1995

Park Station Condominium Owners Association, a Utah Corporation v. Samuel H. Bennion, a Trustee under the Samuel Horne Bennion Trust : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

950102CA

PARK STATION CONDOMINIUM OWNERS ASSOCIATION, a Utah Corporation,	:	
Plaintiffs/Appellees,	:	Docket No. 950102-CA
v.	:	Priority 15
SAMUEL H. BENNION, as Trustee under the Samuel Horne Bennion Trust,	:	
Defendant/Appellant.	:	

APPELLANT'S REPLY BRIEF

On Appeal From the Third Circuit Court, State of Utah
Summit County, Coalville Department

The Honorable Roger Livingston

Case No. 940000014CV

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ARGUMENT

A. LIEN FORECLOSURE IS NOT AVAILABLE TO COLLECT FEES AND INTEREST.

The central issue in this dispute is whether or not the Association can avail itself of the remedy of foreclosure to collect interest and fees it claims to be entitled to. Mr. Bennion's position is clear: the Utah Code does not provide such a remedy. According to Condominium Ownership Act, if a condominium owner fails to pay an assessment of *common expenses*, the amount of *common expenses* which is unpaid constitutes a lien. Accordingly, the lien for "nonpayment of *common expenses* may be enforced by sale or foreclosure of the unit owner's interest by the manager or management committee." Utah Code Ann. § 57-8-20 (emphasis added). The collection of fees and interest does not appear in this or any other section of the Act because they do not constitute common expenses. Therefore, the present action should have been dismissed by the lower court as it has no basis in law.

1. Late fees and interest penalties are not common to all unit owners.

The Association argues that fees and interest should be considered assessments, even though they are not denominated as such, and should be classified as business expenses like taxes and maintenance charges. The argument is basically that since taxes and maintenance charges don't have to be separately assessed in order to be collected, neither do interest penalties and fees. A quick glance at the annual budget reveals the folly of this argument. Taxes and maintenance fees are expenses which must be paid, proportionally, by each unit owner. In order to properly effectuate this collection process, the Association *assesses* each owner his or her

proportional share, to be paid each month. Mr. Bennion has never missed one of these assessments. On the other hand, while fees and interest are included in the budget as an income item,[1] they are not proportionally assessed to each individual unit owner. Indeed, it would not be proper, or legal, to assess a late fee to a unit owner who was not late in making payment. Instead, these fees and interest penalties, rather than being assessed by the Association, are charged when they are incurred, if at all. This is the distinction Mr. Bennion points out to the Court. According to BLACK'S LAW DICTIONARY 149 (4th ed. 1968), "assess" means to "ascertain, adjust, and settle the respective shares to be contributed by several persons toward an object beneficial to them all, in proportion to the benefit received." Late fees and interest cannot be assessments because, until a specific unit owner is late, the fee has not been charged.

2. Late fees and interest penalties are not expenses.

Proof that late fees and interest penalties are not expenses is found in the annual budget prepared by the Association. 000048. Under the heading of "REVENUE" is the entry "Interest and other Late fees." Notably, the fees and interest category is listed *separately* from the "Assessments" category in the budget. Further down the document, under the heading of "EXPENDITURES," are the common expenses which are divided proportionally to be paid by the unit owners. This group includes, among other items, "Repairs and maintenance," "Payroll

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[1] The Association's statement that Mr. Bennion disputes that fees and interest are part of the budget is untrue, evidenced by the conspicuous absence of any citation to Mr. Bennion's brief supporting such a statement. Mr. Bennion did, however, point out the incorrectness of Appellees claim that taxes and maintenance costs are not individually assessed by showing the Court that these charges are separately delineated in the annual budget. *See* Appellant's Brief, p. 9.

taxes" and "Insurance and taxes". Apparently the Association itself classifies late fees and interest as revenue, not as expenses. Because late fees and interest are neither common, *see supra*, nor expenses, they are not of the sort contemplated under the Act for collection by foreclosure.

B. THE DECLARATION CANNOT PROVIDE MORE RIGHTS TO THE ASSOCIATION THAN UTAH LAW PROVIDES.

As explained above, the Act allows for foreclosure to collect amounts which have been assessed for common expenses. The Association, in this action, is attempting to avail itself of the foreclosure provided for in the Act to collect money which is not an assessment for common expenses, but rather a revenue item. The Association looks to Article 9.04 of the Declaration for support of this action, but because this Article bestows greater power on the Association than that given by statute, it must be stricken. *See* Utah Code Ann. § 57-8-10(2)(d)(v). In other words, because the law does not provide for foreclosure for fees and interest, the Declaration cannot supersede the law and provide a remedy where none exists. The Utah Legislature has occupied the field in the area of condominium law and there is no room for private determination of rights.

The Association offers the Court the argument that Mr. Bennion is somehow trying to use the Declaration to interpret the Act. *See* Appellees' Brief, p. 12. The Association states: "The Appellant's rationale for using the Declaration to clarify terms in the Utah Code is unclear and faulty. Bennion offers no justification for using a private agreement as an aid for statutory interpretation." *Id.* Mr. Bennion offers no justification because he has not attempted to use the

Declaration in such a manner. On the contrary, Mr. Bennion asserts that the Act preempts any private determination of rights and responsibilities on the part of the Association. In his Brief, Mr. Bennion cites Utah Code Ann. § 57-8-20 and then makes the following statement:

> The only support for the Association's attempt at foreclosure for these amounts is found in Article 9.04 of the Declaration. That provision provides that "[a]ll sums" may be the *subject of a lien*. 000013-14. Nothing in the Declaration provides for foreclosure for late fees and interest. Notwithstanding, the Declaration could never provide a remedy for the Association which is not supplied by law. Declarations as a matter of law must be "consistent with" the Condominium Ownership Act.

Appellant's Brief, p. 10 (italics in original, underline added). Hence, the Association's argument—that Mr. Bennion's use of the Declaration to aid in statutory interpretation means that he implicitly accepts the legality of collection by foreclosure—is fatally flawed. *See* Appellees' Brief, p. 12. In fact, Mr. Bennion argues the exact opposite; the inclusion of late fees and interest in Article 9 of the Declaration causes that provision to go beyond the power granted the Association under the Act and it should be removed or altered, deleting the illegal authority to collect these sums by foreclosure.

The Association claims that if the Court were to rule in favor of Mr. Bennion it would make the due date on payments of assessments meaningless. *See* Appellees' Brief, p. 13. The Association fears that without the drastic measure of foreclosure available for failure to pay late fees, no unit owner would pay the monthly assessments on time and the Association would experience a cash flow problem. *Id.* This, however, is an extreme reaction to a non-existent problem. The Association, as pointed out in Appellant's Brief, has, and always will have, the remedy of collection. For example, if a person bounces a check at a store, the store can

institute collection proceedings to recover the money owed. If the person pays the amount of the check but refuses to pay an NSF (non-sufficient funds) charge, the store can recover this amount in a collection action as well. Mr. Bennion is simply asserting that an action to foreclose on his property is a far too drastic a remedy to be available for such a trivial matter as late fees and interest.[2]

The Association responds that it "is under no obligation to pursue a remedy which would be more amenable to [Mr.] Bennion." Appellees' Brief, p. 15. Further, the Association states that "[c]ourts in other jurisdictions have had no reservation enforcing liens on condominiums for Late Fees and Interest." *Id.* at 13.[3] As support, the Association cites *Halpern v. Paolini*, 1992 W.L. 14095 (Mass. App. 1992). This case, however, contrary to the Association's hopes, offers no support as it is distinguishable on its facts. In *Halpern*, a lien was enforced against the defendant's condominium "for unpaid *common area fees and expenses* and related late charges." *Id.* at 1 (emphasis added). The instant action is an attempt to foreclose for "related late charges" only. This distinction is of such importance as to make *Halpern* totally without merit as applied to this case.

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[2] Apparently the Utah Legislature agrees as evidenced by the absence of a provision for the collection of late fees and interest in the Act.

[3] The Association cites, however, only one such court. The failure to provide additional support suggests that this position is not as strong as The Associatoin suggests, especially in light of the unpublished nature of the cited case.

C. MR. BENNION DID NOT FAIL TO ADDRESS POINTS ONE AND TWO OF HIS STATEMENT OF THE ISSUES.

The Association argues that because Mr. Bennion outlined two issues for appeal but then subsequently failed to address them in his argument, the Court should ignore these issues. However, Mr. Bennion has briefed and argued each point presented in his statement of the issues.

1. Issue 1: *Whether the trial court correctly concluded that no serous issue of material fact existed to preclude summary judgement as to Appellant's assertion that the Declaration did not apply to him.*

Contrary to the Association's assertion that Mr. Bennion did not brief this issue, it was included in Mr. Bennion's Summary of the Argument. Simply because Mr. Bennion chose not to more fully argue the issue does not lead to the conclusion that it is not relevant to his case or that the Court should now ignore it.[4] However, the Association has provided no proof that Mr. Bennion agreed to be bound to the Declaration, including the payment of late fees and interest penalties. Mr. Bennion disputes paragraph 3 of the Association's Statement of Facts as inaccurate and misleading. *See* Appellee's Brief, p. 4. The trial court, on this issue alone, should have allowed the case to be presented to a fact finder, as it is certainly material.

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[4] We can be assured that if Mr. Bennion had made a statement in his Summary which strenghtened the Association's position, it would not now be asking the Court to disregard it.

2. Issue 2: ***Whether the Trial Court correctly concluded that no genuine issue of material fact existed regarding whether other resolution, documents, contracts, minutes or policies altered the wording of the Declaration.***

Likewise, Mr. Bennion did not fail to brief this issue in his initial Brief. Concededly, no heading which would point distinctly to this issue was used, but the issue was argued nonetheless. Mr. Bennion argued that the trial court's decision that his unit dues were late was erroneous. He based this argument on the fact that the Declaration provided a 15 day grace period in which payments could be made to the Association. Additionally, each of Mr. Bennion's monthly payments went to pay the principal of his assessment, with no money deducted to pay the claimed interest and late fees. The 15 day grace period, and the Association's course of conduct, led Mr. Bennion to believe that the Declaration had been modified and that the fees and interest which were booked were not being, and would not be, collected by the Association. In other words, Mr. Bennion believed that the policies implemented by the Association had altered the wording of the Declaration.

CONCLUSION

The trial court erred in granting summary judgment in favor of the Associations because genuine issues of material fact are present in this case. Additionally, under the standard of review, the lower court's interpretation of the Condominium Ownership Act and the Declaration should be declared erroneous. Therefore, Appellant respectfully requests that this Court reverse the summary judgment entered by the Circuit Court.

DATED this 27th day of July, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 1995, I caused to be hand delivered, a true and correct copy of APPELLANT'S REPLY BRIEF to the following:

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