Andrew Bekken
v.
Greystone Residential Association, Inc., and Greystone Architectural Review Committee

2150365

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016
September 16, 2016

Appeal from Shelby Circuit Court
(CV-14-900090)

DONALDSON, Judge.

Andrew Bekken appeals from the judgment of the Shelby Circuit Court ("the trial court") granting the Greystone Residential Association, Inc. ("the Association"), and the Greystone Architectural Review Committee ("the Committee") an injunction to enforce residential restrictive covenants. As a part of its judgment, the trial court determined that the action was not subject to the six-year limitations period provided in § 6-2-34(6), Ala. Code 1975, concerning "[a]ctions for the use and occupation of land." We determine that actions to enforce restrictive covenants are subject to that statute of limitations. We therefore reverse the judgment and remand the cause to the trial court for further proceedings.

Facts and Procedural History

In July 2007, Bekken purchased a residence on 1064 Greymoor Road ("the property") in the Greystone subdivision ("the subdivision") located in Shelby County. The pool area and backyard of the property adjoins the Greystone Founders golf course around which the subdivision was developed. It is undisputed that the property is subject to the provisions of the "Greystone Residential Declaration of Covenants, Conditions, and Restrictions" ("the restrictive covenants"). The Committee acts on behalf of the Association in considering proposed plans to alter exterior features of properties in the subdivision and in enforcing compliance with the restrictive covenants. After purchasing the property, Bekken removed a wall enclosing the pool area on the property and made other improvements on the property.

On January 23, 2014, the Association and the Committee filed a complaint against Bekken, alleging that Bekken had removed the wall enclosing the pool area on the property and had materially altered the landscaping on the property without the approval of the Committee as required by the restrictive covenants. The Association and the Committee initially sought declaratory relief and monetary damages in addition to injunctive relief and attorney fees. Bekken filed an answer generally denying the allegations in the complaint and asserting, among others, the defenses of laches, statute of limitations, and unclean hands. The claims for declaratory relief and monetary damages were later dismissed by the Association and the Committee.

On May 14, 2015, the Association and the Committee filed a motion for a summary judgment, arguing that Bekken had violated the restrictive covenants by removing the wall around the pool area, by expanding the concrete deck around the pool, and by altering the landscaping on the property without approval of the Committee. In materials filed in opposition to the motion, Bekken argued, among other things, that the

action was barred by the six-year statute of limitations set out in § 6-2-34. The motion for a summary judgment was denied.

The trial court conducted a bench trial on October 21, 2015, and November 5, 2015, at which it received ore tenus testimony and documentary exhibits. The evidence established that the 2007 deed conveying the property to Bekken contained the notation that the conveyance was subject to "all matters of public record, including, but not limited to easements, restrictions of record, and other matters which may be viewed by observation." The restrictive covenants had been recorded in 1990 in the Shelby County Probate Court. The restrictive covenants provide that all alterations to the exterior of a property located within the subdivision, which includes the property, must be approved by the Committee; specifically, § 5.05 of the restrictive covenants provides, in pertinent part:

> "5.05 Approval of Plans and Specifications.
>
> "(a) IN ORDER TO PRESERVE THE ARCHITECTURAL AND AESTHETIC APPEARANCE AND THE NATURAL SETTING AND BEAUTY OF THE DEVELOPMENT, TO ESTABLISH AND PRESERVE A HARMONIOUS DESIGN FOR THE DEVELOPMENT AND TO PROTECT AND PROMOTE THE VALUE OF THE PROPERTY, THE LOTS, THE DWELLINGS, THE MULTI-FAMILY AREAS AND ALL IMPROVEMENTS THEREON, NO IMPROVEMENTS OF ANY NATURE SHALL BE COMMENCED, ERECTED, INSTALLED, PLACED, MOVED ONTO, ALTERED, REPLACED, RELOCATED, PERMITTED TO REMAIN ON OR MAINTAINED ON ANY LOT OR DWELLING BY ANY OWNER OR MULTIFAMILY ASSOCIATION, OTHER THAN DEVELOPER, WHICH AFFECT THE EXTERIOR APPEARANCE OF ANY LOT OR DWELLING UNLESS PLANS AND SPECIFICATIONS THEREFOR HAVE BEEN SUBMITTED TO AND APPROVED BY [the Committee] IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF SECTION 5.05(b) BELOW. WITHOUT LIMITING THE FOREGOING, THE CONSTRUCTION AND INSTALLATION OF ANY ... DECKS, PATIOS, COURTYARDS, SWIMMING POOLS, ... WALLS, FENCES, ... GARAGES OR ANY OTHER OUTBUILDINGS, SHALL NOT BE UNDERTAKEN, NOR SHALL ANY EXTERIOR ADDITION TO OR CHANGE OR ALTERATION BE MADE (INCLUDING, WITHOUT LIMITATION, PAINTING OR STAINING OF ANY EXTERIOR SURFACE) TO ANY DWELLING OR IMPROVEMENTS, UNLESS THE PLANS AND SPECIFICATIONS FOR THE SAME HAVE BEEN SUBMITTED TO AND APPROVED BY [the Committee] IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF SECTION 5.05(b) BELOW.
>
> "(b) [The Committee] is hereby authorized and empowered to approve all plans and specifications and the construction of all Dwellings

and other Improvements on any part of the Property. Prior to the commencement of any Dwelling or other Improvements on any Lot, Dwelling or Multi-family Area, the Owner thereof shall submit to [the Committee] plans and specifications and related data for all such improvements, which shall include the following:

> "(i) Two (2) copies of an accurately drawn and dimensioned site development plan indicating the location of any and all Improvements, including, specifically, the Dwelling to be constructed on said Lot, the location of all driveway, walkways, decks, terraces, patios and outbuildings and the relationship of the same to any set-back requirements applicable to the Lot or Dwelling.
>
> "....
>
> "(iii) Two (2) copies of written specifications and, if requested by [the Committee], samples indicating the nature, color, type, shape, height and location of all exterior materials to be used in the construction of the Dwelling on such Lot or any other Improvements thereto, including, without limitation, the type and color of all brick, stone, stucco, roofing and other materials to be utilized on the exterior of a Dwelling and the color of paint or stain to be used on all doors, shutters, trim work, eaves and cornices on the exterior of such Dwelling.
>
> "....
>
> "(v) Three (3) copies of a landscaping plan prepared and submitted in accordance with the provisions of Section 5.06 below.
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> "(vi) Such other plans, specifications or other information or documentation as may be required by the Architectural Standards.

"(c) [The Committee] shall, in its sole discretion, determine whether the plans and specifications and other data submitted by any Owner for approval are acceptable. One copy of all plans, specifications and related data so submitted to [the Committee] shall be retained in the records of [the Committee] and the other copy shall be returned to the Owner or Multi-Family Area Association submitting the same marked 'approved,' 'approved as noted' or 'disapproved'. [The Committee] shall establish a fee sufficient to cover the expense of reviewing plans and related data and to compensate any consulting architects, landscape architects, designers, engineers, inspectors and/or attorneys retained in order to approve such plans and specifications and to monitor and otherwise enforce the terms hereof. Notwithstanding anything provided herein to the contrary, an Owner may make interior improvements and alterations within his Dwelling that do not affect exterior appearance and a MultiFamily Association may make interior improvements and alterations within any buildings or structures it maintains or owns that do not affect exterior appearance and, in each case, without the necessity or requirement that [the Committee] approval or consent be obtained.

"(d) [The Committee] shall have the right to disapprove any plans and specifications upon any ground which is consistent with the objectives and purposes of this Declaration, including purely aesthetic considerations, any failure to comply with any of the provisions of this Declaration or the Architectural Standards, failure to provide requested information, objection to exterior design, appearance or materials, objection on the ground of incompatibility of any such proposed improvement with the scheme of development proposed for the Development, objection to the location of any proposed Improvements on any such Lot or MultiFamily Area, objection to the landscaping plan for such Lot or Dwelling, objection to the color scheme, finish, proportions, style of architecture, height, bulk or appropriateness of any Improvement or any other matter which, in the sole judgment of [the Committee], would render the proposed Improvement inharmonious with the general plan of development contemplated for the Development. [The Committee] shall have the right to approve any submitted plans and specifications with conditions or stipulations by which the Owner of such Lot or Dwelling shall be obligated to comply and must be incorporated into the plans and specifications for such Improvements to one particular Lot, Dwelling or Multi-Family Area shall not be deemed an approval or otherwise obligate [the Committee] to approve similar plans and specifications or any of the features or

> elements for the Improvements for any other Lot, Dwelling or Multi-Family Area within the Development.
>
> "(e) In the event [the Committee] fails to approve in writing any such proposed plans and specifications within forty-five (45) days after such plans and specifications have been submitted, then the plans and specifications so submitted will be deemed to have been disapproved.
>
> "(f) Any revisions, modifications or changes in any plans and specifications previously approved by [the Committee] must be approved by [the Committee] in the same manner specified above."

(Capitalization in original.) Any landscaping work on a property subject to the restrictive covenants also must be approved by the Committee:

> "5.06 Landscaping Approval.
>
> "(a) In order to preserve, to the extent practicable, the natural landscaping and plant life currently situated on the Property and in order to enhance the aesthetic appearance of the Property, no landscaping, grading, excavation or fill work of any nature shall be implemented or installed by any Owner or Multi-Family Association, other than Developer, on any Lot, Dwelling or Multi-Family Area unless and until landscaping plans therefore have been submitted to and approved by [the Committee]. The provisions of Section 5.05 above regarding the method that such plans are to be submitted to [the Committee], the time for approval or disapproval of the same and the method of approving modifications or changes thereto shall be applicable to such landscaping plans.
>
> "(b) In addition to the requirements of Section 5.06(a) above, the landscaping plan for any Lots, Dwellings or MultiFamily Areas adjacent to the Golf Club Property shall also be subject to the terms of the Reciprocal Easement Agreement, which require, among other things, a natural, undisturbed buffer of thirty (30) feet adjacent to the Golf Club Property."

The alteration of previously approved improvements or landscaping without the approval of the Committee is prohibited:

> "5.07 Construction Without Approval. If (a) any Improvements are initiated, installed, maintained, altered, replaced or relocated on any Lot, Dwelling or Multi-Family Area without [the Committee] approval of the plans and specifications for the same or (b) [the Committee] shall determine that any approved plans and specifications for any Improvements or the approved landscaping plans for any Lot, Dwelling or MultiFamily Area are not being complied with, then, in either event, the Owner of such Lot, Dwelling or Multi-Family Area shall be deemed to have violated this Declaration

> and [the Committee] shall have the right to exercise any of the rights and remedies set forth in Section 5.13 below."

Section 6.33(f) of the restrictive covenants requires the Committee's approval regarding the alteration of the vegetation or the construction of a swimming pool within a 50-foot buffer zone surrounding the golf course:[1]

> "Notwithstanding anything provided to the contrary in this Section 6.33, (i) a fifty (50) foot natural, undisturbed buffer free from any Improvements of any nature, shall remain and at all times be maintained along all portions of each of the Fifth Sector, Phase I Lots (as defined in the Eighth Amendment to Greystone Residential Declaration of Covenants, Conditions and Restrictions dated as of July 16, 1993 and recorded in the Probate Office of Shelby County, Alabama) which abut and are contiguous to the Golf Club Property and (ii) no trees, shrubbery, bushes or other vegetation lying within the aforesaid fifty (50) foot natural, undisturbed buffer area may be cut, pruned, removed or mutilated without the prior written consent of [the Committee]. Furthermore, each Owner, by acceptance of a deed to any of the Fifth Sector, Phase I Lots, acknowledges and agrees that [the Committee] may require additional landscaping, berming and screening to be placed, replaced and maintained in and along the aforesaid fifty (50) foot natural undisturbed buffer area and that, unless expressly approved in writing by [the Committee] and the Club Owner, no fences, walls, berms, mounds, barriers, decks, terraces, patios, tennis courts, swimming pools, outdoor furniture, swingsets, outdoor recreational facilities and equipment and any other devices, equipment, tools, machinery, buildings, structures or appurtenances of any nature shall be placed or permitted to remain in or upon the aforesaid fifty (50) foot natural, undisturbed buffer areas."

Section 5.13 of the restrictive covenants provides for the following remedies in the event of a breach of the restrictive covenants:

> "5.13 Enforcement and Remedies. In the event any of the provisions of this Article V are breached or are not otherwise being complied with in all respects by any Owner or Occupant or the respective family members, guests, invitees, agents, employees or contractors of any Owner or Occupant, then [the Committee] and the Association shall each have the right, at their option, to (a) enjoin any further construction on any Lot or Dwelling and require the removal or correction of any work in place which does not comply with the plans and specifications approved by [the Committee] for such Improvements and/or (b) through their designated agents, employees, representatives and independent contractors, enter upon such Lot or Dwelling and take all action necessary to extinguish such violation or breach. All costs and expenses incurred by [the Committee] or

> the Association in enforcing any of the provisions of this Article V, including, without limitation, attorneys' fees, court costs, cost and expenses of witnesses, engineers, architects, designers, land planners and any other persons involved in the correction of nonconforming work, the completion of uncompleted work or in any judicial proceeding, together with any other costs or expenses incurred by [the Committee] or the Association in causing any Owner or such Owner's contractors, agents or invitees to comply with the terms and provisions of this Article V, shall be paid by such Owner, shall constitute an individual Assessment to such Owner pursuant to Section 8.06 below and, if the same is not paid when due, shall be subject to the lien provided for in Section 8.09 below and be subject to foreclosure as provided for therein. Notwithstanding anything provided herein to the contrary, the rights and remedies of [the Committee] and the Association set forth herein shall not be deemed exclusive of any other rights and remedies which [the Committee] or the Association may exercise at law or in equity or any of the enforcement rights specified in Sections 6.37, 8.09, 11.01, 11.02 and 11.03 below."

The testimony at trial showed that in 2000 the previous owner of the property built a swimming pool, a concrete deck around the pool, and a wall enclosing the pool area with the advance approval of the Committee in compliance with the restrictive covenants. The deck extended approximately four feet from the edge of the pool to the wall. The wall was 48 inches in height and had a finish matching the exterior walls of the house located on the property. The Committee's approval included a 10-foot variance from the otherwise required 50-foot buffer zone extending from the golf course.

At the time Bekken purchased the property in 2007, the exterior walls of the house were clad with an exterior insulation and finishing system ("EIFS"). Bekken submitted a plan to the Committee to replace the EIFS with brick. The Committee approved the plan on September 25, 2007. The documentation in the record shows that the plan submitted by Bekken included changes only to the house and not to the pool area or the wall enclosing the pool area.

Bekken testified that, in December 2007, he and his sons removed the wall enclosing the pool area and cut down trees in the area behind where the wall had been. A picture dated January 20, 2008, shows the pool area on the property without the wall that had been constructed by the previous owner. Bekken testified that in the spring of 2008 he extended the concrete deck further from the pool, installed a wrought-iron fence in place of the wall, and graded the dirt in the area behind the area where the wall had existed. Bekken testified that he made those improvements out of concern for the safety of his children, who were jumping off the wall into the pool, and to avoid violating the building code for Shelby County. According to Bekken's testimony, replacing the exterior of the wall with brick would have extended the wall in the direction of the pool and thereby violated the Shelby County building code requiring a certain distance between the pool and the wall. Bekken testified that he also made landscaping changes in the spring of 2008, including placing sod and replacing the

existing shrubbery and plants with different shrubbery in the area behind where the wall had been.

Steve Janney is a member of the Committee and is the director of operations of the Association. Janney's responsibilities include ensuring that property owners comply with the restrictive covenants. Bekken testified that, before removing the wall, he and Janney orally agreed on a plan for the removal of the wall and on the landscaping alterations, including the placement of sod in the area behind the swimming pool. Bekken testified that he submitted a written plan to the Committee that described the planned removal of the wall, the installation of a fence, the expansion of the pool deck, the grading of the backyard, and the placement of sod. Although Bekken claimed that he had received approval for the plan from the Committee, he was unable to produce written evidence of such an approval.

Janney testified that he had never approved of the plan Bekken claimed to have submitted, and that the Committee had no records of the submission or approval of such a plan. Janney testified that his discussions with Bekken in 2007 were related only to the proposed improvements to the exterior of the house and did not include the pool area, the wall, or alterations to Bekken's backyard.

Janney testified that he met with Bekken on August 16, 2008, at the property after learning of the removal of the wall around the pool area. Bekken testified that Janney never expressed disapproval of the removal of the wall during that meeting. Janney testified to telling Bekken that he needed to restore the wall, that the wrought-iron fence could not be approved for any properties within the buffer zone of the golf course, and that the plants placed by Bekken behind the fence needed to be replaced. Bekken and Janney both testified that they had discussed the placement of sod. Janney testified that Bekken showed him a sketch of the landscaping changes and that he told Bekken to submit the landscaping proposal for approval by the Committee. Janney testified that the landscaping "had nothing to do with the wall."

Janney testified regarding the Committee's process for reviewing proposed improvement plans, which is outlined in a document titled "Greystone Residential Architectural and Construction Standards." That document declares that the Committee has the right to enter and inspect properties "at any time before, during, and immediately upon completion of any [improvements]." Janney testified that the last step of the review process involves a final inspection of the improvements by him on behalf of the Committee. Janney testified that, although he was responsible for those inspections, he did not inspect the property immediately after the approved plan for replacing the exterior walls of the house was completed.

Bekken and Janney testified regarding a number of letters sent to Bekken on behalf of the Association requesting that he replace the wall that had been removed from his property, beginning with a letter dated June 10, 2009. In that letter, Janney stated: "If this work is not completed by August 3, 2009, [the Committee] will turn this item over to our attorneys." In a letter dated November 2, 2009, an attorney who was representing the Association at that time demanded that Bekken immediately rebuild the wall on the property in accordance with the previous owner's plan that had been approved for the construction of the pool. In a letter dated November 17, 2010, another attorney representing the Association demanded that Bekken immediately submit to the Committee a plan to rebuild the wall. On January 7, 2011, Bekken sent an e-mail to that attorney, stating: "[W]e do not have any funds we can apply to addressing the compliance issue. I am aware of the situation and you have my word that I will do whatever I can whenever I can." In a letter dated September 30, 2013, Janney requested Bekken's compliance

regarding a number of items, including the reconstruction of the wall. In a letter dated November 18, 2013, counsel for the Association again demanded that Bekken provide a plan to the Committee for the replacement of the wall. Counsel also stated that appropriate action would be taken to enforce the restrictive covenants, including potential litigation if no action was taken within 21 days of the date of the letter.

At the conclusion of the trial, Bekken made a motion for a judgment pursuant to Rule 52(c), Ala. R. Civ. P. ("If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue ...."). Among other arguments, Bekken contended that the six-year statutory limitations period set out in § 6-2-34, which he asserted was applicable to the action had expired. The trial court denied the motion.

On December 7, 2015, the trial court entered a judgment in favor of the Association and the Committee. In the judgment, the trial court found (1) that the restrictive covenants applied to the property; (2) that the wall around the pool area on the property had been removed, the pool deck had been extended, a wrought-iron fence had been installed, the landscaping had been altered, and new sod had been laid; (3) that those improvements had been made without approval from the Committee in violation of the restrictive covenants; (4) that the removal of the wall and the installation of the fence without approval were each a separate violation of the restrictive covenants; and (5) that Bekken had had actual notice of the restrictive covenants. The trial court also determined that the six-year statutory limitations period set out in § 6-2-34 did not apply to actions to enforce restrictive covenants and that the doctrine of laches did not bar the action. The trial court further determined that the relative-hardship test generally applicable in injunction cases involving the enforcement of restrictive covenants did not apply because of Bekken's "unclean hands" and that, instead, the presumption in favor of irreparable harm resulting from the violation of restrictive covenants applied. See Lange v. Scofield, 567 So. 2d 1299, 1302 (Ala. 1990) (adopting the relative-hardship test and holding that a restrictive covenant will not be enforced upon a determination that doing so would subject the defendant to great hardship or inequitable consequences); Maxwell v. Boyd, 66 So. 3d 257, 261 (Ala. Civ. App. 2010) (holding that relative-hardship test did not apply if the defendant had "unclean hands," i.e., if the defendant had knowledge of a restrictive covenant before violating it by constructing an improvement); and Grove Hill Homeowners' Ass'n, Inc. v. Rice, 90 So. 3d 731, 739 (Ala. Civ. App. 2011) ("The law presumes irreparable harm from the breach of a restrictive covenant regardless of whether the breach actually enhances the value of the subject property."). The trial court granted injunctive relief and ordered Bekken to submit a plan to the Committee for the removal of the wrought-iron fence around the pool area, the construction of a wall enclosing the pool area that is at least 48 inches in height and is finished with brick matching the exterior of the house, and the creation of new landscaping, with sufficient new plants, between the new wall and the golf course. The trial court ordered the Committee to review any such plan submitted by Bekken or, if Bekken failed to submit one within 14 days, to prepare its own plan for Bekken to follow. The judgment assigned the cost of implementing the plan to Bekken. The judgment further granted the request of the Association and the Committee for attorney fees, as provided within the restrictive covenants, the amount of which was to be determined at a future hearing.

On January 8, 2015, the Association and the Committee filed a document with the trial court stating that Bekken had failed to submit to the Committee a plan for proposed improvements to the property, as required by the judgment, and that, accordingly, the Committee had prepared and approved a plan of its own. That plan included two parts. Regarding the enclosure of the pool area, a wall of 48 inches in height and made of material matching the brick house was to be built 10 feet from the edge of the pool. Regarding the landscaping, the backyard area between the proposed wall and the rear property line was to contain mulch with pine straw and particular types of trees and shrubbery in specific locations.

On January 19, 2016, Bekken filed a notice of appeal from the December 7, 2015, judgment to the supreme court. The supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975. The Association and the Committee have filed a motion to dismiss the appeal as having been untimely filed.

Discussion

As a threshold matter, we consider the motion to dismiss the appeal filed by the Association and the Committee, who argue that Bekken failed to timely appeal from the judgment. The Association and the Committee assert that the judgment is an interlocutory order granting an injunction. Rule 4(a)(1), Ala. R. App. P., provides, in relevant part:

> "Except as otherwise provided herein, in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3[, Ala. R. App. P.,] shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure. In appeals from the following orders or judgments, the notice of appeal shall be filed within 14 days (2 weeks) of the date of the entry of the order or judgment appealed from: (A) any interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction ...."

"[T]he 14-day limit prescribed by Rule 4(a)(1)(A), Ala. R. App. P., applies only to interlocutory orders granting an injunction--orders that are not otherwise appealable." Jefferson Cty. Comm'n v. ECO Pres. Servs., L.L.C., 788 So. 2d 121, 125 (Ala. 2000).

> "An order that 'adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties' and 'is subject to revision at any time before entry of [a] judgment adjudicating all the claims and the rights and liabilities of all the parties.' Lunceford[v. Monumental Life Ins. Co., 641 So. 2d 244,] 246 [(Ala. 1994)] (citing, Rule 54(b), Ala. R. Civ. P., and Hallman v. Marion Corp., 411 So. 2d 130 (Ala. 1982)). Such an order is interlocutory unless the trial court certifies the judgment as final pursuant to Rule 54(b). Id."

Crane v. American Cast Iron Pipe Co., 682 So. 2d 1389, 1390 (Ala. Civ. App. 1996). "[A] final judgment is a 'terminal decision which

demonstrates there has been a complete adjudication of all matters in controversy between the litigants.'" Dees v. State, 563 So. 2d 1059, 1061 (Ala. Civ. App. 1990) (quoting Tidwell v. Tidwell, 496 So. 2d 91, 92 (Ala. Civ. App. 1986)). However, "'[a] decision on the merits' of the claims asserted by the parties is a '"final decision"' even when 'there remains for adjudication a request for attorney's fees attributable to the case.'" Wolfe v. JPMorgan Chase Bank, N.A., 142 So. 3d 697, 698 (Ala. Civ. App. 2013) (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202-03 (1988)); see Blankenship v. Blankenship, 963 So. 2d 112, 114 n. 2 (Ala. Civ. App. 2007) ("[A]n unadjudicated claim for an attorney's fee does not affect the finality of a judgment.").

After having conducted a trial, the trial court entered a judgment adjudicating the claim of the Association and the Committee on its merits. The trial court fashioned an injunction requiring either that Bekken submit a plan meeting certain conditions for the approval of the Committee or, if Bekken failed to do so in 14 days, that the Committee formulate the plan. The injunction then required Bekken to implement the plan at his expense. On appeal, the parties dispute only whether granting injunctive relief was warranted and not the trial court's fashioning of that relief. The injunction as ordered in the judgment did not require further action by the trial court, and we interpret the judgment as a final judgment issuing a permanent injunction rather than as an interlocutory order issuing a preliminary injunction. See City of Gadsden v. Boman, 143 So. 3d 695, 703 (Ala. 2013) ("A permanent injunction is '[a]n injunction granted after a final hearing on the merits.' Black's Law Dictionary 855 (9th ed. 2009), whereas a preliminary injunction is '[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case."). The only matter left for the trial court to determine was the amount of attorney fees to award to the Association and the Committee. That unadjudicated amount did not affect the finality of the judgment. See Wolfe, supra. Bekken therefore appealed from a final judgment. See Suther v. Jefferson Cty. Bd. of Health, 456 So. 2d 769, 771 (Ala. 1984) (interpreting injunction as permanent and holding that the parties had 42 days to appeal the order issuing the injunction).

Rule 26(a), Ala. R. App. P., provides, in relevant part:

> "In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, Sunday, or legal holiday .... As used in this rule 'legal holiday' includes New Year's Day, Birthday of Martin Luther King, Jr., Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the governor of the state, by the chief justice, by the legislature, or by the President or the Congress of the United States."

See § 1-1-4, Ala. Code 1975 (providing for the exclusion of the last day from the computation of time required by law if that day is a legal holiday). Rule 4(a), Ala. R. App. P., sets the period in which to file a notice of appeal at 42 days. The 42-day period after the entry of the judgment on December 7, 2015,

ended on the birthday of Martin Luther King, Jr., January 18, 2016. See § 1-3-8(b)(7), Ala. Code 1975, ("Martin Luther King, Jr.'s birthday--the third Monday in January."). Pursuant to Rule 26, Ala. R. App. P., the period for Bekken to appeal extended to the next day. Therefore, Bekken filed a timely notice of appeal on January 19, 2016, and we will consider the merits of his appeal.

The claim of the Association and the Committee against Bekken is based entirely on Bekken's purported violations of the restrictive covenants. Bekken argues that this action was time-barred by § 6-2-34, Ala. Code 1975, which states, in relevant part:

> "The following must be commenced within six years:
>
> > "(4) Actions founded on promises in writing not under seal;
> >
> > "....
> >
> > "(6) Actions for the use and occupation of land."

The trial court found that § 6-2-34 is inapplicable to an equitable action. We agree that equitable principles govern the enforcement of restrictive covenants. E.g. Lange v. Scofield, 567 So. 2d 1299, 1302 (Ala. 1990); AmSouth Bank, N.A. v. British W. Florida, L.L.C., 988 So. 2d 545, 554 (Ala. Civ. App. 2007). There is, however, a lack of uniformity among the states regarding whether statutes of limitations bar actions such as the one on appeal, as stated in 20 Am. Jur. 2d Covenants, Etc. § 265 (2015):

> "Under some authority, an action to enforce restrictive covenants is not subject to a statute of limitations defense, though an applicable statute of limitations may limit the time period for which monetary damages may be recovered. Other authority holds that actions to enforce restrictive covenants are controlled by statutes of limitation, including a jurisdiction's statute of limitations for legal or equitable actions on contract."

(Footnotes omitted.) It appears that the question whether statutes of limitations are applicable to actions to enforce restrictive covenants depends to a great extent upon the language used in the statutes of each state and the caselaw of each jurisdiction. In Alabama, the "various statutes of limitation are to be applicable to all actions seeking the type of relief heretofore granted only by courts of equity." Lipscomb v. Tucker, 294 Ala. 246, 258, 314 So. 2d 840, 850 (1975). See § 6-2-1, Ala. Code 1975 ("This chapter shall apply to and govern claims in all courts, and shall apply whether the claim upon which an action is commenced is based upon a debt or obligation of either legal or equitable nature."). Accordingly, because the claim against Bekken is based on covenants restricting "the use and occupation of land," we determine that the six-year time limitation of § 6-2-34(6) applies to this type of case.

The next question is when did the statute of limitations begin to run on the claim of the Association and the Committee against Bekken.

> """The very basic and long settled rule of construction of our courts is that a statute of limitations begins to run in favor of the party liable from the time the cause of action 'accrues.'

> The cause of action 'accrues' as soon as the party in whose favor it arises is entitled to maintain an action thereon.'"'"

Payton v. Monsanto Co., 801 So. 2d 829, 835 (Ala. 2001)(quoting Ex parte Floyd, 796 So. 2d 303, 308 (Ala. 2001), quoting in turn Garrett v. Raytheon Co., 368 So. 2d 516, 518-19 (Ala. 1979)).

Under the terms of the instruments applicable to this case, a violation of the restrictive covenants occurs when an owner makes improvements to the exterior of a property unless plans and specifications for those improvements had been submitted and approved by the Committee. The restrictive covenants allow the Association or the Committee to take immediate action to enjoin work on improvements that has been commenced without approval of the Committee. Because the restrictive covenants allow for a remedy while the work on an improvement is ongoing, we conclude that a cause of action arose in this case when Bekken began making improvements without an approved plan by the Committee. The limitations period for the action began to run at that time. See Sierra Club v. Oklahoma Gas & Elec. Co., 816 F.3d 666, 674 (10th Cir. 2016) (holding that a cause of action accrued, for purposes of the applicable statute of limitations when the owner began modifying a boiler without obtaining a permit for modification of the boiler as required under Clean Air Act).

Bekken presented undisputed evidence that the removal of the wall around the pool area and the cutting down of some trees in the area behind where the wall had been occurred in December 2007, more than 6 years before the Association and the Committee filed their complaint on January 23, 2014. According to Bekken's uncontradicted testimony, the remainder of the improvements to the property were made between March 2008 and June 2008, which would be within the six-year limitations period of § 6-2-34(6). Because any cause of action based on Bekken's unapproved plans accrued when Bekken began work that was not approved by the Committee, the applicable limitations period had expired for any claim based on Bekken's unapproved plan to remove the wall and to cut down trees in 2007, pursuant to § 6-2-34(6). However, any claim based on unapproved improvements made to the property within six years of the filing of the complaint that were not a part of Bekken's unapproved plan at the time he removed the wall and cut down trees in 2007 could serve as the basis of a cause of action that is not time-barred.

The extent of Bekken's unapproved plan, beginning with the removal of the wall, and whether the plan included any or all of the improvements made in 2008 are factual questions for the trial court to determine. The judgment lacks findings of fact that would allow us to adequately address those issues, and the record contains conflicting evidence that may require credibility assessments. See Davis v. Davis, 108 So. 3d 1057, 1062 (Ala. Civ. App. 2012) (quoting Vestlake Cmtys. Prop. Owners' Ass'n v. Moon, 86 So. 3d 359, 367 (Ala. Civ. App. 2011), quoting in turn Miller v. Associated Gulf Land Corp., 941 So. 2d 982, 990 (Ala. Civ. App. 2005)) ("'"It was within the province of the trial court to consider the credibility of the witnesses, to draw reasonable inferences from their testimony and from the documentary evidence introduced at trial, and to assign such weight to various aspects of the evidence as it reasonably may have deemed appropriate...."'"). We therefore reverse the judgment and remand the cause to allow the trial court to make the necessary factual determinations from the evidence already presented and, if necessary, to conduct further proceedings consistent with this opinion. Accordingly, we pretermit discussion of Bekken's other arguments.[2]

REVERSED AND REMANDED.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.

Footnotes:

1. The restrictive covenants were amended in 1993 to add the requirements in section 6.33(f), including the 50-foot buffer zone surrounding the golf course for Phase I lots in the Fifth Sector of the subdivision. The deed conveying the property to Bekken indicates that the property is a Phase I lot in the Fifth Sector of the subdivision.

2. In addition to his statute-of-limitations argument, Bekken contends that the relative-hardship test precluded enforcement of the restrictive covenants, that the clean-hands doctrine was a defense to the action, and that the defense of laches applied.
