2011 IL App (2d) 100929-U
No. 2—10—0929
Order filed July 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FOREST GLEN COMMUNITY ASSOCIATION,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08—MR—1868
	)	
KEITH and JULIE PRIDMORE,	)	Honorable
	)	Kenneth L. Popejoy,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Shostock and Burke concurred in the judgment.

ORDER

Held: Pursuant to covenant drafted by homeowners association, the association's suit to have fence constructed by homeowner declared an improper use was not timely filed; therefore, trial court properly dismissed the association's complaint.

¶ 1 Plaintiff, Forest Glen Community Association, appeals an order of the circuit court of Du Page County dismissing two counts of its complaint for declaratory judgment (plaintiff voluntarily dismissed an additional count sounding in nuisance) against defendants, Keith and Julie Pridmore. The trial court found the complaint barred by certain provisions in plaintiff's architectural control covenant (the covenant). For the reasons that follow, we affirm.

¶ 2 The facts of this case are relatively few. Plaintiff is the homeowners association of a subdivision known as Forest Glen, and defendants are homeowners that own property within the subdivision. The subdivision is managed in accordance with a set of covenants, which include the covenant at issue in this case. Defendants constructed a fence on their property in January 2001. The covenant requires that a homeowner obtain the approval of the association prior to commencing construction of a fence or other structure. Defendants did not submit written construction plans to the association's board of directors (the board) or otherwise seek approval for construction of the fence. In or shortly before July 2007, plaintiff became aware of the fence after defendants removed some landscaping on their property. After requests to remove the fence were refused by defendants, plaintiff filed suit on November 26, 2008.

¶ 3 Plaintiff contends that defendants' fence violates the covenant, which, in pertinent part, provides as follows (Torode was the original developer of Forest Glen and plaintiff's predecessor in interest):

> "It is understood and agreed that the purpose of architectural controls is to secure an attractive, harmonious residential development having continuing appeal. No construction of a building, fence, wall or other structure shall be commenced, erected or maintained *** until the construction plans and specifications shall have been submitted to and approved in writing by TORODE, or its successors or assigns. TORODE, or its successors or assigns, shall have the right to refuse to approve any such construction plans or specifications *** which are not suitable or desirable in the opinion of TORODE, or its successors or assigns, for aesthetic or other reasons; and in so passing upon such construction plans and specifications *** TORODE, or its successors or assigns, shall have the right to take into

> consideration the suitability of the proposed building or other structure with the surroundings, and the effect of the building or other structure on the compatibility with adjacent or neighboring properties. ***.
>
> All plans, specifications and other materials pertinent to any proposed construction shall be submitted to the office of TORODE, or its successors or assigns, together with the payment of FIFTY ($50.00) DOLLARS for approval or disapproval. A report in writing setting forth the decision of TORODE, or its successors or assigns, and the reasons therefor shall thereafter be transmitted to the applicant by TORODE, or its successors or assigns, within thirty (30) days after the date of filing ***. In the event: (a) TORODE, or its successors or assigns, fails to approve or disapprove within thirty (30) days after submission, the final plans, specifications or other material, as required by this Declaration; or (b) no suit to enjoin construction has been filed within thirty (30) days after commencement of such construction, approval shall not be required, and the related requirements of this Declaration shall be deemed to be complied with."

Resolution of this appeal turns largely on the construction placed on the latter portion of the above quoted material, which the parties refer to as the "presumed-compliance provision."

¶ 4 The trial court, relying on the presumed-compliance provision, dismissed two counts of plaintiff's complaint pursuant to section 2–619 of the Civil Practice Law (735 ILCS 5/2–619 (West 2010)). We conduct *de novo* review of such a dismissal. *Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 516 (2009). A motion to dismiss under section 2–619 admits all well-pleaded facts as well as any inferences that may be drawn from them. *Fleissner v. Fitzgerald*, 403 Ill. App. 3d 355, 358 (2010).

¶ 5 As this appeal requires us to construe the covenant, the following principles apply. Covenants are interpreted using the familiar principles that are used to construe contracts. *Forest Glen Community Homeowners Ass'n v. Bishof*, 321 Ill. App. 3d 298, 303 (2001). Thus, in *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 331 (1985), this court explained that "[t]he paramount rule for the interpretation of covenants is to expound them so as to give effect to the actual intent of the parties as determined from the whole document construed in connection with the circumstances surrounding its execution." Further, "[r]estrictions should be given the effect which the expressed language of the covenant authorizes." *Amoco Realty Co.*, 133 Ill. App. 3d at 332. Finally, any doubts regarding such covenants are to be resolved "in favor of full and unlimited legitimate use of the property and against restrictions." *Pasulka v. Koob*, 170 Ill. App. 3d 191, 205 (1988); see also *400 Condominium Ass'n v. Gedo*, 183 Ill. App. 3d 582, 584 (1989) ("Because restrictions on the free use of property are disfavored [citation] restrictive covenants are to be strictly construed and will be enforced only if they are reasonable, clear and definite"); *Lakeland Property Owners Association v. Larson*, 121 Ill. App. 3d 805, 810 (1984) ("Restrictive covenants which affect land, while not favored at law, will be enforced according to their plain and unambiguous language where reasonable, clear, and definite").

¶ 6 Here, the plain language of the presumed-compliance provision is sufficient to resolve this case. It flatly states that "in the event *** no suit to enjoin construction has been filed within thirty (30) days after commencement of such construction, approval shall not be required, and the related requirements of this Declaration shall be deemed to be complied with." Defendants built their fence in January 2001; plaintiff filed suit in November 2008. As suit was not filed within 30 days of the commencement of the construction of the fence, the covenant clearly states that approval is not

required and that its requirements "shall be deemed complied with." Thus, the plain language of the presumed-compliance provision mandates the result reached by the trial court.

¶ 7 Indeed, in *Garden Quarter I Ass'n v. Thoren*, 76 Ill. App. 3d 99, 100 (1979), this court construed a similar provision, which provided: "In the event the Committee, or its designated representatives, fails to approve or disapprove such design and location within sixty (60) days after the said plans and specifications have been submitted to it, Or, [*sic*] in any event, if no suit to enjoin the addition, alteration or change has been filed within the twenty-five (25) days after the commencement of such addition, alteration or change, approval will not be required and this Article will be deemed to have been fully complied with." The plaintiff sued the defendant to enjoin the defendant to remove certain improvements to the defendant's property for which the defendant had not sought approval from the plaintiff. The defendant moved for summary judgment, relying on the presumed-compliance provision. The plaintiff argued that the 25-day limitation did not apply unless an owner had already submitted plans. We rejected this interpretation, explaining:

> "Plaintiff argues that defendant's interpretation is contrary to the overall purpose of the restrictive covenant. However, although the paramount consideration in construing a document is the intent of the parties [citation], unless a contract is ambiguous its meaning must be determined from the words used. [Citation.] We are of the opinion that plaintiff's interpretation of the restrictive covenant *** is at odds with the unambiguous language used in the covenant and we would agree with defendant that the language used in the covenant did indeed cover 'any event,' including the failure to submit plans for the proposed change to the Board."

We find this reasoning controlling here. We note that plaintiff attempts to distinguish *Garden Quarter I Ass'n* because the presumed-compliance provision in that case included the term "in any event" while the provision at issue in this case does not. We acknowledge that the court in *Garden Quarter I Ass'n*, 76 Ill. App. 3d at 102-03, did mention this language; however, we fail to see–and plaintiff does not explain–how this language meaningfully distinguishes *Garden Quarter I Ass'n* such that its reasoning does not apply here.

¶ 8 Plaintiff raises a number of additional arguments as to why it should prevail. First, it contends that the plain language of the covenant supports its position. It argues that the presumed-compliance provision is referring to "plans" where it states "approval shall not be required." It reaches this conclusion based on earlier provisions in the covenant, which state, "No construction of a building *** shall be commenced, erected or maintained *** until the construction plans and specifications shall have been submitted to and approved." Defendants, plaintiff continues, are not seeking approval of "plans"; rather, they seek approval of their fence. We find this argument unpersuasive. Initially, we note that the presumed-compliance provision also states that in the absence of a timely suit, "the related requirements of this Declaration shall be deemed to be complied with." Thus, regardless of what is being approved, defendants are deemed to have complied with the entire covenant. Further, continuing with plaintiff's logic regarding the distinction between plans and fences, plaintiff points to nothing in the covenant that requires approval of a fence. The covenant itself only requires approval of plans, so the fact that the presumed-compliance provision does not provide for approval of a fence is immaterial.

¶ 9 Plaintiff also argues (as the plaintiff did in *Garden Quarter I Ass'n*) that "[a] homeowner must submit construction plans *** as required by the [covenant] before he can avail himself of a

defense under the presumed-compliance provision." Plaintiff continues, "Then if a homeowner begins construction on his project within the initial 30 day period after submitting his plans while [plaintiff] is reviewing the plans under subsection (a) of the presumed-compliance provision, [plaintiff] would have to file suit to enjoin construction within 30 days after the commencement of construction *** or the homeowner would be deemed to have complied with the Covenants." This interpretation renders section (a) meaningless. The first half of the presumed-compliance provision states that where plaintiff fails to approve or reject plans within 30 days, approval is deemed granted. If, however, the commencement of construction triggered a second 30-day period, then the approval granted pursuant to plaintiff's failure to act would be of no effect. Approval without the ability to commence construction is not approval at all. In accordance with plaintiff's interpretation, actual approval would not occur until 30 days after the commencement of construction. As such, plaintiff's interpretation renders the first portion of the presumed-compliance provision meaningless. It is of course, axiomatic, that a contract should not be interpreted in a manner that renders any of its provisions meaningless. *Coles-Moultrie Electric Co-op v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (1999). Accordingly, we reject plaintiff's reading of the presumed-compliance provision. In its reply brief, plaintiff argues that the presumed-compliance provision must be read in the context of the entire covenant. While we have no quarrel with this proposition in general, its argument in its reply brief leads to a similar interpretation as discussed in this paragraph and again renders the first portion of the provision meaningless.

¶ 10 Plaintiff also relies on two cases from foreign jurisdictions. First, plaintiff cites a case form the Supreme Court of Virginia. In *Riordan v. Hale*, 212 S.E. 2d 65, 67-68 (Va. 1975), a case also involving the construction of a fence, that court stated:

> "This covenant also provides that if the Committee fails to act within 30 days after submission to it of plans and specifications, or if no suit to enjoin the construction has been commenced prior to its completion, approval will not be required, and the applicable covenants shall be deemed to have been complied with. This presumed compliance with the covenants, however, does not relate to location of fences for which Committee approval has not been sought, within areas proscribed by covenants (2) and (4)."

The reason the *Riordan* court found that the presumed-compliance provision did not apply makes that case distinguishable. The presumed-compliance provision in that case became operative at the completion of construction. The court reasoned that since a fence can be built in a mater of hours, it would be unfair to apply the provision to bar suits where no one had time to file a suit to enjoin the defendant. *Riordan*, 215 S.E. 2d at 68. In this case, plaintiff had 30 days after the commencement of construction to act, so it is not "unfairly penalized" in the same manner as the plaintiffs in *Riordan* (see *Riordan*, 215 S.E. 2d at 68) . Plaintiff also cites the Alabama case of *Bramlett v. Dauphin Island Property Ass'n*, 565 So. 2d 216 (Ala. 1990). There is no indication that the presumed-compliance provision at issue in that case allowed for approval based on the failure to file a suit, either prior to 30 days after the commencement of construction or otherwise. See *Bramlett*, 565 So. 2d at 218. As such, *Bramlett* provides no guidance here.

¶ 11 Finally, we note that plaintiff raises an extensive, policy-based argument as to the function of its architectural control covenant. It complains that allowing defendants to prevail on their presumed-compliance defense will "impair the integrity" of its covenant and adversely affect "the distinctive open character" of the community. This court rejected a similar argument in *Garden Quarter I Ass'n*, 76 Ill. App. 3d at 102, holding that "unless a contract is ambiguous its meaning

must be determined from the words used." Indeed, that we interpret a contract with reference to its plain language is an old and venerable principle. *E.g.*, *Fidelity National Title Insurance Co. of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 214 (2007); *Home Mutual Fire Insurance Co. of Chicago v. Hauslein*, 60 Ill. 521 (1871). As the plain language of the covenant states that, in the absence of a timely suit to enjoin construction, "approval shall not be required, and the related requirements of this Declaration shall be deemed to be complied with," we have no occasion to consider matters of policy.

¶ 12 In light of the foregoing, the order of the circuit court of Du Page County dismissing plaintiff's complaint is affirmed.

¶ 13 Affirmed.