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NO. COA10-1257
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

DENTON SNIDER and wife, JEAN
SNIDER, Individually and on behalf
of the Lot Owners in Tull's Bay
Colony Subdivision,
Plaintiffs,

v.

Currituck County
No. 09-CVS-445

TULL'S BAY COLONY PROPERTY OWNERS
ASSOCIATION, INC.,
Defendant.

Appeal by plaintiffs from order entered 21 July 2010 by
Judge Wayland J. Sermons in Perquimans County Superior Court.
Heard in the Court of Appeals 9 March 2011.

Trimpi & Nash, L.L.P., by John G. Trimpi, for plaintiffs.

*Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip
Honrthal, III, for defendant.*

ELMORE, Judge.

Denton Snider and his wife Jean Snider (together
plaintiffs), and on behalf of the lot owners in Tull's Bay
Colony Subdivision, appeal an order granting summary judgment in
favor of Tull's Bay Colony Property Owners Association, Inc.

(defendant) and declaring enforceable an amendment to the restrictive covenants of the Tull's Bay declaration. After careful consideration, we reverse the decision of the trial court.

Tull's Bay Colony (Tull's Bay) is a subdivision located in Moyock Township, Currituck County. Tull's Bay consists of 322 platted lots which were sold by the Northwest River Development Company beginning in the 1970s. Each lot was sold expressly subject to fourteen restrictive covenants. These covenants were recorded in every deed. Covenant fourteen states:

By accepting this deed, the Grantee expressly agree(s) to become a member of the Tull's Bay Colony Property Owners Association and to be bound by the rules, regulations and policies of said association.

On 29 June 1971, Tull's Bay filed articles of incorporation to establish the Tull's Bay Colony Property Owners Association, Inc. (defendant). The association was formed, in part, to:

Own, acquire, build, operate, and maintain recreation parks, playgrounds, swimming pools, commons, footways, including buildings, structures, personal properties . . . and facilities.

On 17 August 1990, plaintiffs purchased lot nine in Tull's Bay. Plaintiffs' deed contained the fourteen restrictive covenants.

On 12 February 2002, the association adopted bylaws that provided for annual and special assessments of the lot owners.

On 18 July 2008, defendant filed a complaint against plaintiffs in district court for past due assessments. Plaintiffs filed a counterclaim for declaratory relief. Plaintiffs argued that the lot owners who purchased property in Tull's Bay should not be obligated by defendant to pay assessments, because the restrictive covenants in their deeds did not include any affirmative obligation to pay assessments. Plaintiffs also sought class certification in order to argue against the assessments on behalf of all of the lots owners in Tull's Bay. The class certification was later granted.

On 2 March 2009, defendant amended its bylaws pursuant to N.C. Gen. Stat. § 47F-1-102(d). This amendment made all of the provisions of the Planned Community Act (PCA) applicable to Tull's Bay. The amendment was signed and enacted by the signatures of sixty-seven percent of the lot owners of Tull's Bay. However, defendant did not supplement or amend its complaint to include the amendment as grounds for enforcing the assessments against plaintiffs.

On 29 May 2009, the district court entered an order granting summary judgment in favor of plaintiffs. The district

court found that "the restrictive covenants make no mention of assessments" and that defendant was without the right or the authority to impose assessments. Defendant did not appeal this order.

On 7 August 2009, plaintiffs filed a complaint against defendant seeking to have the amendment invalidated and stricken from public records. Plaintiffs argued that the amendment should be invalidated for the following reasons: 1) the prior judgment declared the assessment provisions void; 2) the unreasonableness of the amendment; 3) the indefiniteness of the amendment; 4) the insufficiency of vote count taken to pass the amendment. On 1 June 2010, plaintiffs filed a motion for partial summary judgment. On 10 June 2010, defendant filed a motion for summary judgment. On 21 July 2010, the trial court entered an order denying plaintiffs' motion for summary judgment, but granting summary judgment in favor of defendant. The order also declared the amendment enforceable. Plaintiffs appeal from this order.

"Our standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quotations and citation omitted). "Under a de novo review, the court considers the matter anew and freely

substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation and citation omitted). Summary judgment is appropriate when there is no genuine issue as to any material fact, and a party is entitled to a judgment as a matter of law. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

Plaintiffs first argue on appeal that the trial court erred in its summary judgment ruling. Specifically, plaintiffs argue that the trial court should have ruled in plaintiffs' favor, because the prior ruling of the district court established that defendant was without the right to impose assessments. We agree.

Under the doctrine of collateral estoppel, parties are precluded from retrying fully litigated issues that were decided in any prior determination between the parties, even in unrelated causes of action. *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). Collateral estoppel applies when the following conditions are met:

- (1) [t]he issues to be concluded must be the same as those involved in the prior action;
- (2) in the prior action, the issues must have been raised and actually litigated;
- (3)

the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

McCallum v. North Carolina Coop. Extension Serv. of N.C. State Univ., 142 N.C. App. 48, 54, 542 S.E.2d 227, 233 (2001) (citation omitted). In determining what issues were actually litigated in the prior action, "the court in the second proceeding is free to go beyond the judgment roll, and may examine the pleadings and the evidence [if any] in the prior action." *Miller Bldg. Corp. v. NBBJ, Inc.*, 129 N.C. App. 97, 100, 497, S.E.2d 433, 435 (1998).

We must first determine whether the issue presented to the trial court here was the same issue presented to the district court in the prior action. We conclude that the issues are the same.

In the prior dispute between plaintiffs and defendant, the district court considered whether defendant had the authority to impose assessments on the lot owners of Tull's Bay. On 27 May 2009, the district court entered an order in that case. The order stated that:

The restrictive covenants make no mention of assessments and that plaintiff [(here defendant)] has no right or authority to

impose assessments against members of Tulls Bay Colony.

Defendant did not appeal the order of the district court, therefore that order is final and valid. See *In re D.R.F.*, ____ N.C. App. ____, ____, 693 S.E.2d 235, 238 (2010) (citation omitted) (finding that an order remains final and valid when no appeal is taken from it).

Next, defendant amended its bylaws to incorporate the PCA. The PCA governs the operation of planned communities. It grants certain powers to the homeowner's association of a planned community. N.C. Gen. Stat. § 47F-1-102 (2009). One of the powers the PCA provides is the power to impose assessments. The PCA states:

all common expenses shall be assessed against all the lots in accordance with the allocations set forth in the declaration. Any past-due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent (18%) per year. For planned communities created prior to January 1, 1999, interest may be charged on any past-due common expense assessment or installment only if the declaration provides for interest charges, and where the declaration does not otherwise specify the interest rate, the rate may not exceed eighteen percent (18%) per year.

N.C. Gen. Stat. § 47F-3-115(b) (2009).

Therefore, it is evident by the actions of defendant, that defendant incorporated the PCA as a means to acquire the authority to impose assessments against the lot owners of Tull's Bay. Following the passage of this amendment, plaintiffs filed the present suit to have the amendment invalidated in order to avoid future claims to pay assessments. Therefore, the principal issue considered by the trial court was again, whether defendant has the authority to impose assessments on the lot owners of Tull's Bay.

Defendant argues on appeal that the issue raised in the prior action between the parties is not the same issue that is being raised here. Specifically, defendant argues that the district court in the prior action only contemplated whether defendant had the authority to impose assessments through the original bylaws or declaration. Defendant argues that here, the issue presented is whether defendant may impose assessments through the PCA. Defendant argues that this means of imposing assessments was not considered by the district court in the prior action. We disagree with defendant's statement of the issues.

The final judgment of the district court in the prior action clearly stated that defendant had no authority to impose

assessments because the restrictive covenants of the lot owners' deeds make no mention of assessments. It is obvious from this determination that the ruling of the district court in the prior action was based entirely on the language of the deeds. The issue of whether defendant may impose assessments turned upon whether the restrictive covenants of the deeds afforded defendant that authority. In the prior action, the language of the bylaws was not dispositive of the judgment. Therefore, defendant's distinction between authority for imposing assessments under the bylaws or authority for imposing assessments under the PCA is immaterial when framing the issue. We conclude that the issue presented to the trial court in the present case was the same issue presented to the court in the prior case.

Next, we must determine whether the issue was raised and actually litigated in the prior action. We conclude that the issue was raised and actually litigated in the prior action.

In defendant's complaint in the prior action, defendant claimed that:

pursuant to the restrictive covenants and Bylaws Plaintiff Association has established a special assessment and annual assessments which Defendants have refused and failed to pay in full since March, 2005.

In its prayer for relief, defendant asked the district court to

allow defendant to "recover of Defendants [(here plaintiffs)] the sum of \$208.42[.]" The district court entered an order finding that defendant had no authority to impose assessments on the lot owners of Tull's Bay. When analyzing the pleadings and the judgment, we conclude that defendant actually raised the issue of whether it may impose assessments, and the court issued a final judgment. The final judgment ruled that defendant did not have the right to impose assessments. Therefore, we conclude that the issue was actually raised and litigated in the prior action.

Finally, we must determine whether the issue was material and relevant to the prior action, and whether the determination made of the issue in the prior action was essential to the judgment. We conclude that both of these factors were established here.

Defendant in the prior judgment asked the district court to require plaintiffs to pay assessments that were past due. Therefore, the issue of whether defendant had the authority to impose assessments was material and relevant to the action. Furthermore, the judgment of the district court ordered that plaintiffs were not required to pay the assessments. The judgment stated that defendant did not have the authority to

impose assessments on the lot owners of Tull's Bay. Therefore, the determination of whether defendant had the authority to impose assessments on the lot owners of Tull's Bay was essential to the judgment.

We conclude that the doctrine of collateral estoppel applies to the issues. Here, the issue presented to the trial court is the same issue that was presented to the district court in the prior action. The district court in the prior action entered a final judgment in favor of plaintiffs, and defendant did not appeal. Therefore, there exists no issue of material fact concerning whether defendant has the authority to impose assessments against the lot owners of Tull's Bay, and plaintiffs are entitled to judgment as a matter of law.

Reversed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).