

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP723

Cir. Ct. No. 2015CV161

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

C & B INVESTMENTS, A WISCONSIN PARTNERSHIP,

PETITIONER-APPELLANT,

V.

JAMES MURPHY AND REBECCA RICHARDS-BRIA,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Juneau County:
BERNARD N. BULT, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Blanchard, and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. C & B Investments appeals an order that dismissed its lawsuit seeking to enforce a restrictive covenant applicable to all lots within a subdivision it had developed. The issues presented on appeal are whether a treehouse that respondents James Murphy and Rebecca Richards-Bria built on their lot qualified as a “structure” within the meaning of the covenant so as to require preapproval, or otherwise violated local ordinances that may have been incorporated into the covenant. We conclude that the treehouse constituted a structure within the meaning of the covenant, and accordingly reverse the circuit court’s order.

¶2 C & B Investments also seeks compensation for costs, expenses, and legal fees of enforcement. It is premature to decide that claim, however, because the circuit court has not yet ruled on a number of defenses and a counterclaim that were raised before it. Rather, we will remand this matter to the circuit court for further proceedings, as described below.

BACKGROUND

¶3 The deed for Murphy and Richard-Bria’s property is subject to a restrictive covenant entitled “Declaration of Covenants, Conditions, and Restrictions for the Timbers at Shipwreck Bay, 1st Addition Town of Germantown, Juneau County, Wisconsin.” Article 2, section 2.02 of the covenant provides:

In addition to any requirements of the Ordinances of the Town of Germantown, all structures to be placed or constructed upon Lots 11 through 15 of the Timbers at Shipwreck Bay 1st Addition, including primary and auxiliary structures ... shall, prior to the commencement of construction, be approved, in writing, by C & B Investments.

Article 11, subsection (a) of the covenant further provides that “[a]ll regulations concerning land use shall be in accordance with the requirements of the Ordinances of the Town of Germantown.”

¶4 In June 2015, Murphy began building a treehouse. The treehouse was made of wood and measured approximately ten feet long by eight feet wide by seven feet tall. C & B Investments sent Murphy a letter demanding that he remove the treehouse on the grounds that it did not comply with certain covenant requirements for exterior designs and materials of structures, or with ordinance requirements for setbacks. The homeowners subsequently submitted a plan, which was rejected.

¶5 C & B Investments filed suit, and eventually amended its complaint to seek: (1) an abatement of the alleged violation of the covenant by removal of the treehouse; (2) an injunction against building another treehouse unless and until a plan has been approved; and (3) recovery of costs and attorney fees for enforcement of the covenant.

¶6 The homeowners raised a number of defenses, including: estoppel and detrimental reliance (based upon C & B Investments officials having told Murphy that no permits would be required for work done on the property, including the construction of outbuildings); laches (based on the non-enforcement of any other restrictive covenant provisions over a period of ten years); the doctrine of clean hands (based on C & B Investments’ own alleged violations of the restrictive covenant); failure to state a claim upon which relief could be granted (based upon alleged prior verbal consent); failure to mitigate damages (because a C & B Investments official watched the construction of the treehouse for five weeks before taking action to stop it); fraud in the inducement; failure of a

condition precedent, lack of standing, and failure to join a necessary third party (based upon C & B Investments’ alleged lack of authority to enforce town ordinances); and claim preclusion (based upon a previously filed writ of mandamus). The homeowners also filed a counterclaim alleging that C & B had arbitrarily refused to approve the treehouse plan that they ultimately submitted.

¶7 The parties filed cross-motions for summary judgment, after which the circuit court limited the issues for trial to whether the treehouse was a “structure” within the meaning of the covenant and whether C & B Investments officials had engaged in a course of conduct that would lead a reasonable person to conclude that the person was not required to strictly comply with the restrictive covenant, influencing the homeowners’ decision here to build the treehouse without going through the application process.

¶8 Following trial, the circuit court determined that the treehouse was not a “structure” within the meaning of the covenant and dismissed the action. The circuit court did not address the homeowners’ defenses or counterclaim. C & B Investments appeals the dismissal.

STANDARD OF REVIEW

¶9 We will independently review the interpretation of a restrictive covenant as a question of law. *Pietrowski v. Dufrane*, 2001 WI App 175, ¶7, 247 Wis. 2d 232, 634 N.W.2d 109.

DISCUSSION

¶10 Restrictive covenants in deeds are interpreted according to contract principles. *Siler v. Read Inv. Co.*, 273 Wis. 255, 261, 77 N.W.2d 504 (1956). We construe contracts to achieve the parties’ intent, giving terms their plain and

ordinary meanings. *Goldstein v. Lindner*, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. If the words of a contract convey a clear and unambiguous meaning, our analysis ends. *Id.* However, if the contract language could be reasonably understood in more than one way, we may examine extrinsic evidence to determine the parties’ intent and will construe any ambiguous contractual terms against the drafter, particularly when there is a substantial disparity of bargaining power between the parties. *Seitzinger v. Community Health Network*, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426; *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998). Additionally, “[b]ecause ‘public policy favors the free and unrestricted use of property,’ restrictions in deeds ‘must be strictly construed to favor unencumbered and free use of property’” and restrictions that are not imposed by express terms cannot be enforced. *Pietrowski*, 247 Wis. 2d 232, ¶7 (quoted sources omitted).

¶11 Article 2 of the covenant at issue here expressly states that “all structures” must be approved in writing prior to the commencement of construction. C & B Investments first contends that the plain and ordinary meaning of “structure,” according to common dictionary definitions, is something that is built or constructed.

¶12 The homeowners respond that the term “structure” is ambiguous because it is not defined in the covenant, and that C & B Investments did not advance “a single, consistent definition” of the word, instead offering several possible definitions based on local ordinances and case law, as well as dictionary

definitions.¹ However, the homeowners’ argument misses the point because, as stated above, we look *first* to the ordinary meaning of a word. There is no requirement that a word with an ordinary common meaning be further defined in order to be enforced. While an ordinance could certainly limit or refine the definition of a structure to suit a particular statutory purpose, that would not change the ordinary meaning of the word. Such a limited or refined legal definition would only be applicable in the context of construing the ordinance.

¶13 The restrictive covenant referred to “*all* structures.” As C & B Investments points out, the general definition of “structure” is something that is built or constructed. *See structure*, WEBSTER’S II NEW COLLEGE DICTIONARY (1995). That general definition is consistent with the covenant as a whole, which requires prior approval for a wide range of things that would affect the outside appearance of lots in the subdivision. Although that term might be ambiguous when applied to some facts, we discern no reasonable, common meaning of the term structure that would *exclude* a treehouse. We therefore conclude that Murphy and Richards-Bria needed prior written approval to build a treehouse on their property under the terms of the covenant.

¶14 Because we have determined that a treehouse falls within the plain meaning of the term “structure” as used in the covenant, we need not address whether the treehouse at issue here also violated any local ordinances that may have been incorporated into the covenant through Articles 2 and/or 11.

¹ We note that C & B Investments clouded the issue before the circuit court by seemingly conflating its arguments about the plain meaning of the term structure under Article 2 with its arguments that the treehouse violated local ordinances as incorporated into the covenant through Articles 2 and/or 11.

¶15 The parties' briefs on appeal do not address the merits of other defenses that had been raised by the homeowners. We conclude that it would be inappropriate for this court to address those defenses in the first instance, without first allowing the circuit court to make factual findings as might be pertinent to those issues. We leave it to the circuit court's discretion whether it needs to hold any additional evidentiary hearing in order to rule on the homeowner's defenses, or whether it can rely on the record that has already been made.

¶16 Accordingly, we remand to the circuit court for further proceedings. To clarify, the only issue we resolve in this appeal is whether the treehouse is a "structure" under the covenant.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

