Circuit Court of Alexandria
Virginia

Judges
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LISA BONDAREFF KEMLER
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April 3, 2009

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Re: *Gordon Properties, LLC v. First Owners' Association of Forty Six Hundred Condominium, Inc., et al.*, Civil Case No. CL08-001432

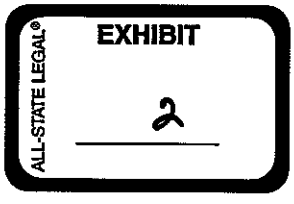
Counsel:

Pending before the Court are several post-trial motions. After hearing argument of counsel, the Court ruled on certain motions and took others under advisement. Below are the Court's rulings.

A. The Motions The Court Ruled On At The Hearing

(1) Gordon Properties' Motion for Reconsideration and A New Trial on Gordon Properties' Storage Area Damages Claim.

The Court denied this motion finding that the evidence established that the Association incurred expenses, albeit limited, with respect to the storage areas for which Gordon Properties was responsible, that under the Condominium Act, as well as the Declaration, unit owners can be assessed the expenses of maintenance and operation for single user limited common elements, and that Gordon Properties failed to present sufficient evidence upon which the jury could base a damage award. See Sunrise Continuing Care, LLC v. Wright, 277 Va. 148, 671 S.E.2d 132 (2009). Specifically, Gordon Properties presented no evidence as to either the amount of the expenses that it should be properly assessed for its use and maintenance of the storage areas or what would constitute a reasonable user fee with respect to the storage areas. For these reasons,



Gordon Properties' motion for reconsideration and new trial is denied.

(2) Association's Motion to Reconsider or for Clarification of February 23, 2009 Letter Opinion.

The Association seeks reconsideration and/or clarification of five issues. With the exception of issue (3), which the Court took under advisement, the Court ruled as follows: Regarding issue (1) (categorization of passenger elevators), the Court found that, pursuant to Va. Code Ann. § 55-79.51, the definition of commercial limited common elements and residential/commercial limited common elements as contained in Sections III.B(2) and (3) of the Declaration is controlling. As for issue (2) (the parking space limited common element (single user)), the Court found that these limited common elements were the subject of Gordon Properties' requests for relief in Count I of the Amended Complaint and, therefore, declined to reconsider or clarify this issue. As to issue (4) (compliance with Exhibit D with respect to assessments related to commercial limited common elements), the Court, in interpreting the governing documents, determined that under Section V of the Declaration the unit owners bear the responsibility for the costs of maintenance and operation of the commercial limited common elements based on the allocations set forth in Table D of Exhibit D to the Declaration. To the extent that there is an error in the percentages such that they do not add up to 100 percent, as required by the Condominium Act, the Association can take corrective action to remedy this defect if it so chooses. Finally, as to issue (5) (reserve assessments), the Court ruled that those portions pertaining to the reserve assessments (sections III(1) and (2) of Letter Opinion) only apply to reserves going forward and do not apply to the prior years' or the current year's reserve amount.

B. The Motions Taken Under Advisement

(1) Association's Motion to Set Aside the Jury's Verdict as to Count I of the Amended Counterclaim.

With respect to Count I of the Amended Counterclaim, the jury found that Gordon Properties did not breach its contract with the Association by paying its assessments into an unauthorized bank account set up by Condominium Services, Inc. (CSI). In determining whether to set aside a jury's verdict under Va. Code § 8.01-430, the applicable legal standard is whether the jury's verdict is contrary to the evidence or without credible evidence to support it.

Upon consideration of the evidence presented at trial, the written memoranda and arguments of counsel and applying the applicable standard, the Court denies the Association's motion to set aside the jury's verdict on Count I of the Amended Counterclaim and enters judgment in favor of Gordon Properties.

(2) Association's Motion to Reconsider the Court's Entry of Judgment in Favor of Gordon Properties on its Claim for Ejectment.

In Count II of the New Matters set forth in Gordon Properties' Answer to the Association's Amended Counterclaim, Gordon Properties asserted a claim for ejectment relating to storage area 1C2. At trial, the evidence showed that, in a Deed of Bargain and Sale dated October 31, 1988, West End Corporation (the predecessor-in-interest to Gordon Properties), "for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration," conveyed to the Association Condominium Unit No. 323, "and the common elements appurtenant thereto, including the Limited Common Element Storage Space No. 1C2 ...." (Defendant's Exhibit 5). The deed was signed by Cornelius Doherty, president of West End Corporation. The evidence also showed that the requirements of Va. Code §§ 55-79.57(A) and (B) were not met in that the purported conveyance of storage area 1C2 was not reflected by the condominium instruments as an amendment to the condominium instruments was never recorded. Despite the failure to comply with the Condominium Act, the evidence showed that the Association has used storage area 1C2 for at the last twenty years even though it continued to charge Gordon Properties an assessment for this limited common element based on a 1990 Resolution of the Association's Board of Directors pertaining to the storage areas. (Defendant's Exhibit 6). The Association argued at trial, and renews its argument in its motion to reconsider, that the doctrine of estoppel by deed precludes Gordon Properties from asserting a claim to storage area 1C2. In response, Gordon Properties contends that Va. Code § 55-79.57 "trump[s] the common law property rule known as estoppel by deed and any instruments purporting to convey limited common elements must comply with its terms." ("Memorandum of Law in Opposition to First Owners' Motion for Reconsideration of the Court's Ruling on Gordon Properties' Ejectment Claim" at p. 2). Gordon Properties also argues that there was no reliance by the Association on the 1988 deed as evidenced by a letter dated May 24, 2008, from the Association's president to counsel for Gordon Properties responding to Gordon Properties' revocation of its consent allowing the Association to use storage areas 1C1 and 1C2. (Plaintiff's Exhibit 47). In the letter, the Association states that it "has not been using these storage areas" and that "Storage Area 1C2 has been partially converted to storage 'cages'" and it "believe[s] that most if not all of those cages were assigned by Condominium Services Incorporated to the commercial tenants it serviced as agents for Gordon Properties." (Id.). Moreover, it was not until recently that former general manager of the Association, Steven Hurwitz, actually located the 1988 deed. Gordon Properties further contends that regardless of whether the estoppel by deed doctrine is applicable, Gordon Properties' claim is not in derogation of the deed because storage area 1C2 was never an appurtenance to Unit 323, but rather to Unit 331.

After further consideration of this matter, the Court grants the Association's motion to reconsider Count II of the New Matters and grants judgment in favor of the Association on Gordon Properties' ejectment claim relating to storage area 1C2. The Court agrees with the

Association that the doctrine of estoppel by deed applies and, as between the parties to the 1988 deed, including any successors-in-interest, storage area 1C2 was conveyed to the association. As noted in Hurley v. Charles, 112 Va. 706, 711, 72 S.E. 689, 691 (1911), "[t]he rule is well established that where the deed recites or affirms, expressly or impliedly, that the grantor is seized of a particular estate, which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all." In Hurley, the fact that the deed was never recorded, while void as to any creditors of the grantor or other third parties, would not prevent the grantor from being estopped from claiming an interest against the grantee. See also, 1924 Leonard Road, L.L.C. v. Dorothy Van Roekel, et al, 272 Va. 543, 636 S.E.2d 378 (2006), quoting from, Barris, et al v. Keswick Homes, L.L.C., 268 Va. 67, 73, 597 S.E.2d 54, 58 (2004) ("the doctrine of estoppel by deed provides that equity will not permit a grantor, *or one in privity with him*, to assert anything in derogation of an instrument concerning an interest in real or personal property as against the grantee or his successors") (Emphasis added). Accord, Lee v. Front Royal-Riverton Improvement Co., 7 Va. Cir. 241, 242 (Va. Cir. 1984). There are no cases applying this doctrine to a deed conveying condominium units or limited common elements, however, nothing in the Condominium Act appears to abrogate this common law principle in that it only applies as between a grantor and grantee.

Though it is true that storage area 1C2 is not, and was not, an appurtenance to Unit 323, as between the grantor, West End Corporation, and the grantee, the Association, the deed evidences a clear and unambiguous conveyance of storage area 1C2 for good and valuable consideration. The situation herein is distinguishable from that in Barris, et al v. Keswick Homes, L.L.C., in which the defendant argued that even if the plain language of the instrument in question did not effectively release a lot from a restrictive covenant "whether the parties to the ... instrument had the authority or intent to release [the lot] from the covenant in perpetuity, that is the effect of the language of the instruments" and the parties and their successors in interest are estopped from denying its effect. The Supreme Court rejected such an argument finding that the "clear intent of the parties to the ... instrument was to give effect to the authority granted by the restrictive covenant to consent to a one-time resubdivision of Lot 7 and that resubdivision has occurred." Barris, et al v. Keswick Homes, L.L.C., 268 Va. at 73, 597 S.E.2d at 58. In so finding, the Supreme Court held that "enforcement of the restrictive covenant against a lot created by the one-time resubdivision of [the lot] would not be in derogation of the ... instrument." Id. Here, Gordon Properties' claim for ejectment against the Association is in derogation of the 1988 deed. The plain language of the deed demonstrates an intent by West End Corporation, as signed by its president, Mr. Doherty, to convey storage area 1C2 to the Association. Further support as to the intent to convey this storage area is evidenced by the Distribution and Confirmation Deed dated October 30, 2002, signed by Cornelius Doherty, in which West End Corporation conveyed to Gordon Properties (West End Corporation's successor-in-interest) various condominium units along with storage area limited common

elements, but *not* 1C2 which was appurtenant to Unit 331, a unit conveyed to Gordon Properties in the Distribution and Confirmation Deed.

Finally, to the extent that the parties failed to comply with Va. Code § 55-79.57(B), this can be remedied by execution of an amendment to the Declaration reflecting the reassignment of storage area 1C2 to the Association.

(3) The Association's Motion to Reconsider the Court's Determination that Assessments for the Single User Limited Common Elements are Governed by Va. Code § 55-79.83A.

In the February 23, 2009 Letter Opinion, the Court concluded that assessments for Limited Common Elements (single user) should be governed by Va. Code § 55-79.83(A). Upon further reflection and consideration of the applicable authorities, the Court now determines that such a conclusion is contrary to the Declaration and the Condominium Act. To conclude, as the Court previously did, that § 55-79.83A governs the assessments for Limited Common Elements (single user) would effectively exclude the cost of maintenance and operation incurred with respect to those Limited Common Elements (single user). The Limited Common Elements (single user) specifically at issue are the storage areas, but parking garage and spaces are also categorized in the Declaration as Limited Common Elements (single user). See Declaration, Article III(A)(1). Article V, Section B provides: "The cost of maintaining and operating the limited common elements, ..., shall be borne among the unit owners having limited common elements appurtenant to their units." In Article V(B)(1), the Declaration provides: "As applicable a unit owner whose unit has assigned to it a limited common element (single user) shall share in the *expense and maintenance* of the limited of the limited common element of which his assigned space is a part." (Emphasis added). Thus, when Articles V(B) and V(B)(1) are read together, the Declaration expressly provides that a unit to which a Limited Common Element (single user) has been assigned is responsible to pay for the expenses relating to the maintenance and operation or use of that Limited Common Element.

Section 55-79.83(B) of the Condominium Act clearly mandates that, where the condominium instruments "expressly so provide," common expenses that benefit less than all of the condominium units "shall be specially assessed against the condominium unit or units involved with such reasonable provisions as the condominium instruments may make for such cases." Evidence at trial established that such common expenses may include expenses such as electricity, security and insurance, all of which the evidence showed were incurred to a limited extent with respect to the Limited Common Elements (single user) at issue. These expenses were incurred in relation to the use and operation of the Limited Common Elements (single user). Pursuant to § 55-79.83(B) the executive organ is empowered to impose reasonable user fees in order to recover for the expenses for the use and operation of the storage areas which are Limited

Common Elements (single user). In this case, because nothing in Exhibit D to the Declaration addresses Limited Common Elements (single user), the Board of Directors, in 1989, enacted a resolution to impose an assessment for the use of the storage areas (Defendant's Exhibit 6) which is consistent with the requirement in the Declaration that the cost of maintaining and operating the Limited Common Elements (single user) "be borne among the unit owners having Limited Common Elements (single user) appurtenant to their units." Declaration, Article V(B). No evidence was introduced at trial that the assessment or user fee for the use of the storage areas was unreasonable.

A close reading of § 55-79.83(A) of the Condominium Act reveals that this section concerns periodic expenses associated with only the maintenance, repair, renovation, restoration, or replacement of any limited common element and not with ongoing expenses of use and operation. The language of § 55-79.83(A) makes this clear in that it provides that such expenses of maintenance, repair, etc. "shall be specially assessed against the condominium unit to which that limited common element was assigned *at the time such expenses were made or incurred.*" (Emphasis added).

For these reasons, the Court grants the Association's motion to reconsider this issue previously addressed in the Court's February 23, 2009 Letter Opinion and concludes that Va. Code § 55-79.83(B), *not* § 55-79.83(A), governs the assessment of the Limited Common Elements (single user) and allows the Association to impose a reasonable user fee.

Counsel are directed to prepare an Order which sets forth the jury's verdict and incorporates the rulings in this Letter Opinion without restating its contents. In addition, counsel should either include in the Order or in separate Order the rulings set forth in the Court's Letter Opinion of February 23, 2009, pertaining to Gordon Properties' request for a permanent injunction that are not inconsistent with the rulings contained in this letter.

Very truly yours,

Lisa B. Kemler