

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

EDWARD TURNER AND STEFFI TURNER,
HUSBAND AND WIFE,
Plaintiffs/Appellants/Cross-Appellees,

v.

ALTA MIRA VILLAGE HOMEOWNERS ASSOCIATION, INC.,
AN ARIZONA NONPROFIT CORPORATION,
Defendant/Appellee/Cross-Appellant.

No. 2 CA-CV 2013-0151
Filed December 24, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. C20124490
The Honorable Carmine Cornelio, Judge

AFFIRMED

COUNSEL

Munger Chadwick, P.L.C., Tucson
By Mark E. Chadwick
Counsel for Plaintiffs/Appellants/Cross-Appellees

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Counsel for Defendant/Appellee/Cross-Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Edward and Steffi Turner (Turners) appeal from the trial court's order denying their request for injunctive or declaratory relief and refusal to grant attorney fees. Alta Mira Village Homeowners Association, Inc. (Alta Mira HOA) cross-appeals, asserting the court erred in denying its motion to join essential parties and in not granting its attorney fees. For the reasons that follow, we affirm the judgment of the trial court.

Factual and Procedural Background

¶2 In an appeal after a bench trial, we view the evidence in the light most favorable to sustaining the judgment. *Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, ¶ 2, 79 P.3d 1214, 1216 (App. 2003). The Turners are residents of the Alta Mira neighborhood. The homes in the neighborhood were originally constructed by two or three different developers with several different individualized custom styles. All residents of the neighborhood are required to comply with certain provisions set forth in the "Declaration of Covenants, Conditions, and Restrictions" (CC&Rs). In order to implement the provisions of the CC&Rs, Alta Mira HOA has adopted three sets of architectural standards, in 1999, 2005, and 2010.

¶3 The Turners conducted a review of the neighborhood and found approximately seventy conditions which, they claimed, violated the various architectural standards. In March 2010, the Turners wrote a letter to an Alta Mira HOA representative

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requesting enforcement action against the claimed violators. In October 2010, Alta Mira HOA issued a letter stating that “architectural and/or landscaping inconsistencies” would be “grant[ed] a variance or grandfather[ed].” This became known as the “grandfather letter.”

¶4 In 2012, the Turners filed suit, claiming breach of contract, breach of fiduciary duty, breach of duty of good faith and fair dealing, and seeking declaratory and injunctive relief.¹ The trial court found the grandfather letter invalid because it was not properly approved by the Alta Mira HOA Board of Directors. The court also concluded that Alta Mira HOA had not breached any contract or legal duties and denied the Turners’ requested injunction. The court denied both parties’ requests for attorney fees. This appeal and cross-appeal followed.

Declaratory/Injunctive Relief

¶5 The Turners sought declaratory relief that the grandfather letter was “revoked and/or null and void” and injunctive relief to require Alta Mira HOA to “enforce Section 8.1 of the CC&R’s in a uniform and consistent manner through the community.” The trial court granted a declaratory judgment regarding the grandfather letter, but denied the requested injunction. The Turners assert the court erred in this denial.

¶6 “An injunction is an equitable remedy,” and “[t]he discretion in injunctive proceedings lies with the trial court.” *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331, 909 P.2d 393, 398 (App. 1995), *supp. op.* “We review the court’s ruling concerning the availability of an equitable remedy de novo as an issue of law,” *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 21, 272 P.3d 355, 361 (App. 2012), but “[t]he grant or denial of injunctive relief ‘is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion.’” *Horton v. Mitchell*, 200 Ariz. 523, ¶ 12, 29 P.3d 870, 873 (App. 2001), *quoting*

¹ The Turners’ complaint initially included a request for monetary damages, but that request was withdrawn.

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Valley Med. Specialists v. Farber, 194 Ariz. 363, ¶ 9, 982 P.2d 1277, 1280 (1999). The Turners claim the trial court abused its discretion because it erred as a matter of law in finding Alta Mira HOA had not breached a contract or a duty, and also erred in applying waiver and laches.

Breach of Contract

¶7 In an action for breach of contract, the burden is on the plaintiff to prove the contract was breached and damages resulted. *Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, ¶ 16, 302 P.3d 617, 621 (2013). “We defer to a trial court’s factual findings and will not set them aside on appeal ‘unless they are clearly erroneous or not supported by substantial evidence.’” *Sholes v. Fernando*, 228 Ariz. 455, ¶ 6, 268 P.3d 1112, 1115 (App. 2011), quoting *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, ¶ 18, 88 P.3d 1165, 1170 (App. 2004). Whether a contract has been breached is generally a question for the finder of fact. See *Matson v. Bradbury*, 40 Ariz. 140, 144, 10 P.2d 376, 378 (1932); see also *Ramada Franchise Sys., Inc. v. Motor Inn Inv. Corp.*, 755 F. Supp. 1570, 1580-81 (S.D. Ga. 1991) (applying Arizona law). In Arizona, “CC&Rs constitute a contract between the subdivision’s property owners as a whole and individual lot owners.” *Ahwatukee Custom Estates Mgmt. Ass’n v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000).

¶8 The trial court found no breach of contract for a number of reasons, including its conclusion that Alta Mira HOA had discretion in some of its decision making regarding enforcement. The Turners maintain the trial court erred in so finding.

¶9 Specifically, they claim that Arizona case law and the CC&Rs provide that enforcement against violations is mandatory, not discretionary. The cases cited by the Turners to support this proposition involve enforcement against specific violations. See *Johnson v. Pointe Cmty. Ass’n*, 205 Ariz. 485, ¶¶ 28-32, 73 P.3d 616, 621-22 (App. 2003) (board had no discretion to waive provision forbidding exposed electrical wiring or to allow change to external stucco without application for approval); *Ekstrom v. Marquesa at Monarch Beach Homeowners Ass’n*, 86 Cal. Rptr. 3d 145, 157-58 (Ct.

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App. 2008) (requiring HOA to take action to enforce against overgrown palm trees).

¶10 Under these cases, Alta Mira HOA would not have discretion to ignore any specific, proven violations of the CC&Rs. But the Turners concede they have never sought “an order requiring enforcement action for each violation,” and that they “do[] not request that the Trial Court enforce any particular violation of the Declaration or architectural controls.” Rather, they base their request for the injunction on their claim that Alta Mira HOA has failed to diligently and uniformly enforce the CC&Rs.

¶11 Nor did the trial court find that Alta Mira HOA had the discretion to refuse to enforce against any specific violation. Rather, the court found that the Turners had failed to prove Alta Mira HOA had breached a contract by failing to enforce the CC&Rs. In so finding, the court noted that “some of the claimed ‘violations’ or ‘inconsistencies’ may have been (or were) constructed by” developers who were not subject to the CC&Rs,² while others “were approved, with Mr. Turner disagreeing . . . as to the appropriateness of approval. Some he thought were not approved when in fact they were.”

¶12 Furthermore, the court found that “[f]or most violations Mr. Turner was unable to identify the date or time frame of the improvement or change,” which was important because “many of Mr. Turner’s complaints are that there is a lack of compliance with the 2010 guidelines. These cannot be applied retroactively to previous changes.” While the court agreed that Alta Mira HOA had occasionally lapsed in requiring owners to secure permission before making any exterior changes to their homes, as required by the CC&Rs, the court concluded that this requirement had “for the most part” been followed. Finally, the court noted that Alta Mira HOA

²To the extent the Turners attempt to challenge this factual finding, they do not do so until their reply brief, which is too late. See *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992).

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has historically conducted bi-monthly tours of the neighborhood to take note of violations and presently continues to do so.

¶13 These factual findings, which the Turners have not shown to be clearly erroneous, *see Sholes*, 228 Ariz. 455, ¶ 6, 268 P.3d at 1115, amply support the trial court’s conclusion that Alta Mira HOA had not failed to diligently enforce the CC&Rs.

Breach of Fiduciary Duty

¶14 The Turners next claim Alta Mira HOA breached its fiduciary duty to the Turners as homeowners in the neighborhood. In *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, ¶¶ 24-27, 165 P.3d 173, 179-80 (App. 2007), this court adopted the approach of the Restatement (Third) of Property (Servitudes) § 6.13 (2000) in determining what duties an HOA owes to its members.³ The Restatement provides that an HOA has, in addition to “duties imposed by statute and the governing documents,” duties:

(a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control;

(b) to treat members fairly;

(c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers;

(d) to provide members reasonable access to information about the association, the common property, and the financial affairs of the association.

³The parties have disputed whether this duty should be referred to as a “fiduciary” duty, but neither side has argued that the label of the duty should have any effect on the outcome. Accordingly, we find it unnecessary to resolve this question.

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Id. The Restatement also imposes the burden of proving a breach of duty by the association on the member asserting the breach. *Id.*

¶15 The Turners have not specified which of these duties they believe Alta Mira HOA has breached. To the extent their claim is based on Alta Mira HOA's alleged failure to enforce the CC&Rs, we have addressed that claim above. To the extent it is based on any of the other duties addressed by the Restatement, the Turners have not developed any argument addressing these duties, and we therefore consider any such claims waived. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009).⁴

¶16 Because we conclude Alta Mira HOA did not breach a contract or duty, we find the trial court did not err in refusing to grant the Turners' requested injunction.

Attorney Fees

Rule 37(e)

¶17 The Turners claim the trial court erred in denying them their request for attorney fees pursuant to Rule 37(e), Ariz. R. Civ. P. We review a court's decision whether to sanction a party for a discovery violation for an abuse of discretion. *Seidman v. Seidman*, 222 Ariz. 408, ¶ 18, 215 P.3d 382, 385 (App. 2009).

¶18 Before trial, the Turners submitted a request for admission pursuant to Rule 36, Ariz. R. Civ. P., to Alta Mira HOA: "Admit that on or about October 5, 2010, the Board of Directors granted a variance for existing architectural and/or landscaping inconsistencies in the Alta Mira subdivision." Alta Mira HOA responded with an "Admit." However, at trial it became clear that the grandfather letter, which granted the variance the Turners referred to, was not an action "discussed, investigated and brought

⁴ Although the Turners' opening brief includes cursory statements that Alta Mira HOA breached the implied covenant of good faith and fair dealing, it has not developed any argument to that effect, and we therefore deem this claim waived as well. *See Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289.

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to a vote or authorized by the [Alta Mira] HOA Board.” In other words, Alta Mira HOA provided incorrect information when it admitted that the Board had granted such a variance.

¶19 Under Rule 37(e), if a party “fails to admit . . . the truth of any matter,” and the requesting party later proves the truth of the matter, the requesting party is entitled to an award of “the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.” Alta Mira HOA claims the erroneous admission was of no substantial importance and that it was made in good faith. But Rule 37(e) states that a court “shall make the order” of expenses involved in proving the truth of the matter, unless it makes specific factual findings.

¶20 Here, it is unclear precisely what findings the trial court made. The court noted that it was “troubled by the Rule 36 Admissions made by the Defendant HOA,” and that “some part of the [Turners]’ legal fees and costs” were incurred in developing the evidence related to the letter, but the court also concluded that the letter, although not authorized, “accurately set out the conduct and ‘decision’ making of the Board.”

¶21 We will affirm the trial court’s decision if it “was ‘correct for any reason, even if that reason was not considered’ by the court.” *Parkinson v. Guadalupe Pub. Safety Ret. Local Bd.*, 214 Ariz. 274, ¶ 12, 151 P.3d 557, 560 (App. 2007), quoting *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986). The court’s ruling does not address Rule 37(e), and it is unclear whether the court intended to find a discovery violation, intended to find no violation, or intended to find a violation but excuse Alta Mira HOA from sanctions. But, by the plain language of Rule 37(e), it only applies when a party “fails to admit . . . the truth of any matter as requested under Rule 36.” See *Potter v. Vanderpool*, 225 Ariz. 495, ¶ 8, 240 P.3d 1257, 1260 (App. 2010) (plain language of court rule is “best reflection” of “our supreme court’s intent in promulgating a rule”). The rule does not encompass a situation where a party erroneously fails to deny a request for admission. “The spirit of Rule 36 requires a litigant to ascertain the truth.” *Fickett v. Superior Court*, 27 Ariz. App. 793, 797, 558 P.2d 988, 992 (1976). But we do not need to construe the rule beyond the terms of its plain language to

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accomplish this purpose; the sanctions provided in Rule 37(e) are not necessary to provide incentives to parties to avoid erroneous admissions. Parties already have ample reason to avoid rendering false admissions—generally, a request for admission presents a fact that is harmful to the case of the party admitting it, and anything a party admits is considered to be conclusively established. Ariz. R. Civ. P. 36(c). Because Alta Mira HOA did not fail to admit the truth of a matter pursuant to Rule 36(a), but rather erroneously admitted the truth of a matter, Rule 37(e) does not apply, and the trial court did not err in denying the Turners attorney fees pursuant to this provision.

A.R.S. §§ 12-341, 341.01

¶22 Both parties have asserted that the trial court erred in denying them their costs and attorney fees. Under A.R.S. § 12-341, the successful party in a civil suit shall recover his or her costs, and such an award is mandatory, not discretionary. *Trollope v. Koerner*, 21 Ariz. App. 43, 47, 515 P.2d 340, 344 (1973). Under A.R.S. § 12-341.01, a court may award reasonable attorney fees to the successful party in an action arising out of contract, and, when a contract provides that the prevailing party shall be awarded attorney fees and costs, “the court lacks discretion to refuse to award fees under the contractual provision.” *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, ¶ 26, 177 P.3d 1207, 1213 (App. 2008).

¶23 Here, the Turners argue that because § 9.1 of the CC&Rs provides that in an action to enforce the provisions a party “shall be entitled to recover costs and reasonable attorneys’ fees as are ordered by the court,” and because they were successful in obtaining declaratory relief that the grandfather letter was invalid, an award of their costs and attorney fees is mandatory. Although § 9.1 does not explicitly state that such costs and fees are awardable only to the prevailing party, it is limited to such awards “as are ordered by the court,” which we construe as requiring a party to be successful in order to receive fees.

¶24 Alta Mira HOA counters that the declaratory judgment on the grandfather letter was not important to the litigation as a

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whole and that the trial court abused its discretion in finding they were not the successful party under § 12-341.01.

¶25 A trial court has substantial discretion in determining whether a party has prevailed. *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, ¶ 35, 214 P.3d 415, 422 (App. 2009) (“The decision as to who is the successful party for purposes of awarding attorneys’ fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it.”), quoting *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994); accord *Bishop v. Pecanic*, 193 Ariz. 524, ¶ 26, 975 P.2d 114, 120 (App. 1998); *Hooper v. Truly Nolen of Am., Inc.*, 171 Ariz. 692, 695, 832 P.2d 709, 712 (App. 1992). The trial court concluded that neither party had been entirely successful because the Turners had prevailed as to the declaratory relief on the grandfather letter and Alta Mira HOA had prevailed as to the injunctive relief. This conclusion was within the trial court’s discretion. See *Bank One, Ariz. v. Rouse*, 181 Ariz. 36, 41, 887 P.2d 566, 571 (1994) (where both parties prevailed and lost on various claims, “proper for the court to find that there were no successful parties”). Because the trial court was reasonable in its determination that both parties had been partially successful and partially not, we conclude the court did not err in refusing to award either party its attorney fees or costs.

Attorney Fees on Appeal

¶26 On appeal, Alta Mira HOA has prevailed. We therefore award its costs pursuant to § 12-341 and reasonable attorney fees pursuant to § 12-341.01, pending compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶27 For all of the foregoing reasons, the judgment of the trial court is affirmed.⁵

⁵Our disposition of the case renders moot the issues of waiver and laches raised by the Turners, as well as that of joinder raised by Alta Mira HOA, and we therefore do not address them.