IN THE COURT OF APPEALS OF IOWA

No. 0-017 / 09-1158
Filed February 24, 2010

**A. TERRY MOSS REVOCABLE TRUST,
A. TERRY MOSS As Trustee of
The A. TERRY MOSS REVOCABLE
TRUST, and in his Individual Capacity,
and MARIANN MOSS,**
Plaintiffs-Appellants,

vs.

KYLE KRAUSE and SHARON KRAUSE,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

The plaintiffs appeal from the district court's order denying their request for injunctive relief. **REVERSED AND REMANDED.**

Steven P. Wandro and Michael R. Keller of Wandro & Baer, P.C., Des Moines, for appellants.

David Swinton of Belin McCormick, Des Moines, for appellees.

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

I. Background Facts and Proceedings.

The parties to this appeal are property owners in Glen Oaks, a housing development in West Des Moines, Iowa. Glen Oaks is a gated residential community that was created in 1992, with the Declaration of Covenants, Conditions, and Restrictions for Glen Oaks, Inc. (Covenants) filed on December 18, 1992.

In 1993, Terry and Mariann Moss purchased lots 81 and 82, which they later replatted into a single lot. They built a home on this lot, which was completed in 1995, and they moved into in 1996.

Kyle and Sharon Krause purchased lot 45 in 1993 and built a home on this lot that same year. In 1994 and 1995, they purchased an additional two and one half lots adjoining their property, one-half of lot 44 and lots 54 and 55. In 1996, the Krauses began investigating whether they could replat their three and one half lots into a single lot.

At that time, Glen Oaks Community Development (GOCD), was the successor in title to Glen Oaks, Inc., and designated as the "Declarant." GOCD's day-to-day operations were managed by Amerus Properties, with William C. Knapp II having managerial decision-making capacity.[1] Kyle Krause consulted with Knapp about his desire to replat his lots into a single lot. Knapp testified that several other property owners approached him at that time with similar replatting requests. He initially had some concerns regarding the financial implications to

[1] On January 20, 2004, GOCD resigned as Declarant and turned over authority to the Glen Oaks Owners Association.

the development. The association dues were assessed on each lot and if numerous property owners replatted multiple lots into a single lot, the revenue from association dues would be significantly reduced. As a result all lot owners' association dues would need to be increased and it would be more difficult for GOCD to sell remaining lots. However, as property owners discovered the significant cost of replatting, only a few owners followed through with their plans. Knapp testified,

> I made the determination that it would be permitted and we could consent to it, so long as they knew if they replatted [and] at some time wanted to resubdivide, they had to get the consent of the association and they had to get the consent of the City of West Des Moines.

He also testified as to his discussions with Kyle Krause regarding resubdividing the combined lot:

> I don't recall going into any detail with him on what was required, other than you're going to [have to] get the approval of the association and West Des Moines . . . . [A]s long as I was the declarant, it would have been very easy, because he would have just come back to me and I would have said fine. But it wasn't my position to try to tell him what was going to happen years later when I was no longer involved. I just know that whatever the association might require, that would be what he'd have to deal with.

Ultimately, Knapp gave the Krauses permission to replat their lots, but advised them that if they wanted to resubdivide the combined lot in the future, they would have to get some sort of approval from the association. In November 1996, the Krauses replatted their three and one half lots into a single lot known as Little Leaf Acres.

Years later, the Krauses moved out of their home in Glen Oaks and sought to subdivide Little Leaf Acres into three lots. Jim McClarnon, the

manager of the Glen Oaks Owners Association, informed the Krauses that they would need to obtain (1) the approval of the Architectural Review Committee (ARC) and (2) the approval by majority vote of the Glen Oaks Owners Association membership. McClarnon then advised some of the neighboring property owners of the Krauses' plan.

On May 11, 2008, the ARC met and voted unanimously to reject the Krauses' proposal to subdivide Little Leaf Acres. The Krauses then revised their proposal, under which they would sell a portion of their lot, which was the majority of the original lot 55, to the neighboring property owner to the west, the Shojaats. On May 29, 2008, the Architectural Review Committee met again. The Mosses objected to the Krauses' proposal claiming that the Krauses were required to obtain approval by the Owners Association membership. The ARC went into a private session, during which the members agreed to approve the plan. At the same time, the Krauses and Mosses came to an agreement, whereby the Mosses would purchase the original lot 54. The ARC formally approved the Krauses' plan.

After the approval, the Mosses sought the opinions of three different attorneys regarding the purchase of lot 54. The attorneys all opined that the Mosses would not be able to obtain clear title to the lot because the Owners Association had not approved the subdividing. As a result, the Mosses did not purchase the lot. However, the Shojaats purchased the majority of the original lot 55 and replatted their two lots into a single lot.

On July 17, 2008, the Mosses filed suit seeking among other things to enjoin the Krauses from selling the remaining subdivided parcels of Little Leaf

Acres. The Mosses asserted that the replatting of Little Leaf Acres was in violation of the Covenants because the Owners Association had not approved the replatting. However, the Mosses only challenged the replatting of the original lot 54, and did not challenge the sale of the majority of the original lot 55 to the Shojaats. Trial was held on April 28, 2009. On July 17, 2009, the district court issued its decision. It found that that the subdivision of Little Leaf Acres was not in violation of the Glen Oaks covenants and therefore, denied the plaintiffs' request for injunctive relief. The Mosses appeal.

II. Analysis.

The petition was tried in equity and therefore, our review is de novo. *See Iowa Realty Co. v. Jochims*, 503 N.W.2d 385, 386 (Iowa 1993). "Because restrictive covenants are contractual in nature, we apply contract-based rules of construction to interpret them." *Sky View Fin., Inc. v. Bellinger*, 554 N.W.2d 694, 697 (Iowa 1996). "Words of a contract must be given their commonly understood meaning." *Iowa Realty Co.*, 503 N.W.2d at 386.

> Where the wording of a restriction is ambiguous, its meaning must be strictly construed against the party seeking to enforce it. However, mere disagreement over the meaning of a word or phrase does not establish ambiguity for purposes of the rule.

Sky View Fin., Inc., 554 N.W.2d at 697. "In construing a restrictive covenant, due regard must be had for the purposes contemplated by the parties but the words must be given their ordinary[,] obvious meaning as commonly understood at the time the instrument was executed." *First Sec. Co. v. Dahl*, 560 N.W.2d 327, 332 (Iowa 1997).

The plaintiffs assert that the subdividing of Little Leaf Acres did not comply with section 3.06 of the Covenants. This section provides:

> 3.06 Changes in Boundaries; Additions to Common Areas; Subdivision of Lots.
>
> (a) Declarant expressly reserved for itself and its successors and assigns, the right to change and realign the boundaries of the Common Areas, any Lots, Parcel, or Village Home Areas owned by Declarant, and with the written consent of the Club Owner, the Country Club Property, including the realignment of boundaries between adjacent Lots, Parcels, Village Home Areas and/or Multi-Family Areas owned by Declarant . . . .
>
> (b) Lots shall not be subdivided unless reserved on the subdivision plat creating said Lot, and, except as provided in Article II and this Section 3.06, the boundaries between Lots shall not be relocated, unless the relocation thereof is made with the consent of at least a majority of the Owners who possess voting rights in the Association; provided, however, that any such subdivision must:
> (i) Comply with all applicable governmental rules and regulations, including without limitation all applicable platting and zoning laws, ordinances and regulations;
> (ii) Be reviewed and approved by the Architectural Review Committee; and,
> (iii) Not result in an increase in the number of Lots from the number which were subdivided.
>
> Notwithstanding the foregoing, so long as Declarant owns a Lot or Parcel primarily for the purpose of sale or has the unexpired option to add the Additional Property or any portion thereof to the Development, Declarant shall have the right to subdivide and/or relocate Lot boundaries for all Lots owned by Declarant at Declarant's sole discretion.
>
> (c) Notwithstanding any of the foregoing, nothing herein shall prohibit the combination of more than one Lot into a larger parcel in order to create a dwelling site larger than one Lot.

Additionally, the Covenants provide:

> 14.06 Interpretation.
>
> In all cases, the provisions set forth or provided for in the Declaration shall be construed together and given that interpretation or construction which, in the opinion of the Declarant

> or the Board of Directors will best effect the intent of the general plan of development. The provisions hereof shall be liberally interpreted and, if necessary, they shall be so extended or enlarged by implication as to make them fully effective. The provisions of this Declaration shall be given full force and effect notwithstanding the existence of any zoning ordinance, building codes or other regulations which are less restrictive. The effective date of this Declaration shall be the date of its filing for Record. The captions of each Article and Section hereof as to the contents of each Article and Section are inserted only for convenience and are in no way to be construed as defining, limiting, or extending, or otherwise modifying or adding to the particular Article or Section to which they refer. This Declaration shall be construed under and in accordance with the laws of the State of Iowa.

The Mosses argue that under section 3.06(b), the Krauses are required to obtain approval of the Owners Association in order to subdivide and replat Little Leaf Acres. In support of their argument, they contend that section 3.06(b) is unambiguous—it clearly requires the approval of the Owners Association to change the boundary lines of a lot and does not contain an exception for the present situation. The Krauses do not argue that any of the terms or phrases in this section are ambiguous. Rather they reply that the covenants are to be construed to "best effect the intent of the general plan of development." They assert that section 3.06(b) was not intended to apply to the current situation, but was to prevent the division of the original lots and not to prevent the division of combined lots.

We find section 3.06(b) is unambiguous and requires that the Owners Association approve any change in boundary lines. The Krauses are attempting to change the boundary lines of their lot and therefore, they are compelled to seek approval from the Owners Association. Whereas subsection (c) makes an exception for property owners changing the boundary lines by combining lots, it

does not make a further exception for subdividing lots. *See RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 324 (Iowa 2006) (defining the rule expressio unius est exclusio alterius as a "canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative").

Furthermore, we do not find the Krauses' argument regarding intent convincing. From the testimony presented and the covenant language itself, it is clear that the drafters did not intend for the original platted lots to be subdivided. This is confirmed by Knapp's testimony that one concern was density of housing and acting on behalf of the Declarant, he would not have allowed property owners to divide original platted lots. However, that is not the issue in the present case. Rather this issue is what the drafters intended to be necessary for a property owner to change the boundaries of their lot, by division or otherwise. As to this issue, we do not have any specific testimony. Knapp testified that he did not know or specify to the Krauses what form of approval would be required to subdivide their combined and replatted lot at a later time. He further stated, "I just knew that whatever the association might require, that would be what [Krause would] have to deal with." However, he did imply that the Krauses would be required to obtain the approval of the Declarant, which at that time was him and now is the Owners Association. There is no testimony stating what the intended procedure was to be for a property owner to subdivide a lot after combining and replatting.

Although the Krauses assert they are dividing their lot back to the original lots, that argument is not a completely accurate description. They are

subdividing their property consisting of three and one half original lots into three separate lots. After their proposed subdivision, only one lot—original lot 54—will be the same as an original platted lot. The covenants clearly require that in order to change boundary lines, the Owners Association must approve. It would be inconsistent to find that although the boundary lines were being changed, because one lot of the original three and one half lots was reverting to the original platted lot then approval was unnecessary.

Finally, the Krauses claim that the Mosses are required to demonstrate they suffered irreparable harm in order to be granted injunctive relief. We disagree. Restrictive covenants create contractual rights, which the parties thereto are entitled to enforce. *See United Properties, Inc. v. Walsmith*, 312 N.W.2d 66, 70-71 (Iowa Ct. App. 1981). The Krauses failed to comply with the covenants in subdividing their property. Under the covenants, whether subdivision is allowed must be determined by the Owners Association. Therefore, we reverse and remand. Costs on appeal are assessed to the Krauses.

REVERSED AND REMANDED.