COURT OF APPEALS DECISION DATED AND FILED

April 3, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2007 **Cir. Ct. No. 2006CV274**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

THOMAS BARKER AND DENISE BARKER,

PLAINTIFFS-APPELLANTS,

V.

LAKE CAMELOT PROPERTY OWNER'S ASSOCIATION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Adams County: CHARLES A. POLLEX, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 DYKMAN, J. Thomas and Denise Barker, who own undeveloped property near Lake Camelot, appeal from the trial court's denial of their summary judgment motion and award of summary judgment in favor of the Lake Camelot

Property Owners Association (the Association). The Barkers argue that the Association is not entitled to dues, fees, and fines totaling $2,205.30 that the Association has assessed against them. They further argue that by placing maintenance liens on the Barkers' property, the Association slandered their title contrary to WIS. STAT. § 706.13 (2005-06).[1] They contend that the restrictive covenants providing for these payments and requiring their membership in the Association expired July 1, 1999.

¶2 The Barkers seek a judgment declaring that the restrictive covenants have expired. They also seek actual and punitive damages, under WIS. STAT. § 706.13(1), for slander of title. The Association argues that the restrictive covenants remain in force through waiver, estoppel, and custom or acquiescence and that its assessments and liens against the Barkers are valid. The Association also asserts that the Barkers did not provide adequate support for their summary judgment motion and that the court properly awarded summary judgment to the Association.

¶3 We conclude that the restrictive covenants were not validly amended so as to extend their effective date beyond July 1, 1999. Further, the Association's affirmative defenses of waiver, estoppel, and custom or acquiescence fail. With no provisions requiring property owners to be association members and therefore subject to dues, fees, and restrictions, the Association is not entitled to file or foreclose liens for maintenance, unpaid dues, and fines against the Barkers.

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Because the Barkers have asserted insufficient facts to show that the Association slandered the Barkers' title and, if it did, that it is liable for actual or punitive damages, the Barkers are not entitled to summary judgment on these claims. Because the Association's equitable defenses to the Barkers' initial summary judgment motion have marginal arguable merit, the Association is entitled to summary judgment in the Barkers' slander of title claim.

¶5 We conclude that the trial court erroneously granted the Association's motion for summary judgment on its claims for foreclosure, unpaid dues, and camping violation fines. On the issues of slander of title and actual and punitive damages, we conclude that the Association is entitled to summary judgment dismissing the Barkers' claim.

Background

¶6 These facts are undisputed. The Barkers purchased two undeveloped lots in the Town of Rome, Adams County. The Barkers' lots are part of a development surrounding Lake Camelot. The deed to each of the properties in the Lake Camelot development had restrictive covenants that were recorded in the Adams County Register of Deeds office in February of 1969. Covenant 16 permitted the formation of a Lake Camelot property owners association "for such purpose of policing and enforcing the aforesaid covenants and for the maintenance and use of wilderness areas, outlots, and lodge" and made association membership mandatory for all property owners, were such an association established.

¶7 Covenant 16 further stated that the association may adopt bylaws to govern its operation, as long as the bylaws provided that "a majority of voting rights shall constitute a quorum for any meeting and a majority vote of voting rights present shall be required to carry any matter submitted to vote."

Covenant 17 stated "[t]hese restrictions shall expire July 1, 1999." These covenants are the basis for the Barker's appeal.

¶8 In June 1972 the Lake Camelot Property Owners Association was incorporated, and in August 1972 bylaws were established. Article III, Section 4 of the bylaws stated that "twelve percent (12%) of the entire number of votes entitled to be cast shall constitute a quorum for any action except as otherwise provided in the Articles of Incorporation, the Covenants, or these By-Laws." Article XIII, Section 2 of the bylaws stated that "[i]n the case of any conflict between the Covenants and these By-Laws, the Covenants shall control."

¶9 The trial court stated that according to the pleadings there were 2,260 properties with voting rights and subject to the restrictive covenants in 1999.[2] On November 7, 1998, the Association held a vote on a bylaw amendment that would add Article III, Section 6 to the bylaws. The proposed new section read:

> The Lake Camelot Property Owners Association (LCPOA) may establish, revise, and/or rescind Protective Covenants with sixty (60) days notice by a two-thirds (2/3) vote of the LCPOA Board of Directors and a simple majority vote of members in attendance and by proxy at a general or special membership meeting at which the covenants are proposed."

[2] The Barkers complaint asserts that at the time of the February 6, 1999 vote, 2,254 properties were subject to the restrictive covenants. The Association's answer asserts that at the time of the complaint, dated November 22, 2006, 2,260 properties were subject to the restrictive covenants. Nothing in Susann Deckow's affidavit in support of the Association's motion for summary judgment provides a count of voting rights in 1999 or 2006. While 2,254 may be a more accurate count for 1999 voting rights, the minor discrepancy is immaterial.

Of the 2,260 properties with voting rights, 839 association members voted in favor of the amendment, and 243 voted against it, for a total of 1,082 proxy or ballot votes, slightly less than half of the properties with voting rights.

¶10 In November 1998, the Association sent a letter to members that said "[a]s you know, our covenants terminate next year." The Barkers received this letter. The letter presented members with a proposed amendment to Covenant 17, which, if passed, would replace "[t]hese restrictions shall expire July 1, 1999" with "[t]hese restrictions shall be perpetual." On February 6, 1999, the Association held a vote on the Covenant 17 amendment. Of the 2,260 properties with voting rights, 934 association members voted in favor of the amendment, and 142 voted against it, for a total of 1,076 proxy or ballot votes, slightly less than half of the properties with voting rights.

¶11 The Association determined that this vote amended the restrictive covenants to make them perpetual. The Association continued to assess members maintenance fees. In September 2005 the Association placed a lien on the Barkers' property for unpaid 2005 membership dues. Throughout 2005 and 2006, the Association sought membership dues, fees, and camping violation fines from the Barkers.

¶12 In October 2006 the Barkers filed a complaint asserting two causes of action against the Association: (1) slander of title for the liens, for which the Barkers sought compensatory and punitive damages pursuant to WIS. STAT. § 706.13(1), and (2) a declaratory judgment stating that the restrictive covenants

had expired.[3] The defendants counterclaimed, seeking foreclosure of liens for maintenance and unpaid dues and fines for camping violations. Both parties filed motions for summary judgment. The trial court granted summary judgment to the Association and denied the Barkers' motion.

Standard of Review

¶13 An appellate court reviews a summary judgment determination de novo, applying the standard found in WIS. STAT. § 802.08, which is the same methodology that the circuit court uses. ***Sonday v. Dave Kohel Agency, Inc.***, 2006 WI 92, ¶20, 293 Wis. 2d 458, 718 N.W.2d 631. An appellate court affirms an award of summary judgment 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." § 802.08(2); *see also* ***Sonday***, 292 Wis. 2d 458, ¶20.

¶14 If it appears that a non-moving party is entitled to summary judgment as a matter of law, the court can award summary judgment to that party. WIS. STAT. § 802.08(6); *see also* ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶19, 261 Wis. 2d 333, 661 N.W.2d 789 (2003).

Discussion

¶15 The Barkers argue that a quorum is "a majority of the voting interests," as stated in the restrictive covenants. They assert that when there is a

[3] A declaratory judgment under WIS. STAT. § 841.01(1) is the legislature's term for a common law quiet title action.

conflict between the restrictive covenants and the bylaws, the restrictive covenants control. They contend that the November 7, 1998 meeting at which members voted to add Article III, Section 6 to the bylaws, which would allow amendment of the restrictive covenants through a simple majority vote of members in attendance, did not have a quorum and that therefore Article III, Section 6 never became part of the bylaws.[4]

¶16 They further contend that the February 6, 1999 meeting at which members voted to amend the restrictive covenants to make them perpetual also did not have a quorum and that therefore the amendment did not pass. Accordingly, they argue, any dues, fees, or fines that the Association has assessed after the July 1, 1999 expiration of the restrictive covenants are invalid, as are the Association's liens on their property. Furthermore, the Barkers argue that the Association's placing of the liens constitutes slander of title, for which the Barkers are entitled to actual and punitive damages.

¶17 The Association counters that, as stated in the restrictive covenants, the purpose of the Association, since its existence in 1972, is to police and enforce the covenants. The Association asserts that the bylaw amendment that resulted from the November 7, 1998 vote and the extension of the covenants that resulted from the February 6, 1999 amendments were necessary for the regulation and management of the affairs of the Association and to enforce and police the covenants. The Association argues that, even though a quorum was not present for either vote, the bylaw amendment and the covenant extension govern under the

[4] Even if Article III, Section 6 had become part of the bylaws, under Article XIII, Section 2 of the bylaws, the quorum requirement in Covenant 16 would control, so a majority of members with voting rights would still be required.

doctrines of waiver, estoppel, and custom or acquiescence, because to nullify them "would result in both uncertainty and chaos as to the Association and its future." The Association concludes that the Barkers' slander of title complaint and claim for punitive damages are meritless.[5]

July 1, 1999 expiration of the restrictive covenants

¶18 A court uses the rules of contract interpretation to ascertain the meaning of restrictive covenants and bylaws. ***Siler v. Read Investment Co.***, 273 Wis. 255, 261, 77 N.W.2d 504 (1956).

> The interpretation must be upon the entire instrument and not upon disjointed or particular parts of it. It must be borne in mind that the office of judicial construction is not to make a contract conform to the wishes of a party manifesting itself after the agreement has been made, but to determine what was agreed and set forth in the instrument itself.

Id. When the meaning of a contract can be determined from its face with "reasonable certainty," a court need not consider evidence beyond the contract and should enforce the clear language itself. ***Central Auto Co. v. Reichert***, 87 Wis. 2d 9, 19, 273 N.W.2d 360 (1978).

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[5] The Association also argues that the Barkers did not file the sworn documents necessary to support their summary judgment motion, citing WIS. STAT. § 802.08(3) and the trial court's comment that it had to rely on the pleadings to rule on the Barkers' summary judgment motion. However, the Association's motion for summary judgment included the affidavit of Susann Deckow, which demonstrated that the Barkers, both a non-moving and moving party, were entitled to summary judgment declaring that the restrictive covenants had expired. *See* WIS. STAT. § 802.08(6); *see also* ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶19, 261 Wis. 2d 333, 661 N.W.2d 789 (2003) (In a summary judgment motion, the court can award summary judgment to the non-moving party if that party appears to be entitled to summary judgment as a matter of law.).

¶19 Restrictive Covenant 16 and Article III, Section 4 of the bylaws conflict. They clearly state quorum requirements as, respectively, a majority of the members with voting rights and twelve percent of the members with voting rights. Article XIII, Section 2 of the bylaws resolves this conflict. Because Article XIII, Section 2 states that "[i]n the case of any conflict between the Covenants and these By-Laws, the Covenants shall control," the quorum requirement for Association action is a majority of the members with voting rights, as stated in Covenant 16.

¶20 At the November 7, 1998 vote to add Article III, Section 6 to the bylaws, 1,082 votes were cast by ballot or proxy. At the February 6, 1999 vote to amend Covenant 17 to make the restrictive covenants perpetual, 1,076 votes were cast. Because there were a total of 2,260 properties with voting rights on the dates the votes were held, neither of these meetings had a quorum of a majority of the members with voting rights. Accordingly, Article III, Section 6 of the bylaws, which would allow the restrictive covenants to be amended through a simple majority vote of members in attendance, was not validly adopted and is unenforceable.[6] The amendment to Covenant 17 is likewise unenforceable. Therefore, the restrictive covenants expired July 1, 1999, as provided in Covenant 17.

¶21 The Association points out that a court's interpretation of a contract should not make any clause or term of the contract superfluous. *See* ***Sonday***, 293 Wis. 2d 458, ¶21. While the Association does not deny the plain meaning of

[6] Even if Article III, Section 6 of the bylaws were enforceable, Covenant 16 would control, so a quorum would still be a majority of voting rights.

Article XIII, Section 2 and of Covenants 16 and 17 and the lack of a quorum at the November 7, 1998 and February 6, 1999 meetings, the Association argues that enforcing the Covenant 16 quorum requirement and allowing the restrictive covenants to expire makes it impossible for the Association to carry out its purpose of "policing and enforcing" the covenants. We disagree. First, nothing in the "policing and enforcing" provision contradicts Covenant 17's expiration provision. The Association could and perhaps did police and enforce the covenants until July 1, 1999. This interpretation does not render any provision in the restrictive covenants superfluous. Second, restrictive covenants "must be strictly construed in favor of the free use of land." ***Voyager Village Property Owners Ass'n v. Johnson***, 97 Wis. 2d 747, 749, 295 N.W.2d 14 (Ct. App. 1980). To allow the restrictive covenants to extend beyond their expiration date without a legal basis for revising the expiration date would violate this principle.

Estoppel, waiver, and custom or acquiescence

¶22 The Association argues that Wisconsin courts recognize estoppel, waiver, and custom or acquiescence and that these doctrines apply in this case, because the Association has been in existence for twenty-six years. The Association further argues that to give effect to its purpose of "enforcing and policing" the covenants and to enable the Association to regulate and manage itself, we must use these doctrines to affirm the trial court.[7]

[7] The Association asserts that because the Barkers did not challenge these doctrines in their appellate brief-in-chief, this issue is waived on appeal. Estoppel, waiver, and custom or acquiescence are affirmative defenses. *See* ***Dubman v. North Shore Bank***, 75 Wis. 2d 597, 599, 249 N.W.2d 797 (1977); ***Arnold v. Robbins***, 209 Wis. 2d 428, 431, 563 N.W.2d 178 (Ct. App 1997). The Association raised these defenses in its respondent's brief, and the Barkers appropriately replied to them in their reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

¶23 The Association asserts that the trial court inferentially acknowledged waiver, estoppel, and custom or acquiescence when it ruled that "logical extension of [the Barkers'] argument would render virtually all Association votes voidable if the required quorum, that is, the quorum required under Covenant 16, was not present."

¶24 The Association cites ***In re Osteopathic Hospital Ass'n***, 195 A.2d 759, 41 Del. Ch. 369 (1963), a Delaware case involving invalidly enacted bylaws. However, in ***Osteopathic Hospital*** "[a]ll parties concede[d] the validity of these bylaws even though certain procedural requirements for their proper enactment were not observed at the time of their passage." ***Id.*** at 762. Furthermore, the Association in ***Osteopathic Hospital*** functioned for six years with the membership "accept[ing] and act[ing] pursuant to" the bylaws in question. ***Id.*** Because the Barkers did not concede the validity of Article III, Section 6 of the bylaws or the amendment to Covenant 17 and did not accept and act pursuant to these provisions, ***Osteopathic Hospital*** is not on point.

¶25 The supreme court recognized adoption by custom and acquiescence where bylaws were prepared and approved at a meeting that occurred before a corporation's articles of incorporation had been recorded, because these bylaws had been treated as the bylaws of the corporation since its existence. ***Graebner v. Post***, 119 Wis. 392, 395, 96 N.W. 783 (1903). In ***Graebner***, adoption by custom and acquiescence allowed for unofficial bylaws to become official when no alternative official bylaws existed and when an organization's conduct indicated that it regarded the unofficial bylaws as the rules to follow. ***Id.*** In contrast, the Association's restrictive covenants and bylaws were officially adopted in 1969 and 1972 through proper procedures and existed for many years as the accepted, official bylaws of the Association. Article III, Section 6 of the bylaws and the

amendment to Covenant 17, which the Association attempted to enact over twenty-five years after the 1972 enactment of the bylaws, conflicted with what had previously been treated as the bylaws and covenants. The Barkers, and perhaps other members of the Association, did not accept and act pursuant to these new provisions.

¶26 The Association argues that acquiescence through custom occurred because Article III, Section 4 requiring a quorum of twelve percent has existed for twenty-six years. However, Article XIII, Section 2 stating that the restrictive covenants control has also existed for twenty-six years, and the Barkers could not raise their issue until July 1, 1999. The Association has produced no evidence demonstrating that it had previously taken action based on a twelve percent quorum or that the Barkers acquiesced to an invalid procedure. The fact of the Association's existence since 1972 does not override the plain, unambiguous quorum requirement and the plain, unambiguous expiration date for the restrictive covenants. Everyone knew, or could have known, of the July 1, 1999 expiration of the restrictive covenants just by looking at them.

¶27 While ignoring the quorum requirement and the restrictive covenants' expiration date may serve the desires of some of the members of the Association, the restrictive covenants and bylaws are agreements we cannot construe to suit their wishes. *See* ***Siler***, 273 Wis. at 261. Furthermore,

> to extend the concept [of custom and acquiescence] to informal adoption by custom and acquiescence of bylaws ... adhered to for some uncertain length of time would be contrary to good policy. Because informal adoption would occur in each case after some varying and indeterminate length of time, the practical effect would be to create uncertainty ….

O'Leary v. Howard Young Medical Center, Inc., 89 Wis. 2d 156, 166, 278 N.W.2d 217 (Ct. App. 1979). Those who purchased land in the Lake Camelot development before February 6, 1999, did so based on the agreement that, unless a vote attended by a quorum of a majority of the property owners occurred, the restrictive covenants would expire July 1, 1999. Some property owners favored expiration; others did not. To allow the restrictive covenants to remain in force beyond their clear expiration date without the support of the majority of property owners is contrary to fairness and good policy.

¶28 We reverse the trial court's award of summary judgment to the Association for foreclosure of maintenance liens, unpaid dues, and fines for camping violations, and we remand with directions to award summary judgment to the Barkers declaring that the restrictive covenants expired July 1, 1999.

Slander of title

¶29 The Barkers argue that because the maintenance fees the Association assessed against them are invalid, the liens the Association placed on their property slandered their title contrary to WIS. STAT. § 706.13. The Barkers further ague that the Association is liable for punitive damages because it knew or should have known that the liens were invalid.

¶30 Under Wisconsin's slander of title law

> any person who submits for filing, entering in the judgment and lien docket or recording, any lien, claim of lien, lis pendens, writ of attachment, financing statement or any other instrument relating to a security interest in or the title to real or personal property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1,000 plus any actual damages caused by the filing, entering or recording.

WIS. STAT. § 706.13(1). The elements of statutory slander of title are "[a] knowingly false, sham or frivolous claim of lien ... filed, documented or recorded which impairs title …." ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 902-903, 419 N.W.2d 241 (1988). Punitive damages are warranted where "evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.043(3).

¶31 The Barkers presented no evidence that the Association filed the liens knowing they were false, sham, or frivolous or intending to hurt the Barkers. Indeed, the Barkers submitted no affidavits at all. The Association's affidavits do not assert they knew that the liens were false, sham, or frivolous. The Barkers are not entitled to summary judgment on their slander of title and punitive damages claims.

¶32 Although we have concluded that the Barkers are entitled to summary judgment declaring that the restrictive covenants expired July 1, 1999, the Association's equitable claims for why the restrictive covenants remain in force have arguable merit, though just barely. They demonstrate the Association's belief that the liens were justified and negate the malice element necessary for punitive damages. *See* ***Kensington***, 142 Wis. 2d at 902-03; *see also* WIS. STAT. §§ 706.13(1), 895.043(3). The Association is entitled to summary judgment on the Barkers' claims for slander of title and punitive damages. *See* WIS. STAT. § 802.08(6).

¶33 To summarize, we conclude that the Barkers are entitled to summary judgment declaring that the restrictive covenants expired July 1, 1999. We also conclude that the Barkers have failed to support their claim for slander of title and that the Association has shown that the Barkers are not entitled to damages for

slander of title. We direct the trial court to grant the Barkers' motion for a judgment declaring that the covenants expired on July 1, 1999 and to deny the Association's summary judgment motion for dues, fees, and fines from the Barkers and for foreclosure. On the issues of slander of title and punitive damages, we direct the trial court to grant summary judgment to the Association.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.