NO. COA10-1562
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

BEN WATFORD, et al
Plaintiffs

v. Craven County
No. 07-CVS-1592

MIDSOUTH GOLF, LLC.
Defendant

and

PATRICIA L. ADAMS, et al
Plaintiffs

v. Craven County
No. 08-CVS-1861

MIDSOUTH GOLF, LLC.
Defendant

and

MIDSOUTH GOLF, LLC,
Plaintiff

v. Craven County

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| BALLI | 07-CVS-1541 |
| BECK | 07-CVS-1543 |
| BERRYMAN, et al. | 07-CVS-1542 |
| BOSSERMAN | 07-CVS-1536 |
| BUSHONG | 07-CVS-1539 |
| BUTLER | 07-CVS-1537 |
| CASEY | 07-CVS-1677 |
| COOGAN | 07-CVS-1678 |
| GUNN | 07-CVS-1676 |
| VANA | 07-CVS-1770 |

Defendants

and

MICHAEL BASTIAN, and
PATRICIA A. DELUCA,

Plaintiffs,

v. Craven County
No. 07-CVS-01202

MIDSOUTH GOLF, LLC., a North
Carolina Limited Liability
Corporation.

Defendant.

Appeal by defendant[1] from orders entered 20 August 2010 and 16 September 2010 by Judge Charles H. Henry in Craven County Superior Court. Heard in the Court of Appeals 12 May 2011.

*Kirkman Whitford Brady & Berryman, P.A., by Neil B. Whitford, for plaintiffs-appellees.*

*Michael Bastian and Patricia DeLuca pro se.*

*Ward and Smith, P.A., by Eric J. Remington and Cheryl A. Marteney, for defendant-appellant.*

THIGPEN, Judge.

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[1]As used in this appeal, "Plaintiffs" means the plaintiffs in file numbers 07-CVS-1592, 08-CVS-1861, and 07-CVS-1202, and the defendants in file numbers 07-CVS-1541, 07-CVS-1543, 07-CVS-1542, 07-CVS-1536, 07-CVS-1539, 07-CVS-1537, 07-CVS-1677, 07-CVS-1678, 07-CVS-1676, and 07-CVS-1770. "Defendant" means MidSouth Golf, LLC.

Defendant MidSouth Golf, LLC, ("MidSouth") owns two golf courses and other recreational amenities located in a large residential community. MidSouth charges property owners a fee for the cost of operating the recreational amenities. In 2007, MidSouth brought actions against certain property owners seeking unpaid amenity fees. The property owners in turn filed counterclaims against MidSouth, and additional property owners brought separate actions against MidSouth contesting MidSouth's authority to collect amenity fees (all property owners hereinafter referred to as "Plaintiffs"). We must decide whether the trial court erred by granting summary judgment in favor of Plaintiffs. After a complete review of the record on appeal, we affirm the orders of the trial court.

In 1975, the original developer of the residential community, Fairfield Harbour, recorded the "Supplemental Declaration of Restrictions – Treasure Lake of North Carolina, Inc." ("1975 Supplemental Declaration"). The 1975 Supplemental Declaration contained a provision authorizing the developer to charge all lots then owned or subsequently acquired by the developer "a uniform annual charge" for "maintenance, repair, and upkeep of all recreational amenities." In 1979, the "Master Declaration of Fairfield Harbour" ("1979 Master Declaration")

was recorded. The 1979 Master Declaration similarly contained a provision authorizing the successor in interest to the original developer and its "successors and assigns of each such recreational amenity" to charge to all lots sold thereafter, including timeshares, an amenity fee for "operation, maintenance, repair and upkeep of all recreational amenities[.]" Additionally, the 1979 Master Declaration created the Fairfield Harbour Property Owners Association, Inc. ("FHPOA").

In 1993, the amenities in Fairfield Harbour, including golf courses, restaurant facilities, tennis courts, swimming pools, parks, a recreation building, and all other recreational amenities, were sold by Fairfield Communities, Inc. ("FCI") to Harbour Recreation Club, Inc. ("HRC"). As part of that sale, FCI recorded the "Declaration of Covenants, Conditions and Restrictions for Harbour Pointe Golf Course, Harbour Country Club and Harbour Recreation Complex" ("1993 Covenant"). In the 1993 Covenant, FCI assigned "the power to levy Amenity Fees" to HRC and any subsequent owners of the property. The 1993 Covenant also required the owner of the amenities to "maintain, operate, and repair" the amenities "at a level or standard equivalent to that of a 'first class' golf course and country club." Finally, the 1993 Covenant reserved an easement right

for the property owners "to walk, jog or run" along the cart paths and fairways of the golf courses at certain times of the day.

In September 1999, MidSouth purchased two golf courses, docks, and tennis courts from HRC. In November 2004, MidSouth filed a lawsuit against FHPOA, alleging it was entitled to collect amenity fees from each individual timeshare unit owner (the "Timeshare Lawsuit"). On appeal, this Court found the 1979 Master Declaration did not provide the timeshare owners with easement rights, but rather a revocable license to use the recreational amenities. *Midsouth Golf, LLC v. Fairfield Harbourside Condominium Ass'n, Inc.*, 187 N.C. App. 22, 35, 652 S.E.2d 378, 387 (2007), *disc. review denied*, __ N.C. __, 666 S.E.2d 123 (2008). Therefore, the covenant to pay amenity fees was a personal covenant that "did not run with the land and was not enforceable by [MidSouth]." *Id.* at 39, 652 S.E.2d at 389.

Following the Timeshare Lawsuit, many property owners did not pay amenity fees. As a result of the lack of funds, MidSouth closed two golf courses in 2008, one of which re-opened in the spring of 2009. Additionally, MidSouth filed the present actions against numerous property owners seeking to recover unpaid amenity fees. The property owners filed counterclaims

against MidSouth, and additional property owners filed lawsuits requesting relief from the obligation to pay amenity fees. MidSouth and Plaintiffs filed cross-motions for summary judgment. On 20 August 2010 and 16 September 2010, the trial court filed orders granting summary judgment for Plaintiffs, denying MidSouth's motion for summary judgment, and dismissing MidSouth's counterclaims. The court held the restrictive covenants in the 1975 Supplemental Declaration and the 1979 Master Declaration "purporting to give [MidSouth], its predecessors and successors the authority to levy against Plaintiffs' lots an 'amenity fee' or 'recreation fee' are unenforceable against Plaintiffs."[2] The trial court also ordered the costs of the actions taxed against MidSouth. From these orders, MidSouth appeals.

On appeal, MidSouth argues (I) the trial court erred by granting summary judgment in favor of Plaintiffs and (II) abused its discretion when it taxed costs against MidSouth.

I. Summary Judgment

In its first argument on appeal, MidSouth contends the trial court erred by granting summary judgment in favor of

[2]The summary judgment order filed in case number 07-CVS-1202 (Plaintiffs Bastian and DeLuca) did not address the 1975 Supplemental Declaration; the trial court concluded only that the 1979 Master Declaration was unenforceable.

Plaintiffs and concluding the covenant to pay amenity fees was unenforceable for three reasons. First, MidSouth argues it is entitled to collect amenity fees because Plaintiffs are third party beneficiaries of the 1993 Covenant. Second, MidSouth contends it is entitled to collect amenity fees from Plaintiffs because the 1975 Supplemental Declaration, 1979 Master Declaration, and 1993 Covenant read *in pari materia* establish mutuality of obligations. Finally, MidSouth argues in the alternative, that if this Court determines it cannot collect amenity fees from Plaintiffs, the trial court erred in granting summary judgment because the 1993 Covenant is unenforceable against MidSouth. We will address each of these arguments in turn.

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "[T]he trial judge must view the presented evidence in a light most favorable to the

nonmoving party [and] . . . the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted).

A. Third Party Beneficiaries

MidSouth first argues the trial court erred by granting summary judgment in favor of Plaintiffs because Plaintiffs are third party beneficiaries of the 1993 Covenant; therefore, MidSouth argues it is entitled to collect amenity fees from them. We disagree.[3]

"To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." *Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317 (citation omitted), *cert. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). "A person is a direct beneficiary of the

[3]Plaintiffs argue the 1993 Covenant does not apply to them because it is outside the chains of title for Plaintiffs' lots. We note that MidSouth admitted in its Objections, Answers, and Responses to Plaintiffs' First Requests for Admissions that the 1993 Covenant "do[es] not fall within the chains of title to Plaintiffs' lots[.]" However, this argument is not relevant to the third party beneficiary analysis.

contract if the contracting parties intended to confer *a legally enforceable benefit* on that person." *Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 703, 671 S.E.2d 7, 13 (citations and quotation marks omitted) (emphasis added), *disc. review denied*, __ N.C. __, 682 S.E.2d 210 (2009).

In this case, the 1993 Covenant states it is created "for the benefit of [FCI and its successors and assigns], [FHPOA], and *the property owners that are members of [FHPOA].*" (Emphasis added). However, the 1993 Covenant also states the following regarding enforcement:

> [FCI and its successors and assigns] and [FHPOA] shall have the right to enforce, by any proceeding at law or in equity, all of the restrictions, conditions, covenants, assessments, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. . . . Neither [FCI and its successors and assigns] nor [FHPOA] shall have any affirmative duty to enforce the provisions of this Declaration in any way, and the failure of either [FCI and its successors and assigns] or [FHPOA] to enforce the provisions of this Declaration shall not subject it to any liability arising from any type of action, claim, or proceeding by any party.

Assuming, without deciding, that the 1993 Covenant is a valid and enforceable contract between FCI and subsequent owners of the amenities, thereby satisfying the first two elements of the third party beneficiary analysis, Plaintiffs are not direct

beneficiaries of the 1993 Covenant because they do not have a right to enforce it. *See Hospira*, 194 N.C. App. at 703, 671 S.E.2d at 13. "Restrictive covenants are to be strictly construed and all ambiguities will be resolved in favor of the unrestrained use of land." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (citations and quotation marks omitted), *disc. review denied*, 359 N.C. 635, 616 S.E.2d 542 (2005). Pursuant to the terms of the 1993 Covenant, only two entities, FCI and its successors and assigns and FHPOA, have the authority to enforce the 1993 Covenant.

In *Beech Mountain Property Owners' Ass'n v. Current*, 35 N.C. App. 135, 240 S.E.2d 503 (1978), this Court addressed a similar issue when a property owners association brought an action against property owners for dues and assessments owed under restrictive covenants. The enforcement provision of the restrictive covenant "expressly conferred on 'the owners of lots in the neighborhood or subdivision, or any of them jointly or severally' the status of third party beneficiaries with the right to sue to enforce the restrictions." *Id.* at 138, 240 S.E.2d at 506. The association argued it could also enforce the covenants as a third party beneficiary because it was "an agent possessing the owners' right to enforce the restrictions." *Id.*

However, this Court held the association was not a third party beneficiary because, as "an entity distinct from its individual members," the covenant did not give it the authority to enforce the restrictions. *Id.* at 139, 240 S.E.2d at 507 (citation omitted).

Although MidSouth argues that "any enforcement action taken by FHPOA would not be for its benefit, but . . . for the benefit of [Plaintiffs]," following our holding in *Beech Mountain*, we conclude FHPOA is a separate entity from the individual Plaintiffs. The 1993 Covenant specifically gives FHPOA, not the property owners, the right to enforce the covenants. Because the 1993 Covenant does not confer on Plaintiffs the right to enforce the covenant, Plaintiffs are not third party beneficiaries of the 1993 Covenant. *See Hospira*, 194 N.C. App. at 703, 671 S.E.2d at 13. Thus, MidSouth is not entitled to collect amenity fees from Plaintiffs on that basis.

B. *In Pari Materia*

MidSouth next contends the trial court erred in granting summary judgment for Plaintiffs because the 1975 Supplemental Declaration, 1979 Master Declaration, and 1993 Covenant read *in pari materia* establish a mutuality of obligations which entitles MidSouth to collect amenity fees from Plaintiffs. Specifically,

MidSouth argues "the beneficial right to walk, jog, or run on the Golf Courses is interdependent with the right of MidSouth . . . to collect an Amenity Fee[.]" We disagree.

"*In pari materia* is defined as upon the same matter or subject." *Durham Herald Co., Inc. v. North Carolina Low-Level Radioactive Waste Management Authority*, 110 N.C. App. 607, 612, 430 S.E.2d 441, 445 (citations and quotation marks omitted), *disc. review denied*, 334 N.C. 619, 435 S.E.2d 334 (1993). The doctrine of *in pari materia* is typically applied in the context of statutory interpretation. *See State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) ("In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible."); *see also Durham Herald Co.*, 110 N.C. App. at 611, 430 S.E.2d at 444 (stating that "under the rules of statutory construction, statutes *in pari materia* must be read in context with each other") (citations and quotation marks omitted). However, North Carolina courts have applied the doctrine of *in pari materia* to the interpretation of contracts. *See Fulford v. Jenkins*, 195 N.C. App. 402, 407, 672 S.E.2d 759, 762 (2009) (stating that "all of the provisions of the [insurance] policy must be interpreted *in pari materia*") (citation omitted).

We have reviewed the three covenants *in pari materia* and conclude they do not provide a basis for MidSouth to collect amenity fees from Plaintiffs. As MidSouth acknowledges, this Court previously determined in the Timeshare Lawsuit that MidSouth could not enforce the covenant to pay amenity fees in the 1979 Master Declaration against the timeshare owners. *Midsouth Golf*, 187 N.C. App. at 35, 652 S.E.2d at 387. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted).

In the Timeshare Lawsuit, this Court reasoned as follows:

> Defendants do not have any easement rights in the recreational amenities financed by the recreational amenity charge; they only have easement rights in the common areas, or parks, within Fairfield Harbour. The Master Declaration provides that "the use and enjoyment of the recreational amenities shall be on such terms and conditions as FHI, its successors, grantees or assigns, from time to time shall license." Therefore, Defendants merely have a revocable license to use the recreational amenities. We find this to be a key distinction, and hold that in the present case, the covenant to pay amenity fees did not touch and concern Defendants' properties.

*Midsouth Golf*, 187 N.C. App. at 35, 652 S.E.2d at 387. This Court concluded that because "the covenant to pay amenity fees did not touch and concern Defendants' properties, we hold that the covenant was a personal covenant. As such, the covenant did not run with the land and was not enforceable by [MidSouth], as a successor in interest to the original covenantor." *Id*. at 39, 652 S.E.2d at 389.

Because this Court has already determined MidSouth cannot enforce the covenant to pay amenity fees in the 1979 Master Declaration, we are bound by that holding. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. We note that the language in the 1975 Supplemental Declaration regarding amenity fees is very similar to the language in the 1979 Master Declaration. Finally, as previously discussed, we have determined that Plaintiffs are not third party beneficiaries to the 1993 Covenant, so MidSouth cannot collect amenity fees on that basis. Accordingly, we have considered the 1975 Supplemental Declaration, the 1979 Master Declaration, and the 1993 Covenant together, and we cannot conclude MidSouth is entitled to collect amenity fees on the basis of the covenants read *in pari materia*.

C. The 1993 Covenant is Unenforceable

MidSouth argues, in the alternative, that if this Court determines it cannot collect amenity fees from Plaintiffs, the trial court erred in granting summary judgment because the 1993 Covenant is unenforceable against MidSouth. Specifically, MidSouth contends if it cannot collect amenity fees from Plaintiffs, there has been a failure of consideration for the burdens imposed on MidSouth by the 1993 Covenant.

This argument is not properly before us because it is outside the scope of the order being appealed in this case. *See Carter v. Hill*, 186 N.C. App. 464, 467, 650 S.E.2d 843, 845 (2007). In its order, the trial court granted summary judgment in favor of Plaintiffs and concluded the 1979 Master Declaration and the 1975 Supplemental Declaration giving MidSouth the right to collect amenity fees were unenforceable against Plaintiffs. The trial court did not determine whether the 1993 Covenant was enforceable against MidSouth.

In any event, the issue of whether the 1993 Covenant is enforceable against MidSouth was recently decided by another panel of this Court. *See Fairfield Harbour Property Owners Ass., Inc. v. MidSouth Golf, LLC*, __ N.C. App. __, __, S.E.2d __ (2011). In *Fairfield Harbour*, this Court held that there was sufficient consideration to support the validity of the 1993

Covenant. *Id.* at __, __ S.E.2d at __. Moreover, this Court concluded that the "language in the [1993 Covenant] specifically provides that the restrictions contained within the covenant are severable. Merely because one restriction in the covenant was declared illegal, the enforceability of the other provisions is not affected." *Id.* at __, __ S.E.2d at __. Thus, the court rejected MidSouth's argument that "[b]ecause [MidSouth] was no longer receiving the amount necessary in fees to maintain the golf courses, it was no longer required to operate the golf courses." *Id.* For the foregoing reasons, this argument is without merit.

II. Costs Taxed Against MidSouth

In its next argument on appeal, MidSouth contends the trial court abused its discretion when it awarded costs to Plaintiffs because Plaintiffs were not entitled to summary judgment. Because we hold the trial court did not err in granting summary judgment in favor of Plaintiffs, we will not address this argument.

AFFIRMED.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).