

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 30, 2022 Session

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RAYMOND A. CONN v. WILLIAM M. DONLON ET AL.

**Appeal from the Chancery Court for Bradley County
No. 2019-CV-164 Jerri Bryant, Chancellor**

No. E2022-00419-COA-R3-CV

The developer of a subdivision filed suit seeking to enforce restrictive covenants against the owners of property within the first phase of a multi-phase subdivision. In response, the homeowners filed a motion for summary judgment, arguing that the developer had breached his fiduciary duty to timely turn over control of the homeowners' association to the homeowners for the first phase of the subdivision. The developer also filed a motion for summary judgment, which was denied by the trial court. The trial court granted summary judgment in favor of the homeowners upon its determination that the developer could no longer enforce the restrictive covenants against the homeowners in the first phase of the subdivision because he was required to turn over control of the homeowners' association for the first phase of the subdivision to the property owners. We affirm the trial court's grant of summary judgment in favor of the homeowners.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

James F. Logan, Jr., Cleveland, Tennessee, for the appellant, Raymond A. Conn.

Tracy C. Wooden and Warren J. Yemm, Chattanooga, Tennessee, for the appellees, William M. Donlon and Ariane Donlon.

OPINION

Background

The original developer began development of Eagle Creek Estates Subdivision, a gated community with private roads in Cleveland, Tennessee. The lots in Phase I of the subdivision were governed by the Declaration of Covenants and Restrictions of record at Book 1713, Page 184 in the Bradley County Register's Office, dated December 2006. Section 2.02 of the covenant and restrictions for Phase I of the subdivision states that the developer "has caused, or will in the future cause" a homeowners' association to be formed under the laws of Tennessee, and each owner is a voting member of the association. Section 3.55 of the covenant and restrictions for Phase I of the subdivision states that in the event of a violation of the covenants and restrictions, "the Developer, its successors or assigns, including all parties hereinafter becoming Owners of any one or more of the Lots to which provisions of this Declaration apply, may bring an action or actions against the Owner in violation, or attempting violation." Section 4.01 of the covenant and restrictions for Phase I of the subdivision establishes an architectural and design review process and provides as follows in pertinent part:

The Developer shall have sole architectural and design review authority for the Development until the Developer has transferred governing authority to the Board in accordance with the By-Laws, provided, however, that prior to calling the meeting of the Association to elect the Board to succeed the Developer as provided in the By-Laws, the Developer may execute and record in the office of the Recorder a document stating that the Developer reserves unto itself, its successors and assigns, the architectural and design reviewing authority provided in this Article, and stating that said reservation, notice of which is thus provided, shall survive the election of the Board to succeed the Developer. Thereafter, the Developer shall continue to exercise the rights thus reserved to it until such time as it shall execute and record in the office of the Recorder a document assigning these rights to the Board. Upon such occurrence, the Board shall establish an Architectural Review Committee as soon as it is practicable. When such Committee has been established, the Developer shall transfer reviewing authority to it.

The original developer formed the "Eagle Creek Homeowners' Association, Inc.," and executed and recorded the original Bylaws for the homeowners' association to be effective in December 2006. Under the Bylaws, the association was to have an annual meeting during which an election of a Board of Directors would occur. The Board of Directors is to have no less than three members, two of which must be owners of lots in the subdivision. The initial homeowners' association was administratively dissolved in

August 2007, and a new Eagle Creek Estates Homeowners' Association, Inc. ("HOA") was reformed in April 2010 and remained active with the Secretary of State through at least 2019.

William M. Donlon and Ariane Donlon ("Homeowners") purchased their property in Eagle Creek Estates Subdivision in December 2007 and continue to own this property. Sometime during 2010, Raymond Conn ("Developer") purchased the Eagle Creek Estates Subdivision as the new developer. Developer also owns various tracts of land within the subdivision. At the time Developer purchased the subdivision, Phase I was the only portion of land that had been platted or developed in any way. Prior to Developer purchasing the subdivision, a homeowners' association existed with a Board of Directors and an architectural review committee. According to Ariane Donlon, Developer dissolved the Board of Directors of the Eagle Creek Homeowners' Association several years after purchasing the property, and she had served on the architectural review committee for the homeowners' association prior to dissolution of the Board. According to Developer, the "Eagle Creek Homeowners' Association, Inc." was administratively dissolved in 2007, and the homeowners' association in effect when he purchased the property in 2010 was "loosely formed" and had been operating without any apparent authority or direction. Developer stated in his affidavit that in March 2014, the homeowners' association agreed to turn over control of the association to Developer at Developer's request. The record reflects a letter from Developer in April 2014 to the previous registered agent of the HOA, stating that it serves as "official notification" that all HOA responsibilities and HOA property had been transferred to Developer "as the developer of Eagle Creek Estates."

Developer stated that since assuming control of the homeowners' association, he had not turned over or transitioned any power or authority to a homeowners' association or board of directors. Since 2010, only four meetings of the Eagle Creek Homeowners' Association had occurred. Additionally, the Board of Directors had been appointed by Developer instead of being elected by the members. The appointed members of the Board of Directors are Developer, Developer's daughter, and another relative of Developer.

In May 2014, Developer revised two lots in the subdivision to allow for construction of a clubhouse and community pool for the subdivision, and in July 2015, the designated lots including a community pool and clubhouse were conveyed to the Eagle Creek Estates Homeowners' Association. It is undisputed that the last lot from Phase I was sold in April 2016. There remain two unsold lots from Phase I, accounting for 3.5% of Phase I.

Developer states as a material fact that the Bylaws for the Eagle Creek Estate Homeowners' Association, Inc. were recorded in Book 2465, Page 197 in the Bradley County Register's Office in April 2016 and that the Bylaws contain a provision stating that the homeowners' association had no authority until after the Developer transfers authority to the association. However, Homeowners dispute that those homeowners' association

Bylaws would be relevant to Phase I and instead aver that the Bylaws applicable to Phase I were recorded in December 2006 at Book 1713, Page 206 and contain no such provision.

In June 2016, Developer recorded the Final Plat for Phase II of the subdivision. Phase II is contiguous to Phase I, and as of December 2019, not all lots in Phase II had been sold. Phase II lots are subject to a separate set of restrictions and covenants than Phase I, and this set is recorded in Book 2365, Pages 167-211 in the Bradley County Register's Office. According to Developer, the covenants and restrictions sets for all three phases of the subdivision are in "substantially the same form as the others."

In December 2018, Ariane Donlon contacted a representative of the homeowners' association regarding construction of a pool and fence on Homeowners' property. Ms. Donlon subsequently contacted Developer's office about the swimming pool again stating that she and her husband were ready to proceed with construction. Thereafter, Ms. Donlon submitted information regarding the swimming pool and fence to Mr. Conn's office for consideration. Without prior approval for the construction, Homeowners paid a down payment to a company for construction of the pool. Ms. Donlon received a letter from Developer wherein he advised her that he was considering the pool proposal. In April 2019, Homeowners began construction of the swimming pool by removing a tree from their yard and began digging on their property and, on the same day, received a letter from Developer stating that Homeowners' request to construct the swimming pool had been denied.

Developer filed a petition in the Bradley County Chancery Court ("Trial Court") the next day, seeking a temporary restraining order and permanent injunction against Homeowners. In his petition, Developer sought to prevent Homeowners from building a swimming pool and erecting a fence on their property and requested that the Trial Court require Homeowners to return their property to its prior condition. Additionally, Developer sought a judgment of \$1,000 against Homeowners for a tree that they had allegedly removed from their property without permission from Developer. The petition states that Developer "currently serves as the Architectural Review Committee of Eagle Creek Estates Subdivision consistent with the Restrictions." Homeowners thereafter filed an answer, including the defense of waiver, abandonment of covenants, unreasonable denial, denial that Homeowners needed approval from Developer, and lack of good faith on the part of Developer. Homeowners argued that Developer had not enforced the covenants and restrictions since purchasing the subdivision.

During the pendency of this action in August 2019, Developer recorded the Final Plat for Phase III of the subdivision. Phase III is contiguous to Phase I and Phase II and as of December 2019, not all lots in Phase III had been sold. The lots in Phase III were subject to the amendment to the covenants and restrictions and addition of Phase III property that was recorded in Book 2619, Page 584 of the Bradley County Register's Office. According to Developer, homeowners in Phase II and Phase III have to drive though Phase I of the

subdivision in order to reach their properties, and access to public water, electricity, and sewer all pass through Phase I of the subdivision.

In October 2019, Homeowners filed a motion for summary judgment, arguing that Developer had breached his duty to turn over control of Phase I of the subdivision to the landowners and is, therefore, prohibited from enforcing the restrictive covenants. In its motion, Homeowners cited to *Innerimages, Inc. v. Newman*, 579 S.W.3d 29 (Tenn. Ct. App. 2019), and the Restatement (Third) of Property: Servitudes § 6.19(1) and (2). No lots had been sold by Developer in Phase I since April 2016, over three years before the litigation began, and the lots in Phase I have been over 96% sold since that time. Homeowners argue that Developer had breached his duty to turn over control to the homeowners after a reasonable period of time.

Developer filed a response to the summary judgment motion, arguing that the defense was waived by failing to raise it as such in their answer. Alternatively, Developer argues that the subdivision “is not anywhere near being completed” and he continues to market, construct, and develop the subdivision. Developer claims *Innerimages* is distinguishable from the present case because the subdivision at issue in this case continues to be actively developed.

While Homeowners’ summary judgment motion was pending, Developer filed his own motion for summary judgment, arguing that he, as the developer of the property, has the authority to enforce the covenants and restrictions and that a permanent injunction preventing unapproved construction by Homeowners is proper. Homeowners filed a response to the motion stating that Developer’s claim is unreasonable because he is not entitled to enforce the restrictive covenants. According to Homeowners, Developer had failed “to turn over authority to a true homeowner’s association.” Homeowners also filed a motion seeking permission to amend their answer to include an affirmative defense that Developer breached such duty. Developer filed a response in opposition to such amendment.

Upon consideration of the pending summary judgment motions and Homeowners’ motion to amend their answer, the Trial Court entered an order in April 2020, granting the motion to amend. Regarding the parties’ respective summary judgment motions, the Trial Court found it undisputed that (1) between 95% and 96% of the lots in Phase I of Eagle Creek Estates Subdivision had been sold and (2) it had been more than two years since Developer had sold new units in Phase I. The Trial Court, therefore, concluded that “the time reasonably necessary to protect [Developer’s] interest in Phase I has been completed.” The Trial Court found that only four annual meetings of the HOA had occurred since 2010 and that the board of directors of the HOA had been appointed by Developer, not the homeowners. As such, the Trial Court ruled that Developer was “required to relinquish control of the association to the members.” The Trial Court ruled that Developer’s failure to turn over control to the homeowners did not result in a loss of the restrictive covenants

in the community but that when control is relinquished to the HOA, the property owners in Phase I will act as the architectural review committee pursuant to the restrictive covenants. Relying on this Court's opinion in *Innerimages, Inc. v. Newman*, 579 S.W.3d 29 (Tenn. Ct. App. 2019), the Trial Court ruled that "the opening of additional phases to this same subdivision does not abrogate the developer's duty to turn over control for Phase I of the subdivision to the property owners." The Trial Court, therefore, granted Homeowners' motion for summary judgment to the extent that Developer was required "to turn over control of this community, Phase I of Eagle Creek Estate subdivision, to the property owners." In this order, the Trial Court denied summary judgment for the remaining issues finding that other issues were questions of fact that were in dispute.

Subsequently, Developer filed a motion to alter or amend the Trial Court's judgment, which was denied by the Trial Court. In its June 2020 order denying the motion, the Trial Court clarified that it had not "determined how much control of the subdivision should be turned over to the HOA and as such, how much control to be held by [Developer] such as it is 'reasonably necessary' according to *InnerImages*, to protect its interest in completing and marketing the project." The Trial Court further stated:

The Court finds that the [Homeowners'] evidence at the summary judgment stage was sufficient to grant judgment following the adoption of the Restatement in *InnerImages* by the Court of Appeals. Developer should create an HOA for Phase I of the subdivision. The percentage of lots sold is above 90%. The developer began first selling lots over twelve (12) years ago. The developer has come forward with no proof as to construction and marketing activity in Phase I. The Court found [Developer] has a duty to turn over the control of Phase I to the property owners to act as an architectural review committee. Additional powers and duties shall be resolved at the final hearing in this matter.

Following pleadings regarding a continuance of the final hearing and revision of a previous order, the Trial Court entered a final order in November 2021, finding as follows:

This case is not about the level or degree of control [Developer] needs to maintain over Phase One of the development but about whether the Court of Appeals' adoption of the Restatement (Third) of Property: Servitudes § 6.19(1)-(2) by the Court of Appeals in *InnerImages v. Newman*, 579 S.W.3d 29 (Tenn. Ct. App. 2019) is a proper defense to [Developer's] claims. It is undisputed that developer began selling lots in Phase One over 12 years ago, over 90 percent of the lots in Phase One have been sold, no parcels of real property have been sold in Phase One in three years, and the board of directors for the homeowner's association is appointed by [Developer] instead of the members. As this Court found in its April 22, 2020 grant of summary judgment and for the reasons provided therein, the Court of

Appeals' ruling in *InnerImages* requires [Developer] to turn over control of the HOA for Phase One to the members.

As [Developer] has not turned over control, *InnerImages* bars the relief requested by [Developer] in his petition. As [Homeowners] made no counterclaim, this case is at an end.

Developer filed a motion to alter or amend the Trial Court's judgment in December 2021. Following a hearing, the Trial Court entered an order in March 2022, denying Developer's motion to alter or amend the judgment. Developer timely filed a notice of appeal with this Court.

Discussion

Although not stated exactly as such, Developer raises the following issues for our review on appeal: (1) whether the Trial Court erred in granting Homeowners' motion for summary judgment and denying Developer's motion for summary judgment; (2) whether Developer is permitted to proceed in an action against Homeowners in his capacity as the developer and a property owner in the subdivision; (3) whether an owner of property in Phase I is permitted to enforce covenants, conditions, and restrictions; (4) whether Developer's conduct as to the phases of the subdivision development was reasonable; and (5) whether the Trial Court's order should address which phases of homeowners are permitted to participate in the HOA.

As our Supreme Court has instructed:

Summary judgment is appropriate when "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 moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *see also Abshure v. Methodist Healthcare–Memphis Hosp.*, 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)).

* * *

[I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye v. Women's Care Ctr. of Memphis, M PLLC, 477 S.W.3d 235, 250, 264-65 (Tenn. 2015).

On appeal, Developer argues that the Trial Court erred by granting summary judgment in favor of Homeowners and denying Developer's summary judgment motion. Developer argues his conduct was reasonable "with respect to each and all phases of the subdivision development."

The Trial Court granted summary judgment in favor of Homeowners, ruling that because Developer had failed to turn over authority to enforce the restrictive covenants to the homeowners' association within a reasonable period of time, he cannot be granted the relief he seeks in his petition. In making its decision, the Trial Court relied on this Court's opinion in *Innerimages, Inc. v. Newman*, 579 S.W.3d 29, 45 (Tenn. Ct. App. 2019). In *Innerimages*, this Court recognized that "one of the primary goals of a developer is to *develop* real estate and turn over control of that property to a self-regulating community" and that "[r]equiring developers to create an association and to turn over control after a reasonable time helps ensure that property owners can *actually obtain* the 'form of collective decision making' that they bargained for when they purchased their property." *Id.* at 47 (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 475 (Tenn. 2012)). This Court in *Innerimages* adopted subsections (1) and (2) of Restatement (Third) of Property (Servitudes) § 6.19, which states as follows:

- (1) The developer of a common-interest-community project has a duty to create an association to manage the common property and enforce the servitudes unless exempted by statute.
- (2) After the time reasonably necessary to protect its interests in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer.

Id. at 47. As such, this Court held that under the foregoing Restatement, developers have a common law duty to create a homeowners' association and turn over control to that association after a period of time reasonably necessary to protect the developer's interest in completing and marketing the project. *Id.* at 46.

Comment (a) to the above Restatement recognized that the interests of the developer and the property owners may diverge and conflict with one another. Restatement (Third) of Property (Servitudes) § 6.19 cmt.a (2000). According to comment (a), the developer's primary interest is marketing and selling lots and units, while the property owners' main interest is "maintaining their property values and establishing the quality of life they expected when buying the property." *Id.* In determining what is a reasonable period of time for the purposes of relinquishing control to a homeowners' association, this Court in *Innerimages* looked to comment (b) of the Restatement which suggests consideration of (1) "the percentage of lots or units that have been sold," (2) "the interval since the first unit was sold," and (3) "the level of the developer's construction and marketing activities." *Innerimages, Inc.*, 579 S.W.3d at 46; Restatement (Third) of Property (Servitudes) § 6.19

cmt.b (2000). Comment (b) proposes more flexibility in the required transfer of control may be appropriate for multiple-phase projects, with the use of subassociations that turn over local control to the homeowners “while allowing the developer to retain control over facilities needed to serve remaining unsold or unbuilt phases and facilities needed for marketing.” *Id.*

Comment (b) to the Restatement also suggests that in the absence of controlling statutory authority, the court may look for guidance from the timetable provided in the Uniform Common Interest Ownership Act (UCIOA). *Id.* The UCIOA provides that the developer of a common-interest community must relinquish control of the homeowners’ association under any of the following circumstances:¹

- (1) [60] days after conveyance of [three-fourths] of the units that may be created to unit owners other than a declarant;
- (2) two years after all declarants have ceased to offer units for sale in the ordinary course of business;
- (3) two years after any right to add new units was last exercised; or
- (4) the day the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

Executive Board Members and Officers, Uniform Common Interest Ownership Act § 3-103(d) (2008). The UCIOA further provides that no later than sixty days following conveyance of one-fourth of the units to be created for owners, “at least one member and not less than 25 percent of the members of the executive board must be elected by unit owners other than the declarant.” *Id.* § 3-103(e). Furthermore, no later than sixty days following conveyance of one-half of the units to be created for owners, “not less than [one-third] of the members of the executive board must be elected by unit owners other than the declarant.” *Id.*

In *Innerimages*, this Court held that the developer could not enforce the covenants and restrictions against the homeowners because it had failed to turn over authority to the homeowners’ association after a reasonable period of time. *Innerimages, Inc.*, 579 S.W.3d at 48. The developer in *Innerimages* had not constructed a new home since 2007, which had been approximately ten years. *Id.* at 47-48. The developer also had built only four homes since the subdivision was established twenty-four years prior and had provided only minimal services. *Id.* at 48. Determining that the developer had breached its duty, the Court in *Innerimages* affirmed the trial court’s ruling that prohibited the developer from exercising further control over the homeowners in the subdivision and their property and

¹ Except for those provided in § 2-123(g), which governs “master-planned communities” which are communities with at least 500 units.

required the developer to create and turn over control to the homeowners' association. *Id.* at 48-49.

The Court in *Innerimages* noted that its holding should not be construed as permission for property owners to escape the consequences of valid restrictive covenants before a developer has had a reasonable period of time within which to market and develop the property or as prohibiting developers from specifying a period of time within which the developer remains in control. *Id.* at 49. However, this Court in *Innerimages* held that a developer cannot rely in perpetuity on a provision specifying a period of time the developer remains in control of the property. *Id.* When a developer's authority to enforce the restrictive covenants is challenged and the court finds that the developer has failed to discharge his duties to create and/or turn over authority to the homeowners' association, "courts may exercise their equitable powers to fashion an appropriate remedy." *Id.*

The Trial Court considered the factors in UCIOA § 3-103(d) in making its decision that Developer needed to turn over control of Phase I to the HOA. The original developer of the subdivision began selling lots from Phase I since at least 2007, which is more than twelve years before the grant of summary judgment in favor of Homeowners. Additionally, approximately 96% of the lots in Phase I had been sold, and no lot had been sold since April 2016, which was more than three years at the time of summary judgment. Pursuant to UCIOA § 3-103(d)(1) and (3), it was past the reasonable period of time for Developer to turn over control to the HOA in that more than three-fourths of the lots had been sold in Phase I and it had been more than two years since Developer had exercised his right to add new units to Phase I.

Although progress had continued in phases II and III, there is evidence that development of Phase I had been stagnant for more than three years with only 3.5% remaining unsold lots. We note that the subsequent phases are controlled by a separate set of covenants and restrictions than Phase I. Unlike *Innerimages*, a HOA was created in the present case. However, Developer usurped control of the HOA and appointed himself and his family members to the board, despite the covenants and restrictions and bylaws requiring a portion of them be elected by the homeowners. Although the covenants and restrictions relevant to Phase I allow Developer to retain sole architectural and design review authority for an undetermined period of time, this Court in *Innerimages* held that developers cannot rely on such provisions to control the property of homeowners in perpetuity. *Innerimages, Inc.*, 579 S.W.3d at 49. Under the Restatement, Developer had a duty not only to create an HOA but also to turn over control to the HOA after a reasonable period of time necessary to protect his interest in completing and marketing the project. However, Developer has not done so timely for Phase I. As the Trial Court found, Developer had breached his duty to turn over control of Phase I to the HOA, and therefore, Developer cannot continue to enforce the covenants and restrictions against the homeowners in Phase I. Because Developer cannot enforce the covenants and restrictions

for Phase I, the Trial Court correctly granted summary judgment in favor of the Homeowners. We affirm the Trial Court's ruling in this regard.

Despite his failure to turn over control to a homeowners' association, Developer raises issues for our review regarding whether he should be permitted to enforce the covenants and restrictions as an owner of various tracts of land within Phase I. However, Developer failed to raise this as an issue before the Trial Court in his response to Homeowners' summary judgment motion. He now seeks to make this argument on appeal stating that it is a separate issue from his claim as the developer.² Developer states in his brief that his status as an owner of property was included at the commencement of the action but acknowledges in this brief that it was "never addressed in prior motions or orders." In his motion for summary judgment, Developer states as follows: "In summary and in support of the [Developer's] requested relief, Raymond Conn would submit that he is the developer of Eagle Creek Estates Subdivision in Cleveland, Tennessee and entitled to enforce the covenants and restrictions affecting the same" Additionally, in his response to Homeowners' motion for summary judgment, he argues that he continued to develop and market the lots in the subdivision in a reasonable way and, therefore, remained entitled to enforce the covenants and restrictions of the subdivision. Furthermore, in his additional statement of material facts, Developer lists the following as a material fact: "Mr. Conn, *as developer*, has enforced and continues to enforce the Restrictions throughout the Subdivision" (emphasis added). It is clear that Developer specifically requested relief to enforce the restrictive covenants through his authority as the developer during the trial court proceedings. Because Developer did not raise an issue regarding whether he could enforce the restrictive covenants before the Trial Court as an owner of land, we decline to address it now. We hold that Developer has waived this issue for appeal. *See PNC Multifamily Cap. Institutional Fund XXVI Ltd. P'ship v. Mabry*, 402 S.W.3d 654, 660 (Tenn. Ct. App. 2012) ("It is well settled that issues not raised at the trial level are considered waived on appeal.").

Finally, Developer raises an issue regarding whether owners within other phases would be allowed to participate in the homeowners' association controlling Phase I. That is not before this Court. Before us is whether the Trial Court erred by granting summary judgment in favor of Homeowners based on Developer's failure to timely turn over control of the HOA for Phase I. We recognize that there may be other issues or questions that are unresolved, such as who the members are to which the HOA for Phase I is being turned over. However, those questions were not before the Trial Court and are likewise not before this Court in the appeal from the grant of summary judgment in favor of Homeowners.

² Developer argues on appeal that the Trial Court's order was not final because it did not address whether Developer could proceed as an owner of property. As stated above, other than initially stating he was an owner of various tracts of land in the subdivision, he failed to raise an issue of whether he could enforce the covenants and restrictions as an owner of the property. We hold that the Trial Court's order is a final, appealable judgment and that this Court has subject matter jurisdiction over this matter.

Conclusion

Based on the foregoing, the Trial Court's judgment granting summary judgment in favor of Homeowners is affirmed. We remand to the Trial Court for the collection of the costs assessed below. Costs on appeal are assessed to the appellant, Raymond Conn, and his surety, if any.

D. MICHAEL SWINEY, CHIEF JUDGE