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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-968

Filed 2 July 2024

Iredell County, No. 21-CVS-3130

KEITH R. OTTO, Plaintiff,

v.

JEFFREY C. COOPER and wife, ALISON C. COOPER, Defendants.

Appeal by Plaintiff from order entered 25 January 2023 by Judge David L. Hall and judgment entered 9 May 2023 by Judge Edwin Wilson, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 3 April 2024.

Davies Law Firm, PLLC, by Kenneth T. Davies, for Plaintiff-Appellant.

Cranford, Buckley, Schultze, Tomchin, Allen & Buie, P.A., by R. Gregory Tomchin, for Defendants-Appellees.

COLLINS, Judge.

This appeal arises from a dispute between Plaintiff Keith Otto and Defendants Jeffrey and Alison Cooper over the proper interpretation of their subdivision's restrictive covenants' setback requirements as applied to Defendants' pool cabana, pool equipment, and pool equipment fencing. Plaintiff appeals from an order denying his motion for summary judgment, arguing that there is no issue of material fact and

that he is entitled to judgment as a matter of law that the appropriate setback is 25 feet. Plaintiff also appeals from the final judgment entered upon a jury verdict finding that the pool cabana and pool equipment are not subject to a 25-foot setback, arguing that the trial court admitted incompetent evidence at trial. Because a final judgment was rendered on the merits, we do not review the trial court's denial of summary judgment. However, because the subdivision's restrictive covenants do not subject Defendants' pool cabana and pool equipment to a 25-foot setback as a matter of law, any error at trial in the admission of challenged evidence was not prejudicial, and we affirm the judgment.

I. Background

Plaintiff and Defendants each own adjacent lots in Saylor's Watch, an Iredell County residential development. The lots are subject to the "Declaration of Covenants, Conditions, and Restrictions for Saylor's Watch" ("Covenants"), which provide default setbacks for all buildings in Saylor's Watch:

5. Building Setback Lines. No building will be located nearer than

- a. Front: 35 feet from the street right of way;
- b. Rear: 50 feet from the boundary line of Lake Norman (760 feet above mean sea level)[;] and
- c. Side: 15 feet from each side property line.

The Covenants also define and provide a separate 25-foot setback for "Recreational Structures":

11. Recreational Structures. No swimming pool, hot

tub, jacuzzi, basketball court, play area, or tennis court (“Recreational Structures”) will be installed or erected on any Lot until the plans and specifications for same showing the nature, kind, shape, materials, height, and location of the same will have been approved by the ARC. No Recreational Structure will be constructed on a Lot in front of the dwelling. No swimming pool may protrude above the finish grade of the adjoining ground. The pool equipment must be screened, housed, or stored underground. No basketball goals may be affixed to a house or garage.

A plot plan showing the location of a Recreational Structure must be submitted to the ARC showing any and all proposed grading and screening. Design and color of fencing materials should blend naturally into the surrounding area and plant materials should be added where necessary to soften the visual impact. Surface colors must be muted and not highly reflective. Lights for Recreational Structures will be permitted as long as the light does not intrude on adjacent property and must be turned off by 10:30 PM. Recreational Structures must be set back a minimum of twenty-five feet (25”) from any property line.

In April 2021, Defendants began constructing a pool on their lot. In July 2021, Defendants began constructing a pool cabana (“Cabana”) between their pool and the property line between Defendants’ and Plaintiff’s lots. Defendants placed the pool equipment behind the Cabana next to Plaintiff’s property. Plaintiff complained that the Cabana was in violation of the Covenants and that it would obstruct his view of the lake. Upon inspection, the Cabana’s foundation was discovered to be fewer than 15 feet from the property line, and Defendants agreed to move the Cabana so that it would be just over 15 feet from the property line.

Plaintiff filed a complaint in November 2021, alleging that Defendants had

violated the Covenants by constructing a Recreational Structure within the 25-foot setback. Plaintiff later amended his complaint to specify that the Recreational structure complained of “consists of a pool, fenced pool equipment (pump, filters, and pipes), and a pool cabana,” and that “the pool equipment, equipment fencing, and pool cabana are all within the 25’ setback area.” Plaintiff sought declaratory judgment that Defendants had violated the Covenants and injunctive relieve mandating removal or relocation of the Recreational Structure. Defendants answered, denying all material allegations, and later amended their answer to include counterclaims that are not subject to this appeal. Both parties moved for summary judgment, each asserting that there were no issues of material fact and that judgment in their favor was proper as a matter of law; the trial court denied the motions.

The case was tried before a jury in April 2023. At the close of Plaintiff’s evidence, Defendants moved for a directed verdict, which was denied. At the close of all the evidence, Plaintiff affirmatively declined to move for a directed verdict. The jury returned a verdict indicating that neither the Cabana nor the pool equipment was a Recreational Structure and therefore neither was subject to the 25-foot setback, and the trial court entered final judgment accordingly. Plaintiff timely appealed.

II. Discussion

A. Summary Judgment

Plaintiff argues that the trial court erred by denying his motion for summary judgment when there were no issues of material fact and he was entitled to judgment

as a matter of law.

We first note that there was considerable conversation at the pretrial conference amongst Plaintiff's counsel, Defendants' counsel, and the trial judge about the propriety of deciding on summary judgment whether, as a matter of law, the Covenants require the Cabana and pool equipment to be located outside the 25-foot setback for Recreational Structures. Plaintiff's counsel stated that he and Defendants' counsel "both felt it was appropriate for summary judgment at the time" their motions for summary judgment were heard, "but we didn't -- neither one of us were successful at getting there."

We agree that Plaintiff's declaratory judgment claim should have been decided on summary judgment. However, "the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). As a final judgment was rendered in a trial on the merits here, this Court may not review the trial court's denial of summary judgment. Accordingly, Plaintiff's argument is dismissed.

B. Admission of Evidence

Plaintiff argues that the trial court erred by admitting incompetent evidence at trial.

1. Standard of review

"In general, appellate courts review a trial court's evidentiary rulings according to an abuse of discretion standard." *Holland v. French*, 273 N.C. App. 252,

258-59, 848 S.E.2d 274, 280 (2020) (citations omitted). However, “the trial court’s articulation and application of the relevant legal standard is a legal question that is reviewed de novo.” *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104, 876 S.E.2d 436, 447 (2022) (citation omitted). “[W]hatever the standard of review, an error of law is an abuse of discretion.” *Id.* (quotation marks and citation omitted).

Additionally, “[i]n civil cases, the burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.” *N.C. Dep’t of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483-84, 810 S.E.2d 217, 222 (2018) (quotation marks and citation omitted). To demonstrate prejudice, the appellant must show “a reasonable probability that the jury would have reached a more favorable verdict” had the error not been committed. *Id.* at 484, 810 S.E.2d at 222 (quotation marks and citation omitted).

2. Analysis

The issue here is whether the Cabana and/or the pool equipment as fenced are Recreational Structures as defined by the Covenants and therefore subject to a 25-foot setback.

“Covenants accompanying the purchase of real property are contracts which create private incorporeal rights . . . to use or limit the use of the purchased property.” *Armstrong v. Ledges Homeowners Ass’n*, 360 N.C. 547, 554-55, 633 S.E.2d 78, 85

(2006) (citations omitted). “As with any contract, when interpreting a restrictive covenant, the fundamental rule is that the intention of the parties governs.” *Wise v. Harrington Grove Cmty. Ass’n*, 357 N.C. 396, 401, 584 S.E.2d 731, 736 (2003) (quotation marks and citation omitted). This intention “must be gathered from study and consideration of [a]ll the covenants contained in the instrument or instruments creating the restrictions.” *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) (citation omitted). “Presumably, the words which the parties select were deliberately chosen” *Briggs v. Am. & Efird Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960) (citations omitted). Thus, “[w]here the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law, and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written[.]” *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975) (citation omitted).

Furthermore, “[c]ovenants and agreements restricting the free use of property are strictly construed against limitations upon such use.” *Long*, 271 N.C. at 268, 156 S.E.2d at 239 (citation omitted). Thus, “[d]oubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted[.]” *Id.* (citation omitted).

Here, the Covenants provide the following regarding Recreational Structures:

11. Recreational Structures. No swimming pool, hot

tub, jacuzzi, basketball court, play area, or tennis court (“Recreational Structures”) will be installed or erected on any Lot until the plans and specifications for same showing the nature, kind, shape, materials, height, and location of the same will have been approved by the ARC. No Recreational Structure will be constructed on a Lot in front of the dwelling. No swimming pool may protrude above the finish grade of the adjoining ground. The pool equipment must be screened, housed, or stored underground. No basketball goals may be affixed to a house or garage.

A plot plan showing the location of a Recreational Structure must be submitted to the ARC showing any and all proposed grading and screening. Design and color of fencing materials should blend naturally into the surrounding area and plant materials should be added where necessary to soften the visual impact. Surface colors must be muted and not highly reflective. Lights for Recreational Structures will be permitted as long as the light does not intrude on adjacent property and must be turned off by 10:30 PM. Recreational Structures must be set back a minimum of twenty-five feet (25”) from any property line.

The Covenants unambiguously define a Recreational Structure as a “swimming pool, hot tub, jacuzzi, basketball court, play area, or tennis court[.]” Neither the Cabana nor the pool equipment is specifically included in this list, and the list cannot be read to include them. *See Martin*, 26 N.C. App. at 508, 216 S.E.2d at 457-58 (“Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law, and the court may not . . . insert words into it, but must construe the contract as written[.]” (citation omitted)). Furthermore, even if there were doubt that this list is exhaustive and exclusive, such doubt would be resolved in favor of the unrestricted use of property. *See Long*, 271

N.C. at 268, 156 S.E.2d at 239. Accordingly, as a matter of law, the Cabana and the pool equipment are not Recreational Structures subject to the 25-foot setback.

Because the Cabana is not a Recreational Structure pursuant to the Covenants as a matter of law, there is no reasonable probability that a more favorable verdict would have been reached had the challenged evidence not been admitted. Thus, any error in admitting incompetent evidence was not prejudicial. *See Mission Battleground Park*, 370 N.C. at 483-84, 810 S.E.2d at 222.

III. Conclusion

For the foregoing reasons, we dismiss Plaintiff's argument that the trial court erred by failing to grant him summary judgment on his declaratory judgment claim and affirm the trial court's final judgment.

DISMISSED IN PART; AFFIRMED IN PART.

Chief Judge DILLON and Judge STADING concur.

Report per Rule 30(e).