

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEGACY VILLAGE PROPERTY
OWNERS ASSOCIATION, A NEVADA
CORPORATION, A NEVADA NON-
PROFIT CORPORATION,

Appellant,

vs.

ROBERT MCNEILL, INDIVIDUALLY,
AND JOANNE MCNEILL,
INDIVIDUALLY,
Respondents.

No. 43259

FILED

AUG 07 2007

JANE L. M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in an action to enforce conditions, covenants and restrictions and an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant, Legacy Village Property Owners Association, sued respondents, homeowners Robert and JoAnne McNeill, for allegedly constructing a home addition in violation of the applicable conditions, covenants and restrictions (CC&Rs). In its complaint, the association sought declaratory relief, specific performance and a permanent injunction against the homeowners. After the district court granted the homeowners' motion for summary judgment and awarded them attorney fees and costs, this appeal followed.

This court reviews a district court's order granting summary judgment de novo, without deference to the findings of the lower court.¹ The moving party is entitled to a judgment as a matter of law when the pleadings and other evidence on file demonstrate that there are no remaining issues of material fact.² When this court reviews a summary judgment, it must consider the evidence, and any reasonable inferences drawn from it, in a light most favorable to the nonmoving party.³

Upon reviewing appellant's brief and the record on appeal, we conclude that the district court erred in granting summary judgment.

Although the association's CC&Rs designate a five-member architectural committee, the CC&Rs also allow the committee's majority, four out of five in this case, to act on behalf of the architectural committee. Therefore, the association's committee acted within its right when it disapproved the homeowners' proposed addition.

As for the issue of non-uniform enforcement of CC&Rs, the record on appeal does not contain any evidence substantiating the homeowners' affirmative defense of non-uniform enforcement. Although the homeowners alleged that other members of the association had built home additions similar to theirs, without prior association approval, the homeowners did not provide any affidavits of their own or of other members of the association, or other admissible evidence demonstrating

¹Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).


²Id.; NRAP 56(c).

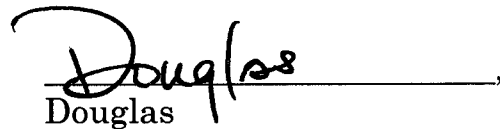
³Wood, at 729, 121 P.3d at 1029.

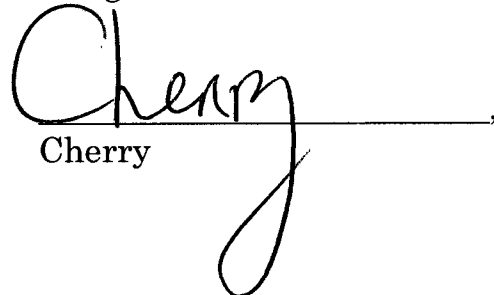
that additions had been made without the necessary approval. Thus, the homeowners failed to satisfy their burden of proof to establish an affirmative defense of non-uniform CC&R enforcement,⁴ and the district court erred when it based its decision on the homeowners' unsubstantiated allegation.

Accordingly, we reverse the district court's order granting summary judgment to the homeowners, vacate the district court's award of attorney fees and costs, and remand this matter to the district court for further proceedings consistent with this order.

It is so ORDERED.⁵


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

⁴See Schmidt v. Sadri, 95 Nev. 702, 704, 601 P.2d 713, 714 (1979) (stating that “[a]n affirmative defense raises a matter which is beyond the limits of the plaintiff’s prima facie case”); Howard v. Waale-C. & Tiberti, 67 Nev. 304, 312, 217 P.2d 872, 876 (1950) (stating that burden of proving an affirmative defense rests on the defendant).

⁵Although appellant also appeals from the district court’s order denying reconsideration, this order is not independently appealable and further is moot in light of this court’s order. See Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983).

cc: Hon. Jackie Glass, District Judge
Kathleen L. England, Settlement Judge
Bolick & Boyer
Nik Skrinjaric
Joanne McNeill
Robert McNeill
Eighth District Court Clerk