Third District Court of Appeal

State of Florida

Opinion filed July 15, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D17-0559 & 3D17-0767
Lower Tribunal Nos. 12-15281 & 14-16340

Evelyn A. Bailey and Robert Farnik,
Appellants,

vs.

Shelborne Ocean Beach Hotel Condominium Association, Inc., et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Creed & Gowdy, P.A., and Bryan S. Gowdy (Jacksonville), for appellants.

Fowler White Burnett, P.A., and Alice K. Sum; Greenberg Traurig, P.A., and Ronald M. Rosengarten, for appellees.

Before SALTER, FERNANDEZ,[1] and LINDSEY, JJ.

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[1] Judge Fernandez did not participate in oral argument.

LINDSEY, J.

These two consolidated appeals concern the validity of seven special assessments, totaling over $30 million, imposed by Appellee Shelborne Ocean Beach Hotel Condominium Association to finance two major construction projects between 2010 and 2014. In 3D17-0559 (the "main case"), Appellants Evelyn Bailey and Robert Farnik, two Shelborne Condominium unit owners (the "unit owners"),[2] appeal from an order entering final summary judgment in favor of the Association and certain former and current members of the Association's Board of Directors. In 3D17-0767 (the "foreclosure case"), Bailey appeals from a final summary judgment of foreclosure resulting from her refusal to pay certain assessments.

Because there are genuine issues of material fact as to the nature of two construction items, we partially reverse the summary judgment as to Counts I and II (violation of the Condominium Act). We affirm as to Count III (breach of fiduciary duty) because the Board's actions were not unreasonable. With respect to the foreclosure case, because the final summary judgment of foreclosure was based on the trial court's entry of final summary judgment in the main case, we likewise reverse the final summary judgment of foreclosure for further proceedings.

[2] This appeal was initially pursued by 36 unit owners, but individual settlement agreements have been entered into with all but Bailey and Farnik.

I. BACKGROUND

The Shelborne is a condominium/hotel located on Miami Beach that was developed as a rental property available to the public for transient occupancy. It is comprised of 281 residential units and 60 commercial units. Between 2010 and 2014, the Shelborne underwent two major constructions projects that were financed, in part, by special assessments levied against all unit owners, ultimately totaling over $30 million.

The first round of construction, which began in 2010, consisted of elevator modernization; exterior painting; repairs to the porte cochere, pool, and lobby; installation of a sewage lift station; and installation of impact-resistant balcony doors. The second round began in 2013 and initially only included window repairs, safety railing installation, unit door replacement, pool paver repairs, hardening of the beach entrance, and reinforcement of the substructure. However, during the 2013 construction, a number of serious issues were discovered, including lack of adequate fire separation throughout the building, old copper and galvanized piping, non-grounded and cloth-wrapped wiring, and the need for a new fire pump. In order to complete the repairs, the Shelborne was completely closed from July 2013 to October 2014.

It is undisputed that before the two construction projects began, only the Board of Directors voted to approve the construction and corresponding special

assessments. It was not until May 2014 and February 2016, after the construction had been completed, that over 75% of the unit owners voted to approve the completed construction.

The main case began as a records request filed in April 2012, but over time, it expanded into a 14-count Sixth Amended Complaint brought by 40 plaintiff unit owners. Ultimately, the trial court either granted summary judgment or dismissal on every count, and final judgment was entered against the unit-owner plaintiffs. Only Counts I, II, and III are challenged on appeal.[3] Counts I and II are against the Association and individual Board members for violation of the Condominium Act, section 718.113(2)(a), Florida Statutes (2017), which sets forth the approval necessary to make "material alterations or substantial additions to the common elements . . . ." Count III is a breach of fiduciary duty claim against the individual Board members for their alleged violation of the Condominium Act.

[3] After the initial brief was filed in the main case, the unit owners retained new appellate counsel who has commendably tried to simplify what he has referred to as "these over-litigated cases." In addition to Counts I, II, and III, the initial brief also challenged summary judgment with respect to Count IV, which alleged civil conspiracy between the majority owner of condominium units—Shelborne Property Associates, LLC and Shelborne Operating Associates, LLC—and Wyndham Hotel Management, Inc. This argument has since been abandoned. The initial brief also challenged the denial of a motion to disqualify the trial judge. However, we do not address this issue because it was also raised in a petition for writ of prohibition, which was voluntarily dismissed. See Materdomini v. Shelborne Ocean Beach Hotel Condo. Ass'n, Inc., No. 3D17-0516 (Fla. 3d DCA June 2, 2017) (order recognizing voluntary dismissal).

One of the primary issues before the trial court on summary judgment had to do with the nature of the construction. The Association provided the court with multiple binders detailing every item of construction and the supporting evidence that the construction constituted necessary maintenance. Over the course of the multi-day hearing, the court considered each item and the Association's evidence that the construction was necessary. At the conclusion of the hearing on the construction items, the Association conceded that it failed to provide evidence that two of construction items were necessary–the pool paver repairs and reinforcement of the structure under the townhomes.

Throughout the hearing, the unit owners were asked on multiple occasions to provide the court with evidence that the construction items were not necessary, but they were unable to do so. Based on the extensive evidence that the construction was necessary, and the unit owners' failure to provide evidence to the contrary, the trial court entered summary judgment in favor of the Association and Board, finding that "all of the construction work for which special assessments were passed by the Board of Directors of Shelborne Ocean Beach Hotel Condominium Association, Inc. . . . (*except* the reinforcement of concrete sub-structure underneath the townhouse units and the repairs to the pavers by the pool to provide additional drainage) . . . constituted necessary repairs and maintenance." Although there was a genuine issue of material fact as to the nature of two of the items, the court entered summary

judgment in favor of the Association and Board members as to all the assessments because it found that "the reinforcement of concrete sub-structure underneath the townhouse units and the repairs to the pavers by the pool to provide additional drainage were properly approved and/or ratified by at least seventy-five percent (75%) of the unit owners at the unit owner meetings held May 28, 2014, and February 19, 2016," and therefore "all the special assessments levied by the Board of Directors between 2010 and 2014 are proper, enforceable and collectible."

Following entry of final summary judgment in the main case, the trial court entered final summary judgment against Bailey in the related foreclosure case. These two consolidated appeals followed.

II. ANALYSIS

The issues on appeal all stem from the trial court's entry of summary judgment. "Summary judgment is proper if no genuine issue of material fact exists and if the moving party is entitled to a judgment as a matter of law. The standard of review for summary judgment is *de novo*." Tropical Glass & Const. Co. v. Gitlin, 13 So. 3d 156, 158 (Fla. 3d DCA 2009) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). Moreover, because determining the applicability of the Condominium Act involves statutory interpretation, our review is likewise de novo. See Kumar v. Patel, 227 So. 3d 557, 558 (Fla. 2017) ("Questions of statutory interpretation are reviewed de novo.").

The two issues before us in the main case are (1) whether the trial court erred in granting summary judgment in favor of the Association and the individual Board members on Counts I and II for violation of the Condominium Act and (2) whether the trial court erred in granting summary judgment in favor of the individual Board members on Count III for breach of fiduciary duty. In the foreclosure case, the issue is whether the trial court erred in granting final summary judgment of foreclosure against Bailey for failure to pay the assessments due. We address each issue in turn.

1. Violation of the Condominium Act

As with all matters of statutory interpretation, we begin with the text of the statute. See Hatten v. State, 203 So. 3d 142, 144 (Fla. 2016) ("The court must begin with the actual language used in the statute . . . because legislative intent is determined primarily from the statute's text." (internal quotation marks omitted)). The unit owners rely on section 718.113(2)(a), Florida Statutes (2017), which governs the approval required for material alterations or substantial additions:

> 2)(a) Except as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions. This paragraph is

> intended to clarify existing law and applies to associations existing on October 1, 2008.

It is clear from the text that material alterations or substantial additions to condominium common elements are generally prohibited: "*there shall be no material alteration or substantial additions* to the common elements or to real property which is association property . . . ." Id. (emphasis added). The statute provides three exceptions to this general prohibition: (1) "[e]xcept as otherwise provided in this section [718.113]"; (2) "except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein"; or (3) "[i]f the declaration . . . does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions."

The unit owners argue that the Association violated the Condominium Act for two reasons. First, the unit owners contend that even if the construction constituted necessary maintenance, as the trial court found based on the undisputed evidence below, there is no necessary maintenance exception to section 718.113(2)(a)'s general prohibition on material alterations, and therefore, the Association was still required to secure unit owner approval for any construction amounting to a material alteration or substantial addition. Second, the unit owners argue that the 75% approval requirement must occur before the Association starts any material alterations to the common elements.

The unit owners' first argument has to do with the potential overlap between necessary maintenance and material alterations or substantial additions. See Gary A. Poliakoff, 1 Law of Condo. Operations § 4:61 (December 2019 Update) ("Conflicts often arise when work necessary for maintenance of the common elements also constitutes a material alteration or addition."). The unit owners contend that section 718.113(2)(a) requires any construction work amounting to a material alteration or substantial addition to be approved, regardless of whether that work is also necessary maintenance. We disagree with this interpretation because it ignores the entirety of the Condominium Act.

In Matheson v. Miami-Dade County, 258 So. 3d 516, 522 (Fla. 3d DCA 2018), this Court explained the importance of considering the entire text of a statute:

> Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.

(Quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012)).

Section 718.113(2)(a) begins with the following language: "*Except as otherwise provided in this section*, there shall be no material alteration or substantial additions to the common elements . . . ." (Emphasis added). This language contemplates an exception to section 718.113(2)(a)'s approval requirement

elsewhere in section 718.113. Relevant here is section 718.113(1), which immediately precedes section 718.113(2)(a) and concerns maintenance of the common elements:

> Maintenance of the common elements is the responsibility of the association. The declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements or that the association shall provide the maintenance, either as a common expense or with the cost shared only by those entitled to use the limited common elements. If the maintenance is to be by the association at the expense of only those entitled to use the limited common elements, the declaration shall describe in detail the method of apportioning such costs among those entitled to use the limited common elements, and the association may use the provisions of s. 718.116 to enforce payment of the shares of such costs by the unit owners entitled to use the limited common elements.

Pursuant to section 718.113(1), the Association is responsible for maintenance of the common elements. See also § 718.111(3) ("The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property."); 10 Fla. Jur. 2d Condominiums, Etc. § 68 ("If proposed work to common elements constitutes ordinary maintenance, the board of directors has the authority to make those repairs on its own."). There is no unit owner approval requirement for maintenance in section 718.113(1), and based on the plain language and structure of

the Condominium Act as a whole, we do not read section 718.113(2)(a) to impose such a requirement should maintenance also constitute a material alteration or substantial addition.

This interpretation is consistent with a long line of cases holding that "[s]imply because necessary work for maintenance may also constitute alterations or improvements does not nullify a condominium board's authority and duty to maintain the condominium common elements." Ralph v. Envoy Point Condo. Ass'n, Inc., 455 So. 2d 454, 455 (Fla. 2d DCA 1984); see also Cottrell v. Thornton, 449 So. 2d 1291 (Fla. 2d DCA 1984); Tiffany Plaza Condo. Ass'n, Inc. v. Spencer, 416 So. 2d 823 (Fla. 2d DCA 1982).

A more recent case out of this Court illustrates the point. In George v. Beach Club Villas Condominium Association, 833 So. 2d 816 (Fla. 3d DCA 2002), the construction at issue involved both maintenance and material alterations to a roof. The condominium was faced with fines if it did not paint and repair its roof. Id. As an initial matter, the Court determined that the condominium board had the authority to pass an assessment to repair termite damage to the roof without unit owner approval "because it is hardly debatable that this undertaking constituted maintenance." Id. at 818. However, a more difficult issue had to do with a special assessment to replace the worn wooden shingles with terracotta tiles. After recognizing the well-established principle that a condominium board has the

authority and duty to maintain the condominium common elements, even if the work may also constitute alterations or improvements, this Court determined that replacing the wooden shingles with terracotta tiles went beyond maintenance and constituted a substantial and material alteration in appearance for which unit owner approval was required.[4] Id. at 819.

Here, there was no genuine issue of material fact that all but two of the construction items were necessary maintenance. The trial court based its findings on the Association's extensive evidence detailing the necessity of each construction item. The court allowed the unit owners ample opportunity to present any evidence to the contrary, but no such evidence was forthcoming. We therefore affirm summary judgment with respect to all the items the trial court found were necessary maintenance.

There remains a genuine issue of material fact with respect to the nature of the pool pavers and the reinforcement of the concrete substructure. See Cottrell, 449

[4] Our decision in George turned on the definition of material alteration or addition. "[T]he term 'material alteration or addition' means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance." Id. at 819 (quoting Sterling Village Condo., Inc. v. Breitenbach, 251 So. 2d 685, 687 (Fla. 4th DCA 1971)). Importantly, "[t]he fact that a major expenditure is involved in making a substantial, necessary repair does not convert the repair into a material or substantial addition or alteration . . . ." Cottrell, 449 So. 2d at 1292.

So. 2d at 1292 (explaining that the nature of proposed changes is a question of fact for the trial court).[5] The trial court avoided addressing the nature of these two construction items because it found that 75% of the unit owners approved these items after they had been completed, and therefore, the corresponding special assessments were valid. For the reasons that follow, we reverse because we interpret section 718.113(2)(a) to require 75% approval before construction begins.

According to the Association, section 718.113(2)(a), Florida Statutes (2017), permits unit owner ratification of material alterations or substantial additions *at any time*. This claim is based on the statute's failure to specify whether approval is required before or after construction begins.[6] Because over 75% of the unit owners ratified the construction *after* it was completed, the Association maintains, and the trial court agreed, that there has been no violation of the statute. We disagree with this interpretation because it is at odds with the text of the statute as a whole, and such an interpretation would defeat the statute's purpose of generally prohibiting material alterations or substantial addition absent a specific exception.

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[5] We express no opinion on the nature of the two remaining construction items.

[6] In 2018, the legislature amended section 718.113(2)(a) to specify that "75 percent of the total voting interests of the association must approve the alterations or additions *before* the material alterations or substantial additions are commenced." (Emphasis added). The unit owners argue that this amendment clarifies what was originally intended by the prior version. The Association argues that the amendment is evidence that the prior version lacked a timing requirement. Because we conclude that the prior version of the statute is clear on its face, we need not reach this issue.

Here, the statute's meaning as to the timing of approval is clear based on its structure and the logical relation of its parts. As set forth above, section 718.113(2)(a) generally prohibits material alterations or substantial additions. Only three exceptions to this general prohibition are provided. If none of the exceptions is satisfied, the statute's general prohibition remains in place, and "there shall be no material alteration or substantial additions . . . ." Therefore, based on the structure of the statute, the 75% approval requirement is a condition necessary to overcome the statute's clear prohibition, insofar as any of the construction work amounts to material alterations or substantial additions.

We also reject the Association's proposed interpretation of the statute because it would lead to an absurd result and defeat the statute's general prohibition of material alterations or substantial additions. See Ferre v. State ex rel. Reno, 478 So. 2d 1077, 1082 (Fla. 3d DCA 1985) ("It is, of course, a well settled principle that courts should avoid interpreting statutes in ways which ascribe to the legislature an intent to create an absurd result."); see also Scalia & Garner, supra, 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

If the 75% approval vote were truly permitted *at any time*, as the Association contends, a condominium association could complete work on significant material alterations and substantial additions; and then, years later, seek approval for the

completed construction.[7] Indeed, if an Association could approve material alterations or substantial additions at any time in the future after completion, it is unclear how there could ever be a violation of the statute's general prohibition because approval could always be pending. We therefore reject the Association's reading of the statute. Because section 718.113(2)(a) requires approval before beginning construction, we reverse and remand for further proceedings to determine the nature of the remaining two construction items.

2. Breach of Fiduciary Duty

Next, we consider the trial court's entry of summary judgment on the breach of fiduciary duty claim (Count III). Based on the record before us, we cannot conclude that the Board's actions were unreasonable. See Farrington v. Casa Solana Condo. Ass'n, Inc., 517 So. 2d 70, 72 (Fla. 3d DCA 1987) ("The 'business judgment rule' will protect a corporation's board of directors' business judgment as long as the board acted in a 'reasonable' manner in passing the special assessment."). It was undisputed below that almost all of the repairs were necessary. Consequently, the Association had the authority to make these repairs. See Hollywood Towers Condo. Ass'n, Inc. v. Hampton, 40 So. 3d 784, 787–88 (Fla. 4th DCA 2010) ("In the instant

[7] Here, Defendant Shelborne Property Associates ("SPA") controlled less than 50% of the total voting interest before construction began in 2010. By May 2014, SPA had acquired over 75% of the total voting interest, and the Association noticed a meeting to approve the construction that had taken place.

case, there was no dispute that the association had the authority to repair . . . a common element under the declaration of condominium." (citing § 718.113(1), Fla. Stat. (2009))). Moreover, the unit owners were unable to provide any evidence that the two remaining items were unnecessary or unreasonable. Id. at 788 ("The association may repair and maintain common elements as long as its decision to do so is reasonable."). We therefore affirm summary judgment as to the breach of fiduciary duty claim.

3. The Foreclosure

After the trial court entered final summary judgment in the main case, it entered a final summary judgment of foreclosure in the related foreclosure case. Because the final judgment of foreclosure was based on the final judgment in the main case, the foreclosure judgment must be reversed. As set forth above, there is a genuine issue of material fact as to the nature of two of the construction items. We therefore reverse and remand the final summary judgment of foreclosure for further proceedings.

III. CONCLUSION

We affirm summary judgment in favor of the Association and Board members and against the unit owners as to the alleged violation of the Condominium Act for all but two of the construction items, and we affirm summary judgment against the unit owners on their breach of fiduciary duty claim. But because there are genuine

issues of material fact as to the nature of two of the construction items, which must be resolved before determining whether there has been a violation of the Condominium Act in the main case, we reverse and remand for further proceedings. And, because the final judgment of foreclosure was based on the final judgment in the main case, the foreclosure judgment must be reversed.

Affirmed in part; reversed and remanded in part.