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NO. 54365-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

**LOST LAKE RESORT CONDOMINIUM ASSOCIATION, a Washington
nonprofit corporation,**

Appellant,

vs.

**LOST LAKE RESORT, LLC, a Washington limited liability corporation; LOST
LAKE DEVELOPMENT, LLC, a Washington limited liability corporation;
BRENT McCAUSLAND and JANE DOE McCAUSLAND and the marital
community composed thereof; and DAVID BLOCK and JANE DOE BLOCK, and
the marital community composed thereof,**

Respondents.

**APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable G. Helen Whitener, Judge**

BRIEF OF APPELLANT

REED McCLURE

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I. NATURE OF THE CASE

Plaintiff condominium association filed an action for breach of a settlement agreement. Defendants moved for summary judgment based on the contention that plaintiff had failed to satisfy conditions in the condominium's governing documents for commencing litigation. The superior court dismissed all causes of action with prejudice, even though the court did not consider the merits of any claim or any defense other than lack of authority to file suit.

II. ASSIGNMENT OF ERROR

The superior court erred in entering the Order Granting Defendant's Motion for Summary Judgment of Dismissal of Plaintiff's Claims on November 22, 2019, which dismissed plaintiff's claims and all causes of action with prejudice. (CP 140-42)

III. ISSUES PRESENTED

A. Did the trial court err by dismissing plaintiff condominium association's claims with prejudice, where defendants moved for summary judgment based on an assertion that plaintiff lacked authority to bring the action, and did not consider the merits of plaintiff's claims or any defense other than lack of authority to file suit?

B. Did the trial court err by dismissing plaintiff condominium association's claims where plaintiff had authority under its governing

documents to file an action for the purpose of tolling a statute of limitations, which was plaintiff's purpose for filing the action?

C. Did the trial court err by dismissing plaintiff condominium association's claims based on lack of authority when the ability to enforce the condominium declaration and the Washington Condominium Act through judicial proceedings may not be abrogated?

IV. STATEMENT OF THE CASE

Plaintiff Lost Lake Resort Condominium Association ("the Association") brings this action alleging defendants McCausland and Block breached a written settlement agreement requiring them to pay to "repair, improve and restore the infrastructure at Lost Lake Resort to the level required by any government agency to permit the full enjoyment of the condominium by its various owners". (CP 3) The Association alleges defendants Lost Lake Resort, LLC, and Lost Lake Development, LLC, breached provisions in the settlement agreement requiring them to pay any liens, dues, and assessment at the closing of the sale of any lot owned by them. (CP 3-4)

On September 25, 2019, defendants moved for summary judgment, asserting that "plaintiff has failed to comply with the Covenants and Declarations of the Condominium Association and this lawsuit is unauthorized and must be dismissed". (CP 20) Defendants asserted that the

Declaration and Covenants, Conditions, Restrictions and Reservations for Lost Lake Resort, a Condominium (“the CC&Rs”) authorized litigation only after a litigation summary has been transmitted to the Board of Directors, and after 80% of the condominium unit owners have granted approval to institute legal proceedings. (CP 25) Defendants moved for dismissal based on the argument that these requirements were not satisfied, and therefore the Association is without authority to maintain this litigation. (CP 26-29, 86-87)

Defendants did not move for summary judgment on any other ground. Specifically, defendants did not ask the court to consider the merits of any claim or cause of action. Defendants did not move for summary judgment based on the statute of limitations. Further, defendants’ motion did not ask the court to dismiss the action with prejudice. (CP 19-29)

The Association opposed the motion for summary judgment. (CP 49) The Association argued, among other things, that exceptions in the CC&Rs to the requirements relied on by defendants applied, including an exception that permitted filing a lawsuit to toll a statute of limitation deadline. (CP 55-56)

On November 22, 2019, the court granted defendants’ motion for summary judgment. (CP 140-42) The court ordered “that plaintiff’s claims

and all causes of action asserted therein against defendants be and the same hereby is dismissed, with prejudice”. (CP 142)

The settlement agreement on which the lawsuit is based was executed in August 2012. (CP 62, 66-67) Lost Lake Resort, LLC, and Lost Lake Development, LLC, Declarants for the condominium, were delinquent in payment of dues and assessments. (CP 66) In lieu of making these payments, the settlement agreement required the defendants “to repair, improve and restore the infrastructure at Lost Lake Resort to the level required by any government agency to permit the full enjoyment of the condominium by its various owners”. (CP 63, 66) The infrastructure includes the water system, the septic system, and the electrical system. (*Id.*)

The Association’s Board of Directors authorized the filing of the lawsuit because they believed they could not reach a resolution of the dispute under the settlement agreement prior to expiration of the statute of limitations. The Association filed suit so it would not lose its right to pursue claims against the defendants for failure to perform pursuant to the settlement agreement. (CP 36, 65)

Paragraph 10.12.3 of the CC&Rs provides in part that in order for The Association to institute legal proceedings, the board of directors must receive a litigation summary which shall be transmitted to all owners, and owners holding 80% of the total Association voting power must grant

approval to institute legal proceedings. (CP 78-79) However, the CC&Rs have exceptions to these requirements, including the following:

10.12.2 The provisions of this Section 10.12 shall not apply to Legal Proceedings, as a result of which the Association could not be held responsible for costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) in a [sic] aggregate amount of not more than \$5,000 (including without limitation fees contingent on a result), and which involve:

...

(e) the filing of a complaint, answer or other pleading for the limited purpose satisfying [sic] a statute of limitation deadline, avoiding entry of a default order or judgement, or preventing personal injury or serious harm to the Condominium (if such purpose is certified in good faith by the Association's attorney), but except for this limited purpose the other conditions of Section 10.12 must be satisfied.

(CP 78)

V. ARGUMENT

A. STANDARD OF REVIEW.

Review of a grant of summary judgment is de novo. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). The reviewing court engages in the same inquiry as the trial court. *International Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013).

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

CR 56(c). All facts, and reasonable inferences therefrom, are viewed most favorably to the nonmoving party. *Bostain v. Food Exp., Inc.*, 159 Wn.2d at 708. “Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented.” *Id.* Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan Cnty. Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

“A condominium declaration is like a deed, the review of which is a mixed question of law and fact”. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The factual issue is the declarant's intent, which the court discerns from the face of the declaration. The declaration's legal consequences are questions of law, which the court reviews de novo. *Id.* Here, where the court is reviewing a summary judgment order, the factual issue of the declarant’s intent must be viewed most favorably to the non-moving party.

B. THE SUPERIOR COURT COMMITTED ERROR WHEN IT ENTERED DISMISSAL WITH PREJUDICE BECAUSE IT DID NOT CONSIDER THE MERITS OF THE ASSOCIATION’S CLAIMS.

The superior court’s entry of dismissal with prejudice was error. The basis for defendants’ motion and the court’s order was the alleged lack of authority of the Association to commence litigation. The court did not consider the Association’s claims on the merits. By entering dismissal with

prejudice, the superior court improperly precluded the Association from commencing litigation on these causes of action after it has authority to do so.

A dismissal with prejudice constitutes a final judgment on the merits. A “final judgment” is “a court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.” *Elliott Bay Adjustment Co. v. Dacumos*, 200 Wn. App. 208, 213–14, 401 P.3d 473 (2017) (quoting BLACK’S LAW DICTIONARY 971 (10th ed. 2014)).

By dismissing the action with prejudice, the court precluded the Association from filing another lawsuit once it has authority to do so. “A dismissal ‘with prejudice’ is equivalent to an adjudication upon the merits and will operate as a bar to a future action”. *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 52, 135 P.2d 71 (1943).

In *Zucker v. Nadreau*, 35 Wn.2d 735, 214 P.2d 652 (1950), the plaintiffs sued for sums due on a contract. After a trial, the trial court concluded that the defendants were making payments in good faith, and dismissed the action with prejudice. The Supreme Court affirmed, but held that dismissal with prejudice was improper, and ordered that the judgment be modified to read without prejudice. *Zucker v. Nadreau*, 35 Wn.2d at 739.

Similarly, here the superior court erred in dismissing the action with prejudice. The court never considered the Association's claims on the merits. Indeed, unlike in *Zucker v. Nadreau*, the court never even reached the issue whether defendants are or are not yet in breach. "Under all the circumstances, the most that respondents were entitled to was a dismissal of the action without prejudice." *Zucker v. Nadreau*, 35 Wn.2d at 739.¹

C. THE PURPOSES OF THE WASHINGTON CONDOMINIUM ACT AND THE CC&RS PROMOTE LIBERAL INTERPRETATION TO PROTECT THE ASSOCIATION'S CONTRACT RIGHTS AND ASSETS.

The superior court dismissed the Association's action with prejudice based on a technicality. The court did not consider the merits of the Association's claim. In doing so, the court deprived the Association and its members of an opportunity to enforce contract rights and preserve condominium assets in a future lawsuit. This result is contrary to public policy and the liberal construction required by the CC&Rs.

¹ The Association anticipates that defendants may argue its attorney's signature on the order under "Approved as to Form" somehow agrees to the content of the order. (*See* CP 142) However, approving the form of the order is simply an acknowledgement that the form of the order comports with the court's ruling. Approving the form of the order does not approve its content. *See Hope v. Larry's Markets*, 108 Wn. App. 185, 197, 29 P.3d 1268 (2001), *overruled on other grounds by Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). Approving the form of the order is not a stipulation. *De Lisle v. FMC Corp.*, 41 Wn. App. 596, 597-98, 705 P.2d 283 (1985). Dismissal with prejudice, which bars refiling suit on plaintiff's causes of action, is clearly part of the content of the order, not merely its form.

The settlement agreement required declarants “to repair, improve and restore the infrastructure at Lost Lake Resort to the level required by any government agency to permit the full enjoyment of the condominium by various owners”. The parties agreed to this obligation in lieu of payment of dues and assessments owed by declarants.

Protecting condominium purchasers is a primary purpose of the Washington Condominium Act, RCW ch. 64.34. *One Pacific Towers Homeowners’ Ass’n v. HAL Real Estate Investments, Inc.* 148 Wn.2d 319, 331, 61 P.3d 1094 (2002). This includes protecting condominium assets owned jointly by condominium purchasers.

Under the Act, the Association’s powers include, in part, the following:

(1) Except as provided in subsection (2) of this section, and subject to the provisions of the declaration, the association may:

...

(d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

(e) Make contracts and incur liabilities;

...

RCW 64.34.304.

Any right declared by the Act is enforceable by judicial proceeding. RCW 64.34.100(2). Under the Act, remedies are liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. RCW 64.34.100(1).

If a declarant or any other person subject to the Act fails to comply with any provision in the Act, the declaration, or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. RCW 64.34.455.

Depriving the Association and its members of contract rights based on a technicality is inconsistent with the purposes of and powers conveyed by the Act. Dismissal, if appropriate, should have been without prejudice.

Dismissal with prejudice was also inconsistent with the liberal interpretation required by the CC&Rs. The CC&Rs provide under the heading “Interpretation”: “The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development and operation of this Condominium under the provisions of Washington law. . . .”. (CP 79)

The CC&Rs further provide:

17.4 Legal Proceedings. The rights, powers, benefits, duties and obligations granted to and imposed upon parties subject to this Declaration (including without limitation the Declarant, Owners, Association, Board, and Officers) shall not be restricted, diminished, or otherwise modified by

threatened or pending legal proceedings (including without limitation litigation, administrative, mediation, or arbitration), which proceedings involve one or more of such parties.

(CP 201)

Depriving the Association and its members of contract rights and assets is not consistent with the development of the Condominium as required by the CC&Rs. Further, dismissal with prejudice deprives the Association and Board of the power of commencing litigation to enforce contract rights and recover condominium assets, and therefore is inconsistent with section 17.4. The court erred in dismissing the action with prejudice.

D. THE COURT ERRED IN DISMISSING THE ACTION BECAUSE THE ASSOCIATION WAS AUTHORIZED TO FILE SUIT TO TOLL A STATUTE OF LIMITATIONS.

The Association filed the lawsuit to toll a statute of limitations. The CC&Rs authorized filing of an action for this purpose. The superior court therefore erred in dismissing the action.

The CC&Rs authorize “the filing of a complaint, answer or other pleading for the limited purpose satisfying [sic] a statute of limitation deadline” without complying with the provisions of Section 10.12. (CP 78) The Association filed the action for this purpose. It had authority to do so.

This exception is subject to the following:

10.12.2 The provisions of this Section 10.12 shall not apply to Legal Proceedings, as a result of which the Association could not be held responsible for costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) in a [sic] aggregate amount of not more than \$5,000 (including without limitation fees contingent on a result) . . .

(CP 78)

This provision is confusing because it contains a double negative: “could not be held responsible” and “aggregate amount of not more than \$5,000”. Read properly, the provision authorizes filing of a suit where the Association could be held liable for more than \$5,000 in costs of suit. This makes sense, because the provision creates an exception to the conditions set forth in section 10.12.3 for instituting litigation “in order for the Association to become obligated in the aggregate sum in excess of \$5,000”.(CP 78)

In construing the CC&Rs, any ambiguity should be interpreted in a manner consistent with the Act. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 530, 243 P.3d 1283 (2010) The “court should place special emphasis on arriving at an interpretation that protects the homeowners' collective interests”. *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27, *rev. denied*, 117 Wn.2d 1013 (1991). The homeowners here have a collective interest in not being deprived of a cause of action to enforce their collective rights under a settlement

agreement to repair, improve, and restore condominium assets in exchange for foregoing payment of dues and assessments.

The court's dismissal was therefore in error. No litigation summary or vote of the members were required because the Association filed suit to toll the statute of limitations. The \$5,000 limit did not apply.

E. COSTS OF SUIT DID NOT EXCEED \$5,000.

Even if the CC&Rs limited costs of suit to \$5,000, this threshold had not been reached. Defendants failed to submit evidence showing that costs of suit exceeded \$5,000. Most of the charges in the invoices they submitted were for negotiations with defendants and their attorneys, which began prior to suit and continued after suit was filed. These were not costs of suit.

Prior to suit, the Association and defendants engaged in negotiations relating to defendants' failure to meet their obligations under the settlement agreement. (CP 64-65, 99-100) The Association's attorney, Elizabeth Thompson, represented the Association prior to suit, as indicated by the Association's payment of nearly \$8,000 on April 11, 2019 for prior work. (CP 44) This is a clear inference that Ms. Thompson represented the Association in these negotiations.

After suit, these negotiations continued. (CP 36) Many of Ms. Thompson's entries in the invoices submitted by defendants relate to

continued negotiations with defendants and their attorneys. They do not mention the lawsuit at all. (CP 45-46)

The only entries relating to prosecuting the lawsuit include²:

3/20/19	Prepare confirmation of service	\$140
6/13/19	Communications concerning discovery issues	\$140
6/26/19	Work on discovery responses and objections	\$924
6/26/19	Review motion to compel	\$168
6/27/19	Communications concerning discovery responses	\$336
	TOTAL	\$1,708

(CP 44-47)

Defendants failed to establish that “costs of suit” exceeded \$5,000. Continuing negotiations and communicating with clients in an attempt to resolve the underlying dispute are not “costs of suit”. Such attorney’s fees could be incurred regardless of whether suit was filed, and were incurred prior to suit.

² The only exception is an entry on June 24, 2019, where counsel attended a meeting with Association members concerning “civil action” and lists and to discuss next steps. (CP 46) Fees incurred for counsel to meet with her clients to provide legal advice were not for discovery, motions, or other litigation related activity. They were not “costs of suit”.

F. EVEN IF THE \$5,000 LIMIT APPLIED AND WAS EXCEEDED, THE COURT SHOULD NOT HAVE DISMISSED THE LAWSUIT.

Defendants argued below that suit was only permitted if the Association could not be held liable for more than \$5,000. Defendants, and presumably the court, misread this provision. The opposite was true. However, even if defendants were correct, and even if the \$5,000 limit was exceeded, dismissal was not the appropriate remedy.

When the Association filed suit, costs of suit did not exceed \$5,000. Defendants submitted no evidence that the Association expected costs would exceed \$5,000. The exception therefore applied at the time suit was filed.

If costs of suit later exceeded \$5,000, the appropriate remedy would not be to dismiss the lawsuit. This could cause the statute of limitations to run, depriving the Association and its members of their causes of action. The appropriate remedy would be to stay the lawsuit and give the Association an opportunity to satisfy the requirements for authority to file suit. Defendants did not request this remedy. Summary judgment should have been denied.

G. THE LIMITATION ON THE ASSOCIATION’S POWER TO COMMENCE LITIGATION TO ENFORCE RIGHTS AND OBLIGATIONS UNDER THE ACT IS UNENFORCEABLE.

The limitation on the Association’s power to commence judicial action to enforce rights and obligations under the Act is unenforceable. Therefore, the court’s dismissal of the Association’s action was error.

The Association filed suit to enforce an agreement settling the declarants’ obligation to pay dues and assessments. In lieu of making these payments, the settlement agreement required the defendants “to repair, improve and restore the infrastructure at Lost Lake Resort to the level required by any government agency to permit the full enjoyment of the condominium by its various owners”. (CP 66) The infrastructure includes the water system, the septic system, and the electrical system. (*Id.*)

The Association is responsible for maintenance, repair, and replacement of common elements. RCW 64.34.328. The Association has powers to institute litigation; make contracts; incur liabilities; regulate the use, maintenance, repair, replacement, and modification of common elements; impose and collect charges for late payment of assessments; levy reasonable fines for violation of the declaration; etc. RCW 64.34.304(1). The Association has a lien for unpaid assessments levied against a unit from the time the assessment is due. RCW 64.34.364.

RCW 64.34.455 provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

The legislative history indicates the legislature intended that this provision would provide a general cause of action or claim for relief for failure to comply with the Act (or the declaration or bylaws) to any person, including the association. *See Mohandessi v. Urban Venture LLC*, __ Wn. App. __, 459 P.3d 407, 418-19 (March 9, 2020) (*quoting* 2 SENATE JOURNAL, App. at 2091).

RCW 64.34.100(2) provides that any right or obligation declared by the Act is enforceable by judicial proceeding. RCW 64.34.030 provides that except as expressly provided in the Act, provisions of the Act may not be varied by agreement, and rights conferred by the Act may not be waived.

Under these statutes, the right to bring a judicial proceeding to enforce the Act cannot be waived.

Regardless of whether terms of the act express a substantive right or make some other provision, neither may be modified by agreement unless explicit authority to do so exists elsewhere in the chapter. The WCA grants that authority in several of its sections, but it allows for no modification of RCW 64.34.100(2).

Marina Cove Condo. Owners Ass'n v. Isabella Estates, 109 Wn. App. 230, 236, 34 P.3d 870 (2001) (*abrogated on other grounds by Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009)).

Therefore, the limitation on the Association's power to commence judicial action to enforce rights and obligations under the Act is unenforceable. Dismissal of the lawsuit was error.

VI. CONCLUSION

Dismissal with prejudice was error when the superior court did not consider the merits of the Association's cause of action. Further, the action should not have been dismissed at all because the Association had authority to institute litigation to toll the statute of limitations. The \$5,000 costs of suit limitation did not apply. Even if it did, defendants failed to establish that costs of suit exceeded \$5,000. Even if they had, the appropriate remedy would be to stay the action to preserve the rights of the Association and its members and to give the Association an opportunity to obtain authority to maintain the suit. For these reasons, the Association requests that this Court reverse the summary judgment order.

DATED this 15th day of April, 2020.

REED McCLURE

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2020, copies of the following document were served on counsel as follows via the Washington State Appellate Court's Electronic Filing Portal:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 15th day of April, 2020, at Seattle, Washington.

/s/ Kristina Nakasone
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REED MCCLURE

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