Third District Court of Appeal

State of Florida

Opinion filed March 13, 2024.
Not final until disposition of timely filed motion for rehearing.

No. 3D23-1616
Lower Tribunal No. 23-16774

Angelica Avila, et al.,
Appellants,

vs.

Biscayne 21 Condominium, Inc., etc., et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Armstrong Teasdale LLP, and Glen H. Waldman and Marlon Weiss and Jeffrey R. Lam, for appellants.

Coffey Burlington, P.L., and Susan E. Raffanello; Cole, Scott & Kissane P.A., and Therese A. Savona, for appellees.

Before FERNANDEZ, LOBREE and BOKOR, JJ.

BOKOR, J.

Appellants, unit owners at a condominium located at 2121 North Bayshore Drive in Miami, appeal the trial court's denial of a temporary injunction against the condominium association. The Owners allege that the Association improperly passed a termination plan upon less than a 100% vote, as required by the condominium declaration and the applicable version of the Condominium Act. The Owners further claim that amendments to the declaration lowering the vote threshold for termination were also improper under provisions of the declaration requiring 100% approval for amendments that alter the voting power of unit owners.

For a temporary injunction, a party must show "(1) a substantial likelihood of success on the merits, (2) the unavailability of an adequate remedy at law, (3) irreparable harm absent entry of an injunction, and (4) that the injunction would serve the public interest." Fla. Dep't of Health v. Florigrown, LLC, 317 So. 3d 1101, 1110 (Fla. 2021). To the extent the trial court's decision to grant or deny an injunction is based on factual findings, our review is for abuse of discretion, but we review the court's legal conclusions de novo. Id.; Quirch Foods LLC v. Broce, 314 So. 3d 327, 337 (Fla. 3d DCA 2020).[1]

[1] As the trial court's denial here turned solely on the lack of a substantial likelihood of success, we constrain our analysis to that element. "A substantial likelihood of success on the merits is shown if good reasons for

The declaration of condominium at issue requires a 100% vote threshold for any amendments altering the voting rights of the unit owners:

> [P]roposals, adoptions and approvals [of amendments] must be by not less than fifty-one (51%) percent of the members of the Association, except as to an amendment altering the percentages of ownership in the Common Elements or the voting rights of any of the Owners of the Condominium, any of which shall require the approval of one hundred (100%) percent of the Owners.
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> . . . .
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> No amendment shall change any Condominium Unit nor the share of the Common Elements, Common Expenses or Common Surplus attributable to any unit, nor the voting rights appurtenant to any Unit, unless the record Owner or Owners thereof and all record owners of liens upon such Unit or Units shall join in the execution of such amendments.

The declaration also originally allowed termination of the condominium only upon the "unanimous agreement of the unit owners and all institutional mortgagees."

In July and August 2022, the Association received approval from a majority of its members and adopted amendments to the declaration changing the voting threshold for termination of the condominium to require the agreement of only 80% of the unit owners. The Association then

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anticipating that result are demonstrated. It is not enough that a merely colorable claim is advanced." City of Jacksonville v. Naegele Outdoor Advert. Co., 634 So. 2d 750, 753 (Fla. 1st DCA 1994).

proposed a plan of termination, received such approval, and moved to terminate the condominium. The Owners sued for declaratory and injunctive relief. The trial court denied their motion for temporary injunction, concluding that amendments did not "alter" the voting rights of the unit owners because each owner continued to receive one vote per unit.[2] As explained below, we disagree with the trial court's conclusion.

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[2] As a preliminary issue, the Association also argues that the amendments were permissible under the Condominium Act, section 718.117(3), Florida Statutes (2022), which allows termination of a condominium pursuant to a plan of termination approved by at least 80% of the total voting interests of the condominium, with less than 5% rejecting the plan. The 1974 version of the Condominium Act (the year in which the declaration was adopted) allowed termination upon unanimous vote or "in such other manner as may be prescribed in the declaration." § 711.16(3), Fla. Stat. (1974). The Association contends that the declaration incorporated all future amendments to the Condominium Act passed since its adoption, and thus that the Condominium Act, as amended, controls over any conflicting provisions the declaration. But this argument presents a red herring, misreading the language of the declaration as well as misapplying our decision in Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977).

We agree with the Association that the declaration references the Condominium Act, as amended. But that doesn't answer the pertinent question. In fact, it doesn't answer much of anything as it relates to the issue before us. The issue here is whether, as a matter of law, such generic reference to a statute as amended overrides a specific provision delineating voting rights that contains no such incorporation. Of course not. And Kaufman provides the association no succor. First, the contractual language here merely acknowledges that the declaration gets its authority from the Condominium Act as amended, as opposed to the more muscular language at issue in Kaufman which incorporated, "adopted and included herein by express reference" the Condominium Act as amended from time to time. Id. at 628. Against that backdrop, Kaufman concluded that an amendment to the Act which declared rent escalators as void against public policy should

The change to the termination vote threshold materially altered unit owners' voting rights. By requiring a unanimous vote for termination, the declaration originally gave every unit owner an effective veto over any termination plan, which would be lost if the amendments at issue here were enforced. See Tropicana Condo. Ass'n, Inc. v. Tropical Condo., LLC, 208 So. 3d 755, 759 (Fla. 3d DCA 2016) (finding that non-unanimous amendments to declaration reducing vote threshold for termination of condominium could not be applied where declaration expressly required unanimous vote to amend termination provision and the "amendment, if

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be read into that declaration prospectively. Id. Second, unlike Kaufman, the declaration at issue contains no "express intention of all parties concerned that the provisions of the Condominium Act [as amended] were to become a part of the controlling document . . . whenever they were enacted." Id. The language here is not, as in Kaufman, an incorporation of the Condominium Act as a substantive part of the contract, but rather a mere recital that the building is submitted "to condominium ownership, pursuant to Chapter 711, Florida Statutes, the Condominium Act, as amended . . . *upon the terms, conditions, restrictions, reservations and limitations contained herein*." (emphasis added). Third, unlike the specific issue in Kaufman, where the amendment rendered an existing provision void as against public policy, here, the voting rights scheme in the declaration would still be permitted under the amendment to the Condominium Act. In other words, the new law sets a lower floor on the voting threshold but doesn't prohibit contracting parties from agreeing to a higher threshold. The relevant voting rights provision contains an unambiguous expression of intent. The plain language of the declaration controls. The parties did not contract to having their voting rights limited by a future statutory amendment which simply allowed for a lower voting threshold.

retroactively applied, would eviscerate the Tropical owners' contractually bestowed veto rights").

For the reasons outlined, the Owners have shown a substantial likelihood of success on the merits. We therefore reverse and remand for entry of a temporary injunction.

Reversed and remanded.