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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-883

Filed: 21 April 2020

New Hanover County, No. 16-CVS-2284

GILMER MARTIN, II, and wife, JEAN SUTTON MARTIN, Plaintiff-Appellants/Cross-Appellees,

v.

THE LANDFALL COUNCIL OF ASSOCIATIONS, INC., et al, Defendant-Appellee/Cross-Appellant.

Appeal by Plaintiffs from order entered 12 October 2017 by Judge R. Kent Harrell, orders entered 30 November 2017 and 4 December 2017 by Judge John E. Nobles, Jr., and order entered 7 May 2019 by Judge Paul M. Quinn. Defendant cross-appeals from award of attorneys' fees entered 7 May 2019 by Judge Paul M. Quinn in New Hanover County Superior Court. Heard in the Court of Appeals 4 March 2020.

*Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm, Sigmon Law, PLLC, by Mark R. Sigmon, for the Plaintiffs.*

*Cranfill Sumner & Hartzog LLP, by Rebecca A. Knudson, Patrick M. Mincey, and Melanie Huffines, Ward and Smith, P.A., by Christopher S. Edwards, Alexander C. Dale, and Allen N. Trask, III, for the Defendant.*

BROOK, Judge.

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Gilmer Martin, II, and Jean Sutton Martin (“Plaintiffs”) appeal from an order granting summary judgment for The Landfall Council of Associations, Inc., (“Defendant”) on Plaintiffs’ first and fourth claims for relief and on Defendant’s first claim for relief, and denying Plaintiffs’ motion for summary judgment; an order granting partial summary judgment for Defendant; and an order entering judgment on the pleadings for Defendant. Defendant cross-appeals from the award of attorneys’ fees for Defendant.

I. Background

A. Factual Background

Plaintiffs purchased their home (the “Property”) in Landfall, a residential planned community in Wilmington, North Carolina, in 2008. The subdivision is governed by Defendant. Defendant

was created to, among other things, manage the shared expense and maintenance of the then-existing incorporated neighborhood associations (“owners [sic] associations”) located within Landfall, a residential and golfing community, and to act as the owners [sic] associations’ respective attorney-in-fact with respect to any action allowed under the owners associations’ corporate documents or declarations.

Plaintiffs’ Property is subject to the terms and agreements of the Declaration of Covenants, Conditions, Easements and Restrictions for Villas at Landfall Subdivision (the “Declaration”) as well as the Bylaws of Villas at Landfall Owners Association, Inc. (the “Bylaws”). Section 1.1.2 of the Landfall Architectural Review Committee

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Guidelines and Procedures (the “Guidelines”)<sup>1</sup> read, in part:

Deed restrictions require that the [Architectural Review Committee] approves in advance . . . landscaping and all additions/alterations affecting the outer appearance of a building or a lot. This includes[] but is not limited to: home landscape renovations. . . . Final approval by the ARC must be received in writing prior to the start of any clearing, grading, landscaping or construction.

Article VI, Section 23 of the Declaration states that all grass areas of yards must be sodded. Article VII, Section 8 states that “no trees, bushes, shrubs, grasses, or other vegetation whatsoever may be removed, planted, or installed from or on any lot without prior written approval” of the Board. The Governing Documents require that members of the owners’ association, such as Plaintiffs, must submit a Form 3 Modification to Existing Home (“Form 3”) to Defendant for any proposed modification to their existing landscape.

Plaintiffs assert that the tree cover on their Property and adjoining property “results in the majority of the Property being shaded for large portions of the average day” and that many of their trees and neighbors’ trees are protected from removal by municipal and county ordinances. Plaintiffs’ natural grass has “repeatedly and continuously” struggled since the beginning of their ownership. They hired professional landscapers, horticulturists, and arborists who advised Plaintiffs that the shade in their yard caused their grass to die. Plaintiffs replaced the natural grass

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<sup>1</sup> We refer to the Declaration, Bylaws, and Guidelines collectively as the “Governing Documents.”

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in whole or in part six times. They also had their trees thinned and limbed several times to reduce the shade coverage.

Article V of the Declaration titled “Architectural Control” gives the Board of Directors of the Villas at Landfall (“Board” or “Board of Directors”) the authority to approve or disapprove landscape improvements requested by homeowners. Article V requires that such requests be submitted in writing. Plaintiffs submitted a Form 3 to Defendant’s Architectural Review Committee (“ARC”) on 11 May 2015 to request permission to replace their yard with artificial turf. The request stated:

We are requesting the ARC’s approval for the installation of artificial turf at [the Property]. We are attaching photos of the specific turf that we desire to install. This turf will encompass approximately 2400 sq. feet inside a wrought iron/brick pillar fence. . . .

Extensive shade tree coverage, due in part to a large live oak tree on the front corner of the yard, and property position present a barrier for successful sod installation. Since 2010, we have attempted sod installation six times, either for the whole yard area or partial areas. We are attaching photos of our yard in its current condition after yet another failed sod installation.

We appreciate the ARC’s consideration of this request and will be happy to provide any additional information needed.

In response to this request, the ARC requested samples of the artificial turf products that Plaintiffs sought to use as well as identification of other properties

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governed by Defendant that had used similar products, which Plaintiffs provided. Members of the ARC “performed a visual inspection” of the Property.

While awaiting the ARC’s response, Plaintiffs purchased artificial turf but did not install it. The ARC held a meeting on 20 May 2015 to discuss various requests including that of Plaintiffs, denying Plaintiffs’ request. On 9 June 2015, the ARC informed Plaintiffs of its decision stating as follows:

The [ARC] discussed your request for artificial turf both in the meeting and onsite. Artificial turf cannot be approved as a lawn replacement.

From the onsite visit, the ARC members felt that there were many large trees, and that a landscape plan could be developed that included removal of some of the trees that appear to be too large for the area that they occupy, and others could be limbed up and thinned.

After receiving the ARC’s denial of their request, Plaintiffs installed approximately 1,700 square feet of artificial turf.

On 29 July 2015, Plaintiffs received a letter from Priscilla Rogers, an employee of Defendant and an ARC liaison. In this letter, Ms. Rogers related:

It has come to the attention of the Landfall Architectural Review Committee that you have installed the artificial turf on your lawn. This cannot be approved as your application for the artificial turf was denied in June, 2015. Please have the artificial turf removed and submit a revised landscape plan within the next 30 days. You will not have to wait for a regularly scheduled meeting for review of the revised plan. Please refer to your letter from the ARC dated June 9, 2015.

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Plaintiffs responded to this letter on 25 August 2015, stating, in relevant part: “After six failed attempts using sod with natural grass, we have followed the recommendation of professional landscapers and horticulturists, as well as turfgrass entomologists in light of ground pearl prevalence, and have begun the process of installing sod with synthetic grass.”

Thereafter, Plaintiffs received a letter on 21 September 2015 from an ARC coordinator, Shelly Kearney, which stated as follows:

In compliance with North Carolina statutes, the Board of Directors has instituted a program whereby you will be given an opportunity to be heard at a hearing of the Association’s Adjudicatory Panel where you may present and give reason, if any, why a fine and/or other penalty should not be levied against you.

A hearing was set for 4 November 2015. Plaintiffs presented arguments and evidence at the hearing.

Plaintiffs were then advised by letter on 9 November 2015 as follows:

Pursuant to N.C. Gen. Stat. § 47F-3-107.1, the Adjudicatory Panel decided to levy a fine against you in the amount of \$100.00 for this violation. Please be advised that a fine in the amount of \$100.00 per day will be issued without further hearing, for each day that the violation exists beginning five days after the date of this notice. Also pursuant to N.C. Gen. Stat. § 47F-3-107.1, these fines shall be assessments secured by liens against your lot under N.C. Gen. Stat. § 47F-3-116.

It is your right to appeal the decision of the Adjudicatory Panel to the COA Board of Directors by delivery of written notice of appeal to the COA Board within 15 days from the date of this decision.

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Plaintiffs appealed the decision in writing on 20 November 2015 and requested an opportunity to be heard. A hearing before Defendant's Board of Directors was held on 26 January 2016 on Plaintiffs' appeal. Plaintiffs again presented argument and evidence. The Board affirmed the decision on 5 February 2016 by letter, stating:

Consistent with our conversation last week, both the Council and I encourage you to submit a plan to the ARC for the alteration of landscaping on your property. That is the appropriate manner for you to pursue approval of a landscaping plan, and to present alternatives if you are inclined to do so. Your property will remain in violation, and the daily fines will continue to accrue, until you restore the natural vegetative sod landscaping as it was prior to the unapproved alteration, or until your landscaping conforms with a plan that has been approved by the ARC.

On 20 May 2016, Defendant sent Plaintiffs a letter indicating that the balance of fines was \$10,900 and that it intended to institute legal proceedings against Plaintiffs. Defendant served and filed a claim of lien pursuant to N.C. Gen. Stat. § 47F-3-116 on Plaintiffs' Property in the principle amount of \$14,900 on 29 June 2016.

B. Procedural History

Plaintiffs brought suit against Defendant on 8 July 2016, asserting causes of action requesting (1) a declaratory judgment, and claims for (2) slander of title and removal of cloud on title, and (3) breach of fiduciary duties. Plaintiffs also moved for preliminary and permanent injunctions. Plaintiffs sought declarations that

a. the artificial sod installed by Plaintiffs on their Property constitutes "sod" as intended by and employed in the Declaration . . . and "sodded lawn" as prescribed by the applicable . . . Guidelines . . . ;

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...

c. alternatively, that the terms “sod” . . . and “sodded lawn” . . . are ambiguous, and should therefore not be extended by implication but rather construed in such a manner as to allow the Plaintiffs’ free exercise of their rights to use and enjoy their Property;

d. the actions of the ARC denying Plaintiffs’ Form 3 were arbitrary and capricious, and were not based on law or fact;

...

j. the CSC and Landfall acted unreasonably, arbitrarily, capriciously, and with complete absence of good faith in determining it would impose and continue daily fines against Plaintiffs . . . .

Defendant filed an answer to Plaintiffs’ complaint, moved to dismiss Plaintiffs’ complaint, and made counterclaims, praying for a declaratory judgment, recovery of past-due amounts and other damages, and entry of judicial foreclosure. Defendant’s counterclaim for a declaratory judgment sought a judicial declaration that

a. The artificial turf installed on Plaintiffs’ property does not fall within the meaning of sod or grass found within the governing documents;

b. The LCOA had the authority, and continues to have the authority, to require approval for modifications and changes to a property owner’s landscaping within the Villas at Landfall;

c. The artificial turf installed on Plaintiffs’ property constitutes a change or modification to Plaintiffs’ landscaping which required approval by the ARC;

d. The ARC’s decision to deny Plaintiffs’ request for



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artificial turf was proper;

e. Plaintiffs are in violation of the governing documents in that they installed artificial turf on their property without ARC approval;

f. The LCOA had the authority to impose fines due to Plaintiffs' installation of the artificial turf without approval and Plaintiffs' refusal to remove the artificial turf; and

g. The imposition of fines by the LCOA due to Plaintiffs' refusal to remove the artificial turf was proper.

Plaintiffs thereafter filed a motion to discharge the claim of lien. Defendant later added a prayer for permanent injunctive relief, claiming that Defendant "is entitled to specific performance of the governing documents including a permanent mandatory injunction ordering the Plaintiffs to comply with the governing documents by removing the artificial turf from the Lot and prohibiting the Plaintiffs from installing such artificial turf again in the future without ARC approval."

The trial court dismissed Plaintiffs' claim for breach of fiduciary duty without prejudice on 20 January 2017.

Defendant moved for partial summary judgment on 19 September 2017 on Plaintiffs' claims for slander of title and for removal of cloud on title. A hearing was held on the matter before Judge Harrell on 5 October 2017 in New Hanover County Superior Court. Defendant amended its answer to include a counterclaim requesting a permanent injunction on 5 October 2017. On 9 October 2017, Defendant moved for summary judgment on Plaintiffs' remaining claims requesting a declaratory

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judgment and injunctive relief, and on Defendant's counterclaims for declaratory judgment, recovery of past-due amounts and other damages, and judicial foreclosure. On 16 October 2017, Plaintiffs moved for summary judgment on their first claim (the declaratory judgment action), their second claim (removal of cloud on title), and their fourth claim (requesting injunctive relief). Judge Harrell denied Plaintiffs' motion for summary judgment on their claim to remove a cloud on title and granted Defendant's motion for summary judgment on Plaintiffs' claim for slander of title without hearing by written order entered on 17 October 2017.

A hearing was held on both parties' pending and unresolved motions for summary judgment—Defendant's motion and Plaintiffs' motion on Plaintiffs' claims for declaratory judgment and preliminary and permanent injunctions, and Defendant's motion on Defendant's claims for declaratory judgment, recovery of past-due amounts and other damages, and judicial foreclosure—on 8 November 2017 before Judge Nobles. At the hearing the court took the matter under advisement and then allowed Defendant's motion for summary judgment on Plaintiffs' request for a declaratory judgment and for injunctive relief on 21 November 2017 by written order. In the November 2017 order, Judge Nobles also granted Defendant's motion for summary judgment, entering a declaratory judgment in favor of Defendant. However, Judge Nobles denied Defendant's motion on its claims for recovery of past-due amounts and other damages and for judicial foreclosure. Thus, after the entry of

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Jude Nobles's 21 November 2017 order, Defendant's counterclaims for recovery of past-due amounts and other damages, judicial foreclosure, and injunctive relief remained outstanding.

Plaintiffs appealed the November order, giving rise to *Martin v. Landfall Council of Ass'ns, Inc.*, \_\_\_ N.C. App. \_\_\_, 821 S.E.2d 894, 2018 WL 6613724 (2018) (unpublished), in which this Court held that it lacked jurisdiction over Plaintiffs' interlocutory appeal, dismissing it. *Id.*

In February 2019, Plaintiffs voluntarily dismissed their claim for removal of cloud on title without prejudice.

On 11 March 2019, Defendant filed a motion for judgment on the pleadings on its remaining counterclaims—for recovery of past-due amounts and other damages, judicial foreclosure, and a permanent injunction—which Judge Quinn allowed in open court on 18 March 2019. Defendant then moved for attorneys' fees pursuant to N.C. Gen. Stat. § 47F-3-116. Judge Quinn entered an order allowing Defendant's motion for judgment on the pleadings on 7 May 2019 and awarded Defendant's attorneys' fees.

Plaintiffs noticed appeal on 4 June 2019. Defendant cross-appealed the partial award of attorneys' fees on 14 June 2019.

II. Jurisdiction

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Jurisdiction lies with this court as an appeal from a final judgment from a superior court in a civil case. N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Analysis

Plaintiffs appeal the October order entering partial summary judgment for Defendant and the November order denying partial summary judgment for Plaintiffs and entering partial summary judgment for Defendant. They further appeal the entry of judgment on the pleadings for Defendant. Defendant appeals from the order awarding attorneys' fees. We first address the entries of summary judgment for Defendant. Then we turn to the entry of judgment on the pleadings. Finally, we conclude by addressing the award of attorneys' fees.

A. Summary Judgment Orders

i. Standard of Review

This Court reviews a trial court's summary judgment order de novo. *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks omitted).<sup>2</sup>

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<sup>2</sup> In granting summary judgment for Defendant, the trial court made several conclusions of law. We note that "[a] trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on

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ii. Merits

a. November 2017 Summary Judgment Order

Plaintiffs argue that the trial court erred in denying summary judgment for Plaintiffs and entering partial summary judgment in favor of Defendant. This appeal rises and falls on whether Defendant properly levied a fine against Plaintiffs for altering their landscape. For the reasons stated below, and viewing the evidence in the light most favorable to the non-moving party, we conclude that the November summary judgment order was proper.

Summary judgment shall only be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). The evidence must be “viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). “An issue is genuine if it can be proven by substantial evidence[,] and a fact is material if it would constitute or irrevocably establish any material element of a claim or a defense.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal marks and citation omitted).

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appeal.” *White v. Emerald Isle*, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179 (1986) (internal marks and citation omitted). “However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment.” *Id.* We therefore disregard the trial court’s conclusions of law as a general matter throughout this opinion.

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“A party may show that there is no genuine issue as to any material facts by showing that no facts are in dispute.” *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979).

The ARC Guidelines require that the ARC approve, in advance, all “landscaping and all additions/alterations affecting the outward appearance of a building or a lot.” “[F]inal approval by the ARC must be received in writing prior to the start of any clearing, grading, landscaping or construction.” The ARC Guidelines specify that “prior approvals do not set new standards; in any issues of non-compliance for an installation or construction whether by ARC oversight or specific grant of exception to the Guidelines by the ARC do not set a precedent for future submittals.” The Guidelines also state that “[u]napproved property modifications may be subject to a standard, as well as daily fine.” The North Carolina Planned Community Act, codified in Chapter 47F of the North Carolina General Statutes, permits the levying of fines under such circumstances and requires that the fines not exceed \$100 per day. N.C. Gen. Stat. § 47F-3-107.1 (2019); *see also id.* § 47F-3-116 (describing the procedures by which a homeowners’ association may seek to recover unpaid fines).

Here, the parties agree that Plaintiffs submitted a request to replace a portion of their lawn with artificial turf and that the ARC denied the request. The parties do not dispute that such an alteration constituted a property modification affecting the

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outward appearance of their lot. The parties also agree that Plaintiffs installed artificial turf after the denial of their request. The Guidelines state that Defendant may impose a fine for “[u]napproved property modifications[.]” Defendant imposed that fine in accordance with N.C. Gen. Stat. § 47F-3-107.1. There remain no genuine issues of material fact regarding whether Plaintiffs violated ARC Guidelines by altering the outward appearance of their lot without prior approval from the ARC or whether Defendant was permitted to impose a daily fine on Plaintiffs for the violation.

Plaintiffs contend that a genuine issue of material fact exists regarding whether the definition of “sod” as required by the Guidelines includes artificial turf. However, neither this Court nor the trial court must consider that question of fact to determine, as explained above, that Plaintiffs violated the Guidelines—not by installing artificial turf instead of natural sod, but by altering their landscaping without prior approval of the ARC.

Plaintiffs also contend that Defendant’s actions were “arbitrary[] and not in good faith[,]” and that therefore Defendant’s imposition of fines was invalid. They further argue that the ARC’s denial of the application is invalid because the ARC reached a consensus to deny Plaintiffs’ application to install artificial turf instead of taking a vote. We do not believe Defendant acted in a fashion that calls into question the propriety of their imposition of fines.

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Our Court addressed a similar allegation that an owners' association unreasonably withheld approval of a property owner's application in *Hyde v. Chesney Glen Homeowners Ass'n, Inc.*, 137 N.C. App. 605, 529 S.E.2d 499 (2000), *rev'd per curiam for the reasons stated in the dissent*, 352 N.C. 665, 535 S.E.2d 355 (2000). The opinion concurring in part and dissenting in part that was ultimately adopted by the Supreme Court concluded that the architectural control committee ("ACC") unreasonably withheld approval of plans for an above-ground swimming pool because it did not "ma[ke] concrete suggestions to the landowners about what was needed" for compliance, 137 N.C. App. at 621, 529 S.E.2d at 509 (Hunter, J., dissenting), did not "communicate[] to the landowners legitimate reasons" for the ACC's decision, "disregarded" the plaintiffs' letter protesting the decision, and denied the application "for an invalid reason," *id.*, by informing the plaintiffs that above-ground swimming pools could not be approved when in fact the relevant governing documents provided "specific design guidelines for above-ground pools," *id.* at 619, 529 S.E.2d at 507.

Here, the ARC suggested to Plaintiffs in its letter denying Plaintiffs' request to install artificial turf on 9 June 2015 that "a landscape plan could be developed that included removal of some of the trees that appear to be too large for the area that they occupy, and others could be limbed up and thinned." Instead of submitting a landscaping plan, Plaintiffs installed 1,700 square feet of artificial turf. In a 29 July 2015 letter, the ARC again requested that Plaintiffs "submit a revised landscape



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plan within the next 30 days.” The ARC communicated to Plaintiffs that they were in violation of the Governing Documents because they altered their landscaping after their “application for the artificial turf was denied in June, 2015[.]” As explained above, the reason given is a valid one under the Governing Documents, which require prior approval for all landscaping changes.

We hold that Defendant “made concrete suggestions to the landowners about what was needed” to be in compliance with the Governing Documents, that is, prior approval of landscaping plans; that Defendant gave Plaintiffs “legitimate reasons why” Plaintiffs were in violation of the Governing Documents; and that the application was denied for a valid reason. *Id.* at 621, 529 S.E.2d at 509.<sup>3</sup> Further, Plaintiffs cite no published authority to support their assertion that reaching a consensus instead of taking a vote constitutes a substantive violation of the Bylaws and renders any decision reached by the ARC invalid.

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<sup>3</sup> Plaintiffs also cite *Makar v. Mimosa Bay Homeowners Ass’n, Inc.*, \_\_\_ N.C. App. \_\_\_, 824 S.E.2d 924, 2019 WL 1283811 (2019) (unpublished) and *Homestead at Mills River Prop. Owners Ass’n v. Hyder*, \_\_\_ N.C. App. \_\_\_, 814 S.E.2d 924, 2018 WL 3029008 (2018) (unpublished) to support their argument that Defendant acted unreasonably. Because these opinions are unpublished, they “do[] not constitute controlling legal authority.” N.C. R. App. P. 30(e)(3) (2019). Further, both *Makar* and *Homestead* are distinguishable such that they do not constitute persuasive authority here. *See State v. Burrow*, 248 N.C. App. 663, 670 n.1, 789 S.E.2d 923, 929 n.1 (2016) (adopting persuasive analysis from an unpublished opinion). *Makar* involved a provision in the homeowners’ association’s governing documents stating “that all applications must receive a ruling within 45 days by a duly authorized committee or else the application will be deemed to be in compliance with the Declaration”; no such provision is at play here, nor did Plaintiffs receive any other form of de facto approval for the installation of the artificial turf at issue. 2019 WL 1283811, at \*4. In *Homestead*, whether the homeowners’ association acted according to its bylaws was relevant to the question of whether Plaintiffs had standing to sue, which is not at issue here. 2018 WL 3029008, at \*5-\*15.

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We therefore affirm the partial entry of summary judgment in favor of Defendant.

b. October 2017 Summary Judgment Order

Plaintiffs contend that the trial court erred in granting partial summary judgment for Defendant on their claim for slander of title. Because we have determined that the Governing Documents permitted Defendant to levy a fine against Plaintiffs, we disagree.

As our Court explained in *Selby v. Taylor*, 57 N.C. App. 119, 290 S.E.2d 767 (1982), regarding claims for slander of title:

The nature of the action for slander of title is peculiar, being based upon a defamatory attack upon property. It has little in common with the ordinary action for slander. Its gist is the special pecuniary loss sustained by reason of malicious utterances or publications by the slanderer. Three elements are necessary for the maintenance of such a suit. The words must be: (1) [f]alse; (2) maliciously published; and (3) result in some special pecuniary loss. These requisites must not only be proved but under the fundamental law of pleading must be averred.

*Id.* at 120, 290 S.E.2d at 768 (citation omitted). Further, “unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, *and* a pecuniary loss or injury to himself, he cannot maintain the action. If the alleged infirmity of the title exists, the action will not lie[.]” *Id.* at 121, 290 S.E.2d at 769 (citation omitted) (emphasis added).

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Here, Plaintiffs allege that the lien on their Property forms the basis for their claim of slander of title. Having determined that the lien on Plaintiffs' Property is valid, we conclude that "the alleged infirmity of the title exists" and hold that the trial court correctly determined that summary judgment was proper for Defendant on this claim. *Id.* (citation omitted).

B. Judgment on the Pleadings

Plaintiffs appeal the trial court's entry of judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c) for Defendant on Defendant's counterclaims for (1) recovery of past-due amounts and other damages, (2) judicial foreclosure, and (3) a permanent injunction. Plaintiffs contend that because Defendant's motion for summary judgment on the first two of these claims had been denied by a superior court judge, the subsequent superior court judge's entry of judgment on the pleadings erroneously overruled its predecessor's legal conclusion that material questions of fact remained. We agree. However, because Defendant did not include its request for a permanent injunction in its initial summary judgment motion, we conclude that it was properly considered by the trial judge whose ruling Plaintiffs now appeal, and for the reasons explained below, we affirm.

i. Standard of Review

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As a general matter, we review an entry of judgment on the pleadings under Rule 12(c) de novo. *Fox v. Johnson*, 243 N.C. App. 274, 284, 777 S.E.2d 314, 323 (2015).<sup>4</sup>

“Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court[,] and the appellate court will not interfere unless such discretion is manifestly abused.” *Schwartz v. Banbury Woods Homeowners Ass’n, Inc.*, 196 N.C. App. 584, 596, 675 S.E.2d 382, 391 (2009) (internal marks and citation omitted).

ii. Merits

a. Recovery for Moneys Owed and Judicial Foreclosure

Plaintiffs contend the entry of judgment on the pleadings directly contradicts the legal conclusions in the 30 November 2017 order denying Defendant’s motion for summary judgment on their counterclaims for recovery of past-due amounts and other damages and judicial foreclosure. In its counterclaim for recovery of past-due amounts and other damages, Defendant asserted that it “is entitled to a money judgment against Plaintiffs for the total balance of the unpaid and now past-due

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<sup>4</sup> As with a summary judgment order, a trial court is not required to make findings of fact or conclusions of law in an order granting judgment on the pleadings, *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878 (1970), and such findings and conclusions, if made, will be disregarded by a reviewing court, *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986). We do briefly note the trial court’s conclusions of law in affirming its grant of Defendant’s permanent injunction motion for judgment on the pleadings as it is helpful to our analysis. *See supra* n.2.

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finer, the currently accruing fines, late fees, charges and attorneys' fees and costs incurred in the collection on this account[.]" and that "[a]dditional fines, late fees, interest and other charges may become due before the termination of this action[.]" and that it "is also entitled to recover any other damages resulting from Plaintiffs' violations of the governing documents." In Defendant's claim for judicial foreclosure, Defendant asserted that it "is entitled to have the Court enforce the Claim of Lien by allowing the LCOA to foreclose under the Claim of Lien" and prayed the court

enforce the Claim of Lien, and the LCOA be allowed to foreclose under the Claim of Lien in accordance with the procedures for judicial foreclosure under Article 29A of Chapter 1 of the North Carolina General Statutes or in like manner as a mortgage/deed of trust on real estate under power of sale under Article 2A of Chapter 45 of the North Carolina General Statutes, thereby allowing the LCOA to sell at public sale to the highest bidder the property described in the Claim of Lien[.]

Judge Nobles, in the November summary judgment order, concluded as a matter of law that there existed genuine issues of material fact with regard to those two counterclaims. Our task is to determine whether Judge Quinn's order entering judgment on the pleadings for Defendant impermissibly overrules Judge Nobles's order as a matter of law.

"Our Courts have [] clearly held that one judge may not reconsider the legal conclusions of another judge." *Adkins v. Stanly Cty. Bd. of Educ.*, 203 N.C. App. 642, 646, 692 S.E.2d 470, 473 (2010). That rule is violated here if either (1) Judge Quinn's entry of judgment on the pleadings legally constituted a second, facially contradictory

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summary judgment order; or (2) the legal conclusions in the judgment on the pleadings are substantively incompatible with those in the previous summary judgment order.

We first consider whether Judge Quinn's entry of judgment on the pleadings constitutes a second, contradictory summary judgment order for the purposes of our review. Motions for judgment on the pleadings and summary judgment both require the trial court "to view the facts and permissible inferences in the light most favorable to the nonmoving party" and to take "[a]ll well pleaded factual allegations in the nonmoving party's pleadings . . . as true." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). But they differ as to the scope of the trial court's review. A trial court reviewing a summary judgment motion considers the facts found in "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any[.]" *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). In contrast, a trial court considering a Rule 12(c) motion for judgment on the pleadings "is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984).

When a trial court is presented with and fails to exclude materials beyond the pleadings in connection with a motion for judgment on the pleadings, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule

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56[.]” N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019). To be sure, “[m]erely receiving evidence, without considering or relying on it, does not convert a motion for judgment on the pleadings into a motion for summary judgment.” *Davis v. Durham Mental Health/Dev. Disabilities/Substance Abuse Area Auth.*, 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004). But “under most situations, consideration of the court file, briefs, and attached affidavits would indeed convert a [Rule 12] motion . . . into a motion for summary judgment pursuant to Rule 56.” *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 241, 511 S.E.2d 671, 674 (1999); *see also Shelf v. Wachovia Bank, NA*, 213 N.C. App. 82, 84, 712 S.E.2d 708, 710 (2011) (reviewing a trial court’s conversion of a Rule 12 motion to dismiss to a motion for summary judgment by considering, among other materials extrinsic to the pleadings, “the entire court file”).

Judge Quinn’s 7 May 2019 written order granting Defendant’s motion for judgment on the pleadings indicates that he considered, in addition to the pleadings and exhibits attached thereto, “the contents of the court’s file.” The parties had engaged in discovery and submitted deposition transcripts and interrogatory responses as attachments to the October summary judgment motions. Because Judge Quinn considered the court’s file and did not mention excluding any depositions or other materials from his review, Defendant’s motion for judgment on the pleadings likely should have been formally converted to a motion for summary judgment. When

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a trial judge fails to make this conversion, “the motion is treated as if it were a motion for summary judgment on review by this Court.” *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 427, 651 S.E.2d 386, 388 (2007) (internal marks and citation omitted). Assuming Judge Quinn considered materials outside the pleadings, as the order entering judgment on the pleadings indicates, the order constituted a second summary judgment disposition that impermissibly contradicted the first as to Defendant’s counterclaims for recovery of past-due amounts and judicial foreclosure.

Second, even if Judge Quinn did not consider materials beyond the pleadings to formally convert his entry of judgment on the pleadings to a summary judgment order, his disposition of Defendant’s second and third counterclaims is nevertheless precluded by the substance of the 30 November 2017 summary judgment order.

In *Madry v. Madry*, 106 N.C. App. 34, 415 S.E.2d 74 (1992), our Court addressed a situation in which one trial judge considered a legal issue already decided by another trial judge in the same case. *Id.* at 37, 415 S.E.2d at 77. One superior court judge had disallowed a motion to amend the defendant’s answer, ruling “that defendant had failed to present evidence” necessary to seek relief under a particular statute. *Id.* at 36, 415 S.E.2d at 76. A later superior court judge then granted summary judgment in favor of the defendant, and our Court reversed. *Id.* at 39, 415 S.E.2d at 77. In doing so, we noted:

Despite the fact that Judge Morelock’s order is denominated a summary judgment, the legal issue decided



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by that judgment, whether G.S. 50–5.1 bars this plaintiff's claim[,] . . . was precisely the same issue decided to the contrary by Judge Fullwood's earlier order denying defendant's motion to amend. The materials and arguments considered by Judge Morelock were essentially the same arguments and materials considered by Judge Fullwood. Simply labeling the order a summary judgment did not change its essential character nor authorize Judge Morelock to overrule Judge Fullwood.

. . . It is obvious from the record that, in filing her [Rule] 12(b)(6) motion, defendant was simply attempting to again put before the court those contentions that Judge Fullwood had rejected.

We hold that Judge Morelock committed reversible error in ruling that G.S. 50–5.1 is the exclusive remedy for this plaintiff when Judge Fullwood had previously ruled otherwise.

*Id.* at 38, 415 S.E.2d at 77.

The exception described in *Bruggeman v. Meditrust Co.*, 165 N.C. App. 790, 600 S.E.2d 507 (2004), further illuminates the rule that “one Superior Court judge may not correct another's errors of law, and one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.” *Id.* at 795, 600 S.E.2d at 511 (internal marks and citation omitted).

[T]his Court has upheld a subsequent order issued by a different judge in the same action where the subsequent order was rendered at a different stage of the proceeding, did not involve the same materials as those considered by the previous judge, and did not present the same question as that raised by the previous order.

*Id.* (internal marks and citation omitted).

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Here, both orders were rendered after the close of pleadings and discovery. The subsequent order considered the same pleadings that had been before the previous judge when he denied summary judgment on these counterclaims.<sup>5</sup> And the subsequent order decided the same legal question disposed of by the first order, namely whether Defendant was entitled to judgment as a matter of law on Defendant's claims for recovery of past-due amounts and other damages and judicial foreclosure.

Judge Nobles concluded as a matter of law that Defendant had not proved that no issues of material fact remained on those two claims. But Judge Quinn's order granting judgment on the pleadings on these claims determined that "no material issue of fact exists[,] and that Defendant is entitled to judgment as a matter of law" on the same counterclaims. This was "precisely the same issue decided to the contrary" by Judge Nobles's order denying summary judgment on these same claims. *Madry*, 106 N.C. App. at 38, 415 S.E.2d at 77.

We therefore hold that the trial court committed reversible error by entering judgment on the pleadings for Defendant and ruling that no genuine questions of material fact remained as to Defendant's counterclaims for recovery of past-due

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<sup>5</sup> Defendant received an order on 5 October 2017 granting its motion to amend its complaint to include a fourth counterclaim seeking permanent injunctive relief, four days before filing its initial motion for summary judgment on 9 October 2017. Defendant did not move for summary judgment on its fourth counterclaim, and it did not further amend its answer after the 30 November 2017 summary judgment order.

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amounts and other damages and for judicial foreclosure. We remand for further proceedings on those claims.

b. Permanent Injunction

Because Defendant's request for a permanent injunction was not before Judge Nobles at the summary judgment stage, Judge Quinn's entry of judgment on the pleadings on that claim remains to be reviewed on the merits here. Having found that the trial court correctly granted Defendant's first counterclaim for declaratory relief at summary judgment, we now consider whether the subsequent trial court appropriately granted permanent injunctive relief in accordance with Defendant's fourth counterclaim.

"Where a restrictive covenant must be enforced, a permanent injunction is the proper remedy." *Fed. Point Yacht Club Ass'n v. Moore*, 233 N.C. App. 298, 299, 758 S.E.2d 1, 2 (2014). A permanent injunction is appropriately calibrated "where the prohibited behavior is clearly limited in terms of geographic scope." *Id.* at 315, 758 S.E.2d at 11.

Here, Defendant seeks enforcement of its restrictive covenants. The trial court's affirmation of Defendant's legal right to enforce its covenants, in its 30 November 2017 summary judgment order granting Defendant's counterclaim for declaratory judgment, is therefore sufficient to support a subsequent determination that a permanent injunction is also appropriate. The trial court determined that

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“Plaintiffs remain in violation of Defendant’s governing documents in that the offending artificial turf remains on Plaintiffs’ lot.” It also determined that “Defendant’s enforcement of its governing documents is not barred[.]” Because the injunction granted in the subsequent order is geographically limited to the portion of Plaintiffs’ lot where artificial turf was installed, its scope is appropriate.

We therefore affirm the trial court’s judgment as a matter of law as to Defendant’s request for a permanent injunction.

C. Attorneys’ Fees

After entering judgment on the pleadings for Defendant on its remaining counterclaims, Judge Quinn entered an award of attorney’s fees for Defendant. Judge Quinn determined that Defendant’s full fee request of \$246,241.25 was reasonable but then reduced the award to \$50,000 to Ward & Smith, P.A., counsel for Defendant. Defendant appeals, arguing that, once the trial court determined the rates and hours worked by the firm to be reasonable, N.C. Gen. Stat. § 47F-3-116(g) does not grant the trial court any discretion to limit the award.

i. Standard of Review

This Court reviews a trial court’s decision “to award mandatory attorney’s fees *de novo*.” *Willow Bend Homeowners Ass’n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008).

ii. Merits

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Section 47F-3-116(g) requires that “[a]ny judgment, decree, or order in any judicial foreclosure or civil action relating to the collection of assessments shall include an award of costs and reasonable attorneys’ fees for the prevailing party[.]” N.C. Gen. Stat. § 47F-3-116(g) (2019). Our reversal of the judgment on the pleadings granting Defendant’s counterclaims for recovery of the past-due amount and other damages and for judicial foreclosure is pivotal here. Given this reversal, although Defendant prevailed on the theories of liability raised in their request for a declaratory judgment and in its request for injunctive relief, Defendant is not a “prevailing party” with respect to “[a]ny judgment, decree or order in any judicial foreclosure or civil action relating to the collection of assessment[.]” We therefore must reverse and remand the award of attorneys’ fees. However, if Defendant prevails on any part of its claim for damages on remand, then an award of attorneys’ fees under N.C. Gen. Stat. 47F-3-116(g) would be proper.

Because the question of the trial court’s discretion to reduce the award of attorneys’ fees may “arise upon such further proceeding” on this matter, “we deem it advisable upon the present appeal to determine [that] matter[] also.” *Tidwell v. Booker*, 290 N.C. 98, 115, 225 S.E.2d 816, 826 (1976).

While many statutes grant trial courts discretion to award attorneys’ fees, *see, e.g.*, N.C. Gen. Stat. § 6-21.5 (2019) (“[T]he court, upon motion of the prevailing party, *may* award a reasonable attorney’s fee to the prevailing party”) (emphasis added), the

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Planned Community Act states that prevailing parties “*shall* be entitled to recover the reasonable attorneys’ fees and costs it incurs in connection with the collection of any sums due[,]” *id.* § 47F-3-116(e) (emphasis added), and that “[a]ny judgment, decree, or order in any judicial foreclosure or civil action relating to the collection of assessments *shall* include an award of costs and reasonable attorneys’ fees for the prevailing party,” *id.* § 47F-3-116(g) (emphasis added). Because “shall” in statutory contexts indicates that a trial court does not have discretion, *see State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978) (“[O]rdinarily, the word ‘must’ and the word ‘shall,’ in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory”), §§ 47F-3-116(e) and (g) do not afford the trial court any discretion with regard to the award of attorneys’ fees in such actions beyond the discretion to determine whether the rates and hours were reasonable.

IV. Conclusion

Because we conclude that the trial court correctly determined that no genuine issues of material fact remained to be litigated regarding Plaintiffs’ claims for slander of title, declaratory judgment, or permanent injunction, or Defendant’s claim for declaratory judgment, we hold that summary judgment was proper for Defendant on these claims. We further hold that the trial court erred in entering judgment on the pleadings for Defendant on Defendant’s claims for recovery of past-due amounts and other damages and for judicial foreclosure because that order impermissibly

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overruled the prior conclusion of another judge that genuine issues of material fact existed with regard to those claims. However, we conclude that the trial court correctly entered judgment on the pleadings on Defendant's claim for a permanent injunction. Because the Defendant has not prevailed in a judgment requiring the award of attorneys' fees under N.C. Gen. Stat. § 47F-3-116, we reverse and remand the award of attorneys' fees.

In sum, we affirm both summary judgments, reverse the judgment on the pleadings in part, affirm the judgment on the pleadings in part, reverse the award of attorneys' fees, and remand for further proceedings consistent with this opinion.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

Judges STROUD and BERGER concur.

Report per Rule 30(e).