No. 16-1005

IN THE SUPREME COURT OF TEXAS

KENNETH H. TARR,

Petitioner,

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,

Respondent.

On Petition for Review From the Fourth Court of Appeals
San Antonio, Texas, No. 04-16-00022-CV

PETITIONER'S SUPPLEMENTAL AUTHORITY

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THIRD COURT OF APPEALS REAFFIRMS *ZGABAY*

In a case referenced in Petitioner's briefs as awaiting decision, the Third Court of Appeals at Austin has now reaffirmed its 2015 decision in *Zgabay v. NBRC Property Owners Association,* No. 03-14-00660-CV, 2015 WL 5097116 (Tex. App.—Austin 2015, pet. denied) (mem. op.). *See Boatner v. Reitz*, No. 03-16-00817-CV (Tex. App. – Austin Aug. 22, 2017).[1]

The Third Court rejected the Fourth Court at San Antonio's decision in this case while approving of the reasoning of the recent Second Court *Garrett* decision. *See Garrett v. Sympson*, 02-16-00437-CV, 2017 WL 2471098 (Tex. App.—Fort Worth June 8, 2017, no pet. h.). The new *Boatner* decision also finds no legally significant distinctions between the "residential purposes" wordings in the various cases.

It is notable that since the Boatners were sued by the owner challenging their short-term rentals, their DJ counterclaim was determined duplicative, preventing them from obtaining an award of attorney's fees despite prevailing on the merits. In this case, by contrast, Tarr filed first in order to have his rights declared and to preserve an attorney-fee claim under the DJ Act. There are good reasons for an owner threatened with fines or legal action to race to the courthouse in cases like this.

[1] A copy is attached for the Court's convenience.

Respectfully submitted,
/s/ JPS
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CERTIFICATE OF SERVICE

I certify that on August 22, 2017, per T.R.A.P. 6.3(b), a true and correct copy of this supplement was served by efiling on:

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i)(2)(D) because it contains 187 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1), and does not exceed the total number of words permitted for a party.

/s/ *J. Patrick Sutton*
Attorney for Petitioner

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00817-CV

Appellants, Bruce Boatner and Carole Boatner // Cross-Appellant, Craig Reitz

v.

Appellee, Craig Reitz // Cross-Appellees, Bruce Boatner and Carole Boatner

FROM THE COUNTY COURT AT LAW NO. 2 OF HAYS COUNTY
NO. 16-0524-C, HONORABLE DAVID GLICKLER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

These appeals concern the interplay between short-term rentals or leases of property and deed restrictions that included a provision that "[a]ll tracts shall be used for residence purposes only, and not for business." The parties own property in a subdivision subject to these deed restrictions, and Craig Reitz sued Bruce and Carole Boatner, seeking damages for past violations of the deed restrictions and injunctive relief to prohibit the Boatners from the short-term rental or leasing of their property. Facing competing motions for summary judgment and a Rule 91a motion to dismiss brought by the Boatners, *see* Tex. R. Civ. P. 91a, the trial court denied the Boatners' Rule 91a motion and their motion for summary judgment and granted summary judgment in favor of Reitz, concluding that the deed restrictions prohibited short-term rentals and leases.

The trial court thereafter entered final judgment enjoining the Boatners from renting or leasing their property "for vacation, non-residence, short-term/temporary, or transient type housing

purposes, of less than 30 days or without the intent of the occupant to establish a residence." The trial court also awarded damages and attorney's fees to Reitz pursuant to the Texas Property Code, *see* Tex. Prop. Code §§ 5.006, 202.004(c), and attorney's fees pursuant to Rule 91a, *see* Tex. R. Civ. P. 91a.7. For the following reasons, we vacate the trial court's judgment in part, affirm in part, and reverse and render in part.

Background

The relevant facts concerning the parties' issues on appeal are undisputed. The deed restrictions in the Rocky Springs subdivision in Hays County, Texas were executed and recorded by the subdivision's developers in 1970. The restrictions include a provision that "[a]ll tracts shall be used for residence purposes only, and not for business" and require the "main dwelling" to be a "single family dwelling" and "under construction within ninety (90) days after any out-buildings are started."

Bruce and Carole Boatner purchased property in the subdivision "as a second home." They advertised the home for short-term rental and periodically rented or leased it for "varying terms [of] 2 days to 2 weeks," paying the Texas Hotel Occupancy Tax "for leases of 30 days or less." *See* Tex. Tax Code §§ 156.001(b), .101. Craig Reitz, who was also a property owner in the subdivision, sued the Boatners asserting that they were violating the subdivision's deed restrictions when they rented their property for short terms. Reitz sought damages pursuant to section 202.004(c) of the Texas Property Code, injunctive relief to enjoin the Boatners from leasing or renting their property for short terms, and attorney's fees and costs. *See* Tex. Prop. Code §§ 5.006, 202.004(c).

The Boatners answered and asserted a counterclaim for declaratory judgment under the Uniform Declaratory Judgments Act (UDJA). *See* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011.

They sought a declaration that "the deed restrictions [do] not unambiguously forbid leasing or restrict it by duration, thereby allowing leasing without any duration restrictions." They also filed a motion to dismiss pursuant to Rule 91a of the Texas Rules of Civil Procedure, *see* Tex. R. Civ. P. 91a, asserting that Reitz's "lawsuit must be dismissed to the extent it assert[ed] a violation of the deed restrictions based on the duration of leasing."

The parties filed competing motions for summary judgment, primarily joining issue on whether the deed restrictions prohibited short-term rentals or leases. *See* Tex. R. Civ. P. 166a(c). In their motion, the Boatners argued that the deed restrictions "[did] not unambiguously bar leasing and thus must be read to allow it under the rule in *Zgabay* favoring property rights." *See Zgabay v. NBRC Prop. Owners Ass'n*, No. 03-14-00660-CV, 2015 Tex. App. LEXIS 9100, at *3–4 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.). To support their position, they focused on the fact that the lease did not contain a definition of "residence purposes," an express prohibition on leasing, or any restrictions on the duration of occupancy in the deed restrictions. The Boatners' evidence included a copy of the deed restrictions and Carole Boatner's affidavit in which she declared that: (1) the Boatners use or occupy their property themselves at least once per month and have done so for the past ten years; (2) they pay all state and local occupancy taxes on the property, "including the Texas Hotel Tax for leases of 30 days or less"; (3) they "do not rent out rooms" but "lease the entire property and turn over possession entirely to our tenants"; (4) they "do not have employees at the property, a front desk or concierge there, or otherwise operate an ongoing business concern upon the Wimberley property"; and (5) they "do not file an IRS schedule C but instead a Schedule E, relating to rental income from property."

In his summary judgment motion, Reitz argued that the Boatners were violating the deed restrictions by "operating a short-term vacation rental" on property in the subdivision and that "[u]sing the house for transient, weekend, vacation type rentals" violated both the provision restricting use to "residence purposes" and the provision prohibiting use of the property "for business." He also challenged the Boatners' UDJA claim, arguing that it was improper because his claims already raised the same issues before the trial court. Reitz's evidence included an affidavit by Reitz with exhibits that provided additional evidence concerning the Boatners' rental or leasing of their property. The parties also filed responses and replies to the competing motions for summary judgment and objections to summary judgment evidence. In response to Reitz's objections, the Boatners filed supplemental summary judgment evidence.

Following a hearing, the trial court denied the Boatners' Rule 91a motion to dismiss and their motion for summary judgment and granted Reitz's motion for summary judgment. The trial court also ruled on the parties' objections to the summary judgment evidence. The parties then entered a Rule 11 agreement, *see* Tex. R. Civ. P. 11, stipulating to Reitz's attorney's fees and the affirmative defenses that the Boatners agreed not to assert on appeal.

The trial court thereafter entered final judgment enjoining the Boatners from "renting or leasing" their property "for vacation, non-residence, short-term/temporary, or transient type housing purposes, of less than 30 days or without the intent of the occupant to establish a residence." The trial court also awarded Reitz damages and attorney's fees pursuant to the Texas Property Code,

see Tex. Prop. Code §§ 5.006, 202.004(c), and attorney's fees pursuant to Rule 91a of the Texas Rules of Civil Procedure, *see* Tex. R. Civ. P. 91a.7. These appeals followed.[1]

Analysis

The Boatners raise three issues on appeal challenging the trial court's judgment granting Reitz's motion for summary judgment and denying their motion for summary judgment and Rule 91a motion to dismiss. They challenge the trial court's interpretation of the deed restrictions, arguing that they do not prohibit short-term rentals or leases. They also argue that the trial court erred in denying their declaratory judgment counterclaim because it is not duplicative of Reitz's claims and that the trial court improperly awarded attorney's fees and damages to Reitz.

Interpretation of Deed Restrictions

In their first issue, the Boatners argue that the trial court erred in its summary judgment rulings concerning its interpretation of the deed restrictions because the restrictions do not prohibit short-term rentals or leases of the Boatners' property.

Standard of Review

We review a trial court's ruling on a motion for summary judgment de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is

[1] Although Reitz filed a notice of conditional cross appeal, he does not seek to alter the trial court's judgment. *See* Tex. R. App. P. 25.1(c) (addressing who must file notice of appeal). He also did not file a cross-appellant brief but raised a conditional cross point in his appellee brief, which cross point we will address in this opinion.

entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Joe*, 145 S.W.3d at 156–57. When, as here, both parties seek summary judgment and the court grants one motion and denies the other, we render the judgment that the trial court should have rendered. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

The Boatners' first issue also requires us to interpret the deed restrictions. When interpreting restrictive covenants, we apply general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *see Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987) (describing rules for interpreting restrictive covenants); *Zgabay*, 2015 Tex. App. LEXIS 9100, at *3–4 (same). "Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered." *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). When interpreting undefined terms, courts determine the parties' intent by giving the terms their "plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996); *see Travis Heights Improvement Ass'n v. Small*, 662 S.W.2d 406, 409 (Tex. App.—Austin 1983, no writ) ("In construing a restrictive covenant, the language used by the parties will be given its plain grammatical, ordinary and commonly-accepted meaning, unless it appears that to do so will defeat the intention of the parties as clearly evidenced by other provisions of the instrument.").

If a restrictive covenant can be given a definite legal meaning, it is unambiguous and must be construed liberally to effectuate its purpose and intent. *See* Tex. Prop. Code § 202.003(a); *Jennings v. Bindseil*, 258 S.W.3d 190, 195 (Tex. App.—Austin 2008, no pet.). However, if a

restrictive covenant can reasonably be given more than one interpretation, "it is ambiguous, and we will resolve all doubts in favor of the free and unrestricted use of the property, strictly construing any ambiguity against the party seeking to enforce the restriction." *Zgabay*, 2015 Tex. App. LEXIS 9100, at *4 (citing *Wilmoth*, 734 S.W.2d at 657). "The party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable." *Id.* (citing *Sharp v. deVarga*, No. 03-05-00550-CV, 2010 Tex. App. LEXIS 91, at *10 (Tex. App.—Austin Jan. 8, 2010, no pet.) (mem. op.); *Gillebaard v. Bayview Acres Ass'n*, 263 S.W.3d 342, 347 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).

Whether restrictive covenants are violated by a particular set of facts presents a question of law, which we also review de novo. *Owens v. Ousey*, 241 S.W.3d 124, 129 (Tex. App.—Austin 2007, pet. denied); *Hicks v. Falcon Wood Prop. Owners Ass'n*, No. 03-09-00238-CV, 2010 Tex. App. LEXIS 6804, at *20 (Tex. App.—Austin Aug. 19, 2010, no pet.) (mem. op.). With these standards in mind, we turn to our review of the deed restrictions.

Are the deed restrictions ambiguous with respect to short-term rentals or leases?

As previously stated, the deed restrictions provide that "[a]ll tracts shall be used for residence purposes only, and not for business." The phrases "residence purposes" and "not for business" are not defined, and the deed restrictions do not specify what activities constitute "business" use. The restrictions also do not require owner occupancy, expressly address rentals or leases, or set a minimum permissible duration for occupancy. In contrast, the restrictions include a provision that addresses a maximum time period. That provision permits out-buildings to be

constructed prior to the "main dwelling" as long as the "main dwelling [is] under construction within ninety (90) days after any out-buildings are started."

Facing a challenge to the short-term rental of property based on analogous deed restrictions, one of our sister courts recently found the restrictions ambiguous and that they "must be interpreted in favor of the [property owners'] free and unrestricted use of the Property, thus allowing the Property to be used for short-term rentals." *Garrett v. Sympson*, No. 02-16-00437-CV, 2017 Tex. App. LEXIS 5266, at *12 (Tex. App.—Fort Worth June 8, 2017, no pet. h.) (mem. op.). In that case, the restrictions stated in relevant part that "[n]o lot or plot shall ever be used for other than single family residence purposes" and that "use of any lot or plot for other purposes including but not limited to commercial or professional purposes is hereby expressly prohibited." *Id.* at *3. The court found the phrase "residence purposes" ambiguous in two respects, explaining:

> First, "residence purposes" is ambiguous as to whether "residence purposes" is viewed only in contradistinction to business or commercial purposes; and, if not so limited, it is ambiguous both as to whether "residence purposes" requires an intention to be physically present in a home for more than a transient stay and as to whether the focus of the inquiry is on the Owner's use of the Property or the renter's use. . . . Second, if the phrase "residence purposes" carries with it a duration-of-use component, it is ambiguous as to when a rental of the Property moves from short-term to long-term.

Id. at *7 (citing *Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007)).

Noting that few Texas courts have considered the prohibition against using the property for "commercial or professional purposes," the court considered out-of-state opinions on the issue. Relying on the analysis by these courts, our sister court explained: "if a vacation renter uses a home 'for the purposes of eating, sleeping, and other residential purposes,' as was done in the present case, 'this use is residential, not commercial, no matter how short the rental duration.'"

Id. at *10 (citing *Wilkinson v. Chiwawa Cmtys. Ass'n*, 327 P.3d 614, 620 (Wash. 2014); *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003)). Our sister court also observed that "an owner's receipt of rental income from either short- or long-term rentals in no way detracts from or changes the residential characteristics of the use by the tenant." *Id.* (citing *Wilkinson*, 327 P.3d at 620; *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569, 580 (Ala. Civ. App. 2012) (on reh'g)); *see Slaby*, 100 So. 3d at 580 ("When the Slabys rent their cabin, they no doubt realize some pecuniary gain, but neither that financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial.").

This Court in *Zgabay* also faced an analogous challenge to the short-term rental of property based on deed restrictions providing that properties in the subdivision were only to be used "for single family residential purposes." 2015 Tex. App. LEXIS 9100, at *1. Similar to the Boatners' use of their property, the property owners in *Zgabay* intended to continue "advertising and renting the house for varying lengths of time, [and] paying hotel and lodging taxes when the house [was] rented for fewer than thirty days." *Id*. at *2. In holding that the restrictions were ambiguous with respect to short-term rentals and resolving the ambiguity in favor of the property owners' "free and unrestricted use of their property," we concluded that "the drafters were familiar with the concept of time limits with regard to uses that may be made of structures in the subdivision and did not impose any duration limits with regard to the leasing of homes." *Id.* at *7–8. A provision of the restrictions prohibited temporary structures from being used as a residence "except for up to six months while the permanent house is under construction." *Id.* at *5–6.

Similarly, the drafters here were familiar with the concept of time limits, having included a provision requiring construction on the "main dwelling" to begin "within ninety (90) days after any out-buildings are started," but they did not include a duration limit of occupancy or with regard to leasing homes. *See id.*; *cf. Cedar Oak Mesa, Inc. v. Alternate Real Estate, LLC*, No. 03-10-00067-CV, 2010 Tex. App. LEXIS 7241, *5 (Tex. App.—Austin Aug. 31, 2010, no pet.) (mem. op.) (addressing bylaws which required tenant occupancy period to be "for no less than 6 months").

As support for his position that the deed restrictions prohibit short-term rentals or leases, Reitz focuses on differences in the deed restrictions that were at issue in *Zgabay* and the ones at issue here. For example, the deed restrictions in that case "permitted signs advertising property for rent, subject to specific limitations," *see Zgabay*, 2015 Tex. App. LEXIS 9100, at *5, and the deed restrictions here do not reference rentals or leases at all. Reitz also focuses on the provisions in the deed restrictions that reference "dwelling" and "residence," that prohibit the property from being used "for business," and that limit the main structure on the property to "a single-family dwelling." *See, e.g*, *Davis v. City of Hous.*, 869 S.W.2d 493, 495 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (construing "word 'dwelling' to mean residential use"—"its ordinary meaning").

The references in the deed restrictions to the terms "single family" and "dwelling," however, are in the context of the building requirements for the main structure on the property as compared with the provision addressing the "use" of the property. *See Permian Basin Ctrs. for Mental Health & Mental Retardation v. Alsobrook*, 723 S.W.2d 774, 776–77 (Tex. App.—El Paso 1986, writ ref'd n.r.e.) (observing that paragraph in deed restrictions in which phrase "single-family dwelling" appeared dealt with "character of structures" that were permitted on property and that to

read in restriction of "use" would be contrary to "general rule resolving doubt in favor of free use"); *cf. Wein v. Jenkins*, No. 03-04-00568-CV, 2005 Tex. App. LEXIS 7477, at *2–3 & n.1 (Tex. App.—Austin Sept. 9, 2005, no pet.) (mem. op.) (addressing jury finding that property owner had violated restriction that "no lot . . . shall be used for anything other than single-family, private residential purposes" and injunction prohibiting property owner from "operating at the Property the business known as 'The Inn at Inverness'" or "operating at the Property any other commercial business in the nature of a hotel, 'bed & breakfast,' inn, or venue for parties, business meetings, or retreats"). The restrictions require the "main dwelling" to be a "single-family dwelling containing at least 1000 square feet under roof and constructed of new material."

Further, the use of the word "residence" in the phrase "residence purposes" and the use of the word "residential" in the phrase describing the tracts "as residential sites" do not resolve the ambiguity here. *See Zgabay*, 2015 Tex. App. LEXIS 9100, at *6–7 n.4 (citing various definitions of "residence" and "residential"; observing that "[r]eference to common usage does not lead to a definitive answer of what was intended by the phrase 'single-family residential purposes'"; and noting that "[residence] usually 'just means bodily presence as an inhabitant' whereas 'domicile' usually 'requires bodily presence plus an intention to make the place one's home'"); *see also Black's Law Dictionary* 1423 (9th ed. 2009) (defining "residence" as "living in a given place for some time" or as a "house or other fixed abode; a dwelling").

Reitz also relies on *Tarr v. Timberwood Park Owners Association Inc.*, 510 S.W.3d 725 (Tex. App.—San Antonio 2016, pet. filed), to support his position that temporary stays do not establish a residence. In that case, the deed restrictions required the property to be used "solely for residential purposes" and the court distinguished "transient purposes" from "residential purposes"

to conclude that the restrictions were not ambiguous and that "[o]ne leasing his home to be used for transient purposes is not complying with the restrictive covenant that it be used *solely* for residential purposes." *Id.* at 727, 730; *see also Benard v. Humble*, 990 S.W.2d 929, 931 (Tex. App.—Beaumont 1999, pet. denied) (holding that property owner's short-term rental of home violated deed restriction that limited use of property to "single-family residence purposes"); *Munson v. Milton*, 948 S.W.2d 813, 815, 817–18 (Tex. App.—San Antonio 1997, writ denied) (concluding that plaintiffs established probable violation of restrictive covenant that limited use of property "solely for residential, camping or picnicing purposes and shall never be used for business purposes" but modifying temporary injunction to enjoin property owner from "renting and/or leasing said property to the public for temporary or transient housing purposes").[2]

We, however, are not bound by the *Tarr* opinion; rather, we are informed by the *Zgabay* opinion. *See Glassman v. Goodfriend*, 347 S.W.3d 772, 781 & n.8 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc) (explaining horizontal stare decisis); *Chase Home Fin., L.L.C. v. Cal W. Reconveyance Corp*., 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court."). Although the deed restrictions that

[2] We also find misplaced Reitz's reliance on the Texas Hotel Occupancy Tax. *See* Tex. Tax Code §§ 156.001(b) (defining "hotel" to include "short-term rental" for purposes of hotel occupancy tax and defining "short-term rental" for purposes of subsection to mean "the rental of all or part of a residential property to a person who is not a permanent resident under Section 156.101"), .101 (stating that "chapter does not impose a tax on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days, so long as there is no interruption of payment for the period"). As Reitz concedes in his briefing, our interpretation of the deed restrictions resolves this appeal.

were at issue in *Zgabay* are not identical to the ones at issue here, we conclude that they are sufficiently analogous. We also are persuaded by the analysis of our sister court in *Garrett* in which the court relied on the *Zgabay* opinion and addressed deed restrictions that are also analogous to the ones here. *See Garrett*, 2017 Tex. App. LEXIS 5266, at *9, 11–12 (concluding that *Zgabay* opinion was "squarely on point" and supportive of holding and observing that court was not bound by *Tarr*, *Benard*, or *Munson* opinions from San Antonio and Beaumont courts of appeals).

Informed by the analysis of this Court in *Zgabay* and our sister court in *Garrett*, we conclude that the deed restrictions that Reitz seeks to enforce against the Boatners based on their short-term rental or lease of their property, at best, are ambiguous. *See id.* at *12; *Zgabay*, 2015 Tex. App. LEXIS 9100, at *7. Therefore, the requirement of section 202.003(a) that we liberally construe a restrictive covenant to effectuate its intent and purpose does not apply, *see* Tex. Prop. Code § 202.003(a), and we must resolve the ambiguity against Reitz and in favor of the Boatners' free and unrestricted use of their property, *see Garrett*, 2017 Tex. App. LEXIS 5266, at *12; *Zgabay*, 2015 Tex. App. LEXIS 9100, at *7.[3]

[3] As our sister court in *Garrett* observed, our interpretation of the deed restrictions is consistent with interpretations by other courts from other jurisdictions that have concluded that short-term rentals were not prohibited by the particular restrictive covenants because ambiguities must be resolved in favor of the free and unrestricted use of property. *See, e.g.*, *Dunn v. Aamodt*, 695 F.3d 797, 800 (8th Cir. 2012) (holding that phrase "residential purposes" was ambiguous with respect to short-term rentals); *Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007) (holding that "residential purposes" was ambiguous in several aspects, including whether or not focus was on owner's use or renter's use, and, if there is duration component, when rental moves from short-term to long-term); *Yogman v. Parrott*, 937 P.2d 1019, 1021, 1023 (Or. 1997) (concluding that ordinary meaning of "residential" was ambiguous; observing that "'residence' can refer simply to a building used as a dwelling place, or it can refer to a place where one intends to live for a long time"; and concluding that "defendants' rental of the property [was] permissible, because that use [was] not 'plainly within the provisions of the covenant'").

On this basis, we conclude that the trial court erred when it granted summary judgment in favor of Reitz, denied the Boatners' competing motion for summary judgment as to Reitz's claims, and enjoined the Boatners from "renting or leasing" their property "for vacation, non-residence, short-term/temporary, or transient type housing purposes, of less than 30 days or without the intent of the occupant to establish a residence." Thus, we sustain the Boatners' first issue as to the meaning of the deed restrictions.[4]

Declaratory Judgment

In their second issue, the Boatners argue that the trial court erred by not granting their UDJA counterclaim and that it was not duplicative of Reitz's claims because they sought "clarity on an ongoing relationship, whereas [Reitz's] breach claim involve[d] proof of individual instances of breach." The Boatners argue that their UDJA claim has greater ramifications than Reitz's breach claim—i.e., it would settle future disputes as well as prior disputes. They also ask this Court to remand the case to the trial court for the consideration of their request for attorney's fees under the UDJA. *See* Tex. Civ. Prac. & Rem. Code § 37.009 (authorizing court to award attorney's fees as are equitable and just).

As recognized by the Boatners, however, the UDJA is "'not available to settle disputes already pending before a court.'" *See BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841–42 (Tex. 1990) (citation omitted); *Owens*, 241 S.W.3d at 132. A party also may not merely restate a defense in the form of a declaratory judgment in the hopes of recovering attorney's fees.

[4] Because we have concluded that the trial court erred in granting injunctive relief, we do not address the Boatners' additional argument that the trial court's injunction in the final judgment is too vague to be enforced. *See* Tex. R. App. P. 47.1.

MBM Fin. Corp. v. Woodlands Operating Co., 292 S.W.3d 660, 669, 671 (Tex. 2009) (stating that "rule is that a party cannot use the [UDJA] as a vehicle to obtain otherwise impermissible attorney's fees" and concluding that party may not recover fees when UDJA claim "merely duplicated issues already before the trial court"); *Owens*, 241 S.W.3d at 132; *see also Tanglewood Homes Ass'n v. Feldman*, 436 S.W.3d 48, 71–72 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (concluding that UDJA claims were duplicative because turned on same questions as plaintiffs' causes of action in context of dispute over deed restrictions).

To support their position that their UDJA counterclaim was not duplicative, the Boatners cite this Court's opinion in *Owens*, but we find the facts of that case distinguishable. The counterclaim at issue in *Owens* sought a declaration that an instrument titled "Amendment/Extension of Deed Restrictions" was void in its entirety—seeking "affirmative relief extending beyond the subject matter of [plaintiffs]' suit"—not just with respect to the issues already before the court. 241 S.W.3d at 132–33. The plaintiffs, who owned adjacent property, sought an injunction to compel the removal of a mobile home from the defendants' property based on restrictive covenants, and the defendants counter-claimed alleging that the instrument created a cloud on their title. *Id.* at 127–28. The plaintiffs recorded this instrument in the real property records after the mobile home was placed on the defendants' property. *Id.* As to the instrument, the defendants "requested a declaratory judgment that the instrument 'is void and of no force or effect.'" *Id.* at 128. In concluding that the defendants' claims for declaratory relief extended beyond the subject of the plaintiffs' suit, we explained: "The restrictions contained in the instrument include not only prohibitions against mobile homes," but also include other provisions such as "a ban on using the property for 'any business, commercial, trade, mercantile or professional purpose.'" *Id.* at 132–33. In contrast, resolution of

the Boatners' request for a declaration that "the deed restrictions do not unambiguously forbid leasing or restrict it by duration, thereby allowing leasing without any duration restrictions" was already before the court and turned on the same questions as Reitz's breach and injunctive relief claims. *See Tanglewood Homes Ass'n*, 436 S.W.3d at 71 (concluding that "to the extent these declarations have future operation, they duplicate the relief plaintiffs sought by injunction"). Accordingly, we overrule the Boatners' second issue and deny their request to remand the case to the trial court to consider an award of attorney's fees under the UDJA.

Statutory Damages and Attorney's Fees

In their third issue, the Boatners challenge the trial court's award of damages under section 202.004 of the Texas Property Code. *See* Tex. Prop. Code § 202.004 (addressing enforcement of restrictive covenants and authorizing court to assess civil damages for violation). They also argue that, if they prevail on appeal with respect to the meaning of the deed restrictions, the award of attorney's fees to Reitz must be reversed. *See id.* § 5.006 (authorizing recovery of reasonable attorney's fees to "prevailing party who asserted the [breach of restrictive covenant] action"). Given our interpretation of the deed restrictions as stated above and our conclusion that the trial court erred in its summary judgment rulings, we agree with the Boatners to the extent that Reitz was awarded attorney's fees pursuant to the Texas Property Code.[5]

[5] In his pleadings, Reitz also sought attorney's fees pursuant to chapter 38 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 38.001(8) (allowing person to recover reasonable's attorney's fees "in addition to the amount of a valid claim and costs, if the claim is for: . . . an oral or written contract"). Assuming without deciding that Reitz would have been entitled to attorney's fees pursuant to chapter 38 if he had prevailed, we conclude that he was not entitled to fees pursuant to that chapter because he did not establish a valid claim against the Boatners.

Because we have concluded that the trial court erred in its summary judgment rulings in favor of Reitz and by enjoining the Boatners from the short-term rental or leasing of their property, we also conclude that the trial court erred in awarding damages to Reitz and attorney's fees pursuant to the Texas Property Code. On this basis, we sustain the Boatners' third issue.[6]

Rule 91a Motion

Among the arguments in their issues, the Boatners argue that the trial court should have granted their Rule 91a motion seeking the dismissal of Reitz's "duration and multi-family claims" as a matter of law. *See* Tex. R. Civ. P. 91a. They request that we reverse the trial court's ruling on their motion and remand the case to the trial court to consider the attorney's fees that they incurred in bringing the motion. *See id.* R. 91a.7 (requiring court to "award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court").

The merits of a Rule 91a motion to dismiss are reviewed de novo "because the availability of a remedy under the facts alleged is a question of law and the rule's factual-plausibility standard is akin to a legal-sufficiency review." *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016). "Dismissal is appropriate under Rule 91a 'if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought . . . [or] no reasonable person could believe the facts pleaded.'" *Id.* (quoting Tex. R. Civ. P. 91a.1). In its

[6] Because we have concluded that the trial court erred in granting damages, we do not address the Boatners' additional arguments that the award of damages was improper and exceeded the trial court's subject matter jurisdiction. *See* Tex. R. App. P. 47.1.

inquiry, the court "may not consider evidence" and "must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." Tex. R. Civ. P. 91a.6; *see Koenig v. Blaylock*, 497 S.W.3d 595, 600–01 (Tex. App.—Austin 2016, pet. denied) (describing standard of review of ruling on Rule 91a motion and concluding that suit had no basis in law).

In their motion to dismiss, the Boatners asserted that, as a matter of law, the deed restrictions contain no duration requirement and the "single family" requirement in the restrictions applies only to the types of buildings allowed. In his pleadings, however, Reitz alleged that the Boatners were "operating a weekend, vacation, short-term, and/or a bed and breakfast type rental business" in violation of the subdivision's deed restrictions. These allegations, construed liberally and taken as true, are sufficient to state a cause of action for violation of the deed restrictions. *See Sanchez*, 494 S.W.3d at 724; *see also Weizhong Zheng v. Vacation Network, Inc*, 468 S.W.3d 180, 185 (Tex. App.—Houston [14th Dist] 2015, pet. denied) (concluding that trial court erred by dismissing claim because motion to dismiss asserted that "evidence and authority negate[d] the pleaded facts" which should have been evaluated under summary judgment standard). On this basis, we conclude that the trial court did not err when it denied the Boatners' Rule 91a motion and, thus, we also deny the Boatners' request to remand the case to the trial court to consider an award of attorney's fees incurred in bringing their Rule 91a motion.

Conditional Cross Point

In a conditional cross point, Reitz argues that the trial court should have sustained his objections to exhibits that were filed by the Boatners as part of their summary judgment evidence.

In particular, he challenges the admissibility of exhibits that concern businesses allegedly operating on properties within the subdivision.[7] The Boatners offered these exhibits to support their waiver-type defenses, but they agreed in the Rule 11 agreement not to assert those affirmative defenses on appeal, and they have not done so. Accordingly, we do not address Reitz's conditional cross point. *See* Tex. R. App. P. 47.1.

Conclusion

For these reasons, we vacate the portions of the trial court's judgment enjoining the short-term rental or leasing of the Boatners' property, reverse the award of attorney's fees and damages to Reitz pursuant to the Texas Property Code, and render judgment that Reitz take nothing on those claims. However, we affirm the portions of the trial court's judgment that denied the Boatners' claims for declaratory relief and their Rule 91a motion to dismiss and that awarded attorney's fees to Reitz pursuant to Rule 91a of the Texas Rules of Civil Procedure.

Melissa Goodwin, Justice

Before Justices Puryear, Pemberton, and Goodwin

Vacated in Part; Affirmed in Part; Reversed and Rendered in Part

Filed: August 22, 2017

[7] The exhibits include copies of printouts from websites of businesses with addresses within the subdivision, printouts from the website of the Hays County Appraisal District for properties located within the subdivision, and unofficial copies of deeds and assumed name certificates for businesses with addresses within the subdivision.