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IN THE SUPREME COURT OF THE STATE OF IDAHO

EAGLE SPRINGS HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff-Respondent,

v.

JAN RODINA.

Defendant-Appellant

Supreme Court Case No. 46323

APPELLANTS' REPLY BRIEF ON APPEAL

Appeal from the District Court of the Fourth Judicial District
for Ada County, State of Idaho, the Honorable Lynn G. Norton, presiding.

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I. REBUTTAL ARGUMENT

A. The Pleadings Addressed the Issue of the First Architectural Committee Application and the Issues of Good Faith and Fair Dealing.

Summary judgment is proper when:

[T]he **pleadings**, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. (Emphasis Added) *Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 680 (2011).

Contrary to the Assertion of the Plaintiff, that issues related to the first Architectural Committee Application were raised for the first time in the Appellant's Brief, the pleadings tell another story. The Plaintiff raised the issue of the relevant application at paragraphs 20, 21, 22, 23, 24 and 25. R. Vol. I., p 000011. Jan Rodina's Answer responded to those allegations at paragraphs 8, 9, 10, 11 and 12. R. Vol. I., p 000025. A liberal application of Idaho Rule of Civil Procedure 56 in favor of Jan Rodina allows him to argue the relevant issues on appeal. This is particularly important given the absolute truth of Jan Rodina's contention that the application was approved, as allowed by the relevant covenants, without conditions and that he did not conduct any unapproved work.

Similarly, Jan Rodina's Answer, raised the Affirmative Defense of good faith and abuse of power by the Plaintiff.

B. Restrictive Covenants are Disfavored¹ in the State of Idaho

In Idaho, restrictive covenants are recognized but disfavored. For this reason, this Court will not extend by implication any restriction not clearly expressed in the Covenants themselves and all ambiguities must be resolved in favor of the free use of land. Therefore, whether the Pinehaven Covenants are deemed unambiguous or ambiguous, this Court resolves this dispute in favor of the Brooks. *Pinehaven Planning Board v. Brooks*, 138 Idaho 826 (2003) 70 P.3d 664.

The Plaintiff's continued reliance on the "No Waiver of Future Approvals" language in the restrictive covenants provision is misplaced. In fact, it is likely that this manner of overreach is why restrictive covenants are disfavored in the State of Idaho. It is no more than a raw exercise of power. Extending the argument to its logical conclusion would allow the Plaintiff to approve all other lot owners nonconforming uses, except for Jan Rodina. The Plaintiff's position is that it can never waive a provision of the restrictive covenants by prior conduct as it relates to future requests. This also violates the specified terms of the Declaration. For example, Article I, section 1.2 requires that "The purpose of this Declaration is to set forth the basic restrictions, covenants, limitations, easements, conditions and equitable servitudes (collectively "Restrictions") that will apply to the **entire** development and use of **all** portions of the Property." (Emphasis Added). R. Vol. I., p 000066. Clearly, the Plaintiff should be complying with this stated purpose by engaging in uniform enforcement of the covenants. This they have not done.

Non-uniform and/or selective enforcement of the restrictive covenants is a violation of this concept as well as those principles set forth at Article II titled "Declaration". This reads in part "Grantor ... declare that the Property, and each lot, parcel or portion thereof, is and/or shall

¹ *verb* avoid, be loath, deny respect, despise, disaffect, disapprove, discountenance, discredit, disdain, dishonor, dislike, disregard, disrespect, frown on, have no regard for, have no respect for, have no use for, hold cheap, invidia, look askance at, look down on, misprize, not care for, not like, not respect, object to, rebuff, regard unfavorably, reject, repel, repulse, turn away, turn from, view with disfavor. *Burtons Legal Thesaurus*, 4E (2007).

be held...used, occupied and improved subject to the following terms...all of which are declared and agreed to be **in furtherance of a general plan** for the protection, maintenance, subdivision, improvement and sale of the Property, **and to enhance the value, desirability and attractiveness of the Property.**” [Emphasis Added] R. Vol. I., p 000066.

A consequence of a failure of nonuniform enforcement of specific provisions is that the Plaintiff is deemed to have waived or abandoned those provisions. This is particularly compelling since there is little evidence that Jan Rodina’s actions in improving his property did anything but enhance the value, desirability and attractiveness of the property.

Reading the stated purpose, at Article I, section 1.2 and the the declaration, at Article II together, it is clear that it is inconsistent with the Plaintiff’s position that they can selectively enforce the stated restrictions and then deem that selective enforcement valid through the invocation of the “No waiver Provision”. This creates an ambiguity which should be construed in Jan Rodina’s favor for purposes of summary judgment.

II. CONCLUSION

The District Court has committed several errors of law and fact which necessitate the reversal of its summary judgment order in favor of the HOA. By its conduct, an HOA may waive, acquiesce to, abandon or be estopped from bringing an enforcement action against a lot owner such as Rodina. The conduct of this HOA fits well within that category. To allow the drafter of a contract to excuse its bad behavior through a “get out of jail” no waiver provision is bad public policy. This should be discouraged. Rodina respectfully requests that the summary judgment order be reversed and that this Court hold that the HOA waived its right to bring this specific enforcement action against him.

DATED this 7th day of May, 2019

Respectfully submitted,

NEAL COLBORN PLLC

By: Gary L. Neal
GARY L. NEAL

Attorneys for Defendant-Appellant Jan Rodina

III. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of May, 2019, I served a true and correct copy of the foregoing document, by the method and to the interested parties listed below:

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