FILED
Court of Appeals
Division I
State of Washington
1/25/2018 11:23 AM

No.

SUPREME COURT OF THE STATE OF WASHINGTON

No.: 76106-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KLAHANIE ASSOCIATION,

Respondent,

vs.

KRYSTAL MCCORD; RICHARD E. MILLER & EVELYN E. MILLER, and the marital community comprised therein; BANK OF AMERICA, N.A.,

Defendants,

SUNDANCE AT KLAHANIE CONDOMINIUM ASSOCIATION, a Washington nonprofit corporation,

Appellant,

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Sundance At Klahanie Condominium Owners Association ("Association") is a Washington nonprofit corporation pursuant to the Washington Condominium Act, Ch. 64.34 RCW (CP 318). Petitioner was Appellant in the case before the Court of Appeals and a Defendant before the trial court.

B. COURT OF APPEALS DECISION

The Association seeks review of the Court of Appeals decision ("Published Opinion") of December 26, 2017, ___ Wn. App. ____ (2017), copy attached as Appendix A. The Court of Appeals decided that (1) Respondent HOA's Covenant lien enjoys lien priority over the Association's statutory assessment lien and thus may be *permanently foreclosed*, and (B) the Association is subject to *in personam* liability for attorney fees for the HOA's foreclosure of its lien against the HOA's third party debtor's real property.

C. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err:

(1) By holding that an HOA lien that arose after a condominium declaration was recorded can *permanently* extinguish a statutory condominium lien on a unit, such that, upon sheriff's sale, the statutory

lien no longer exists to secure post-sheriff sale assessments? RCW 64.34.364(1); RCW 64.34.364(2)(a); RCW 64.34.435(1).

(2) In failing to hold that no condominium regime may be created under a development scheme whereby condominium units are sold by the developer to Washington purchasers subject to a previously-existing third party creditor lien? RCW 64.34.364(1); RCW 64.34.364(2)(a); RCW 64.34.435(1).

(3) In failing to conclude as a matter of law that the HOA's Covenant lien, which by its express terms does not come into existence until 30 days after an obligation becomes due, and in this case came into existence years after a Declaration of Condominium was recorded, is junior and subordinate to the statutory condominium lien. RCW 64.34.364(1); RCW 64.34.364(2)(a).

4. In failing to follow prior Court of Appeals precedent establishing that a foreclosing mortgage or lien creditor (such as the HOA) cannot obtain an *in personam* award of attorney fees against a *stranger to the contract,* such as another lien creditor (the Association) in inter-creditor lien priority dispute litigation, contrary to the American Rule on attorney fees. *4518 S. 256th, LLC v. Gibbon,* 195 Wn. App. 423, 446-7 (2016), *rev. denied,* 187 Wn.2d 1003 (2017).

D. STATEMENT OF THE CASE

1. The Association And Its Statutory Lien on the Unit.

Appellant Sundance At Klahanie Condominium Owners Association ("Association") is a Washington nonprofit corporation established under the Washington Condominium Act, Ch. 64.34 RCW ("Act") and Condominium Declaration recorded under King County Rec. No. 9505010788 ("Declaration") for the operation of Sundance At Klahanie, a condominium. (CP 318, 382-441).

Miller are the owners of condominium Unit N-201, located at 25235 S.E. Klahanie Boulevard, Unit N-201, Issaquah, WA 98029 ("Unit"). (CP 46). Miller is not a party to this appeal.

Under RCW 64.34.364(1), the Association has a continuing statutory lien against the Unit, to secure the payment of all assessments levied by the Board of Directors of the Association. (CP 405). Those assessments represent that unit's percentage interest contribution to the condominium building's vital maintenance, repair, insurance and other common expenses that the Association is statutorily obligated to make, for the benefit of that condominium Unit and all other units in the condominium. (CP 395-6, 404-5, 408-9).

Under RCW 64.34.364(2), the Association's statutory lien is superior to every other type of lien, mortgage, deed of trust or any other interest of any kind, with only narrow statutory exceptions. (CP 405).

Relevant here, statutory assessment liens are subordinated to liens that arise *before* the recording of the Declaration of Condominium that creates a condominium. RCW 64.34.364(2)(a). RCW 64.34.364(9) provides that the Association may foreclose its statutory lien for assessments in like manner as any mortgage, *i.e.,* under Ch. 61.12 RCW. (CP 406).

2. Relationship of Association to HOA.

Respondent Klahanie Association ("HOA") is a homeowners association (not condominium) created under a Declaration of Covenants recorded under King Co. Rec. No. 8502060789 ("Covenants"). (CP 322-381). That development contemplated that single family houses would be built; that apartments would be built, and significantly here, that condominiums would be built. Covenants §§ 1.6, 1.12, 2.1, Exhibit B. (CP 331-333, 336, 381). One of those parcels was purchased by a developer who then elected to build a condominium in 1995, five years after the enactment of the Washington Condominium Act, Ch. 64.34 RCW and a decade after the HOA was created. (CP 382-441). When the developer built this condominium, it recorded the Declaration, which act converted the lot into condominium units, and created the Association and its statutory lien on the Unit under RCW 64.34.364(1). (CP 382-441).

3. HOA's Non-Statutory Covenants Lien.

The HOA Covenants established HOA charges on each lot owner. Covenants §§ 1.12, 1.13, 4.3. (CP 332-3). If any lot was converted to

condominium, then what had been a lien on the lot is then purportedly converted into a lien on each of the newly-created condominium units. Covenants §§ 1.6, 1.12, 4.3. (CP 331-3, 344-5).

The HOA lien does not exist at all unless and until an owner fails to pay the charge levied by the HOA, and until 30 days have passed since the date the charge originally became due. Covenants § 4.9. (CP 348-9). In this case, the earliest unpaid charge levied by the HOA was December 31, 2013. Declaration of Kim Prentice Exhibit A (CP 71). Thus, the HOA lien only arose and became enforceable as of January 30, 2014. This date is after the 1995 recording of the Declaration of the Association, and thus under RCW 64.34.364(2) the HOA's lien arose after the Association's Declaration was recorded and is thus subordinate to the Association's statutory lien under RCW 64.34.364(2)(a). (CP 382-441).

Only lot owners (or if a condominium was created, those new condominium unit owners) are personally liable to the HOA for those charges - not any condominium association that may be later created if a lot is converted to condominium. Covenants §§ 1.12, 1.17, 4.1, 4.3, 4.6, 4.9, 4.10. (CP 332-3, 335, 342-50). Only a lot owner (or if a condominium was created, that new condominium unit owner), is deemed, by acceptance of a deed to a lot or condominium unit, to have covenanted and agreed to comply with all terms of the Covenants (including subject to being sued personally for unpaid charges and to be subject to judicial

foreclosure of the lien) - not any condominium association nonprofit corporation that may be later created if a lot is converted to condominium. Covenants § 3.7, 4.1, 4.9. (CP 341-3, 348-9).

The Covenants provide that when an *owner* fails to pay charges to the HOA and the HOA elects to file a suit to "collect any money due hereunder or to foreclose a Covenants lien, the unsuccessful party in such suit or action shall pay to the prevailing party. . . all attorneys fees that the prevailing party has incurred in connection with the suit or action, in such amounts as the court may deem to be reasonable therein. . . . ." Covenants § 11.4. (CP 376). The term "party" is not defined anywhere in the Covenants. (CP 322-381).

4. HOA Foreclosure of Its Covenants Lien.

The HOA filed a foreclosure lawsuit seeking a personal judgment and foreclosure decree against Miller as owner for unpaid HOA charges. (CP 3-4). The HOA also sued the Association for nonmonetary relief, claiming lien priority, that the HOA was entitled to a decree of foreclosure against the Association's statutory lien, and that by sheriff's sale the Association's statutory lien would be extinguished. (CP 1-2, 4). The trial court, and subsequently the Court of Appeals, decided that (a) Respondent HOA's Covenant lien enjoys lien priority over the Association's statutory assessment lien and thus may be *permanently foreclosed*, and (b) the Association is subject to *in personam* liability for attorney fees for the

HOA's foreclosure of its lien against the HOA's third party debtor's real property.

E. ARGUMENTS WHY REVIEW SHOULD BE GRANTED.

1. Whether an HOA Lien That Arises After A Condominium Declaration Can Enjoy Priority over the Statutory Condominium Lien (and Thus Can Permanently Extinguish It) are Issues of Substantial Public Interest That Should Be Determined by the Supreme Court.

When the Legislature enacted the Washington Condominium Act, Ch. 64.34 RCW ("Act"), it evidenced, via a very detailed, comprehensive Act, a strong public policy protecting the ability of nonprofit corporation condominium associations to effectively carry out their maintenance, repair and other obligations under the Act. RCW 64.34.328(1); RCW 64.34.352; RCW 64.34.360.

To that end, the Act establishes the public policy that every condominium unit in Washington is encumbered, and forever will be encumbered, by a continuing statutory lien securing unpaid assessments levied by a nonprofit corporation condominium association. RCW 64.34.364(1). Only liens arising and recorded before the recording of the Declaration may enjoy lien priority over this permanent statutory assessment lien that exists for as long as the condominium exists. RCW

64.34.364(2)(a). "Under the terms of the Act, when an association records its declaration, it establishes its lien priority to secure future obligations to make payments of condominium assessments even though payments are not actually due at the time the declaration is recorded." *BAC Home Loans Servicing, LP v. Fulbright,* 180 Wn.2d 754, 762 (2014).

That strong public policy mandates that no third party lien creditor can extinguish the statutory condominium lien *permanently*, such that, upon sheriff's sale, the statutory lien no longer exists to secure post-sheriff sale assessments: In other words, that the condominium unit is now forever free of any continuing statutory lien. RCW 64.34.364(1) ("The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due."). RCW 64.34.364(7) ("Recording of the declaration constitutes record notice and perfection of the lien for assessments"). There is no Washington statutory or case law authority that provides that the statutory lien on a particular condominium unit can be permanently extinguished.

The Court of Appeals decision directly violates RCW 64.34.364(1) and Washington public policy as evidenced by all of the foregoing statutory authority. The effect of that ruling means that the Association's statutory lien is decreed a junior lien and is thus permanently extinguished upon any HOA sheriff's sale. *See, Hallgren Co. Inc. v. Correl, Inc.,* 13 Wn. App. 263, 265-6 (1975).

The Court of Appeals decision means that the winning bidder at an HOA sheriff sale would take ownership of this Unit *free of any Association statutory assessment lien*, including those assessments that come due after the date of such sheriff's sale. The decision violates RCW 64.34.364(1).

If a competing lien creditor (with a lien on a *particular unit*, as opposed to a lien creditor (such as a construction lender) with a lien on the *entire lot* that arose before the condominium was created) can now permanently foreclose out a statutory assessment lien on a particular unit, then the statutory ability of Washington associations to enforce payment of assessment obligations via foreclosure is rendered unavailable. This is not and cannot be the law in Washington. Such a result is contrary to the Association's statutory lien rights under RCW 64.34.364(1), (2), (3), (5), (7), and (9). This result would be inequitable and contrary to public policy.

2. The HOA Had no Lien Whatsoever Until 30 Days After the Unpaid Charge Became Due, Which Date Was After the Creation of the Condominium And Resulting Statutory Priority of the Association's Lien Over All Liens (Except Property Taxes and Certain Mortgages).

The HOA lien does not exist at all unless and until an owner fails to pay the charge levied by the HOA, *and until* 30 days have passed since the date the charge originally became due. Covenants § 4.9. (CP 348-9). Thus, if HOA charges are timely paid, *a lien never arises.* And if an owner makes a partial payment towards unpaid charges then due, that payment advances forward in time the date that the lien is deemed to arise ("Such lien. . . expiring prorata as the assessment payments are made. . . ."). Covenants § 4.10. (CP 349). Miller stopped paying the HOA with that charge due December 31, 2013. Thus, No HOA lien *even existed until January 30, 2014*, which was 30 days after Miller stopped paying HOA charges.

In this case, the earliest unpaid charge levied by the HOA was December 31, 2013. Declaration of Kim Prentice Exhibit A (CP 71). Thus, the HOA lien only arose and became enforceable as of January 30, 2014. This date is well after the 1995 recording of the Declaration of the Association, and thus under RCW 64.34.364(2) the HOA's lien arose *after* the Declaration was recorded and is thus subordinate to the Association's statutory lien.

While RCW 64.34.364(2)(a) uses the phrase "liens and encumbrances *recorded* before the recording of the declaration," the plain language of the statute is predicated on the prior "recorded lien" being an actual lien, *i.e., enforceable* before the Declaration was recorded.

As held by our Supreme Court,

> Our fundamental objective when interpreting a statute is to discern and implement the intent of the Legislature. The surest indication of the legislature's intent is the plain meaning of the statute, which we glean from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. If the statute is *susceptible* to two or more reasonable interpretations, it is ambiguous. The fact that two or more interpretations are *conceivable* does not render a statute ambiguous.

Five Corners Family Farmers v. State, 173 Wn.2d 296, 305 (2011) (citations omitted) (emphasis added). Further, "[t]o the extent possible, all provisions should be harmonized so that no words or phrases are rendered superfluous or meaningless. *City of Puyallup v. Pac. NW Bell Tel. Co.,* 98 Wn.2d 443, 448 (1982) (citations omitted). In the case of RCW 64.34.364(2)(a), the Legislature chose *both* the words "liens" and "recorded." Thus, under the above quoted canons of statutory construction, to enjoy lien priority over the Association's Declaration under this statute, there must both be a *lien, i.e.,* an *existing* security interest in real property that secures an obligation, and it must be *recorded.* While the HOA's Covenants were *recorded* a decade before the Declaration, the *lien* attempting to be foreclosed by the HOA did not *exist* until January 30, 2014, being 30 days after Miller's unpaid HOA charge was due.

In this context regarding liens, the act of recording the 1985 Covenants simply provided third parties constructive notice that *if* a lien actually arose down the road at some point (because an owner failed to pay an HOA charge within 30 days), then the lien is deemed "automatically" recorded at that time that the lien became effective, because the recorded HOA Covenants impart constructive notice of the *possibility* of a future lien arising. *See, Lake Limerick Country Club v. Hunt Manufactured Homes, Inc.*, 120 Wn. App. 246, 260 (2004) (recorded covenants impart constructive notice).

And under the *Five Corners* canons of statutory construction, the Washington Condominium Act, Ch. 64.34 RCW, establishes legislative intent about the provision in question: That any lien with the disastrous power to permanently wipe out a statutory condominium lien on a condominium unit must be paid off before the developer can sell that unit to a third party under RCW 64.34.435(1); that the Legislature affords extensive statutory protection of and ability to enforce the Association's statutory lien rights under RCW 64.34.364(1), (2), (3), (5), (7), and (9); and that the statutory assessment lien exists to secure the payment of vital assessments necessary to fund the nonprofit corporation condominium association's obligations.

3. The Washington Condominium Act prohibits the HOA from establishing a development scheme under its Covenants whereby

a Lot is Later Converted to Condominium and the Condominium Units are Sold by the Developer to Purchasers Subject to a Previously-Existing HOA lien.

Washington law recognizes that a lien (such as a construction lender mortgage) that arises and is recorded before the recording of a declaration of condominium takes priority over the condominium association's statutory lien. RCW 64.34.364(2)(a). However, Washington law definitively disposes of the threat of foreclosure of those prior liens as follows:

> At the time of first conveyance of each unit, every mortgage, lien, or other encumbrance affecting that unit. . . shall be paid and satisfied of record, or the unit being conveyed. . . shall be released therefrom by partial release duly recorded or the purchaser of that unit shall receive title insurance from a licensed title insurance company against such mortgage, lien or other encumbrance.

RCW 64.34.435(1). The purpose of this statute is to protect the first purchaser of a condominium unit from a developer, from liens that arose before their purchase, and to protect the statutory lien on that unit from foreclosure by a prior lien creditor. This statute prohibits condominium developers from selling any condominium unit without any such prior lien (commonly a construction lender's deed of trust) having been paid in full, otherwise released as a lien on that particular unit, or provided that a title insurance company provides title insurance insuring against such prior

lien, *i.e.*, that the title insurance company would be contractually bound to defend against any attempted foreclosure by such prior lien holder.

Under these statutory protections, the HOA could not lawfully maintain any scheme under its Covenants that would in effect permit a prior lien on this Unit to survive the first sale of this Unit by the developer. Now, the HOA could certainly establish a continuing covenants lien that arises whenever a charge due the HOA is not paid (or in this case, the lien arises 30 days after the charge is due), without violating the above statutory protections. And that is what the Covenants duly provide.

4. The Published Opinion Is in Conflict with Another Decision of the Court of Appeals That Holds That a Lien Creditor Cannot Obtain an *in Personam* Award of Foreclosure Attorney Fees Against a *Stranger to the Contract,* Such as Another Lien Creditor (here the Association) in Lien Priority Dispute Litigation, Which Would Be a Violation of the American Rule on Attorney Fees.

Washington follows the American Rule on whether a lawsuit defendant is liable to another litigant for that litigant's attorney fees: "The general rule in Washington, commonly referred to as the 'American rule," is that each party in a civil action will pay its own attorney fees and costs." *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296 (2006). Further, "this general rule can be modified by

contract, statute, or a recognized ground in equity." *Cosmopolitan,* 159 Wn.2d at 297. Applying the American Rule is straightforward:

a. There is no contract between competing lien creditors. There may be a contract with their respective borrowers or debtors, but not between creditors.

b. There is no statute providing a right to attorney fees between lien creditors.

c. There is no recognized right of equity (*i.e.,* reported Washington appellate case so holding) establishing a right to attorney fees when two lien creditors litigate over whose lien enjoys lien priority.

Indeed, Washington law expressly provides the opposite: There is no right to an award of attorney fees against a third party, pursuant to a contract that provides for attorney fees, if the third party *is not a party to the contract. 4518 S. 256th, LLC v. Gibbon,* 195 Wn. App. 423, 446-7 (2016), *rev. denied,* 187 Wn.2d 1003 (2017) (subsequent owner of real property disputing foreclosing mortgage lender was not borrower under deed of trust, and therefore not a party to the note and deed of trust between borrower and mortgage lender). The Court of Appeals ignored this authority in ruling that the Association as a lien creditor who is not personally liable for HOA assessments, is nonetheless personally liable for the HOA's attorney fees incurred in foreclosing on owner Miller's real property.

5. The Association Is Not An Owner or Party to the HOA Covenants.

The Covenants provide that when an owner fails to pay charges to the HOA and the HOA elects to file a suit to "collect any money due hereunder or to foreclose a Covenants lien, the unsuccessful party in such suit or action shall pay to the prevailing party. . . all attorneys fees that the prevailing party has incurred in connection with the suit or action, in such amounts as the court may deem to be reasonable therein. . . . ." Covenants § 11.4. (CP 376). The term "party" is not defined anywhere in the Covenants. The trial court determined, incorrectly, that "party" means not only the Unit owner, Miller, but also a hapless lien creditor (the Association) *that the HOA elected to name as a defendant* in its Covenants foreclosure lawsuit. The Court of Appeals incorrectly opined that by possessing a statutory lien interest on real property within the HOA boundaries, the Association "assented" to the Covenants and therefore would be liable for foreclosure legal fees.

To the contrary, interpreting this attorney fee provision to provide for an award of attorney fees against a third party lien creditor, who is not a party to the agreement (here, covenants), is contrary to Washington law. *4518 S. 256th, LLC v. Gibbon,* 195 Wn. App. 423, 446-7 (2016), *rev. denied,* 187 Wn.2d 1003 (2017) (subsequent owner of real property disputing foreclosing mortgage lender was not borrower under deed of

trust, and therefore not a party to the note and deed of trust between borrower and mortgage lender). Indeed, in that case, the *Gibbon* Court had before it an attorney fee provision that could also potentially be broadly interpreted to provide for an award of attorney fees in favor of that lender against *anyone* in any dispute regarding the lender's note and deed of trust ("Lender shall be entitled to recover its reasonable attorneys fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument"). *Gibbon,* 195 Wn. App. At 446. The *Gibbon* Court held that that language could not be interpreted so broadly, and only applied to the party to the note and deed of trust. *i.e.,* the borrower - not the third party present property owner who was disputing the lender foreclosure. *Gibbon,* 195 Wn. App 446-7.

A court's review of covenants such as the Covenants here are subject to accepted rules of contract interpretation. *Roats v. Blakeley Island Maint. Commission,* 169 Wn. App. 263, 273-4 (2012). Further,

> The purpose of contract interpretation is to determine the parties' intent. Washington courts apply the 'context rule' of contract interpretation in ascertaining the parties' intent. This rule 'allows a court, while viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations.'"

Roats, 169 Wn. App. At 274 (citations omitted). Applying these legal principles, it is clear that only lot owners (or condominium unit owners)

are subject to attorney fee liability if HOA charges are not paid, and the HOA sues an owner for those unpaid HOA charges, and elects to foreclose its lien for those unpaid HOA charges against an owner's lot (or condominium unit).

The Association is not the HOA's debtor: It does not owe that HOA anything whatsoever. It is not personally liable for HOA charges against the Unit. There is no legal basis to make the Association *personally* liable for Miller's debt, or for the HOA's legal fees incurred to collect it or foreclose its lien on Miller's Unit. Yet that is what the trial court did here. This is simply contrary to Washington law.

Significantly, only lot owners (or if a condominium was created, purportedly those new condominium unit owners) are personally liable to the HOA for HOA charges - not any condominium association nonprofit corporation that may be later created if a lot is converted to condominium. Covenants §§ 1.12, 1.17, 4.1, 4.3, 4.6, 4.9, 4.10. (CP 332-3, 335, 342-50).

Also significantly, only a lot owner (or if a condominium was created, purportedly that new condominium unit owner), is deemed, by acceptance of a deed to a lot or condominium unit, to have covenanted and agreed to comply with all terms of the Covenants (including subject to being sued personally for unpaid charges and to be subject to judicial foreclosure of the lien) - not any condominium association nonprofit

corporation that may be later created if a lot is converted to condominium. Covenants §§ 3.7, 4.1, 4.9. (CP 341-3, 348-9).

Here, the Association was forced into existence by a developer, who happened to buy one of the lots covered by the Covenants and elected to build a condominium. The Association did nothing voluntarily with regard to this HOA and its Covenants. The Association did not voluntarily accept any deed or other interest in the Unit. However, the owner, Miller, did. *Nowhere in the Covenants are condominium associations even mentioned.* The Association is not personally liable for HOA charges, and thus cannot be held liable for the HOA's foreclosure attorney fees when a unit owner fails to pay HOA charges.

Under the Covenants, this HOA is not without its remedy regarding its attorney fees incurred to litigate the lien priority issue. It can certainly seek a supplemental judgment *in personam* against its debtor, Miller, for those attorney fees it incurred in litigating the lien priority issue with a competing lien creditor, here, the Association.

If any third party lien creditor who just happens to have a lien interest in a unit can be made personally liable for this HOA's attorney fees when the HOA elects to foreclose a Covenants lien, then this HOA can proceed with foreclosure lawsuits that name a whole host of lien creditor defendants, and demand attorney fees from them *personally*: Mortgage lenders, utility lien creditors, other condominium associations,

mechanics lien creditors, judgment creditors, state tax warrant liens and DSHS liens, federal income tax liens, and anyone else with a lien interest in the Unit. Interpreting the Covenants this way leads to a nonsense result.

F. CONCLUSION

The petition herein seeks reversal of Court of Appeals Published Opinion, and in so doing (a) determine that the HOA's Covenant lien is junior to the Association's statutory lien under RCW 64.34.364(2)(a), and (b) determine that the Association is not personally liable to the HOA for the HOA's attorney fees incurred in foreclosing its Covenant lien against a third party owner's real property.

The appeal herein also seeks an award to the Association of its attorney fees incurred in this appeal and before the trial court under equitable basis authority cited in Petitioner's Brief.

Dated this 25 day of January, 2018.

LAW OFFICES OF JAMES L. STRICHARTZ

Michael A. Padilla, WSBA No. 26284
Attorneys for Petitioner Sundance At Klahanie Condominium Owners Association, a Washington non-profit corporation

CERTIFICATE OF SERVICE

CAROLYN GLAUNER declares and states as follows:

1. I am a paralegal at the law firm Law Offices of James L. Strichartz, am over the age of 18, and am otherwise competent to testify.

2. This is to certify that on the 25th day of January, 2018, I did cause to be served a true and correct copy of the foregoing Petition for Review and this Certificate of Service by the method indicated below and addressed to the following parties:

David M. Tall Oseran Hahn, P.S. 929 108th Avenue NE, Suite 1200 Bellevue, WA 98004	☐ via US First Class Mail X Delivery via ABC Messenger Service X via Electronic Mail X via Email to dtall@ohswlaw.com

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct:

Dated this 25th day of January, 2018 at Seattle, Washington.

Carolyn Glauner

Carolyn Glauner, Paralegal

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KLAHANIE ASSOCIATION, Respondent, v. SUNDANCE AT KLAHANIE CONDOMINIUM ASSOCIATION, Appellants, KRYSTLE MCCORD; RICHARD E. MILLER & EVELYN E. MILLER, and the marital community comprised therein; BANK OF AMERICA, N.A., Defendants.	No. 76106-4-I DIVISION ONE PUBLISHED OPINION FILED: December 26, 2017

APPELWICK, J. — The trial court concluded that the condominium association's lien for assessments was not entitled to statutory priority over similar assessments made pursuant to the covenants of the homeowners association within which the condominium was organized. We affirm.

FACTS

Krystle McCord and Evelyn Miller owned real property in Issaquah. That property is part of two separate associations, Klahanie Association (Klahanie) and Sundance at Klahanie Condominium Association (Sundance). Klahanie is a homeowners association (HOA) created in 1985. Sundance is a condominium

association created pursuant to the Washington Condominium Act (WCA), chapter 64.34 RCW, in 1995. Sundance is a condominium association on property that is within Klahanie.

McCord and Miller fell behind on their assessments owed to both associations. On March 12, 2015, Sundance obtained an $8,559.73 judgment against them.

Two months later, on May 12, 2015, Klahanie filed a complaint to foreclose on its lien for $3,596.09 in assessments owed. Klahanie moved for summary judgment on the basis that its lien was senior to Sundance's lien. Klahanie reasoned that its priority date was established when its covenants, conditions, and restrictions (CC&Rs) were recorded in 1985 (as opposed to when the owner defaulted in 2014), while Sundance's priority date was when Sundance's declaration was recorded in 1995. The trial court agreed. It granted summary judgment in favor of Klahanie, and, pursuant to the CC&Rs awarded attorney fees in Klahanie's favor.

Sundance appeals.

DISCUSSION

When reviewing a summary judgment order, this court engages in the same inquiry as the trial court. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. All facts and reasonable inferences are considered in the light most favorable to the nonmoving party. Id. Questions of law are reviewed de novo. Id.

I. Competing Claims of Lien Priority

Sundance, like all condominiums created in this state after July 1, 1990, organized under the Washington Condominium Act (WCA). RCW 64.34.010(1). The WCA provides for assessments to be levied against association members. See RCW 64.34.360. The WCA also gives WCA associations a statutory lien for unpaid assessments. RCW 64.34.364(1). As to those liens' priority date, RCW 64.34.364(7) states that "[r]ecording of the declaration constitutes record notice and perfection of the lien for assessments." And, the WCA gives statutory superpriority to condominium association assessment liens over other liens, with limited exceptions. See RCW 64.34.364(2).

Klahanie was created upon the recording of its CC&Rs in 1985.[1] The CC&R's bind owners within Klahanie to pay assessments. The master plan included plans for both single family and multifamily development. Section 1.6 of the CC&Rs contemplates that later condominiums, referred to as "Living Units," may be created on the property. Section 4.3 requires that assessment obligations pass through to each individual living unit, rather than the lots themselves. And, the CC&Rs state that the consequence of not paying assessments is a lien against the living unit "in the nature of a mortgage in favor of the Association."

[1] Washington has multiple acts that govern condominiums, the WCA and the Horizontal Property Regimes Act[1] (HPRA), ch. 64.32 RCW, which was enacted in 1963. WASH. BAR ASS'N, REAL PROPERTY DESKBOOK § 22.2 (3d ed. 1996). HPRA applies to all condominiums created prior to July 1, 1990. Id. at § 22.3(1)(a). "It is a typical 'first generation' condominium statute." Id. at § 22.2. It does not provide significant statutory guidance on the rights and responsibilities of the owners' association. Id.

Unlike Sundance, Klahanie has no statute comparable to RCW 64.34.364(2) to rely upon for superpriority for its lien claim. But, within the WCA, RCW 64.34.364(2)(a) creates an exception to superpriority for "[l]iens and encumbrances recorded before the recording of the declaration." The priority of the respective liens here turns on whether Klahanie's non-WCA lien is a lien or encumbrance that falls within this exception for previously recorded liens or encumbrances.

II. Exception to Superpriority

The WCA does not contain a definition for either "lien" or "encumbrance." RCW 64.34.020. This presents a question of statutory interpretation, which this court reviews de novo. Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

Our Supreme Court has defined encumbrances as follows:

> An "encumbrance" has been defined by this court to be any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistent with the passing of the fee; and, also, as a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee.

Hebb v. Severson, 32 Wn.2d 159, 167, 201 P.2d 156 (1948).

The Klahanie CC&Rs are an encumbrance within this definition. They are a burden on the property adverse to the owner. They subsist in a third party: the association and its members. They limit types of acceptable uses of the property. They do not interfere with conveying the subject property in fee, but bind all successive owners. They include an affirmative obligation on owners to pay

monthly assessments. And, importantly for this case, they dictate that any failure to pay assessment obligations gives rise to a lien enforceable by the association. The CC&Rs are restrictions that diminish the value of the condominium. They are "encumbrances" on the land within Klahanie, previously recorded. They were not extinguished by the recording of the Sundance condominium declaration.[2]

But, Sundance points to the language of the Klahanie CC&Rs in arguing that no lien arises until the assessments are past due. Specifically, the CC&Rs state that "[i]f any assessment payment is not made in full within 30 days after it was first due and payable, the unpaid amounts shall constitute a lien against the Lot." Thus, it argues that the terms of Klahanie's own CC&Rs dictate that no lien exists until 30 days after the assessment was due.

However, other portions of the Klahanie CC&Rs cut against this reading. Section 4.10 of the Klahanie CC&Rs states that "any such lien when created, shall be a security interest in the nature of a mortgage in favor of the association." And, the general rule is that a mortgage for future advances becomes an effective lien as to subsequent encumbrances from the time of its recording. John M. Keltch, Inc. v. Don Hoyt, Inc., 4 Wn. App. 580, 581, 483 P.2d 135 (1971). Applying this

[2] Sundance also argues that RCW 64.34.435 dictates that the Klahanie lien could not have been a lien or encumbrance in place at Sundance's 1995 priority date. The statute states that every lien or encumbrance affecting the property shall be paid or released prior to the first conveyance. RCW 64.34.435(1). Sundance did not rely on this statute in either its summary judgment response, or in its own motion for summary judgment, and under RAP 2.5(a) we therefore need not consider it. But, even so, we have no trouble observing that this statute does not contemplate the types of encumbrances at issue here.

general rule to the CC&Rs, we conclude that the Klahanie lien for assessments relates back to the date of the recording of the CC&Rs.

Doing so is analogous to and consistent with the treatment of WCA assessment liens as future advances on mortgages in BAC Home Loans Servicing, LP v. Fulbright, 180 Wn.2d 754, 767, 328 P.3d 895 (2014). There, the court noted the similarity between WCA liens and liens for future advances. Id. at 763. It reasoned that "[t]his is, in essence, a particular application of a lien for future advances, which secures the obligations the obligor has not yet incurred." Id. Second, the court noted that RCW 64.34.364(7)'s plain language supports the analogy to future advances. BAC, 180 Wn.2d at 763. RCW 64.34.364(7) states that recording of the declaration constitutes record notice and perfection for a lien for unpaid assessments. As a result, the assessment lien related back to the filing of the declaration and had priority over the mortgage lien which would otherwise have had statutory priority under RCW 64.34.364(2)(b). BAC, 180 Wn.2d at 764, 767. We find the reasoning in BAC persuasive as to non-WCA assessment liens.

The Klahanie CC&Rs were an encumbrance recorded before the 1995 Sundance CC&Rs. Therefore, consistent with the CC&Rs and BAC, the Klahanie lien—which arises out of that encumbrance—should be treated as a mortgage for future advances. It relates back to the recording date of the CC&Rs, and pursuant to the exception found in RCW 64.34.364(2)(a), has priority over the Sundance lien. The trial court properly granted summary judgment.

III. Attorney Fees

Sundance challenges the trial court's award of attorney fees in favor of Klahanie. Washington generally follows the "American rule" on attorney fees. Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 143, 930 P.2d 288 (1997). That rule provides that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery is permitted by contract, statute, or some recognized ground of equity. Id.

Klahanie argues that it is entitled to attorney fees under the CC&Rs. Specifically, the CC&Rs state that:

> In the event of a suit or action to enforce any provision of this Declaration or to collect any money due hereunder or to foreclose a lien, the unsuccessful party in such suit or action shall pay to the prevailing party all costs and expenses . . . and all attorney's fees that the prevailing party has incurred in connection with the suit or action.

Sundance argues that, because it is merely a creditor, and not the debtor, it is not liable for fees under this provision. Sundance makes numerous analogies to third party creditors. It argues that, if an HOA can claim attorney fees under CC&Rs against any creditor who is not a party to the CC&Rs, it will send a chilling message to any potential creditors.

But, Sundance is not a typical third party creditor, because it is a development within Klahanie. And, the Klahanie CC&Rs state they are "binding upon all parties having or acquiring any right, title, or interest in Klahanie or any part thereof . . . and shall in all respects be regarded as covenants running with the land." As a governing entity of property that was already subject to the

Klahanie CC&Rs, Sundance has an "interest" in Klahanie property, and therefore assented to the Klahanie CC&Rs' terms.

The trial court properly found that Sundance was in privity with Klahanie because Sundance is within the Klahanie property and subject to the CC&Rs. Klahanie therefore was entitled to attorney fees. Klahanie also requests attorney fees on appeal on the same basis. The CC&Rs entitle Klahanie to appellate attorney fees in a suit to collect assessments. We affirm the trial court's award of attorney fees and also award appellate attorney fees to Klahanie.

We affirm.

WE CONCUR:

LAW OFFICES OF JAMES L STRICHARTZ

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