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DISTRICT II

March 15, 2017

To:

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Reserve Judge

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1935-FT Talmer Bank and Trust v. Highlands of Hunters Ridge Condominium Association, Inc. (L.C. # 2015CV468)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Highlands of Hunters Ridge Condominium Association, Inc. appeals from a judgment granting summary judgment to Talmer Bank and Trust. Highlands contends that the circuit court erred in concluding that Talmer was not liable for assessments against its two unconstructed condominium units. Pursuant to a presubmission conference and this court's order of October 25, 2016, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2015-16).[1] Upon review of those memoranda and the record, we reverse the judgment of the circuit court and remand for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

This case centers on unimproved land located in the City of Kenosha. Talmer owns two unconstructed condominium units subject to the Declaration of Condominium of Highlands of Hunters Ridge, a Condominium (the "Declaration"), which created a twelve-unit condominium. Talmer acquired the properties by quit claim deed from the condominium's original developer.

In 2014, Highlands attempted to levy assessments and impose liens against Talmer and its units. Talmer disputed those assessments and liens, maintaining that unconstructed units are not subject to assessments under the Declaration.

Talmer subsequently commenced the present action. It sought a declaration that it was not liable for assessments against its units. It also sought a permanent injunction against future assessments or liens. Highlands counterclaimed seeking a declaration that Talmer was liable for assessments.

As the parties' dispute turned on the Declaration's interpretation, they stipulated to the material facts. Talmer filed a motion for summary judgment on its claims for declaratory and injunctive relief, which the circuit court granted. Highlands then filed a motion for reconsideration, which the court denied. This appeal follows.

On appeal, Highlands contends that the circuit court erred in granting summary judgment to Talmer. It argues that Talmer is liable under the Declaration for assessments against its two unconstructed units.

We review a grant of summary judgment de novo, using the same methodology as the circuit court. *See* ***Estate of Sheppard ex rel. McMorrow v. Schleis***, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of

material fact and one party is entitled to judgment as a matter of law. *See* ***id.***, WIS. STAT. § 802.08(2).

Determining whether summary judgment was properly granted in this case requires interpretation of the condominium's Declaration. The interpretation of a written document affecting land is a question of law that we also review de novo. *See* ***Kaitlin Woods Condo. Ass'n, Inc. v. North Shore Bank, FSB***, 2013 WI App 146, ¶10, 352 Wis. 2d 1, 841 N.W.2d 562.

Here, the Declaration provides that, "Each Unit Owner … shall be liable for the share of expenses of the Association assessed against such Owner's Unit." The Declaration defines "unit" as "a part of the Condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms of enclosed space located on one or more floors (or parts thereof) in a building."

On its face, the Declaration's definition of "unit" applies to unconstructed units. This reading is supported by case law, which construed a nearly identical definition in similar fashion. *See* ***Aluminum Indus. Corp. v. Camelot Trails Condo. Corp.***, 194 Wis. 2d 574, 582-83, 535 N.W.2d 74 (Ct. App. 1995) (concluding that the definition of "unit" found in WIS. STAT. § 703.02(15)[2] includes condominium land intended for construction but on which construction has not begun).

[2] WISCONSIN STAT. § 703.02(15) defines "unit" as "a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors, or parts thereof, in a building. A unit may include 2 or more noncontiguous areas."

Thus, the question becomes whether there is anything else in the Declaration that evinces an intent to limit assessments to only constructed units. Talmer submits that there is. It argues that the Declaration, when read as a whole, narrows the definition of a unit to part of a constructed building. In support of this interpretation, it cites language in section 2.5 (general description of condominium),[3] section 3.2 (boundaries of units),[4] article 6 (uses),[5] and section 4.2 (common elements).[6]

We are not persuaded that the language cited by Talmer modifies the definition of unit. To begin, such language is required to be contained in the declaration of any condominium project. *See* WIS. STAT. § 703.09(1). Moreover, the reference to buildings in relation to units does not mean that a building has to be constructed for a unit to exist. *See* ***Saddle Ridge Corp. v. Board of Review for Town of Pac.***, 2010 WI 47, ¶53, 325 Wis. 2d 29, 784 N.W.2d 527. Likewise, the reference to uses in relation to units does not mean that a residence has to be constructed for a unit to exist. Finally, the Declaration's description of common elements does not separate land from any constructed building sitting upon it. On the contrary, the Declaration makes clear that "units," as opposed to buildings or improvements, are excluded from the common elements.

[3] Section 2.5 describes the condominium as consisting of "six (6) buildings containing twelve (12) condominium units (hereinafter "Units"), together with guest parking stalls, driveways and land. The buildings are one (1) and two (2) story structures with full basements."

[4] Section 3.2 defines the boundaries of the units by references to the planes created by constructed buildings.

[5] Article 6 restricts the use of units to residential occupancy and parking.

[6] Section 4.2 treats the condominium's land as part of the common elements.

Other language in the Declaration supports the conclusion that a unit includes property on which there is no building or improvement. Article 7 describes a "unit owner" as someone holding legal title to a "unit." It is undisputed that Talmer holds legal title to the properties in question. Section 8.2, meanwhile, makes clear that all unit owners are members of the association and subject to its rules, which include collecting assessments. Article 12, which comes into play in the event that the condominium is damaged or destroyed, is also instructive. It discusses a vote of the unit owners and authorizes the levy of assessments where no physical, inhabitable buildings exist (because they have been destroyed). Finally, section 4.4 gives each unit owner a "one-twelfth" interest in the common elements. This suggests that unit owners are responsible for paying common expenses regardless of whether their units are constructed.

For these reasons, we are satisfied that Talmer was liable for assessments against its two unconstructed condominium units. Accordingly, we reverse the judgment of the circuit court and remand for further proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed and the cause remanded, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals