COLORADO COURT OF APPEALS

1290-4 TML

Court of Appeals No. 05CA2549
Eagle County District Court No. 05CV580
Honorable Richard H. Hart, Judge

Frederick Wyman II Trust, f/b/o Nicholas F. Wyman; Abbeline G. Wyman Trust, f/b/o Nicholas F. Wyman; and All Seasons Condominium Association, Inc., a Colorado nonprofit corporation,

Plaintiffs-Appellees,

v.

Remonov & Company, Inc., a Colorado corporation,

Defendant-Appellant.

ORDER AFFIRMED

Division III
Opinion by: JUDGE ROMÁN
Taubman and Webb, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: April 18, 2007

John W. Dunn and Associates, LLC, John W. Dunn, Avon, Colorado; Davis, Graham & Stubbs, LLP, Andrew M. Low, Rudy E. Verner, Denver, Colorado; Murray Franke Greenhouse List & Lippitt, LLP, Paul R. Franke, III, Denver, Colorado, for Plaintiffs-Appellees

Porterfield & Associates, LLC, Wendell B. Porterfield, Jr., Beth S. Ayres, Vail, Colorado, for Defendant-Appellant

In this land use dispute, defendant, Remonov & Company, Inc., appeals the preliminary injunction entered by the trial court in favor of plaintiffs, Frederick Wyman II Trust, Abbeline G. Wyman Trust, and All Seasons Condominium Association, Inc. We affirm.

I.

Vail Village is a covenant-protected subdivision at the base of Vail Mountain. Plaintiffs are owners of and the association for condominiums located within Vail Village. The covenants allow enforcement by anyone owning real property within Vail Village.

Tract E is an open space at the base of Vail Mountain located near the ski runs, and is the subject of this dispute. Defendant owns a three-story building just outside Tract E and leases the space to commercial tenants, including a restaurant and bar called the Tap Room. The Tap Room, which is located on the second floor, currently has a 150-square-foot deck that faces Tract E.

Defendant planned to expand the deck to 800 square feet, and received a building permit from the Town of Vail for that purpose. The expansion would encroach onto Tract E. Plaintiffs, asserting that the expansion would violate paragraph 2.4 of the covenants, sought to enjoin defendant from beginning construction. Following a

hearing, the trial court entered a preliminary injunction, enjoining defendant from constructing the deck expansion.

II.

Defendant contends the trial court erred in determining that plaintiffs established a reasonable probability of success on the merits. We disagree.

To obtain a preliminary injunction, the movant must establish that (1) there is a reasonable probability of success on the merits; (2) there is a danger of real, immediate, and irreparable harm; (3) it has no plain, speedy, and adequate remedy at law; (4) granting the preliminary injunction will not disserve the public; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982); Sanger v. Dennis, 148 P.3d 404, 410 (Colo. App. 2006).

The grant or denial of a preliminary injunction lies within the sound discretion of the trial court. Rathke, supra, 648 P.2d at 653; Baseline Farms Two, LLP v. Hennings, 26 P.3d 1209, 1213 (Colo. App. 2001).

However, if the issue being reviewed concerns only legal, rather than factual, questions, a preliminary injunction ruling is subject to independent de novo appellate review. State ex rel. Salazar v. Cash Now Store, Inc., 31 P.3d 161, 164 (Colo. 2001).

A.

First, defendant contends the covenants are ambiguous, and therefore must be construed in favor of unrestricted use of the property. We perceive no such ambiguity.

In determining whether the provisions of a document are ambiguous, a court must construe the language of the document in harmony with the plain, ordinary, and commonly accepted meaning of the words employed, and must refer to all provisions of the document. Wilson v. Goldman, 699 P.2d 420, 423 (Colo. App. 1985). Courts will enforce a covenant as written if it is clear on its face. Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., 21 P.3d 860, 862 (Colo. 2001); Allen v. Reed, ___ P.3d ___, ___ (Colo. App. No. 04CA2206, June 29, 2006).

A term is ambiguous if it is susceptible of more than one reasonable interpretation. Allen v. Reed, supra. However, mere disagreement between the parties about the meaning of a term does

not create an ambiguity. Kane v. Royal Ins. Co., 768 P.2d 678, 680 (Colo. 1989). Any doubts as to the meaning of a covenant should be resolved against restricting the use of the land and in favor of its free and unrestricted use. Allen v. Reed, supra.

"Interpretation of a covenant is a question of law requiring de novo review." Evergreen Highlands Ass'n v. West, 73 P.3d 1, 3 (Colo. 2003).

Here, the relevant covenants provide:

> 2.2 The lettered Lots in Blocks 2, 3, and 5-A shall be used for apartments, condominiums, retail shops, service shops, restaurants and tea rooms, hotels, lodges, professional offices and medical clinics.
>
> 2.4 Tracts A, E, F, F-1, F-2, and G shall be used as open areas or for recreational uses, including parking. No permanent above-ground buildings, other than buildings for recreational purposes, shall be constructed or maintained on any of such tracts.

Defendant contends that because the term "recreational use" is not defined, it is susceptible of more than one meaning and cannot be consistently or reasonably enforced. We disagree.

Though not specifically defined in the covenants, the term "recreational" is used elsewhere in the covenants and their amendments. See Wilson v. Goldman, supra, 699 P.2d at 424

(covenant not ambiguous simply because term not precisely defined). In an amendment to the covenants relating to Tracts B and F of Vail Village, the land use clause refers to a "Winter Seasonal Ski School[,] Related Child Care and Children's Ski School and Appurtenant Recreational Facilities and Programs." The same document recognizes a conditional use permit for a "recreation room/minor arcade." The use of the term here suggests sporting or leisure activities, namely skiing and games.

Likewise, the plain and commonly accepted meaning of the term "recreational" involves sports, play, or entertainment. See Webster's Third New International Dictionary 1899 (1976)(recreational is defined as "refreshment of the strength or spirits after toil," "diversion, play," or "a means of getting diversion or entertainment"). The illustration of a "recreational area" cited in Webster's is an "area with cinder track, tennis courts, and practice fields."

Finally, the overriding theme of the protective covenants relating to Tract E focuses on an undisturbed open area in its natural condition and absent structures or improvements. In fact, the approved structures within Tract E are in harmony with the

commonly accepted meaning of "recreational" and include a children's playground, a pedestrian walkway, and a foot bridge. Though the parties argued about the relevance of some of the amendments in the trial court, we must interpret the covenants as a whole and consider all applicable provisions. See Wilson v. Goldman, supra. Because the covenants are clear and can be interpreted according to their plain language, we will enforce them as written. See Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., supra. Therefore, we conclude that the term "recreational" is not ambiguous.

B.

We also conclude the trial court correctly determined that, based on the record presented at this stage, the deck does not provide a recreational use as required by the covenants.

When granting the injunction, the trial court found, "[T]he use of this property, meaning for a deck ancillary to a restaurant and bar, falls more within Paragraph 2.2 than it does 2.4. . . . [I]t is not recreational in the sense that the covenants use that word."

We agree with the trial court's conclusion that the use of the deck as established during the preliminary injunction hearing does

not fall within the common meaning of the term "recreational" or within the meaning of the term as employed by the covenants as a whole, particularly where the covenants contain a separate land use category that includes restaurants and tea rooms. In so concluding, we recognize that the Tap Room customers may not be required to purchase food or beverage while utilizing the deck and may, in fact, watch recreational activities, such as skiing, hiking, and children playing. However, both the common meaning of the term and the underlying purpose of the covenants allow some uses that are ancillary or appurtenant to the recreational use, but do not contemplate a nonrecreational use, such as a restaurant, that may have some ancillary recreational benefit.

Because we determine that neither the customers' nor defendant's use of the deck falls within the meaning of "recreational" as considered by the covenants, we need not reach plaintiffs' argument that compliance with the covenants is determined by defendant's use of the land rather than that of its customers.

Finally, we reject defendant's argument that the trial court unreasonably restricted its use of the property because the covenants' language fails to contain restrictive terms such as

"exclusively," "only," or "solely." The plain language of the covenants permits open areas and recreational uses and prohibits permanent, above-ground buildings, except those used for recreational purposes. The trial court properly enforced the covenants' clear language. See Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., supra.

Consequently, plaintiffs have established a reasonable probability of success on the merits. Because none of the remaining elements for obtaining a preliminary injunction is challenged here, we conclude the trial court did not err in granting the injunction. In so concluding, of course, we do not suggest that defendant is barred from developing facts during a permanent injunction proceeding that would establish a recreational use.

Order affirmed.

JUDGE TAUBMAN and JUDGE WEBB concur.

Court of Appeals
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NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41 (b), the mandate of the Court of Appeals may issue forty-six days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52 (b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Janice B. Davidson
Chief Judge

DATED: July 1, 1998