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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 319130

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CLUB ENVY OF SPOKANE, LLC a Washington limited liability company;
DAVID LARGENT, a married man dealing in his separate property;
RIDPATH PENTHOUSE, LLC, a Washington limited liability company;
515 SPOKANE PARTNERS, LLC, a Nevada limited liability company,

Respondents.

v.

RIDPATH REVIVAL, LLC, a Washington limited liability company

Appellant,

and

THE RIDPATH TOWER CONDOMINIUM ASSOCIATION, a Washington
non-profit corporation; FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for Bank of Whitman,

Non-Appealing Defendants.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions The Ridpath Tower (“Second Amended Declaration”) was recorded on August 28, 2008. It created condominium units 20 and 21, which were subsequently purchased by Ridpath Revival, LLC in January 2013. Respondents Club Envy of Spokane, LLC, David Largent, Ridpath Penthouse, LLC and 515 Spokane Partners, LLC’s (together the “Partners”) waited over four years after the Second Amended Declaration was recorded to challenge its validity.

The trial court’s summary judgment order erroneously endorses the Partners’ belated action, contrary to the applicable statute of limitations. The trial court erred by declaring the Second Amended Declaration void from its inception. The trial court failed to properly apply applicable principles of statutory construction to the statute of limitation contained in RCW 64.34.264(2), which entitled Appellant, Ridpath Revival, LLC (“Ridpath Revival”) to summary judgment.

The trial court committed reversible errors. It erred by disregarding substantive evidence of the validity of the Second Amended

Declaration, which entitled Ridpath Revival to summary judgment, or at least created an issue of fact for trial, and improperly ruled on issues beyond the scope of the Partners' motion by granting summary judgment on all matters, which is error as a matter of law. These errors require reversal and entry of summary judgment in favor of Ridpath Revival, or at the very least, remand for trial.

AUTHORITY

A. The trial court erred by not granting Appellant's Motion for Partial Summary Judgment on a dispositive issue that had no genuine issues of fact.

Orders denying summary judgment may be reviewed in circumstances where: 1) the trial court committed obvious error which would render further proceedings useless; or 2) ruling on a denied motion serves the interest of judicial economy where there are no genuine issues of fact and the issue can be decided on a matter of law. *Sea-Pac Co. v. United Food & Comm. Workers Local Union*, 44, 103 Wn.2d 800, 699 P.2d 217 (1985); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000); *Waller v. State*, 64 Wn. App. 318, 338, 824 P.2d 1225 (1992) *citing* RAP 18.8(a). It is appropriate to review the trial court's denial of summary judgment here because the trial court obviously erred by failing to apply the applicable

rules of judicial construction to RCW 64.34.264. Further, deciding Appellant's motion serves the interest of judicial economy because no issues of fact exist on the statute of limitations issue, a decision on which would avoid a useless trial.

Trial courts have the duty to interpret statutes so as to give effect to their purpose and avoid absurd results. *Pasco v. Napier*, 109 Wn.2d 769, 773, 775 P.2d 170 (1988). Where a statute can be reasonably interpreted in more than one way, the court must ascertain and give effect to the Legislature's intent. *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 405, 842 P.2d 938, 944 (1992). By failing to apply the applicable rules of judicial construction to RCW 64.34.264(2) to bar the Partners' untimely claim challenging the validity of the Second Amended Declaration, the trial court erred. The extension of the trial court's ruling is that the one year statute of limitations contained in RCW 64.34.264(2) does not apply. The statute of limitations states:

No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

RCW 64.34.264(2).

The substantive evidence before the trial court was that the Second Amended Declaration was adopted by a unanimous vote of the association, and was recorded on August 28, 2008. CP 351-403. The Partners had notice of their claim, and sat on their rights several years beyond the statutory period. *See Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960) (statute of limitations for claims related to recorded instruments is triggered on recording, even for fraud). All elements of RCW 64.34.264(2) have been met here, and the language of the statute plainly bars the Partners' claim.

A cardinal purpose of the statute of limitations is to provide condominium unit owners and third parties certainty of title. Barring claims after a one year statute of limitations accomplishes that. The Condominium Act (RCW 64.34) provides a detailed statutory framework which both prescribes a system of self-governance and fully protects the rights and property interests of condominium owners. Express dates and standards of care owed by condominium boards of directors are defined. RCW 64.34.308. Periodic meetings of all owners ensure accountability of directors and rights to participate in matters affecting their interests. *See e.g.* RCW 64.34.332-.340. The power to repeal or amend

condominium declarations is expressly provided and the requirements for doing so set out. RCW 64.34.264. Subsection (2) of this statute creates an unambiguous one-year statute of limitations for challenging any declaration amendment. *Id.*

The trial court erred by interpreting RCW 64.34.264(2) to allow claims challenging the validity of declaration amendments beyond the one year limitation. Its construction of the statute is inconsistent with Legislative intent and leaves condominium owners' property ownership rights uncertain, indefinitely. The public relies upon statutes and public records to inform the rights and interests they are purchasing when buying a condominium unit. *See Cunningham v. Norwegian Lutheran Church*, 28 Wn.2d 953, 956, 184 P.2d 834 (1947) (“[W]e have held without deviation that a bona fide purchaser of real property may rely upon the record title.”). These policies are undermined if stale claims are allowed to void long-held property interests. The Legislature could not have intended the circular requirement that owners defending their interests against claims challenging declaration amendments first judicially prove the validity of the amendment prior to the application of the statute of limitations.

B. The trial court erred by granting Respondents' Motion for Summary Judgment.

The evidence before the trial court established that association members holding one hundred percent of the voting interests voted to amend and restate the Ridpath condominium declaration. CP 403. Given this evidence, conflicting declarations regarding the approval of the Second Amended Declaration creates an issue of fact, precluding summary judgment. *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993). The trial court could not have determined the Second Amended Declaration was void from its inception as a matter of law in the face of conflicting evidence on a material issue.

The record reflects the trial court considered all the evidence before it, which includes the Certificate attached to the recorded Second Amended Declaration ("Certificate"). CP 606-608.¹ On its face, the Certificate is probative evidence which establishes compliance with the

¹ The Partners' argument that the Certificate does not conform to CR 56(e) is waived. A party waives non-conformance with CR 56(e) if the party fails to file a timely motion to strike the documents. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998); *Crabtree v. Lewis*, 86 Wn.2d 282, 544 P.2d 10 (1975); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967). No such motion was filed.

procedures outlined in Section 13.2 of the First Amended Declaration, and RCW 64.34.264.

The trial court erred by granting summary judgment where there were conflicting issues of material fact. The Certificate is an admissible publicly recorded instrument going to the heart of the issue in this case. *See* RCW 5.44.070; ER 803(a)(15).² The subdivision of condominium unit 18 into units 18, 20 and 21 was intended by the very entity that owned those units. CP 396. The owner, 515 Washvada Investments, LLC, never raised any objection to that subdivision or the vote memorialized in the Certificate. All subsequent dealings with the condominium units established by the Second Amended Declaration were consistent with the Certificate.³ Even the foreclosure of unit 18 was effected subject to the Second Amended Declaration. *See* CP 5; 444-

² *See In re Det. of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010) (Courts may look to federal cases as persuasive authority in interpreting Washington's rules). The Advisory Committee's note to Federal Evidence Rule 803(15) explains that "dispositive documents often contain recitals of fact" and that "under the rule, these recitals are exempted from the hearsay rule." *United States v. Boulware*, 384 F.3d 794, 807 (9th Cir. 2004).

³ Any suggestion that the Certificate is invalid because it was not sworn under oath is misguided. The First Amended Declaration does not require a signature under oath, and such premise cannot be the basis of the trial court's ruling below because it would require an impermissible interpretation of contract terms that could only be determined at trial.

460; 507-522. These subsequent acts additionally support the efficacy of the Certificate. The Certificate is probative of the validity of the Second Amended Declaration, or its ratification by the membership of the condominium association. At the very least, the trial court's error requires remand for trial regarding the vote on, or ratification of the Second Amended Declaration.

C. The trial court erred by ruling on issues beyond those in Respondents' motion.

Trial courts cannot go outside the pleadings in granting summary judgment. To do so is an error of law. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 148-49, 969 P.2d 458 (1999). The trial court granted summary judgment on the Partners' claim for declaratory relief that "the use restriction set forth in Section 8.1 of the First Amended Declaration does not prohibit the rental of apartment units in Unit 18 of the Ridpath Tower Condominium." CP 12-14. This issue was nowhere raised in the Partners' motion, and was not briefed or argued. The Partners' brief does not contest these facts. The trial court's error is evident from comparison of the Complaint (CP 12-14), the Partners' Motion and Memorandum (CP 224-233, 239) and the trial court's order (CP 606-608). The trial court's error requires remand for

trial on all issues not addressed in the Partners' initial motion.

D. Ridpath Revival's equitable defenses were disregarded in error.

The Partners waited four and a half years after the recording of the Second Amended Declaration to file a claim challenging its validity. The trial court was presented with evidence of the Partners' knowledge or reasonable opportunity to discover their claim to invalidate the Second Amended Declaration, their unreasonable delay in commencing that action, and damages to Ridpath Revival resulting from that delay.

Where evidence supports even a reasonable inference of the elements of laches, a trial court's order granting summary judgment is in error. *State ex rel. Bond v. State*, 62 Wn.2d 487, 490-91, 383 P.2d 288 (1963). The Partners met the elements of laches when they 1) took interests in the Ridpath property that was subject to the Second Amended Declaration; 2) their claim was evident from the face of a publicly recorded document affecting their interests; 3) they waited over four years after the Second Amended Declaration; and 4) their action was commenced four months after Ridpath Revival purchased its interests and invested substantial time and money into its project. CP 5, 528, 537-538. Remand for trial is required because the trial court erred by failing

to view the facts and inferences in favor of Ridpath Revival on its defense of laches.

E. RCW 64.34.348 does not render the Second Amended Declaration void from inception.

RCW 64.34.348 outlines the procedure allowing the conveyance or encumbrance of common elements. A common elements conveyance that fails to following the statutory procedures is void. RCW 64.34.348(4).

The trial court's order made no mention of RCW 64.34.348, and the Partners' suggestion that RCW 64.34.348 is a basis for the trial court's order is unavailing. The plain language of RCW 64.34.348 does not support the trial court's order, but if it based its order on the statute, it is error. First, 100% of the membership ratified the conveyance as evidenced by the Certificate. Second, the common element transfer would have only been a limited conveyance within the Second Amended Declaration, leaving the rest of the document, and the creation of units 20 and 21 intact.

The law favors traditional conservative rules of construction. These principles are what underlie concepts of severability and judicial restraint when construing agreements and statutes. *See Viking Props.*,

Inc. v. Holm, 155 Wn.2d 112, 124, 118 P.3d 322 (2005). Invalidation of a portion of a contract or conveyance does not itself render the entire agreement void. Here, the principles are supported by both the plain language of RCW 64.34.348 and the Second Amended Declaration. RCW 64.34.348(4) states “[a]ny purported conveyance, encumbrance, or other voluntary transfer *of common elements*, unless made pursuant to this section, is void.” RCW 64.34.348(4) (emphasis added). The Second Amended Declaration states that if any provision or “any portion of any provision...shall be deemed invalid...such invalidity... shall not alter any remaining portion of any provision.” CP 395.

The Second Amended Declaration did not solely convey common elements. It was an entire restatement of the condominium declaration and included an authorized subdivision of existing units. Even if the conveyance was not ratified as reflected by the Certificate, a plain reading of RCW 64.34.348(4) would only invalidate the common elements transfer, not the entire Second Amended Declaration. To the extent RCW 64.34.348 was the basis of the trial court’s order, it erred in applying the statute more broadly than necessary to uphold the rest of the Second Amended Declaration.

CONCLUSION

Summary judgment should be granted for Appellant Ridpath Revival and the Partners' claims challenging the validity of the Second Amended Declaration should be dismissed as a matter of law because the statute of limitations bars their untimely claim.

The Partners' motion for summary judgment seeking to invalidate the Second Amended Declaration should be denied, even if their challenge was not barred by the statute of limitations. The Second Amended Declaration meets statutory requirements for a condominium declaration amendment, and is valid. At a minimum, the trial court erred because there are issues of fact regarding whether the Second Amended Declaration was approved or ratified, precluding a finding that it is invalid as a matter of law. For these reasons, this Court should reverse the ruling of the trial court, and remand the matter for trial.

DATED this 8th day of July, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that, on the 8th day of July, 2014, I caused a true and correct copy of this REPLY BRIEF OF APPELLANT to be served upon the following in the manner indicated below:

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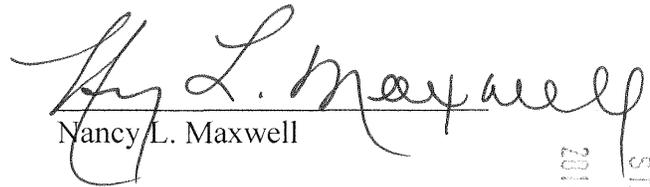
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