

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

PRESCOTT GREEN CONDOMINIUM
ASSOCIATION

C. A. No. 24948

Appellee

v.

SUZANNAH W. WALKER, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2008 11 8003

DECISION AND JOURNAL ENTRY

Dated: June 9, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Prescott Green Condominium Association sued Suzannah Walker, seeking to foreclose on a lien it had filed against her unit after she failed to pay all of the maintenance fees, common expenses, and assessments she owed. Ms. Walker counterclaimed, alleging that the condominium association had not properly maintained her unit and that it had refused to accept some of her payments. The condominium association moved to dismiss Ms. Walker's counterclaims and moved for summary judgment. The trial court granted the condominium association's motion to dismiss regarding Ms. Walker's claim that it had not adequately maintained her unit because it concluded that she was prohibited from raising that issue as a counterclaim in a foreclosure action by Section 5311.18(B)(6) of the Ohio Revised Code. It granted the condominium association's motion to dismiss regarding Ms. Walker's refusal to accept payment claim because it concluded that she could not establish that the condominium

association wrongfully refused to accept checks from her once she was in default. The court also granted the condominium association's motion for summary judgment and granted it a decree of foreclosure. Ms. Walker has appealed, arguing that Section 5311.18(B)(6) is unconstitutional because it violates her right to seek redress in Ohio's courts, as guaranteed by Article I Section 16 of the Ohio Constitution. This Court affirms because Ms. Walker forfeited her argument that Section 5311.18(B)(6) is unconstitutional.

DEPRIVATION OF REMEDY

{¶2} Ms. Walker's assignment of error is that the trial court incorrectly dismissed her counterclaims under Section 5311.18(B)(6). She has argued that Section 5311.18(B)(6) is unconstitutional because it violates her right to seek redress in Ohio's courts, as guaranteed by Article I Section 16 of the Ohio Constitution.

{¶3} In her brief in opposition to the condominium association's motion to dismiss, Ms. Walker did not argue that Section 5311.18(B)(6) is unconstitutional. Accordingly, she forfeited that argument. *Holman v. Grandview Hosp. & Med. Ctr.*, 37 Ohio App. 3d 151, 157 (1987) ("Issues not raised . . . in the trial court cannot be raised for the first time on appeal."). Even if she had preserved it, this Court concludes that it is without merit.

{¶4} Under Section 5311.18(A)(1), a condominium unit owners association "has a lien upon the estate or interest of the owner in any unit . . . for the payment of any of the . . . expenses that are chargeable against the unit and that remain unpaid for ten days after any portion has become due and payable." "The lien . . . may be foreclosed in the same manner as a mortgage on real property in an action brought on behalf of the unit owners association" R.C. 5311.18(B)(1). In a foreclosure action under Section 5311.18(B)(1), "it is not a defense, set off, counterclaim, or crossclaim that the unit owners association has failed to provide the unit owner

with any service, goods, work, or material, or failed in any other duty.” R.C. 5311.18(B)(6). The trial court concluded that Ms. Walker’s counterclaim that the condominium association failed to maintain her unit was barred by Section 5311.18(B)(6).

{¶5} Under the Ohio Constitution, “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” Ohio Const. Art. I, § 16. The condominium association has argued that Section 5311.18(B)(6) does not violate the Ohio Constitution because Ms. Walker had an adequate remedy under Section 5311.18(C) or 5311.19(A). Under Section 5311.18(C), “[a] unit owner who believes that the portion of the common expenses chargeable to the unit . . . has been improperly charged may commence an action for the discharge of the lien in the court of common pleas of the county in which all or a part of the condominium property is situated.” Under Section 5311.19(A), a condominium owner has the right to sue a condominium association for damages or injunctive relief if the association has violated any of the “covenants, conditions, or restrictions” that it is required to comply with under “a deed to which they are subject or in the declaration, the bylaws, or the rules of the unit owners association”

{¶6} “[L]egislative enactments are to be afforded a strong presumption of constitutionality.” *Taddeo v. Estate of Ellis*, 144 Ohio App. 3d 235, 239 (2000). Because condominium owners have the right to bring an independent cause of action against a condominium association under Sections 5311.18(C) or 5311.19(A), this Court concludes that Section 5311.18(B)(6) does not violate Article I Section 16 of the Ohio Constitution on its face.

{¶7} Ms. Walker has argued that, once the condominium association filed its foreclosure complaint, there was not enough time for her to bring an independent cause of action

before the foreclosure action concluded. Section 5311.18(B)(6), however, is not unconstitutional as applied to Ms. Walker. In her counterclaim, Ms. Walker alleged that, “[i]n violation of the Condominium Association Regulations,” the condominium association had not maintained her unit since 2004. Section 5311.19(A) was enacted in 2004. Ms. Walker, therefore, could have brought an independent cause of action against the condominium association for failing to comply with its rules well before the condominium association filed its foreclosure complaint in November 2008.

{¶8} Ms. Walker has also argued that her case is similar to *New England Square Condo. Ass’n v. Blake*, 7th Dist. No. 02 CO 64, 2004-Ohio-1551. That case is distinguishable, however, because it was decided before Section 5311.18(B)(6) became effective in July 2004. Ms. Walker has further argued that the trial court should not have dismissed her counterclaims because they were compulsory. She failed to raise that issue in the trial court, however, arguing to that court instead that her counterclaims were “permissive.” Her assignment of error is overruled.

CONCLUSION

{¶9} Ms. Walker forfeited her argument that Section 5311.18(B)(6) is unconstitutional. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

GREGORY L. HAIL, attorney at law, for appellant.

DARCY MEHLING GOOD, M. KATHERINE BUSHEY, and KEVIN M. FIELDS, attorneys at law, for appellee.