NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WCI COMMUNITIES, INC., a Florida corporation, Appellant, v. COLIN STAFFORD, Appellee.	)	Case No. 2D07-3724

Opinion filed November 13, 2009.

Appeal from the Circuit Court for Hillsborough County; Claudia R. Isom, Judge.

Thomas J. Roehn and Henry G. Gyden of Carlton Fields, P.A., Tampa, for Appellant.

James C. Washburn and Stacy J. Borisov of Pohl & Short, P.A., Winter Park, for Appellee.

GILNER, MARC B., Associate Judge.

WCI Communities, Inc. (WCI), appeals the trial court's award of a final summary judgment in favor of Colin Stafford. Mr. Stafford sued to rescind a contract to purchase a condominium-townhouse (unit) from WCI and for the refund of his deposit. We reverse and remand for further proceedings.[1]

[1]This case was originally argued in April 2008, but our consideration of this case was delayed by WCI's filing for bankruptcy and the resulting automatic stay of the

In September 2005, Mr. Stafford contracted to buy a $616,790 unit. The unit was located in a phased development called the Westshore Yacht Club. The contract provided that Mr. Stafford would also have to pay certain costs, including homeowners' association fees and assessments. The contract stated, "[A]ll budgets are subject to change at any time and from time to time to reflect actual and projected expenditures." Exhibit "E" of the contract, which listed fees and assessments, stated, "[I]t is very likely that changes will occur and the amounts will increase."

Contemporaneously with the execution of the contract, WCI gave Mr. Stafford certain condominium documents required by Florida law (referred to collectively as a "prospectus"). The prospectus included a 2006 "estimated budget and schedule of homeowner's expense" indicating that the "total assessment to unit owners" would be $10,343.30. This included a "master association general assessment" of $1876.14, a "common expense" or "operating budget" assessment of $5298.16, and an annual "amenities" fee of $3169. The prospectus also included a management agreement between Westshore Yacht Club Townhomes II Condominium Association and WCI Communities Property Management, Inc. (the management company). The agreement provided that the management company would be compensated at $10 per unit per month ($120 per unit per year).

The contract contained the following cancellation statement required by section 718.503(1)(a)(1), Florida Statutes (2005):

> THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN FIFTEEN (15) DAYS

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proceedings. On September 18, 2009, WCI advised this court that discharge had been granted and the stay was dissolved as of August 26, 2009.

> AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER, AND RECEIPT BY BUYER OF ALL OF THE ITEMS REQUIRED TO BE DELIVERED TO HIM BY THE DEVELOPER UNDER SECTION 718.503, FLORIDA STATU[T]ES. THIS AGREEMENT IS ALSO VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF RECEIPT FROM THE DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN FIFTEEN (15) DAYS AFTER THE BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

(Emphasis added.) The contract provided that closing would take place following substantial completion of the unit. Closing had not taken place at the time this lawsuit was filed.

In June 2006, WCI furnished Mr. Stafford with changes to the prospectus. These changes included a reduction of the "total assessment to unit owners" from $10,343.30 to $10,291.84. Some of the assessment components had increased; others had decreased. The net reduction was $51.46. The annual management company fee of $120 per unit was not changed, but a provision was added stating that the management company would either receive the $120 annual fee or a flat fee of $462 per month, "whichever is greater." There was no indication that the $462 monthly flat fee would be per unit. Another change provided that the management company would be paid a one-time fee of $3000 for "start-up costs and preliminary management work." There was no indication that Mr. Stafford or any other purchaser would be responsible for this fee. The management agreement was also changed to provide that, upon

turnover of control of the association to the unit owners, the management company could terminate its agreement upon thirty days' written notice instead of the 180-day notice called for in the original agreement. There was no suggestion of any associated increase in cost. The changes also included an eleven-unit reduction in Westshore Yacht Club.

Mr. Stafford provided written notice to WCI of his intention to cancel his contract pursuant to section 718.503(1)(a)(1). In early September 2006, Mr. Stafford sued WCI. He alleged that the changes to the prospectus were material and adverse to him.

The parties engaged in discovery, highlighted by Mr. Stafford's requests for admission to WCI. Mr. Stafford requested that WCI admit that if he should be the only unit owner, he would be responsible for paying the management company the monthly flat fee of $462 which he calculated to be $5544 per year for each unit. WCI denied this request. Mr. Stafford requested that WCI admit that if he were the only unit owner, he could be required to pay the entire $3000 one-time start up fee for the management company. WCI denied this request, too. Mr. Stafford requested that WCI admit that a new line item of $89.40 annually for accounting services had been added to the "common expenses" budget. WCI admitted this request; this item had contributed to the increase in the "common expenses" component of the "total assessments." Finally, WCI admitted that the changes to the prospectus "may result in increased costs to the Buyer."[2]

[2]Mr. Stafford also requested that WCI admit that it had raised the maximum "settlement services" charges, resulting in a potential increase of "more than $1,500." WCI denied the request. Mr. Stafford reduced this figure to $1465 in his

In January 2007 Mr. Stafford moved for summary judgment, relying on the contract, prospectus and amendments, and WCI's responses to requests for admission. WCI filed no written response to Mr. Stafford's motion and offered no affidavits or other documentary evidence in opposition. At an April 2007 hearing, WCI simply argued that the trial court should continue the hearing because it had not completed discovery. The trial court denied a motion for continuance and later rendered a final summary judgment for Mr. Stafford.

We review a final summary judgment de novo. Deutsch v. Global Fin. Servs., LLC, 976 So. 2d 680, 682 (Fla. 2d DCA 2008). Mr. Stafford is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). Mr. Stafford bears the burden of proving that WCI cannot prevail. If the record raises even the slightest doubt that an issue might exist, summary judgment is precluded. Pasco v. City of Oldsmar, 953 So. 2d 766, 769 (Fla. 2d DCA 2007). We must view the facts and the inferences in the light most favorable to WCI. See Estate of Githens v. Bon Secours-Maria Manor Nursing Care Ctr., Inc., 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006).

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answer brief, but continues to assert that it constitutes a material, adverse change. WCI responds that it had advised Mr. Stafford that the revised estimated settlement charges cannot be unilaterally changed by WCI and are applicable only to future purchasers not currently under contract. We note that the difference between the maximum estimated charges in the contract actually signed by Mr. Stafford and the maximum potential charges under the revised version appears to be $165, not $1465. However, because WCI concedes that the estimated charges contained in the disclosure statement notice actually signed by Mr. Stafford cannot be changed as to him, we conclude that this issue is moot and decline to address it further.

Because WCI offered nothing in opposition to Mr. Stafford's motion, we must define Mr. Stafford's burden in seeking cancellation of the contract and then determine whether he met that burden. Section 718.503(1)(a)(1) provides that he can cancel his contract "within 15 days after the date of receipt from the developer of any amendment which materially alters or modifies the offering in a manner that is adverse to the buyer." Thus, Mr. Stafford had to demonstrate with undisputed facts that WCI materially changed the prospectus and that such changes were adverse to him.[3]

At this point, however, we must recognize that the legislature amended the condominium statute in 2007. Particularly important for our purposes is section 718.504(21)(e):

> Each budget for an association prepared by a developer consistent with this subsection shall be prepared in good faith and shall reflect accurate estimated amounts for the required items in paragraph (c) at the time of the filing of the offering circular with the division, and subsequent increased amounts of any item included in the association's estimated budget that are beyond the control of the developer shall not be considered an amendment that would give rise to rescission rights set forth in s. 718.503(1)(a) or (b), nor shall such increases modify, void, or otherwise affect any guarantee of the developer contained in the offering circular or any purchase contract. It is the intent of this paragraph to clarify existing law.

§ 718.504(21)(e) (emphasis added). Simply put, changes to the budget which may materially and adversely impact the unit buyer, if they are beyond the developer's control, will not give rise to a cancellation right under section 718.503(1)(a)(1). See D&T Props., Inc. v. Marina Grande Assocs., Ltd., 985 So. 2d 43 (Fla. 4th DCA 2008).

[3]The parties do not contest that Mr. Stafford exercised his rescission right in a timely manner.

Moreover, because this statutory change clarifies existing law, it applies to Mr. Stafford's contract. See id. at 47-48.

At first blush, we tend to view the changes made by WCI as relating to matters within its control. We need not resolve that issue, however. Mr. Stafford cannot prevail on summary judgment. On a more basic level, he has not demonstrated the absence of a genuine issue of material fact as to whether the changes were material and adverse to him.

In assessing materiality, our sister district in D&T provided an appropriate guidepost:

> [W]e hold that an objective test is appropriate to decide whether an amendment amounts to a "material" alteration or modification of an offering under section 718.503(1)(a)- would a reasonable buyer under the purchase agreement find the change to be so significant that it would alter the buyer's decision to enter into the contract?

Id. at 49. See also Mastaler v. Hollywood Ocean Group, L.L.C., 10 So. 3d 1114, 1116 (Fla. 4th DCA 2009); In re Paramount Lake Eola, L.P., Litigation, 2009 WL 2525558, at *3 (M.D. Fla. Aug. 17, 2009) (Slip Copy). We conclude that Mr. Stafford has not shown that any of the changes to the prospectus were objectively material. After all, the changes made by WCI resulted in a decrease, albeit minor, in Mr. Stafford's estimated assessment. As for nonmonetary changes, we conclude, based on D&T, that the change in the management company's timing for notice of termination is not material.

It is equally clear that Mr. Stafford has failed to establish in any objective manner that the changes are adverse to him. Again, the net monetary change benefits him. Moreover, Mr. Stafford's speculation about his potential responsibility for the $462 flat fee or the $3000 one-time start up fee should he be the only unit owner is

unsupported by any evidence. To the contrary, WCI denied, in its responses to requests for admission, that this was the case. Further, there was no indication that Mr. Stafford and other unit buyers would be responsible for any of these costs. Finally, Mr. Stafford's argument that the planned reduction in total number of units from 537 to 526 proves that his allocated costs must increase fails because the amended prospectus does not support any cost increase to unit owners resulting from the eleven-unit reduction. Thus, the evidence on which Mr. Stafford relies either fails to support his claims or affirmatively disputes them.

"[T]he burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried." Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966). See also Fla. R. Civ. P. 1.510(c). Because the record does not establish as a matter of law that Mr. Stafford was materially and adversely affected by the amended prospectus, he has not met his burden of proving the absence of a genuine issue of material fact. Accordingly, we reverse the trial court's order granting Mr. Stafford a final summary judgment.

Reversed and remanded for further proceedings.

VILLANTI and LaROSE, JJ., Concur.