

FILED
Court of Appeals
Division II
State of Washington
7/6/2020 2:20 PM
No. 54477-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AVERA LEE DEHLS,

Appellant,

vs.

KIONA PARK ESTATES,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR LEWIS COUNTY

BRIEF OF APPELLANT

CHRISTI C. GOELLER, WSBA #33625
Attorney for Appellant

Goldstein Law Office, PLLC
1800 Cooper Point Road SW
Olympia, WA 98502
(360) 352-1970

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I. INTRODUCTION

This case involves a question of first impression before this court – what is the statute of limitations on homeowners’ association (HOA) dues and assessments? Homeowners’ associations are governed by the Homeowner Association Act – RCW 64.38 et seq. The Condominium Act is set forth in RCW 64.34 et seq. While the Condominium Act provides that a lien for assessments is extinguished after three years from the date the amount comes due, RCW 64.34.364, the corresponding RCW for HOA’s is silent on this issue.

As explained below, because the protective covenants and the HOA’s governing documents are the controlling source of an HOA’s powers, they govern the collection of payments from homeowners. Those governing documents are a written agreement between the HOA and the homeowner, and as a written agreement, debt arising from that agreement should be governed by a six-year statute of limitations.

II. ASSIGNMENTS OF ERROR

Did the trial court err in granting Kiona Park Estates' motion for summary judgment when it awarded Kiona Park Estates for HOA dues going back to 2002 and held that HOA dues are akin to an open account and not subject to any statute of limitations?

III. ISSUES

1. Is the statute of limitations on homeowner association membership dues six years, when the governing documents and protective covenants are a written agreement between the property owner and the association and the statute of limitations on a written agreement is six years?
2. Does the statute of limitations begin to run the moment the homeowner is delinquent on payment of HOA dues and assessments when the failure to timely pay gives rise to a cause of action in the homeowner association?
3. Because a cause of action cannot arise in the homeowner association for late payment until payment has become due, does each year's assessment give rise to its own cause of action and is therefore subject to its own statute of limitations?

IV. STATEMENT OF THE CASE

1. Mr. Dehls' history with Kiona Park.

Appellant Avera Lee Dehls owned a parcel of land in Lewis County, Washington, located at 138 Shelton Road in White Pass. CP 25. The parcel is also known as Tract 22 of Kiona Park Estates. CP 26. The parcel is subject to a homeowner's association (HOA) known as Kiona Park Estates ("Kiona Park"). CP 51-52, CP 55-137.

Mr. Dehls purchased the property in 1989 with his then-wife Jacqueline Dehls. CP 11. The property was sold to them by Jeff Shelton. CP 11, CP 25-26.

Property owners within Kiona Park Estates must pay annual HOA dues. CP 48-50, CP 84. The annual dues are payable once per year in January. CP 48-50. In 2002, dues were \$150 per year. CP 239-240. From 2003 through 2017, the annual dues were \$200 per year. CP 48-50. Kiona Park raised the amount due to \$250 per year beginning with 2018. CP 48-50.

Kiona Park had recorded liens against Mr. Dehls' property in 2003 and again in 2006. CP 44; CP 239-240, CP 242-243. The lien in 2003 was for \$150 in dues for 2002 and \$200 for 2003. CP 239-240. The 2006 lien was recorded on January 27, 2006 for dues owed for 2004 and 2005. CP

242-243. The amounts of \$224 was recorded for each of those two years, indicating the amounts were for “dues and late fees.” CP 243. The lien also included \$150 for attorney fees, bringing the total of the 2006 lien to \$598. CP 243. The HOA took no further action to foreclose those liens.

On May 21, 2018, Kiona Park recorded a third lien against Mr. Dehls’ property under Lewis County Auditor file number 3484290 for past due HOA dues. CP 4, CP 37-39. The claim of lien stated, “To date, you are in arrears membership dues and assessments, interest, and/or late charges in the amount of \$10,041.67.” CP 38. That is, the lien filed in 2018 sought to recover all unpaid dues going back to 2002, which happens to be the same year the Protective Covenants were amended. CP 78-87. The May 2018 lien further claimed that “Attorney’s fees and collection costs to date are \$368.02, for a total owed of \$10,409.69.” CP 38.

Interestingly, the Declaration of Lesli Merhaut, dated May 21, 2019, stated that all past due HOA payments, with interest of 12%, totaled \$7,101.00 through March 31, 2019. CP 43-44.

On November 15, 2018, Respondent Kiona Park filed a Complaint against Mr. Dehls, Jacqueline Dehls and Jeff Shelton for a money judgment and foreclosure of its lien for past due assessments. CP 1-8. Jacqueline Dehls and Jeff Shelton responded to the action, renouncing any interest in

the subject property, leaving Mr. Dehls as the sole named defendant. CP 11;
CP 32.

Mr. Dehls answered Kiona Park's Complaint and asserted affirmative defenses of failure to state a claim, statute of limitations, laches, waiver and/or estoppel, failure to mitigate, unclean hands, and fault of Kiona Park. CP 140-142.

In seeking its relief, Kiona Park asked the court to incorporate the liens of 2003 and 2006 into its 2018 lawsuit and award it all dues beginning in 2002 and continuing through 2019. CP 44.

2. Creation of Kiona Park Estates.

When Mr. Dehls purchased the parcel with his wife, the Statutory Warranty Deed provided that the parcel was subject to:

1. Restated Declaration of Protective Covenants and Easement
for Kiona Park Estate, as hereto attached.

Recorded : September 23, 1986

Auditor's No. : 949885

Affects : The south 30 feet, EXCEPT the east 30 feet and the west 30 feet and amendments thereto in documents "Declaration of Protective Covenants and Easements for Kiona Park Estates" recorded on July 23, 1981, under Lewis County Auditor Fee No. 891087, in

volume 230, pages 810-817, and as amended by recording on September 26, 1985, under Lewis County Auditor's Fee No. 938361, in volume 316, pages 351-355, and as further amended by recording on September 23, 1986 under Lewis County Auditor Fee No. 949884, in volume 341, pages 264-269.

CP 25-26.

The 1981 Declaration of Protective Covenants and Easements for Kiona Park Estates, Article C, Section 7 – Road Maintenance and Improvement after December 31, 1984, envisions the owners of parcels sharing in the cost of road maintenance and improvements:

- a) All owners of Parcels shall pay the cost of all construction maintenance or repair on such easement equally, regardless of the Parcel size or the amount of property owned within the area of Real Property described in Exhibit B.
- b) No construction, maintenance or repair shall be commenced until at least sixty-six percent (66%) of the owners of the property have given written approval to undertake construction, maintenance or repair.
- c) Once an obligation for construction, maintenance or repair is determined, such obligation shall be binding on each owner, his personal representatives, successors, or assigns to the same extent as any other debt of that owner and such debt shall **also be considered a lien against the property of such owner within the area described in Exhibit B, and proceeded against as a lien for improving real property.** Any lien so levied shall carry on interest at 12 percent per annum on the unpaid balance.

- d) Any subsequent subdivision of Lots 1-28, as per Exhibit B will require easement roads extending from the easement as recorded on Exhibit B. The parcel owners using these extended easement roads will be responsible for the maintenance and improvements thereof in the same manner as set forth in Paragraphs a, b, and c.

CP 58-59 (emphasis added).

Article D – Optional Community Association provides in pertinent part:

1. Purpose of Community Association – At any time after Seller has sold one-half of Real Property, or before if Seller shall agree in writing, the Owners may form a Community Association, which may have, among other things, for its purposes the maintenance and development of roads, utilities systems and other common facilities, the establishment of recreational common areas and facilities, **the enforcement of liens**, covenants, restrictions and easements existing upon or created for the benefit of the parcels of real property, and the fostering of acquaintance-ship and friendship amount the owners.

2. Methods of Formation – The Community Association formation may be initiated by one or more record owners. Said owner(s) will give thirty (30) days written notice to all other record owners by registered or certified mail. To those owners whose address is unknown, the last address registered with the respective County Treasurer or Comptroller in the County where the real property is situated (or such other person who is responsible for real estate tax notices) shall be used. The notice shall state that said owner(s) desire the formation (sic) of a Community Association. If two-thirds (2/3) of all record owners voting in person or by proxy, at a meeting called for such purposes vote in favor of a Community Association, the Association shall be established.

3. Dues and Assessments/Covenants – The Articles or equivalent document of the Community Association may provide for dues and assessments to finance the Association, if dues and assessments are provided for, **the Articles shall provide that delinquent dues and assessments shall constitute a lien upon the Parcel(s) of Real Property owned by the delinquent member of the Association. Upon recording, the Articles or equivalent document will be considered protective covenants having the same force and effect as the other provisions herein and shall be binding upon all record owners.**

CP 59 (emphasis added).

The above-stated provisions of the Restated Declaration of Protective Covenants and Easements for Kiona Park Estates, filed in 1986, remained unchanged, except for the word “construction in section 7(b), which was crossed out in the 1986 recording. CP 65-75.

The HOA was formed in March 2001. CP 133-139. The Articles of Incorporation state the purpose of the HOA was “[t]o provide an organization and forum for:

- A) the maintenance of established roads and right-of-ways,
- B) the procurement, development, construction and maintenance of other common areas and facilities for the exclusive benefit of Lots 1 through 28 and their legal subdivisions within Kiona Park Estates,
- C) the adoption, amendment and enforcement of liens, covenants, restrictions and easements existing upon or created for the benefit of parcels of real property within Kiona Park,

- D) the establishment of dues and assessments to finance the corporation. **Delinquent dues and assessments will constitute a lien upon the parcel(s) of real property owned by the delinquent member of the corporation.**
- E) the fostering of acquaintanceship and friendship among the owners within Kiona Park.

CP 133-134 (emphasis added).

The Bylaws of Kiona Park Estates Association were drafted in April 2001 and provide in pertinent part as follows:

Article X – Duties of Trustees

Section 1. [...]

e. To present a budget to the members at the annual meeting, or a special meeting called for such purposes, which shall include, but not be limited to the following:

1. An annual fee per membership certificate to be used in accordance with the Articles of Incorporation.

2. A sum of money for liability insurance, as appropriate, for the Association and each member of the Association, incident to operation, maintenance and use of the roads, right-of-ways, and other common areas and facilities within the Kiona Park Estates; such total fee to be equally pro-rated among all members of the Association.

3. General physical improvements and major maintenance.

4. Enforcement of Rules, Regulations, and Covenants adopted in accordance with these Bylaws and Articles of Incorporation.

f. [...]

g. To enforce the collection of any dues and/or assessments of members which has been levied by the members. **The Board of Trustees shall have the option to declare a member delinquent and bring action at law against the member obligated to pay or place a lien against the property, or both.** All costs of recovery including reasonable attorney fees shall be added to the amount of the assessment.

[...]

ARTICLE XII – Benefits and Duties of Members

[...]

Section 2. Each member shall be required to pay an annual charge, in the form of dues, for maintenance of established roads and right-of-ways, other common areas and facilities not pertaining to the airstrip, liability insurance charges, and for the making and enforcement of rules, regulations and covenants.

[...]

Section 4. The Board of Trustees may suspend the right to use common facilities, other than roads by a member for non-payment of any charge or for the non-payment of an assessment duly imposed by the Board of Trustees within sixty days after the due date.

CP 196-199 (emphasis added).

Thereafter, in October 2002, a Declaration of Amendment of Protective Covenants for Kiona Park Estates was recorded under Lewis County Auditor No. 3149066. In pertinent part, Article C – Easements and Reservations reads as follows:

1. Easements for Roads, Utilities and Airstrip. The original Declaration of Protective Covenants and Easements created, declared and reserved easements for ingress, egress and utilities and airstrip. Said easements and any subsequent amendments thereto, are unaffected by these amendments and shall remain in full force and effect. The airstrip easement shall not be used in any manner that would potentially pose a safety hazard to aircraft landing, taking off or parking on the easement. Persons and domestic animals shall be prohibited from roaming freely on the airstrip. No vehicles shall be allowed on the airstrip easement except for purposes of providing maintenance, construction or emergency services.

6. Under no circumstances shall any of the easements be dedicated to the County for public use.

7. Maintenance and Improvement of Common Amenities.

1) The lot owners envision that certain improvements may be made to the real property which is intended for common use of all lot owners. These improvements may include, but are not limited to, entrance signs, landscaping and road repair and development. Said improvements shall be collectively referred to as "Common Amenities."

It shall be the obligation of the owners of the lots to contribute their agreed upon share to maintain the common amenities.

Said costs shall be paid by an annual assessment against each member. The amount of the assessment shall be set by a two-thirds (2/3) vote of the lot owners. The decision to make repairs or improvements shall be made by the Board of Trustees of the Community Association.

Lot owners shall receive an **annual statement for dues**. The lot owners shall make full remittance of said dues within thirty (30) days. Upon failure to remit as required, the Board may contract for the services of an attorney **to seek enforcement of this agreement**. The prevailing party shall be entitled to attorney fees in any such action. **Any dues that remain unpaid for a period of ninety (90) days shall become a lien against**

the defaulting lot owner's property enforceable as any other real estate lien in the State of Washington.

All unpaid dues shall bear twelve (12) percent per annum interest after thirty (30) days until paid.

2) Airstrip Maintenance and Improvement. The owners of Lots 5-14, inclusive, and Lots 24 and 25, and all lot owners who elect to join the Airpark Association, shall have the duty and obligation to share pro-rata the expense of maintenance and improvement of the airstrip easement and the airstrip surface. Said lot owners, their guests, being the only persons entitled to use of the airstrip.

3) Easement for Flight. [...]

CP 83-85 (emphasis added). Article D – Community Association included only one section:

1) Pursuant to the terms of the original Declaration of Protective Covenants, a Community Association has been formed as is known as the Kiona Park Estates Association. Said Community Association is governed by the By-laws and these Declarations as they now exist or are amended from time to time.

CP 85-86. Article E – Miscellaneous did not directly pertain to the issues in this case but it should be noted how the amendments were drafted. Sections 1-5 of Article E were unchanged and expressly stated so:

- 1) No need to change.
- 2) No need to change.
- 3) No need to change.
- 4) No need to change.
- 5) No need to change.

CP 86 (emphasis added).

Thereafter, the Protective Covenants were amended four more times, in 2006, 2008, 2012, and 2017. CP 89-131. No substantive changes were made to Articles C or D, above, in 2006. CP 98-99.

In 2006, Sections 1, 5 and 6 of Article E – Miscellaneous, were amended. All sections, however, were fully set forth, as opposed to stating “no need to change,” as was previously done with the 2002 amendments. CP 99-100.

In 2008, the amendments included a change to the section governing “Maintenance and Improvement of Common Areas.” CP 114. The fourth paragraph now read:

Lot owners shall receive an annual statement for dues. The lot owners shall make full remittance of said dues within thirty (30) days. **The Board will review non-payment of dues on an individual basis.** Upon failure to remit as required, the Board may contract for the services of an attorney to seek enforcement of this agreement. The prevailing party shall be entitled to attorney fees in any such action. Any dues that remain unpaid for a period of ninety (90) days shall become a lien against the defaulting lot owner’s property enforceable as any other real estate lien in the State of Washington.

All unpaid dues shall bear twelve (12) percent per annum interest after thirty (30) days until paid.

[...]

CP 114-115 (emphasis added).

In 2012, the amendments set forth only the specific sections of the Protective Covenants to be amended. CP 122. It expressly amended Article

C, 2a, paragraph 4 and 5 (Maintenance and Improvements of Community

Amenities):

Lot owners shall receive an annual statement for membership dues. The lot owners shall make full remittance of said dues within thirty (30) days. The Board will review non-payment of dues on an individual basis. Upon failure to remit as required, the Board may contract for the services of an attorney to seek enforcement of this agreement. The prevailing party shall be entitled to attorney fees in any such action.

All unpaid dues shall bear twelve (12) percent interest compounded monthly after thirty (30) days until paid.

CP 123 (emphasis added). Notably, the provision that unpaid dues shall become a lien was removed. This removal was maintained in the 2017 amendments. CP 127-131.

The Bylaws were also amended in 2017 and read in pertinent part:

ARTICLE VI – Membership

Section 1. Any person or persons, firm or corporation owning and holding a Membership Certificate issued by this corporation shall be considered a member of the corporation, and shall be subject to all rules, laws, covenants, and duties adopted or established by these Bylaws or their amendments, and the Articles of Incorporation to include but not be limited to the following:

- a. Annual membership payments, as suggested by the Board of Trustees and approved by at least fifty percent (50%) of members in good standing, either present or by proxy, at the annual meeting of the members or at a special meeting called for that purpose.

- b. Agreement to thereafter maintain good standing membership in the corporation, including payment of fees and assessments associated with the maintenance of established roads and right-of-ways, procurement, development, construction, and maintenance of other common areas and facilities, maintenance of insurance as appropriate, adherence to the covenants and to Codes and Laws of Lewis County and the State of Washington. Membership in this corporation entitles each member to the rights and privileges and liabilities of the corporation.

[...]

ARTICLE X – Duties of Trustees

Section 1. The Board of Trustees, subject to restrictions of Law, the Articles of Incorporation, or these Bylaws shall exercise all the powers of the corporation and, without prejudice to or limitation upon their general owners it is hereby expressly provided that the Board of Trustees shall have, and are hereby given full power and authority to be exercised by a majority vote of all the trustees in respect to the matters and thus hereinafter set forth.

- a. [...]
- b. [...]
- c. [...]
- d. [...]
- e. To present a budget to the members at the annual meeting, or a special meeting called for such purposes, which shall include but not be limited to the following:
 - 1. An annual fee per membership certificate to be used in accordance with the Articles of Incorporation.

- 2. A sum of month for liability insurance, as appropriate, for the Association and each member of the Association, incident to operation, maintenance and use of the roads, right-of-ways, and other common areas and facilities within Kiona Park Estates; such total fee to be equally pro-rated among all members of the Association
 - 3. General physical improvements and major maintenance.
 - 4. Enforcement of Rules, Regulations, and Covenants adopted in accordance with these Bylaws and the Articles of Incorporation.
- f. [...]
- g. To enforce the collection of any dues and/or assessments of members, which have been levied by members. **The Board of Trustees shall have the option to declare a member delinquent and bring an action at law against the member obligated to pay or place a lien against the property or both.** All costs of recovery including reasonably attorney fees shall be added to the amount of the assessment.
- h. [...]
- [...]

ARTICLE XII – Benefits and Duties of Members

Section 1. Every member shall be entitled to the right of use of roads, right-of-ways, and common areas and facilities within Kiona Park Estates except the airstrip, all in accordance with rules and regulations of the Association, and subject to suspension in the event of delinquency or default in payment of Association dues, charges, or assessments.

Section 2. Each member shall be required to pay an annual charge, in the form of dues, for maintenance of established roads

and right-of-ways, other common areas and facilities not pertaining to the airstrip, liability insurance charges, and for the making and enforcement of rules, regulations, and covenants.

Section 3. Each member shall be subject to future assessments for improvements to the common areas and their associated facilities as determined to be necessary by the Board of Trustees, and as approved by fifty percent (50%) of members in good standing, and shall be required to pay such assessments upon demand of the Treasurer of the corporation.

Section 4. **The Board of Trustees may suspend the right to use common facilities, other than roads, by a member for non-payment of any charge or for the non-payments** of an assessment duly imposed by the Board of Trustees within sixty (60) days after the due date.

CP 201-213 (emphasis added).

V. ARGUMENT

1. Standard of Review

When the facts are undisputed and the only issues on appeal are questions of law, the standard of review is de novo. *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273, 883 P.2d 1387 (1994). Questions of statutory construction are also subject to de novo review. *State v. Votava*, 149 Wn.2d 178, 183, 66 P.3d 1050 (2003). Further, questions of contract interpretation that do not depend on the use of extrinsic evidence are reviewed de novo. *Wash. St. Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176

Wn.2d 502, 517, 296 P.3d 821 (2013); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Finally, summary judgment orders are reviewed de novo on appeal. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The reviewing court must consider “the facts in the light most favorable to the nonmoving party.” *Mt. Park Homeowners Ass’n v. Tydings*, 72 Wn. App. 139, 144, 864 P.2d 392 (1993), citing *Scott v. Pacific West Mt. Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); *Glesener v. Balholm*, 50 Wn. App. 1, 7, 747 P.2d 475 (1987). Summary judgment should be upheld only when there is no issue of material fact. *Id.*, citing CR 56(c); *Atherton Condominium Apartment-Owners Ass’n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

2. The HOA’s powers are derived from the governing documents.

The powers of a homeowners’ association arise from the governing documents. See RCW 64.38.020. The association’s “governing documents” means the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument by which the association has the

authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction.” RCW 64.38.010(10).

In the present case, the original covenants from 1981 provide that a parcel owner’s unpaid share of road maintenance and repair expenses shall be considered a lien and proceeded against as a lien for improvement of real property. CP 59. Thereafter, when the Association was formed, the Articles of Incorporation similarly provided that delinquent dues and assessments would constitute a lien against the property, although it did not specify the nature of the lien as the original covenants did. CP 134. In 2001, when the By-Laws were drafted, the Board of Trustees was provided with the authority to enforce the collection of dues and assessments by either declaring a member delinquent and bringing an action at law against the member or by placing a lien against the property, or both. CP 197. This portion of the By-Laws remained unchanged in the 2017 By-Law Amendments.

When the Board of Kiona Park first decided to exercise the option of placing a lien on Mr. Dehls’ property in 2002, it recorded its lien with the Lewis County Auditor. This is, in part, because the governing documents of the Association in effect in 2002 only gave Kiona Park the

option of placing a lien on Mr. Dehls' property for unpaid assessments, but such a lien was not automatically created merely by Mr. Dehls' failure to make a timely payment of the Association's annual assessment. His failure to pay a particular year's assessment, however, did give Kiona Park the option to pursue that particular assessment as a delinquent debt.

That is exactly what Kiona Park did when it recorded its lien against Mr. Dehls in 2003 for assessments for years 2002 and 2003. CP 239-240. When the dues for 2004 and 2005 became delinquent, Kiona Park again recorded a lien, this time only for those two years: 2004 and 2005, making no reference to the prior years' debts from 2002 and 2003. CP 242-243.

Kiona Park's governing documents also gave it the right to pursue an action at law to collect the debt owed. By its own governing documents, each year's assessment becomes delinquent after 90 days, therefore 90 days after a property owner's yearly assessment becomes due, Kiona Park's cause of action would have arisen on that debt. For example, in 2002, Mr. Dehls' payment of \$150 was due on January 1st. According to Kiona Park's governing documents, the failure to pay becomes an actionable delinquency on April 1st, at which time Kiona Park has the option of bringing suit, recording a lien or both. But as explained below, Kiona Park's options are not without restrictions at law.

3. The HOA's governing documents are restrictive covenants running with the land and interpreted under contract law.

The original Declaration of Protective Covenants provided that the Association's Articles of Incorporation and By-Laws would be incorporated as a part of those covenants, running with the land. CP 59. The protective covenants constitute a contract between the HOA and the homeowner. *See Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-74, 279 P.3d 943 (2012) (governing documents are reviewed as contracts).

Restrictive (or protective) covenants are analyzed in accordance with contract law. *See e.g., Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005); *see also Rodruck v. San Point Maint. Com.*, 48 Wn.2d 565, 578, 295 P.2d 714 (1956).

Enforcement between [a covenant's] original parties is a matter of the law of contract ... [...] The doctrine of 'running' is analogous to the contract doctrines of assignment of rights and delegation of duties; it is a doctrine whereby remote parties are bound or benefitted by contractual covenants made by the original parties. However, while a party must consensually undertake assignment or delegation, the law of running covenants imposes a duty or confers a benefit upon remote parties, not because they consensually agree, but because the covenant bore a certain relationship to parcels of land and because they stepped into a certain relationship with the same parcels. The essence of the law of running covenants has to do with what these relationships must be for the remote parties to be bound or benefitted.

Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 257, 215 P.3d 990 (2009), quoting William B. Stoebuck & John W. Weaver, Wash. Prac.: Real Estate: Property Law § 3.2, at 126 (2d ed. 2004).

“A court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document.” *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 14, 945 P.2d 717 (1997), quoting *Mt. Park Homeowners Ass’n*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). A court’s first objective in interpreting a restrictive covenant is ascertaining the intent of the original parties. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997).

In this case, we have the various declarations of protective covenants in place that envision the property owners would share in the expense of road maintenance. These shared costs were calculated annually by the Board and billed to the property owners on an annual basis. Then we have the Articles of Incorporation which give Kiona Park the power to, among other things, enforce liens. CP 133-134. Finally, we have the By-Laws, which provide that the Board of Trustees has the option of declaring a member delinquent and bringing a legal action against that member for payment or placing a lien upon the property, or both. CP 196-199.

4. The statute of limitations on delinquent assessments is six years and each annual assessment constitutes a new debt.

Kiona Park has argued that the liens, once recorded, were actions to recover real property and were subject to a 10-year statute of limitations. RP 17:5-7. This is incorrect. Neither the protective covenants nor the subsequent liens resulted in an interest in real property. *See e.g., Ensberg v. Nelson*, 178 Wn. App. 879, 886-87, 320 P.3d 97 (2013) (protective covenants and liens are encumbrances and although adverse to property owner's interest, do not convey an interest in property). A lien confers no general right of property or title upon the holder. *Fed. Intermediate Credit Bank v. O/S Sablefish*, 111 Wn.2d 219, 276, 758 P.2d 494 (1988), citing *Swanson v. Graham*, 27 Wn.2d 590, 597, 179 P.2d 288 (1947).

Division I of the Washington Court of Appeals has held that even a deed of trust is subject to the six-year statute of limitations governing agreements in writing. *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 434, 382 P.3d 1 (2016), citing *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 927, 378 P.3d 272 (2016); RCW 4.16.040(1).

This lawsuit was filed in 2018, the same year the lien was recorded by the Association against Mr. Dehl's property. CP 1-8, 37-39. The statute of limitations on a written document is six years. RCW 4.16.040. *See also*,

4518 S. 256th, LLC, v. Karen L. Gibbon, PS, 195 Wn. App. 423, 434, 382 P.3d 1 (2016) (“As an agreement in writing, the deed of trust foreclosure remedy is subject to a six-year statute of limitations), citing *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 927, 378 P.3d 272 (2016).

“...[W]hen recovery is sought on an installment note, ‘the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.’” *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 434, 382 P.3d 1 (2016), quoting *Herzog v. Herzog*, 23 Wb.2d 382, 388, 161 P.2d 142 (1945); accord 25 David K. DeWolf, Keller W. Allen & Darlene Barner Caruso, *Wash. Prac.: Contract Law & Prac.* § 16.21, at 511 (3d ed. 2014) (“Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due”). This is consistent with the general rule “that a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976); also *Bale v. Flloyd*, 119 Wn. 503, 506, 91 P.2d 1025 (1939) (that statute of limitations begins to run when a cause of action accrues).

Division I of the Washington Court of Appeals recently addressed the issue of how the statute of limitations applied to condominium association assessments. *Mohandessi v. Urban Venture, LLC*, 2020 Wn. App LEXIS 1908 (2020). In that case, the court held that the plaintiff's cause of action alleging improper assessments accrued annually – each time the board passes a budget. *Id.* at 16. In this way, HOA dues should be treated no differently. Each year, Mr. Dehls owed Kiona Park for his share of yearly road maintenance. Upon his failure to pay on January 1, ninety days later – in accordance with Kiona Park's governing documents, he was delinquent and Kiona Park had the right, pursuant to those written covenants, to pursue collection of that debt either by lien, lawsuit or both. This is also the moment the statute of limitations began to run on that debt. As a debt based upon a writing, Kiona Park had six years from the date of delinquency to bring a lawsuit for collection or enforcement of its lien. RCW 4.16.040.

5. Kiona Park is advocating for either no statute of limitations or a 10-year statute of limitations – both in violation of Washington law.

Kiona Park attempted to circumvent the statute of limitations by re-billing Mr. Dehls for prior years. This is inconsistent with Washington law, which provides a cause of action accrues when an individual may bring an

action at law to enforce its rights. *Supra*. In Kiona Park recorded its liens in 2003 and 2006, it recognized that its annual assessments were a separate debt, setting forth each year's assessment as a separate debt in the lien.

Kiona Park failed to take any further action to obtain payment and chose not to bring an action in court to obtain payment on those prior years. It did not seek payment until 2018, at which time it recorded a new lien, which provided a single lump sum for all years owed, going back to 2002. This veiled attempt to renew the debt should be seen for what it was – an attempt to circumvent Washington's statute of limitations on written debt.

VI. CONCLUSION

In this case, the protective covenants incorporate the HOA's governing documents as further covenants. All of these documents are a written agreement between the homeowner and the association. Enforcement actions based on a written agreement are subject to a six-year statute of limitations and those actions accrue when the default occurs.

In November of 2018, when Kiona Park filed the underlying lawsuit against Mr. Dehls, it was limited to an enforcement action for the assessments of 2013, 2014, 2015, 2016, 2017 and 2018. As the 2012 assessments would have been deemed delinquent pursuant to Kiona Park's

governing documents on April 1, 2012, the six-year statute of limitations would have run on April 1, 2018.

For the foregoing reasons, Mr. Dehls respectfully requests this Court grant his appeal and hold that a six-year statute of limitations applies to HOA dues and assessments, and further remand this case with a directive that the HOA may only recover the amounts owed for 2013-2018. Mr. Dehls is also requesting award of his attorney fees and costs incurred in connection with this appeal.

Respectfully submitted this 6th day of July, 2020.



CHRISTI C. GOELLER, WSBA #33625
Goldstein Law Office, PLLC
1800 Cooper Point Road SW, #8
Olympia, WA 98502
360.352.1970
christi@jaglaw.net

Attorney for Appellant Avera Lee Dehls

CERTIFICATE OF SERVICE

The undersigned certifies that on July 6, 2020, that this Brief of Appellant was filed electronically with the Court of Appeals and served upon counsel below by way of the Washington State Appellate Courts' Portal and via email.

Kelly Delaat-Maher
SMITH ALLING, PS
1501 Dock Street
Tacoma, WA 98402
kelly@smithalling.com

The foregoing is true and correct, based upon my own personal knowledge and made under the penalty of perjury under the laws of the state of Washington.

Dated this 6th day of July, 2020, at Olympia, WA.


CHRISTI C. GOELLER

GOLDSTEIN LAW OFFICE, PLLC

July 06, 2020 - 2:20 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54477-6
Appellate Court Case Title: Kiona Park Estates, Respondent v. Avera Lee Dehls, Appellant
Superior Court Case Number: 18-2-01287-1

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