Third District Court of Appeal

State of Florida

Opinion filed October 7, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-0521
Lower Tribunal No. 18-3869

IconBrickell Condominium No. Three Association, Inc., et al.,
Appellants,

vs.

New Media Consulting, LLC,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Daryl E. Trawick, Judge.

Greenberg Traurig, P.A., and Mark F. Bideau (West Palm Beach), Elliot H. Scherker, Brigid F. Cech Samole, and Katherine M. Clemente; and Kaye Bender Rembaum, P.L., and Lauren T. Schwarzfeld (Pompano Beach), for appellants.

Annesser Armenteros, PLLC, and John W. Annesser, and Megan Conkey Gonzalez, for appellee.

Before SCALES, MILLER, and GORDO, JJ.

MILLER, J.

Appellant, IconBrickell Condominium No. Three Association, Inc. (the "Association"), challenges an adverse summary declaratory judgment rendered in favor of appellee, New Media Consulting, LLC. We have jurisdiction. Fla. R. App. P. 9.030(b)(1)(A). On appeal, the Association contends the lower tribunal erred in finding its declaration terms impermissibly divested residential unit owners of their undivided share in the common elements of the condominium. For the reasons articulated below, we affirm the cogent order under review.

BACKGROUND

Developed in 2008, IconBrickell is a multi-condominium community comprised of three towers. All three edifices are subject to a master declaration of condominium known as the Declaration of Covenants, Restrictions and Easements for IconBrickell. The third building, Tower No. Three, a mixed-use condominium consisting of hundreds of residential units, several commercial units, and the W Miami Hotel, a luxury boutique hotel owned by Senyar Miami Holding, LLC, is further governed by the Declaration of IconBrickell Condominium No. Three (the "Declaration"). New Media is the owner of a residential unit located within Tower No. Three.

As relevant to these proceedings, while the Declaration, recorded in February 12, 2009, submits "to the condominium form of ownership and use in the manner

provided for in the Florida Condominium Act as it exists on the date hereof and as it may be hereafter renumbered," section 2.14 provides:

> The Condominium has been established in such a manner to minimize the Common Elements. Most components which are typical "common elements" of a condominium have instead been designated herein as part of the Shared Facilities of the Hotel Unit, including, without limitation, all property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements, if any.

Consequently, the common elements are limited to property not included within the units, along with: (1) "[a]n easement of support in every portion of a Unit which contributes to the support of the Building;" and (2) "the surface water management system." Conversely, "shared facilities" specifically include,

> any and all structural components of the Improvements, . . . balconies, terraces and/or facades attached or affixed thereto . . . ; all utility, mechanical, electrical, telephonic, telephone switchboard, Life Safety Systems, telecommunications, plumbing and other systems, including, without limitation, all wires, conduits, pipes, ducts, transformers, cables and other apparatus used in the delivery of the utility, mechanical, telephonic, telecommunications, electrical, plumbing, Life Safety Systems and/or other services or systems; . . . all elevator shafts, elevator cabs, elevator cables and/or systems and/or equipment used in the operation of the elevators [traversing] the Condominium Property; and all trash rooms, trash chutes (if any) and any and all trash collection and/or disposal systems. In addition, the Shared Facilities include the following areas . . . the main hotel lobby and the residential lobby.

The shared facilities are subject to the ownership and control of Senyar, the owner of the W Hotel. Notwithstanding the absence of common ownership, the Declaration emburdens residential unit owners with those expenses incurred by

Senyar in furtherance of the maintenance, repair, replacement, improvement, management, and operation of the shared facilities. At the same time, Senyar remains unencumbered by certain statutory provisions regulating condominium association assessments.

In early 2018, citing the designation of statutorily circumscribed common elements as shared facilities, New Media filed a single-count action in the lower court, seeking a judicial determination that the Declaration runs afoul of chapter 718, Florida Statues. Thereafter, when ripe for decision, the trial court granted summary judgment in favor of New Media. The instant appeal ensued.

STANDARD OF REVIEW

"[A] declaratory judgment is accorded a presumption of correctness." Three Keys, Ltd. v. Kennedy Funding, Inc., 28 So. 3d 894, 903 (Fla. 5th DCA 2009) (citation omitted). Nonetheless, because here, the trial court's interpretation and application of both the Florida Condominium Act and Declaration present pure questions of law, our standard of review is de novo. See Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n, Inc., 105 So. 3d 579, 580 (Fla. 3d DCA 2012) ("A trial court's interpretation of a condominium's declaration is also reviewed de novo.") (citation omitted); State v. J.L.M., 926 So. 2d 457, 459 (Fla. 1st DCA 2006) ("The trial court's interpretation and application of a statute is a pure question of law subject to de novo review.") (citation omitted).

LEGAL ANALYSIS

Although the lower tribunal found multiple violations of law, the dispositive threshold question before us is whether the Association is endowed with the discretion to reclassify certain amenities as "shared facilities." Two autonomous yet convergent sources of law guide our resolution of this issue. The first is the Florida Condominium Act (the "Act") codified in chapter 718, Florida Statutes, and the second is the Declaration.

"A condominium unit is a hybrid interest in real estate, entitling an owner both to the exclusive ownership and possession of a unit and an undivided interest as a tenant in common with other unit owners in the common areas."[1] 3C Sutherland Statutory Construction §78:1 (8th ed. 2019). "The declaration of condominium, which is the condominium's 'constitution,' creates the condominium and 'strictly

[1] "[T]he legal doctrine of condominium ownership has its roots . . . in twelfth century Germany, during which time houses were owned by floors known as *stockwerkseigentum* — 'story property.'" William P. Sklar, Concept of Condominium and Homeowner Association Ownership, CONDO FL-CLE 1-1 (2018). "One of the earliest identifiable statutory recognitions of the condominium is found in the Napoleonic Code of 1804. The first sophisticated U.S. condominium statute was enacted in 1958 by the Commonwealth of Puerto Rico." Richard J. Kane, The Financing of Cooperatives and Condominiums: A Retrospective, 73 St. John's L. Rev. 101, 101-02 (1999). Shortly thereafter, the Federal Housing Administration "gave great impetus to the condominium concept when, in 1960, . . . [it] issued [a] . . . Model Statute for the creation of apartment ownership . . . , creating the first generation of condominium acts that were eventually passed by all [fifty] states by 1970." William P. Sklar, Concept of Condominium and Homeowner Association Ownership, CONDO FL-CLE 1-1 (2018).

governs the relationships among the condominium unit[] owners and the condominium association.'" Neuman v. Grandview at Emerald Hills, Inc., 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (quoting Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 456 (Fla. 2002)); see Cohn v. Grand Condo. Ass'n, Inc., 62 So. 3d 1120, 1121 (Fla. 2011) ("A declaration of condominium . . . operates as a contract among unit owners and the association, 'spelling out mutual rights and obligations of the parties thereto.'") (citation omitted).

As condominium ownership is created only by statute, such acts also regulate the operation of condominiums. 3C Sutherland Statutory Construction §78:1 (8th ed. 2019). Accordingly, in Florida, all provisions of a condominium declaration must conform to the Act, "and to the extent that they conflict therewith, the statute must prevail." Winkelman v. Toll, 661 So. 2d 102, 105 (Fla. 4th DCA 1995); see Tranquil Harbour Dev., LLC v. BBT, LLC, 79 So. 3d 84, 86 (Fla. 1st DCA 2011) ("Because a condominium is strictly a creature of statute, the language of the statutes in effect on the date of the declaration of condominium 'is as controlling as if engrafted onto'" the declaration itself.) (citation omitted); see also § 718.102, Fla. Stat. ("Every condominium created and existing in this state shall be subject to the provisions of this chapter."); § 718.303(2), Fla. Stat. ("A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision.").

The Act defines a condominium as "that form of ownership of real property created pursuant to this chapter, which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements." § 718.103(11), Fla. Stat. As the shares are undivided, the separate sale of the common elements is prohibited. § 718.107(1), Fla. Stat. ("The undivided share in the common elements which is appurtenant to a unit shall not be separated from it and shall pass with the title to the unit, whether or not separately described."). The condominium association is "responsible for the operation of common elements," § 718.103(2), Fla. Stat., and in mixed-use and residential condominiums, "the common expenses of the condominium and common surplus of the condominium shall be the same as the unit's appurtenant ownership interest in the common elements." § 718.115(2), Fla. Stat.

Under the Act, the "common elements" consist of "the portions of the condominium property not included in the units," § 718.103(8), Fla. Stat., along with the following:

> (b) Easements through units for conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to units and the common elements.
> (c) An easement of support in every portion of a unit which contributes to the support of a building.
> (d) The property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements.

§ 718.108, Fla. Stat.

This language is clear and unambiguous, hence we "need not look behind the statute's plain [wording] or employ principles of statutory construction to determine legislative intent." English v. State, 191 So. 3d 448, 450 (Fla. 2016) (citations omitted). Despite this plainly penned legislative preemption, here, intrepidly mirroring the words of the Act, the Declaration designates all "property and installations required for the furnishing of utilities and other services to more than one unit or to the Common Elements, if any," along with the "wires, conduits, pipes, ducts, transformers, cables," residential lobby and elevators, and communal trash disposal systems as shared facilities. This recharacterization, and the resultant expropriation of undivided common ownership, indubitably contravenes the edict of the Act. See § 718.107, Fla. Stat.

In closing, we decline to embrace the broader proposition that the transfer of ownership and control of any amenities traditionally designated as common elements violates the spirit, if not the letter, of the law. Nonetheless, here, compliance with the remainder of the Act remains wholly contingent upon a proper classification of the minimally required common elements.[2] Hence, this threshold misnomer necessarily engendered the litany of additional statutory violations comprehensively delineated in the order below. See § 718.108(1)(d), Fla. Stat.

[2] "[I]f it is not necessary to decide more, it is necessary not to decide more." PDK Labs., Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

("'Common elements' includes within its meaning . . . [t]he property and installations required for the furnishing of utilities and other services to more than one unit."); § 718.113(1), Fla. Stat. ("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."); § 718.115(2), Fla. Stat. (In a "mixed-use condominium . . . each unit's share of the common expenses of the condominium and common surplus of the condominium shall be the same as the unit's appurtenant ownership interest in the common elements."); § 718.116(9)(a), Fla. Stat. ("A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment."); § 718.404(3), Fla. Stat. ("[F]or mixed-use condominiums . . . the ownership share of the common elements assigned to each unit shall be based either on the total square footage of each unit in uniform relationship to the total square footage of each other unit in the condominium or on an equal fractional basis."); § 718.3026(1), Fla. Stat. ("If a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment by the association on behalf of any condominium operated by the association in the aggregate that exceeds [five] percent of the total annual budget of the association, including reserves, the

association shall obtain competitive bids for the materials, equipment, or services.").

Accordingly, we discern no error and affirm.[3]

Affirmed.

[3] The Association contends the trial court further erred in ordering reformation. Because the order on appeal merely directed the Association to "reform" the Declaration to comply with Florida law, we find no such error. See *Reform*, The American Heritage Dictionary (5th ed. 2020) ("To improve by alteration, correction of error, or removal of defects; put into a better form or condition.").