STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-11280

ROBERT M. PITTENGER and wife, SUZANNE B. PITTENGER,

Plaintiffs,

v.

GLENEAGLES HOMES ASSOCIATION, a North Carolina Nonprofit Corporation, RICHARD B. BOOTH, JR., as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, KEVIN J. ROCHE, as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, DWIGHT H. BERG, individually and as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, and DOUG L. LEBDA (a/k/a DOUGLAS R. LEBDA) and MEGAN GRUELING,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS GLENEAGLES HOMES ASSOCIATION, RICHARD B. BOOTH, JR., KEVIN J. ROCHE, AND DWIGHT H. BERG MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants Gleneagles Homes Association, Richard B. Booth, Jr., Kevin J. Roche, and Dwight H. Berg (hereinafter the "HOA Defendants"), by and through the undersigned counsel, and hereby submit this Memorandum of Law in support of their Motion for Summary Judgment pursuant to North Carolina Rule of Civil Procedure 56.

STATEMENT OF THE CASE

This action arises out of the Gleneagles Homes Association ("Association") alleged unreasonable exercise of its powers, authority, and standards of conduct pursuant to Chapter 55A of the North Carolina General Statutes. Specifically, Plaintiffs Robert M. Pittenger and Suzanne B. Pittenger ("Plaintiffs") allege that the Association, Defendant Richard Booth ("Defendant

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Booth") as a member of the Association's Board of Directors and individually, and Defendant Kevin Roche ("Defendant Roche") and Defendant Dwight Berg ("Defendant Berg") as members of the Association's Architectural Review Committee ("ARC"), and individually, breached a fiduciary duty owed directly to Plaintiffs based on the alleged arbitrary and capricious approval of building plans for a house on the lot adjacent to Plaintiffs' lot – a house built by Defendants Doug Lebda and Megan Grueling (hereinafter the "Lebda House"). Plaintiffs allege that the Lebda House as approved violates four restrictive covenants set forth in the original and supplementary Declaration of Covenants, Conditions, and Restrictions. Specifically, Plaintiffs allege that the Lebda House violates: the two and one half story height limitation; the ten-foot interior lot line set back; a maximum of four car bays for the garage; and prohibition against nuisance. (ECF No.3¶19). Plaintiffs also allege that the Lebda House is allegedly not in harmony with surrounding homes in the neighborhood.

Plaintiffs' Amended Complaint asserts the following causes of action against the HOA Defendants: Arbitrary and Capricious Approval against Defendants Association, Booth, Roche, and Berg (Second Cause of Action); Breach of Fiduciary Duty against Defendants Association, Booth, Roche, and Berg, individually (Third Cause of Action); Negligence against Defendant Association; Punitive Damages against Defendant Berg (Sixth Cause of Action); and Constructive Fraud against Defendant Berg (Seventh Cause of Action). (ECF No.4).

Plaintiffs complain that the ARC and Board of Directors refused to take corrective action and allowed a violation of the restrictive covenants. Plaintiffs allege that these violations and the alleged failure to take corrective action are detrimental to the members of the Association. However, the undisputed evidence clearly establishes that the ARC and Board of Directors immediately investigated and addressed Plaintiffs alleged concern with the Lebda House,

responded appropriately, and at all times acted in the best interest of the neighborhood. Plaintiffs also attempt to claim that they have somehow been individually damaged. However, as more fully set forth below, Plaintiffs have established absolutely no evidence that any member of the Association nor that they personally have been damaged in any way. Rather, the evidence establishes that the value of Plaintiffs' house increased from the time before construction of the Lebda House to the present and that the Lebda House has had an overall positive impact on the neighborhood. Plaintiffs also seek a declaratory judgment and preliminary and permanent injunctions, among other relief to remedy the alleged violations of the restrictive covenants, which they claim will impact and provide relief for the entire Association. Plaintiffs have not sought any preliminary injunctive relief since the filing of this action despite pleading that they were seeking it in the Complaint. Notably, the construction of the Lebda House has been ongoing over the course of this litigation and was completed as of approximately April 2019. Defendant Lebda and Grueling and their family have been living in their home since that time.

On January 30, 2019, the HOA Defendants filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure which is currently pending before the Court. (ECF No.28, 29). The HOA Defendants respectfully incorporate by reference the Memorandum of Law in Support of the pending Motion for Judgment on the Pleadings as a further grounds and support for this Motion for Summary Judgment.

STATEMENT OF FACTS

Quail Hollow, Part 1, is a single-family residential subdivision in Mecklenburg County, North Carolina ("Quail Hollow"). (ECF No.3¶11). Gleneagles Homes Association is a North Carolina Nonprofit Corporation incorporated for the purpose of administering and enforcing the covenants, conditions, and restrictions of Quail Hollow. (ECF No.3¶2; ECF No.9¶2). Plaintiffs

and Defendants Booth, Roche, Berg, Lebda, and Grueling are lot owners in Quail Hollow. Defendants Berg, Lebda, Grueling, and Plaintiffs own adjacent lots. (ECF No.4¶12; ECF No.9¶12; Exhibit 7 – Deposition of Dwight Berg p.26-27).

By virtue of their property ownership, Plaintiffs and the Individual Defendants are members of the Association, and subject to the Declaration of Covenants, Conditions, and Restrictions ("Declaration") and Supplementary Declaration of Covenants, Conditions, and Restrictions ("Supplementary Declaration"). (ECF No.3 ¶1-5,14; ECF No.9 ¶1-5,14; Exhibit 1 – Declaration of Covenants, Conditions, and Restrictions; Exhibit 2 – Supplementary Declaration of Covenants, Conditions, and Restrictions; Exhibit 3 – Deposition of Suzanne Pittenger p.10; Exhibit 4 - Deposition of Robert Pittenger p.9; Exhibit 5 - Deposition of Richard Booth p.7-8; Exhibit 6 - Deposition of Roche p.5-7; Ex.7 p.14-15).

The Declaration provides:

> "No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, not shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and ***approved in writing as to the harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association or by an architectural control committee composed of three or more representatives appoint by the Board***."

(Ex.2 p.10-11) (*emphasis added*). The Supplementary Declaration sets forth specific conditions and restrictions applicable to lots in Quail Hollow. (Ex.2).

The Board of Directors appointed the ARC after individual members of the neighborhood volunteered to be on the ARC. (Ex.1 p.10-11; Ex.5 p. 11; Ex.6 p.8-10,17; Ex.7 p.19). In March 2017 when the Lebda House plans were submitted to the ARC for review, the ARC had five

members: Defendant Roche, Defendant Berg, Peter Hollett, Fred Woltz, and Merry Schoonmaker.[1] (Ex.6 p.10-11; Ex.7 p.17-18; Exhibit 8 – Affidavit of Peter Hollett, ¶ 2; Exhibit 9 – Affidavit of Merry Schoonmaker, ¶ 2). Defendant Roche has experience reviewing architectural plans as he has built a few houses and is familiar with working with ARCs. (Ex.6 p.10-11). Defendant Berg is a licensed general contractor. (Ex.7 p.19-22).

At all relevant times to this action, Defendant Booth was the President of the Board of Directors of the Association. (Ex.5 p.8-9). He had no role on the ARC at the time the Lebda House plans were submitted to the ARC. (Ex.5 p.8-9). He was made aware of the happenings on the ARC and assisted as needed but did not have a vote in the ARC review and approval process. (Exhibit 10 – Affidavit of Kevin Roche at ¶8, 12, 29).

A. **<u>The ARC's Review and Approval of the Lebda House Plans</u>**

On March 14, 2017, Defendants Lebda and Grueling's architect, Harry Schrader with Schrader Design, Inc., emailed Defendant Roche and Peter Hollett as members of the ARC to notify the ARC that he was working on an architectural project for 7318 Baltusrol Lane and was preparing to request ARC approval. (Ex.1 ¶ 9 and Ex.A). Schrader asked the ARC members about the ARC review and approval process to which Defendant Roche responded with a detailed overview of the ARC's review process. (Ex.10 ¶ 9; Ex.6 p.38-39). The following day Schrader sent Defendant Roche the architectural design package for the Lebda House for the ARC's review. The design package included Site Plans showing setbacks, elevations for all four sides of the house, plans for the upper, main, and lower level of the house, the roof plan, and model images of the house. (Ex.10 ¶ 9 and Ex.A). Upon receipt of the design package, Defendant Roche distributed the design package to the other members of the ARC. (Ex.10 ¶¶6,10, and Ex.B; Ex.6 p.18;40-42; Ex.7

[1] Plaintiffs only sued two members of the ARC.

p.18-19). Consistent with the way the ARC reviewed proposed architectural plans in the past, the ARC members individually reviewed the design package and voted via email to approve the plans submitted. (Ex.9 ¶6; Ex.8 ¶13; Ex.10 ¶¶6,10, and Ex.B; Ex.6 p.13-14,19-20,37,49; Ex.7 p.24). It is not the ARC's standard procedure to submit any architectural plans submitted for review to an outside architect for review during the review process.

1. The architectural plans for the Lebda House showed a house in harmony with and that fit in with the external design of the homes already built in Quail Hollow.

Plaintiffs complain that the external design and location of the Lebda House are not in harmony with surrounding structures in the neighborhood. (ECF No.3¶18). The Declaration states that:

> All lots shall be used for residential purposes only and no structure shall be erected, placed or permitted to remain on any lot other than one detached since-family dwelling *not to exceed two and one-half stories in height above ground level*, a private *garage or carport for not more than four cars…*

(Ex.1,p.11.) The ARC members charged with review of the architectural plans for the Lebda House took this charge seriously and thoroughly reviewed the plans submitted to them to ensure the proposed home fit with and was in harmony with the neighborhood as developed and built. (Ex.9 ¶6; Ex.8 ¶6; Ex.6 p.14-15,17,31-35,53-54; Ex.7 p.31,33; Exhibit 11 - Affidavit of Dwight Berg, ¶7 and 8). The HOA Defendant's architecture expert is also of the opinion that the Lebda House fits with and is in harmony with the neighborhood. (Exhibit 14 – Affidavit of Robin Roberts ¶7).

2. The ARC members considered the number of garage bays proposed on the architectural plans for the Lebda House and determined that permission to build one extra garage bay would not have any detrimental impact on the neighborhood.

The ARC considered that the plans submitted for called for five garage bays while the restrictive covenants call for no more than four garage bays. The ARC considered that there were

already homes in the neighborhood with five garage bays; the scale and scope of the overall project; and that approval of a five-car garage would not be detrimental to the members of the HOA. The ARC members were of the consensus that approving the plans with the proposed five garage bays was reasonable and appropriate. (Ex.6 p.27-30; Ex.7 p.44-45; Ex.8 ¶12; Ex.9 ¶7; Ex.10 ¶ 12). The ARC had the authority to approve the five garage bays because it is consistent with the changing nature of the neighborhood and the ARC is responsible for reviewing and approving plans which are in harmony with or that fit with the neighborhood as developed today. (Ex.6 p.28-29; Ex.7 p.45; Ex. 13 ¶7).

3. The architectural plans for the Lebda House called for the construction of a two-story house with a basement in compliance with the restrictive covenants and that was clearly consistent with the homes already built in Quail Hollow.

Nowhere in the Declaration or Supplementary Declaration is "two and one-half story above ground level" or a "story" defined. The ARC has consistently evaluated compliance with this restrictive covenant by looking at the proposed house from the street to see if it exceeds two and one-half stories. The members of the ARC found the architectural plans for the Lebda House met the two and one-half story above ground level restriction based on this established standard. (Ex.9 ¶9; Ex.8 ¶11,13; Ex.6, p.37,42,49-50; Ex.7 p.37-38).

The fact that the Lebda House has a walk-out basement does not make it a three-story house in violation of the restrictive covenants or not in harmony with the neighborhood. Several homes in the neighborhood have walk-out basements. (Ex.14 ¶7b). The neighborhood's topography makes it so that when looking at a particular spot on a house, one may be able to count three levels; however, any point on the house has not been the standard for which the two and one-half story above ground level restrictive covenant has been evaluated and enforced. (Ex.6 p.50-52; Ex. 8 ¶11; Ex.9 ¶9-10). Additionally, the current makeup of homes in the neighborhood shows that a level

below ground is certainly allowed and consistent with the homes that are currently built in the neighborhood. Notably, the architectural experts designated by the Defendants agree that this is a two-story house. (Ex.14 ¶7b and Affidavit of Josh Allison and Harry Schrader).

4. The architectural plans for the Lebda House submitted to the ARC in March 2017 complied with the 10-foot setback from the interior lot line requirement.

The members of the ARC considered whether the architectural plans for the Lebda House complied with the restrict covenant stating that “no building shall be located nearer than ten (10) feet to an interior lot line.” (Ex.2 p.2). The architectural plans for the Lebda House submitted to the ARC for review in March 2017 show over an 11-foot setback from the interior lot lines on the North and South sides of the Lot and therefore are in compliance with the 10-foot from the interior lot line setback requirement. (Ex.9 ¶8; Ex.8 ¶10; Ex.10 ¶11; Ex.11 ¶¶7-8; Ex.6, p. 41-42, 54).

After a thorough and thoughtful review by the ARC, the Lebda plans were approved by the ARC. On March 21, 2017, Defendant Roche sent a letter relaying the ARC’s approval of the plans to the Lebda’s architect. (Ex. 10 ¶ 10 and Ex.D; Ex. 6 p. 49). The ARC did not know the identity of the homeowners until after the plans were approved and Defendants Lebda and Grueling had no communication with the ARC prior to approval and had little to no communication with them at any time. (Ex.10 ¶¶10-12; Exhibit 12 – Deposition of Doug Lebda, p.67-68; Exhibit 13 – Deposition of Megan Grueling, p.71-72.)

B. <u>Alleged Issues with the Lebda House during Construction</u>

During the construction of the Lebda House, Plaintiffs, through their attorney, notified the Board and ARC of aspects of the Lebda House that they felt were in violation of the restrictive covenants. (Ex.10 ¶13 and Ex.E; Ex.6 p.55-56). Upon notification of the alleged issues, the Board and ARC investigated and met to address and discuss Plaintiffs concerns. (Ex.10 ¶¶16-17 and

Ex.H-I; Ex.9 ¶13,¶¶13-14; Ex.8 ¶14-15). The ARC and Board met on December 14, 2017, to discuss the alleged violation of the height restriction, 10-foot setback from the interior lot line, and garage bay restriction. (Ex.10 ¶16 and Ex.H; Ex.9 ¶14; Ex.8 ¶15.)

Later in December 2017, it was discovered that the Lebda House was not sited and built as shown in the plans approved by the ARC in March 2017, due to a surveying/foundation steaking error. The Lebda House was positioned 10 inches closer to the southern interior lot line than was indicated on the plans approved by the ARC. (Ex.10 ¶16 and Ex.H; Ex.6 p.56-58). Specifically, 13 to 14 inches of a cantilever bay/bump out planned for the south elevation of the house would, if completed, encroach into the 10-foot side setback requirement. Over the course of the next months, the ARC and Board communicated regarding the setback violation issue and met with Lebda's architect at the site to assess the situation. The ARC stressed the importance of compliance with the 10-foot setback requirement and voted to require compliance with it. (Ex.10 ¶¶17-23 and Ex.I-O; Ex.8,¶15; Ex.9,¶¶13-14). Defendants Lebda and Grueling and their architect asked the ARC for a waiver for the cantilever bay section/bump-out that created the encroachment on the basis that the Supplementary Declaration permitted the ARC to allow up to a 10% waiver of a side setback requirement. (Ex. 10 ¶¶ 24 and Ex.P; Ex.2 p.3). The ARC stuck with its decision to require compliance and ultimately required Defendants Lebda and Grueling to remove the cantilever bay section/bump out. (Ex. 10 ¶¶ 24 and Ex.P). Defendants Lebda and Grueling complied and revised their building plans to eliminate the cantilever bay section/bump out. (Ex.10 ¶¶24 and Ex.I-O; Ex.8 ¶15; Ex.9 ¶14; Ex.6 p.58-60).

Subsequently, the addition of a limestone veneer caused approximately a 2-inch encroachment issue on the back corner of the south side of the house. Upon discovery, the ARC discussed how to address this issue and determined that the addition of external finishing material

on a house was exactly the kind of encroachment the Supplementary Declaration contemplated regarding authority to grant up to a 10% waiver of the 10-foot setback requirement. The ARC voted to grant a waiver for the approximately 2-inch encroachment caused by the limestone veneer conditioned upon the cantilever bay section/bump out being moved back in order to comply with the 10-foot interior lot line set back requirement. (Ex.10 ¶¶ 25-28 and Ex.Q-V; Ex.8 ¶16; Ex.9 ¶15; Ex.6p. 67-68). Any side setback issues were completely addressed and cured prior to Plaintiffs filing this lawsuit. (Ex.10 ¶ 30).

ARGUMENT

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the] party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A 1, Rule 56(c). The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist . . . or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Robinson v. Forest Creek Ltd. P'ship*, 213 N.C. App. 593, 596, 712 S.E.2d 895, 896 (2011) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted)). "To maintain a genuine issue as to that fact, a plaintiff must forecast substantial evidence of that fact." *Robinson*, 213 N.C. App. at 598, 712 S.E.2d at 897-98 (emphasis added). Here, there are no genuine issues of material fact and the HOA Defendants are entitled to judgment as a matter of law.

I. The ARC's approval of the Lebda House plans was not arbitrary and capricious.

Plaintiffs seek a declaratory judgment that the ARC's approval of the Lebda House plans was arbitrary and capricious. The Declaratory Judgment Act "exists to permit courts 'to declare

rights, status, and other legal relations,' not to serve as arbiters of routine fact disputes that arise in people's dealings with one another." *Perry v. Bank of Am.*, --- N.C. App. ----, 796 S.E.2d 799, 802 (N.C. Ct. App. 2017). "Declaratory relief does not seek execution or performance from the defendant or opposing party." *Goldston v. State*, 361 N.C. 26, 34, 637 S.E.2d 876, 882 (2006) (quotation omitted). North Carolina permits the use of restrictive covenants that require the approval of all improvements in a community by an architectural review committee like the ARC. *See Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 195, 218 S.E. 2d 476, 479 (1975). Generally, such restrictive covenants, even if vesting the approving authority with broad discretionary power, are valid and enforceable *so long as the ARC's exercise of that authority is reasonable and in good faith*. *See Raintree Homeowners Ass'n, Inc. v. Bleimann*, 342 N.C. 159, 163-64, 463 S.E.2d 72, 75 (1995); *Smith v. Butler Mtn. Estates Property Owners Assoc.,* 90 N.C.App. 40, 48, 367 S.E.2d 401, 407 (1988). *Boiling Spring Lakes*, 27 N.C. App. at 196, 218 S.E.2d at 479. The Declaration vests broad discretionary authority in the ARC for review and approval of architectural plans for the construction of all improvements in the neighborhood. (Ex.2,p.10-11). Plaintiffs have not challenged the validity of the restrictive covenants in question but rather question the ARC's exercise of their authority in enforcing the restrictive covenants. Therefore, the Court is asked to determine whether the ARC's decision to approve the Lebda Plans was reasonable and in good faith. If not, then the ARC's decision is null and void. *See Hyde v. Chesney Glen Homeowners'* Association, 73 N.C. App. 605, 615, 529 S.E.2d 499, 505 (2000), *rev'd*, 352 N.C. 665, 535 S.E.2d 355 (2000). The undisputed evidence establishes that at all times throughout the ARC review and approval process, the ARC exercised its authority reasonably and in good faith. (Ex.8, Ex.9, Ex.10, Ex. 11).

An ARC's exercise of the authority to approve the house plans cannot be arbitrary. *Boiling Spring Lakes*, 27 N.C. App. at 195, 218 S.E.2d at 478. The standard by which the ARC exercises its authority can come from restrictive covenants themselves or is based on the general plan or scheme of development of the neighborhood. *Id.* (applying the general test of reasonableness and good faith to assess the architectural control committee's authority, the court considered "the general plan or scheme of development which was established initially and subsequently up to the time that the proposed plans were submitted to the architectural review committee for approval."). The undisputed evidence shows that the ARC's review of the Lebda plans was far from arbitrary. The Declaration sets forth specific restrictive covenants that the ARC used in its review. The ARC also considered clearly established standards evident in the general plan or scheme of development of the neighborhood in interpreting and applying the restrictive covenants. The ARC reviewed the Lebda Plans consistent with the manner in which they have reviewed other plans submitted to them for review. (Ex.8, Ex.9, Ex.10, Ex. 11).

In *Raintree Homeowners Ass'n, Inc. v. Bleimann*, the issue presented was whether the homeowners association, through its architectural review committee ("ARC") acted reasonably and in good faith when it denied the homeowners' application for approval of the installation of vinyl siding to replace their wood siding. 342 N.C. 159, 162, 463 S.E.2d 72, 74 (1995). The ARC denied the homeowner's application for approval to use vinyl siding rather than wood siding and affirmed their denial after multiple pleas for reconsideration. *Id.* at 161-62, 73-74. The homeowners failed to present evidence that the ARC acted arbitrarily or in bad faith when reviewing the homeowner's application or when making its decision. Mere evidence that the vinyl siding looked like wood, was of good quality, and accepted by neighbors was not sufficient evidence of bad faith on part of the ARC in denying the homeowners application to use vinyl

siding. *Id.* 165, 75. Evidence that the ARC considered the homeowner's application on three occasions despite the fact that it had previously found the material to be unacceptable; that the members of the ARC visited house and looked at the vinyl siding before making a decision; that the ARC conducted a study and found that vinyl siding was not appropriate for the community; that previous applications for vinyl siding had been rejected for similar reasons; and the ARC consistently found that vinyl siding was not appropriate for this section of community established that ARC acted reasonably and in good faith in denying the homeowner's application *Id.* at 165, 75.

In *Smith v. Butler Mountain Estates Property Owners Association, Inc.*, the plaintiffs submitted plans for the construction of a house which the ARC did not approve because the house plans showed a structure that did not meet the minimum square footage requirements and were a marked departure from home-building styles prevailing throughout the area. 90 N.C. App. 40, 48, 367 S.E.2d 401, 401 (1988). Because the ARC considered all legitimate considerations which an ARC may assess when determining the aesthetic value in approving house plans which fit into a general plan or development scheme of the neighborhood, ARC's decision was reasonable and made in good faith. *Id.*

The undisputed evidence shows that at all times the ARC exercised its authority to review and approve the Lebda House plans reasonably and in good faith. Members of the ARC independently reviewed the Lebda House plans when initially submitted for review in March 2017. Each ARC member considered the restrictive covenants as well as the general scheme and development of the neighborhood to determine whether the plans submitted fit in with and were in harmony with the neighborhood and complied with the restrictive covenants. (Ex.8; Ex.9; Ex.10; Ex.11; Ex.14).

The ARC appropriately considered whether the inclusion of five instead of four garage bays was appropriate and determined that it was considering the design of the garages in an interior motor court, that five garage bays fit with the size and scale of the house, and there were other homes in the neighborhood with more than four garage bays. The ARC waived this requirement. The ARC's authority in approving the waiver for one additional garage bay that is not visible from the street and has no negative impact on the neighborhood was reasonable and done in good faith. (Ex.8; Ex.9; Ex.10; Ex.11; Ex.14).

The ARC used their standard evaluation when determining whether the Lebda House complied with the two and one-half story above ground level restrictive covenant. At all times, the ARC considered the Lebda House to be a two-story house when viewed from the street. The HOA Defendants' architect expert is of the opinion that the Lebda House is a two-story house with a basement and is consistent with the other houses built in the neighborhood. Defendants' Lebda and Grueling's architect experts are also of the opinion that the Lebda House is a two-story house. Defendants' Lebda and Grueling's architect experts conducted complex measurements to arrive at the conclusion that under all definitions the Lebda House is a two-story house. (Ex.8; Ex.9; Ex.10; Ex.11; Ex.14).

Throughout the ARC review and approval process, there was dialog with the Lebda's architect; plans were thoroughly reviewing considering the restrictive covenants; the development of the neighborhood especially the large homes that have been developed along the golf course; and consideration of whether the house was harmonious with the neighborhood. Throughout construction and until the Lebda House was completed, the ARC remained actively involved in the process and actively enforced the restrictive covenants. When Plaintiffs raised concerns with the Lebda House during construction, the concerns were immediately addressed and action taken.

Notably, the ARC voted to require Defendants Lebda and Grueling to remove the cantilever bay/bump out on the South elevation when it came to light that it encroached into the 10-foot interior lot line set back and stuck with their decision. (Ex.8; Ex.9; Ex.10; Ex.11).

The actions of the ARC here are strikingly similar to the ARC in *Raintree* and *Smith* which were held to be reasonable and in good faith. Evidence that the Plaintiffs disagreed with or don't like the ARC's decision to approve the Lebda plans is insufficient to show bad faith or an arbitrary and capricious approval. The ARC, specifically Defendants Roche and Berg, acted reasonably and in good faith. The Court should declare that the ARC acted reasonably and in good faith and that the approval of the Lebda Plans was not arbitrary and capricious. The HOA Defendants are entitled to judgment as a matter of law.

II. DEFENDANTS GLENEAGLES HOMES ASSOCIATION, RICHARD BOOTH, KEVIN ROCHE, AND DWIGHT BERG ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM.

A. A valid fiduciary relationship does not exist between Plaintiffs and Defendants Association, Booth, Roche, and/or Berg.

A fiduciary relationship must exist between the parties for a breach of fiduciary duty claim. *Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, 805 S.E.2d 147, 157 (N.C. Ct. App. 2017), *appeal dismissed, review denied*, 370 N.C. 695, 811 S.E.2d 596 (2018). Members of an Association's Board of Directors while serving as *directors* and *officers* of the Association *owe a fiduciary duty to the Association*." *Id.; Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 498, 764 S.E.2d 203, 217 (2014) (finding a fiduciary relationship between individual board directors and the association); *Estate of Browne v. Thompson*, 219 N.C.App. 637, 640–41, 727 S.E.2d 573, 576 (2012) (A corporation director's fiduciary duty is owed to the corporation itself and not to the shareholders *individually*.) Here, a

fiduciary relationship only exists between the board members and the Association itself under N.C. Gen. Stat. 55A. *Conleys Creek Ltd. P'ship*, 805 S.E.2d at 157. Defendant Booth officially, as a member of the Board of Directors, owes a fiduciary duty to the Association and Defendants Roche and Berg officially, as members of the ARC (a committee created by the Board of Directors), owe a fiduciary duty to the *Association* but not to Plaintiffs individually. The Association itself does not owe a fiduciary duty to Plaintiffs individually. Under no circumstances do Defendants Booth, Roche, and Berg individually, as homeowners and members of the Association, owe Plaintiffs a fiduciary duty.

Defendants Booth, Roche, or Berg do not owe Plaintiffs a special duty beyond that of the general fiduciary duty to the Association to give rise to a common-law fiduciary duty. "In general terms, a fiduciary relationship is said to exist '[w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Vail v. Vail,* 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951) (internal citations omitted). *See also* ECF Nos. 28, 29.

Plaintiffs claim for breach of fiduciary duty fails due to the lack of a valid fiduciary relationship as a matter of law. The HOA Defendants are entitled to summary judgment.

B. Defendants Booth, Roche, and Berg did not breach their fiduciary duty.

Assuming the existence of a valid fiduciary relationship, Plaintiffs cannot establish a *prima facie* case of breach of fiduciary duty.

Under N.C. Gen. Stat. § 55A-8-30, "a director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner

the director reasonably believes to be in the best interests of the corporation." *Id.* "In discharging his duties, a director is entitled to rely on information, opinions, reports, or statements…if prepared or presented by … committee of the board of which he is not a member if the director reasonably believes the committee merits confidence." N.C. Gen. Stat. § 55A-8-30(b)(3). "If a director performs his duties in compliance with this statute then he is not liable for any actions taken as director." N.C. Gen. Stat. § 55A–8–30(d).

In *Taddei v. Vill. Creek Prop. Owners Ass'n, Inc.*, the court granted summary judgment in favor of the association's president on the plaintiffs' breach of fiduciary duty claim. 220 N.C. App. 487, 493, 725 S.E.2d 451, 455 (2012). The association's president did not breach his fiduciary duty because the evidence merely indicated that plaintiffs and the association's president were on separate sides of the issues and highlighted their differences of opinions "with regard to interpretation of the Covenants." The evidence was insufficient to establish a genuine issue of material fact. *Id. I;*

There is absolutely no evidence to support a determination that Defendant Booth, Roche, or Berg breached any fiduciary duty owed to Plaintiffs or the Association. The undisputed evidence shows that the Defendants Roche and Berg acted in the best interest of the Association and discharged their authority as members of the ARC reasonably and in good faith. (Ex.10 and Ex.11). Defendant Booth was not on the ARC and had no involvement in the review and approval of the Lebda House plans. (Ex.10). Defendant Booth reasonably relied on the ARC's expertise and review of the Lebda plans as permitted under N.C. Gen. Stat. § 55A-8-30(b)(3).

At best, the undisputed evidence shows that the Plaintiffs do not agree with or like the decisions of the ARC in approving the Lebda House and are on separate sides of the issues. Like in *Taddei*, this is insufficient to establish a genuine issue of material fact.

Should Plaintiff be able to establish a *prima facie* case of the existence of a fiduciary duty, and its breach, which they cannot, the burden shifts to Defendant to prove they acted in an 'open, fair and honest' manner, so that no breach of fiduciary duty occurred. *Taddei*, 220 N.C. App. at 494, 725 S.E.2d at 456. The undisputed evidence shows they acted in an "open, fair and honest" manner eliminating any potential breach of fiduciary duty.

The HOA Defendants are entitled to summary judgment on Plaintiffs' breach of fiduciary duty claim.

III. THE ASSOCIATION IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM.

Plaintiffs cannot establish the essential elements of negligence to establish a valid claim against the Association. Plaintiffs allege that the Association owed Plaintiffs a duty of reasonable care arising out of Chapter 47F and 55A of the North Carolina General Statutes as well as Plaintiffs' entrustment of money, power, and authority to the Association Board and ARC. (ECF No.4. ¶66.) Plaintiffs' negligence claim is a reiteration of the claim for Breach of Fiduciary Duty which fails and should be dismissed.

While the Association, through its officers and directors, may owe the members of the Association a duty of reasonable care, the Association does not owe an individual duty of care to Plaintiffs. There is no evidence to support that the Association breached any duty of care owed to Plaintiffs. Rather, the evidence overwhelmingly shows that the Association, through the ARC, acted reasonably at all times through the review, approval, and construction process of the Lebda House. (Ex.8; Ex.9; Ex.10; Ex.11). The ARC appropriately granted approval of the Lebda House plans, and upon notice of alleged issues during construction, the ARC immediately addressed the issues and took it upon itself to keep the Board members informed about the developments as well. Notably, none of Plaintiffs' designated experts have any opinions regarding the appropriateness of

the ARC's actions. The HOA Defendants architect expert is of the opinion that the ARC's actions were consistent with similar ARCs under similar circumstances. (Ex.14 ¶7a).

There is absolutely no evidence that the Association's actions proximately caused Plaintiffs any damage. In fact, Plaintiffs have failed to establish any evidence to support the conclusion that they have been damaged in any way whatsoever as more fully set forth below. *See* Section V, *infra*.

The Association is entitled to summary judgment on Plaintiffs' negligence claim.

IV. DEFENDANT BERG IS ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' CLAIMS FOR CONSTRUCTIVE FRAUD AND PUNITIVE DAMAGES.

For the constructive fraud claim against Defendant Berg to survive summary judgment, Plaintiffs must establish: "(1) a relationship of trust and confidence [between Plaintiffs and Defendant Berg], (2) that the [Defendant Berg] took advantage of that position of trust in order to benefit himself, and (3) that [Plaintiffs were], as a result, injured." *Anderson v. SeaScape at Holden Plantation, LLC*, 241 N.C. App. 191, 209, 773 S.E.2d 78, 91 (2015) (internal citation omitted). The "relationship of trust and confidence" required for a constructive fraud claim is akin to a fiduciary relationship. Put simply, Plaintiffs must first show (1) the existence of a fiduciary duty, and (2) a breach of that duty. *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002); *White*, 166 N.C. App. at 294–95, 603 S.E.2d at 156. Plaintiffs evidence "*must* prove defendants sought to benefit themselves or to take advantage of the confidential relationship." *Anderson,* 241 N.C. App. at 191 (emphasis added).

In *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, summary judgment was granted on the plaintiff's constructive fraud claim against individual members of the association's executive board because the plaintiff failed to show any evidence that the defendants

sought or gained any personal benefit by taking unfair advantage of their relationship with plaintiff. 236 N.C. App. 478, 503, 764 S.E.2d 203, 220 (2014).

Here, as stated above, a “relationship of trust and confidence,” or simply put a fiduciary relationship, does not exist between Plaintiffs and Defendant Berg, either by North Carolina Statute or North Carolina common law. At best, Plaintiffs and Defendant Berg are neighbors and members of the Association together. Defendant Berg is a volunteer on a Board committee. Without evidence of a “relationship of trust and confidence,” or fiduciary relationship between Plaintiffs and Defendant Berg, Plaintiffs constructive fraud claim fails as a matter of law on the first element.

Further, there is absolutely no evidence that Defendant Berg took advantage of a non-existent relationship with the Plaintiffs as an ARC committee member in approving the plans for the Lebda House to benefit himself. (Ex. 11). Plaintiffs were not involved in any way in the submittal or review process from the Lebda House and there is no evidence to show that Defendant Berg somehow took advantage *of Plaintiffs* when he reviewed plans submitted by Plaintiffs' neighbors for architectural approval. There is no evidence that Defendant Berg had any involvement in the siting of the Lebda House or that Defendant Lebda and Grueling influenced Defendant Berg in any way to gain plan approval. (Ex. 13 ¶13-16). Defendant Berg had no conversations with Defendants Lebda or Grueling prior to the Lebda House plans being submitted to the ARC for review. (Ex. 11 ¶ 10-11, 13-14; Ex.14 p.71-72; Ex.12 p.67-68). The undisputed evidence shows that Defendant Berg, along with the other ARC members, was not aware of the identity of the lot owners when the building plans for the Lebda House were submitted. (Ex. 10 ¶ 12 and Ex.D and Ex. 13 ¶ 9-10). Importantly, the original plans submitted to the ARC for the Lebda House showed roughly 11 feet and 2 inches of setback on both the Northside of the lot (the

Berg side) and on the Southside of the lot (the Plaintiff's side) (Ex.6 p.54). The Lebda House is 10 feet from the interior lot line on the Pittenger side, with the exception of the 2 inch encroachment on the southwest corner of the Lebda House for which the ARC granted a waiver. (Ex. 10). Approximately 27 years ago, before Defendant Berg lived in the neighborhood, his in-laws owned the lot where he currently lives. At that time, his in-laws purchased a 10 foot section running parallel to their lot of the now Lebda lot from the prior owners to increase the size of their side yard on the Southside of their lot. (Ex. 13 ¶ 15). Any appearance that the Lebda House is situated further from the Berg lot line is untrue. There is simply no evidence that Defendant Berg's actions on the ARC in approving the Lebda plans were done for his own benefit. Just like the Plaintiffs, with the construction of the Lebda House, Defendant Berg went from living next to a vacant lot to living next to a newly constructed home. (Ex. 13 ¶ 16). A mere showing, while again unsupported by the evidence, that the Lebda plans violated any restrictive covenant is insufficient to support a constructive fraud claim against Defendant Berg as it does not establish that Defendant Berg took advantage of a relationship of trust and confidence with *Plaintiffs*, which does not exist, to benefit himself.

Finally, to prove a constructive fraud, Plaintiffs must establish that they were injured as a result of Defendant Berg's alleged actions that he took advantage of his ARC committee membership to benefit himself, again which are completely unsupported by any evidence. There is absolutely no evidence that Defendant Berg caused any injury to Plaintiffs. Importantly, Plaintiffs have established no evidence that they been injured or damaged in any way as a result of the construction of the Lebda House let alone actions taken by their neighbor as a volunteer on the ARC. *See* Section 5, *infra*.

The essential elements of Plaintiffs' claim for constructive fraud against Defendant Berg are wholly unsupported by any evidence. Defendant Berg is entitled to summary judgment.

Given that Defendant Berg is entitled to judgment as a matter of law on claims against him, most specifically as to the claims for constructive fraud, Plaintiffs are not entitled to punitive damages from him. Punitive damages may be awarded only if Plaintiffs prove first that Defendant Berg is liable for compensatory damages and there is clear and convincing evidence of the presence of one of the following aggravating factors: fraud, malice or willful and wanton conduct. N.C. Gen. Stat. § 1D-15(a) and (b). Without an award of compensatory damages, in no event can Plaintiffs be awarded punitive damages against Defendant Berg. Even if compensatory damages were appropriate, there is no evidence of fraud, malice or willful and wanton conduct for award of punitive damages as a matter of law. *Id.* Plaintiffs cannot make out a case of constructive fraud against Defendant Berg and even if they could, constructive fraud alone, without an element of *intent* present, does not amount to "fraud" sufficient for an award of punitive damages as a matter of law. *See* N.C. Gen. Stat. § 1D-5(4) ("'Fraud' does not include constructive fraud unless an element of intent is present."); *Jay Grp., Ltd. v. Glasgow*, 139 N.C. App. 595, 600, 534 S.E.2d 233, 236 (2000) ("Unlike actual fraud, constructive fraud does not require evidence of intent to deceive.")

The basis of willful or wanton conduct as an aggravating factor also fails. "Willful and wanton conduct" requires evidence of "the conscious and intentional disregard of and indifference *to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm*. Willful or wanton conduct means "more than gross negligence." N.C. Gen. Stat. § 1D-5-7. There is no evidence that Defendant Berg intentionally

disregarded Plaintiffs' rights. Thus, any claim for punitive damages against Defendant Berg should be dismissed.[2]

V. THERE IS NO EVIDENCE THAT PLAINTIFFS HAVE BEEN DAMAGED

All evidence establishes that Plaintiffs have not been damaged in any way because of the construction of the Lebda House or by any actions of the HOA Defendants. In fact, the evidence establishes that Plaintiffs and the neighborhood have been positively impacted by the construction of the Lebda House.

According to an impact study conducted by Defendants' Lebda and Grueling's expert Carol Fortenberry, who is an expert in the field of subdivision development, the "Lebda home does not harm or injure the values of the adjoining properties. It is in keeping with current styles and market desired in the neighborhood" and "high home prices usually benefit the surrounding area." (Exhibit 16 – Deposition of Carol Fortenberry p. 14 and Impact Study at p.2, 58).

A pre-construction appraisal of the Plaintiffs home in 2017 compared to a current appraisal of Plaintiffs home after the construction of the Lebda House show that the value of the Plaintiffs' home actually increased from 2017 to 2019. According to the HOA Defendants appraisal Expert, Noeleen Griffin, the value of Plaintiffs house was $3,400,000 in 2017 and is $3,800,000 as of May 29, 2019. In Griffin's expert opinion, the construction of the Lebda Home on the lot next to Plaintiffs has not had a detrimental effect on Plaintiffs' property value. (Exhibit 17 – Deposition

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[2] N.C. Gen. Stat. § 1D-45 provides Defendant Berg with a remedy for the defense of a frivolous or malicious action for punitive damages. Defendant Berg has maintained since the beginning of this action that an action that punitive damages are not recoverable as a matter of law as fully briefed and set forth in Defendants Motion for Judgment on the Pleadings. (ECF No. 28, 29). Defendant Berg reserves his right to make a separate motion for attorneys' fees pursuant to N.C. Gen. Stat. § 1D-45.

of Noeleen Griffin- p. 55,63; Retrospective Appraisal of 2017 Value at p. 24-25; Appraisal as of May 29, 2019 at p. 22-23).

Plaintiffs were struggling to sell their house long before the construction of the Lebda House and that there is no evidence to support that their house did not sell or has not sold because of the Lebda House. Plaintiffs listed their house for sale with Susan May, a real estate broker in Charlotte, prior to construction of the Lebda House. The Plaintiffs' house was listed for over a year prior to the construction and did not sell. There was only one showing and one offer on the Plaintiffs' house in that time, which Plaintiffs rejected. (Exhibit 15 – Susan May Deposition p.7,9,14,18).[3] The evidence is insufficient Plaintiffs have been damaged in any way. The HOA Defendants are entitled to summary judgment.

CONCLUSION

The HOA Defendants respectfully request that the Court GRANT their Motion for Summary Judgment.

This the 30th day of September, 2019.

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[3] Plaintiffs' initially designated Susan May as an expert; however, during her deposition she testified she has no expert opinions in this case and does not intend to be an expert witness. (Ex.14 p.13-14,16).

CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that this brief complies with the 7,500 word count limit pursuant to BCR 7.8.

This the 30th day of September, 2019.

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CERTIFICATE OF SERVICE

Pursuant to the BCR 3.9(a), I hereby certify that I filed and served the foregoing ***Memorandum of Law is Support of Defendants Gleneagles Homes Association, Richard B. Booth, Jr., Kevin J. Roche, And Dwight H. Berg Motion for Summary Judgment*** using the North Carolina Business Court's electronic filing system, which will generate and issue a Notice of Filing to counsel of record:

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