

APR 19 2007
COURT OF APPEALS
DIVISION II
KSO

No. 35610-4-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

IN RE PRAIRIE PARK EAST HOMEOWNERS' ASSOCIATION

APPELLANT'S OPENING BRIEF

Larry D. Stout WSBA #17065
Attorney for Appellant
3025 Limited Lane NW
Olympia WA 98502
(360) 866-4995 (tel)
(360) 866-4997 (fax)

pm 4/19/07

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I. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Whether the trial court erred in awarding judgment to Respondents?

2. Whether the trial court erred in awarding attorney fees to Respondents?

II. STATEMENT OF THE CASE

Appellant Irish McCammant owns a lot in the Prairie Park East subdivision in southern Thurston County. (CP 42-67)

The Respondents also own lots in that subdivision (CP 42-67)

There is a document entitled Declaration of Easements, Restrictions and Covenants to Maintain Non-Platted Street (Declaration) that applies to the lots in the subdivision (CP 3-11)

The Declaration contains a section entitled Restrictions and Covenants to Maintain (Covenants). (CP 3-11)

Paragraph 7 of the Covenants states that the association “shall be entitled to contract for maintenance or improvement in any commercially reasonable fashion, *and upon completion*, each lot owner obligated to maintain that easement...shall pay his share of the total cost...”

[Emphasis supplied] (CP 3-11)

Paragraph 8 of the Covenants begins by providing that “Failure of any lot owner to contribute to maintenance, improvement or repair within thirty (30) days *from the date upon which said lot owner was notified of the cost thereof*, shall entitle the remaining lot owners to file a lien upon the property of the non-paying owner.” [Emphasis supplied] (CP 3-11)

Paragraph 8 of the Covenants goes on to provide that “In the event that the services of any attorney are required *to enforce any right granted hereunder*, then in addition to monies owed for maintenance, there shall be assessed a reasonable attorney’s fee, together with any taxable costs, and interest *from the date said obligation became delinquent...*”

[Emphasis supplied] (CP 3-11)

In September of 2004 a majority of the lot owners in the Prairie Park subdivision voted to pave the easement road that serves the lots in the subdivision. (CP 42-67)

The cost of the paving was estimated to be \$15,000.00, with each lot owner’s share amounting to approximately \$3,100.00. (CP 42-67)

The road work was not expected to be completed until “sometime during the year 2005 at which time the exact cost of said work and each lot owner’s share will be known”. (CP 12-14)

Appellant Irish McCammant filed a Complaint for Declaratory Judgment in April of 2005 to determine the rights and responsibilities of Prairie Park lot owners under the Declaration. (CP 3-11)

Ms. McCammant was not notified when the other lot owners changed their mind and decided to re-gravel the easement roadway rather than pave it, nor was she ever asked to pay the actual costs. (CP 105-109)

Ms. McCammant first became aware that costs had been incurred when she read the Declaration of Pat Murphy, which was filed on October 2nd, 2006. (CP 105-109).

Ms. McCammant's actual pro-rata share of the cost of re-graveling the easement roadway turned out to be only \$334.83. (CP 105-109)

In response to Ms. McCammant's Complaint for Declaratory Judgment the Respondents' filed a counter-claim in which they requested an order "imposing a lien against the petitioner and her property in an amount to be shown at trial..." (CP 12-14)

In Ms. McCammant's response to Respondents' counterclaim she asserted that the Respondents' counterclaim was not yet ripe and should not be entertained by the Court since no claim for contribution, lien, costs or fees could be made until a demand for contribution has been made, refused and thirty days have passed. (CP 15-16)

Ms. McCammant filed her Motion for Summary Judgment on September 5th, 2006. (CP 33-41)

Respondents filed their motion for summary judgment on September 15th, 2006. (CP 42-67)

After oral argument, the trial court found that “Ms. McCammant was given notice of her responsibility, notice of the charges, and that the charges were reasonable. Therefore, the Court will grant a judgment in favor of the homeowners’ association for the \$334.83 plus interest as requested.” (RP 20)

The trial court entered its Order Granting Summary Judgment for Respondents on October 13th, 2006. (CP 110-112)

Ms. McCammant filed a motion for reconsideration with the trial court on October 23rd, 2006. (CP 113-118)

The trial court issued a letter opinion on November 2nd, 2006 summarily denying Ms. McCammant’s motion for reconsideration without comment. (CP 126)

Ms. McCammant filed a Notice of Appeal on November 29th, 2006, however the appeal was deemed premature due to lack of entry of a final order in the case. (CP 127-131).

The final Order Denying Petitioner's Motion for Reconsideration was entered on January 12th, 2007.

III. ARGUMENT

3.1 This appeal is about whether the trial court correctly awarded judgment and attorney fees to the Respondents. The answer hinges on the interpretation of Paragraphs 7 and 8 of the Covenants as applied to the facts of this case.

3.2 The relief sought in Respondents' counterclaim was for an order imposing a lien against Ms. McCammant and her property *in an amount to be proven at trial*. The reason the amount of the lien would have to be proved subsequent to the filing of Respondents' counterclaim was because no actual costs had yet been incurred. [Emphasis supplied]

3.3 For the reasons set forth below, Respondents' counterclaim was not ripe and therefore no judgment should have been entered. In addition, no lien rights ever attached to Ms. McCammant, and therefore no attorney fees could be awarded under Paragraph 8 of the Covenants.

3.4 Under Paragraph 7 of the Covenants, lot owners are not obligated to share in the cost of maintenance or improvement until such maintenance or improvement has been completed.

3.5 The trial court's ruling impliedly holds that Respondents did not need to wait until the work was completed to make a claim for reimbursement or to pursue collection efforts. This is in direct conflict with Paragraph 7 of the Covenants.

3.6 Furthermore, the logical extension of the trial court's ruling is that the association could incur costs for road maintenance, file a lawsuit to establish a judgment against members for those costs, without making a request for reimbursement of actual costs incurred, and then be entitled to attorney fees. This result is neither logical nor equitable.

3.7 Washington follows the American rule that a prevailing party normally does not recover its attorney fees. *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994).

3.8 Attorney fees are properly awarded only if specifically authorized by a contract, statute, or recognized equitable ground. *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993)

3.9 The meaning of words in a restrictive covenant is a question of law for the court. *Krein v. Smith*, 60 Wn. App. 809, 811, 807 P.2d 906, review denied, 117 Wn.2d 1002 (1991).

3.10 When interpreting a restrictive covenant, a court must give clear and unambiguous language its plain and obvious meaning. *Mains Farm v. Worthington*, 64 Wn. App. 171; 824 P.2d 495 (1992).

3.11 The only logical construction of the unambiguous language of Paragraphs 7 and 8 of the Covenants is that there must be (1) a demand for reimbursement of actual costs incurred, (2) after completion of the work, (3) refusal to pay, and (4) the passage of 30 days before the association accrues lien rights. Under this procedure there is no need to litigate the amount of the lien because it is automatically established by the amount that was paid, or is to be paid, after completion of the work.

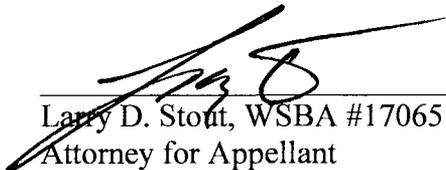
3.12 And the only “right” that Paragraph 8 of the Covenants grants that the attorney fee language could possibly attach to is the right to file and enforce a lien for non-payment of assessments for road maintenance, improvements or repair. No other rights are specified.

3.13 Ms. McCammant was not aware that her actual pro-rata share of the costs of the work amount to \$334.83 until eleven days prior to judgment being entered in favor of Respondents. And even then no formal demand for payment was made. It was simply asserted in Respondents' pleadings.

3.14 Since the Respondents did not follow the proper procedure for obtaining reimbursement for the cost of improvements, no lien rights were acquired by the Respondents, and therefore Respondents are not entitled to judgment. For the same reason Respondents may not rely on Paragraph 8 of the Covenants as a basis for asserting a right to attorney fees.

IV. CONCLUSION

Appellant Irish McCammant submits that the trial court committed reversible error by awarding judgment and attorney fees in favor of the Respondents, and therefore asks this court to reverse the trial court.

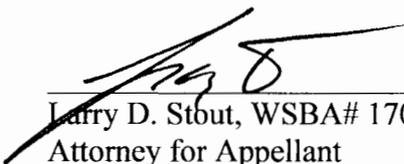

Larry D. Stout, WSBA #17065
Attorney for Appellant

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CERTIFICATION OF SERVICE

I, Larry D. Stout, counsel for the Appellant, hereby certify that on the 19th day of April, 2007, I served counsel for the Respondents with a copy of Appellant's Opening Brief by depositing a copy in the US Mail, first-class postage pre-paid, to Christopher Constantine, attorney for Respondents, P.O. Box 7125, in Tacoma, Washington, 98409.

Dated: April 19th, 2007


Larry D. Stout, WSBA# 17065
Attorney for Appellant