[Cite as *Meadows Condominium Unit Owners Assn. v. Blakey*, 2010-Ohio-2437.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

THE MEADOWS CONDOMINIUM UNIT OWNERS ASSOCIATION,	:	
	:	CASE NO. CA2009-09-247
Plaintiff-Appellee,	:	
	:	O P I N I O N
		6/1/2010
- vs -	:	
	:	
JESSE D. BLAKEY, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-06-2863

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HENDRICKSON, J.

{¶1} Defendant-appellant, Jesse Blakey, appeals a decision of the Butler County Court of Common Pleas granting summary judgment in favor of The Meadows Condominium Unit Owners Association in a foreclosure action. For the reasons outlined below, we reverse the decision of the trial court and remand.

{¶2} This appeal concerns a lien filed against real property owned by Blakey in response to his failure to pay condominium assessments. Blakey owns one of 56 condominium units located in a development known as The Meadows Condominiums in West Chester Township, Ohio. All unit owners are members of The Meadows Condominium Unit Owners Association ("the Association"). The Association is a nonprofit corporation governed by its own Declaration and Bylaws, as well as R.C. Chapter 5311. A Board of Managers ("the Board") is vested with the power and authority to govern the Association.

{¶3} The Association is required to hold annual meetings. Sometime in 2007, the Board sent all unit owners a notice informing them that the 2007 annual meeting would be held on June 7, 2007 ("the Notice"). The Notice informed unit owners that voting would begin on that date on two proposed amendments to the Declaration and Bylaws. It also specified that voting would be conducted over a 14-day period beginning on June 7, 2007 at the meeting. Voting was to continue during the 14-day period until a sufficient number of votes were collected to either pass or defeat the proposed amendments.[1]

{¶4} The 2007 annual meeting took place on the scheduled date and votes were gathered. At the close of the meeting, it was announced that the amendments had received 40 votes in favor (40 out of 56 units, or 71 percent) and seven votes in

1. By statute, amendments to the Declaration must receive an affirmative vote of at least 75 percent of unit owners in order to pass. R.C. 5311.05(B)(10). Each of the 56 condominium units was entitled to one vote.

opposition (seven out of 56 units, or 13 percent). In accordance with the Notice, votes were then collected during the 14-day open voting period. The final tally of votes, announced at a June 28, 2007 meeting, included 43 votes in favor (or 77 percent) and seven votes in opposition (or 13 percent). Having received enough votes to pass, the amendments were recorded in August 2007.

{¶5} The amendment that is key to the dispute in the case at bar modified the Declaration and Bylaws to grant the Board power to charge common expenses on a monthly and/or quarterly basis. Prior to the passage of this amendment, these expenses had been assessed on a monthly basis only. After the amendment was passed and recorded, the Board altered assessments to impose quarterly charges in addition to the monthly charges. According to the Association, each unit owner's annual obligation for his share of common expenses remained unaffected by this change. According to Blakely, however, his annual obligation increased by nearly $650.

{¶6} Blakey repeatedly refused to pay the quarterly assessments, arguing that the vote which passed the amendments was invalid. Blakey's refusal to pay prompted the Association to file a lien against his condominium unit in February 2008. The amount of the lien was $1,499.64, consisting of unpaid common expenses, late fees, interest, attorney fees, and court costs.

{¶7} The Association filed an action to foreclose on the lien in June 2008. Blakey filed a separate complaint against the Association and the Board which was consolidated with the foreclosure action. The parties thereafter filed cross motions for summary judgment.

{¶8} In a decision rendered in May 2009, the trial court awarded summary judgment to the Association and denied Blakey's summary judgment motion. This was followed by the trial court's September 2009 issuance of a judgment entry and decree in

foreclosure. The entry awarded the Association $6,810.32, which included unpaid quarterly assessments, late fees, attorney fees, court costs, and title examination fees. Blakey timely appeals, raising six assignments of error.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED BY GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT TO FORECLOSE WHERE THE UNDERLYING VOTE GIVING RISE TO THE AMENDMENT AND THE SUBSEQUENT LIEN ARE EACH INVALID."

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ERRED BY GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT TO FORECLOSE ON AN INVALID LIEN."

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED BY GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE ASSOCIATION'S LIEN IS CONTINUING."

{¶15} Assignment of Error No. 4:

{¶16} "THE TRIAL COURT ERRED BY GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF WHETHER R.C. § 5311.081(C) MANDATES A HEARING."

{¶17} Assignment of Error No. 5:

{¶18} "THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT BY OVERRULING DEFENDANT'S MOTION TO STRIKE WHERE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT IN ACCORD WITH CIVIL RULE 56(A)."

{¶19} Assignment of Error No. 6:

{¶20} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT WHERE THE UNDERLYING VOTING, AMENDMENT AND LIEN WERE INVALID AS A MATTER OF LAW."

{¶21} In his first assignment of error, Blakey challenges the trial court's decision grating summary judgment to the Association. Blakey maintains that the vote which passed the amendments contravened constraints imposed by the Declaration, the Bylaws, and Ohio law.

{¶22} Summary judgment is a procedural device employed to end litigation when there are no issues in a case requiring a formal trial. *Nibert v. Columbus/Worthington Heating & Air Conditioning*, Fayette, App. No. CA2009-08-015, 2010-Ohio-1288, ¶13. A trial court's decision on summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296.

{¶23} Summary judgment is proper when (1) there are no genuine issues of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

{¶24} An issue of fact exists when the relevant factual allegations in the pleadings, affidavits, depositions, or interrogatories are in conflict. *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741. A dispute of fact is "material" if it affects the

outcome of the case, and "genuine" if demonstrated by substantial evidence going beyond the allegations of the complaint. *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 371.

{¶25} At the outset, we observe that similar versions of the amendments in question were stricken once before. In *Gormley v. The Meadows Condominium Unit Association* (Mar. 20, 2007), Butler C.P. No. CV06 10 3802, the Board called a special meeting at which votes were cast and both amendments failed. After the special meeting was adjourned, Board members solicited votes from unit owners who did not attend the special meeting. The Board claimed it acted within its authority in doing so because the Bylaws allowed the Board to take action without a meeting.

{¶26} The trial court disagreed with the Board's argument, declaring that "[t]he bylaws allow Special Meetings or Actions Without a Meeting[,] but there is not [a] provision allowing a combination of the two[.]" Such an unauthorized combination is what the *Gormley* court found the Board had attempted to do. The trial court concluded that both amendments failed at the special meeting and at the action without a meeting because an insufficient number of votes was received by either means when viewed individually and not improperly combined.

{¶27} In the present matter, Blakey argues that the Board once again improperly combined two methods – an annual meeting and an action without a meeting – in violation of the prohibitions enunciated by the *Gormley* court. The Association maintains that the present matter is distinguishable from *Gormley*. In that case, voting ceased at the special meeting and the Board thereafter wrongfully solicited proxies. Here, the Association emphasizes, there was an open voting period rather than a single voting date and unit owners received notice thereof. According to the Association, voting began on the date of the annual meeting and did not conclude until the expiration of the

14-day period or collection of enough votes to either pass or defeat the amendment. The Association asserts that all votes were properly obtained during the announced voting period and not improperly solicited after the annual meeting's conclusion.

{¶28} As stated, the trial court granted summary judgment in favor of the Association in the present matter. In its analysis, the court observed that the Bylaws permitted the Association to hold annual meetings and special meetings, and to take actions without a meeting. The court quoted the Notice and opined that the document served two separate purposes: (1) to notify owners of the 2007 annual meeting, and (2) to notify owners of an action to be taken without a meeting over a 14-day period (i.e., the vote). Regarding the open voting period, the trial court found that the Notice informed unit owners that voting would *begin* at the annual meeting on June 7, 2007 and would *continue* over a 14-day period commencing on June 7, 2007 at the annual meeting.

{¶29} In examining the events of the case, the trial court reasoned that the number of votes obtained at the 2007 annual meeting was not sufficient to pass or defeat the amendments. Pursuant to the Notice, votes were then solicited during the open period until enough were received to either pass or defeat the amendments. The court found that the final number of votes collected in the open period, 43 (or 77 percent), resulted in passage of the amendment. The trial court concluded that no questions of fact remained, that voting was conducted pursuant to the Bylaws and the Declaration, and that the amendments were passed through an action taken without a meeting for which notice was given.

{¶30} Despite the trial court's conclusion that the amendments were passed through an action without a meeting, the record does not consistently support this classification. Blakey avers that the Association never advocated in favor of this

classification at the trial court level. Rather, the Association only referred to the vote as an action without a meeting for the first time on appeal. Blakey insists that the votes were gathered by way of an unauthorized combination of meetings in violation of *Gormley*. Contrary to the Association's belief, Blakey asserts, this deficiency could not be cured simply by issuing notice of an extended voting period.

{¶31} Although the Notice did not use the phrase "action without a meeting," the Association maintains that the document was worded in such a way that the intent to take action without a meeting was conveyed. However, the express wording of the Notice arguably speaks to the contrary. The Notice stated that "the voting itself will be conducted over a 14 day period *beginning on June 7, 2007 at the meeting* and will continue during that period * * *." (Emphasis added.) In other words, the Notice revealed that there would be action taken *at* the meeting (i.e., voting), not merely afterwards.

{¶32} The sole affidavit produced by the Association, that of treasurer Larry Olivia, attested to the following relevant averments: "In reference to the meeting in which the quarterly assessment was passed it was announced that voting would take place over a two (2) week period or until such time as enough votes were gathered either passing or defeating the Amendment[;]" and "The meeting itself never adjourned until after the voting took place." These averments intimate that the 2007 annual meeting remained in session throughout the open voting period. This further supports the inference that the annual meeting and the action without a meeting were inextricably linked.

{¶33} Other evidence in the record suggests that the vote in this case was accomplished by combining the annual meeting and an action without a meeting. The Resolution codifying and recording the amendment stated that an "annual meeting" was

held on June 7, 2007 "for the purpose of, inter alia, amending the Declaration and By-Laws * * *." This wording directly contradicts the Association's claims on appeal that the voting was separate from the annual meeting and that the vote was passed by an action without a meeting.

{¶34} In addition, the certificate accompanying the Resolution stated that the attached resolution and amendment were true and accurate copies of those passed *at* the June 7, 2007 annual meeting. In reality, the amendment was not passed at the annual meeting because only 71 percent of the affirmative vote was gathered that day. The assertion in the certificate that the amendment was passed *at* the annual meeting insinuates that the annual meeting was combined with the subsequent action without a meeting to accumulate sufficient votes to pass the amendments.

{¶35} One hindrance to deciphering whether the amendment was improperly passed by a combination of voting methods is that the record does not divulge exactly what occurred at the 2007 annual meeting. R.C. 5311.09(A)(1)(c) mandates that the unit owners association keep minutes of the meetings of the association. In the present case, there is no official record or minutes commemorating the events that took place during the 2007 annual meeting. The Association's only attempt to explain the missing meeting minutes occurred at the hearing on the parties' cross motions for summary judgment. However, counsel's statements during oral argument cannot be considered as evidence under Civ.R. 56(C). No individual affiliated with the Association submitted an affidavit explaining what actually occurred at the 2007 annual meeting. The sole affidavit filed on behalf of the Association, that of treasurer Larry Olivia, did not illuminate the meeting's events.

{¶36} After a thorough review of the record, we can come to but one conclusion amidst the convoluted facts of this case. The similarities between this case and

Gormley are manifest. In *Gormley*, the Association convened a special meeting, undertook a vote, adjourned the meeting, and thereafter solicited additional votes by action without a meeting. In the case at bar, the Association convened an annual meeting, undertook a vote, may or may not have adjourned the meeting (the parties conflict on this issue), and thereafter collected additional votes during an open voting period.

{¶37} Faced with these facts, the trial court in the case at bar found no combination and concluded that the amendments were passed through an action without a meeting. Upon conducting a de novo review, we are not convinced that the record supports the trial court's determination. As the record stands, there remain questions of fact regarding whether the amendments were passed at the 2007 annual meeting, by an action without a meeting, or by an improper combination thereof. Construing the facts in favor of Blakey, the nonmovant for purposes of the Association's summary judgment motion, we find that these genuine issues of material fact preclude summary judgment.

{¶38} Blakey's first assignment of error is sustained.

{¶39} Our disposition of Blakey's first assignment of error renders his remaining assignments of error moot. Therefore, assignments two, three, four, five, and six will not be addressed. App.R. 12(A)(1)(c).

{¶40} The judgment of the trial court is reversed and this matter is remanded for further proceedings according to law and consistent with this opinion.

{¶41} Reversed and remanded.

BRESSLER, P.J., and POWELL, J., concur.