Third District Court of Appeal

State of Florida

Opinion filed July 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1634
Lower Tribunal No. 16-2081

Weisser Realty Group, Inc.,
Appellant,

vs.

Porto Vita Property Owners Association, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Haber Law, P.A., and David B. Haber, Jonathan Goldstein, and Brett Silverberg, for appellant.

Phillips, Cantor & Shalek, P.A., and Gary S. Phillips and Jeffrey B. Shalek (Hollywood), for appellee.

Before SALTER, LOGUE, and HENDON, JJ.

HENDON, J.

Weisser Realty Group, Inc. ("Weisser Realty") appeals from a final judgment of foreclosure of Porto Vita Property Owners Association's ("Association") lien for unpaid assessments. We affirm.

In June 2012, Weisser Realty purchased a condominium unit in the Porto Vita North Association ("Tower"). The special warranty deed identifies the property as "Commercial Unit 1" of the Towers of Porto Vita, and provides that the property is subject to the conditions set forth in the Association's 1995 Declaration of Condominium ("Declaration"). The Association operates the master community association subject to the Declaration, and collects all of the maintenance and special assessments for the Association. Pursuant to the Declaration, the owner is obligated to pay periodic and special assessments. The Declaration defines an "assessable unit" as follows:

> (i) Concept of Assessable Units. For purposes hereof, an "Assessable Unit" shall mean (i) each residential condominium unit and commercial unit (i.e., having an **active business-related function**) subject to the condominium declaration . . .

(Emphasis added). When Weisser Realty purchased the unit in June 2012, it entered into an addendum contract with the Association providing that Weisser Realty agreed to pay the maintenance assessments, beginning on the date of closing. The Association invoiced Weisser Realty on the date of closing, but Weisser Realty never paid.

In August 2012, the Association sent its first demand letter to Weisser Realty advising it of its intent to file a claim of lien. The letter was sent to Weisser Realty at Commercial Unit 1's address, because that was the address Weisser Realty provided as its place of business and address for service of process. In March, 2013, the Association sent Weisser Realty a letter advising it of its intent to foreclose should Weisser Realty fail to pay its past due assessments. Weisser Realty did not respond or pay. The Association recorded its lien on March 11, 2013.[1]

Nearly three years later, in January 2016, the Association filed the complaint to foreclose against Weisser Realty. The summons was issued to Weisser Realty at the address of Commercial Unit 1. Weisser Realty filed its answer and affirmative defenses and a request for production. The Association timely responded. In July 2017, the Association moved for summary judgment based on Weisser Realty's failure to pay past due assessments and insufficient affirmative defenses. The trial court set a June 2018 date for the trial. Weisser Realty filed numerous motions to continue.

The Association deposed Weisser Realty's designated corporate representative, Kim Riedy, who is also Weisser Realty's secretary, bookkeeper and

[1] Section 718.116(5)(b), Florida Statutes (2013), states that a claim of lien by a condominium association for unpaid assessments "secures all unpaid assessments that are due and that may accrue after the claim of lien is recorded and through the entry of final judgment."

office manager. As it turned out, Riedy was only informed that day that she would be the one deposed. In her deposition, Riedy admitted that she had not read the materials, and was unfamiliar with the details of the lawsuit. She did testify that she was aware of certain letters requesting unpaid assessments, and the pending foreclosure. She stated in her deposition that the only reason Weisser was not paying the past due assessments was because Michael Weisser, president of Weisser Realty, told her not to write any checks for that debt. She testified that Weisser Realty managed shopping malls and was operating out of Unit 1. Riedy freely admitted in her deposition that she was not qualified to be the corporate representative.

The Association specially set the hearing on its motion for summary judgment, which motion had been pending for more than fifteen months as a result of Weisser Realty's motions for continuance, and repeatedly resetting dates for taking depositions. One week before the scheduled summary judgment hearing, Weisser Realty filed another motion for continuance in order to take an additional deposition. Three days before the scheduled hearing, Weisser Realty filed a motion for leave to amend and motion to compel. Two days before the scheduled hearing, Weisser Realty filed its response in opposition to the Association's motion for summary judgment, and attached an affidavit from Michael Weisser that contradicted the sworn deposition testimony of Weisser Realty's corporate representative.

In the affidavit, Michael Weisser averred that the condominium unit has no active business-related function, and is thus not assessable under the definition in the Declaration. Additionally, Michael Weisser's affidavit stated that the former president of the Association reassured him that he would not have to pay assessments. After hearing arguments, the trial court entered final summary judgment of foreclosure in favor of the Association. Weisser Realty's motion for rehearing was heard, and denied.

Standard of Review

The court's standard of review on grant of a motion for summary judgment is de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c). The burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact. See Moore v. Morris, 475 So. 2d 666 (Fla. 1985). "Before a plaintiff is entitled to a summary judgment of foreclosure, the plaintiff must either factually refute the alleged affirmative defenses or establish that they are legally insufficient to defeat summary judgment." Knight Energy Servs., Inc. v. Amoco Oil Co., 660 So. 2d 786, 788 (Fla. 4th DCA 1995).

Analysis

Record facts reveal that the purchase documents and addendum refer to the unit as "Commercial Unit 1" at the address Weisser Realty gave as its recorded business address and address for service of process. There is no dispute that the invoice for fees and assessments, the notice of intent to file a lien for failure to pay, the claim of lien, and the complaint and summons were sent to the Unit's proper address.

Further, it is disingenuous of Weisser Realty to suggest that the unit is merely an unassessable "storage" room when all of the documents refer to it as "Commercial Unit 1." The record provides that there are three such classified units in the building. The deposition testimony of the Association's building manager explained that each space within the building is classified as residential, commercial, studio, marina, spa/storage/maintenance – with each assessed differently depending on the share. A commercial unit is assessed at one full share. There is no ambiguity in the purchase and addendum documents regarding the assessability of Weisser Realty's commercial unit. As the record indicates, it is not the activity in the unit that defines its assessability, but its classification in the purchase documents.

Michael Weisser asserted in his affidavit in opposition to summary judgment that, before he purchased the unit, he was told by the then-president of the Association that the Association, not the buyer, would pay the assessments. Michael

Weisser relies entirely on this purported assurance from the former Association president and the “if required” language of the Addendum, which provides;

> 6. Buyer agrees to pay maintenance assessments, currently $3,654.40 per quarter **(if required by [Association]),** and adjusted from time to time, to Porto Vita Property Owner’s Association, Inc. (the "Master Association") for maintenance of common areas and any other expenses incident to the operation of the common areas governed by the Master Association from the date of closing forward. Such payments shall begin on the date of Closing.

(Emphasis added). Mr. Israelson, the current president of the Association, testified at his deposition that the “if required” language did not refer to any deal exempting Weisser Realty’s Unit 1 from assessments. Rather, that language had to do with the quarterly payment schedule, which could be adjusted “if required” by the Association. Indeed, Weisser Realty’s affidavit in opposition to summary judgment is not supported by any documentation or testimony. Weisser Realty provides no record evidence, testimonial or otherwise, that Weisser Realty was somehow exempted from having to pay contractual assessments. The contract and addendum language is clear and unambiguous as to Weisser Realty’s obligation to pay, how much was due, and when it was due. The affidavit in opposition to summary judgment is replete with statements that are conclusory, speculative, contains hearsay or would otherwise not be admissible at trial. Moreover, the affidavit specifically contradicts the testimony by Weisser Realty’s designated corporate representative that Weisser Realty did conduct business in the condominium unit.

Weisser Realty argues that summary judgment was improper because there was pending discovery and a motion to amend its affirmative defenses. Despite having had two years since service of the complaint in which to schedule depositions and seek further discovery, it was only a week before the specially set summary judgment hearing that Weisser Realty moved to set the Association's corporate representative's deposition, and three days before the hearing that Weisser Realty filed motions to compel discovery and for leave to amend its affirmative defenses. As the Fifth District recently explained,

> [i]f there is good faith discovery still in progress, the trial court should not grant the moving party's motion for summary judgment. . . . However, if the non-moving party does not act diligently in completing discovery or uses discovery methods to thwart and/or delay the hearing on the motion for summary judgment, the trial court is within its discretion to grant summary judgment even though there is discovery still pending.

Martins v. PNC Bank, N.A., 170 So. 3d 932, 936 - 37 (Fla. 5th DCA 2015). The trial court found no justification in the record for the last minute motions to continue discovery or to add additional affirmative defenses where the facts appeared to be well-established and sufficient to address at summary judgment. The trial court was within its discretion to grant summary judgment, where the filings mere days prior to a noticed summary judgment hearing appeared to be intended to delay the proceedings. Further, the trial court did not abuse its discretion to deny the motion for rehearing or the motion to stay the sale pending appeal.

Finally, Weisser Realty argues that laches precludes summary judgment. The record shows that there was a less than three-year delay between filing the claim of lien and the complaint in foreclosure. Laches was not raised in Weisser Realty's affirmative defenses, motion in opposition to summary judgment, or motion seeking leave to amend its affirmative defenses. To apply the doctrine of laches, the party asserting the defense must show that it had no knowledge that the plaintiff would assert the right on which the suit was based. Gevertz v. Gevertz, 566 So. 2d 541, 543 (Fla. 3d DCA 1990). It is clear from the record on appeal that Weisser Realty was fully aware of its obligation to pay assessments, and that the claim of lien was filed to secure those arrears.

Moreover, in a foreclosure context, delay between the filing of a claim of lien and the foreclosure complaint usually works to the property owner's benefit by allowing continued residence – that does not amount to legal prejudice. See Florance v. Johnson, 366 So. 2d 527, 528 (Fla. 3d DCA 1979) (finding any delay in enforcing the mortgagee's rights acted only to mortagee's benefit in permitting her to remain in the property, thus no showing of a detriment or disadvantage to the defendant occasioned by that delay, which is indispensible to a finding of laches). We conclude that the laches issue is without legal merit.

Following de novo review of the entire record, we find no genuine issues of material fact precluding summary judgment, and we therefore affirm.

Affirmed.