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CURTIS ACRES ASSOCIATION, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. STEPHEN HOSMAN, APPELLANT.

859 N.W.2d 365

Filed January 13, 2015. No. A-13-946.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.
4. **Restrictive Covenants.** If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction; however, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.
5. ____. Restrictive covenants that permit a homeowners association to approve or disapprove improvements based on a standard of whether such improvements conform to the harmony of external design and location in relation to surrounding structures are not per se ambiguous; rather, such covenants are enforceable, provided that the authority is exercised reasonably within the framework of the covenants' stated purposes.
6. ____. If a restrictive covenant agreement contains a provision which provides for future alteration or amendment, the language employed within the agreement determines the extent of that provision.
7. **Equity: Words and Phrases.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
8. ____: ____. Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Michael F. Coyle and Alexander D. Boyd, of Fraser Stryker, P.C., L.L.O., for appellant.

David D. Ernst and Kellie Chesire Olson, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee.

IRWIN, INBODY, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Stephen Hosman commenced construction on a boathouse on his lakefront property located in Douglas County, Nebraska. Shortly after construction began, the Curtis Acres Association (Association), the corporation which operates and manages the Curtis Acres subdivision, where Hosman's property is located, filed suit against Hosman. The Association alleged that the construction on Hosman's property violated various restrictive covenants applicable to the land and asked that the court enter an injunction requiring Hosman to permanently remove the boathouse from his property.

Ultimately, the district court found that the construction of the boathouse violated several restrictive covenants and ordered the removal of the structure from Hosman's property. Hosman appeals. Upon our review, we affirm the decision of the lower court.

II. BACKGROUND

In 1990, Hosman purchased a lot in the Curtis Acres subdivision. Prior to Hosman's purchase of the property, the Association filed a "Declaration of Covenants, Conditions, Restrictions, and Easements" (declaration) for the subdivision with the Douglas County register of deeds. Included in the declaration was a requirement that residents obtain preapproval of any improvements built on their lots. That provision provided, in relevant part:

> No improvements of any nature shall be constructed, erected, placed, altered, maintained or permitted on any Lot until detailed plans and specifications with respect thereto in a form reasonably satisfactory to the Association showing the proposed improvement, including a site plan, exterior elevations, exterior lighting, materials, colors,

> landscaping, grading, and such other information as the Association may require has been submitted to and approved in writing by the Association. The Association may designate an Architectural Committee to perform this function.

After Hosman purchased his lot, he submitted building plans to the Association, seeking approval of the construction of a residence on the lot. During his deposition, Hosman testified about the approval process as follows:

> There was a committee that I went through, I believe three sets of plans to get to something that they would allow me to build. It was a rather expensive way to go. My first set of plans were turned down. My second set of plans were turned down because they told me it was a three-story — it was a two-story walkout towards the lake. They told me nothing was allowed to have three stories towards the lake. I finally got a third set of plans, which finally were approved.

Subsequent to Hosman's obtaining approval of the construction of his residence, the declaration was amended on four separate occasions. The first three amendments did not alter the requirement that residents obtain preapproval of any improvements built on their lots. However, the fourth and most recent amendment did alter this provision. In the "Fifth Amendment and Amended and Restated Declaration of Covenants, Conditions[,] Restrictions and Easements" (Fifth Amended Declaration), which was filed with the register of deeds on September 28, 2007, the Association added the following pertinent language to its previous instructions regarding the approval of any new construction:

> An owner desiring to erect an improvement shall deliver two sets of construction plans, landscaping plans, plot plans and grading plans to Association (herein collectively referred to as the "Plans"). Such plans shall include a description type, quality, color (including any color change) and use of materials proposed for the exterior of such Improvement and the proposed grading plan of each lot. Concurrent with submission of the plans,

> Owner shall notify the Association of the Owner's mailing address.
>
> . . . The Association shall review such Plans in relation to the type and exterior of improvements constructed, or approved for construction, on neighboring Lots and in the surrounding area, and any general scheme or plans formulated by Association. In this regard, Association intends that the Lots shall form a residential community with homes constructed of high quality materials. The decision to approve or refuse approval of a proposed improvement shall be exercised by Association to promote development of the Lots and to protect the valued [sic], character and residential quality of all Lots. If Association determines that the proposed improvement will not protect and enhance the integrity and character of all the Lots and neighboring Lots as a quality residential community, Association may refuse approval of the proposed improvement.
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> . . . Written notice of any approval of a proposed improvement shall be mailed (or faxed) to the owner at the address specified by the owner upon submission of the Plans. Such notice shall be mailed (or faxed), with a copy to the Secretary of the Association, within thirty (30) days after the date of submission of the plans. If notice of approval is not mailed (or faxed) within such period, the proposed improvement shall be deemed disapproved by Association. Construction of any improvement cannot begin until the Plans have been approved by Association.

The president of the Association at the time the Fifth Amended Declaration was adopted and filed explained the rationale behind this amendment as follows:

> The Association determined that new restrictive covenants were necessary in order to bring the existing covenants in compliance with Nebraska law and to articulate a clear standard for approval of new improvements. Additionally, the Association determined that new covenants were needed to reflect the growth of the Curtis

> Acres Subdivision; to articulate the pre-existing master plan of the Curtis Acres Subdivision, which was to ensure any future improvements were in conformity with the existing improvements and upscale design of the Curtis Acres Subdivision; to ensure that any future improvements would be consistent with the master plan; and to preserve and maintain the high character and quality of the Curtis Acres Subdivision.

Approximately 3 years after the Fifth Amended Declaration was filed, Hosman began constructing a boathouse on his lot. The boathouse was located approximately 15 feet from the edge of the lake. Prior to beginning construction, Hosman did not seek approval of his construction plans. When the Association learned of the new construction on Hosman's lot, it sent him a letter reminding him of the requirement delineated in the Fifth Amended Declaration that he submit building plans prior to beginning construction on any improvement on his property. The letter also stated, "You have not made such a submittal, and until submittal and approval by the Association, you are hereby immediately required to cease and discontinue construction of the improvement. If the improvement is not approved, you will be required to remove the improvement from your property."

After receiving the letter from the Association, Hosman submitted a one-page, handwritten drawing of his boathouse for approval. The drawing noted various dimensions for the boathouse and attached deck. Also included on the drawing was a note that the siding on the boathouse was to be the same as on the existing residence and that the roof of the boathouse was to be blue in color.

Hosman subsequently received a letter from the Association's architectural committee which informed him that the drawing he submitted for approval was not sufficient pursuant to the requirements of the Fifth Amended Declaration. The letter also informed him, "A blue standing seam roof is not acceptable." In addition, the letter noted, "Structures will be set back from the shore line so as not to impede one's neighbor's views. We suggest 100′. Lake front is not acceptable."

Essentially, this letter denied Hosman approval to continue building the boathouse.

Despite not receiving approval from the Association, Hosman did not relocate the boathouse; nor did he attempt to comply with any of the Association's building requirements. As a result, on October 6, 2010, the Association filed a complaint against Hosman in the district court. In the complaint, the Association alleged that Hosman's boathouse was in violation of the Fifth Amended Declaration in that Hosman did not obtain or receive approval to construct the boathouse and the boathouse violated the aesthetic integrity of the subdivision and lessened the value of all nearby properties. More specifically, the Association alleged that the boathouse was not appropriately set back from the shoreline; the boathouse was an enclosed lakefront structure, which was not acceptable; and the color and type of roof on the boathouse were not acceptable. The Association requested that the court enter an order requiring Hosman to take down and remove the boathouse.

Hosman timely filed an answer and counterclaim. Therein, he denied a majority of the Association's assertions regarding his boathouse and affirmatively alleged that the covenants contained in the Fifth Amended Declaration were ambiguous, that his boathouse was in conformity with any relevant covenants, and that the covenants were unenforceable because the Association had not reasonably exercised its authority. Hosman requested that the court enter an order declaring that the boathouse constructed on his property is permissible and not in violation of the Fifth Amended Declaration.

Subsequent to the filings of the complaint and answer, both the Association and Hosman filed motions for summary judgment. After multiple hearings, the district court granted the Association's motion for summary judgment, denied Hosman's similar motion, and ordered Hosman to permanently remove the boathouse from his property. Specifically, the court found that Hosman had breached the covenants contained in the Fifth Amended Declaration, that those covenants were enforceable by the Association, and that the Association

had not in any way waived its right to enforce the covenants against Hosman.

Hosman appeals from the district court's decision.

III. ASSIGNMENTS OF ERROR

On appeal, Hosman generally alleges that the district court erred in granting the Association's motion for summary judgment. Hosman specifically alleges that the district court erred in finding (1) that the covenants provide a clear, articulable standard for approval of building projects; (2) that the enforcement of the covenants against Hosman was reasonable; and (3) that the Association did not have unclean hands in its administration of the covenants.

IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

V. ANALYSIS

On appeal, Hosman challenges the district court's decision to grant the Association's motion for summary judgment and to require him to remove the boathouse from his property. However, before we address Hosman's specific allegations concerning the court's granting of the Association's motion for summary judgment, we note that Hosman does not dispute the district court's finding that he breached the covenants contained in the Fifth Amended Declaration when he failed to submit detailed, complete building plans for the boathouse to the Association prior to beginning construction. In fact, Hosman

does not dispute that he continues to be in breach of this requirement because he has never submitted appropriate building plans and has never received approval from the Association for the construction of his boathouse.

Instead, Hosman focuses his arguments on appeal on his contention that the building covenants contained in the Fifth Amended Declaration are not enforceable by the Association. We read his arguments to suggest that despite his failure to comply with the requirement to submit appropriate building plans, the Association did not have the authority to deny his plan to build a boathouse with a blue roof at the lakeshore.

First, Hosman argues that the Association should not have disapproved of his boathouse plans, because the covenants contained in the Fifth Amended Declaration are not enforceable insofar as they "do not provide a clear, articulable standard for approval" of construction requests made by residents. Brief for appellant at 16. Hosman asserts that under the facts of this case, the Association's decision to approve or deny building plans has been left to the subjective opinions of members of the Association. We conclude that Hosman's assertion lacks merit. We find that the relevant covenants contained in the Fifth Amended Declaration contain a sufficient standard for approval and are not ambiguous.

[3,4] Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants. *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012). If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction. However, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property. *Id.*

The Nebraska Supreme Court has previously addressed the specificity required by covenants which control residents' requests to build new construction or to make improvements on their property in *Normandy Square Assn. v. Ells*, 213 Neb. 60, 327 N.W.2d 101 (1982). In that case, a homeowner's

association filed suit against a resident after the resident built a fence on her property without receiving the approval of the association. The association had apparently denied the resident's submitted building plans because the fence was not appropriately set back from the street. *Id.* The relevant covenants at issue included a requirement that residents obtain approval of any construction projects, but did not include any specific standards upon which that approval would be based. *Id.* Instead, the covenants included the following broad standard for the association's approval of building plans: "'[T]he harmony of external design and location in relation to the surrounding structures and topography . . . .'" *Id.* at 63, 327 N.W.2d at 104. In addition, the covenants indicated that their purpose was "'enhancing and protecting the value, desirability and attractiveness of said property . . . .'" *Id.* Ultimately, the trial court required the homeowner to relocate the fence so as to comply with the policy of the association.

[5] On appeal, the Supreme Court affirmed the decision of the trial court. *Ells, supra.* The court held that restrictive covenants that permit a homeowners association to approve or disapprove improvements based on a standard of whether such improvements conform to the harmony of external design and location in relation to surrounding structures are not per se ambiguous; rather, such covenants are enforceable, provided that the authority is exercised reasonably within the framework of the covenants' stated purposes. *Id.*

When we apply the rule set forth in *Ells, supra*, to the applicable restrictive covenant contained in the Fifth Amended Declaration, we conclude that it contains a sufficient standard for approval and is not ambiguous. Like the building covenant in *Ells*, the building covenant in the Fifth Amended Declaration contains a general and broad standard for approval, rather than specific building standards:

> The Association shall review such Plans in relation to the type and exterior of improvements constructed, or approved for construction, on neighboring Lots and in the surrounding area, and any general scheme or plans formulated by Association.

However, also similarly to the covenant in *Ells*, this building covenant clearly conforms to the purposes of the declaration for the benefit of all owners:

> The decision to approve or refuse approval of a proposed improvement shall be exercised by Association to promote development of the Lots and to protect the valued [sic], character and residential quality of all Lots. If Association determines that the proposed improvement will not protect and enhance the integrity and character of all the Lots and neighboring Lots as a quality residential community, Association may refuse approval of the proposed improvement.

Essentially, it is clear that the intent of the building covenants within the Fifth Amended Declaration is to review residents' building plans in order to determine whether such plans conform to the standards of the neighborhood. We conclude that, pursuant to the holding in *Normandy Square Assn. v. Ells*, 213 Neb. 60, 327 N.W.2d 101 (1982), this intent is clearly stated within the covenants and, as a result, does not create ambiguity or an unclear standard of approval as Hosman suggests. Accordingly, we find, as did the district court, that the Association had the power and authority to disapprove of Hosman's boathouse.

We now turn to the question of whether that authority was exercised reasonably. The Association informed Hosman that it could not approve the boathouse because the blue roof was not in conformity with other, existing structures and because the boathouse was located too close to the shoreline of the lake. The Association indicated that the structure needed to be located at least 100 feet away from the lake. On appeal, Hosman argues that the Association's failure to approve the boathouse was unreasonable for three reasons: (1) There are other boathouses in Curtis Acres subdivision that are located within 100 feet of the shoreline of the lake, (2) the Association does not consistently enforce all of the covenants contained in the Fifth Amended Declaration, and (3) the Association treats Hosman differently from other residents because members of the Association dislike him.

1. Other Boathouses Within 100 Feet of Lake

Hosman asserts that the Association exercised its authority under the covenants unreasonably because there are multiple boathouses in Curtis Acres subdivision that are located within 100 feet of the shoreline and the Association has not asked that those boathouses be removed or moved back. Essentially, Hosman asserts that the Association waived its ability to enforce the setback rule. The Association concedes that there are boathouses in the subdivision that are located within 100 feet of the shoreline, but it asserts that those boathouses were built prior to the filing of the Fifth Amended Declaration wherein the Association amended its building covenants and reexamined its standards for approval. The Association also asserts that since the filing of the Fifth Amended Declaration in 2007, it has consistently required a 100-foot setback from the shoreline for covered structures.

[6] The Nebraska Supreme Court has previously recognized that if a restrictive covenant agreement contains a provision which provides for future alteration or amendment, the language employed within the agreement determines the extent of that provision. *Regency Homes Assn. v. Schrier*, 277 Neb. 5, 759 N.W.2d 484 (2009); *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994). The court indicated, "Although we will enforce those restrictions of which a landowner has notice, we will not hold that a property owner is bound to that of which he does not have notice." *Boyles*, 246 Neb. at 191, 517 N.W.2d at 617.

Our review of the original declaration and its various amendments reveals that in each version of the document, there has been a clear provision which indicates that the declaration and the restrictive covenants contained therein are subject to amendment. That provision provides that the Association may extend, modify, or terminate any part of the declaration with a two-thirds vote of the members of the Association. Therefore, the question before us is whether the policy requiring structures to be set back from the lake by at least 100 feet can be considered an "extension" or "modification" of the original declaration such that a homeowner in

the Association would be on notice that his or her property could be subject to such a policy.

The original declaration indicated a clear intention by the Association to maintain control over the general appearance of all structures constructed within the subdivision, including materials, colors, landscaping, and exterior lighting. In addition, the Association required each homeowner to submit a "site plan" prior to beginning any construction. Presumably, such a site plan would include the location of a structure within the relevant lot. Accordingly, we conclude that the original declaration contemplated control over the general appearance and location of all structures built within the subdivision. As such, homeowners, including Hosman, would have reasonably contemplated that an extension or modification of the declaration could later include more specific building and location requirements.

And, such an extension or modification occurred when the Association adopted the Fifth Amended Declaration and decided to make its building policies more exacting, including deciding to require structures to be set back from the lake by at least 100 feet. Evidence presented by the Association revealed that since the adoption of the Fifth Amended Declaration in 2007, the Association has uniformly required such a setback for every new structure. Because the Association properly amended the covenants in 2007 and because it has uniformly enforced those amended covenants since 2007, we do not find that it acted unreasonably in denying Hosman approval of his boathouse, as the structure clearly did not comply with the setback requirement.

We must also note that the Association's failure to approve Hosman's boathouse was not based entirely on its location on his property or on its proximity to the shoreline. The Association also indicated that the structure was not permissible because of the color of the roof. Hosman did not present any evidence to demonstrate that there are other boathouses or structures within the subdivision that have a blue roof. As such, even if the Association unreasonably denied the boathouse based on its location, there is no evidence that the denial based on the roof color was also unreasonable.

2. Inconsistent Enforcement of All Covenants

Hosman asserts that the Association exercised its authority under the covenants unreasonably because the Association has failed to consistently enforce all of the restrictive covenants applicable to homeowners within the Curtis Acres subdivision. Specifically, Hosman points to evidence that the Association has permitted two homeowners to violate a covenant which requires the construction of a residence to commence within 1 year of purchasing a lot. The Association does not dispute that two homeowners have technically violated this covenant. However, it offered evidence of extenuating circumstances in each homeowner's situation. The Association apparently did not enforce the covenant against the two homeowners because of those extenuating circumstances.

Our review of the Fifth Amended Declaration reveals that the Association is permitted to waive the application of covenants to certain homeowners: "The Association will have the right . . . for the purpose of avoiding undue hardship to waive partly or wholly the application to any Lot of any covenant or easement granted to the Association." Given this language and the Association's explanation regarding why it has not enforced the building covenant against these two homeowners, we conclude that Hosman's assertion lacks merit. There is no evidence that the Association has acted unreasonably by failing to require these two homeowners to commence building a residence while at the same time requiring Hosman to comply with the covenant concerning approval of the construction of new structures.

Hosman also asserts that the Association cannot enforce the covenants against him because it has unclean hands in its enforcement of those covenants. As the basis of this argument, Hosman again points to the Association's permitting the two homeowners to violate the covenant which requires the construction of a residence to commence within 1 year of purchasing a property. Hosman contends that the Association's failure to act is particularly egregious because these two homeowners were, at least at one time, on the decisionmaking board of the Association.

[7,8] Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable. *Id.*

As we discussed above, the Association did not act unreasonably by failing to enforce the covenant requiring building to commence on each lot within 1 year of its purchase against these two board members, because each had an extenuating circumstance and because the Fifth Amended Declaration permitted such a deviation from enforcement. Accordingly, there is also no evidence that the Association acted inequitably, unfairly, or dishonestly, and Hosman's assertions to the contrary lack merit.

3. Inconsistent Treatment of Residents

Hosman also asserts that the Association exercised its authority under the covenants unreasonably because members of the Association dislike him and, as a result of this dislike, treat him differently from the other residents. There was evidence presented at the summary judgment hearing that Hosman does not have a good relationship with certain members of the Association. There was also evidence that during the pendency of the lower court proceedings, one member of the Association participated in sending to Hosman's home a package which contained derogatory comments and insinuations about Hosman's character. However, Hosman did not present any evidence which would link any animosity held by individual Association members to the Association as a whole or to its decisionmaking process. Stated another way, Hosman did not demonstrate that any one member's dislike of him contributed in any fashion to the Association's decision to deny approval of the boathouse.

We note that Hosman did offer evidence about a previous instance between himself and the Association which, he

asserts, is evidence of ongoing inconsistent treatment by the Association. Apparently, sometime in 2008, Hosman attempted to build a seawall on his property which he believed to be similar in nature to other residents' seawalls. Hosman was sent a letter by the Association that his seawall was not permitted. Hosman argues that he was not permitted to build the seawall simply because of the Association's animosity toward him. However, the Association presented evidence that Hosman's seawall was not similar to other residents' seawalls because Hosman had attempted to excavate the shoreline in order to construct the seawall, whereas other residents had finished construction without engaging in any excavation. Excavation of the shoreline is clearly not permitted by the Fifth Amended Declaration, as that document states: "The shoreline of the Lake will not be permitted to be excavated." Thus, Hosman's evidence does not demonstrate a pattern of inconsistent treatment as he suggests. Rather, the evidence demonstrates that Hosman has failed to comply with the restrictive covenants contained in the Fifth Amended Declaration on more than one occasion.

Based on the evidence presented at the summary judgment hearing, we conclude that the district court did nor err in finding that the covenants in the Fifth Amended Declaration were enforceable by the Association, that the Association exercised its authority to enforce those covenants reasonably, and that Hosman breached the covenants in his construction of the boathouse. Accordingly, we affirm the decision of the district court to grant the Association's motion for summary judgment and order Hosman to permanently remove the boathouse from his property in the Curtis Acres subdivision.

VI. CONCLUSION

We affirm the district court's order granting the Association's motion for summary judgment, denying Hosman's motion, and ordering Hosman to permanently remove the boathouse from his property.

AFFIRMED.