2018 IL App (4th) 180017-U

NO. 4-18-0017

FILED
October 16, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KATHLEEN WEAVER,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Piatt County
ROBERT L. and SHEILA RAE CLEARY,	)	No. 15CH31
Defendant-Appellees,	)	
and	)	Honorable
VILLAGE OF MANSFIELD,	)	Wm. Hugh Finson,
Defendant.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff failed to establish defendants violated a restrictive covenant by constructing a garage that exceeded the permissible size. Plaintiff failed to present evidence that defendants were operating a business on their residential property. Plaintiff forfeited review of her remaining arguments for failure to comply with Illinois Supreme Court Rule 341(h) (eff. Nov. 1, 2017).

¶ 2 In November 2015, plaintiff, Kathleen Weaver, filed a complaint alleging her neighbors, defendants Robert L. Cleary and Sheila Rae Cleary, violated a restrictive covenant and the Mansfield Zoning Code by building a detached garage on their land that exceeded the permissible size and subsequently using it for allegedly nonresidential purposes. Plaintiff sought declaratory and injunctive relief. Both plaintiff and defendants filed motions for summary judgment. The trial court granted defendants' motion for summary judgment and denied plaintiff's. Plaintiff appeals, arguing (1) defendants' construction of the new garage violated the

Mansfield Zoning Code and a restrictive covenant; (2) the trial court erred by granting defendants' motion for summary judgment where an issue of disputed fact exists regarding compliance with the restrictive covenant and the Mansfield Zoning Code; and (3) the trial court erred in denying plaintiff's motion for summary judgment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 24, 2015, plaintiff filed a complaint alleging her neighbors, defendants Robert and Sheila Cleary, violated a restrictive covenant and the Mansfield Zoning Code when they constructed a new detached garage on their property. Plaintiff later filed an amended four-count complaint adding the Village of Mansfield as a defendant. Count I sought a declaratory judgment that defendants violated a restrictive covenant in "Bateman's Second Subdivision Dedication and Statement of Restrictions" by building more than one garage on their property that exceeded a three-car capacity. Count I also alleged the construction of the new garage disrupted the flow of ground and surface water, affected plaintiff's septic system, impeded plaintiff's view of a nearby lake, and affected the water quality of the lake. Plaintiff further alleged defendants trespassed by using subdivision land for their motorcycle business. Count II sought declaratory relief, claiming defendants did not have a valid permit pursuant to the Mansfield Zoning Code. Count III sought declaratory and injunctive relief, asserting defendants used their property for nonresidential purposes in violation of the restrictive covenant. Count IV sought declaratory relief against the Village of Mansfield. We address the issues only as they relate to plaintiff and defendants, Robert and Sheila Cleary.

¶ 5 The record reveals plaintiff lived across the street from defendants in Mansfield, Illinois. Defendants' property abuts a lake. According to affidavits submitted by defendants, their

home had a preexisting attached garage that they later converted to a "rec room/home office." Defendants subsequently constructed a detached two-car garage with a workshop area.

¶ 6 Plaintiff alleged the new construction violated the following covenant in Bateman's Second Subdivision Dedication and Statement of Restrictions:

> "All lots in Bateman's Second Subdivision shall be known and described as residential lots and no structure shall be erected on any lot other than for family dwelling not to exceed two (2) stories and attic space in height and one (1) or two (2) or three (3) car attached or detached garage, carport, or open surfaced parking area of similar capacity."

¶ 7 Plaintiff further alleged defendants violated the following provision of the Mansfield Zoning Code by failing to commence construction within the required timeframe:

> "Construction must commence within six months of the permit issue date and construction must be completed within 12 months of the permit issue date or the permit shall automatically expire. After expiration, applicant must reapply for a new building permit and all applicable fees must be paid, prior to completing or commencing the construction." Mansfield, Illinois, Zoning Code § 154.126(B)(2).

¶ 8 In November 2015, the trial court entered a temporary restraining order (TRO) requiring defendants to cease all action relating to the new garage. The trial court denied plaintiff's motion to extend the TRO. In December 2015, plaintiff filed an interlocutory appeal with respect to the TRO. In January 2016, this court entered an order dismissing the appeal for lack of jurisdiction.

¶ 9 On January 5, 2017, defendants filed a motion for summary judgment on counts I,

II, and III, arguing there were no genuine issues of material fact that the new construction was in violation of the restrictive covenant and the Mansfield Zoning Code. In the motion, defendants alleged the new garage had "a large attached workshop area in addition to having a two-car garage ***." Defendants attached exhibits depicting the new garage, which showed it had two doors and space for a workshop. Defendants also submitted the affidavit of Tom Williams, a zoning officer for the Village of Mansfield. He stated he issued a building permit to defendants on February 23, 2015. He issued a second permit on October 3, 2016. He further stated defendants had complied with the Mansfield Zoning Code.

¶ 10 In defendant Robert Cleary's affidavit, he stated the preexisting attached garage was remodeled to be a home office and recreation room. He stated "[t]he garage door on the attached garage has been removed and a walk in door has been constructed." With respect to the new garage, he alleged that he "commenced construction of the garage within six months of issuance of the building permit[,] which involved clearing the area, moving underground utilities and gravel placement, as well as marking the area for construction." He stated the exterior of the new garage was completed by February 23, 2016. He was later granted a new building permit in October 2016 to complete the second phase of construction for the interior of the new garage. He further stated that he operated a motorcycle business in Champaign, Illinois, and he was "not running [his] business out of [his] home."

¶ 11 On April 7, 2017, plaintiff filed a cross-motion for summary judgment on counts I through IV. She argued she was entitled to summary judgment on counts I, II, and III because the language in the restrictive covenant was unambiguous, defendants violated the covenant by constructing a second garage, and defendants operated a business from their residential property

in violation of the covenant. She further argued the construction altered the flow of water around the subject property.

¶ 12 In plaintiff's affidavit, she stated defendants "began building a new 'garage'/building on their property on or about October 10, 2015." She stated "[t]he new building is much larger than any garage in my subdivision and contains more space than an ordinary two-car garage." She further explained defendants have completed construction of the new garage but they "continue to park vehicles in front of their attached garage." She observed there has been increased runoff and surface water around the subject property. She also stated that her "home has a septic system which [was] affected by the underground flow of water." She further stated that, "[s]ince the construction, I have seen motorcycle activity in and around the new building."

¶ 13 On May 10, 2017, the trial court conducted a hearing on the motions for summary judgment. The court granted defendants' motion and denied plaintiff's motion, stating as follows:

> "*** I really think we have to *** take into consideration the common sense and ordinary experience in life. It's not at all uncommon now-a-days to see a newly-built garage that includes some extra space, at least, for storage of tools, rakes, shovels, spades, lawn mowers, snow blowers, trimmers, things like that. It's also not at all unusual for a newly-built garage to include at least some space as a work area, where you work on the lawn mower, the snow blower, *** [and] clean off the tools when they've been used. So the fact that the garage contains extra space beyond what is necessary to park the vehicles does not in my mind

disqualify that structure from being called a garage or being considered a garage. *** I think [plaintiff's] interpretation of the covenant[] is a little too restrictive. A two-car garage can mean something more than just space needed to park two vehicles.

Another issue before the court is the [defendants'] building permit. *** Mr. Cleary says in his affidavit that he commenced construction by clearing the area where the new garage was going to be built, moving underground utilities, putting in gravel, things like that, and that that was commenced within the six-month period. The court finds that is sufficient, and so there is no genuine issue of material fact on whether the building permit was still in effect.

Are the *** [defendants] using the property for business purposes? Mr. [a]nd Mrs. Cleary each state in their affidavits they are not. [Plaintiff], in her affidavit, says I am aware and have personal knowledge that Robert Cleary owns a motorcycle business in the City of Champaign. Since the construction I have seen motorcycle activity in and around the new building. [Defendants] continue to keep tools and motorcycle[s] in and around the old garage. I don't think that rebuts what the defendants had indicated in their affidavit. So I don't regard that as an issue either.

We've had arguments today about [issues] regarding subsurface water, ground water. *** [Plaintiff], in her affidavit, says [her] home has a septic system which is affected by the underground flow of water, and that's the only reference in her affidavit to the ground water issue. She doesn't say she has been affected

by the underground water. She says she has a septic system which is affected by the underground flow of water. [She] [d]oesn't say if she has been affected, doesn't say how or when. So I don't think that's sufficient to rebut [defendants' contentions].

So the court thinks that at this point there are no genuine issues of material fact."

¶ 14 On May 17, 2017, the trial court entered an order granting defendants' motion for summary judgment on counts I, II, and III. The court denied plaintiff's motion for summary judgment. The court's order did not address count IV, which pertained only to defendant, Village of Mansfield. Plaintiff subsequently requested the trial court make a finding under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying appeal of the court's May 2017 order granting defendants' motion for summary judgment. On December 8, 2017, the court entered an "amended order" granting plaintiff's Rule 304(a) motion.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Plaintiff appeals, arguing (1) defendants' construction of the new garage violated the Mansfield Zoning Code and a restrictive covenant; (2) the trial court erred by granting defendants' motion for summary judgment where an issue of disputed fact exists regarding a violation of the restrictive covenant and the Mansfield Zoning Code; and (3) the trial court erred in denying plaintiff's motion for summary judgment.

¶ 18 A. Law Relating to Summary Judgment

¶ 19 "Summary judgment is proper where the pleadings, affidavits, depositions,

admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20, 52 N.E.3d 319 (citing 735 ILCS 5/2–1005(c) (West 2012)). "Accordingly, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424, 706 N.E.2d 460, 463 (1998). "[T]o survive a motion for summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12, 21 N.E.3d 684. "[U]nsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact." *Valfer*, 2016 IL 119220, ¶ 20. Our review is *de novo. Bowles v. Owens–Illinois, Inc.*, 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267.

¶ 20 B. The Restrictive Covenant

¶ 21 Plaintiff argues defendants violated a restrictive covenant by building a new detached garage on their property that exceeded the permissible size. She further argues defendants violated the covenant by using their residential property to operate a business.

¶ 22 "Generally, restrictive covenants affecting land will be enforced according to their plain and unambiguous language ***." *Levitt Homes Inc. v. Old Farm Homeowners' Ass'n*, 111 Ill. App. 3d 300, 308, 444 N.E.2d 194, 199 (1982). "When the language of a covenant is unambiguous, clear and specific, no room is left for interpretation or construction." *Fick v. Weedon*, 244 Ill. App. 3d 413, 417, 613 N.E.2d 362, 365 (1993). "Whether a restrictive covenant is ambiguous is a question of law because that determination necessarily involves a construction

of the restriction." *Id.* at 416-17. "Where an ambiguity exists, parol or extrinsic evidence may be considered to interpret the contract." *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 275, 869 N.E.2d 310, 316 (2007). "The paramount rule for the interpretation of covenants is to expound them so as to give effect to the actual intent of the parties as of the time the covenant was made and as collected from the whole document construed in connection with the circumstances surrounding its execution." *Fick,* 244 Ill. App. 3d at 417. All doubts and ambiguities are resolved against restrictions and in favor of the free use of the property. *Lake Holiday Property Owners' Ass'n v. Arenkill*, 172 Ill App. 3d 892, 893, 527 N.E.2d 167, 168 (1988).

¶ 23 Although our interpretation of the restrictive covenant is reviewed *de novo*, the trial court's factual findings "will only be overturned if the court's findings are against the manifest weight of the evidence." *Pettey v. First National Bank of Geneva*, 225 Ill. App. 3d 539, 545, 588 N.E.2d 412, 416 (1992); see also *Johnstowne Centre Partnership v. Chin*, 99 Ill. 2d 284, 291, 458 N.E.2d 480, 483 (1983). Thus, we review the interpretation of the restrictive covenant *de novo* and consider whether the trial court's findings of fact were against the manifest weight of the evidence.

¶ 24 Here, Bateman's Second Subdivision Dedication and Statement of Restrictions provides as follows:

> "All lots in Bateman's Second Subdivision shall be known and described as residential lots and no structure shall be erected on any lot other than for family dwelling not to exceed two (2) stories and attic space in height and one (1) or two

(2) or three (3) car attached or detached garage, carport, or open surfaced parking area of similar capacity."

¶ 25 Plaintiff contends (1) the restrictive covenant is unambiguous because it limits the size of a garage to a three-car capacity; (2) defendants violated the restrictive covenant by building a new garage that exceeded a three-car capacity; and (3) although defendants claim they converted their old garage into a "rec room/home office," defendants actually have two garages that, taken together, exceed the permissible three-car garage capacity in violation of the restrictive covenant. Defendants argue there is no evidence the new garage exceeds the three-car limitation on size. Defendants further argue the term "car" is ambiguous and the covenant fails to specify whether it allows for "pick-up trucks" or "storage space." Defendants contend the new garage consists of space for two cars and a workshop area, which does not violate the covenant. Defendants argue their old garage is being used as a "rec room/home office" and not a garage.

¶ 26 Based on our reading of the covenant at issue here, we find it unambiguously provides the garage cannot exceed a three-car capacity. Thus, the question we consider is whether there is a genuine issue of material fact that defendants' new detached garage was designed for three cars or less.

¶ 27 The trial court found that it is "not unusual for a newly-built garage to include at least some space as a work area, where you work on the lawn mower, the snow blower, *** [or] clean off the tools when they've been used." The court further found the construction of the new garage did not violate the restrictive covenant simply because it contains extra space beyond what is necessary to park vehicles. The court concluded that "[a] two-car garage can mean something more than just space needed to park two vehicles." We agree.

¶ 28 Our review of the record reveals the new detached garage has two garage doors and additional space for a workshop area. There is no evidence it exceeds the permissible size under the restrictive covenant. Indeed, plaintiff failed to present evidence of the precise measurements or other indicia that the new garage was designed to exceed a three-car capacity. Instead, plaintiff's affidavit alleged only that "[t]he new building is much larger than any garage in my subdivision and contains more space than an ordinary two-car garage." This conclusory allegation is insufficient to create a genuine issue of material fact that the design of the new garage violates the restrictive covenant. *Valfer*, 2016 IL 119220, ¶ 20 ("[U]nsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact."). Thus, we cannot say the trial court's findings are against the manifest weight of the evidence.

¶ 29 Additionally, as stated, plaintiff maintains defendants' original attached garage is not being used as a "rec room/home office"; rather, defendants allegedly have two garages that, taken together, violate the restrictive covenant. Plaintiff's affidavit states defendants have "an attached 2-1/2 car garage." It further states defendants began constructing a new detached garage, and defendants "continue to park vehicles in front of their attached garage." We find plaintiff's conclusory allegations fail to create a genuine issue of material fact that the original attached garage is not being used as a recreational room or home office. To the contrary, plaintiff's allegation that defendants park their vehicles outside the original attached garage would suggest it is *not* being used as a garage. Thus, we find plaintiff's argument lacks merit.

¶ 30 Further, plaintiff contends defendants violated the restrictive covenant by operating a motorcycle business in and around the new garage. The restrictive covenant unambiguously limits the use of subdivision property to residential purposes. Specifically, it

states, in pertinent part, that all lots in the subdivision "shall be known and described as residential lots and no structure shall be erected on any lot other than for family dwelling ***."

¶ 31 Defendants acknowledge they own and operate a motorcycle business in Champaign, Illinois. Plaintiff contends, however, that this business has been extended to defendants' residence because (1) there has been an increased presence of motorcycles in and around the new garage and (2) defendants admit in their affidavits that the old garage was converted to a home office.

¶ 32 In support of her argument, plaintiff cites two cases from other jurisdictions, *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996) and *Morean v. Duca*, 287 Pa. Super. 472, 475, 430 A.2d 988, 989 (1981). We find both cases distinguishable. In *Holaday*, the trial court found defendants violated a restrictive covenant limiting the use of their property to residential purposes by constructing a shop to perform automobile and boat repairs. *Id.* at 524-25. On appeal, the court noted defendants "admitted to bringing automobiles and boats of others to the shop building, and repairing them for compensation." *Id.* at 527. The court concluded the purpose of the restrictive covenant was clear and unambiguous, and defendants violated the covenant by using the lot for non-residential purposes. *Id.*

¶ 33 In *Morean*, the deed to defendants' property contained a restrictive covenant limiting use of the property to "residential and recreational purposes." *Id. at* 473. Defendants used the garage on their property for an automotive and tractor repair business, and they later expanded their garage to use as a place of business for repairing and selling snowmobiles. *Id.* at 474. On review, the court found the term "residence" "expressly creates a use restriction." *Id.* at 476. The court held defendants' automotive repair and snowmobile businesses were commercial

ventures and, therefore, violated the restriction. *Id.*

¶ 34 Unlike *Holaday* and *Morean*, plaintiff in the instant case failed to present evidence that defendants were servicing motorcycles or otherwise using their property for commercial purposes. Plaintiff only cites her affidavit, which states she has "seen motorcycle activity in and around the new building." Plaintiff also notes defendants' affidavits state their old garage is being used for a "home office." We find the mere increase of "motorcycle activity" in and around the new garage is insufficient to create a genuine issue of material fact that defendants were servicing motorcycles in connection with the operation of a commercial enterprise. Further, the existence of a home office on defendants' property does not establish, or even suggest, that defendants were operating a motorcycle business from their home office. Accordingly, it cannot be said that defendants' use of their property violated the restrictive covenant. We therefore find summary judgment was appropriate here.

¶ 35 C. The Permit

¶ 36 Plaintiff argues the trial court erred by granting summary judgment in favor of defendants because they constructed the new garage without a valid permit where (1) defendants did not commence building the new garage within six months of the issuance of the initial permit as required by the Mansfield Zoning Code; (2) defendants failed to reapply for a new permit after the initial permit expired; and (3) defendants failed to pay fines and fees. Plaintiff further argues the restrictive covenant would render any permit null and void. We disagree.

¶ 37 Because we have already found the restrictive covenant was not violated here, we need not address plaintiff's argument that the restrictive covenant would render any permit for the new garage null and void. We also find no genuine issue of material fact regarding plaintiff's

remaining assertions concerning the validity of defendants' permit.

¶ 38 The Mansfield Zoning Code provides, in pertinent part, as follows:

> "Construction must commence within six months of the permit issue date and construction must be completed within 12 months of the permit issue date or the permit shall automatically expire. After expiration, applicant must reapply for a new building permit and all applicable fees must be paid, prior to completing or commencing the construction." Mansfield, Illinois, Zoning Code § 154.126(B)(2).

¶ 39 Here, the record reveals defendants' first permit was issued on February 23, 2015. Plaintiff asserts in her affidavit that defendants began construction over six months later on October 10, 2015. However, defendant Robert Cleary states in his affidavit that "[he] commenced construction of the garage within six months of issuance of the building permit[,] which involved clearing the area, moving underground utilities and gravel placement, as well as marking the area for construction." He further states the exterior of the structure was completed within 12 months of the issuance of the first permit and another permit was subsequently issued.

¶ 40 We find plaintiff failed to provide evidentiary support to refute defendants' assertion that construction commenced within six months where defendants cleared the area, moved underground utilities and gravel, and marked the area for construction. Plaintiff also failed to provide any other evidentiary support, beyond conclusory allegations, that construction was not completed within the required timeframe. *Bruns*, 2014 IL 116998, ¶ 12 ("[T]o survive a motion for summary judgment, a plaintiff *** must present a factual basis that would arguably entitle her to a judgment."). Accordingly, the record does not demonstrate the existence of a genuine issue of material fact regarding the validity of the permit. Further, we find defendants

would not have been subject to the fines and fees provision of the Mansfield Zoning Code because plaintiff failed to present evidence that defendants actually violated the Code. Thus, we find summary judgment was appropriate.

¶ 41 D. Forfeiture

¶ 42 Finally, plaintiff maintains issues of material fact exist regarding whether the construction of defendants' new garage disrupted the flow of ground and surface water, affected her septic system, impeded her view of a nearby lake, and affected the water quality of the lake. Plaintiff also argues defendants trespassed by using subdivision land for their motorcycle business.

¶ 43 In her brief on appeal, plaintiff fails to provide any analysis of these remaining contentions or cite relevant authority. Pursuant to supreme court rules, an appellant's brief must contain an argument section with "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). A reviewing court "is not a repository into which an appellant may foist the burden of argument and research ***." *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993). The failure to comply with relevant supreme court rules results in forfeiture of an argument on appeal. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 11, 964 N.E.2d 1139. Because plaintiff failed to adequately analyze her remaining contentions on appeal with proper legal or factual support, we find she has forfeited these arguments. *Vancura v. Katris*, 238 Ill. 2d 352, 370, 939 N.E.2d 328, 340 (2010) ("An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.").

¶ 44 III. CONCLUSION

¶ 45 In closing, we thank the trial court for its thoughtful analysis, which we found helpful. For the reasons stated, the trial court's judgment is affirmed.

¶ 46 Affirmed.