IN THE UTAH COURT OF APPEALS

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Centennial Pointe Owners' Association; and LEBR Associates, LLC, Plaintiffs, Appellees, and Cross-appellants, v. Myriam Onyeabor, Defendant, Appellant, and Cross-appellee.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070851-CA F I L E D (November 13, 2009) 2009 UT App 325

Third District, Salt Lake Department, 040918762
The Honorable Robert P. Faust

Attorneys: Myriam Onyeabor, Salt Lake City, Appellant and Cross-appellee Pro Se
Jeffrey L. Silvestrini, Edward T. Vasquez, and George A. Hunt, Salt Lake City, for Appellees and Cross-appellants

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Before Judges Bench, Orme, and Davis.

ORME, Judge:

The trial court properly determined that the "Restated Declaration of Covenants, Conditions and Restrictions" (the Restated CC&Rs) were valid and encumbered both lot 1 and lot 2, which are owned by Myriam Onyeabor.[1] The original "Declaration

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[1]A recurrent theme in Onyeabor's brief is that the trial court erred in making its various rulings, given her pro se status. While both trial and appellate courts tend to be more lenient with some procedural failures of a pro se litigant, pro se status does not excuse a failure to comply with evidentiary requirements before the trial court or a failure to provide meaningful legal analysis in an opening brief on appeal. See Lundahl v. Quinn, 2003 UT 11, ¶¶ 3-4, 67 P.3d 1000 (per curiam). We do not address unbriefed issues that are identified in

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of Covenants, Conditions and Restrictions" (the Original CC&Rs) provided, with our emphasis, as follows:

> Except as provided below, the vote of Owners holding at least 67% of the Percentage Interests shall be required to amend this Declaration or the Plat. . . . The foregoing right of amendment shall, however, be subject to the following:
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> . . . .
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> (b) Until the Declarant[, Centennial Pointe LLC,] has sold all Lots, Declarant shall have the right unilaterally to amend and supplement this Declaration and the Plat to correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Project.

Centennial Pointe LLC exercised its right under the Original CC&Rs to unilaterally amend certain portions of the Original CC&Rs that created an overlap in the description of the common areas and lots, and recorded the Restated CC&Rs containing such amendments. We conclude that the trial court properly determined that Centennial Pointe was within its rights to unilaterally amend the Original CC&Rs, based on the prescribed amendment procedure contained therein, when the amendments essentially

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Onyeabor's statement of the issues, and we note that many of her arguments are inadequately briefed, particularly her claims of assault, that her affidavits were improperly stricken, and concerning the legal effect of dissolution of the Centennial Pointe Owners' Association as a nonprofit corporation. See generally Utah R. App. P. 24 (setting forth appellate briefing requirements). We have declined to address some of the inadequately briefed arguments, but we have chosen to address others where we could gather what Onyeabor was getting at. See Ball v. Public Serv. Comm'n (In re Application of Questar Gas Co.), 2007 UT 79, ¶¶ 40, 43, 175 P.3d 545 (indicating that a court may decline to address an argument when it is inadequately briefed); State v. Carter, 776 P.2d 886, 888 (Utah 1989) ("[T]his Court need not analyze and address in writing each and every argument, issue, or claim raised. . . . Rather, it is a maxim of appellate review that the nature and extent of an opinion rendered by an appellate court is largely discretionary with that court.").

clarified the scope of the common areas and the amendments were made prior to the sale of all the lots. Both the Original CC&Rs and the Restated CC&Rs defined common areas as including parking spaces.[2] As pointed out by Appellees, the Restated CC&Rs merely eliminated ambiguities created by the overlapping definitions of lots, buildings, and common areas in the Original CC&Rs, wherein lots were originally defined based on reference to the plat, which did not show common areas as being part of the lots.

Furthermore, even though Onyeabor purchased lot 1 prior to the Restated CC&Rs becoming effective, lot 1 was clearly subject to the covenants, conditions, and restrictions set forth in the Original CC&Rs, including Centennial Pointe's right to unilaterally amend the Original CC&Rs to correct any technical errors or clarify any ambiguous provisions. Her special warranty deed stated her title was "SUBJECT TO current general taxes, easements, restrictions and rights of way of record." In light of the amendment procedure in the Original CC&Rs, which was correctly followed by Centennial Pointe, the Restated CC&Rs are applicable to lot 1. And given that Onyeabor purchased lot 2 after the Restated CC&Rs were recorded, lot 2 is also clearly subject to the Restated CC&Rs because that warranty deed,[3]

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[2]Section 12.8 of the Original CC&Rs also indicated that "parking stalls are shown on the Plat as Common Area and the [Owners'] Association shall be responsible for the maintenance and repair thereof, and the cost of such management, operation, maintenance and repair by the [Owners'] Association shall be borne as provided herein." And section 4.7 provided:

> Each Owner shall have the right, which right shall be appurtenant to and pass with the title to such Lot, to ingress and egress over, upon and across the Common Areas as reasonably necessary for access to such Owner's Lot, and to park, and have its invitees and licensees park, in such parking stalls as exist on the Property from time to time[.]

These sections further evidence the intent of the Original CC&Rs that parking areas would be common areas for the use and benefit of all owners of lots within the complex.

[3]Onyeabor claims that because her deeds were warranty and special warranty deeds, they could not be subject to any encumbrances. However, Utah law clearly provides that such deeds may contain exceptions and that such exceptions may be stated following a deed's description of the land. See Utah Code Ann. §§ 57-1-12(3), -12.5(3) (Supp. 2009). Onyeabor's deeds clearly

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although referencing the Original CC&Rs, also expressly provided that her title to lot 2 was subject to restrictions of record.

Contrary to Onyeabor's assertion, the amendments within the Restated CC&Rs did not constitute any sort of transfer in fee simple to the Owners' Association or to Centennial Pointe LLC. Onyeabor still held the same title to her lots as described on the recorded plat, which was referenced in her deeds. The scope of the easements over the common areas within the complex were simply clarified and corrected. As such, the trial court's determination that Onyeabor was required to pay the dues set forth in the Restated CC&Rs for maintenance of the common areas is affirmed. Its dismissal of Onyeabor's counterclaims for quiet title and declaratory judgment, which claims were based on the assertion that the Restated CC&R's were invalid is, therefore, likewise affirmed.

Onyeabor's claim that she lacked notice of the Restated CC&Rs is without legal merit. Onyeabor had constructive notice based on her deeds' general references to restrictions of record. See Utah Code Ann. § 57-3-102(1) (2000); First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 837 (Utah 1998) ("Utah law recognizes [two] types of constructive notice. The first type is evidenced in the Utah Recording Statute, Utah Code Ann. § 57-3-[102](1), which provides that documents and instruments filed with the county recorder pursuant to this statute 'impart notice to all persons of their contents.'"). Further, the trial court found that her title report for lot 2 specifically referenced the Restated rather than the Original CC&Rs, which should have called her attention to the fact that two versions of the CC&Rs existed.

We also affirm the trial court's rulings on Onyeabor's claims of trespass and intentional infliction of emotional distress. The trial court correctly concluded that the undisputed facts did not show such egregious conduct as to support the intentional infliction of emotional distress claim, see generally Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 51, 194 P.3d 956 (outlining the requirements of intentional infliction of emotional distress), and did not show any trespass because the common areas could by accessed by all property owners within the development under the Restated CC&Rs, see generally Utah Code Ann. § 76-6-206(2) (2008) (stating the elements of criminal trespass).

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[3](...continued)
had such exceptions that indicated her lots were subject to restrictions of record.

Onyeabor's standing argument also lacks merit. Here, LEBR is an aggrieved owner, and the Restated CC&Rs provided that an aggrieved owner, as well as the Owners' Association, could bring suit to enforce payment of dues and other obligations under the Restated CC&Rs. And the stranger to the deed doctrine is inapplicable. See generally Potter v. Chadaz, 1999 UT App 95, ¶ 12, 977 P.2d 533 ("Utah law prohibits parties from expressly creating an easement in a land transaction for the benefit of a third party who is not involved in the transaction--i.e., a 'stranger to the deed.'"). That an association would be formed to manage the common areas on behalf of the owners of the lots within the complex was clearly anticipated in both the Original and Restated CC&Rs.

Onyeabor's fraud, constructive fraud, and fraudulent nondisclosure claims fail because she has not shown that the Owners' Association or LEBR had a duty to disclose the existence of the Restated CC&Rs or that either made any misrepresentation. See generally Giusti v. Sterling Wentworth Corp., 2009 UT 2, ¶ 53 n. 38, 201 P.3d 966 (listing elements of fraud); Hermansen v. Tasulis, 2002 UT 52, ¶ 24, 48 P.3d 235 (stating elements of fraudulent nondisclosure); Jensen v. IHC Hosps., Inc., 944 P.2d 327, 339 (Utah 1997) (outlining elements of constructive fraud). Onyeabor has also failed to convince us that the Restated CC&Rs were voidable, as to her, so that she could unilaterally decide to opt out of the Owners' Association. See generally Ockey v. Lehmer, 2008 UT 37, ¶ 19, 189 P.3d 51 ("Contracts that offend an individual, such as those arising from fraud, misrepresentation, or mistake, are voidable.").

Regarding the cross-appeal, LEBR and the Owners' Association argue that the trial court did not consider all of the required attorney fee factors under Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). See id. at 989-91. The trial court, however, clearly focused on what it considered to be the key factors, namely, the work performed and the scope of the work required. Thus, the challenge is really to the adequacy of the findings to disclose the steps the trial court took in making its ruling, which challenge was not preserved. See In re K.F., 2009 UT 4, ¶¶ 58-64, 201 P.3d 985 (reaffirming the holding of 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 56, 99 P.3d 801, requiring preservation of challenges to the adequacy of factual findings, and indicating that a challenge to a trial court's failure to disclose analytic steps is an adequacy challenge).

We also affirm the trial court's refusal to award the requested late fees and fines. The late fees and fine provision in the Restated CC&Rs is in the nature of a liquidated damages provision, which provisions will not be enforced if they impose arbitrary penalties, "bearing no reasonable relationship to the

actual damages suffered" by the nonbreaching party. Woodhaven Apts. v. Washington, 942 P.2d 918, 920-21 (Utah 1997) (citation and internal quotation marks omitted). The trial court's award in the amount of dues, interest, and over $70,000 in attorney fees and costs adequately compensated Appellees for Onyeabor's breach in failing to pay. And we agree with the trial court's conclusion that the Owners' Association should not be "awarded any fines or penalties against [Onyeabor], since these penalties are not damages which have been sustained and suffered by the plaintiffs due to [Onyeabor]'s breach."

Affirmed. The parties will bear their own attorney fees and costs on appeal.

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Gregory K. Orme, Judge

WE CONCUR:

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Russell W. Bench, Judge

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James Z. Davis, Judge