IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GLORIA HOLCOMB, a single person, Appellant, v. TAREE COMMUNITY ASSOCIATION, a Washington nonprofit corporation, acting through its Architectural Control Committee; and MORRIS MOSER, Chairman of the Association's Architectural Control Committee, Respondents.	)	No. 63875-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: November 9, 2009

AGID, J.—Gloria Holcomb submitted home construction plans to the Taree Community Association's Architectural Control Committee (ACC) for approval in May 2006. The plans were approved by June 2006, but the ACC refused to acknowledge that approval until December 2006 because Holcomb did not comply with its ultra vires submittal procedure. The evidence shows that Holcomb could not have reasonably constructed her home under these circumstances without risking violating the consent to construct covenant. Nor does the evidence in the record support a finding that

Holcomb chose not to pursue the construction. We therefore hold that the trial court erred to the extent it found the ACC's actions did not delay Holcomb's construction project. Because the trial court based its ruling that Holcomb had no damages caused by the ACC on an unsupported finding that the ACC did not unreasonably delay the construction, we reverse and remand. On remand, the trial court will determine whether the ACC breached the covenant by unreasonably delaying approval.

FACTS

In 2003, Gloria Holcomb lived in a house on a lot in the Taree Community.[1] She purchased the undeveloped adjacent lot (lot 18) thinking that she might want to build her retirement home on it. The property is located on a sloping parcel of land with views of Puget Sound and is subject to restrictive covenants (Taree Covenants). The covenants establish an architectural control committee to ensure that Taree owners abide by the following covenants governing buildings within the community:

> 4. No building shall be erected, placed or altered on any lot until construction plans and specifications and [a] plan showing [the] location of structure have been approved by the architectural control committee, as to the quality of workmanship and materials, harmony of external design with existing structures and as to location with respect to topography and finished grade elevation. . . .
> . . . .
> 12. No dwelling or other structure will be built on any lot of this plat with the highest point more than 17 feet above the ground level at the base of said dwelling or structure.
> . . . .
> 21. The committee's approval or disapproval as required in the covenants shall be in writing. In event the committee or its designated representatives fails to approve or disapprove within 30 days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin construction has been commenced prior to the completion thereof, approval will not be required and related covenants shall be deemed to

[1] She no longer lived there by the time of trial.

have been fully complied with.

In February 2006, Holcomb retained architect Peter Brachvogel to prepare construction plans for a single-family home on the undeveloped lot.[2] Holcomb gave Brachvogel a copy of the Taree Covenants so that he could incorporate those restrictions into his design. Brachvogel's preliminary design called for a garage tucked under a one-story house. Because he and Holcomb were not sure what the ACC would count as the "ground level at the base of [the] structure" for purposes of the 17 foot height restriction, she submitted "preliminary plans" to the ACC chairman, Morris Moser, and solicited his input on the height limitation.[3] The envelope and Moser's notes indicate that she submitted the preliminary drawing on April 12, 2006, for ACC approval.[4]

Moser called an ACC meeting to discuss the preliminary plans on April 13, 2006. On April 18 or 19, 2006, he called Holcomb to discuss the setback and height limitations. Moser told her that the ACC needed "final" plans. Csilla Elliot, an architect who worked for Brachvogel, talked to Moser after Holcomb did. Holcomb and Moser spoke about the setback and height issues after the Taree annual meeting on April 20, 2006. Moser and Holcomb spoke again on April 29, 2006.

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[2] Holcomb also paid to have a septic system designed.

[3] As of March, Holcomb was not sure if the garage would count as the base of the structure or if the base would be measured from the back of the house. Holcomb's chronology of Moser's alleged unresponsiveness to those concerns is not supported by the record. Holcomb claims that she and Brachvogel tried to get an answer out of Moser, but could not and that "lacking definitive guidance on the height issue, Mr. Brachvogel prepared a set of preliminary design plans for ACC review." But Holcomb's testimony shows that she submitted plans in order to obtain ACC guidance and then had conversations with Moser, at which time Moser agreed that the height limitation was ambiguous.

[4] Holcomb testified that she sent the drawings to Moser on April 6 or 7.

On May 10, 2006, the ACC sent a letter to Holcomb stating that the current preliminary site plan did not meet Taree Covenants because it measured the 17 foot height from the first floor rather than from the "'ground level at the base of [the] dwelling.'" The letter requested that she submit a side elevation drawing and advised her that the "30 day ACC response will apply when the ACC receives your finalized home and site plan that are intended for presentation to the Kitsap County Planning for your building permit." Although the Taree Covenants only require applicants to submit "plans and specifications," the ACC adopted an internal submittal procedure in 2000-2001 or 2003 that required applicants to submit "a detailed site plan identical to what was submitted to Kitsap County Planning for the building permit." The submittal procedures state that "[t]he 30 day []clock[] for the ACC to vote on your request does not start until after the ACC has received all of the requested information." The Taree Covenants were not amended to include the new ACC submittal procedures.

On May 11, 2006, Brachvogel met with Moser and Paul Middlehoven, another member of the ACC, at lot 18 to present plans with the revised height depiction. Moser understood that Brachvogel would begin preparing the final plans after their May 11, 2006 discussion. Brachvogel understood that Moser and Middlehoven approved the design he presented to them and wrote a letter memorializing that understanding on May 12, 2006. In his ACC minutes, Moser wrote that Brachvogel's "updated progress prints" showed that the 17 foot requirement was met. Brachvogel testified that the ACC had all the information they needed to approve the plans, including an explanation that the roof would be no more than 17 feet above the pre-existing grade.[5]

[5] The plans show that the concrete at the base of the first floor in the back of the house

Holcomb arrived at lot 18 on May 11, 2006, shortly after Brachvogel left, and testified that Middlehoven and Moser told her that her plans were approved. A third ACC member, Dennis Woldte, arrived after Holcomb and she understood him to have approved her plans also. Moser testified that he did not approve the plans on May 11, 2006. Middlehoven testified that he did not approve the plans and that he told Brachvogel that the ACC would still need a copy of the plans that were submitted to the county. Woldte does not remember talking to Holcomb on May 11, 2006. Holcomb also testified that Moser told her on May 11, 2006, to disregard the ACC's May 10, 2006 letter that she had not yet received because plans submitted on May 11, 2006, made it moot. Moser does not agree that he told Holcomb to disregard the letter. Holcomb did not open it until June or July 2006.[6]

Brachvogel's May 12, 2006 letter stated his understanding that the ACC "approved the design" on May 11, 2006, and that he was "moving ahead with the completion of the Contract Documents in preparation for building permit submittal to Kitsap County." Brachvogel's letter also stated that "any changes regarding the design which relate to the restrictions and requirements 'Protective Covenants' shall be reviewed and approved by the ACC." Holcomb submitted her construction plans to Kitsap County on June 7, 2006. Holcomb did not submit those plans to the ACC.

On June 15, 2006, the ACC sent a letter to Holcomb stating that the ACC had not received a set of final drawings for review.[7] The letter also informed Holcomb that

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would be at rough grade and that the roof would be 17 feet above the base of the first floor. Brachvogel testified that he explained to Moser on May 11 that the final grade would equal to the preconstruction grade at the back of the lot.

[6] The ACC sent their submittal procedures, which were not online or in the Taree Covenants, to Holcomb in the May 10, 2006 letter.

the plans had measured the 17 foot height from the peak of the roof to rough grade and explained why the plans should measure from the roof peak to the existing grade.[8] In her June 28, 2006 reply, Holcomb stated that the ACC had already approved her plans and that she would be progressing with construction according to the May 11, 2006 plans unless the ACC confirmed to her that they were "taking the position of withdrawing their approval." Kitsap County issued building permits on July 8, 2006, and Holcomb picked them up on July 11.

The ACC responded to Holcomb on July 12, 2006, and told her that it was still waiting for final plans identical to what she submitted to the county. Holcomb did not give the ACC a copy of the plans she had submitted to the county. Holcomb also approached the Taree Association president, Dan Maloney, with "approved plans in hand." Maloney said he would not interpret the plans and told her that lawyers would handle the matter. Holcomb sued the ACC and Moser on October 27, 2006. Moser, Wodtle, Maloney, Brachvogel, Holcomb, and her attorney met on December 1, 2006. Holcomb did not bring the permit set to the meeting. Brachvogel explained how the May 11, 2006 plans met the height limit and wrote "[r]ough grade = pre construction

[7] "As of this date the ACC has not received a set of the final drawings to review, discuss, and vote on for final approval as is required per the Taree ACC Submittal Procedure (see the attachment to the ACC letter dated May 10, 2006). No[tw]ithstanding the letter from [Brachvogel] dated May 12, 2006 the ACC is required to follow the ACC Submittal Procedure before it can issue a letter of approval. In summary, the information provided thus far has been very useful and the ACC awaits the submittal of your final drawings."

[8] "The onsite meeting that was held on May 11, 2006 with your architect Peter Brachvogel was useful and the ACC members received more refined preliminary drawings to [re]view that were signed and initialed by Peter. After studying these drawings however, it was noted that the 17' height was taken from the roof peak to 'rough grade' and not existing grade. Unlike existing grade, which is identifiable and measurable today, rough grade at the rear of the dwelling only exists after the foundation is in and backfilled. As used in this context, rough grade is a meaningless reference and if used instead of existing grade would not restrict in any way the elevation of the completed structure."

grade" on those plans. Moser testified that this additional information allowed the ACC to determine the height of the proposed house and the ACC voted to approve the plans. Brachvogel testified that the ACC already had that information.

The trial court determined that Holcomb presented claims for breach of contract (grounded in covenants) and breach of covenant of good faith and fair dealing. The trial court found that the ACC either approved Holcomb's plans or made no decision in writing within 30 days, meaning that Holcomb "had the approval of the ACC by June 12, 2006." As for damages, the trial court found that Holcomb chose not to pursue building the building after approval so that "[t]here is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding." Based on those findings, the trial court concluded that "[t]here are no compensable damages based upon the ACC's actions in this matter" and that the "Taree Community Association and Mr. Moser are not responsible for any of the damages argued by the Plaintiff." Holcomb moved for reconsideration and appeals from the denial of that motion.[9]

DISCUSSION

To prevail on her claim that the Taree Community Association breached the Taree Covenants, Holcomb must show that the ACC made an unreasonable decision under the covenant.[10] If she does so, she may recover damages that "accrue naturally from the breach."[11] Delay damages are recoverable when they are caused by a

[9] Holcomb offered a declaration from her banker in support of that motion.

[10] See Riss v. Angel, 131 Wn.2d 612, 627, 934 P.2d 669 (1997).

[11] See Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 430, 10 P.3d 417 (2000) (citing Eastlake Const. Co. v. Hess, 102 Wn.2d 30, 686

homeowners association's unreasonable decision under a consent to construction covenant.[12] Here, the trial court did not expressly address the predicate question of whether the ACC unreasonably took the position that Holcomb did not have approval. Instead, the trial court skipped to the question of causation damages, finding that the ACC's actions did not cause Holcomb delay damages because Holcomb could have built but chose not to.

"Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court."[13] The trial court found that Holcomb had ACC approval by June 12, 2006, because the ACC either agreed to the plans or made no decision in writing by 30 days as required by the Taree Covenants. Neither Holcomb nor the ACC assigns error to the trial court's finding that Holcomb had approval by June 12, 2006, and substantial evidence in the record supports the finding that she had either implicit or express approval. In order to have found that the ACC actually "agreed" to the plans by June 12, 2006, the trial court must have found that the ACC could not rely on the provision in the Taree Covenants requiring written approval.[14] Substantial evidence would support that finding.[15] In order to have found that the ACC made no decision within 30 days,

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P.2d 465 (1984)), review denied, 142 Wn.2d 1018 (2001).

[12] See Riss, 131 Wn.2d 612 (affirming trial court decision to award delay damages).

[13] Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008) (citation omitted).

[14] This is because the ACC did not issue written approval before December 2006.

[15] The trial court could have found Brachvogel and Holcomb credible when they testified that the ACC approved Holcomb's plans during the May 11 meeting, that Holcomb reasonably relied on those representations, and that Holcomb would be injured by ACC

the trial court must have found that Holcomb submitted plans for ACC approval by May 13. Because Holcomb never submitted to the ACC plans identical to those submitted to Kitsap County, the trial court must have also found that the ACC's submittal procedure was not enforceable.[16] Substantial evidence would also support that conclusion.[17] Although it would have been helpful for the trial court to have made more detailed findings, both of the predicate findings are supported by substantial evidence in the record and in turn support the court's ultimate finding that Holcomb had approval by June 12, 2006, even if the June 15, 2006 letter from the ACC would have given Holcomb the opposite impression.

Holcomb assigns error to the trial court's finding that she chose not to pursue building her retirement home. The ACC argues that three pieces of evidence support that finding. First, it relies on testimony that she put the lot up for sale in May 2006 to show that she had chosen not to pursue building on the lot. While listing the lot for sale could support an inference that Holcomb would have abandoned building for the right price, or that she was hedging against ACC intransigence, it is not sufficient to support a finding that Holcomb chose not to build.[18]

Second, the ACC contends that Holcomb's testimony about how she "might"

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repudiation. See Brevick v. City of Seattle, 139 Wn. App. 373, 379, 160 P.3d 648 (2007).

[16] If the ACC submittal procedures were enforceable, the 30 day clock would not start running until Holcomb submitted plans identical to those submitted to Kitsap County, which she had not done by May 13, 2006.

[17] Moser's testimony and the covenants themselves show that the covenants, which do not require applicants to submit plans identical to those submitted to Kitsap County, had not been amended to include the ACC submittal procedures. The interpretation of covenants presents a legal question, which we review de novo. Parry v. Hewitt, 68 Wn. App. 664, 668, 847 P.2d 483 (1992). These covenants do not give the ACC authority to condition approval on receipt of final plans.

[18] That she had not yet chosen to abandon building by May is supported by evidence that she later paid $4,600 to apply for a building permit.

want to develop the lot "someday" shows that she was less than fully committed to building. But when she used that equivocal language, she was responding to a question asking what she had intended to do with that property when she bought in 2003, at a time when she already lived in the house on the lot next door.[19] Her answer, which was responsive to the question asked, does not support an inference that she planned to abandon the project three years later, especially when the uncontroverted evidence that she engaged Brachvogel to prepare building plans shows that whatever equivocation she may have felt three years earlier had since dissipated.[20]

Third, the ACC argues that Holcomb must have chosen not to build because nothing the ACC did after June 12, 2006, could have prevented Holcomb from building. But that argument is not supported by the evidence in the record. The ACC never confirmed Brachvogel's May 13, 2006 letter asserting that the ACC had approved Holcomb's plans. And on June 15, 2006, the ACC sent Holcomb a letter indicating that it had not approved her plans. Accordingly, Holcomb had no assurance that she indeed had approval by June 12, 2006. No reasonable lot owner would have elected to proceed with construction under those circumstances.[21]

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[19] By 2006, she had moved out and was renting a house.

[20] Holcomb paid Brachvogel roughly $37,000 to design her retirement home.

[21] See Heath v. Uraga, 106 Wn. App. 506, 24 P.3d 413 (2001) (affirming partial summary judgment order to raze house built without review committee approval on a lot subject to restrictive covenants when the house exceeded height covenant), review denied, 145 Wn.2d 1016 (2002).

In addition, Holcomb offered evidence from her banker with her motion for reconsideration that she could not have pursued building because her bank would not close her loan after she told it that the ACC "took the position that it had not approved construction of her residence." "In June 2006, Washington Federal was prepared to make the loan contingent upon Ms. Holcomb obtaining necessary approvals from Kitsap County and the Taree Community Association. . . . Shortly after June 15, 2006, Ms. Holcomb told me that although she had received building permits from Kitsap County, the Taree Community Association took the position that it had not approved construction of her residence. Under

In response, the ACC argues that she would not have had to build in defiance of the ACC's position had she taken the simple steps necessary to obtain approval, namely submitting final plans showing that final grade equaled rough grade. This argument fails because the ACC did not have the authority to require final plans when its submittal procedure had not been incorporated into the Taree Covenants. The ACC's position that Holcomb should have sought approval on its terms also ignores the trial court's unchallenged finding that Holcomb had in fact obtained approval by June 12, 2006. Accordingly, whether she could have proceeded without defying the ACC was controlled by the ACC, which could have chosen to formally acknowledge its approval.[22]

The ACC further contends that this court cannot overturn the trial court's finding because it incorporates an implicit credibility determination that cannot be reviewed on appeal. Holcomb's theory of the case is that the ACC's unreasonable denial caused delay that damaged her by preventing her from timely constructing her retirement home. Because the trial court found that Holcomb was the party who chose not to build, the ACC argues that the trial court must not have believed Holcomb. But nothing in the findings shows the trial court's decision flowed from not believing Holcomb. The trial court could have reached the conclusion that Holcomb was wrong about whether she could build based on its ruling that she had approval on June 12. The trial court made no credibility finding about Holcomb, and the evidence in the record does not support a conclusion that Holcomb could have built. There is no credibility

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those circumstances, Washington Federal would not close the loan."

[22] Whether the ACC unreasonably failed to timely acknowledge its approval under the consent to construction covenant is a factual question for the trial court to answer on remand.

determination at issue here.

Holcomb also challenges the trial court's finding that nothing in the record shows that any action after June 12, 2006, was a legally cognizable cause of the building not proceeding. Again, the record does not support that finding: the ACC's June 15 and July 12, 2006 letters are actions that would have caused a reasonable person to put building plans on hold until receiving approval confirmation. Because the trial court's findings of fact are not supported by substantial evidence, the conclusions of law that flow from those findings are also unsupported.

Holcomb also argues that the trial court abused its discretion by failing to grant her motion for reconsideration. We agree. First, there is no evidence to support the conclusion that the ACC's actions after June 12, 2006, were not a "legally cognizable cause of the building not proceeding" when any reasonable lot owner would have halted construction in the face of the ACC's post-June 12, 2006 assertions that Holcomb did not have its approval.[23] Second, during trial, the ACC denied having approved Holcomb's plans before December 2006.[24] Thus, the trial court's decision in favor of ACC on the basis that Holcomb had ACC approval as of June 12, 2006, while supported by evidence in the record, was a surprise.[25] Because the trial court decided the case on a theory not presented, Holcomb would not have had a reason to present evidence disputing the trial court's theory that she chose not to build after June 12,

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[23] See CR 59(a)(7).

[24] In its trial brief, the ACC stated, "Defendants deny giving verbal approval in May 2006"; "Once Ms. Holcomb finally relented and provided the required information at the December 1, 2006 meeting, the ACC granted written approval to her." At trial, the ACC argued that "Yes, approval was given, but given December 4th, 2006."

[25] See CR 59(a)(3).

2006. In support of her motion for reconsideration, Holcomb offered additional evidence relevant to the construction constraints she faced after June 12, 2006, in the form of a declaration from her banker that her bank would not release the funds it agreed to loan to her in light of the ACC's position denying approval. Accordingly, the trial court should have granted her motion for reconsideration in light of the evidence offered for the purpose of showing that Holcomb's bank would not close her loan after the ACC asserted she did not have approval.

The trial court did not reach the question of Moser's personal liability as the ACC chairman. But, as a matter of law, Taree's corporate form shields Moser from personal liability. The corporate form protects officers from personal liability unless the officer commits a tort or disregards the corporate entity.[26] Taree is a non-profit corporation, and both parties agree that Moser was acting in his official capacity as ACC chairman on behalf of Taree. Holcomb does not allege that Moser's actions were tortious, nor does she attempt to pierce the corporate veil.

Instead, Holcomb argues that Moser should be personally liable because the court in Riss v. Angel held that homeowners' association members who participated in or ratified the act at issue could be jointly and severally liable.[27] But the homeowners' association in Riss was not incorporated, so that holding does not apply here. Holcomb also argues that corporate officers can also be liable to corporate members, as Holcomb was, for breaching fiduciary duties. But Holcomb is not asserting claims against Taree based on the duties owed to her as a member. Instead, she claims

[26] See Grayson v. Nordic Const. Co., 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 752-53, 489 P.2d 923 (1971).

[27] 131 Wn.2d 612, 636, 934 P.2d 669 (1997).

Taree breached its contract with her as a lot owner.

We reverse and remand to the trial court to determine whether the ACC unreasonably delayed approval of Holcomb's plans and the amount of damages that

naturally flowed from the ACC's refusal to approve Holcomb's construction application.[28]

Ajid, J.

WE CONCUR:

Becker, J.

Grosse, J.

[28] Holcomb may recover normal contract damages, which are damages that "accrue naturally from the breach." See Panorama Village, 102 Wn. App. at 430 (citing Eastlake Const. Co. v. Hess, 102 Wn.2d 30, 686 P.2d 465 (1984)). Here, there is sufficient evidence in the record, in the form of Holcomb's uncontested testimony, for the trial court to determine the damages naturally flowing from the ACC's allegedly unreasonable decision. Under the correct measure of contract damages, some of the damages Holcomb alleges are not recoverable. For example, the increased cost of construction helps explain why she was unable to build after the ACC finally granted her formal approval, but those costs are not recoverable because Holcomb did not actually incur them. Similarly, she did not actually pay a higher interest rate after she lost her loan, so those damages were not accrued and are not recoverable.

Damages that accrued from the breach would include architectural fees for a design she can no longer construct ($37,000), a septic design she can no longer use ($3,000), permit fees ($4,600), rent paid from the time she would have been in her completed home until trial ($12,000), unusable fixtures she sold at a loss ($1,800), and storage fees paid from the time she would have been in her completed home until trial ($45 per month).