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NEBRASKA SUPREME COURT
COURT OF APPEALS

NO. A-23-000836

IN THE NEBRASKA COURT OF APPEALS

HILLSBOROUGH HOMEOWNERS ASSOCIATION, INC.
PLAINTIFF/APPELLANT

v.

PAUL KARNISH AND CONNIE KARNISH
DEFENDANTS/APPELLEES

On Appeal from the District Court of Douglas County, Nebraska
The Honorable Leigh Ann Retelsdorf
Case Number CI 20-6962

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

Appellant's basis of jurisdiction statement in this case is accepted as correct.

STATEMENT OF THE CASE

Appellant's statement of the case in subparagraphs (1), (2) and (3) are fully accepted as correct, and (4) is also accepted as correct, except for the standard of review in actions for injunctive relief, which is an equitable action, so additionally, the appellate court takes into consideration that the trial court had the advantage of observing the witnesses, and where the evidence is conflicting, must have accepted the successful parties' version of the facts. Further deviating from agreement of Appellants statement of the case, Appellant now makes argument not plead or raised at trial in connection with the law of contract as well.

PROPOSITIONS OF LAW

(1) An action for injunction sounds in equity. On appeal, an appellate court tries factual questions de novo on the record, and as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion of the trial court. *Lambert v. Holmberg* 271 Neb. 443, 712 NW 2d 268 (2006), *Stuthman v. Lippert*, 287 N.W.2d, 205 Neb. 302 (1980)

(2) Despite de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other. *Hopkins v. Hopkins*, 294 Neb 417, 883 NW2d 363 (2016) and *Mock v. Neumeister*, 296 Neb 376, 892 NW2d 569 (2017)

(3) The right to enforce restrictive covenants may be lost on waiver or acquiescence and whether there is waiver or acquiescence depends upon the circumstances of each case. *Farmington Woods Homeowners Ass'n v. Wolf*, 284 Neb 280, 286 (2012); *Pool v. Denbeck*, 196 Neb 27, 241 N.W. 2d, 503 (1976);

(4) When a party raises an issue for the first time on appeal, an appellate court will disregard it because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *First Express Services Group, Inc. v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013)

STATEMENT OF FACTS

Appellant's statement of facts is generally accepted as correct, but with the following amplification of facts that Appellees believe are essential thereto because these were the basis for the trial court findings of fact.

The first reported objection to the Karnish daycare was an email by next door neighbor Darcy Smith on June 15, 2013, (E5) when she reported to board president Darren Will of the Karnish intention to open a day care. The president replied to her by email the same day, informing Smith that the board was notified (E6). The daycare indeed promptly opened when Karnishes moved in, (BOE 99:18-100:3; 128:18-24). The daycare has no signage, is in the lower level of the house, with no significant amount of outdoor play equipment (BOE 100:7-102:24, E12-E21) and the children are never outside for long, nor unsupervised. (BOE 128:25-129:11)

The next reported communication on the subject was by email on June 18, 2013 from Darcy Smith, apparently to the HOA president, giving more details about Karnishes intention and her issues (E7). On June 19, 2013, president Will relayed to Smith by email that he would address the matter with "them" directly (E8). A letter went out to Karnishes apparently initiated by Mr. Will (E54) admonishing the Karnishes and "requesting that you begin the process of relocating your business no later than 15 days from the date of this letter. Failure to comply with this request will result in future interaction through legal representation."

The next known communication was not until October 22, 2013, (E9) which was from Smith to the president by email again, wherein she reported to him the motor vehicle traffic, with detailed cars and times, to which the president replied in an email later that same day "I will act upon this information. Thank

you; dw" (E8). Karnishes believed they could operate a day care (BOE 108:16-110:3)

The next documented communication or activity about the subject was not until July 21, 2019, (E11) whereby Darcy Smith and her co-resident Michael O'Connor, by email, asked new president Diane Briggs to give it attention, and they acknowledged to her that they "waited until Darren Will was no longer involved with HALO hoping that new members would look into our situation and ask Connie to move her business out of Hillsborough."

That renewed communication with another board did not result in any investigation of any kind to verify the existence or extent of the concern, (BOE 54:4-57:13).   That part of the allegation or inquiry as to whether any activity was disturbing anyone equally failed (BOE 57:19-59:25).

After Hillsborough rested its case-in-chief, counsel for Karnishes moved for a directed verdict, (BOE 71:1-14) the court had considerable reservations about Hillsborough's case and their evidence. An extended colloquy between the court and counsel for Hillsborough ensued.   (BOE 72:4-73:17, 74:4-76:15, 77:24-80:10).

SUMMARY OF THE ARGUMENT

First, the standard of review is de novo on the record, with the appellate court giving great weight to the findings of fact of the lower court. Second, the trial court found waiver by Hillsborough because it did nothing for 6 years, after knowing of the violations. The only complaints that Appellant received was by the same neighbor, 6 years apart. Karnishes were very upfront about their intentions and their activity, and they continued their operation uninterrupted. Karnishes did show that Hillsborough had full knowledge of the daycare in 2013, and at trial in 2022, Hillsborough could not show at trial by competent evidence any more details about any investigation into the matter, or what, if any, further action it took to prevent the continued operation. The neighbor, evidently unhappy that the HOA in 2013 did not shut down the day care at that time, admitted she waited until 2019 when there was a new board, to try again.

Lastly, Hillsborough's new argument on appeal about the law of contracts should not now be considered.

ARGUMENT

(1) Standard of Review

An action for injunction sounds in equity. On appeal, an appellate court tries factual questions de novo on the record, and as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion of the trial court. *Lambert v. Holmberg,* 271 Neb. 443, 712 N.W. 2d 268 (2006)

Despite de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other. *Hopkins v. Hopkins,* 294 Neb. 417, 883 N.W.2d 363 (2016) and *Mock v. Neumeister,* 296 Neb. 376, 892 N.W.2d 569 (2017).

Therefore, the extensive findings of fact by the court should be given great weight. To the extent that the factual versions differed, the trial court findings should be seen in that light. Not a lot of the record is markedly different though, but from Karnishes point of view, is highlighted below

(2) The District Court did not err in finding that Appellant waived the home business covenant as to them and it correctly applied the law to the findings of fact.

The findings of fact by the court in its order dated August 3, 2022 (T 67-68) included that the separate complaint received in 2019 was from the same individual who made the initial complaint. Neither the neighbor complainer or board president in 2013 testified at trial as to the complaint specifics. The court found by the evidence that Hillsborough had notice of the violation since 2013. Upon threat of further action, the HOA nonetheless took none from 2013 to 2019. Court findings included that the violation is not in question, and Karnishes admit to the ongoing and continuous operation of the daycare (T67-71). No complaining person testified, the HOA was found to have merely acting on those unchecked words, made no investigation of its own, and there was no admitted

evidence as to what disturbances there allegedly were to the neighbor. Only the current HOA president testified that the complainant was a next door neighbor to the daycare, and the new president knew the neighbor was waiting for a new board to be in place, to try again. The trial court found that there is clearly an affirmative approval of the continuation of the daycare as there was no follow up action from 2013 to 2019, nor true investigation after that and no attempt to curb the violation in that 6 year gap.

The trial court also found that the violation, being the operation of the daycare, is ongoing and has been for almost 10 years and appears permanent in nature but exists only part of each day and week (T67-71). The court also found Karnishes met their burden to show general and multiple violations without protest. The court accepted Karnishes unrefuted testimony that they have operated the daycare in generally the same manner day-to-day from 2013 up through trial. Although Karnishes were told in 2013 by the board president I nan email to cease running the daycare from their home, from then through the present day they continue, daily, to go about their business although it violated the covenant by operation of the daycare for years, without any other further formal protest.

The parties to this action admit the overall statutory authorization by the HOA and its Declarations cited above, but the issue is over waiver and abandonment of the one particular provision pertaining to home businesses in the entire Hillsborough HOA jurisdiction, and whether they can now be enjoined after all these years. "Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants." *Stuthman v. Lippert*, 287 N.W.2d, 205 Neb. 302 (1980). Noteworthy, this action is brought before the district court by the HOA entity, the Hillsborough Homeowners Association, Inc., not the individual homeowner neighbor as a private action, who is the only documented complainer.

In *Farmington Woods Homeowners Ass'n v. Wolf*, 284 Neb 280, 286, 817 N.W.2d 758 (2012), the Nebraska Supreme Court stated,

"in order to prove a waiver, a defendant must prove that a plaintiff has waived the covenant through substantial and general noncompliance. The

enforcement of valid restrictive covenants may be denied only when non-compliance is so general as to indicate an intention or purpose to abandon the condition."

Farmington Woods was also an "HOA vs. daycare" case in which the Nebraska Supreme Court reversed a district court summary judgment against the homeowner. The Supreme Court ruled that the violation itself of the covenant is not enough. Despite the violation that is of a daycare home business as is here, circumstances create questions of fact upon which the trier of fact shall determine if that covenant has been waived or abandoned by Plaintiff. The tests identified in *Farmington Woods* are:

1. Whether those seeking to enforce the covenants had notice of the violation,
2. The period of time in which no action was taken,
3. The extent and kind of violation.
4. The proximity of the violations to those who complain of them,
5. Any affirmative approval of the same,
6. Whether such violations are temporary or permanent in nature, and
7. The amount of investment involved.

The *Farmington Woods* Court also quoted itself from *Pool v. Denbeck*, 196 Neb. 27 (1976) (cleaned up) when it said there,

"Generally 'mere acquiescence in the violation of a restrictive covenant does not constitute an abandonment thereof, so long as the restriction remains of any value, and …a waiver does not result unless there have been general and multiple violations without protest.' Thus, in order to prove a waiver, a defendant must prove that a plaintiff has waived the covenant through substantial and general noncompliance. The enforcement of valid restrictive covenants may be denied only when non-compliance is so general as to indicate an intention or purpose to abandon the condition."

The trial court here in its decision applied the facts to the *Pool v. Denbeck* factors (T69-70) , and the criteria as it saw the test to be, knowing that the violation by Karnishes was ongoing, daily and continuous, hence, substantial and general noncompliance. The court also applied the facts to the *Farmington Woods* test. And the court therefore found that Hillsborough waived (abandoned) that covenant as to Karnishes. The complaining neighbor used the HOA to

resurrect their old complain after years of the day care going on as usual. Whether the court would have gone farther to deem that the covenant was abandoned entirely for the whole neighborhood is not necessary because Karnishes were asking for relief as to them, not on behalf of a class of property owners and the general abandonment of the covenant. Karnishes produced evidence nonetheless regarding other home businesses within Hillsborough. As a red herring, Hillsborough is now trying to argue that since other day cares were not shut down, its non-compliance by other parties that is require for Karnishes to prevail. Although Karnishes presented ample evidence of other home businesses as well (BOE 111:15-119:6, E37-51) the court felt it didn't need to go so far as to find an HOA-wide waiver, as only one party was being singled out by the HOA. (T70)

At the conclusion of Hillsborough's case-in-chief, Karnishes made a motion for a directed verdict on the basis that there was no actual testimony to prove by clear and convincing evidence that the covenant should be enforced against them. An extraordinarily long exchange between the court and counsel for Hillsborough from pages 71 through 90 of the bill of exceptions (BOE 71:15-90:12) reflects the mindset of the court in its findings of fact with regard to the evidentiary shortfall of Hillsborough in this case. While such colloquy is not direct evidence, it is the further explanation of the court and its subsequent order about its findings of facts and conclusions of law, consistent when it was rendered later on. Although the court had overruled the motion for the directed verdict, as the court stated on page 90 at line 9 (BOE 90:9-12) "I'm going to overrule the motion at this point in time and we'll proceed and finish this. I think I have a better chance of doing this right if I do it that way, so plaintiff rested."

(3) An argument raised the first time on appeal will be disregarded from appellate consideration.

Hillsborough raises contract issues for the first time on appeal, not tried in the lower court. Nothing in the record is about the law of contract. Hillsborough's statement in its brief regarding the issues actually tried in the court below doesn't mention it. Therefore the propositions of law numbers 9 and 10 in Hillsborough's brief and the argument that flows therein should not be considered.

"When a party raises an issue for the first time on appeal, an appellate court will disregard it because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition." *First Express Services Group, Inc. v. Easter,* 286 Neb. 912, 840 N.W.2d 465 (2013*)*.

CONCLUSION

In conclusion, Karnishes believe the district court got it right, by finding that Hillsborough waived the home business restrictive covenant with respect to Karnishes and their day care as it has been operating. The court didn't find a blanket waiver or abandonment for the whole subdivision, nor would that affect the outcome between Hillsborough and Karnishes. Karnishes argued in the alternative at trial that the covenant was abandoned by Hillsborough, but despite the district court not ruling as such, the outcome and the result need not be disturbed upon appeal as to Karnishes, the only party having to defend their situation.

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CERTIFICATE OF BRIEF WORD COUNT

The undersigned hereby certifies that the foregoing brief complies with the word count as required by this rule. The brief was prepared using Microsoft Office Word. The brief complies with the typeface requirements of Neb. Ct. R. App. §2-103 and the total number of words in the brief is 3,094.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this ____ day of March, 2024, a copy of the foregoing Appellee Brief was delivered to the parties listed below pursuant to Neb. Ct. R. App. §2-205.

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Certificate of Service

I hereby certify that on Tuesday, March 19, 2024 I provided a true and correct copy of this *Brief of Appellees Karnish* to the following:

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