68152-4 68152-4

NO.68152-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FAIRWAY ESTATES ASSOCIATION OF APARTMENT OWNERS, a Washington nonprofit corporation,

Appellant,

v.

SAND POINT COUNTRY CLUB, INC., a Washington non-profit corporation;

Respondent,

BRIEF OF RESPONDENT

EISENHOWER & CARLSON, PLLC
By Robert G. Casey, WSBA # 14183
Jennifer McIver, WSBA # 38798
Attorneys for Respondent

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 25 PM 1:36

EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 572-4500

TABLE OF CONTENTS

I. RESTATEMENT OF THE ISSUES 1

II. INTRODUCTION / SUMMARY OF ARGUMENT 1

III. RESTATEMENT OF THE FACTS 4

IV. ANALYSIS 9

A. STANDARD OF REVIEW 9

B. THE TRIAL COURT DID NOT ERR IN GRANTING SPCC'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE ASSOCIATION CAN ONLY FORECLOSE THE OWNERSHIP INTEREST CREATED BY THE DECLARATION – A LEASEHOLD OWNERSHIP INTEREST IN THE UNIT 9

1. The Condominium Declaration Effectively Creates A Leasehold Condominium 11

2. The Leasehold Condominium is Not Subject to RCW 64.24.220 Because the Condominium Was Created Prior to July 1, 1990 13

3. The Association May Only Foreclose The Ownership Interest Held by the Unit Owner – the Leasehold Ownership Interest . 16

4. SPCC's Fee Simple Interest in The Condominiums is Not a Lien or Encumbrance 18

5. A Conclusion in Favor of The Foreclosure of SPCC's Interest in the Unit Would Provide Absurd Results 19

C. THE TRIAL COURT PROPERTY AWARDED FEES AND COSTS TO SPCC 23

1. SPCC is Entitled to Attorneys' Fees under the Lease, the Declaration, and the Condominium Act 23

a. Authority for Attorney Fees under Lease, as modified..... 23

b. Authority for Attorney Fees under the Condominium Declaration. 24

c. Authority for Attorney Fees under the Condominium Act 26

2. The Trial Court's Award of Attorneys' Fees and Costs to SPCC Was Not an Abuse of Discretion 27

D. SPCC IS ENTITLED TO FEES ON APPEAL PURSUANT TO RAP 18.1 28

TABLE OF AUTHORITIES

Cases

Washington Cases

Canyon Lumber Co. v. Sexton et al, 93 Wash. 620, 626, 161 P. 841 (1916) 17

Cook v. Evanson, 83 Wn. App. 149, 920 P.2d 1223 (1996) 19

Marine Enterprises, Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 774, 750 P.2d 1290 (1988) 29

Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989) 28

Richter v. Trimberger, 50 Wn. App. 780, 784, 750 P.2d 1279 (1988) 26

Seattle First National Bank v. Washington Ins. Guar. Ass'n, 94 Wn. App. 744, 761-62, 972 P.2d 1282 (1999) 27

Shannon v. Grindstaff, 11 Wash. 536, 40 P. 123 (1895) 17

Summerhill Village Homeowners Ass'n v. Roughley, ___ Wn. App. ___, 270 P.3d 639, 641 (2012) 18, 19

Other Cases

Alma Invest. Inc. v. Bahia Mar Co-Owners Ass'n, 999 S.W.2d 820 (1999) 10

Statutes

RCW 6.23.010 20

Chapter 61.12 RCW 16, 17
RCW 61.12.170 17

Chapter 61.24 RCW 16, 17

RCW 61.24.040(1)(b)(iii) 17
RCW 61.24.050 16

RCW 62A.9A-102(a)(32) 18

Chapter 64.32 RCW 13
RCW 64.32.010(2) 11
RCW 64.32.150 15
RCW 64.32.200 ..... 2, 8, 10
RCW 64.32.200(2) 8, 10

Chapter 64.34 RCW 4, 10, 13, 14
RCW 64.34.010(1) 13, 14
RCW 64.34.220 ..... 13, 14, 15
RCW 64.34.220(1) 15
RCW 64.34.268 15
RCW 64.34.364 10
RCW 64.34.364(2) 18, 19
RCW 64.34.364(9) 2, 16
RCW 64.34.364(14) 26

Rules

RAP 18.1 28
RAP 18.1(a) 28

Other Authorities

Black's Law Dictionary (8th ed., Thompson West 1999) 18

I. RESTATEMENT OF THE ISSUES

1. Whether the trial court erred by granting Respondent Sand Point Country Club's Motion for summary Judgment and denying Appellant Fairway Estates Association of Apartment Owners Motion for Summary Judgment when (a) the Condominium Declaration created a leasehold condominium, with each condominium unit being the leasehold interest therein and each condominium unit owner being the holder of the leasehold interest therein and (b) Fairway Estates Association of Apartment Owners may only foreclose the leasehold ownership interest in a condominium unit created by the Condominium Declaration? **No**.

2. Whether the trial court erred by granting Respondent Sand Point County Club's Motion for Attorneys' Fees when (a) the Lease, the Condominium Declaration, and the Condominium Act each provide for an award of attorneys' fees and costs and (b) the trial court found the attorneys' fees and costs requested by Respondent Sand Point County Club to be reasonable? **No.**

3. Whether Respondent Sand Point County Club is entitled to Attorneys' Fees upon appeal? **Yes.**

II. INTRODUCTION / SUMMARY OF ARGUMENT

Appellant Fairway Estates Association of Apartment Owners ("Association") commenced an action to collect delinquent unpaid assessments and to foreclose upon the Association's assessment lien against the particular unit within the Fairway Estates Condominiums ("Condominiums") commonly known as 8001 Sandpoint Way NE, Unit

C-42, Seattle, WA 98115 ("Unit"), basing its right to do so upon RCW 64.32.200 and RCW 64.34.364 and the Condominium Declaration of Covenants, Conditions, and Restrictions for "Fairway Estates a Horizontal Property Regime," with the Map & Plans for the Condominium (as amended and modified, "Condominium Declaration"). Under the Condominium Declaration, the Association is comprised solely of holders of lessee's interests in condominium units. Respondent Sand Point Country Club ("SPCC") is not a member of the Association. As part of its assessment lien foreclosure, the Association moved for summary judgment against SPCC to foreclose upon and eliminate SPCC's fee simple ownership interest in the Unit.

The question as to what ownership interests are subject to a foreclosure of the assessment lien is governed solely by statute and the provisions of the Condominium Declaration. There is no statutory authority or any provision within the Condominium Declaration that supports the Association's argument that its lien attaches to SPCC's fee simple ownership interest in the Unit. Instead, the contrary is true - the Condominium Declaration expressly limits the attachment of the assessment lien to the leasehold interest in the Unit and the express wording of the applicable statute and the Condominium Declaration does not include SPCC's fee interest as one that is subordinate to the assessment lien and subject to being foreclosed in a lien foreclosure action.

In support of the foreclosure and elimination of SPCC's fee simple ownership interest in the Unit, the Association attempts to complicate and confuse the issues by asserting SPCC did not establish a "common ground lease scheme" for the Condominiums. In furtherance of this proposition, the Association bases its argument on the fact that the Condominium Declaration does not provide for the termination of the Condominiums upon termination of the underlying ground lease. From this alleged factor, the Association leaps to the unwarranted conclusion that the assessment lien foreclosure by the Association forecloses not only the Unit Owner's leasehold interest in the Unit, but SPCC's fee simple ownership in the Unit as well.[1] The Association's argument is fallacious because whether the condominium regime created by the Condominium Declaration survives the termination of the underlying lease is not relevant to whether SPCC's fee simple ownership in the Unit is subject to the foreclosure of the Association's assessment lien. The Association's argument is neither supported by the governing Condominium Declaration or by statute.

The issues in this case are fully resolved by reference to the relevant provisions of the Lease (under which SPCC is Lessor), the Condominium Declaration, and the applicable statutory provisions regarding the Association's assessment lien and its rights regarding foreclosure of the lien. According to these controlling documents, the Association's lien attaches only to the leasehold interest in the Unit and

[1] It goes without saying that eliminating SPCC's fee simple interest in the Unit also results in the elimination of SPCC's interest as the Lessor of the underlying ground lease.

the lien may only be foreclosed upon the Unit Owner's leasehold interest and those subordinate "liens and encumbrances" not given priority by statute. SPCC's fee simple ownership interest in the Unit is neither a lien nor an encumbrance upon the Unit. Accordingly, the Association's assessment lien does not attach to SPCC's fee simple ownership in the Unit.

Even though the Association may not foreclose SPCC's fee simple ownership interest in the Unit, the foreclosure of the Unit Owner's leasehold interest is still a foreclosure of the Association's assessment lien as contemplated and provided under the Condominium Declaration and as supported by the Condominium Act (Chapter 64.34 RCW). Thus, the trial court did not err in granting SPCC's Motion for Summary Judgment and denying the Association's Motion for Summary Judgment.

III. RESTATEMENT OF THE FACTS

SPCC is the fee owner and Lessor of condominium estates with respect to the real property situated at 8001 Sand Point Way N.E., Seattle, Washington. CP 395-96. SPCC originally leased the real property to Fairway Estates, a limited partnership ("Fairway Estates"),[2] under the terms and conditions of that certain lease between SPCC and Fairway Estates dated March 27, 1973 (recorded on March 29, 1973) ("Lease"). CP

[2] Fairway Estates limited partnership was the entity that developed the property, is no longer in existence, and should be distinguished from the plaintiff Fairway Estates Association of Apartment Owners, which is the entity constituting the condominium homeowners association and the Appellant in this matter.

354-380.[3] By an amendment and agreement entitled "Second Modification of Lease", dated October 11, 1974, and recorded on Feb. 3, 1975, the term of the Lease was amended to be an eighty-eight (88) year term ending March 31, 2061. CP 337-38. Currently there is just under fifty (50) years remaining under the term of the Lease. *Id.*

The original Lease, which makes no mention of the creation of condominium estates, contemplated Fairway Estates' development of the real property by its construction of buildings and improvements per a residential planned unit development. CP 311, 313. As originally constructed, there were 84 residential apartment units. CP 382. The economic structure of the original Lease is essentially that of a traditional "net" ground lease in that the Lessor is to be paid rent periodically, CP 309-10, and the Lessee is to be responsible for all costs and expenses such as taxes, insurance, repairs and maintenance. CP 316-17, 320.

Based on Fairway Estates' determination to market the constructed apartments as individual condominium units, SPCC and Fairway Estates, together with Continental Mortgage Investors (the lender providing financing to Fairway Estates for the construction of improvements) and First American Title Insurance Company (the designated trustee on the lender's deed of trust), entered into a further amendment to the Lease, entitled Modification of Lease, dated November 19, 1974, which was

---

[3] *See also* CP 309-326 for an unrecorded, but more legible copy of the Lease. For ease of review, this more legible copy of the Lease will be referenced for the remainder of this Brief of Respondent.

recorded and registered on January 21, 1975 ("Lease Modification"). CP 327-336. On the same day, a Condominium Declaration of Covenants, Conditions, and Restrictions for "Fairway Estates, a Horizontal Property Regime," with the Map & Plans for the Condominium, was recorded and registered (as Registered Land) in King County ("1975 Declaration of Condominium"). CP 118-218. The original 1975 Declaration of Condominium later was amended and modified by the Association according to an Amended and Restated Declaration of Covenants, Conditions and Restrictions for Fairway Estates, A Condominium, dated October 12, 1996 ("1996 Amended (Restated) Declaration) CP 220-348.

The Lease Modification contained provisions relating to (1) converting the subject of the Lease from traditional real property and improvements to condominium estates as created by the abovementioned condominium documents; (2) converting Fairway Estates` interest from a lessee's interest in real property to the lessee's interest in all of the Condominium Units; and (3) contemplating that Fairway Estates would transfer its leasehold interests in the various condominium units by way of specific Assignments of Lease to transferee "purchasers" of condominium units each of whom would become a holder of the lessee's interest in the Condominium Unit acquired. CP 327-28. Exhibit B to the Lease Modification provides the form by which the partial leasehold interests in the various condominium units would be assigned to assignee-buyers and provides for the assignee's acknowledgment that the assignment is taken subject to the Lease with SPCC, as amended and modified. CP 332-36.

Pursuant to the express provisions of the Condominium Declaration, each individual unit within the Condominium regime is "owned" by a person or persons holding the leasehold interest in the individual condominium unit. CP 227, 232-33, 305 . SPCC, which retains the fee simple interest in the Condominiums subject to the Lease, as modified, is purposefully excluded from the Declaration of Condominium's definition of "owner" of a condominium unit. CP 232-33, 305. The Condominium Declaration does not support the notion that SPCC is as an "owner" of a condominium unit for any purpose related to condominium administration and operations, including that with respect to the matter of the Association's process of creating assessments or of its enforcement of collection of unpaid assessments due from the holders of the leasehold interests as the "owners" of the condominium units. *See* CP 221-306. SPCC's superior fee simple interest in the Condominiums is confirmed by Paragraph 2 of the Lease Modification, which sets forth a new Paragraph 34 to the Lease, stating that "This Lease and the interests created thereby are hereby subordinated and made inferior to all of the condominium estates established by the map and plans and the Declaration." CP 328-29. Appellant would like to have this Court construe this provision so that it provides for SPCC`s fee interest to be "subordinated and made inferior," but the wording of the provision simply is not subject to such a construction. Br. of App. at 10.

Section 17 of the Condominium Declaration addresses default on payment of assessments. CP 276-79. More specifically, Section 17.1

provides that assessments are only the personal debts and obligations of the "owner(s)" of apartment units; that the amount of any assessment, plus interest thereon, costs and reasonable attorneys fees incurred, "shall be a lien upon such Apartment Unit;" and that the lien "shall have priority over all other liens and encumbrances, recorded or unrecorded, to the extent provided by RCW 64.32.200 (2)." CP 276-77.

Section 17.3 of the Condominium Declaration provides for the Association's authority to bring an action to foreclose the lien of any assessment and that the lien is foreclosable against any "Unit;" later in this section it is stated that that unpaid amounts "constitute a lien against the Owner's Unit who has defaulted until paid." CP 277 (underlining added for emphasis). There is no provision whatsoever in Section 17 or any other provision of the Condominium Declaration for any notice to SPCC regarding the imposition of assessments, the default in payment of any assessments, or the process for collection of unpaid assessments; nor is there any provision for any obligation on the part of SPCC to pay any assessments, for the Association to provide any opportunity to SPCC to pay any assessments against any apartment unit, or for SPCC's interest to be in any way subordinate or inferior to the Association's assessment lien. *See* CP 221-306.

In understanding the several aspects of Section 17 of the Condominium Declaration, it is important to recognize that Section 38.2 of the Condominium Declaration provides: "[w]henever the word 'Owner' or 'Owners' is used, it shall mean the assignee(s) of Lessee's leasehold

interest under the Underlying Lease in the Unit(s) and estate(s) herein established." CP 305. Additionally, Section 38.1 of the Condominium Declaration provides: "[w]henever the word 'sale', 'sold', 'convey', 'rent', 'lease', <u>or any other words are used giving rise to the inference of a transfer of</u> <u>an interest in an [sic] Unit(s) or an estate(s)</u> in the same shall mean the assignment of lessee's interest under the Underlying Lease in Unit(s) and estate(s) herein established." *Id.* (emphasis added). It further is to be noted that, according to Section 9.2.1 of the Condominium Declaration, only the owners of apartment units (who, by definition, are the persons holding the lessee's interest therein) are members of the Association. CP 257, 305.

IV. ANALYSIS

A. Standard of Review.

SPCC does not dispute the Association's stated authority for the standard of review for summary judgment or for the entitlement to and award of attorneys' fees. Br. of App. 13.

B. The Trial Court Did Not Err in Granting SPCC's Motion for Summary Judgment Because the Association Can Only Foreclose the Ownership Interest Created by the Declaration – a Leasehold Ownership Interest in the Unit.

SPCC does not dispute that the Association has a foreclosable lien interest in the individual apartment units within the Fairway Estate Condominium. Br. of App. 2, Issue Nos. 1 and 2. In fact, SPCC agrees

that, consistent with both RCW 64.32.200 and RCW 64.34.364[4], the Association enjoys a lien against each individual apartment unit to secure unpaid assessments. Br. of App. 6-7, 15. Accordingly, this matter is not analogous to the Texas Court of Appeals case *Alma Invest. Inc. v. Bahia Mar Co-Owners Ass'n,* 999 S.W.2d 820 (1999), as argued by the Association. Br. of App. 15-16, where the Court addressed whether certain provisions within a condominium regime's maintenance agreement excepting some unit owners from the payment of maintenance fees were against public policy. *Id.* at 825.

Notably, the Texas Court of Appeals did not address whether the lien for the collection of said maintenance fees attached to a leasehold or fee simple ownership interest, which is the remaining issue on appeal. Br. of App. 2, Issue No. 3. The Association's lien is not a lien against SPCC's fee simple ownership interest in the individual apartment units; rather, the Association's lien attaches only to the leasehold interest in the apartment units specifically created by the Condominium Declaration.

---

[4] It is important to note that while condominiums created prior to July 1, 1990 are generally subject to the old Horizontal Property Regimes Act (Chapter 64.32 RCW), certain sections of the later Washington Condominium Act ("Condominium Act") (Chapter 64.34 RCW), may apply to condominiums created prior to July 1, 1990. RCW 64.34.010(1). More specifically, the Condominium Act provides that its provisions under RCW 64.34.364 (lien for assessments) apply to condominiums created prior to July 1, 1990, if the events and circumstances occur after July 1, 1990. RCW 64.34.010(1). Because the past due assessments giving rise to the Association's lien occurred after July 1, 1990, the current provisions of RCW 64.34.364 are applicable to this matter. It is to be noted, however, that while RCW 64.34.364 is the applicable statute to the matter at issue, the provisions of RCW 64.32.200 (2), relating to the priority of the Association's assessment lien and which was in effect when the subject condominium estate was created, are essentially the same.

1. The Condominium Declaration Effectively Creates A Leasehold Condominium.

The Association argues the Condominiums pursuant to the Condominium Declaration are not leasehold condominiums. Br. of App. 17. The initial recitals provided in the 1975 Declaration of Condominium expressly provide SPCC's intent to create individual apartment units and the ownership interest in which is only a leasehold interest. CP 118. More specifically, the 1975 Declaration of Condominium provides as follows:

> WHEREAS, Declarant desires and <u>intends to assign leasehold interest to apartment units</u> in Buildings A, B, & C;

Id. (emphasis added). Further, the recitals of the 1996 Restated (Amended) Declaration define "Apartment Units" as follows:

> WHEREAS, Declarant <u>assigned leasehold interests to apartment units</u> in Buildings A, B and C (the "Apartment Units");

CP 227 (emphasis added).

Therefore, contrary to the Associations assertion that "[n]othing in these documents states that the "Unit" is only a leasehold", Br. of App. 26, based on the express intent of the Condominium Declaration, the ownership interest created and assigned to each individual apartment unit is a leasehold ownership interest, not a fee simple ownership interest. This is consistent with and authorized by RCW 64.32.010(2), the applicable statutory scheme for forming condominiums at the time of recording the Condominium Declaration, which provides the following definition of an "apartment owner":

> "Apartment owner" means the person or persons owning an apartment, as herein defined, in fee simple absolute <u>or qualified, by way of leasehold or by way of a periodic estate</u>, or in any other manner in which real property may be owned, leased or possessed in this state, together with an undivided interest in a like estate of the common areas and facilities in the percentage specified and established in the declaration as duly recorded or as it may be lawfully amended.

(emphasis added).

Further, Section 38.2 of the Condominium Declaration expressly provides "[w]henever the word 'Owner' or 'Owners' is used, it shall mean the assignee(s) of Ground Lessee's leasehold interest under the Underlying Lease in the Unit(s) and estate(s) herein established". CP 305. The Condominium Declaration expressly excludes SPCC's fee simple ownership interest in the individual apartment units from the definition of an "Owner" of an individual apartment unit. CP 232-33, 305. Therefore Condominium Declaration <u>does not</u> support the Association's assertion that SPCC granted the Association a security interest in its fee simple ownership interest in the Unit. Br. of App. 24-25. Rather, the Condominium Declaration supports the Owner of the Unit, the assignee of the leasehold interest in the Unit, granting the Association a security interest in its interest in the Unit – a leasehold interest.

When the provisions of the Condominium Declaration and the relevant statutory sections are read in context, the only reasonable conclusion is that the Association's assessment lien does not attach to the

fee simple interest of SPCC in the Unit. By providing for the leasehold interests in the individual apartment units to be the "owners" of the apartment units and by providing for the operation and administration of the condominium and the Association to be limited solely to and among the apartment unit "owners," the Condominium Declaration legally and effectively created a leasehold condominium.

2. The Leasehold Condominium is Not Subject to RCW 64.34.220 Because the Condominium Was Created Prior to July 1, 1990.

The Association attempts to obfuscate the basic issues of this matter by stressing to the Court that the lease from SPCC is not a "common ground lease." Br. of App. 17. The Association further points out that "leasehold condominiums" are heavily governed by RCW 64.34.220. Br. of App. 18. However, the regulations provided under RCW 64.34.220 are not applicable to the issues before the Court because RCW 64.34.220 of the "Condominium Act" (Chapter 64.34 RCW) is only applicable to condominiums created on or after July 1, 1990. RCW 64.34.010(1). The Association has acknowledged there is no comparable section in the Horizontal Property Regimes Act (Chapter 64.32 RCW) and conceded that the Fairway Estates Condominiums were legally structured under the Horizontal Property Regimes Act, the applicable code at the time they were created. CP 31.

The Association appears to be arguing that, somehow, because a termination of the condominium regime is not expressly tied to the expiration of the underlying lease, SPCC's interest should be deemed

subject to being foreclosed in an assessment lien foreclosure action. Br. of App. 17-18. There simply is no logic to such an argument because there is no rationale for analyzing the assessment lien issue by reference to the matter of how and when the condominium regime will terminate.

It is to be noted that, despite arguing for the alleged significance of the condominium regime not expressly terminating upon the expiration of the Lease, the Association nevertheless concedes that the Lease and the Condominiums in this case were legally structured under the Horizontal Property Regimes Act (Chapter RCW 64.32), the applicable code at the time the Condominium was created. CP 31. This is important because the later Condominium Act provides that Chapter 64.34 RCW applies to all condominiums created within this state after July 1, 1990, and does not invalidate or supersede preexisting inconsistent provisions within condominium documents created prior to July 1, 1990. RCW 64.34.010(1). The Condominium Act does not provide an exception for its applicability to the extent necessary to construe RCW 64.34.220. *Id.* Thus, because the subject Condominiums were created prior to July 1, 1990, the later Condominium Act's provisions for leasehold condominiums under RCW 64.34.220 are not applicable or relevant to the Lease and the Condominiums in this case.

Even assuming *arguendo* that RCW 64.34.220 is applicable and that RCW 64.34.220 governs leasehold condominiums by setting forth certain requirements where the expiration or termination of an underlying lease may terminate the condominium or reduce its size, RCW 64.34.220

does not, however, expressly provide that the structure of every leasehold condominium *must* include the termination of the condominium upon the termination of the underlying lease. RCW 64.34.220(1). Accordingly, whether or not the Condominiums terminate upon the expiration of the Lease is not relevant to the legality of the Lease and Condominiums in this case. RCW 64.34.220 and its regulation of leasehold condominiums provides no support for the Association's attempt to foreclose upon SPCC's fee simple ownership interest in the Unit.

Further, even if the occurrence of the Condominiums' termination upon the Lease expiration were to be deemed relevant to the issues in this case, it is a fact that when the Lease terminates, SPCC will become the sole owner, with right of possession, of all of the Condominiums, free of the Lease and the interests of all persons holding a partial lessee`s interest under the Lease. As such, SPCC will then have the right immediately to terminate the condominium structure and remove the property from condominium status, regardless of which statute may be applicable to that process. *See* RCW 64.32.150 and RCW 64.34.268.

Therefore, under the law and the undisputed facts of this case, the matter of the Condominiums' survival, after the termination of the Lease some forty nine years from now, is not relevant to whether SPCC's fee simple ownership interest is subject to the foreclosure of the Association's assessment lien. That issue is to be determined solely by a proper understanding of the provisions of the Lease, Lease Modification, and the Condominium Declaration specifically relating to the scope of the

assessment lien and the particular interests that are foreclosable in an action to foreclose the lien. As the Association's foreclosure of its assessment lien is limited to foreclosing upon the Unit Owner's leasehold interest in the Unit together with those liens and encumbrances against the Owner's leasehold interest which are not excluded by statute, the court did not err in denying the Association's Motion for Summary Judgment.

3. The Association May Only Foreclose The Ownership Interest Held by the Unit Owner – the Leasehold Ownership Interest.

RCW 64.34.364(9) provides that subject to certain conditions, the lien for assessments may be enforced either judicially pursuant to Chapter 61.12 RCW or non-judicially pursuant to Chapter 61.24 RCW. The Association notes that Chapter 61.24 RCW (Deed of Trust Act) has no applicability to this case because the Association is seeking the judicial foreclosure of its assessment lien. Br. of App. 29. However, even if the Association is choosing to foreclose judicially, rather than non-judicially, the enforcement provisions under both Chapter 61.12 RCW and Chapter 61.24 RCW make it clear that, as to any foreclosure proceeding brought by the Association, only the leasehold interest held by the Unit Owner may be foreclosed.

Under the statutory provisions for non-judicial foreclosures, RCW 61.24.050 provides "the trustee's deed shall convey all the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired."

Additionally, when providing the requisite notice requirements, RCW 61.24.040(1)(b)(iii) only provides that notice shall be provided to "... the lessee in any lease, or the holder of any conveyances of any interest or estate in any portion or all of the property described in such notice..." Further, under the statutory provisions for judicial foreclosures, RCW 61.12.170 provides "... only the debtor's interest may be levied on and sold on execution, and the sheriff's notice of sale shall describe the extent of the debtor's interest to be sold as accurately as possible."

Based on both the judicial foreclosure (Chapter 61.12 RCW) and non-judicial foreclosure (Chapter 61.24 RCW) provisions, it is clear that the Association may only foreclose the interest that the owner (debtor) of the Unit holds. It is undisputed that the Condominium Declaration, Lease, and Lease Modification provide that the holder of a leasehold interest in the Unit is to be considered the "owner" of the Unit. Therefore, as a matter of law, if the owner of the Unit only holds a leasehold interest, the Association may only foreclose that leasehold interest. *See Canyon Lumber Co. v. Sexton et al*, 93 Wash. 620, 626, 161 P. 841 (1916) (holding "[b]y a foreclosure and sale, the appellant could acquire no greater rights in the leasehold estate than the persons against whom the foreclosure was had possessed therein..." (citing *Shannon v. Grindstaff*, 11 Wash. 536, 40 P. 123 (1895)).

Accordingly, as a matter of law, by any foreclosure proceeding, whether judicial or non-judicial, only the leasehold interest in the Unit can

be foreclosed upon and the purchaser at a sale can not acquire a fee simple interest in the Unit.

4. SPCC's Fee Simple Interest in The Condominiums is Not a Lien or Encumbrance.

RCW 64.34.364(2), dealing with an association's assessment lien, provides, in part, that a "A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit." (Emphasis added). A "lien" is a "legal right or interest that a creditor has in another's property, lasting [usually] until a debt or duty that it secures is satisfied." *Black's Law Dictionary* (8th ed., Thompson West 1999). Further, a "lien holder" is an "encumbrancer who holds a lien." *Id.* An "encumbrancer" is a person who holds "any property right that is not an ownership interest." *Id.* Moreover, the term encumbrance means a right, other than an ownership interest, in real property and includes a mortgage or other lien on real property. RCW 62A.9A-102(a)(32).

An example of the applicability of RCW 64.34.364(2) is this Court's holding in *Summerhill Village Homeowners Ass'n v. Roughley*, ____ Wn. App. _____, 270 P.3d 639, 641 (2012), where it was determined that (i) the term mortgage includes a deed of trust, and (ii) a condominium association's lien for common expenses assessments has

"super priority" over the deed of trust. However, unlike the lender in *Summerhill* who held a security interest in the condominium unit being foreclosed, the Association does not merely hold a security interest in the subject Unit. Rather, it is undisputed that pursuant to the Lease, Lease Modification, and the Condominium Declaration, SPCC holds a fee simple ownership interest in the Condominiums, including a fee simple ownership interest in the subject Unit. By definition and statute, because SPCC holds a fee simple ownership interest in the Unit, SPCC's interest in the Unit can not be considered to be a "lien or encumbrance."

Thus, as a matter of law, RCW 64.34.364(2) does not apply to SPCC or to SPCC's interest in the Unit, and SPCC's interest in the Unit can neither be deemed inferior to the Association's lien, nor can it be foreclosed in a foreclosure proceeding respecting the Association's lien.

5. A Conclusion in Favor of The Foreclosure of SPCC's Interest in the Unit Would Provide Absurd Results.

A ruling by the Court in favor of the Association's claim that SPCC's fee simple ownership interest in the Condominiums is inferior to the assessment lien and is subject to being foreclosed in a foreclosure of the assessment lien, would lead to absurd results. Contracts are to be given a practical and reasonable interpretation, not an interpretation that leads to absurd results. *Cook v. Evanson*, 83 Wn. App. 149, 920 P.2d 1223 (1996). The following are some examples of absurd results that would occur should the Association prevail in this action.

First, SPCC may face the absurd situation of being subject to the judicial foreclosure of its fee interest, but not entitled to redeem from the purchaser at the foreclosure sale. RCW 6.23.010, the statute governing who may redeem from judicial foreclosure sales, expressly limits persons who may redeem to the following persons: (1) the judgment debtor; (2) any creditor having a lien by judgment, decree, deed of trust or mortgage, on any portion of the property, or any portion of any part thereof . . . subsequent in time to that on which the property was sold; and (3) the respective successors in interest to any of the persons mentioned in (1) and (2). Based on this statute, SPCC, having a fee simple and lessor's interest in the property, would not be a redemptioner following the foreclosure of the assessment lien. Thus, should the Association be allowed to foreclose upon SPCC's fee simple interest in the Unit, SPCC will have no right of redemption.

Next, any adverse ruling against SPCC in favor of the Association in this matter would conflict with the indemnity provisions provided in the Lease, as modified. For example, Paragraph 8 of the Lease, as modified, specifically provides "[i]f the Lessor without fault on its part is made a party to any litigation commenced by or against the Lessee, then the Lessee shall defend the action and hold the Lessor harmless … in connection with such litigation." CP 312.

Further, the Condominium Declaration and the Lease Modification both require the individual condominium unit owners to pay their proportionate share of the underlying lease payments to SPCC. CP 269-

71, 329. If a unit owner fails to do so, SPCC may terminate the Lease, as modified, with respect to the unit, and retake possession of the unit. *Id.* Here, the Association at all times has made the proportionate lease payment on behalf of the Unit which is the subject of the foreclosure, and the Association includes that amount in its judgment claim against the Unit owner. Had the Association not "advanced" that lease payment on behalf of Unit Owner, SPCC could have exercised its rights years ago to terminate the Lease, as modified, and take possession of the Unit.

Moreover, should the Association's lien be deemed superior to SPCC's fee simple ownership interest in the Unit and the Association be allowed to foreclose upon said interest, SPCC would also be faced with the prospect of having its ownership interest in the various individual apartment units wiped out over the remainder of the term of the Lease, as modified. It is very conceivable that, as the remainder of the lease term continues to diminish in duration and the market value of leasehold interests in units therefore continue to decrease, the Association may seek to enforce collection of unpaid assessments by foreclosure of its assessment liens against additional individual condominium units and should the Association's liens be deemed superior to SPCC's fee simple ownership interest in those units, SPCC would continue to lose its fee simple ownership interest in the units, through absolutely no fault or action on its part.

Finally, the above results are revealed to be patently absurd in light of the basic nature and intent of the Lease, the Lease Modification, and the

Condominium Declaration. Under the Lease, SPCC leased the Condominium estate, including the individual units on an absolutely net basis, with the original Lessee, Fairway Estates, and its successors in interest (who consist of its successor assignees as the holders of a leasehold interest in each of the condominium units, now represented by the Association in this action) being obligated to pay rent to SPCC, CP 309-10, and to be responsible for and pay all taxes, insurance, maintenance and repairs with respect to the "Leased Premises." CP 316-17, 320. The Condominiums' common expenses assessed by the Association to the unit "owners" (being the holders of the leasehold interests in the individual condominium units), are expressly meant to cover all of such expenses so as to meet the lease obligations to SPCC. CP 269-71. However, if the Association's position is accepted, SPCC will face the absurd result of being burdened by the delinquent assessments and of losing its fee interests in the subject condominium unit (as well as in other units subject to future foreclosures of an assessment lien) precisely because holders of the leasehold interest in the Condominiums have failed to meet their obligations to pay assessments meant to cover the very expenses which the lessees are obligated to pay, through the Association's assessments, pursuant to the Lease, as modified.

In light of the these absurd results which would arise should the Court find the Association's lien for assessments against the Unit is superior to SPCC's fee simple ownership interest in the Unit and foreclosable against SPCC's interests in this action, the Court should hold

that the Association's claim with respect to SPCC is contrary to and inconsistent with the intent and meaning of the provisions of the Lease, as modified, the Condominium Declaration, and the applicable law relating to the issues in this action.

C. The Trial Court Properly Awarded Fees and Costs to SPCC.

1. SPCC is Entitled to Attorneys' Fees under the Lease, the Declaration, and the Condominium Act.

On appeal, the Association argues that the trial court erred in awarding SPCC its attorneys' fees and costs pursuant to the Lease, Condominium Declaration, and the Condominium Act. Br. of App. 3, Issue No. 4. Further, the Association asserts the award of SPCC's attorneys' fees and costs were unreasonable. Br. of App. 3, Issue No. 5.

a. Authority for Attorney Fees under Lease, as modified.

SPCC is the fee owner and lessor of the property which is the subject of the Association's foreclosure proceeding and the Association instituted the proceeding, in part, to foreclose upon SPCC's interest. The Lease, as modified, provides at Paragraph 8 as follows:

> Indemnity Against Liens: . . . If the Lessor without fault on its part is made a party to any litigation commenced by or against the Lessee, then the Lessee shall defend the action and hold the Lessor harmless and shall pay all costs, expenses, and reasonable attorney's fees incurred by the Lessor in connection with such litigation.

CP 312. A similar provision is found in Paragraph 10 of the Lease:

> Lessee will indemnify the Lessor and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with . . . or occasioned by any act or omission of the Lessee, its agents, employees, servants, contractors or subcontractors. If the Lessor, without fault on its part, is made a party to any litigation commenced by or against the Lessee, then the Lessee shall defend the action and hold the Lessor harmless and shall pay all costs, expenses and reasonable attorneys' fees incurred by the Lessor in connection with such litigation.

CP 313. The Lease also includes another provision for attorney fees in Paragraph 19:

> Attorneys' Fees: If because of any default on the part of the Lessee in the performance of any of the provisions of this Lease, it becomes necessary for the Lessor to employ an attorney, the Lessee shall pay all costs, expenses and reasonable attorneys' fees expended or incurred by the Lessor in connection therewith.

CP 317.

b. Authority for Attorney Fees under the Condominium Declaration.

As the individual units within the Condominiums were sold, the obligations of the "Lessee" under the Lease were assumed by each of the Unit Owners, all of whom comprise the Association. The Condominium Declaration provides in relevant part at Paragraph 13.9:

> Commencing on date of purchase of a Unit, each Unit Owner shall be directly obligated

> to pay that portion of all payments other than rent which are required under the Underlying Lease to be paid by Ground Lessee to Ground Lessor. . . . The amount of rent and other lease payments attributable to each Unit Owner shall be collected by the Association as Common Expenses and shall be paid by the Association to the Ground Lessor.

CP 369-71. The Association represents the interests of all of the Unit Owners in this litigation, but it is also independently liable for the attorney fees owing to SPCC pursuant to Paragraph 13.10 of the Condominium Declaration:

> 13.10 In addition to the payments set forth in Section 13.9 above, the Board on behalf of the Association shall assume and agree to pay, perform, assume and hold harmless Ground Lessee from all payments other than rent required to be made by Ground Lessee to Ground Lessor and from the following paragraphs of the Underlying Lease . . . Paragraph 8 . . . Paragraph 10 . . . Paragraph 19 . . . .[5]

CP 371-72. Further, Paragraph 17.3 of the Condominium Declaration also includes a provision for the recovery of attorney fees specifically in the foreclosure of assessment liens:

> The Board on behalf of the Association may initiate action to foreclose the lien of any Assessment. In any action to foreclose a lien against any Unit for nonpayment of delinquent Assessments, any judgment

[5] These paragraph references correspond to the sections of the Lease authorizing the collection of attorney fees by SPCC as Lessor from the Lessee, which is the Association.

> rendered against the Owner in favor of the Association shall include a reasonable sum for attorneys' fees and all costs and expenses reasonably incurred in preparation for or in the prosecution of said action in addition to costs permitted by law.

CP 377.

c. Authority for Attorney Fees under the Condominium Act.

SPCC is also entitled to attorney fees pursuant to the Condominium Act, specifically RCW 64.34.364(14), which provides as follows:

> The Association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the Association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal in the enforcement of a judgment.

This provision should also apply on a reciprocal basis allowing SPCC to recover its attorney fees in this action. *See Richter v. Trimberger,* 50 Wn. App. 780, 784, 750 P.2d 1279 (1988) (holding a unilateral attorney's fees clause is reciprocal).

The Association appears to argue that there is no "Lessee" liable to Lessor (SPCC) for attorney fees under the Lease, as modified. Br. of App. 31. The original Lessee under the Lease was the developer of the property; however, pursuant to the Lease Modification, the developer was allowed

to assign the lessee's interest in individual condominium units to purchasers through assignments of lease, the form of which was attached as Exhibit "B" to the Lease Modification. CP 327-336. Accordingly, each of the 84 condominium units was sold, and there were Assignments of Lease memorializing each unit sale. Those individual condominium unit owners, collectively, are the "Lessee" under the Lease, as modified. However, under the Condominium Declaration, the Association is required to perform all obligations of "Lessee" under the Lease, as modified. CP 271-72. As above, Section 13.10 of the Declaration specifically recites that the Plaintiff Homeowners Association, "shall assume and agree to pay . . . all payments . . . required to be made by Ground Lessee to Ground Lessor . . . ." CP 271. This section of the Declaration specifically references the paragraphs of the Lease, as modified, involving payment of attorney fees in a dispute between the Lessee and Lessor. *Id.* Accordingly, SPCC is entitled to an award of attorneys' fees under the Lease, Lease Modification, and Condominium Declaration, as well as the Condominium Act.

2. The Trial Court's Award of Attorneys' Fees and Costs to SPCC Was Not an Abuse of Discretion.

The court will not disturb on appeal an award of attorney fees unless the trial court exercised its discretion in a manifestly unreasonable manner or based its decision on untenable grounds. *Seattle First National Bank v. Washington Ins. Guar. Ass'n*, 94 Wn. App. 744, 761-62, 972 P.2d 1282 (1999). By entering the Judgment Granting Sand Point Country

Club's Motion for Attorney's Fees and Costs on January 3, 2012, the trial court found the fees requested by Respondent to be reasonable and granted Respondent an award of attorneys' fees and costs in the total amount of $24,754.74. CP 519-21. The Court's ruling was supported by the Affidavit of Robert G. Casey in Support of Defendant Sand Point Country Club's Motion for Attorneys' Fees and Costs. CP 452-62.

Although the Association argues on appeal that block billing and duplicative fees should preclude SPCC from recovering its fees, Br. of App. 40, the Association passed up on its opportunity to provide evidence that SPCC's attorneys' hours or hourly rates are unreasonable by failing to raise this issue at the trial court level; rather, Appellant's only written defense of SPCC's request at the trial court level addressed SPCC's drafting of the underlying contractual documents, which does not address the reasonableness of attorneys' fees and costs.

D. SPCC is Entitled to Fees on Appeal Pursuant to RAP 18.1.

Pursuant to RAP 18.1, SPCC requests its attorneys' fees and costs incurred on appeal. As set forth in RAP 18.1(a), if applicable law grants to a party the right to recover attorney fees or expenses on review, the party must request the fees and expenses as provided in this rule. For the reasons set forth at length above, SPCC has a contractual right to recover its attorneys' fees and costs of defense, not only at the trial court but on appeal before this Court. *Reeves v. McClain,* 56 Wn. App. 301, 311, 783 P.2d 606 (1989) (contractual provision for award of attorney fees at trial

supports award of attorney fees on appeal); *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988). SPCC requests fees on appeal.

RESPECTFULLY SUBMITTED this 25 day of April, 2012.

EISENHOWER & CARLSON, PLLC

By:

Robert G. Casey, WSBA # 14183
Jennifer McIver, WSBA # 38798
Attorneys for Respondents

CERTIFICATE OF SERVICE

KIMBERLY S. RUGER declares and states as follows:

1. I am a legal assistant at the law firm of Eisenhower & Carlson, PLLC, am over the age of 18, and am otherwise competent to testify.

2. On the 25th day of April, 2012, I deposited with Legal Messengers, a true and correct copy of the foregoing, Brief of Respondent, to be delivered to counsel for the Appellant on April 25, 2012 at the following address:

Michael A. Padilla
Law Offices of James L. Strichartz
201 Queen Anne Ave. North, Suite 400
Seattle, WA 98109-4824

3. On the 25th day of April, 2012, I deposited in the United States Mail, a true and correct copy of the foregoing, Brief of Respondent, in an envelope properly addressed to pro se Respondents at the following address:

Judy Havens
John Doe Havens
20219 - 104th Place SE
Kent, WA 98031

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 25 PM 1:36

///

///

///

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

DATED at Tacoma, Washington this 25th day of April, 2012.

Kimberly S. Ruger

KIMBERLY S. RUGER