ERIC T. SMALL APPELLANT
v.
WEST VALE HOMEOWNERS' ASSOCIATION, INC. APPELLEE
NO. 2013-CA-000899-MR
Commonwealth of Kentucky Court of Appeals
JANUARY 9, 2015

NOT TO BE PUBLISHED

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 12-CI-00848

OPINION
AFFIRMING

BEFORE: CAPERTON,[1] COMBS AND VANMETER, JUDGES.

CAPERTON, JUDGE: Eric T. Small appeals from the findings of fact, conclusions of law, and final judgment entered by the McCracken Circuit Court on May 9, 2013, wherein the court found in favor of the West Vale Homeowners' Association, Inc. based upon a determination that the Association had not waived its right to enforce the setback restrictions. After a thorough review of the parties' arguments, the record, and the applicable law, we hereby affirm.

The matter on appeal relates back to litigation originally filed in April of 2010, involving a dispute between the Association and Small, culminating in this Court's opinion of *West Vale Homeowners' Ass'n, Inc. v. Small*, 367 S.W.3d 623, 625 (Ky. App. 2012) (hereinafter *West Vale I*), which we have set forth the facts therefrom:

> The West Vale subdivision consists of large, estate-style lots located along a private, dead-end road in Paducah, Kentucky. Each home located in the subdivision is valued in excess of $1,000,000. The lots in the subdivision are large, with Small's 3.6-acre lot being the smallest, and the largest measuring 6.3 acres. The original developer of West Vale imposed a series of restrictions upon the lots comprising the development. These restrictions, which appear of public record with the McCracken County Clerk, govern many aspects of property ownership within West Vale. Restrictions apply to aspects of building size, architectural approvals, and building setback lines. They also contain a provision affording property owners the opportunity to seek a waiver of one or more restrictions through the approval of a two-thirds vote of Homeowners' Association members. All of the lots were subject to a 100-foot minimum setback line from the street in front of the lot, as well as being subject to a 25-foot minimum side setback to the sidelines.
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> The matter at issue *sub judice* arose when Small applied for such a waiver. Seeking to construct a large addition onto his home, Small requested a waiver of the setback restriction for the side lot line on his property so as to extend the proposed addition approximately 11 feet into the setback. Small submitted a proposal to the Association as well as a copy of the drawing of the proposed addition. The members of the Homeowners' Association met, discussed the issue, and ultimately declined to grant the waiver. Nevertheless, Small decided to move forward with his planned addition. He notified the Homeowners' Association of his intent to proceed, obtained a building permit, and commenced construction on the addition.
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> Upon discovering Small's disregard of the restrictions, the Homeowners' Association commenced the instant litigation, and obtained interlocutory relief from the trial court barring Small's construction activities. In response to the action filed by the Homeowners' Association, Small conceded that his proposed addition

> would violate the restrictions, but defended his actions by stating that the Association had, through acquiescence to other violations, waived its ability to enforce the restrictions. After the Association initiated this action, Small hired Rick Tosh of Dummer Surveying & Engineering Services to perform a physical survey and inspection of the West Vale subdivision and, in particular, to look for structures which violated setback lines.
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> Tosh testified below that his crew found eleven separate violations of structures which were placed within the various setback lines on seven of the ten lots. As found by the trial court, these included retaining walls and other landscaping features, driveway pedestals and signs, portions of driveways, a porch column located ten inches into the setback, and a pool house located seven feet into the setback. There was never any evidence submitted below as to whether the proposed addition would have increased or diminished the value of Small's home.
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> Upon reviewing these other alleged violations of the restrictions, the trial court concluded that only one—the construction of a pool house—was material. The court went on to hold that a single material violation did not equate to a waiver of the Association's right to enforce the setback restriction, and granted the Association's motion for a permanent injunction. Below, Leigh Smith, the Association president, testified that the Association had not been aware of the various violations, but acknowledged that no action had been taken to require the particular residents to remove the stone porch canopy or the pool house.
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> In its original opinion, the trial court noted that should any property owner be aggrieved by the pool house violating the setback restriction, the owner could file suit over the issue. Facing the possibility of additional litigation, the owners of the pool house property petitioned the Association for a post hoc waiver of the setback restriction for their pool house. The Association met, considered the request, and granted the variance. In so doing, the Association found that granting the variance would not materially affect the quality and character of West Vale.
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> Approximately four months later, following the prehearing conference in the original appeal, Small moved the trial court to alter or amend its original opinion based upon the grant of the variance. Small maintained that by granting the variance, the Association waived its ability to enforce the restriction against Small. The trial court accepted that argument, and granted Small's request for relief under Kentucky Rules of Civil Procedure (CR) 60.02.

Id. at 624-25.

In *West Vale I*, this Court reversed the trial court's grant of Small's CR 60.02 motion on procedural grounds and noted that we were not opining as to the viability of a new action on the basis of the newly developed facts. *Id*. at 628 n.2.

Small then initiated the current litigation[2] on the basis of the Association's grant of the variance to the homeowners of the pool house and of the stone porch canopy, arguing that by granting a variance to twenty percent of the properties, the Association had waived its right to enforce the setback. The parties stipulated to the facts and submitted to the court all exhibits previously introduced at the prior evidentiary trial.

The court entered its findings of fact, conclusions of law, and final judgment entered by the McCracken Circuit Court on May 9, 2013, wherein, the court found in favor of the West Vale Homeowners' Association, Inc., based upon the determination that the Association had not waived its right to enforce the side setback restrictions.

In reaching this conclusion, the court noted that there was no dispute that the pool house, which the

variance for was granted by the Association, exceeded the side setback line by 6.95 feet; Small asserted that this would be the same distance his addition would exceed the side setback line. The prior testimony established that even with the addition, 140 feet would still exist between it and Small's next door neighbor. The court found there was no evidence that the Association knew there were violations of restrictions prior to Small's surveyor testifying; thus, it cannot be said that the Association waived the restrictions previously.

The court then opined that the other two violations of the side setback restriction, the pool house and the stone porch canopy, that had been retroactively granted a variance, were secondary[3] structures, which were barely visible from the road, unlike Small's addition to his primary house. The court noted that these two violations had gone unnoticed for years, whereas a $200,000.00 addition to the primary residence would certainly be noticeable. The court concluded that it cannot be said that the prior violations created a fundamental change to the neighborhood, since they went without being noticed. The restrictions are still of value to both current and future members of the Association. The court believed that the Association was arbitrarily enforcing the covenant against Small, but that did not render the covenant unenforceable. Thus, the court concluded that the Association had not waived its right to enforce the side setback restrictions. It is from this judgment that Small now appeals.

On appeal, Small argues: (1) this Court should review this matter *de novo*; (2) the Association, through its express waiver of other violations has acquiesced in objecting to Small's receiving the exact same waiver;[4] and (3) the trial court has made one finding in support of its decision which is not supported by the facts.[5]

In response, the Association argues: (1) the correct standard of review is whether the court's findings were clearly erroneous; (2) the court was correct to find that there had been no fundamental change in the character of the neighborhood so as to vitiate the subdivision restrictions; (3) Small ignores the relevant precedent and fails to show any change to the character of the neighborhood sufficient to vitiate the restrictions; and (4) it was not clear error for the court to determine that the waivers for the secondary structures were barely visible from the road.

At the outset, we note that interpretation or construction of restrictive covenants is a question of law; thus, we review this matter *de novo*. *Colliver v. Stonewall Equestrian Estates Ass'n, Inc*., 139 S.W.3d 521, 523 (Ky. App. 2003). The trial court's factual findings are reviewed under a clearly erroneous standard. CR 52.01 provides that the factual findings of a trial court are binding upon the appellate courts unless clearly erroneous. Findings of fact are not clearly erroneous if supported by substantial evidence. Substantial evidence is that evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men. *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999), citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). With this in mind, we turn to the determinative issue on appeal, namely, whether the setback restriction was unenforceable.

The trial court correctly determined that, "arbitrary enforcement of covenants does not necessarily render covenants unenforceable. Instead, [if] arbitrary enforcement has resulted in a fundamental change in the character of a neighborhood, [then] the purpose of the covenants may be defeated and accordingly become unenforceable." *Colliver v. Stonewall Equestrian Estates Ass'n, Inc*., 139 S.W.3d 521, 525 (Ky. App. 2003). Additionally, the right to enforce restrictive covenants may be lost by waiver, abandonment, or by a general change in the character of the neighborhood to which the covenants applied. *Bagby v. Stewart's Executor*, 265 S.W.2d 75, 77 (Ky. 1954). Correspondingly, the restrictive covenants may become unenforceable when the conditions have been disregarded over a period of years by the owners of most or all of the lots in the group. *Goodwin Bros. v. Combs Lumber Co*., 275 Ky. 114, 120 S.W.2d 1024 (Ky. 1938).

In looking at whether there has been a change in the character of the neighborhood, the court in *Logan v. Logan*, 409 S.W.2d 531, 534 (Ky. 1966), noted:

> In his finding of fact and conclusion as to the applicable law, the chancellor found there had been a change in the character of the neighborhood sufficient to abrogate the restrictions. The rule of law relative to this proposition was stated in *Bagby v. Stewart's Ex'r*,

> Ky., 265 S.W.2d 75 (1954) as follows:
>
> 'A change in the character of the neighborhood which was intended to be created by restrictions has generally been held to prevent their enforcement in equity, where it is no longer possible to accomplish the purpose intended by such covenant.'
>
> *See also Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W.2d 1024 (1938).The fact and circumstances must be examined to determine whether the change of the character of the neighborhood is sufficient to vitiate the restrictions; or, to state the question in other terms, whether the 'scheme of development' contemplated by the restrictions has been abandoned sufficiently to operate ipso facto as a vitiation of the restrictions.

More recently, this Court addressed a similar issue to that *sub judice* in *Colliver*, *supra*, wherein this Court noted that even if the Court were to find that appellees had waived the restrictions in regard to pools and fences, the same could not be said with the detached garage Colliver wished to build. *See Colliver* at 525. The *Colliver* court also noted "another reason that the Collivers' garage is not in the class as other improvements in the neighborhood is the magnitude of the garage built. It is noticeably larger than other improvements." *Id.* at 526.

In light of *Colliver*, we cannot say that the trial court *sub judice* erred in concluding that the proposed addition to Small's residence was certainly different than that of the previously unknown violations, namely, in the magnitude of the addition to the primary residence compared to the secondary structures. We likewise agree that while the Association appears to have arbitrarily enforced the restrictions, we cannot say that the arbitrary enforcement has resulted in a fundamental change in the character of a neighborhood. Thus, the Association was permitted to enforce the restriction. The trial court likewise having so concluded, we affirm.

Finding no reversible error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John T. Reed
Paducah, Kentucky

BRIEF FOR APPELLEE:

Nicholas M. Holland
Paducah, Kentucky

Footnotes:

[1.] Judge Caperton authored this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

[2.] We note that the current litigation was before a different division of the McCracken Circuit Court than that of *West Vale I*.

[3.] Small believes that the court was mistaken for utilizing this term. We disagree. It is readily apparent from the court's judgment what structures the court labeled as such and the inherent differences therein the court found.

[4.] In support of this argument, Small cites this Court to *Smith v. Shinn*, 350 P.2d 348 (Idaho, 1960). We do not find this case persuasive given our binding Kentucky jurisprudence.

[5.] We agree that the trial court's finding that the secondary structures which were in violation of the setback are barely visible from the road is not supported by substantial evidence based upon our review of the photographs in evidence. However, this singular erroneous finding is harmless error. Per CR 61.01, we decline to reverse on this ground.
