IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CASE NO. 12-13619-CI-13

BAREFOOT BEACH RESORT OF INDIAN SHORES CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation,
Plaintiff,

vs.

SUN VISTA INDIAN PASS, LLC owner;
Unknown Tenant(s),
Defendants.
_____/

FINAL SUMMARY JUDGMENT

THIS CAUSE coming on to be heard on April 1, 2014, and there being present, Bruce Bornick, President of Barefoot Beach Resort of Indian Shores Condominium Association, Inc., Plaintiff, Richard A. Zacur, Esquire, Counsel for Plaintiff; Christopher Blain, Esquire, Counsel for Plaintiff; Steven Gianfillippo on behalf of the Defendant; and David Delrahim, Esquire, Counsel for Defendant; and the Court having consolidated this case with Circuit Civil Case No. 12-13622-CI-19 and Circuit Civil Case No. 12-13623-CI-11; and the Court having heard argument of counsel; and the Court having reviewed the Declaration of Condominium, as well as Florida Statute Chapter 718, and the Court finding:

1. Barefoot Beach Resort of Indian Shores is a condominium as set forth within the Declaration of Condominium recorded July 21, 2005 in O.R. Book 14472, Page 560 et seq., of the Public Records of Pinellas County, Florida. The Declaration of Condominium, By-Laws and Articles of Incorporation, as well as all parties to this litigation, are subject to the

provisions of Florida Statute Chapter 718. However, prior to selling the condominium units, a prospectus and a budget was prepared, which prospectus and budget states how common expenses are to be allocated per unit in keeping with the developer's intent.

2. This Court finds it has jurisdiction of the parties, including the condominium association and the unit owners, and jurisdiction of the property, and pursuant to Tedeschi v. Surfside Tower Condominium Association, Inc., 35 So.3d 915 (Fla 2nd DCA 2010), the unit owners are parties to this complaint as a result of action being filed against the condominium association, which includes all of the unit owners, since this case deals with the interest of the Association, which is essential to its operation as it deals with the common property area, elements and expenses.

3. The Court finds that the prospectus and budget provides the correct methodology of allocation for assessments, which prospectus and budget individual buyers relied upon when purchasing their unit. Furthermore, the prospectus and budget, as set forth in Composite Exhibit A, incorporated by reference herein, specifically sets forth the allocation in a correct manner.

4. The Plaintiff Condominium Association in relying upon the Declaration filed foreclosure actions against the Defendant on three (3) separate parcels, which have now been consolidated. The Condominium Association documents specify how the common expenses, maintenance

fees, reserves are allocated among and assessed to the condominium units. In addition to the condominium units, there are three (3) additional parcels that belong to the developer, Sun Vista Indian Pass, LLC, or their grantees, successors and assigns that are part of this consolidated litigation. The three parcels consisting of boat slips/seawall, clubhouse and gazebo were not transferred or made part of the condominium plat, but are included in the overall project as commercial units which are responsible for paying maintenance fees to the Association.

5. The Court finds that following foreclosures filed by the Plaintiff, an Amended Counterclaim was filed by the Defendant, which Amended Counterclaim included a Count for Declaratory Judgment, a Count for Reformation, a Count for Damages and a Count for Injunctive Relief. This Court has jurisdiction over the parties and subject matter and has the equitable right to consider this case, including the power to reform a written instrument, when that instrument as drawn does not accurately express the true intention of the agreement or the parties to the instrument. Further, this Court has jurisdiction to apply this principle of reformation to instruments of conveyance of real property, as well as contracts, and can be applied to correct an erroneous land description in order to protect a person's rights in real property. The Court has the power of reformation and can use that power to correct the defective written instrument. See Providence Square Association, Inc. v. Biancardi, 507 So.2d 1366 (Fla Supreme Court 1987), and all cases cited therein.

6. The Court is confronted in this equitable action with parties that have presented this Trial Court with a chaotic and complex legal and factual history. This Court has sought to make order out of chaos, so as to avoid further litigation and ruination of this association. This Court has the equitable right to take this action. See Marcia K. Fortune, et al v. Floyd Hutchinson, et al, 20 So.3d 476 (Fla 2nd DCA 2009).

7. The Court finds when a Declaration of Condominium is drawn, even though it is unilateral in nature, once the parcels are sold, the conveyance, based upon a deed, is a contractual agreement between the seller and purchaser and is a bi-lateral instrument which be reformed as a mutual mistake. See Providence Square Association, Inc., supra. The Court finds that the provisions in the current Declaration of Condominium pertaining to each proportionate share as set forth hereinafter is an integral part of the transaction between the developer (Defendant) and the Condominium unit purchasers (Plaintiff/Counter-Defendants). However, the provisions of the Declaration are incorrect and this Court considers this Declaration does not express the true intent of the developer as set forth in Composite Exhibit A (prospectus and original budget), which original intention stated that the percentage of common element ownership, percentage of common element expense and percentage of common element surplus would be allocated on a square foot basis and not on an equal basis. The prospectus specifically states:

Section 2.1.1 Share of Common Elements, Common Expenses and

Common Surplus.

The share of ownership of the common elements appurtenant to each condominium unit, the share of common surplus to which each condominium unit is entitled and the share of the common expenses each condominium unit owner will bear is set forth in Article 6 of the Declaration. The shares in common elements are based upon the relative square footage of each condominium unit to the total square footage of all the condominium units taken together.

Further, the budget specifically states how each unit was to be charged based upon percentage of common element ownership, which has been the same budgetary expenses provided to the unit owners for the last seven or more years.

Furthermore, the prospectus provided in Section 3 information regarding the resorts unit as demonstrating the percentage of common ownership area: Studios .288%, One Bedroom .480%, Two Bedroom .641%. These percentages are also identical to the percentages in Exhibit E, which was utilized in allocating the common element expenses among the unit owners based on the square footage of their units.

8. The Court finds as a matter of law that an error exists within the Declaration of Condominium, wherein an ambiguity exists regarding how common expenses are to be allocated among unit owners, including the developer's property. The Declaration sets forth within Paragraph 6 the following language:

> 6.1.1 Ownership of the Common Elements and Membership in the Condominium Association. Each Condominium unit shall have . . . an equal undivided share of ownership in the Common Elements expressed as a fractional formula, the numerator of which shall be

one (1), and the denominator of which at any time shall be the aggregate of all Condominium Units submitted to the Condominium as a portion of the Condominium Property at such time.

6.2 Share of Common Expenses and Common Surplus. The Common Expenses shall be shared equally by each Condominium Unit Owner . . . which is equal to the Condominium Unit Owner's share of ownership of the Common Elements.

However, in conflict with those provisions of the Declaration, assessments were determined by Exhibit E and the prospectus, which correctly reflected the developer's intent and the allocation of assessments and the Declaration, which does not set forth the correct developer's intent is in error. The Court finds that the prospectus and budget are the correct manner in which to allocate assessments, which is on a square foot basis, since that method of allocation correctly sets forth the developer's intent, which was relied upon by the buyers and the owners.

9. Additionally, the Court finds that within Exhibit E, improperly set forth as a common element, a submerged land lease, which does not belong to the developer and was not part of condominium ownership as set forth within Paragraph 5.7 of the Declaration of Condominium, which states the following:

Submerged Land Lease. As of the effective dates of this Declaration, the Declarant is in the application process with the Trustees of the Internal Improvement Fund of the State of Florida to obtain a submerged land lease. Accordingly, in the future, there may be a sovereignty submerged land lease associated with this Condominium. If the Declarant obtains a submerged land lease, the lease terms are generally for five (5) years and any renewal of the submerged land lease will be subject to compliance with lease provisions and applicable law. Neither the sovereignty submerged land nor the leasehold interest therein may be submitted for

condominium ownership.

Therefore, the Court finds that the submerged land lease should not have been included as a common element or allocated as a percentage of common element ownership of the developer and that allocation is incorrect and improper.

10. The Court finds Exhibit E to the Declaration of Condominium (attached hereto as A-1) was a correct exhibit, but unfortunately, it included the submerged land lease as part of the common elements, which was incorrect and therefore the charge for the developer's share or the owners of the commercial unit as to the submerged land lease was incorrect and inconsistent with the Declaration and resulted in charges that were not accurate and in fact were larger than they should have been.

11. The Court finds, however, that individual owners had a right to rely upon the prospectus and budget and, further, had a right to rely upon the percentage of common ownership interest, which provided the percentage of common element expense as allowed by Florida Statute Chapter 718 and as has been provided to the unit owners since the inception of this condominium. The Court finds that every budget was based upon the percentage of common ownership interest and the owners and their mortgage carriers relied upon this budget. The Court finds these percentages are in keeping with the prospectus and the terms of Exhibit E and the budget, except for the error as to including the total square footage of the submerged land lease and the calculation, which has

resulted in the arrearage which forms the basis of the foreclosures by the Plaintiff.

12. Notwithstanding the provisions of Paragraph 21.4 of the Declaration, which provides that the provisions of the Declaration supersede any Exhibit to the Declaration, however, the Court finds that it would be unfair and inequitable to have a studio unit or a one bedroom pay the identical common expense as a two bedroom, which is substantially larger (1000 square feet for a two bedroom versus 450 square feet for a studio). This identical charge would be unfair and inequitable. Therefore, Exhibit E is correct method of allocating common expenses, common elements and common surplus and the Declaration of Condominium provisions to the contrary are rendered of no effect and this Association shall continue to assess its owners as set forth within Exhibit E, except as corrected to remove the submerged land lease as part of the calculation of percentage of common element ownership for Commercial Unit 1. The Court finds that all other percentages need to be corrected to reflect 100% of the common elements allocated among the various owners.

13. These claims by both sides are not accurate, since the budgets were inaccurate, payments made were not in keeping with the requirements of Florida Statute Chapter 718 and the Declaration of Condominium, and, as such, these payments have no basis on either side for a claim for damages, nor does any individual unit owner have a basis for any claim, as this Court finds it would be inequitable to charge more or less to others,

since the budgets have been in effect since 2006.

14. The Court finds that no statutory remedy exists to the instant situation as none existed in Providence Square Association, Inc., supra, except for equitable reformation and as allowed by Fortune, et al vs. Hutchinson, et al, supra, and the Court finds that the Association must comply with the provisions of 6.1.1 and 6.2 as modified by determining that the common expenses shall be as set forth within Exhibit E. Therefore, Exhibit E as to the percentage of common element ownerships shall be the methodology utilized in calculating maintenance fees, assessments, special assessments or other charges.

15. The Court finds that the Counter-Plaintiff has agreed to waive any claim of any amounts due as overpayment or damages in consideration of the Association correcting their budget within 60 days of the date of this Final Summary Judgment as set forth within the Mediated Agreement in keeping with Exhibit E with the correction as to the removal of the percentages allocated for the submerged land lease. The Court further finds in equity that there shall be no retro-obligation to the developer, nor shall any unit owner be entitled to a monetary claim, for this error was mutual and the instrument drawn did not accurately express the true intention or the agreement of the parties. The Court also takes into consideration the length of time the statute of limitations would apply to this case and the undue necessity of multiple litigation and has determined that this matter should proceed as identified within the parties'

Mediated Agreement, which resolves this matter, with a direction to the Association to prepare a new budget within the time frame set forth herein, complying with the Declaration and moving forward to notify and to send to all unit owners the new budget.

17. The Court finds that the Mediated Agreement which is identified in evidence as Exhibit B was entered into freely and voluntarily by the representatives of the Plaintiff Association and the Defendant at a length mediation. The Mediated Agreement correctly resolves the issues, including the resolution of ownership of various commercial units, boat slips and all other matters contained therein. The Court finds that the Mediated Agreement is binding on the parties and the Court shall order its enforcement.

It is thereupon:

ORDERED AND ADJUDGED that the Court finds as a matters of law that the Declaration contains an ambiguity which requires reformation so as to properly reflect the allocation of common expenses, common element ownership and common surplus as set forth within Exhibit E as that Exhibit and future budgets shall be corrected as herein set forth. It is further

ORDERED AND ADJUDGED that the budget allocations as set forth within Exhibit E shall reflect common element ownership among the various units and commercial units, except that the submerged land lease square footage shall not be included as a common element to be allocated to Commercial Unit 1. It is further

ORDERED AND ADJUDGED that the Court accepts and shall enforce the

waiver of any claim for damages by either party, together with any claims of overpayment, interest, late fees. It is further

ORDERED AND ADJUDGED that the Plaintiff Association shall have 60 days from the date of this Final Summary Judgment to ~~comply with this Order by~~ setting forth the correct budget with proper allocations as identified herein. It is further

ORDERED AND ADJUDGED that the Mediated Agreement of the parties is hereby ratified and approved. It is further

ORDERED AND ADJUDGED that each party shall pay their own attorneys fees and costs. It is further

ORDERED AND ADJUDGED that this Court reserves jurisdiction for the enforcement of this Order.

DONE AND ORDERED in Chambers, Pinellas County, St. Petersburg, Florida, this _____ day of April, 2014.

Original Signed
APR 01 2014
Pamela A.M. Campbell
Circuit Judge

CIRCUIT JUDGE

Copies provided to:

Richard A. Zacur, Esquire
David Delrahim, Esquire
Christopher Blain, Esquire