[Cite as *Iyami Condominium Assn. v. Ledgewood Homeowners Assn.*, 2004-Ohio-6102.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 84162

IYAMI CONDOMINIUM ASSOCIATION	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
LEDGEWOOD HOMEOWNERS' ASSOCIATION	:	OPINION
Defendant-Appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 18, 2004
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-455984
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellant:

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ANNE L. KILBANE, P.J.:

{¶ 1} Iyami Condominium Association ("Iyami") appeals from an order of Judge Kathleen Ann Sutula that granted summary judgment to Ledgewood Homeowners' Association ("Association") and against Iyami's contention that its members could unilaterally decide to cease paying the Association's mandatory fees.

{¶ 2} Iyami claims that a 1985 amendment to its condominium declaration that incorporated its members into the Association was invalid, that the Association's acceptance of Iyami members was invalid, and that irrespective of any validity concerns, the agreement between Iyami and the Association created a license the parties could revoke at will. We affirm.

{¶ 3} From the record we glean the following: Iyami, a condominium association with twenty-three units, was established in Strongsville in the early 1970's under R.C. 5311. Ledgewood subdivisions is an abutting planned unit development subject to the Ledgewood declaration, originally consisting of 309 residential units on sublots, the common areas and recreational facilities of which are owned, maintained, and operated by the Association, a non-profit corporation under R.C. 1702.

{¶ 4} Initially, the Association let individual Iyami members use its recreational facility for an annual fee. In the mid 1980's, however, the Association declined to continue this informal arrangement and insisted that Iyami amend its condominium declaration to formalize the addition of Iyami members into the Association and to make its land subject to the Ledgewood declaration. Iyami passed the amendment in 1985 and the Association trustees passed a resolution adding Iyami membership in Ledgewood subdivisions and in the Association with all the rights and obligations set

forth in the Association declaration.

{¶ 5} In 2001, 75% of Iyami members voted to rescind and delete the 1985 amendment to extinguish any purported duty it owed to the Association. It then filed a declaratory judgment action to validate its latest amendment and sought a determination that its members no longer had any duty to pay fees to the Association and for an injunction to prevent the Association from any collection of fees or enforcement provision efforts, and to return fees already collected.

{¶ 6} The parties filed cross-motions for summary judgment. Iyami claimed its 1985 amendment was not valid because it did not meet with the requisite formalities, that it simply memorialized the original arrangement and created a revocable license for Iyami members to use the Association facilities, and that the Association accepted this amendment through a process inconsistent with Ledgewood's declaration and bylaws. Ledgewood claimed the amendment created an irrevocable servitude through which Iyami members could be assessed mandatory fees. The judge granted the Association's motion and dismissed Iyami's claims with prejudice. Iyami's assignments of error are set forth in the appendix to this opinion.

I. STANDARD OF REVIEW

{¶ 7} We review the grant of summary judgment de novo, applying the same standard of review as that applied by the trial judge.[1] Under Civ.R. 56, summary judgment shall be entered in favor of a moving party if: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. The moving party for summary judgment

[1]*Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors* (2000), 139 Ohio App.3d 772, 785, 745 N.E.2d 1069, citing *Druso v. Bank One of Columbus* (1997), 124

bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.[2] If the party requesting summary judgment presents evidence showing its entitlement to judgment as a matter of law, the nonmoving party must then present evidence showing a dispute of material fact.[3]

{¶ 8} TRUSTEE AUTHORITY; NONPROFIT STATUS V. DECLARATION COVENANTS AND RESTRICTIONS.

{¶ 9} Iyami contends that the Association trustees could not accept it into the Ledgewood subdivisions because it was a matter that required Ledgewood to amend its declaration. It argues that the Ledgewood members were required to vote on this resolution in order for it to be valid.

Ohio App.3d 125, 131, 705 N.E.2d 717.

[2]*Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 370, 1998-Ohio-389, 696 N.E.2d 201, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107, 662 N.E.2d 264.

[3]*Dresher v. Burt,* 75 Ohio St.3d at 293.

{¶ 10} Both Iyami and Ledgewood fall under the general category of common-interest communities that are defined as "a real estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal[.]"[4] Ledgewood is not in the sub-group known as condominium associations and, therefore, is not subject to R.C. Chapter 5311.[5] Ledgewood is the type of common-interest community generally known in Ohio as a planned unit development.[6]

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[4]2 Restatement of the Law 3d, Property (1998) 75, Servitudes, Common-Interest Communities, Section 6.2(1).

[5]*Prestwick Landowners' Association v. Underhill* (1980), 69 Ohio App.2d 45, 429 N.E.2d 1191, at paragraph one of the syllabus.

[6]See 1 Curry & Durham, Ohio Real Property Law and Practice (5th Ed. 1996) 457, Section 11-24 ("Unlike a condominium, where a purchaser's unit consists of air space in a

building and an undivided interest in community property, a planned unit development consists of lots or parcels of land that are sold to individual purchasers.”)

{¶ 11} The Ledgewood declaration provides in Article II, Section 2(a), that "[a]dditional real property may, upon approval by the Association in accordance with its Articles of Incorporation, become subject to these Covenants & Restrictions provided that any such proposed addition is adjacent to the Existing Property (or to any property added thereto in accordance with this Article II)." Article II, Section 2(b), provides that "[a]ny such addition shall be made by filing of record a deed, agreement or other instrument in form approved by the Association which shall extend the scheme of these Covenants and Restrictions to such additional property." Under these provisions, the Association may add additional members through any process approved in the articles of incorporation and by filing a form approved by the Association.

{¶ 12} The Association articles of incorporation simply state that trustees may exercise authority as provided under R.C. Chapter 1702. Thus, the power to add additional property and members to the Ledgewood subdivisions rests with the trustees as described in Ohio's non-profit corporation statutes. The trustees, therefore, had the authority to add Iyami to the subdivisions without putting the issue to a vote.[7] Moreover, since the trustees extended membership through a form they approved, the resolution complied with Article II, Section 2(b) of the Ledgewood declaration.

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[7]See R.C. 1702.30(A)(vesting in trustees authority to conduct the affairs of non-profit corporations).

{¶ 13} Allowing planned unit developments to expand without a vote of its members is one way such associations are more flexible than condominium associations. For example, under R.C. 5311.05, condominium associations must explicitly reserve the right to expand and, in addition to a number of other requirements, must identify in the declaration what property may be added and how many units may be built on that property. A unanimous vote is required for expansion if a condominium declaration does not meet these statutory requirements.[8]

{¶ 14} Ledgewood is a planned unit development, not a condominium association, and "[o]ne of the attractive features of a planned unit development is the flexibility to provide for the extension of the planned unit development over additional property without meeting the rigid statutory requirements such as those set forth in the Condominium Act."[9] Ledgewood followed the proper procedure to expand its association and membership to the Iyami Condominium Association. Iyami's first assignment of error is overruled.

{¶ 15} INVALIDITY OF THE 1985 AMENDMENT

{¶ 16} Iyami argues that the 1985 amendment passed by its members was invalid because it was not passed by the required votes and that it was not signed by officers as required in its declaration.

{¶ 17} It is undisputed that more than 90% of Iyami members voted to pass the 1985 amendment. Iyami claims on appeal, however, that under R.C. Chapter 5311 and the terms of its

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[8]R.C. 5311.04(E)

[9]1 Curry & Durham, supra, note 3, at 463, Section 11-26(l).

condominium declaration, the amendment needed unanimous approval to pass.

{¶ 18} The applicable version of R.C. 5311.04(D) mandated the following: "Except as provided in section 5311.051 of the Revised Code, the percentage of interest in the common areas and facilities of each unit as expressed in the original declaration shall not be altered except by an amendment to the declaration unanimously approved by all unit owners affected." Here, the exception listed in R.C. 5311.051 did not and does not apply. We must determine, therefore, whether the 1985 amendment altered the percentage of interest in the common areas and facilities.

{¶ 19} Condominium association members own common areas and facilities as tenants-in-common.[10] Condominium declarations must list what percentage of ownership interest applies to each unit.[11] Those percentages are set forth in the Iyami declarations in Article VII, Section 4. Common areas and facilities in planned unit developments, on the other hand, are owned by the Association, as opposed to individual members.[12] Here, the non-profit corporation owns the Ledgewood common areas and facilities. As a result, when Iyami members became members of the subdivision, they did not get any ownership interest in the Ledgewood common areas. The percentage of interest in the Iyami common areas and facilities set forth in Article VII, Section 4 of the Iyami declarations did not change. A unanimous vote, therefore, was not required under R.C. 5311.04(D).

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[10]R.C. 5311.04(A).

[11]R.C. 5311.04(B).

[12]See 1 Curry & Durham, supra, note 3, at 457, Section 11-24 (stating that a key difference between planned unit developments and condominiums is that in planned unit developments the association typically owns the common property, while in condominium associations the common areas and facilities are owned by the unit owners themselves).

{¶ 20} Iyami further claims a unanimous vote was required under the terms of its declaration. This is contrary to the allegation in paragraph 15 of Iyami's complaint in which it claimed that the 1985 amendment was passed under a provision that required only 75% of the vote. Iyami, therefore, has failed to create a genuine issue of material fact with respect to this claim it raised, for the first time, on appeal.[13]

[13]Although we need not address this issue in detail, it seems as though the confusion created over the required vote percentage needed to pass the 1985 amendment was the result of mislabeling the amendment to constitute Article XX when the preamble to the amendment should have provided that the amendment constituted Article XXI.

{¶ 21} In addition to its claims about a unanimous voting requirement, Iyami asserts that the 1985 amendment was invalid because it was not signed by the required officers. Article XX, Section 1, of its declaration requires that a certificate containing a copy of any amendment be filed with the county recorder. It additionally provides that "[s]uch certificate shall be signed by the president or other chief officer and the secretary or an assistant secretary of the association." Iyami claims the amendment was not signed by the president or the secretary. Iyami has failed to set forth facts, by affidavit or otherwise, to demonstrate that these officers did not sign the filed amendment.[14] In fact, an Iyami affidavit reveals just the opposite because it avers that Jean Karoli, whose signature appears on the 1985 amendment, was president of the Iyami condominium association in 1985. Iyami additionally failed to demonstrate that one of the other twenty-one signatories was not the secretary or an assistant to the secretary. It seems at the very least Iyami could have identified, in an affidavit, the name of the 1985 secretary and ascertain whether that name is one of the twenty appearing on the amendment. The 1985 amendment was valid, and Iyami's third assignment of error is overruled.

{¶ 22} LICENSE V. EASEMENT

[14]See Civ.R. 56(E)("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

{¶ 23} Iyami contends that its 1985 amendment and the Association resolution created a license Iyami could revoke through its 2001 amendment. It relies on *Cambridge Village Condominium Association v. Cambridge Condominium Association,*[15] which affirmed summary judgment in favor of Cambridge, which passed an amendment deleting its perpetual license to use Cambridge Village's recreational facilities. The Developer of Cambridge drafted its declarations to provide a perpetual license to use, and concomitant duty help maintain, adjacent recreational facilities owned by the Developer. Later the adjacent land and facilities became Cambridge Village, whose declarations recognized the perpetual license. The *Cambridge Village* court held that the perpetual license was essentially an easement that could not be terminated at will, but could be abandoned.[16] The *Cambridge Village* court concluded that nothing in the declarations prohibited amending out the perpetual license and Cambridge could abandon the easement.[17]

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[15]*Cambridge Village Condominium Assoc. v. Cambridge Condominium Assoc.* (2000), 139 Ohio App.3d 328, 743 N.E.2d 954.

[16]Id., citing *Kamenar Railroad Salvage, Inc. v. Ohio Edison Co.* (1992), 79 Ohio App.3d 685, 607 N.E.2d 1108.

[17]Both parties are under the mistaken impression that *Cambridge Village* was decided on the basis that a license was created, when, in fact, the court treated the property interest as an easement. See, generally, Id. at 334.

{¶ 24} At first glance, it seems Iyami could abandon its rights and obligations under the reasoning in *Cambridge Village*; but, Iyami's easement encompasses broader rights and interests than those at issue in *Cambridge Village* and could not be abandoned by adopting the 2001 amendment. The Cambridge members were only given rights to use the recreational facilities, but were given no interest in Cambridge Village.[18] Iyami owners, however, were made full members of the Association. They have the right to vote in Ledgewood affairs and are afforded all other rights outlined in the Ledgewood declaration and bylaws. Under the declaration, they are assessed a fee along with every other member of the Association.

{¶ 25} Unlike *Cambridge Village*, where the assessed fee flowed solely from use of the recreational facilities, the fee here flows from membership in the Ledgewood association. Iyami members could not effectively abandon this membership by a declaration amendment the way Cambridge members could. Membership in Ledgewood created a reciprocal easement with both a burden and a benefit. With membership, Iyami members gained as a benefit all the privileges outlined in the Ledgewood declaration; they also acquired the burden of paying a mandatory fee.

[18]See Id. at 330-31 (setting forth declaration provisions and bylaws granting Cambridge Condominium Association members rights to use recreational facilities).

{¶ 26} Ledgewood's right to collect fees from its members, including Iyami members, was created through an assessment covenant in Article V of the Ledgewood declaration. An assessment covenant is considered the burden of an easement.[19] Iyami cannot abandon this burden by amending its declaration.[20] Its remedy is to seek withdrawal from Ledgewood through the provisions in the Ledgewood declaration and bylaws. This result is consistent with current practice, which recognizes that common-interest communities today "involve higher-density development and greater financial interdependence[.]"[21] In most instances, a group cannot unilaterally withdraw from a common-interest community association without a membership vote. Iyami's second assignment of error is overruled.

Judgment affirmed.

APPENDIX – ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT RULED THAT APPELLEE/LEDGEWOOD'S PRIMARY AUTHORITY IS DERIVED FROM ITS NONPROFIT STATUS RATHER THAN FROM ITS DECLARATION OF COVENANTS AND RESTRICTIONS.

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[19]See 2 Restatement of the Law 3d, Property (1998) 96, Servitudes, Common-Interest Communities, Section 6.5, Comment *a* (discussing the validity of assessment covenants from an historical perspective).

[20]See Id. at 352, Servitudes, Modification and Termination, Section 7.4, Comment *b* (illustrating that a burdened estate cannot extinguish a covenant by abandonment).

[21]Id. at 96, Servitudes, Common-Interest Communities, Section 6.10, Comment *g*.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULEING [sic] THAT APPELLANT/IYAMI DID NOT CREATE A REVOCABLE LICENSE BUT AN EASEMENT TERMINATED ONLY BY BOTH APPELLANT/IYAMI AND APPELLEE LEDGEWOOD.

III. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE IYAMI 1985 AMENDMENT WAS INVALID AND THEREFORE A NULLITY AND COULD NOT BIND IYAMI OWNERS TO THE PURPORTED LEDGEWOOD AGREEMENT."

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE, J., And

KENNETH A. ROCCO, J., CONCUR

ANNE L. KILBANE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).