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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2043**

Nick Kossick,
Respondent,

vs.

DiamondRock Development L.L.C., et al.,
Appellants.

**Filed June 29, 2020
Affirmed
Frisch, Judge**

Clay County District Court
File No. 14-CV-19-4141

Matthew D. Kirschenmann, Anderson, Bottrell, Sanden & Thompson, Fargo, North Dakota
(for respondent)

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Considered and decided by Larkin, Presiding Judge; Rodenberg, Judge; and Frisch,
Judge.

UNPUBLISHED OPINION

FRISCH, Judge

In this interlocutory appeal, appellants challenge the issuance of a temporary
injunction prohibiting the construction of residential homes allegedly in violation of

applicable restrictive covenants. Because the district court did not abuse its discretion in granting the temporary injunction, we affirm.

FACTS

This case involves the Shepherd Meadows First Addition, a housing development in the City of Moorhead. The Shepherd Meadows plat includes 28 individual lots. The legal description of the lots provides that Block 1 consists of Lots 1-22 and Block 2 consists of Lots 1-6. Appellant DiamondRock Development, L.L.C. is the current owner of Lots 3-8 on Block 1, and appellants Eric and Linda Klebe are the current owners of Lots 9-10 on Block 1.¹

In December 2007, the original developer recorded the Shepherd Meadows plat in Clay County, followed in February 2010 by the execution and recording of a declaration of covenants, conditions, and restrictions of Shepherd Meadows (the governing covenants). The governing covenants imposed certain restrictions related to home construction and ran with the land, binding all successors and assigns of any property within Shepherd Meadows.

In pertinent part, the governing covenants provide, “No building shall be erected on any lot unless the design, location, materials, and workmanship are in harmony with existing structures and locations in the residential portions of the Development and such building must conform to these restrictive covenants.” In addition, the governing

¹ Although the district court found that both Eric and Linda Klebe own those two lots, the Klebes maintain that only Eric holds an ownership interest in the lots. This issue does not affect our analysis of the case.

covenants require that “[a]ll structures shall be erected or altered with front yard and side yard setbacks in compliance with the zoning ordinance of the City of Moorhead as existing on the date thereof.” The applicable zoning ordinance requires a minimum of five feet for side yard setbacks. Moorhead, Minn., Mun. Code § 10-12D-6(D) (2019). The governing covenants also provide that “[a]ny dwelling structure on the lots within the Development” must have a specific “minimum structural area,” depending on the location of the lot and type of structure. For any violation of the governing covenants, “the owner or owners of any lots shall have the right to sue for and obtain an injunction to prevent the breach of or to enforce any of the restrictions herein.”

At some point between 2010 and 2017, Clay County acquired from the original developer some of the lots in Shepherd Meadows, and the City of Moorhead then purchased those lots. In 2017, the city advertised the sale of certain of those lots, including Lots 3-10 on Block 1. The advertisement characterized the lots as “twin home lots” and listed Lots 3-10 in pairs. The advertisement provides:

Twin home lots are offered for sale in pairs only. However, it is possible that three styles of homes could be constructed on the properties: (1) a standard attached twin home; (2) two detached twin homes known in the market as “skinnies;” or (3) a single family home by combining the two parcels and capping services to one parcel.

In September 2017, DiamondRock purchased from the city Lots 3-8 on Block 1. Also in 2017, the Klebes separately purchased from the city Lots 9-10 on Block 1. All lots were undeveloped at the time of sale. Both DiamondRock and the Klebes, independent of each other, visited Shepherd Meadows and reviewed the governing covenants before

purchasing the lots. DiamondRock intended to construct one single-family detached house on each of Lots 3-8 (for a total of six separate structures), and the Klebes planned to construct one single-family detached house on each of Lots 9-10 (for a total of two separate structures).

In spring 2018, DiamondRock and the Klebes requested a zoning change from the city to increase the maximum building coverage so as to allow the construction of larger houses on the lots. In 2014, the city approved the same zoning change for Lots 1-4 on Block 2 of Shepherd Meadows, located across the street from Lots 3-10 on Block 1. Although the city sent notice to nearby property owners and held a public hearing regarding the requested zoning change, the city received no comments, and no one appeared at the public hearing. The city determined that the zoning change did not alter the proposed residential use of the property and was consistent with the original plan for the area. As a result, the city approved the requested zoning change for Lots 3-10.

In July 2019, the city issued a building permit to DiamondRock to build a single-family detached house on Lot 3. Shortly thereafter, DiamondRock began construction on the house. On August 30, 2019, DiamondRock received a “notice to cease and desist” from respondent Nick Kossick. Kossick is a resident of Shepherd Meadows, and he sent the notice on behalf of himself and other homeowners in Shepherd Meadows. In the notice, Kossick instructed DiamondRock to stop construction on Lot 3, alleging that the construction of one house on each lot violated the governing covenants and “would not be in harmony with existing structures and locations” in Shepherd Meadows. Kossick claimed that DiamondRock instead must build “one house per pair of lots.” Accordingly, Kossick

demanded that DiamondRock “stop all activity on any lots in Shepherd Meadows you own until this matter is resolved.”

Construction on Lot 3 continued. After Kossick sent to DiamondRock a second notice to cease and desist, DiamondRock and the Klebes began negotiations with the homeowners of Shepherd Meadows. The homeowners held a neighborhood meeting with the president of DiamondRock, the Klebes, and various city officials. At the meeting, DiamondRock and the Klebes answered questions from the homeowners and addressed concerns about the proposed construction. Shortly after the meeting, a construction company applied for a building permit on behalf of the Klebes, seeking to construct a single-family detached house on Lot 10. On October 1, 2019, the city issued that building permit. The Klebes commenced construction activities on Lot 10, while DiamondRock continued construction activities on Lot 3.

On October 8, 2019, Kossick commenced this action, alleging that DiamondRock and the Klebes breached the governing covenants because construction of single-family detached houses on Lots 3-10 would not be in harmony with the existing structures in Shepherd Meadows. Kossick also moved for an ex parte temporary restraining order (TRO) to prevent continued construction on the subject lots in violation of the governing covenants. The district court granted the ex parte TRO pending a hearing for temporary injunction.

A week later, the district court held a hearing for temporary injunction. Before the hearing, Kossick submitted an affidavit from the original developer of Shepherd Meadows, which provides in pertinent part that “Lots 1-10 of Block 1 of Shepherd Meadows

Development were only to be one single family home per pair of lots, or a twin home dwelling per pair of lots. I would not have approved the building of two single family homes per pair of lots.” Kossick also submitted a supplemental affidavit alleging that the foundation poured on Lot 3 violated the zoning ordinance regarding setbacks because the setback was less than five feet. The applicable ordinance provides that “[s]etbacks shall be of sufficient width to accommodate required buffering, screening, and landscaping,” and lists a minimum width of five feet for side yard setbacks for interior single-family detached houses in the zoning district for Lots 3-10. Moorhead, Minn., Mun. Code § 10-12D-6(D). Kossick alleged that the failure to comply with the municipal zoning ordinance in contravention of the governing covenants further justified the imposition of injunctive relief.

For its part, DiamondRock submitted a letter from a Moorhead city official providing that “[b]ased on our measurements, which are not that of a professional, registered land surveyor and may not be exact, we measured that the setback was within half an inch of the five (5) foot setback requirement.” The letter concluded, “Although this measurement does not constitute a professional survey, it is our opinion that the building meets the applicable setback standards and will not be requiring removal and replacement.”

On October 24, 2019, the district court granted the motion for a temporary injunction, enjoining DiamondRock and the Klebes “from completing construction on their respective properties” throughout the pendency of the action.

DiamondRock and the Klebes appeal.

DECISION

This interlocutory appeal arises under Minn. R. Civ. App. P. 103.03(b), which authorizes an appeal “from an order which grants, refuses, dissolves or refuses to dissolve, an injunction.” A temporary injunction is “an extraordinary equitable remedy,” and its purpose is “to preserve the status quo until adjudication of the case on its merits.” *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). The district court has discretion in determining whether to grant a temporary injunction, and we will not reverse that decision absent an abuse of that discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). We will not set aside findings of fact by a district court unless such findings are clearly erroneous. *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

When determining whether to grant a temporary injunction, Minnesota courts consider five factors: (1) the nature and background of the relationship of the parties; (2) the balance of harms between the parties; (3) the likelihood of success on the merits; (4) public policy; and (5) administrative burdens in the supervision and enforcement of the injunction. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). We address each factor in turn.

A. Relationship of the Parties

“The purpose of a temporary injunction is to preserve the status quo until judgment.” *Upper Midwest Sales Co. v. Ecolab, Inc.*, 577 N.W.2d 236, 244 (Minn. App. 1998). “Generally, injunctive relief based on a contract must be coextensive with the terms of the contract.” *Id.* As such, a district court abuses its discretion by issuing a temporary

injunction that extends the relationship of the parties beyond that established in the contract, as such an injunction does not preserve the status quo. *Id.*

DiamondRock and the Klebes argue that the absence of any long-standing or specialized relationship weighs against the imposition of a temporary injunction. We disagree. The district court correctly noted that the status of the parties as property owners in Shepherd Meadows governs their relationship. Pursuant to the terms of the governing covenants, which run with the land, Kossick has the right to enforce those covenants against DiamondRock and the Klebes. The temporary injunction does not expand the parties' relationship beyond that established in the governing covenants. Accordingly, we see no abuse of discretion by the district court in declining to weigh the relationship of the parties against the issuance of an injunction.

B. Balance of Harms

When considering the balance of harms, a district court weighs the harm to be suffered by the moving party if the injunction does not issue compared to the harm to be suffered by the nonmoving party if the injunction issues. *Dahlberg*, 137 N.W.2d at 321. The party seeking an injunction must establish that “legal remedies are inadequate” and that an injunction is necessary “to prevent great and irreparable injury.” *Metro. Sports Facilities Comm’n v. Minn. Twins P’ship*, 638 N.W.2d 214, 222 (Minn. App. 2002), *review denied* (Minn. Feb. 4, 2002). “The lack of a showing of irreparable injury may be a sufficient ground for determining that the district court abused its discretion in granting a temporary injunction.” *Id.* But irreparable harm is “not always susceptible of precise proof.” *Id.*

In balancing the respective harm to the parties, the district court considered and credited evidence showing that the harm to Kossick in the absence of injunctive relief exceeded the potential harm to DiamondRock and the Klebes in the event the injunction issues. The district court concluded that if DiamondRock and the Klebes continued construction and did not ultimately prevail on the merits, “the Court will likely be unable to undo the construction of the homes,” and “it would be unreasonable for the Court to order the demolition of the homes after their completion.” Therefore, the district court determined that Kossick “may suffer an irreparable harm” without an injunction. By contrast, the district court found that the evidence established that any harm to DiamondRock and the Klebes associated with a construction delay would be “minimal.” We see no abuse of discretion by the district court.

DiamondRock and the Klebes argue that any claimed harm to Kossick associated with aesthetics or diminished market value of Shepherd Meadows is unsubstantiated, speculative, and ultimately insufficient to support injunctive relief. We disagree. Kossick alleged that the proposed construction of single-family detached houses “will drastically change the aesthetic of the development and will not be harmonious with existing structures,” and that “the new developments will have an adverse financial effect on the market value for Shepherd Meadows.” In support of these allegations, Kossick submitted a rendering of Shepherd Meadows comparing the proposed houses with the existing structures. Kossick presented market research and analyzed other housing developments to demonstrate the potential financial impact of inclusion of single-family detached houses in the development. Specifically, Kossick introduced evidence that a similar housing

development in the city recently added single-family detached houses and subsequently experienced a reduction in property values with open market listings for nearly one year. This evidence far surpasses mere assumptions or fears insufficient to sustain the imposition of temporary injunctive relief. *See Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn. 1981) (providing that a district court cannot enjoin what a party “only assumes” or “fears will be a possible result”). And although DiamondRock and the Klebes contest the reliability of this evidence, and they submitted their own competing evidence regarding aesthetics and market value, the district court ultimately credited the evidence submitted by Kossick, a choice well within its discretion.

It bears noting that the findings of the district court are preliminary, based on a limited record and without the benefit of discovery. And although the district court stated that Kossick “may” suffer irreparable harm, the district court ultimately concluded, based on its assessment of competing evidence, that issuance of the injunction was “necessary” to prevent irreparable harm. At this early stage of the proceedings, and based on the limited record, the district court did not abuse its discretion in determining that Kossick established the potential for irreparable harm in the absence of temporary injunctive relief.

C. Likelihood of Success on the Merits

A district court errs as a matter of law in granting a temporary injunction if the plaintiff “can show no likelihood of prevailing on the merits.” *Metro. Sports Facilities Comm’n*, 638 N.W.2d at 226. “But if a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may consider issuing a temporary injunction to preserve the status quo until trial on the merits.” *Id.*

Here, the district court found that Kossick has a reasonable likelihood of success in showing that DiamondRock and the Klebes violated at least two provisions of the governing covenants: (1) that all structures be “in harmony with” existing structures, and (2) that all structures comply with applicable city zoning ordinances.² We address each finding in turn.

1. Section 3.1 of Governing Covenants

Section 3.1 of the governing covenants provides, “No building shall be erected on any lot unless the design, location, materials, and workmanship are in harmony with existing structures and locations in the residential portions of the Development and such building must conform to these restrictive covenants.” Minnesota courts apply rules of contract interpretation in interpreting restrictive covenants. *See State by Crow Wing Env’t Prot. Ass’n v. City of Breezy Point*, 363 N.W.2d 778, 781 (Minn. App. 1985), *review denied* (Minn. May 20, 1985). We apply the ordinary meaning of language in an unambiguous contract. *Boe v. Christlieb*, 399 N.W.2d 131, 133 (Minn. App. 1987). Ambiguity exists where provisions of a contract are “susceptible of more than one meaning.” *Id.* Whether a contract is ambiguous is a question of law that we review de novo. *Id.* And, while interpretation of a contract is a question of law where a contract is unambiguous, interpretation of a contract is a question of fact where a contract is ambiguous. *City of Virginia v. Northland Office Props. Ltd. P’ship*, 465 N.W.2d 424, 427 (Minn. App. 1991),

² Kossick alleges other violations of the governing covenants, including that DiamondRock and the Klebes must obtain approval from the developer before construction of the houses. The district court did not consider these alleged violations as a basis for the issuance of temporary injunctive relief, and we therefore decline to address the same here.

review denied (Minn. Apr. 18, 1991). Courts may use extrinsic evidence to interpret an ambiguous contract. *Id.*

We agree with the district court that the governing covenants are ambiguous. The covenants do not define those circumstances where construction may, or may not, be “in harmony with existing structures.” No provision of the governing covenants sets forth any definition or standard to evaluate whether a building is “in harmony with” existing structures in the development. In light of this ambiguity, the district court properly turned to extrinsic evidence to determine whether the proposed construction satisfies the harmony requirements of section 3.1.

DiamondRock and the Klebes argue that a different provision of the governing covenants unambiguously permits the construction of single-family detached houses on each of their lots. Section 3.3 of the governing covenants provides:

Any dwelling structure on the lots within the Development (excluding porches, decks, basements and garages) shall have a minimum structural area outlined as follows:

Lake Lots	All Other Lots	
<u>1700 sq. ft.</u>	<u>1400 sq. ft.</u>	Rambler and 1½ Story home.
<u>2200 sq. ft.</u>	<u>1700 sq. ft.</u>	Standard 2 Story home
<u>Not Allowed</u>	<u>Not Allowed</u>	Bi-Level home.
<u>2400 sq. ft.</u>	<u>2000 sq. ft.</u>	Split-Level home (excluding lowest basement level)
<u>Not Allowed</u>	<u>1300 sq. ft.</u>	Rambler per side for twin homes on those lots designed by the Developer for the twin home use

<u>Not Allowed</u>	<u>1700 sq. ft.</u>	2 Story per side for twin homes on those lots designed by the Developer for the twin home use
<u>Not Allowed</u>	<u>Not Allowed</u>	Bi-Level/Split-Level twin home

DiamondRock and the Klebes argue that section 3.3 permits the construction of a “rambler (i.e., a single-family detached home) on each of [their] lots as long as the rambler has a minimum structural area of at least 1,400 square feet” because section 3.3 applies to “All Other Lots,” including the lots owned by DiamondRock and the Klebes.

We are not persuaded. As a threshold matter, Kossick did not allege a violation of section 3.3 of the governing covenants. Kossick instead alleged that the proposed construction of single-family detached houses violates section 3.1 of the governing covenants because the proposed construction is not in harmony with *existing* structures. Even assuming that the proposed construction complies with the terms of section 3.3, setting forth the scope of *possible* structures, the proposed construction must also, and independently, comply with the harmony requirements of section 3.1. The governing covenants do not unambiguously provide that a structure automatically becomes “in harmony with existing structures” by meeting the minimum structural area requirements set forth in section 3.3.

DiamondRock and the Klebes then argue that, even if the governing covenants are ambiguous, the district court erred as a matter of law by failing to resolve ambiguity in their favor. As a general proposition, “covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will

not be aided or extended by implication or enlarged by construction and doubt will be resolved in favor of the unrestricted use of property.” *Mission Covenant Church v. Nelson*, 91 N.W.2d 440, 442 (Minn. 1958); *see also Costley*, 313 N.W.2d at 26 (reaffirming the principle from *Mission Covenant Church* that courts strictly construe restrictive covenants against limitations on the use of property).

But even though the law favors the unrestricted use of property, the law does not require that a court ignore extrinsic evidence when construing an ambiguous restrictive covenant. *Cf. Staffing Specifix, Inc. v. Tempworks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 694 (Minn. 2018) (holding that the rule that ambiguous terms of a contract are construed against the drafter should not be applied until after the fact-finder has attempted to determine the parties’ intent by examining extrinsic evidence); *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66-67 (Minn. 1979) (stating that the general rule that ambiguous terms of a contract are construed against the drafter does not “ineluctably lead to the conclusion that the drafter is to lose”). Indeed, we previously remanded a case to the district court with instructions to use extrinsic evidence to construe an ambiguous restrictive covenant. *Crow Wing Env’t Prot. Ass’n*, 363 N.W.2d at 781. And the strict rule that DiamondRock and the Klebes promote would render the governing covenants largely meaningless, requiring the automatic resolution of any ambiguity in favor of unrestricted use notwithstanding the existence of extrinsic evidence suggesting a contrary interpretation.

The district court did not err in declining to resolve ambiguity in the governing covenants in favor of the unrestricted use of property. When a contract is ambiguous, its

interpretation is a question of fact. *City of Virginia*, 465 N.W.2d at 427. We do not set aside an interpretation by a district court of an ambiguous contract unless it is clearly erroneous, and we view the evidence in the light most favorable to the findings of the district court. *Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn. 1990). In concluding that construction of single-family detached houses would violate the governing covenants, the district court assessed the limited record, including the advertisement from the city for the sale of the lots providing that “three styles of homes could be constructed on the properties: (1) a standard attached twin home; (2) two detached twin homes known in the market as ‘skinnies;’ or (3) a single family home by combining the two parcels and capping services to one parcel”; the original restrictive covenants for Shepherd Meadows dividing the lots into two groups, “single family lots” and “twin home lots”; and the affidavit of the original developer of Shepherd Meadows setting forth the original intent of Lots 1-10 on Block 1 “to be one single family home per pair of lots, or a twin home dwelling per pair of lots,” and attesting that the developer “would not have approved the building of two single family homes per pair of lots.” The district court did not clearly err in concluding that this extrinsic evidence supported the conclusion that the proposed construction would not be in harmony with the existing structures in Shepherd Meadows.

2. Section 3.2 of the Governing Covenants

Section 3.2 of the governing covenants provides, “All structures shall be erected or altered with front yard and side yard setbacks in compliance with the zoning ordinance of the City of Moorhead as existing on the date thereof.” The district court evaluated competing evidence regarding the claimed ordinance violation by DiamondRock with

respect to the measurement of the setback. Although a city official opined that the alleged setback violation was minimal and acknowledged that his measurement was not akin to a professional survey but was “within half an inch” of the setback requirement, the district court noted that the opinion of the city official was not that of a professional surveyor and credited contrary evidence, including photographs and measurements, showing that the foundation on Lot 3 appeared to violate the applicable zoning code. Based on this evidence, the district court concluded that Kossick demonstrated a “reasonable showing regarding the merits of the action related to a violation of Section 3.2 of the Governing Covenants.” We see no abuse of discretion by the district court.

D. Public Policy

The district court found that public-policy considerations set forth by both parties yielded a neutral result in determining whether the injunction should issue. DiamondRock and the Klebes reiterate that public policy favors the unrestricted use of real property and that the district court therefore abused its discretion in declining to weigh public-policy considerations in their favor. But covenants that run with the land are enforceable against the successors of the original contracting parties. *Federated Retail Holdings, Inc. v. County of Ramsey*, 820 N.W.2d 553, 560 (Minn. 2012). Property owners in Shepherd Meadows enjoy a contractual right to enforce the restrictions set forth in the governing covenants. We cannot conclude that the district court abused its discretion in declining to afford greater weight to DiamondRock and the Klebes under these circumstances.

E. Administrative Burdens

The district court determined that the administrative burden in enforcing its order was “minimal” in light of the narrow and temporary relief granted. Although DiamondRock and the Klebes claim that the order of the district court is overbroad insofar as it prohibits any construction and is not limited to a prohibition on construction of single-family detached houses, the scope of the order for injunctive relief does not undercut the manner in which the district court evaluated administrative burdens associated with the issuance of injunctive relief. Even so, in the event DiamondRock and the Klebes desire to construct something other than a single-family detached house, they have available remedies at the district court to seek such relief.

Finally, we note that an order for temporary injunction is just that, *temporary*. We emphasize that the grant of a temporary injunction “neither establishes the law of the case nor constitutes an adjudication of the issues on the merits.” *Metro. Sports Facilities Comm’n*, 638 N.W.2d at 220. The order remains in effect until the final adjudication on the merits, an act which will occur after the parties conduct fulsome discovery as contemplated by the order of the district court. Accordingly, the district court did not abuse its discretion by issuing a temporary injunction to preserve the status quo.

Affirmed.