour a concrete slab on their property, located about two feet from the rear lot line, to serve as a place to park their boat.

Some years after the concrete slab was poured, the Flaims sought permission from the Association to construct a carport over the slab. The Flaims first approached Eddie Bass—a general contractor as well as a member of the Association's board of directors—about constructing the carport on their property. Mr. Bass informed the Flaims that they could not build their desired carport because it would violate the setback restrictions.

Subsequently, the Flaims submitted a series of four written requests to the Association dated: (i) August 20, 2011; (ii) April 28, 2012; (iii) February 20, 2013; and (iv) May 12, 2013. The Association concedes that it did not respond in writing to the Flaims' requests until May 28, 2013, when its attorney sent the Flaims written notice that the Association denied their request, but argues that it did verbally deny each of the Flaims requests. The Flaims admit that they received verbal denials from

the Association to some, but not all, of their letters, and they argue that they did not receive the May 28th letter.

In June of 2013, the Flaims built their carport. In July of 2013, the Association filed suit against the Flaims seeking declaratory judgment that the Flaims violated the setback requirement of the deed restrictions and asking the trial court to order the Flaims to remove their carport and grant a permanent injunction enjoining the Flaims from constructing any future structures in violation of the deed without a variance. Additionally, the Association requested that the trial court award it reasonable and necessary attorney's fees incurred in the matter.

Following a bench trial, the trial court denied the Association's petition for declaratory judgment. The trial court later filed findings of fact and conclusions of law, and this appeal ensued.

II. Waiver of Right to Enforce Deed Restrictions

The Association challenges the legal and factual sufficiency of the evidence to support the trial court's findings of fact and conclusions of law underlying the theory that the Association waived its right to enforce the deed restrictions against the Flaims.

A. Standard of review

"Findings of fact by the trial court are always reviewable for legal and factual sufficiency of the evidence." *Koch Oil Co. v. Wilber*, 895 S.W.2d 854, 861 (Tex. App.—Beaumont 1995, writ denied).

Where an appellant challenges both legal and factual sufficiency of the evidence, the appellate court should first review the legal sufficiency challenge. *Glover v. Tex. Gen. Indem. Co*., 619 S.W.2d 400, 401 (Tex. 1981). If an appellant is attacking the legal sufficiency of an adverse finding on which the appellant did not have the burden of proof, the appellant must show on appeal that there is no evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). The reviewing court considers the evidence in the light most favorable to the finding to determine if there is any probative evidence or reasonable inferences therefrom, which supports the finding. *Glover*, 619 S.W.2d at 401. The court disregards all evidence and inferences to the contrary. *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992).

When reviewing a factual sufficiency challenge, the appellate court considers and weighs all of the evidence supporting and contradicting the challenged finding and sets aside the finding only if the evidence is so weak as to make the finding

clearly wrong and manifestly unjust. *Hertz Equip. Rental Corp. v. Barousse,* 365 S.W.3d 46, 54 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

In a bench trial, the trial court determines the credibility of the witnesses and the weight to be given their testimony. *Woods v. Woods*, 193 S.W.3d 720, 726 (Tex. App.—Beaumont 2006, pet. denied). In resolving factual disputes, the trial court may believe one witness and disbelieve others, and it may resolve any inconsistencies in a witness's testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). In making credibility determinations, the fact-finder "cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005). The fact-finder is also not "free to believe testimony that is conclusively negated by undisputed facts." *Id*. However, if the fact-finder could reasonably believe the testimony of one witness or disbelieve the testimony of another witness, the appellate court "cannot impose [its] own opinions to the contrary." *Id*. at 819.

An appellant may not challenge a trial court's conclusions of law for factual sufficiency, but the appellate court may review the legal conclusions drawn from the facts to determine their correctness. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). In an appeal from a bench trial, the appellate court

reviews a trial court's conclusions of law as legal questions, *de novo*, and will uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Id*.; *In re Moers*, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

B. Waiver based on the deed restrictions

The trial court made findings of fact that the Association failed to respond to the Flaims' requests to construct a carport and a conclusion of law that the Association's failure to respond to the Flaims' "repeated requests for permission to construct the carport constitutes a waiver."

1. Deed restriction construction

Deed restrictions are restrictive covenants concerning real property. *See* Tex. Prop. Code Ann. § 202.001(4) (West 2014). "[R]estrictive covenants are subject to the general rules of contract construction." *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). "Courts strive to honor the parties' agreement and not remake their contract by reading additional provisions into the policy." *Gastar Expl. Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Courts must give a restrictive covenant's words and phrases their commonly accepted meaning. *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2002, no pet.). We review a trial court's interpretation of

a restrictive covenant *de novo*. *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

2. The trial court's findings and conclusions

The trial court issued written findings of fact that the deed restrictions "make provisions for the Board['s] failure to respond to request[s] for improvements," and then quoted the following portion of the deed restrictions:

> Approve or reject all plans and specifications for improvements to be constructed in said Subdivision. All plans and specifications for improvements must be submitted to the Committee for approval prior to the commencement of construction of any improvement. If the Committee fails to act within thirty (30) days after submission of plans and specifications, construction in accordance with these restrictions may begin.

The trial court further found that the Flaims received "no written response" to their requests for a variance to build their carport; and "therefore they commenced construction of the carport in accordance with the previously submitted proposal."[1] The trial court then concluded that the Association's "failure to respond to [the

[1] Specifically, the trial court found: "On May 12, 2013, Defendants submitted a proposal outlining the details of the proposed carport to the Board of Directors and the Architectural Committee. Defendants received *no written response* from the Board of Directors or the Architectural Committee within 30 days as outlined in the [Deed Restrictions], therefore they commenced construction of the carport in accordance with the previously submitted proposal." (emphasis added)

Flaims'] repeated requests for permission to construct the carport constitutes a waiver."

3. No waiver under the terms of the deed restriction

We first review the trial court's factual findings for legal sufficiency. It was undisputed at trial that the Association made "no written response" to the Flaims' requests before May 28, 2013. However, the Association offered testimony from three of its board members that the Association had verbally denied each of the Flaims' requests to build the carport. The Association further offered testimony that on May 28, 2013, its attorney penned a letter to the Flaims rejecting their requests. While the Flaims denied receiving the May 28th letter, they conceded during trial that the Association told them verbally on multiple occasions that they could not build the carport.

The trial court's findings of fact and conclusions of law seem to conflate the deed restrictions' language—"fails to act"—with failure to issue a written response. The deed restrictions state: "If the Committee *fails to act* within thirty (30) days after submission of plans and specifications, construction in accordance with these restrictions may begin." Because the restrictions do not prescribe that the Association must provide written notice of its action on such submissions, and because we do not read additional terms into the agreement, we interpret the

restrictions to allow the Association to give verbal notice. *See Gastar*, 412 S.W.3d at 583. We therefore find no evidence to support the trial court's factual finding that the Association failed to respond to the Flaims' requests.

Because we hold that the record conclusively establishes that the Association did respond to the Flaims' requests for permission to construct the carport, we cannot uphold the trial court's legal conclusion that the Association's "failure to respond to [the Flaims'] repeated requests for permission to construct the carport constitutes a waiver." *See Marchand*, 83 S.W.3d at 794.

Moreover, even if the Association's verbal responses had been insufficient to constitute action under the deed restrictions, the restrictions only allow the requestor to begin "construction in accordance with these restrictions." There is no question that construction of the carport was not in accordance with the deed restrictions because its placement violated the setback requirement. Therefore, regardless of whether the Association responded at all, the deed restrictions would not have allowed the Flaims to begin construction.

C. The trial court's finding of waiver in equity

The trial court also concluded that the Association waived its right to enforce the deed restrictions because "[s]elective prosecution of [the Flaims] is inequitable

based on violations of the Deed Restrictions by other individuals especially members of the Board of Directors and/or the Architectural Committee."

1. Waiver in equity

"Waiver is the voluntary relinquishment of a known right." *Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 851 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). A party wishing to establish waiver of a deed restriction, must prove that the violations "are so great as to lead the mind of the 'average man' to reasonably conclude that the restriction in question has been abandoned and its enforcement waived." *Id*. "Among the factors to be considered by the 'average man' are the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant." *Id*.; *see also Uptegraph*, 312 S.W.3d at 935.

The trial court made the following finding of fact underlying its conclusion of waiver: "There are other violations of the Deed Restrictions, specifically Board Member and Architectural Committee Member Eddie Bass, has and [sic] for many years operated his business out of his home in violation of the [deed restrictions]." However, the restriction on commercial operations is separate and distinct from the "restriction in question"—the setback requirement.

The Association put on evidence at trial to show that it enforced the setback requirements against other owners. The Flaims failed to put on any evidence to show that there were other violations of the setback requirements. Therefore, we hold as a matter of law that the Association did not waive its right to enforce the setback requirements of the recorded deed restrictions for the subdivision. *See Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 68 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (holding that the court can rule on a question of waiver as a matter of law when the facts are clearly established).

We set aside the trial court's finding of fact that the Association failed to respond to the requests of the Flaims to construct the carport and the trial court's legal conclusions that the Association waived its rights to enforce the setback requirement.

IV. Attorneys' Fees

The Association argues on appeal that it was entitled to attorneys' fees under the Declaratory Judgments Act (the "DJA"). The DJA allows the trial court to award reasonable and necessary attorneys' fees as are equitable and just. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2015). We remand to the trial court to determine what, if any, award of attorneys' fees is equitable and just in this matter.

V. Conclusion

We reverse the trial court's judgment denying the Association's petition for declaratory relief and remand the cause to the trial court with instructions to: (1) render appropriate declaratory judgment, consistent with this opinion, that the Flaims' carport, as constructed, violates the setback provisions of the recorded deed restrictions; (2) grant any relief, injunctive or otherwise, that is appropriate to the ordered declaration; and (3) consider the Association's claim for attorneys' fees.

REVERSED AND REMANDED.

_____

CHARLES KREGER
Justice

Submitted on June 7, 2017
Opinion Delivered November 9, 2017

Before Kreger, Horton, and Johnson, JJ.