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NO. COA01-1267

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

PAUL GOFORTH,
Plaintiff

v.

Dare County
No. 00 CVD 786

CHERI PAIN, Individually
and d/b/a Cape Management,
Inc.,
Defendants

Appeal by plaintiff from judgment entered 1 May 2001 and order entered 20 June 2001 by Judge Amber Davis in Dare County District Court. Heard in the Court of Appeals 12 June 2002.

Van H. Johnson, for plaintiff-appellant.

Trimpi, Nash & Harman, L.L.P., by John G. Trimpi, for defendant-appellees.

CAMPBELL, Judge.

Paul Goforth ("plaintiff") appeals from the trial court's entry of summary judgment in favor of Cheri Pain and Cape Management, Inc. (collectively, "defendants") and the trial court's denial of his motion for a new trial. We affirm.

Plaintiff is the owner of a one-tenth (1/10) interest in a condominium unit located in Nags Head, North Carolina, known as Hawk's Nest II, 17A. Hawk's Nest II is a duplex consisting of two joined dwellings (17A and 17B) separated by a common wall. Each

individual owner owns a one-tenth (1/10) interest in their respective condominium unit and a one-twentieth (1/20) interest in the tract of land on which Hawk's Nest II is located. The condominium units are used by the individual owners on a revolving basis. Each individual owner is entitled to exclusive use of his or her respective unit for five calendar weeks per year. The remaining two weeks are set aside for repair and maintenance by the Agent responsible for managing and maintaining the property.

Defendant Cheri A. Pain ("Pain") is the President of Cape Management, Inc. ("Cape Management"), which has acted as the sole and exclusive Agent for Hawk's Nest II since 1989. According to Pain's affidavit, Cape Management's rights and responsibilities as Agent for Hawk's Nest II were contractually delegated and assigned to it by the initial Agent, PPMI. The procedures governing the appointment and removal of an Agent for Hawk's Nest II are set forth in Section 5 of the Declaration of Co-Ownership Interests ("the Declaration"), which was duly recorded in the Dare County Register of Deeds on 24 April 1994. Section 5 of the Declaration provides:

5. The Agent. Declarant shall employ the initial Agent. The initial Agent and each successor Agent may be removed upon 30 days written notice which shall also set forth the appointment of a successor Agent and shall be signed, or otherwise consented to, by a Two-Third's Majority in Interest of the Owners of the Dwelling.

An Agent may resign upon giving 90 days notice to each of the Owners of the Dwelling. In such event the Owners shall use their best efforts to agree upon the appointment of a successor Agent with the consent of Two-

Third's Majority in Interest of Owners. If they cannot so agree within 30 days after receipt of the notice of the Agent's resignation, the Clerk of Superior Court of Dare County shall have authority, upon the request of any Owner, to appoint a successor Agent upon such terms and for such compensation as the Clerk may, in his discretion, determine, but an Agent appointed by the Clerk shall be subject to removal as hereinafter provided.

Each Dwelling shall be managed by an Agent until the termination of this Declaration as hereinafter provided, unless all of the Owners of an interest in a Dwelling agree to eliminate the services of an Agent.

Each Agent shall enter into a written contract in which the Agent agrees to perform the obligations and duties set forth herein. The Agent shall be entitled to compensation from the Owners for its services at the rate provided for and adopted in the budget each year unless the Agent and a Two-Third's Majority in Interest of Owners of the Dwelling shall otherwise agree or unless a new rate shall be established by the Clerk of Superior Court upon the appointment of a successor Agent as provided above.

Dissatisfied with the performance of Cape Management as Agent for Hawk's Nest II, 17A, and under the impression that no written contract existed between the condominium unit owners and Cape Management, plaintiff went to the Clerk of Superior Court of Dare County seeking the appointment of a successor Agent. On 22 May 2000, the Clerk of Superior Court of Dare County signed an order appointing Coldwell Banker-Seaside Realty, Inc. ("Seaside"), as Agent for Hawk's Nest II, 17A. This order was subsequently filed in the Dare County Register of Deeds on 16 June 2000. When the Clerk of Superior Court appointed Seaside as successor Agent, Cape Management had not resigned nor had a two-third's majority of the

individual condominium unit owners in Hawk's Nest II, 17A, voted to remove Cape Management as Agent.

On 28 December 2000, plaintiff filed the complaint in the instant action alleging that defendants had refused to discontinue acting as Agent for Hawk's Nest II, 17A, despite plaintiff's request and the order signed by the Clerk of Superior Court appointing Seaside as Agent. Plaintiff further alleged that defendants had refused to provide the records related to defendants' actions as Agent, and that defendants had continued to act as Agent without the benefit of a contract and without the authority or approval of the individual condominium unit owners. Plaintiff sought a preliminary injunction against defendants enjoining them from acting as Agent for Hawk's Nest II, 17A, requiring them to produce the contract under which they were acting as Agent, and requiring them to produce all records related to their actions as Agent.

On 26 January 2001, defendants filed a motion to dismiss, answer and counterclaim. In their motion to dismiss, defendants prayed that plaintiff's action be dismissed with prejudice and that the Clerk of Superior Court's order appointing Seaside as Agent for Hawk's Nest II, 17A, be declared null and void. In their counterclaim, defendants alleged that plaintiff had attempted to circumvent the two-third's majority vote requirement set forth in the Declaration for action regarding management and the use and enjoyment of the property, that plaintiff had interfered with the use and enjoyment of the property by changing the locks on 17A on

two occasions, thus preventing access by defendants and the other unit owners, and that plaintiff had failed to pay assessments when due. Defendants sought an injunction preventing plaintiff from changing the locks on 17A, as well as the recovery of past due assessments in the amount of \$1,711.20 and reasonable attorneys' fees.

On 26 January 2001, Superior Court Judge J. Richard Parker granted defendants' motion for a temporary restraining order enjoining plaintiff from changing the locks on 17A or otherwise interfering with access to 17A by defendants and the other unit owners. Defendants' motion for a preliminary injunction was set for hearing on 5 February 2001 in Dare County Superior Court. On 31 January 2001, the matter was removed from superior court to district court. On 5 February 2001, the district court judge converted the temporary restraining order into a preliminary injunction and continued the security that had been posted in connection with the temporary restraining order.

On 16 April 2001, defendants' motion to dismiss and motion for summary judgment were heard by Judge Amber Davis. On 1 May 2001, Judge Davis entered a judgment dismissing plaintiff's action with prejudice and rendering null and void the Clerk of Superior Court's order appointing Seaside as Agent for Hawk's Nest II, 17A. The trial court also entered judgment in favor of defendants in the amount of \$1,711.20 in unpaid assessments and awarded defendants \$4,000.00 in attorneys' fees. In addition, the trial court permanently enjoined plaintiff from changing the locks on Hawk's

Nest II, 17A, or otherwise interfering with access by defendants and other unit owners.

On 8 May 2001, plaintiff filed a motion for a new trial. On 14 May 2001, plaintiff amended his motion for a new trial to add an additional ground for relief. On 20 June 2001, the trial court denied plaintiff's motion for a new trial. Plaintiff appeals from both the trial court's judgment entered 1 May 2001 and the trial court's denial of his motion for a new trial.

At the outset we note that several of plaintiff's assignments of error are deemed abandoned pursuant to N.C. R. Civ. P. 28(b)(6) for his failure to argue them in his brief. We address only those assignments of error properly set forth and argued in plaintiff's brief.

Plaintiff first contends that the trial court erred in entering summary judgment because defendants failed to produce the contract under which they were acting as Agent for Hawk's Nest II, 17A. Plaintiff maintains that Section 5 of the Declaration requires that there be a written contract between the individual unit owners and the Agent and that the evidence presented a factual issue as to whether such written contract existed. Accordingly, plaintiff contends that defendants were not entitled to summary judgment. We disagree.

While Section 5 of the Declaration does state that "[e]ach Agent shall enter into a written contract in which the Agent agrees to perform the obligations and duties set forth therein[,]'" there is nothing in Section 5, or any other section of the Declaration,

which purports to grant standing to a single individual unit owner to file suit to force the Agent to produce the written contract referred to in Section 5. However, if a two-third's majority of the individual unit owners wished to force the Agent to produce the written contract under which the Agent was managing the property, or remove the Agent if no such written contract existed, Section 5 would clearly allow such action. In the instant case, there is no showing in the record that two-thirds of the individual unit owners were dissatisfied with Cape Management's actions as Agent or concerned about the existence, or lack thereof, of a written contract for Cape Management's services. In fact, the record shows that, in a vote taken approximately two weeks before plaintiff filed the instant action, only three of the ten individual unit owners in Hawk's Nest II, 17A, voted to terminate Cape Management as Agent. In view of this record and our interpretation of Section 5 of the Declaration, we conclude that plaintiff did not have the standing to file suit individually seeking to force Cape Management to produce the written contract under which it was performing its services as Agent. Accordingly, the fact that Cape Management has or has not produced the written contract does not create a genuine issue of material fact which precludes summary judgment against plaintiff in the instant action. Thus, plaintiff's first argument lacks merit.

Plaintiff next contends that the trial court erred in declaring null and void the Clerk of Superior Court's order appointing Seaside as Agent for Hawk's Nest II, 17A, in the absence

of evidence of fraud. In so doing, plaintiff argues that the trial court permitted an impermissible collateral attack on the Clerk of Superior Court's order. We disagree.

The Clerk of Superior Court of Dare County lacked authority to sign and file an order designating an Agent for Hawk's Nest II, 17A. Under Section 5 of the Declaration, the Clerk of Superior Court is only authorized to appoint a successor Agent in the event of the resignation of an Agent. If a resignation occurs and two-thirds of the individual unit owners are not able to agree on a successor Agent within thirty (30) days, then any individual unit owner is permitted to request that the Clerk of Superior Court appoint a successor Agent. Under the Declaration, that is the only situation in which the Clerk of Superior Court can act to appoint an Agent. Here, the record shows that Cape Management has been the sole and exclusive Agent for Hawk's Nest II, 17A, since 1989. When the Clerk of Superior Court appointed Seaside as Agent, Cape Management had not given notice that it intended to resign as Agent. Therefore, the Clerk of Superior Court's order appointing a successor Agent lacked any force and effect.¹ Accordingly, the trial court did not err in declaring the order null and void.

In its final argument, plaintiff contends that the trial court's award of attorneys' fees was excessive. In its award of summary judgment, the trial court awarded defendants attorneys' fees in the amount of \$4,000.00 pursuant to Section 11 of the

¹ We also note that the Clerk of Superior Court lacked statutory authority under N.C. Gen. Stat. § 7A-103 to take the action it did in the instant case.

Declaration, which provides that in an action to enforce the provisions of the Declaration, "the prevailing party shall be entitled to costs and reasonable attorneys' fees." Having reviewed the record, the transcript of the hearings before the trial court, the arguments of counsel, and the applicable case law, we conclude that the trial court's award of attorneys' fees was in no way excessive. Plaintiff's final argument is overruled.

For the reasons stated herein, the judgment of the trial court and the trial court's denial of plaintiff's motion for a new trial are affirmed.

Affirmed.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).