2013 IL App (1st) 121198-U

FIFTH DIVISION
July 19, 2013

No. 1-12-1198

THE BOARD OF DIRECTORS OF THE PLUM CREEK CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v. OLEG LORMAN, Defendant-Appellee (Aleksander Lorman, Defendant).	)	Appeal from the Circuit Court of Cook County No. 10 CH 28836 Honorable LeRoy K. Martin, Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 Held: Circuit court's denial of a permanent injunction to plaintiff board of directors of condominium association is reversed and remanded. Plaintiff had a protectable interest in the enforcement of a restrictive covenant in its agreement with defendant and was, therefore, entitled to enforcement of the covenant.

¶ 2 Plaintiff, the board of directors of the Plum Creek condominium association (the board), appeals from the circuit court's judgment in favor of defendant Oleg Lorman on the board's complaint for injunctive relief. The board had requested a permanent injunction requiring defendant to install wall-to-wall carpeting in his condominium unit in

compliance with the declaration and rules of the condominium association. The court found that the board failed to prove that it had a clear right in need of protection by injunctive relief. On appeal, the board contends that the court erred in denying injunctive relief because it failed to properly apply principles of contract construction in reviewing the written evidence. Defendant has not filed a brief in response, but we will consider the case on the board's brief alone pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976). We reverse and remand with directions.

¶ 3 **BACKGROUND**

¶ 4 Defendant owns a condominium unit in the Plum Creek condominium community. Plum Creek is an association governed by the board. Every owner of a condominium unit in Plum Creek is subject to the provisions set forth in the "Declaration of Condominium Ownership and By-laws Easements Restrictions and Covenants for Plum Creek Condominium" (the declaration). The board is responsible for the enforcement of the declaration.

¶ 5 Article XVII of the Declaration is titled "Covenants and Restrictions as to the Use and Occupancy." Section 7 of this article provides:

> "Floor coverings. In order to enhance the soundproofing of the Building[,] the floor covering for all occupied Units shall meet a certain minimum standard as may be specified by rules and regulations of the Board."

The rules and regulations are set forth in the "Plum Creek Condominium Association

Unit Owners Manual and Rules" (the rules). Chapter 2, Section 3(c) of the rules provides:

> "Soundproofing. All unit floors shall be carpeted with the exception of the kitchen and bathroom(s). Unit owners desiring to install materials other than wall-to-wall carpet over floors shall obtain prior written consent of the Board. The consent of the Board shall only be granted if the unit owner can establish that adequate soundproofing will be provided with the floor surface to be installed. All requests shall be in writing before consideration will be given by the Board. Unit owners may use the forms attached to these Rules at the back of this Manual."

¶ 6 In May 2001, defendant sought authorization to install laminate floors in his unit. He submitted the "Appearance or Architectural Change or Improvement Application" form (the application) contained in the Rules to the board for approval. In the application, defendant described the proposed "change" as

> "Installing the laminate floors in unit [;] the adequate soundproofing will be provided per your request[;] notwithstanding, should complaints be registered by residents, for noise, floor shall be carpeted."

¶ 7 In an "Affidavit" set forth in section 3 of the application, defendant agreed as follows:

> 2. I hereby agree to comply with all Association Declarations, By-Laws, and Rules and Regulations in respect to this change and/or improvement.

* * *

7. I hereby agree that failure to comply with any of the above requirements may result in the revocation of the approval of my change and/or improvement and removal of my change and/or improvement and restoration of my property to a condition that existed immediately before approval of this Application.

All necessary costs and expense to restore my property shall be at my expense, including but not limited to, construction costs, and consequential expenses, such as attorney's fees, court costs, permit fees, etc.

* * *

9. All verbal and written communication between the parties is expressed hereinabove, and no verbal understandings or agreements shall alter, change, or modify the terms and provisions of this Agreement, and the entire Agreement between the parties is expressed herein. No course of prior dealings between the parties and no usage of trade shall be relevant to supplement or explain any term used in this agreement. Further, this agreement shall not be modified or altered by subsequent course of performance between the parties. In addition, should any provision of this Agreement be found to be unenforceable, all other terms and provisions shall remain in full force and effect."

Both defendant and a representative of the board executed the Application.

¶ 8 On May 18, 2001, the association manager sent defendant a letter notifying him that the board had approved his application. The letter stated:

> "the board has approved your request to install laminate floors in your unit with adequate soundproofing. However, should complaints be registered by other residents because of the noise created by the hardwood flooring, you may be requested to carpet either wall to wall or area rug the floors in question. With that condition, you are permitted to proceed with the installation accordingly."

Defendant installed laminate floors

¶ 9 In 2009, the board received complaints from residents about noise emanating from defendant's unit. On September 17, 2009, the board held a hearing on the noise complaints. Defendant participated in the hearing. On September 30, 2009, the association manager notified defendant by letter that the board had found him guilty of the noise violation and had assessed a $500 fine. The letter further stated:

> "However, the fine will be suspended if you correct the violation within thirty days from the date of this letter. The board feels that installing sizable area rugs will eliminate the noise nuisance. However, if that is not sufficient, wall to wall carpeting will be required."

¶ 10 In October 2009, defendant installed area rugs in his unit. However, the board recorded additional complaints regarding noise. In December 2009, members of the board inspected one of the units affected by the noise coming from defendant's unit and confirmed that the noise level was unacceptable. The board held a second

complaint hearing.

¶ 11 On December 21, 2009, the association manager advised defendant by letter that the board had found him guilty of the noise complaint and assessed a $500 fine. The letter stated: “However, the fine will be suspended if corrective action is taken.” The corrective action included the requirement that “wall to wall carpeting is installed no later than January 21, 2010.” Defendant refused to install wall to wall carpeting.

¶ 12 On July 6, 2010, the board filed a complaint against defendant, asserting that, by refusing to install wall to wall carpeting, defendant was in violation of the declaration, the rules and the agreement between the parties.[1] It claimed that "noise continues to emanate from the Lorman's Unit creating a nuisance and disturbing their neighbor's [*sic*] quiet enjoyment of their property at Plum Creek" and that defendant's actions were causing irreparable harm. The board sought a mandatory permanent injunction ordering defendant to install wall to wall carpeting in his unit, as well as a judgment for all damages the association incurred as a result of defendant’s actions and costs, including attorney’s fees.

¶ 13 Following a two-day hearing, the court entered judgment in favor of defendant. It held that “plaintiff has failed in its burden to prove that there was a right in need of protection” because “the May 18, 2001, letter defined for the parties what their rights were.” The court found that, in the May 18, 2001, letter, the board reserved for itself the

[1] The board also named Aleksander Lorman as a defendant. At trial, Lorman claimed that he was no longer a record owner of the condominium unit. The court entered judgment in his favor and Lorman is not a party to this appeal.

right to require defendant to either install wall to wall carpeting or install area rugs if complaints were registered. The court then found that, in the September 30, 2009, letter, the board made its choice by requiring defendant to install area rugs in the unit. The court found defendant complied with that requirement and the board, therefore, had no clear right in need of protection.

¶ 14 The board filed a motion to reconsider, arguing that the May 18, 2001, letter should not have been construed as a contract between the parties. On March 13, 2013, the court denied the board's motion. The board filed a timely notice of appeal on April 12, 2012.

¶ 15 ANALYSIS

¶ 16 The board argues that the circuit court erred in denying it permanent injunctive relief. A party seeking a permanent injunction must demonstrate "(1) a clearly ascertainable right in need of protection, (2) that he will suffer irreparable harm without protection of that right, (3) that there is no adequate remedy at law, and (4) that there is a substantial likelihood of success on the merits of the underlying action." *Christian Assembly Rios de Agua Viva v. City of Burbank*, 408 Ill. App. 3d 764, 768 (2011).

¶ 17 The court denied the board's request for a permanent injunction on the basis that the board had failed to show that there was a clear right in need of protection. It reasoned that the "May 18, 2001, letter defined for the parties what their rights were" and granted the board the choice to request defendant "to carpet either wall to wall or area rug the floors in question" if noise complaints were registered. It found that the

board made its choice in the September 30, 2009, letter when it told defendant that it felt that installing area rugs would eliminate the noise problem. The court held that, because defendant installed the area rugs in compliance with the two letters, the board, therefore, had no clear right in need of protection.

¶ 18 The board argues that it has a protectable interest in enforcing the covenant requiring unit owners to install wall to wall carpeting in their units. It asserts that the court erred in discounting the terms of the contractual agreement between the parties. The board argues that the agreement between the parties, including the covenant requiring the installation of wall to wall carpeting, is established in the application, the declaration and the rules. It asserts that the May 18, 2001, letter is not a contract between the parties and, moreover, does not bar the board from reserving any rights in its September 30, 2009, letter, *i.e.* does not bar the board from reserving the right to have defendant install wall to wall carpeting if the area rugs failed to abate the noise.

¶ 19 Generally, we review a court order denying a permanent injunction under an abuse of discretion standard. *Christian Assembly Rios de Agua Viva*, 408 Ill. App. 3d at 768. The issue here, however, concerns the court's construction and interpretation of contractual provisions between the parties. The construction of a contract is a question of law. When, as here, the case raises pure questions of law, the determination of the merits of the permanent injunction is subject to *de novo* review. *Christian Assembly Rios de Agua Viva*, 408 Ill. App. 3d at 768.

¶ *20* The primary goal of contract interpretation is to give effect to the intent of the

parties, as shown by the language in the contract. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 685 (2009). In determining the intent of the parties, a court must consider the document as a whole and not focus on isolated portions of the document. *Premier Title Co. v. Donahue,* 328 Ill. App. 3d 161, 164 (2002). If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract itself. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). That language should be given its plain and ordinary meaning and the contract enforced as written. *Virginia Surety Co.*, 224 Ill. 2d at 556. When a contract incorporates another document by reference, its terms become part of the contract. *Lease Management Equipment Corp.*, 392 Ill. App. 3d at 685.

¶ 21 The agreement between the parties is contained in the declaration, the rules, and the application. The declaration makes it clear that all unit owners must take any measures specified by the board in the rules in order to soundproof their unit. The rules establish that wall to wall carpeting is required to soundproof the units. The rules also establish a unit owner may install flooring other than wall to wall carpet but only upon the filing of a written application and obtaining written consent from the board, which will not be granted unless the owner can establish that adequate soundproofing will be provided with the alternative flooring.

¶ 22 Defendant submitted the requisite application and obtained the board's approval to deviate from the soundproofing covenant by installing laminate floors instead to wall

to wall carpeting. Upon the parties' execution of the application, it became, by its own terms, "the entire Agreement between the parties." In the application, defendant specifically agreed "to comply with all Association Declarations, By-Laws, and Rules and Regulations in respect to this change and/or improvement." He also acknowledged that: “should complaints be registered by residents for noise, floor shall be carpeted.” By its clear language, the application established that, if noise complaints were registered as a result of the laminate flooring, installation of wall to wall carpeting would be required. In other words, the board approved the requested architectural change, but only so long as the soundproofing covenant was not thwarted by the change.

¶ 23 Read together, the express language contained in the application, the declaration and the rules shows that installation of wall to wall carpeting was required by covenant and, even if the board approved a deviation from the wall to wall requirement, installation of wall to wall carpeting might still be required if noise complaints resulted from the alternative flooring. “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 (1993). “Restrictions should be given the effect which the express language of the covenant authorizes. [Citation.] While doubts and ambiguities in the covenant should be resolved in favor of natural rights and against restrictions [citation], this generalization cannot be used to ignore or override the specific language of a restrictive covenant." *Fick*, 244 Ill. App. 3d at 417.

¶ 24 It is clear that the stated purpose of the covenant, to soundproof the

condominium building, remained intact even after defendant was given approval to install laminated floors in his unit. Throughout its dealings with defendant, the board consistently sought to ensure that defendant understood that the soundproofing requirements stated in the covenant were not waived and that wall to wall carpeting remained the abiding requirement, subject to modification by approved application only as long as no noise complaints resulting from the modification were registered.

¶ 25 The May 18, 2001, letter notifying defendant that his application to install laminate flooring had been approved did not supersede the wall to wall carpeting requirement. The letter specifically reminded defendant that "should complaints be registered by other residents because of the noise created by the hardwood flooring, you may be requested to carpet either wall to wall or area rug the floors in question."

¶ 26 Contrary to the circuit court's finding, the May 18, 2001, letter does not set forth the rights of the parties. It is not part of the agreement between the parties. First, the letter does not have the requisite offer and acceptance elements for an enforceable contract.

¶ 27 Second, the application, as agreed to by defendant, clearly provides that:

> "All verbal and written communication between the parties is expressed hereinabove, and no verbal understandings or agreements shall alter, change, or modify the terms and provisions of this Agreement, and the entire Agreement between the parties is expressed herein. No course of prior dealings between the parties and no usage of trade shall be relevant to supplement or explain any

> term used in this agreement. Further, this agreement shall not be modified or altered by subsequent course of performance between the parties."

Pursuant to this provision, the application is the entire agreement between the parties and the May 30, 2001, letter cannot alter the terms of that agreement. The letter is merely a written notification informing defendant that his application to deviate from the soundproofing covenant in the declaration and rules had been conditionally approved. Indeed, the letter restates the terms of the covenant, pointing out that "should complaints be registered by other residents because of the noise created by the hardwood flooring, you may be requested to carpet either wall to wall or area rug the floors in question."

¶ 28 For the same reasons, the September 30, 2009, letter is not part of the parties' agreement. It is merely a communication notifying defendant of the board's decision regarding the latest noise complaints resulting from his installation of laminate flooring and of the remedy required for this violation of the soundproofing covenant, a remedy that was expressly reserved by the May 30, 2001, letter.

¶ 29 The court found that (a) the "either *** or" language of the May 2001 letter gave the board a choice to either require defendant to install area rugs or wall to wall carpet in the unit, but not both; and (b) the board made its choice in the September 30, 2009, letter when it required defendant to install area rugs in the unit. We disagree.

¶ 30 As noted previously, the letters were not binding agreements setting forth or altering the parties' rights. Further, the statement in the May 2001 letter that defendant

might "be requested to carpet either wall to wall or area rug the floors in question" was merely a warning, setting forth the possible remedies should other residents complain regarding noise resulting from the laminate flooring. This caveat cannot be construed as limiting the board to only one of the two remedies. Lastly, the September 2009 letter did not require defendant to install area rugs. Rather, it required defendant to comply with the soundproofing requirement by abating the noise resulting from his hardwood flooring but it gave him two options on how to accomplish this: (1) by installing area rugs in the unit, with the knowledge that, if the measure failed, defendant would be required to install wall to wall carpeting, or (2) by installing wall to wall carpeting in the unit without trying the area rug option first. Defendant chose the first option. The board did not make this choice for him.

¶ 31 Read together, the 2001 and 2009 letters cannot be interpreted as a waiver of the covenant requiring the installation of wall to wall carpeting. The point of requiring wall to wall carpeting is to assure soundproofing of the units and prevent noise complaints. In each letter, the board made clear that noise abatement remained its ultimate concern and that it would approve flooring options other than wall to wall carpeting only as long as no noise complaints were registered as a result of the other options.

¶ 32 The covenant at issue is a restrictive covenant. It unambiguously forces a unit owner to forgo installation of the flooring of his choice and to install wall to wall carpeting in order to soundproof the building. The application makes it very clear that

the board intended to enforce the covenant, approving defendant's request to install laminate flooring or laminate flooring topped with area rugs only as long as no noise complaints resulted from his choice of flooring. If such complaints were registered, the board would require defendant to install wall to wall carpeting.

¶ 33 The restrictive covenant runs in favor of the board. "[A] person in whose favor a restrictive covenant runs is *prima facie* entitled to its enforcement. *Fick*, 244 Ill App. 3d at 417. Therefore, the board is *prima facie* entitled to its enforcement. *Fick*, 244 Ill App. 3d at 417. Defendant's failure to install wall to wall carpeting in his unit when noise complaints resulted from his choice of flooring is a breach of the covenant. "[T]he mere breach of a covenant is sufficient grounds to enjoin the violation." *Fick*, 244 Ill App. 3d at 417. Therefore, defendant's breach is sufficient grounds to enjoin his violation. The board has a clear and ascertainable right to enforcement of the covenant that is in need of protection. Defendant breached that covenant. The board is, therefore, entitled to a permanent injunction requiring defendant to comply with the covenant by installing wall to wall carpet. Therefore, we reverse the court's decision denying the board's request for injunctive relief.

¶ 34 Conclusion

¶ 35 For the reasons stated above, we reverse the decision of the circuit court and remand this matter to the circuit court for entry of a permanent injunction consistent with this order.

¶ 36 Reversed and remanded with directions.