IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

JEFFREY C. BUSCH and SUSAN D. BUSCH,

Plaintiffs,

v.

SAND LAKE HILLS HOMEOWNERS ASSOCIATION, INC.,

Defendant.
_____/

CASE NO: 48-2010-CA-11262-O

DIVISION: 39

ORDER ON PLAINTIFF'S FIRST PARTIAL SUMMARY JUDGMENT MOTION - MARKETABLE RECORD TITLE ACT

THIS CAUSE having come to be heard before this Court on January 28, 2011, on Plaintiff's First Partial Summary Judgment Motion - Marketable Record Title Act, filed June 17, 2010, and this Court having reviewed the file and pleadings, heard the argument of counsel and being fully advised in the premises, finds as follows:

Undisputed facts: In the 1970s and 1980s, an area in Dr. Phillips loosely known as Sand Lake Hills was developed. The development occurred by sections with each section having its own separately recorded Declaration of Covenants and Restrictions. The undisputed facts establish that the plat for Sand Lake Hills Section Three (hereinafter "plat") was filed in the public record of Orange County on February 15, 1978 at plat book 7, pages 55 and 56. The Declaration of Covenants and Restrictions for Sand Lake Hills Section Three (hereinafter "Section Three Covenants and Restrictions") was filed in the public records of Orange County on April 26, 1978 at book 2884, pages 898 through 907. Developer, Bel-Aire Homes, Inc., conveyed lot 318 within Sand Lake Hills Section Three by warranty deed to Ronald and Nancy

Dennis on January 16, 1979 (plaintiff's root of title). Mr. and Mrs. Dennis conveyed lot 318 to Jeffrey Busch by warranty deed on September 17, 1985. Busch later conveyed lot 318 to himself and Susan Busch by quit claim deed. By the Covenants and Restrictions of both Sections Two and Section Three, each of the homeowners' associations is a voluntary association.

None of the deeds in the chain of title for lot 318, including the root of title, refer to the Section Three Covenants and Restrictions or the book and page at which it is filed. The plat does not refer to the Section Three Covenants and Restrictions or the book and page at which it is filed.

On December 11, 1980, Bel-Aire Homes, Inc., assigned architectural control of Sand Lake Hills Section Three to a neighboring homeowners' association, Sand Lake Hills Homeowners Association, Inc. (hereinafter "Section Two HOA").[1] The assignment was recorded in the public records of Orange County at book 3158, pages 2081 through 2083. Bel-Aire Homes, Inc. conveyed its last lot in section three on December 10, 1985 and ceased to own or have an interest in land in section three.

The various boards of directors of the Section Two HOA made resolutions attempting to bring under its control the homes in sections three through eleven as follows: June 15, 1982 Articles of Amendment to Article of Incorporation of Section Two HOA and Section Two HOA By-Laws as Amended on August 30, 1990. All parties agree that Section Two HOA is not a homeowners' association as defined in F.S. 720.301. On May 17, 2004, the Section Two HOA filed in the public record at book 7435, pages 4010 through 4129, its "Notice of Reassertion of

[1] No not-for-profit corporation existed under the name "Sand Lake Hills Homeowners Association, Inc." at that time; however, the document goes on to give the mailing address and president's name. It is clear that the document intended to assign architectural control to "Sand Lake Hills Section Two Homeowners Association, Inc."

Covenants and Restrictions pursuant to Chapter 712, Florida Statutes" comprising a document of 120 pages.

On January 17, 2008, Section Two HOA recorded Amended and Restated Declaration of Covenants and Restrictions after approval of at least 50% of the section three homeowners. Plaintiffs did not consent to the Amended and Restated Declaration.

Analysis: In determining if the Marketable Record Title Act made the title to lot 318 free and clear of the Section Three Covenants and Restrictions after the requisite period of time, the Court must determine if the Section Two HOA had authority to avail itself of the provisions of F.S. 712.05 to preserve the Covenants and Restrictions upon the homes in section three and if the notice complied with the requirements of law.

Under F.S. 712.05, a person claiming an interest in land or a homeowners' association may file notice to preserve the covenants and restrictions.[2] 712.01(5) defines homeowners' association as one defined by F.S. 720.301 or an association of parcel owners which is authorized to enforce use restrictions that are imposed on the parcels. Because Section Two HOA is not a homeowners' association as defined in F.S. 720.301, it has authority to preserve the Section Three Covenants and Restrictions only if it is an association of parcel owners which is authorized to enforce use restrictions that are imposed on the parcels.

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[2] Plaintiff argues that the version of the statute in effect at the time of root of title or at the time Plaintiff acquired deed to the property should apply, citing *Board of Trustees of the Internal Improvement Fund v. Paradise Fruit Company, Inc.*, 414 So.2d 10 (Fla. 5th DCA 1982). The court believes that *Paradise Fruit* is distinguishable in that the landowner's title had perfected in 1963 with the enactment of MRTA becoming free and clear of all claims. To retroactively apply the 1978 amendment to MRTA would divest the landowner of vested rights.

In the instant case, plaintiff's title was not free and clear of all claims at the time of the 1997 amendment that permitted homeowners' associations to file the notice required in F.S. 712.05. Because the court has determined that the Section Two HOA was not a "homeowner's association" within the meaning of F.S. 712.01(4), the court need not decide the issue.

After Bel-Aire Homes, Inc. sold its last lot in section three on December 10, 1985, it ceased to own or have an interest in the land within section three as required in paragraph 15 of the Section Three Covenants and Restrictions. As such, its exclusive membership in the Architectural Control Committee ended. The assignment of its exclusive rights of architectural control to Section Two HOA terminated. Thus, Section Two HOA was not authorized to enforce use restrictions in section three after December 10, 1985.

Paragraph 22 of the Section Three Covenants and Restrictions provides the homeowners in section three with the ability to form a voluntary homeowners' association of not less than twenty-five (25) lot owners in section three. Paragraph 22 sets forth the method for showing compliance with the percentage - a membership roll signed by the lot owners and recertified each year by signature of the homeowners. No such association was formed and maintained by section three homeowners. Without the voluntary association outlined in paragraph 22 of the Section Three Covenants and Restrictions, the paragraph specifically provides that the homeowners' association was without the power or right of enforcement granted by the document. Based upon the foregoing, Section Two HOA was without authority to enforce use restrictions and thus was not a "homeowners' association" as defined in F.S. 712.01(4) and did not have the authority to file the notice required by F.S. 712.05.

Even if the Defendant were able to establish that it had the power to enforce the use restrictions within section three or that 25 or more homeowners of section three had paid dues to the Section Two HOA during 2004 and that this fact alone was sufficient to creating the Section Three voluntary homeowners' association, the 2004 notice was insufficient. On May 17, 2004, the Section Two HOA filed in the public record its "Notice of Reassertion of Covenants and Restrictions pursuant to Chapter 712, Florida Statutes" comprising a document of 120 pages. At

page 118, the affidavit of the secretary of the Section Two HOA indicates that the notice required by F.S. 712.06 was sent to the "association members." The by-laws of the Section Two HOA define membership as those who pay the annual dues set by the association. Section Two HOA is a voluntary association, not a mandatory association. Thus, the notice was provided to the members of the Section Two HOA, not all property owners. No record evidence exists that Plaintiffs were members of the voluntary Section Two HOA. F.S. 712.05(1) requires notice be delivered by mail or by hand to members of the homeowners' association not less than 7 days before the meeting. If the notice is filed by someone other than a homeowners' association, the notice must be mailed by the clerk of the court to the purported property owner or published. See F.S. 712.06(3)(a) and (b). Notice and an opportunity to be heard are the lynchpin of due process. Due process would require that notice be sent to those whose property is affected by the proposed action. The legislature recognized this in creating F.S. 712.06(3). There is no reason to believe that the legislature intended to exclude from notice those individuals whose property was at issue but who chose to forgo membership in the voluntary association. The required notice was no notice at all to non-members of the Section Two HOA. The court notes that F.S. 712.11 provides a procedure for revitalization of lapsed covenants. The procedure is set forth in F.S. 720.403 - 407. F.S. 720.405(6) requires notice to all affected owners.

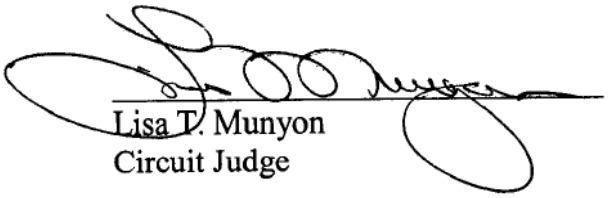
Defendant argues that lot 318 is currently encumbered by the Amended and Restated Declaration of Covenants and Restrictions recorded on January 17, 2008 by the Section Two HOA. The document was recorded after approval of at least 50% of the section three homeowners. This recently filed document is not within the Plaintiff's chain of title or muniments of title and does not encumber lot 318. See *Matissek v. Waller*, 36 FLW D122 (Fla. 2nd DCA, January 14, 2011).

Based upon the foregoing, it is therefore ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Partial Summary Judgment should be and the same is hereby GRANTED.

2. Plantiff's Lot 31, Sand Lake Hills, Section 3, Dr. Phillips has been free and clear of the Declaration of Covenants and Restrictions for Section 3 recorded at book 2884, pages 898 through 907 of the public records of Orange County, Florida and any purported amendments thereto since January 16, 2009.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 4th day of March, 2011.



Lisa T. Munyon
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by ECF to Frederic B. O'Neal, Esquire, P. O. Box 842, Windermere, Florida, 34786, and Frank A. Ruggieri, Esquire, Larsen and Associates, P.A., 300 South Orange Avenue, Suite 1200, Orlando, Florida, 32801, on this 4th day of March, 2011.

Pursuant to the Procedures Implementing Electronic Case Filing in Circuit Civil Cases Section 4.3, any party not receiving a copy of this order by ECF must be provided a paper copy of this document and a copy of the Notice of Electronic Filing by the movant. Paper copies will not be provided by the Court.

Lisa Shorten, Judicial Assistant
to Judge Lisa T. Munyon