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NO. COA01-854

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

CROWFIELDS CONDOMINIUM
ASSOCIATION, by and through
the Executive Committee of
the Board of Directors,
Plaintiff-Appellee,

v.

Buncombe County
No. 99 CVS 4918

O. CLAUDE SMITH and wife,
LINDA SMITH,
Defendant-Appellants.

Appeal by defendants from judgment dated 8 February 2001 by Judge Ronald K. Payne in Superior Court, Buncombe County. Heard in the Court of Appeals 17 April 2002.

McGuire, Wood & Bisette, P.A., by T. Douglas Wilson, for plaintiff-appellee.

Dungan & Mitchell, P.A., by Robert E. Dungan and Shannon Lovins, for defendant-appellants.

McGEE, Judge.

The Crowfields Condominium development (Crowfields development) in Asheville, North Carolina consists of 34 separate "cluster" buildings with a total of 192 individual units. A Declaration of Condominium dated 11 May 1973 was recorded for each cluster and unit within each cluster. The condominium bylaws for each cluster and unit were attached to the Declaration of Condominium. The Cluster C Declaration of Condominium and Bylaws

were recorded at Deed Book 1080, Page 573, of the Buncombe County Registry.

The Declaration of Condominium states that in order to revoke or amend any provision of the Declaration of Condominium "all 'family units' in the Cluster and the holders of all mortgages or deeds of trust covering the same [must] unanimously agree to such revocation or amendment by duly recorded instruments." The Declaration of Condominium further provides that each unit owner automatically becomes a member of his or her individual cluster association.

The bylaws for each cluster described the method for electing members of a board of directors and officers; the bylaws included a requirement that each owner pay any annual assessments imposed by the individual cluster associations, as well as monthly assessments for the maintenance and upkeep of the common grounds and the individual cluster buildings. Further, Article XI of the bylaws stated that an umbrella association "may be created and enlarged from time to time to include representatives from [each individual cluster] Association" for the purpose of "provid[ing] uniformity of management and to reduce the costs of administration to owners of individual units." The umbrella association was to be called Crowfields Cluster Association.

Additionally, Article XIV of the individual cluster bylaws described the manner by which the bylaws could be amended:

- (a) Notice of the subject matter of a proposed amendment shall be included in the notice of any meeting at which a proposed amendment is considered.

(b) . . . Except as elsewhere provided, such approvals must be either by:

(1) Not less than 66-2/3% of the entire membership of the Board of Directors and by not less than 66-2/3% of the votes of the entire membership of the Association; or

(2) not less than 80% of the votes of the entire membership of the Association; and

(3) Prior to January 1, 1997, by and with the consent and approval of the Developer.

The Crowfields Community Association was created effective 31 December 1974 for the purpose of owning, operating, and maintaining recreational facilities and common grounds developed in conjunction with the Crowfields development. All unit owners accepting membership in Crowfields Community Association were deemed members of that association until they conveyed ownership to another person. Members were required to pay annual assessments. O. Claude Smith and Linda Smith (defendants) purchased unit four in Cluster C of the Crowfields development on 15 June 1989. At that time, Crowfields development was operating under the original bylaws. Defendants signed the Crowfields Community Association's Certificate and Agreement of Membership, specifying the obligation to pay assessments.

In 1992, ballots were sent to unit owners requesting votes on proposed amendments to the bylaws. One amendment proposed the creation of the Crowfields Umbrella Association (formerly Crowfields Cluster Association), to be created pursuant to Article XI of the bylaws. Another proposed amendment stated that for

purposes of amending the bylaws, it would be necessary for not less than 66-2/3% of the entire membership of the *Board of Governors* and not less than 66-2/3% of the unit owners of the cluster association to vote for the measures by written ballot, thus changing the voting procedures from a vote of the Board of Directors of each cluster to the Board of Governors of the proposed Crowfields Umbrella Association. Defendants voted affirmatively for the amendments and the creation of Crowfields Umbrella Association on 13 December 1992 and the measures passed overwhelmingly. The amendments to the bylaws were to become effective on 1 January 1993 and were recorded in the Buncombe County Registry, but not as an amendment to the Declaration of Condominium. In 1997, the bylaws were properly recorded as an amendment to the Declaration of Condominium in the Buncombe County Registry.

A bylaws committee was appointed in 1996 by the Board of Governors to consider possible new changes to the bylaws. The committee recommended to the executive committee, which was comprised of the officers, that the bylaws of the individual cluster associations, the Crowfields Community Association, and the Crowfields Umbrella Association be combined into one set of bylaws and rules and regulations to simplify and streamline the administration of the Crowfields development.

A meeting was held on 2 February 1998 for comments regarding possible changes in the bylaws. On 21 April 1998 the president of the executive committee sent a memorandum with a committee report and ballots to all unit owners concerning the recommendation that

the rules by which the Crowfields development was governed be simplified and consolidated. The balloting was halted and at least one additional meeting was held for residents to discuss the changes in the bylaws. Ballots again were distributed.

Of the thirty-four clusters, thirty-three voted in favor of the 1998 amendments, with Cluster C not having the necessary percentage voting for approval. The Board of Governors voted twenty-seven to three in favor of the amendments. The individual unit owners voted 173 in favor and three opposed. Seventeen unit owners did not vote, including defendants. The 1998 amendments to the bylaws were approved and recorded as an amendment to the Declaration of Condominium on 26 August 1998 and made applicable to all clusters and units, except Cluster C. The new bylaws created Crowfields Condominium Association (plaintiff), replaced all other bylaws at Crowfields development, and stated that all unit owners were members of the new association.

Defendants ceased payment of monthly assessments beginning in November 1998. Cluster C later voted to approve the 1998 amendments. The vote was duly recorded as an amendment to the Declaration of Condominium on 3 March 1999.

Plaintiff filed a claim of lien and complaint for unpaid assessments against defendants on 28 October 1999. Defendants filed an answer, a counterclaim requesting a declaratory judgment that plaintiff's alleged assessments be deemed illegal and unenforceable, and a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 19 January 2000. The trial court denied

defendants' motion to dismiss in an order dated 22 March 2000.

This matter was heard at a trial without a jury beginning 30 October 2000. In a pre-trial memorandum, defendants argued that plaintiff was an unincorporated association and had no capacity or standing to sue because it had failed to allege it had filed an assumed name certificate pursuant to N.C. Gen. Stat. § 1-69.1; thus the trial court did not have jurisdiction to rule on plaintiff's claims. Defendants also made an oral motion to dismiss before trial for lack of jurisdiction. The trial court reserved ruling on defendants' motion until the close of all the evidence. At the close of all the evidence, the trial court did not rule on defendants' motion but instructed the parties to submit to the court proposed findings of fact, conclusions of law, and judgments, as well as any arguments on relevant issues, including defendants' motion to dismiss.

The record shows that plaintiff submitted proposed findings of fact and conclusions of law, a memorandum in support of the proposed findings and conclusions, and a "response to defendants' motion for directed verdict" for lack of jurisdiction. The record also shows that defendants submitted a proposed judgment, which included proposed findings of fact and conclusions of law.

The trial court, in a judgment dated 8 February 2001, ordered defendants to pay to plaintiff the sum of \$7,783.00 plus interest from 1 November 1998 to date of payment and dismissed defendants' counterclaims. The trial court did not rule in its judgment on defendants' motion to dismiss for lack of jurisdiction. Defendants

appeal.

I.

Defendants first argue the trial court erred in denying their motion to dismiss because plaintiff's complaint failed to allege the location of an assumed name certificate, and plaintiff offered no evidence of the certificate.

Plaintiff alleged in paragraph one of its complaint that

[p]laintiff is an unincorporated association of homeowners organized pursuant to a Declaration of Condominium under North Carolina Unit Ownership Act recorded at Deed Book 1080, page 573, of the Buncombe County Registry, as amended in those amendments recorded in . . . Deed Book 1995, page 554, Deed Book 2044 page 583, Deed Book 2080, Page 396 and Deed Book 2171, page 108 of the Buncombe County Registry.

In their answer, defendants denied this allegation.

"At common law . . . an unincorporated association could not sue or be sued as a legal entity since it had no existence separate and distinct from its members." *Highlands Township Taxpayers Assoc. v. Highlands Township Taxpayers Assoc., Inc.*, 62 N.C. App. 537, 538, 303 S.E.2d 234, 235 (1983) (citing *Youngblood v. Bright*, 243 N.C. 599, 91 S.E.2d 559 (1956)). However, unincorporated associations may now

sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. . . . Any unincorporated association . . . bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.

N.C. Gen. Stat. § 1-69.1 (2001).

N.C. Gen. Stat. § 66-68 "requires that a business operating under an assumed name file a certificate, stating the name of the business and name and address of the owner(s), in the office of the register of deeds of the county in which business is conducted." *Highlands Township* at 538-39, 303 S.E.2d at 235. See also N.C. Gen. Stat. § 66-68 (2001).

Defendants argue that plaintiff never complied with the requisites of N.C.G.S. §§ 1-69.1 and 66-68. Plaintiff responds that defendants failed to timely raise this issue in a pleading prior to trial, and the trial court therefore did not err in not granting defendants' oral motion at trial.

A party desiring to raise the issue of capacity shall negatively aver its nonexistence and support that averment. N.C. Gen. Stat. § 1A-1, Rule 9(a) (2001). A negative averment is "[a]n averment that is negative in form but affirmative in substance and that must be proved by the alleging party." Black's Law Dictionary 132 (7th ed. 1999).

Defendants contend they "made sufficient allegations to raise the issue of Plaintiff's capacity in their Answer." We disagree. First, the general denial filed by defendants in their answer as to plaintiff's allegations in paragraph one of the complaint is not a negative averment and therefore did not, by itself, place plaintiff's legal existence in issue. Defendants argue, however, that paragraphs two, three and nine in their answer sufficiently raised the issue of plaintiff's capacity. The paragraphs at issue

read as follows:

2. Defendant . . . is an unincorporated association which purports to represent the homeowners at Crowfields Condominiums under a document[] entitled, Declaration of Condominium, which was recorded at Deed Book 1995, Page 554, Deed Book 2044, Page 583, Deed Book 2080, Page 396 and Deed Book 2171, Page 108 of the Buncombe County Registry.

. . .

3. This is a proceeding for declaratory judgment as to [defendants'] rights and for a permanent injunction enjoining [plaintiff] from claiming assessments or filing liens on the [defendants'] properties for alleged unpaid assessments.

. . .

9. In the immediate action, [plaintiff] has supposedly filed this action 'by and through the Executive Committee of the Board of Directors.' However, [plaintiff] has not alleged that it owns any property or that the action is actually maintained by its board of directors or manager. Further, the 'current ByLaws of the Association,' as referred to in [plaintiff's] Complaint, do not provide for the [plaintiff] to act on behalf of its membership and do not authorize anyone other than the board of directors or manager to act on its behalf. As such, [plaintiff] does not have authority to maintain this action or to file the Claim of Lien on [defendants'] real property.

We fail to discern how these paragraphs put into issue whether or not plaintiff appropriately complied with N.C.G.S. §§ 1-69.1 and 66-68. Furthermore, we note that defendants filed a counterclaim against plaintiff in its capacity as an unincorporated association, thus admitting plaintiff's existence as an unincorporated association suing in the name of "Crowfields Condominium Association." See *Truck Service v. Hill*, 53 N.C. App. 443, 449,

281 S.E.2d 61, 66 (1981).

Finally, we note that although the trial court did not explicitly deny defendants' motion to dismiss, defendants did not file objection to the 8 February 2001 order, or move the trial court to amend or modify its order to determine defendants' motion to dismiss on the record. Defendants bear the burden of seeking a determination by the trial court on their motion to dismiss.

This assignment of error is overruled.

II.

Defendants next contend the trial court erred in failing to grant defendants' motion for declaratory judgment because the documents recorded by plaintiff or its predecessor entity purporting to amend the declarations and bylaws are invalid and should be declared null and void.

Crowfields development was formed under Chapter 47A of our General Statutes, the Unit Ownership Act. N.C. Gen. Stat. § 47A-13(9) (2001) states that a declaration creating unit ownership shall contain the method by which the declaration may be amended. N.C. Gen. Stat. § 47A-19(8) (2001) states that the bylaws shall provide for "[t]he percentage of votes required to amend the bylaws, and a provision that such amendment shall not become operative unless set forth in an amended declaration and duly recorded." Thus, the bylaws must set forth voting procedures and any amendments to those procedures must be recorded as an amendment to the declaration. See also N.C. Gen. Stat. § 47A-18 (2001) (stating that "[n]o modification of or amendment to the bylaws

shall be valid, unless set forth in an amendment to the declaration and such amendment is duly recorded").

Defendants first argue that the documents recorded in 1997 are invalid because the Declaration of Condominium requires changes to the bylaws to be unanimously agreed upon. Defendants claim that the voting provisions in the Declaration of Condominium and in the bylaws conflict; therefore, because the bylaws are made a part of the Declaration of Condominium, it follows that "to amend the bylaws as part of the declaration would require unanimous agreement." In interpreting a contract, a court must ascertain the intent of the parties at the time the contract was executed. To do so, the court must look at the circumstances surrounding the execution including "the language used, the situation of the parties, and objects to be accomplished. Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance." *Briggs v. Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960) (citations omitted).

The trial court found, and we agree, that the bylaws are a document independent from the Declaration of Condominium, with their own specifications and requirements for amendment. Although the Declaration of Condominium states that the bylaws are "made a part of th[e] Declaration," it does not state that the bylaws were *subject* to the Declaration of Condominium to the extent of rendering meaningless the provisions of the bylaws.

The Declaration of Condominium in this case clearly states that to amend *the Declaration* there must be a unanimous vote. The

Declaration of Condominium does not state any procedures or requirements for amending the bylaws. The original bylaws clearly state that to amend *the bylaws* there must be a vote of not less than 66-2/3% of the entire membership of the board of directors and not less than 66-2/3% of the entire membership of the Association. In amending the bylaws in 1992, plaintiff complied with its obligations pursuant to the bylaws provisions ensuring that at least two-thirds of the membership of each cluster association voted in favor of the amendments, as well as two-thirds of the entire membership and two-thirds of the board of directors. Defendants themselves affirmatively voted for the measures at issue in 1992 and received the benefits of the changes to the bylaws without protest until 1998.

Defendants also argue that because the 1992 amendments to the bylaws were not properly recorded until 1997, said amendments are void. Although we agree that the amendments adopted in 1992 did not become effective until 1997 when they were properly recorded as an amendment to the Declaration of Condominium, the trial court did not err in failing to declare these amendments void since they were in fact properly recorded in 1997. *See Cornerstone Condominium Association, Inc. v. O'Brien*, 336 N.C. 307, 307, 442 S.E.2d 321, 322 (1994) (standing for the principle that bylaws become effective as of the date of proper recordation).

Defendants next argue that the documents recorded in 1998 are invalid because no duly recorded instrument shows the unanimous written agreement of the unit owners and mortgagees, and because no

notices were sent out and no meetings were held as required by the bylaws. As determined above, the bylaws do not require a unanimous vote in order to properly be amended. The trial court found, and we agree, that plaintiff substantially complied with its obligations pursuant to the bylaws of the cluster organizations, requiring that: a written ballot be distributed to unit owners, a vote of the Board of Governors representing the votes of each cluster located in the development be taken and at least two-thirds of the membership of each cluster association vote in favor of the amendments to the bylaws.

The record shows that notices were sent to unit owners and defendant O. Claude Smith testified that at least one meeting was held on the issues. Specifically, he testified at trial that in 1998, "I asked for open discussion, and there was one meeting set up on a date that I had a business obligation, and I figured, 'Well, I'll go to one of the others.'" Defendants' failure to attend a scheduled meeting does not render plaintiff's balloting process void.

Defendants additionally argue that the documents recorded in 1999 are invalid because no duly recorded instrument shows the unanimous written agreement of the unit owners and mortgagees, and because defendants never consented to the document and no meetings were held. We disagree that the documents are invalid; rather, the documents duly recorded in 1999 simply made the bylaws that were properly passed and duly recorded in 1998 applicable to Cluster C. Thus, no additional notices, votes or meetings were required.

Defendants' remaining assignments of error are overruled.

We affirm the judgment of the trial court.

Affirmed.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).