Third District Court of Appeal

State of Florida

Opinion filed June 3, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D17-1393 & 3D17-1494
Lower Tribunal Nos. 16-5957 & 16-13168

Jockey Club III Association, Inc., and
The Jockey Club Condominium Apartments, Inc., and
Jockey Club Condominium Apartments, Unit No. II, Inc.,
Appellants/Cross-Appellees,

vs.

Jockey Club Maintenance Association, Inc., and
Apeiron Miami, LLC,
Appellees/Cross-Appellants.

Appeals from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Blaxberg, Grayson, Kukoff & Forteza, P.A., and I. Barry Blaxberg, Ian J. Kukoff, and Edward A. Proenza; Waldman Barnett, P.L., and Glen H. Waldman, and Jeffrey R. Lam, for appellants/cross-appellees.

Mark Perlman, P.A., and Mark Perlman (Hallandale Beach); Carlton Fields, P.A., and Christopher W. Smart, Joseph H. Lang, Jr., and Scott D. Feather (Tampa), for appellees/cross-appellants.

Before SALTER, LINDSEY, and MILLER, JJ.

PER CURIAM.

These two consolidated appeals and respective cross-appeals concern the maintenance and development of approximately 14 acres of property (the "Club Property") situated within a 22-acre waterfront condominium community known as the Jockey Club. The original developer, Jockey Club, Inc. (the "Developer"), developed the Jockey Club in the 1960s and retained fee simple ownership of the 14-acre Club Property to operate a club, hotel, marina, restaurants, tennis courts, pools, and other amenities. The Developer dedicated the remaining eight acres to the development of three independent residential condominium buildings: Jockey Club Condominium Apartments, Inc. ("Jockey I"); Jockey Club Condominium Apartments, Unit No. II, Inc. ("Jockey II"); and Jockey Club III Association, Inc. ("Jockey III"). Each condominium building owns the land on which it is built, a small footprint around the building, and its parking area.

In 1996, the Developer lost ownership of the Club Property due to foreclosure. Over the years, several entities have owned the Club Property.[1] In 2014, Apeiron Miami, LLC (the "Current Owner"), acquired the property in fee simple. The various underlying disputes arise from the Current Owner's attempt to develop and maintain its property. Although the two consolidated appeals stem from the same Final Order, we discuss each appeal separately because they involve different parties

[1] In 2001, the then-owner of the Club Property filed for bankruptcy. In 2002, the Property was sold to Jupiter Miami Building LLC pursuant to a Final Order Approving Sale of Property and a Trustee's Deed.

and issues. For the reasons more fully explained below, we affirm the appeals and cross-appeals in both cases.

I. Jockey III v. Jockey Club Maintenance Association, 3D17-1393

The issue in this appeal is whether the trial court erred when it directed Appellant/Cross-Appellee Jockey III to pay a maintenance assessment for the month of May 2017 to Appellee/Cross-Appellant Jockey Club Maintenance Association, Inc. (the "Maintenance Association"). Because the temporary injunction order requiring payment of a monthly maintenance assessment remained in effect until further order of the trial court, we affirm.

In 1996, after the Developer lost ownership of the Club Property due to foreclosure, Jockey I, II, and III formed the Maintenance Association to maintain the Club Property themselves. This was made possible by a 1995 Agreement in which the Developer had granted the three associations a license and non-exclusive easement to continue to operate, at their expense, the Club Property in the event the Developer ceased to provide site maintenance and services.

After the Current Owner purchased the Club Property in 2014 and later sought to resume site maintenance, Jockey III withdrew from the Maintenance Association and entered into its own common services agreement with the Current Owner. Since there were now two entities seeking to maintain and operate the Club Property—the Maintenance Association and the Current Owner—Jockey III sought a declaration

below setting forth its rights and obligations with respect to the Maintenance Association.[2]

While the action was pending, the Maintenance Association filed an emergency motion for temporary injunction to compel Jockey III to pay its monthly maintenance assessments. The parties ultimately reached an agreement on payment, and the trial court entered an agreed order on the Maintenance Association's emergency motion for temporary injunction. Subject to further order of the court, the Maintenance Association was to continue maintenance of the Club Property, and Jockey III was ordered to pay the amounts due to the Maintenance Association "on the first day of every month going forward."

The matter proceeded to a non-jury trial, which concluded on March 3, 2017. On May 26, 2017, the trial court entered a detailed Final Order, finding, in relevant part, that the Current Owner could resume maintenance and that the Maintenance Association was no longer authorized to maintain the Club Property. The court ordered Jockey III to pay its monthly obligations through May 2017, after which Jockey III would be released from further obligations to the Maintenance Association.

[2] Jockey III filed this third-party claim against the Maintenance Association in a pending action between Jockey I/II and the Current Owner. Jockey III also requested that the trial court take control of the Maintenance Association and appoint a receiver.

On appeal, Jockey III challenges the trial court's order directing it to pay its May 2017 maintenance obligation because Jockey III contends the evidence at trial established that it withdrew from the Maintenance Association in May 2016. We find no error. Florida Rule of Civil Procedure 1.610(a)(2) provides that a "temporary injunction shall remain in effect until the further order of the court." On May 26, 2017, the trial court issued an order on the merits that, in effect, dissolved the temporary injunction. Until that point, the preliminary injunction remained in effect and the Maintenance Association was to continue to maintain the Club Property, and Jockey III was obligated to pay the Maintenance Association on the first day of the month.[3] See Glenn v. 1050 Corp., 445 So. 2d 625, 626 (Fla. 3d DCA 1984) ("The purpose of a preliminary injunction is to maintain the status quo until final determination on the merits." (citing Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc., 212 So. 2d 365, 366 (Fla. 4th DCA 1968))). We therefore affirm the trial court's order requiring Jockey III to pay its obligation for the month of May 2017.

With respect to the Maintenance Association's cross-appeal, we affirm. The Maintenance Association raises four arguments. First, the Maintenance Association claims the trial court's determination that Jockey III withdrew from the Maintenance

[3] If there had been a change in circumstances pertaining to the continued need for the preliminary injunction prior to the trial court's final determination on the merits, Jockey III could have moved to dissolve the temporary injunction pursuant to Florida Rule of Civil Procedure 1.610(d) ("A party against whom a temporary injunction has been granted may move to dissolve or modify it at any time. If a party moves to dissolve or modify, the motion shall be heard within 5 days after the movant applies for a hearing on the motion.").

Association is not supported by the evidence. We disagree. There is competent substantial evidence in the record that Jockey III withdrew. See Underwater Eng'g Servs., Inc. v. Util. Bd. of City of Key West, 194 So. 3d 437, 444 (Fla. 3d DCA 2016) ("In reviewing a judgment rendered after a bench trial, 'the trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly erroneous.'" (quoting Emaminejad v. Ocwen Loan Servicing, LLC, 156 So. 3d 534, 535 (Fla. 3d DCA 2015))). Deborah Kolsky, one of Jockey III's two members on the Maintenance Association's Board of Directors, testified that she and Jockey III's other Board member resigned in April or May of 2016. Moreover, Carlos Miranda, the Maintenance Association's property manager also testified that Jockey III resigned in May 2016.

The Maintenance Association also contends the trial court erred in finding Jockey III released from its obligations under the Maintenance Association's Articles of Incorporation; however, the Maintenance Association fails to direct us to any provision in the Articles of Incorporation governing resignation of its members. And indeed, the Articles of Incorporation appear to be silent with respect to resignation.

The Maintenance Association's third argument on cross-appeal is that the trial court erred in failing to order payment through rendition of the final judgment. As we have already explained, Florida Rule of Civil Procedure 1.610(a)(2) provides that

a temporary injunction remains in effect until further order of the court. There is simply no requirement that this need be a final, rendered order.

Finally, the Maintenance Association argues that the trial court erred in finding there was no prevailing party. "A determination of attorney's fees rests within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." Payne v. Cudjoe Gardens Prop. Owners Ass'n, Inc., 875 So. 2d 669, 671 (Fla. 3d DCA 2004). We find no abuse of discretion here, and we agree with the trial court that there is no prevailing party because "[b]oth parties have won and lost . . . ."

II. Jockey I and Jockey II v. Apeiron, 3D17-1494

This appeal concerns the extent to which Appellee/Cross-Appellant Apeiron, the Current Owner, is entitled to develop and maintain the 14-acre Club Property.[4] Appellants/Cross-Appellees Jockey I and II's position below and on appeal is that the Current Owner is limited from developing or maintaining its property pursuant to two agreements signed by Jockey Club, Inc., the Developer and original owner of the Club Property: one signed in 1977 and the other in 1995.[5] We discuss each

[4] There were originally two separate actions below: a development action and a maintenance action. The two cases were consolidated for all purposes.

[5] The Final Order addressed the parties' rights with respect to several other agreements, including a 1990 parking easement and several 1995 pool easements. Moreover, the Final Order found that that other "unrecorded agreements, documents, and claims against the Property were . . . expressly extinguished by the 2002 Trustee Deed and corresponding Bankruptcy Order." See supra note 1. None of these agreements are subject to this appeal.

agreement in turn. We conclude by addressing the Current Owner's cross-appeal, which challenges the trial court's ruling on prevailing party attorney's fees.

a. The 1977 Agreement

The Developer and Jockey II entered into the 1977 Agreement during the development of Jockey III. In exchange for Jockey II's promise to support the construction of Jockey III, the Developer agreed it would not "at any time in the future seek additional permission for the construction of additional living units on any of the real property presently embodied within the lands described on Exhibit A . . . ." It is undisputed that the 1977 Agreement was not recorded until 1979, and none of the exhibits referenced in the Agreement were attached to the recorded document, including "Exhibit A," which describes the real property subject to the above-mentioned restriction.

After the Current Owner purchased the Club Property in 2014 and prepared to develop two new residential buildings, Jockey I and II filed the underlying action for declaratory relief and permanent injunction. The original complaint alleged that the 1977 Agreement was a "restrictive covenant running with the land" that prevented the Current Owner from further residential development of the Club Property. The Current Owner sought partial judgment as a matter of law on the basis that the 1977 Agreement was not a restrictive covenant running with the land, and even if it were, it was extinguished by Florida's Marketable Record Title Act ("MRTA").

Instead of directly addressing the Current Owner's arguments, Jockey I and II amended their complaint and removed all allegations that the 1977 Agreement was a restrictive covenant. The amended complaint alleged that the 1977 Agreement was instead a contract between Jockey II and the Developer that bound the Current Owner due to a "successors and assigns" clause.[6] Jockey I and II then moved for entry of an order declaring the Current Owner's motions moot because the amended complaint no longer alleged the 1977 Agreement was a restrictive covenant. Jockey I and II also filed a cross-motion for summary judgment arguing that MRTA was inapplicable because the 1977 Agreement was not a restrictive covenant running with the land or a title transaction.

Based on Jockey I and II's newly alleged position—that the 1977 Agreement was not a restrictive covenant running with the land—the Current Owner renewed its request for partial judgment as a matter of law and argued that since Jockey I and II admitted that the 1977 Agreement was a personal agreement that does not run with the land or restrict the use of real property, the Current Owner could only be bound by the "successors and assigns" clause if it were a corporate successor to the Developer or its express assignee. The Current Owner also filed an unrebutted affidavit of its manager, which established that the Current Owner had not assumed

[6] "This agreement shall be binding upon the successors and assigns of the parties hereto."

or been assigned the 1977 Agreement and that it had never contracted with, merged with, or become an assignee of the Developer.

The trial court granted partial summary judgment in favor of the Current Owner on the basis that the 1977 Agreement was not a restrictive covenant running with the land but a personal contract between the Developer and Jockey II. Cf. Maule Indus., Inc. v. Sheffield Steel Prods., Inc., 105 So. 2d 798, 801 (Fla. 3d DCA 1958) ("A covenant running with the land differs from a merely personal covenant in that the former concerns the property conveyed and the occupation and enjoyment thereof, whereas the latter covenant is collateral or is not immediately concerned with the property granted."). Moreover, because Jockey I was never a party to the 1977 Agreement, the trial court determined that it lacked standing to enforce any of the Agreement's terms.[7] The court also found that "failure to attach Exhibit A at the time of recording the Agreement is fatal to Plaintiff's claim."

Despite taking the position below that the 1977 Agreement was not a restrictive covenant running with the land, Jockey II now argues on appeal that the trial court committed reversible error in granting summary judgment on that basis. We decline to entertain this argument because "[a] party cannot invite certain action by the trial court only to assert on appeal that the trial court's action was erroneous." Yampol v. Schindler Elevator Corp., 186 So. 3d 616, 617 (Fla. 3d DCA 2016) (citing

[7] This determination on standing has not been challenged on appeal.

Gupton v. Village Key & Saw Shop, Inc., 656 So.2d 475 (Fla.1995); Pope v. State, 441 So.2d 1073 (Fla.1983)). Simply put, at the time the trial court granted partial summary judgment in favor of the Current Owner, it was undisputed that the 1977 Agreement was not a restrictive covenant running with the land.[8] Moreover, although Jockey II relied on the 1977 Agreement's "successors and assigns" clause, it failed to explain how the Current Owner, apart from being a successor-in-title, was a successor or assignee of the Developer, and it failed to rebut the Current Owner's affidavit, which established that the Current Owner was not a corporate successor of the Developer or its assignee. We therefore affirm the trial court's entry of partial summary judgment as to the 1977 Agreement.

b. The 1995 Agreement

In 1995, Jockey I, II, and III entered into an Agreement with the Developer, which created a number of covenants, restrictions, easements, and conditions running with the land. At issue here is the portion of the 1995 Agreement having to do with the creation of a non-exclusive maintenance easement (Article XII). As set forth by the relevant language in the Agreement, the Developer granted the three associations

[8] Because it was undisputed that the 1977 Agreement was not a title transaction, we need not address MRTA. As Jockey II conceded below, "[t]here is no bona fide, actual need for a declaration that the 1977 Agreement has been extinguished by MRTA *as the 1977 Agreement was not a title transaction subject to MRTA, but a contract*, and a declaratory relief action to determine whether the 1977 Agreement was extinguished by MRTA would serve no actual judicial purpose." (Emphasis added).

> a license and non-exclusive easement during the term of this Agreement and continuing thereafter to the extent provided in this paragraph to enter upon the Common Area[9] to enable them to continue to operate, at their expense, either jointly or severally, all of the Common Area, and to provide for themselves all of the Common Services relating to the Common Area excluding room and maid service. This license and easement shall apply at any time [the Developer] either announces its intention to close substantially all of its facilities or ceases site maintenance, or failing such announcement, if [the Developer] closes all or substantially all of its facilities or ceases . . . to provide the site maintenance and Common Services relating to the Common Area as required by this Agreement. . . . Nothing in this paragraph shall affect [the Developer]'s ownership rights or its right to encumber sell or lease its properties, as well as its right at any time to reopen or to recommence site maintenance. . . . Upon the expiration of the term of this Agreement or any subsequent renewal thereof the liscense [sic], easement, grant and privileges established by this paragraph shall continue unabated and they shall expressly survive the termination hereof for ninety-nine (99) years.

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[9] The 1995 Agreement defines "Common Areas" as:

> a portion of the real property owned by [the Developer] east of Biscayne Boulevard less that portion thereof presently constituting the North and South Marinas, the proposed fifty (50) room hotel, the Condominium Units which are operated as the existing hotel, certain parking areas, the Villas, the Lear School Property, and the Jockey Club Clubhouse. Subject to the foregoing, the Common Areas shall include all the areas and facilities which currently exist and constitute the Jockey Club Complex and facilities including by way of example, and not by way of limitation, all existing tennis courts, the spa facility, the tennis pro shop its toilets, bath, sauna and locker facilities, the three (3) existing swimming pools, landscape areas, common walkways, etc., together with such other appurtenances and improvements which may be added on the Common Areas from time to time.

In the same paragraph, the Developer was given an option to remove the tennis courts and spa from the non-exclusive maintenance easement "not later than ninety (90) days subsequent" to expiration or termination of the Agreement's ten-year term. A handwritten notation at the end of this sentence, which was subsequently typed as a formal amendment, added that a "parcel of land" specifically referenced elsewhere in the Agreement could likewise be removed "provided that with respect to the elimination of said land, the gatehouse shall have been relocated . . . ."

Shortly after execution of the 1995 Agreement, the Developer lost the Club Property in foreclosure.[10] As previously explained, the three associations formed the Jockey Club Maintenance Association to collect maintenance fees and maintain the "common areas." When the Current Owner attempted to resume maintenance, Jockey I and II sought declaratory relief with respect to their rights under the 1995 Agreement.

Following a five-day bench trial, the trial court entered a detailed Final Order setting forth the parties' rights pursuant to the 1995 Agreement. The court determined that Jockey I and II "ultimately seek to increase the scope and burden of their non-exclusive easements . . . ." Moreover, "[n]othing in the 1995 Agreement precludes Apeiron from developing its property." The court also found that although the non-exclusive maintenance easement vested at the conclusion of the 1995

[10] See supra note 1.

Agreement's ten-year term, it "was, by its own terms, a stop-gap measure that allowed the Associations to maintain the 'Common Areas' at their expense, while the developer was not doing so, and was never intended to elevate the easement holders' rights over those of the owner." Finally, with respect to the tennis courts and spa, the trial court found that "the prior owner of the Property removed the tennis courts and the spa facility from that non-exclusive maintenance easement pursuant to written notice sent in 2005."

Despite these findings, the Final Order concluded that the Current Owner could only resume maintenance subject to Jockey I and II's easement rights and that the Current Owner was prohibited from developing the Common Areas covered by the maintenance easement without the consent and approval of Jockey I and II. Further, although the court found that a prior owner of the Property had provided timely, written notice of its intent to remove the tennis courts and the spa from the maintenance easement, the court determined that the notice was moot because the guardhouse was never removed.

Due to seemingly conflicting interpretations of the 1995 Agreement in the Final Order, the Current Owner filed a motion for rehearing and sought clarification of its right to maintain and develop the Common Areas. The Current Owner also sought clarification of the trial court's determination that the tennis courts and spa were not removed from the non-exclusive easement. In their Response, Jockey I and

II argued that there was no basis for rehearing, but they did not challenge any of the findings of fact or conclusions of law in the Final Order.

The trial court granted rehearing and issued an Amended Final Order. Consistent with the trial court's original findings, the Amended Final Order clarified that the vested, non-exclusive maintenance easement "is limited solely for the periods of time when, and if, the owner ceases site maintenance." Further, "Apeiron has the right to not only develop, but to recommence its site maintenance" and "is not prohibited from developing on the Common Areas encumbered by" the maintenance easement. Finally, the Amended Final Order clarified that the tennis court and spa were removed from the non-exclusive maintenance easement pursuant to timely written notice, and "those portions of Apeiron's Property are no longer subject to the non-exclusive easement."

On appeal, Jockey I and II argue that the trial court committed reversible error in granting the Current Owner's motion for rehearing and subsequently amending the Final Order. "The purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it overlooked or failed to consider . . . and to correct any error if it becomes convinced that it has erred." Francisco v. Victoria Marine Shipping, Inc., 486 So. 2d 1386, 1389 (Fla. 3d DCA 1986) (citing Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981); Elmore v. Palmer First National Bank & Trust Co. of Sarasota, 221 So. 2d 164, 166 (Fla. 2d DCA 1969)). A trial court has "broad discretion to grant rehearing and reconsider its decision in order to

correct any errors." Richmond v. State Title & Guar. Co., Inc., 553 So. 2d 1241, 1242 (Fla. 3d DCA 1989); see also Monarch Cruise Line, Inc. v. Leisure Time Tours, Inc., 456 So. 2d 1278, 1279 (Fla. 3d DCA 1984) ("In reviewing this type of discretionary act of the trial judge, the appellate court should apply the reasonableness test to determine whether the trial court abused its discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." (citations omitted)).

Based on our review of the Final Order and Amended Final Order, we cannot conclude that the trial court abused its discretion. The Amended Final Order simply remedies inconsistencies in the Final Order with respect to the Current Owner's ability to develop and maintain the "Common Areas" pursuant to the 1995 Agreement and the removal of the tennis courts and spa from the non-exclusive easement pursuant to timely written notice.

c. Attorney's Fees

The sole issue raised in the Current Owner's cross-appeal is whether the trial court erred in declining to award prevailing party attorney's fees pursuant to a provision in the 1995 Agreement. As previously explained, the standard of review for an award of attorney's fees is abuse of discretion. See Payne, 875 So. 2d at 671. This matter was heavily contested below, and following a five-day bench trial, the trial court determined that none of the parties prevailed for the purposes of attorney's

fees. The court's proximity to the litigation unquestionably places it in the best position to determine whether there was a prevailing party. On the record before us, we find no abuse of discretion. Although the Current Owner was permitted to develop and maintain its property pursuant to the 1995 Agreement, this was not without limitation. The Amended Final Order contains findings in favor and against both sides. As such, we decline to disturb the trial court's discretionary determination that neither party prevailed.

III. Conclusion

For the reasons stated, we affirm the appeals and cross-appeals in these consolidated cases. In 3D17-1393, we conclude the trial court did not err in ordering Jockey III to pay its maintenance obligation for the month of May 2017 because the agreed temporary injunction remained in effect until further order of the court. We also conclude the trial court did not commit reversible error with respect to any of the issues raised on cross-appeal. In 3D17-1494, we affirm the trial court's entry of partial summary judgment in favor of the Current Owner with respect to the 1977 Agreement. We also affirm the Amended Final Order, which addresses the 1995 Agreement. As to the cross-appeal, we affirm because the trial court did not abuse its discretion in failing to award prevailing party attorney's fees.

Affirmed.