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John A. Sergovic, Jr., Esquire
Sergovic, Ellis & Shirey, P.A.
9 North Front Street
P.O. Box 875
Georgetown, DE 19947

David J. Weidman, Esquire
Hudson, Jones, Jaywork & Fisher
100 North Bedford Street
P.O. Box 359
Georgetown, DE 19947

RE: Michele A. Rodgers Russo v. Joseph W. Nelson
C.A. No. 01C-08-005

Date Submitted: January 28, 2003

Dear Counsel:

This is my decision on the parties' cross-motions for summary judgment. Plaintiff Michele A. Rodgers Russo ("Russo") contends that Defendant Joseph W. Nelson ("Nelson") encroached upon condominium complex common elements and denied Russo a view of the ocean by altering the exterior of his condominium unit. Nelson contends that he had a right to build on the common elements. Nelson also filed a counterclaim contending that alterations to Russo's unit encroach on the common elements. Both parties seek actions in ejectment to reclaim property rights and remove encroachments.

FACTS

Russo owns Unit 3 ("Unit 3") in Oceanside Townhomes (the "Complex"), a three unit condominium development in Dewey Beach, Delaware. Nelson owns Unit 1 ("Unit 1") in the Complex. Nelson purchased Unit 1 from J. Paul Rodgers, Sr., Blanche M. Rodgers, J. Paul Rodgers, Jr., Richard Rodgers, Michael Kelly Rodgers, and Russo in 1984. Prior to this sale, the Complex became subject to the Unit Property Act (the "Act") when the Declaration Submitting Real Property to Provisions of Unit Property Act (the "Declaration") and the Code of Regulations for the Condominium (the "Regulations") were filed with the Sussex County Recorder of Deeds.

For the duration of Nelson's ownership of Unit 1, a six foot high wooden fence has separated the property behind Unit 1 from the property behind Units 2 and 3. The other units have similar fences separating their "backyards." In the mid-1980's Russo's father requested that Nelson build a second fence along the side of Unit 1 and the Condominium's property line, enclosing the area behind Unit 1. Since the erection of the second fence, unit owners have treated the fenced-in space behind their units as their own property and have separately maintained the areas.

Nelson renovated his unit in 2000, enclosing the existing porch and balcony to create an expanded living room and bedroom and constructing a new porch and deck. These alterations changed the appearance of Unit 1's exterior and enlarged the unit so it filled formerly unoccupied ground and airspace. Upon learning of Nelson's project, Russo objected to the alterations and filed an action in ejectment with this Court.

STANDARD OF REVIEW

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the nonexistence of material issues of fact. Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1970). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact. Id. at 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. Rule 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If, after discovery, the nonmoving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991), cert. den., 504 U.S. 912 (1992); Celotex Corp. v. Catrett, supra. If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962). This Court now will determine if summary judgment is appropriate in this property dispute.

DISCUSSION

A. Common Areas of a Condominium

According to 25 Del. C. § 2205:

> The percentage of undivided interest in the common elements assigned to each unit shall be set forth in the declaration, and such percentage shall not be altered except by recording an amended declaration duly executed by all of the unit owners affected thereby. . . The common elements shall remain undivided . . . and

> no action for partition or division of any part of the common elements shall be permitted, except as provided in § 2239 of this title.

See also 25 Del. C. § 2219. The Declaration stipulated that each unit owner possessed a 33 1/3% undivided interest in the Complex's common areas. Pursuant to 25 Del. C. § 2221(4), the deeds for Unit 1 and Unit 3 repeated this undivided ownership interest in the common elements. It is undisputed that Nelson and Russo each hold an undivided one-third interest in the common elements. To determine whether summary judgment is appropriate in this instance, the Court must determine the extent of the Complex's common elements.

The Act defines condominium units to include a "proportionate undivided interest in the common elements." 25 Del. C. § 2202(14). Common elements are the "yards, parking areas and driveways" and "[s]uch facilities as are designated in the declaration as common elements." 25 Del. C. § 2202(3). The declaration is the governing instrument in disputes concerning condominium common elements. Murray v. Wang, Del. Ch., Civ. A. No. 1384, Chandler, V.C., (Mar. 16, 1995), at 8. The Declaration describes common elements as "all portions of the property except the units." Units, the property not held in common by the unit owners, are limited by the Declaration to the following:

> Each condominium unit shall consist vertically of the space above the plane created by the underside of the lowest plywood subflooring material, to-wit: the underside of the building and below the plane created by the underside of the asphalt shingles and horizontally the space between the unexposed surface of the drywalls or other wall covering material . . .
> Each unit shall be similar in construction and shall generally be described as follows:
> UNIT #1 through #3 . . .

> Units 1 and 2 have a 1st level screened in porch adjacent to the family room. The 1st level porch on Unit 1[1] is enclosed and is part of that unit . . . The second level of Unit 1 contains a third bedroom. The second level also contains an entrance from the bedroom to a balcony or deck which is situate [sic] directly above the first-level porch . . .
>
> RESERVING AND EXCEPTING from each unit, however, all facilities and installations within the unit designated as common elements herein.
>
> Any exterior portions of the building which are considered part of a unit shall be subject to restriction with regard to the use thereof and in order to insure a uniform appearance of the building, all as herein more particularly set forth or as contained in the Codes of Regulations herein referred to and recorded simultaneously herewith.

Common elements are a vast portion of the property in the Complex. The Declaration specifically reserves as common elements "the lands on which the buildings are located, including the air space above the ground and the soil beneath it, and all portions of the building which are not included in a unit." Furthermore, the Declaration describes "[a]ll exterior steps, porches, balconies, landings, decks, roofs, railings and walls appurtenant thereto and all parts thereof" as common elements. Any encroachment into these areas is a taking of a common element. See Makeever v. Lyle, 609 P.2d 1084 (Ariz. Ct. App. 1980) (erecting second story on a one story unit and building basement underneath carport encroached on common elements);

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[1]The statement that the enclosed porch of Unit 1 is not a common element is an error. Unit 1's porch cannot be enclosed and screened. This ambiguity allows the Court to examine the facts and circumstances surrounding the drafting of the Declaration. See Rohner v. Niemann, 380 A.2d 549 (Del. 1977) (discussing with ambiguities in deeds); City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191 (Del. 1993) (using extrinsic evidence in contract interpretation). The building plans submitted with the Declaration shows Unit 3 with an enclosed porch and Unit 1 with a screened porch. Furthermore, prior to Nelson's construction, the first floor porch was not enclosed. Thus, the enclosed porch belongs to Unit 3 and the reference to Unit 1 is in error.

Grimes v. Moreland, 322 N.E.2d 699 (Ohio Ct. Com. Pl. 1974) (placing fences and air conditioning units on common element land prohibited). Unit 1's additions were constructed on property that was not part of the unit and not solely owned by Nelson. Thus, the deck and balcony structure occupy common element airspace and common element land. See Posey v. Leavitt, 280 Cal. Rptr. 568 (Cal. Ct. App. 1991) (extending an existing deck is an encroachment on common elements); Grey v. Coastal States Holding Co., 578 A.2d 1080 (Conn. Ct. App. 1990), cert. den. 580 A.2d 57 (constructing an additional story on a unit appropriates common element airspace and land); Grimes, 322 N.E.2d 699. Nelson's enclosure of the balcony and deck also appropriated the Complex's common elements.

Nelson contends that the deeds, Declaration, and Regulations do not control the outcome of this case. According to Nelson, an 18 year pattern of conduct, oral agreements, and by-law amendments trump the ownership scheme detailed in the Complex's recorded documents. The homeowner's council of a condominium has broad power to regulate a condominium's common elements, but it is not omnipotent. Bonczek v. Helena Place, Inc., Del. Ch., Civ. A. No. 9501, Jacobs, V.C. (July 24, 1990), at 11-12. The Regulations stipulate that "structural alterations" can be made to a unit with the homeowners' council's (the "Council") written approval; however, "[n]o such addition, alteration or improvement shall be allowed or approved which may alter or affect the common elements." Changes to the exterior of a unit that include the destruction of existing structures and the creation of new structures are structural in nature. Nelson has not shown that he had the Council's written approval to make these changes. Furthermore, Nelson's project altered the Complex's common elements. The Council did not have the power to permit Nelson to alter Unit 1.

The Regulations stipulate that any alteration to a unit owner's percentage ownership in the common elements must be unanimously approved by the unit owners and an amendment announcing this change to the Declaration must be recorded. This Regulation echoes the Court of Chancery's holding that altering the size of the common elements requires the approval of all homeowners because property rights may not be deprived without a property owner's consent. Bonczek, at 12. The validity of an amendments is contingent upon its submission to the recorder of deeds. 25 Del. C. § 2225; see also Potter v. Haley, Del. Ch., Civ. A. No. 1529, Allen, C. (Dec. 1, 1993), at 10. Although reducing the size of the common elements does not alter a unit owner's actual percentage interest, "in substance it [achieves] that result by reducing the common elements in which all unit owners have an undivided interest." Bonczek, at 10; see also Kaplan v. Boudreaux, 573 N.E.2d 495, 500 (Mass. 1991). Granting a unit owner exclusive use of a portion of common elements changes the relative interest of other unit owners. See Bonczek, at 10; cf. Ridgely Condo. Ass'n, Inc. V. Smyrnioudis, 681 A.2d 494 (Md. 1996) (comparing grants of exclusive use and uniform restrictions). Oral permission from Unit 2's owner was not sufficient to give Nelson the power to appropriate a portion of the common elements for his personal use. Nelson did not gain unanimous approval for his project nor has an amendment to the Declaration evidencing a change in the common elements been recorded.

Contrary to Nelson's contention that the property behind each unit became part of the associated unit when the fences were installed, the property behind each unit remains a common element and has not been partitioned. Russo's father did not have the authority to nullify the deed and partition the these areas. See Strauss v. Oyster River Condominium Trust, 631 N.E.2d 979, 982 (Mass. 1994) (developer cannot retain interest in common areas to effect later partition

unless deed grants this power). The by-law amendments also failed to partition common element property. The context of the relevant by-law provisions is not property ownership, but the allocation of property maintenance. See Strauss, 631 N.E.2d at 982. By-law amendments must be promulgated by a board of directors or homeowners' council with the authority to enact such provisions. See Ridgely Condominium Assoc., 681 A.2d at 499. The Act states: "The common elements shall remain undivided . . . and no action for partition or division of any part of the common elements shall be permitted, except as provided in § 2239[2] of this title." 25 Del.C. § 2205. The council did not have the power to partition the property behind the units by amending the by-laws and could not give Nelson sole ownership of particular portions of the common elements. Thus, the property behind Unit 1 was not partitioned and is not exclusively owned by Nelson. Nelson encroached upon the common elements when he expanded rooms and added a porch and deck to Unit 1.

B. Ejectment

An action in ejectment determines legal title to property. 10 Del. C. § 6701(a); See Tallent v. Meredith, Del. Super., Civ. A. No. 86C-JL3, Lee, J. (June 20, 1988), at 3. Ejectment is within the common law jurisdiction of the Superior Court. Heathergreen Commons Condominium Ass'n v. Paul, 503 A.2d 636 (Del. Ch. 1956). A plaintiff in an ejectment action must be out of possession of the disputed property. Downs v. Carnvale, Del. Super., 84C-DE7, Chandler, J. (Oct. 1, 1987), at 6. The plaintiff must prove his or her title to the disputed property by a preponderance of the evidence. Tallent, at 3-4.

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[2]A statutory exception exists that allows partition under 25 Del.C. § 2239, the section concerning the repair and reconstruction of damaged condominium buildings.

> A legal title to lands may be proved (1) by proving or producing the deed, will, and descents under which said title is claimed, or (2) by proving that the claimant and those under whom he claims had adverse, exclusive and continuous possession of the premises for at least 20 years . . . in which case the law presumes that he has the legal title to the premises.

Doe v. Roe, 80 A. 352, 354 (Del. Super. 1911). An action in ejectment may lie between co-tenants. Knight v. Knight, 89 A. 595 (Del. Ch. 1914). When one co-tenant excludes other co-tenants "from the possession or enjoyment of the whole or any part of the land his conduct amounts to an ouster and an action of ejectment will lie in favor of the excluded tenants." In re Estate of Margery Gedling, Del. Ch., No. 110840, Kiger, M. (Feb. 29, 2000).

Russo, as owner of a one-third undivided interest in the common elements, is Nelson's co-tenant. The very nature of Nelson's addition makes Russo's entry into and use of the disputed property impossible. Russo has proven her title to a one-third undivided interest in the common elements through a deed. Russo's interest has not been erased through by-law amendments or Nelson's possession. As discussed above, none of the actions taken by the unit owners were sufficient to partition the common areas or to grant Nelson exclusive title to the disputed area. The relevant facts are uncontroverted and as a matter of law Russo has legal title to a 33 1/3% undivided interest in the disputed common elements, including the area where Nelson constructed his addition. This Court declares that Russo is entitled to eject Nelson from full possession of the disputed property and regain her undivided one-third interest.

C. Right to a View

A property owner has no right to an unobstructed view unless an easement, covenant or statute provides otherwise. Law v. Lee, Del. Super., C.A. No. 84C-OC-16, Babiarz, J. (June 21,

1988), at 3. This rule is equally applicable to disputes between condominium owners, as this right does not exist without an explicit provision in the condominium's declaration. Posey v. Leavitt, 280 Cal.Rptr. 568 (Cal. Ct. App. 1991). Since no general right to an unobstructed view exists and Russo has not been granted this right through the Declaration or another contract, Russo cannot recover for the alleged loss to her view.

D. Nelson's Counterclaim

Nelson's counterclaim seeks to eject Russo from the Florida room underneath Unit 3. Ejectment, a legal action to determine title to land, is subject to the three year statute of limitations mandated by 10 Del. C. § 8106. The disputed room was constructed by Russo's parents in the early 1980s, approximately 20 years ago. This structure has existed for well over three years, a fact that now bars Nelson from pursuing this claim. Nelson's argument that the room is a continuing trespass and not subject to the three year statute of limitation confuses his own argument. In a continuing trespass action, this Court's jurisdiction traditionally is limited to a grant of temporary relief. Epps v. Park Centre Condominium Council, Del. Super., No. 95C-05-033, Quillen, J. (Aug. 18, 2000), at 8 n.8. Nelson seeks the removal of the Florida room, not a short-term solution. If this is a continuing trespass claim, the proper forum for deciding this dispute would be the Court of Chancery. Id. As a matter of law, Nelson's motion for summary judgment on his action in ejectment must fail and Russo's motion must be granted.

SUMMARY

For the reasons stated herein, Russo's Motion for Summary Judgment is granted in part and denied in part and Nelson's Motion for Summary Judgment is denied. Therefore, upon her action in ejectment, Russo is granted a one-third undivided interest in those portions of Nelson's

home that encroach upon the Complex's common areas. On this issue of Russo's alleged lost view, Russo's motion for summary judgment must fail because she has failed to assert a valid

claim. Nelson is not entitled to summary judgment on his counterclaim for an action in ejectment against Russo as Nelson's claim is barred by the statute of limitations.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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