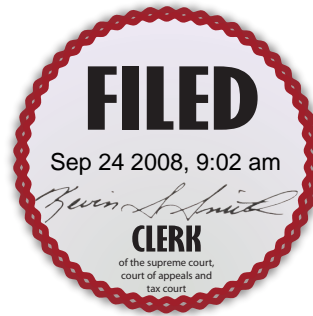


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KFT REALTY, LLC)
)
Appellant-Defendant,)
)
vs.) No. 32A01-0802-CV-60
)
PRESTWICK COMMUNITY)
SERVICES)
)
Appellee-Plaintiff.)

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0611-SC-1690

September 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The Prestwick Planned Unit Development (Prestwick P.U.D.) consists of several separate residential subdivisions and a golf course in Hendricks County, Indiana. The appellees, Prestwick Community Services Association, Inc. (Prestwick CSA) is a corporation formed in 1975 for the purpose of managing and maintaining real estate and other assets in the Prestwick P.U.D. Prestwick CSA filed seventeen notices of claim in Hendricks Superior Court No. 2, Small Claims Division, against KFT Realty, Inc. (KFT). Each claim involved a separate lot owned by KFT in the residential subdivision Prestwick Villas and sought payment from KFT for Prestwick CSA regular and special assessments for the years 2005 and 2006. Those seventeen separate claims were consolidated into a single hearing and a single case-in-chief, as the claim relating to each lot was based upon the same theory. Following the hearing, the trial court found in favor of Prestwick CSA as to each separate claim. KFT appeals those decisions, which have been consolidated into a single appeal. KFT presents the following consolidated, restated issue: Did the trial court err in concluding that KFT's properties are subject to the assessments set out in Prestwick CSA's Declaration?

We affirm.

The facts are that Prestwick CSA was formed on February 5, 1975, by a Declaration recorded in the Hendricks County Recorder's Office, for the purpose of managing and maintaining real estate and other assets in the Prestwick P.U.D. In 1993, Forefront, Inc. began the process of gaining approval from the Hendricks County Plan Commission and the Hendricks County Commissioners to develop what was to be called Prestwick Villas, a residential real estate subdivision that would be a part of the Prestwick P.U.D. A preliminary plat of the proposed subdivision was submitted to Hendricks County. That plat indicated that

a homeowner's association would be created later, and did not mention Prestwick CSA or the Declaration. During negotiations between Hendricks County officials and Forefront, Hendricks County asked Forefront to either form its own homeowner's association or join Prestwick CSA in order to resolve maintenance responsibilities for the common areas, drainage, and streets in the subdivision. A Final Plat of Prestwick Villas (Final Plat) was recorded on December 13, 1995. The Final Plat divided the subject real estate into seventeen lots and included areas set aside for roads, drainage, and utilities. The Final Plat provided:

The Prestwick Community Services Association shall be responsible for the maintenance of the Common Area designated hereon, as well as the storm water drainage facilities within the property and the pavement and sidewalks within the designated "Access Easement."

Appellant's Appendix at 63. In 1999, Prestwick CSA established common area and road maintenance reserve funds for the benefit of Prestwick Villas. In 2000, Jay Speckman, an owner of Forefront, was elected to Prestwick CSA's Board of Directors as a representative of Prestwick Villas.

On October 14, 2003, KFT purchased lots 1-17 in Prestwick Villas via a bankruptcy sale. KFT thereafter failed to pay 2005 and 2006 assessments billed by Prestwick CSA for the cost of its services. Those assessments were based upon a per-unit fee for the seventeen lots that comprised the Prestwick Villas subdivision. When KFT failed to pay the assessments, Prestwick CSA filed a Notice of Claim for unpaid assessments relative to each of the units – for a total of seventeen notices – in the Hendricks County Superior Court, Small Claims Division. Each notice sought damages in the amount of \$725.21, plus interest, costs, and attorney fees. The parties stipulated that the issues as to each of the seventeen cases were identical and the evidence was presented as if the seventeen causes were a single

cause. Following a hearing conducted on July 2 and October 11, 2007, the trial court entered judgment in favor of Prestwick CSA and against KFT in the amount of \$1367.67 per unit, for a total of \$23,250.39 for the 2005 and 2006 assessments. KFT appeals that judgment. Further facts will be provided where relevant.

We note at the outset that the parties disagree as to the appropriate standard of review. Prestwick CSA contends we should apply a “clearly erroneous” standard, while KFT contends we should conduct a de novo review. Our Supreme Court set out the standard for reviewing small claims court decisions, as follows:

Judgments in small claims actions are “subject to review as prescribed by relevant Indiana rules and statutes.” Ind. Small Claims Rule 11(A). Under Indiana Trial Rule 52(A), the clearly erroneous standard applies to appellate review of facts determined in a bench trial with due regard given to the opportunity of the trial court to assess witness credibility. This “deferential standard of review is particularly important in small claims actions, where trials are ‘informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.’” *City of Dunkirk Water & Sewage Dep’t v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995) (quoting S.C.R. 8(A)). But this deferential standard does not apply to the substantive rules of law, which are reviewed de novo just as they are in appeals from a court of general jurisdiction. Similarly, where a small claims case turns solely on documentary evidence, we review de novo, just as we review summary judgment rulings and other “paper records.”

Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1067-68 (Ind. 2006) (some internal citation to authority omitted). Pursuant to this standard, the question whether this case should be reviewed for clear error or de novo turns on whether the decision was based upon something other than documentary evidence. If it was based only upon documentary evidence, as KFT contends, then we conduct a de novo review. If on the other hand, the court considered something other than documentary evidence, as Prestwick CSA contends, we review for clear error. We conclude that the result is the same regardless of which standard is applied.

In a nutshell, this case can be reduced to a single question: was Prestwick Villas included within the Prestwick CSA regime? Prestwick CSA contends it was, based upon the following argument: The Prestwick P.U.D. is comprised in part of residential subdivisions. In 1975, pursuant to the Declaration creating it, Prestwick CSA was created for the purpose of managing and maintaining real estate and other assets in the Prestwick P.U.D. The Declaration contains covenants that permit Prestwick CSA to levy regular maintenance assessments to fund its operations. The property that eventually became Prestwick Villas was included in the original plat but was designated for commercial use and therefore was not initially covered by the Declaration. The Declaration did, however, provide for annexing real estate into the Prestwick CSA regime, as follows:

Section 2. Additions. So long as there are Class B members of the Association, additional property may be annexed to the above-described property without the assent of the Class A members of the Association, if any; provided, however, that both the Federal Housing Administration and the Veterans Administration determine that such annexation is in accord with the general plan previously approved by them, if any. Thereafter, such additional property may be annexed only with the consent of two-thirds (2/3) of the Class A members of the Association. Any additional property so annexed, however, must be adjacent to or in the immediate vicinity of the above-described property. The scheme of the within Covenants and Restriction shall not, however, be extended to include any such additional property unless and until the same is annexed to the real property described on "EXHIBIT A", as hereinafter provided.

Any annexations made pursuant to this Article; or otherwise shall be made by recording a Supplementary Declaration of Covenants and Restrictions among the Land Records for Hendricks County, Indiana, which Supplementary Declaration shall extend the scheme of the within Covenants and Restrictions to such annexed property. Such Supplementary Declaration may contain such complementary additions and modifications to the covenants and restrictions set forth in the within Declaration as may be necessary to reflect the different character or use, if any, of such annexed property.

Appellant's Appendix at 45. The foregoing purports to establish certain criteria for annexing property into the Prestwick CSA regime, including the following: (1) To be eligible for annexation, the land must be “must be adjacent to or in the immediate vicinity of” the original Prestwick P.U.D, *id.*; (2) if there are class B members, no assent is required from class A members for annexation to occur; (3) in the absence of class B members,¹ annexation requires the assent of two-thirds of the class A members; and (4) such annexation shall be completed “by recording a Supplementary Declaration of Covenants and Restrictions among the Land Records for Hendricks County”. *Id.*

Clearly, Forefront did not comply with the requirement of a two-thirds vote of class A members, as no such vote was sought or taken. Despite this alleged procedural shortcoming, Prestwick CSA contends that Forefront accomplished the task of annexing Prestwick Villas. According to Prestwick CSA, it did this by complying with Hendricks County’s directive to either form its own homeowner’s association or join Prestwick CSA, choosing the latter. Prestwick CSA contends that the writing requirement set out in the Declaration was met by virtue of the filing of Prestwick Villa’s Final Plat. To review, the Final Plat provided “[t]he Prestwick Community Services Association shall be responsible for maintenance of the Common Areas designated hereon[.]” *Id.* at 63. That plat was approved and recorded. Approximately four years later, Prestwick CSA established funds for maintaining Prestwick Villa’s property. One year after that, Jay Speckman, an owner of Prestwick Villas, was elected to Prestwick CSA’s Board of Directors as a representative of Prestwick Villas.

¹ Pursuant to the Declarations, class B membership in the association “shall lapse” upon the happening of any one of certain, named conditions. One of those conditions was “on January 1, 1990[.]” *Appellant's Appendix* at 52.

KFT counters that Prestwick CSA did not prove it had complied with the requirements set out in the 1975 Declaration concerning annexation of new properties. Thus, the argument goes, the obligation to pay Prestwick CSA's assessment could not arise by virtue of addition to the Prestwick CSA. In the alternative, KFT contends that even assuming Prestwick Villas was properly added, the assessment was not valid. According to KFT,

[T]he recorded plat which includes the KFT properties did not incorporate by reference the 1975 Declaration, but rather only included a blank reference without any specific recorded document number, to "additional covenants and restrictions" which is not sufficient to give Prestwick CSA the right to impose and collect assessments on the KFT properties. Additionally, there was no reference to the Prestwick CSA Declaration in KFT Realty's chain of title for the subject properties.

Appellant's Brief at 5.

In *Kuchler v. Mark II Homeowners Ass'n*, 412 N.E.2d 298 (Ind. Ct. App. 1980), this court addressed a question similar to the one before us here. There, the appellants were homeowners in a subdivision that was divided into three sections, each of which was ostensibly subject to the same restrictive covenants. We say "ostensibly" because the question whether the lots in the section in question were subject to the restriction was the focus of the lawsuit. Each of the three sections in the subdivision presented a different scenario with respect to that restriction, which was an obligation to maintain common area through mandatory assessments that could be collected through liens on the various lots. That restriction was not included on the final plat for Section I, which was recorded on June 6, 1973. It was added on April 25, 1974 via a document entitled "Declaration of Covenants and Restrictions" (Recorded Declarations), which was recorded by the developer on April 25, 1974, after eleven lots had been sold in Section I. *Id.* at 299. On April 25, 1974, the final

plat for Section II was recorded and it referred to the Recorded Declarations as a further restriction on the property therein. On May 2, 1975, the final plat for Section III was recorded and it did not mention the Recorded Declaration or otherwise refer to the obligation to pay an assessment in order to maintain the common ground. Several lot owners formed a homeowner's association in 1978, after which a complaint for declaratory judgment was filed challenging the Recorded Declaration as a burden on the homeowners' lots. The trial court determined that Section II owners were burdened by the covenants contained in the Recorded Declarations but Section III owners were not.²

Upon appeal, we affirmed the trial court's decision as to both Section II and Section III. Particularly relevant to the instant case, we determined that Section II owners were burdened by the Recorded Declarations even though those covenants were not mentioned in the deeds conveying their individual lots. Quoting *Wischmeyer v. Finch*, 231 Ind. 282, 288, 107 N.E.2d 661, 664 (1952), we observed, "There are two methods of creating restrictions upon the use of property. One is by express covenants contained in the deed, and the other is by a recorded plat of the subdivision and a purchaser buys lots with reference to the plat." *Kuchler v. Mark II Homeowners Assoc.*, 412 N.E.2d at 300. Thus, we held that where a recorded plat in which a lot is located contains restrictions on land, all lots therein are burdened by the restrictions on that basis.

Pursuant to *Kuchler*, any restrictions contained in the Final Plat for the Prestwick Villas burdened all lots therein, regardless of whether said restrictions were included in the deed or deeds conveying that property or those individual lots. Even accepting this as true,

² The trial court's determination with respect to Section I owners was not appealed and therefore not

KFT contends the trial court erred because the obligation to pay Prestwick CSA's assessment was not set forth in the Final Plat. In resolving this question, we must examine the Final Plat in detail. In so doing, we are mindful that the essence of KFT's argument in this regard is that the Final Plat did not *explicitly state* that Prestwick Villas property owners were obligated to pay for Prestwick CSA's services.

We begin by noting that the title affixed to the Final Plat document was "FINAL PLAT, PRESTWICK VILLAS, PRESTWICK PLANNED UNIT DEVELOPMENT". *Appellant's Appendix* at 63. We note also that the attestation paragraph of the surveyor who provided the perimeter description of the Prestwick Villas property described the subject property as "Prestwick Villas, a subdivision of the Prestwick Planned Unit Development[.]" *Id.* The map itself included shaded areas that were identified by the map key as common areas and access easements. With respect to the common areas, the key indicated, "Maintenance by Prestwick Community Services Assn." *Id.* With respect to the access easements, the key provided, "For public and utility company use. Maintenance of pavement drainage facilities within site and sidewalks by Prestwick Community Services Association." *Id.* The "Dedication" section of the Final Plat provided, "The within plot shall be known and designated as Prestwick Villas, a subdivision of the Prestwick Planned Unit Development[.]" *Id.* Further down in the dedications was the provision set out previously in this opinion, viz., "The Prestwick Community Services Association shall be responsible for maintenance of the Common Areas designated hereon, as well as the storm water drainage

facilities within the property and the pavement and sidewalks within the designated ‘Access Easement’.” *Id.*

The foregoing unambiguously conveys that Prestwick Villas is a subdivision of the Prestwick P.U.D. – or at least that Hendricks County and Forefront considered it such when the Final Plat for Prestwick Villas was approved. Prestwick CSA’s later actions indicate that it considered Prestwick Villas to be part of Prestwick CSA as well. The Final Plat also conveys that Prestwick CSA would service Prestwick Villas. KFT, however, contends that Forefront did not follow the procedures set out in the 1975 Declarations for annexing property into Prestwick CSA, and therefore that Prestwick Villas is not a part of Prestwick CSA. In short, KFT contends Forefront’s attempt at annexation was procedurally deficient and thus ineffective. We disagree.

Forefront commenced its efforts to annex Prestwick Villas into the Prestwick P.U.D. as a residential subdivision by at least early 1993. Before that, the parcel ultimately platted as Prestwick Villas was a part of the Prestwick P.U.D., but was designated for commercial use. Thus, an initial step in the process required Forefront to gain approval by the Hendricks County Plan Commission for an amendment of the overall Prestwick P.U.D. master plan converting the parcel from commercial to private residential use. Among other things, the Plan Commission requested a letter from Prestwick CSA stating that it did not object to the conversion of that parcel from commercial to residential use. During this phase of the process, Forefront apparently pursued approval by the Prestwick CSA, but left open the option of forming a homeowner’s association that would maintain the common property in the proposed subdivision. As of December 16, 1993, that issue had not been resolved, as

reflected in a proposed final plat submitted by Forefront for Prestwick CSA. That plat called for the formation of a homeowner's association, which would be responsible for maintaining the common areas. Further negotiations ensued, however, and Forefront submitted another proposed final plat for Prestwick CSA, which was approved on December 13, 1995. That plat called for Prestwick CSA to maintain the common areas of Prestwick Villas. As indicated previously, it unambiguously referred to Prestwick Villas as "a subdivision of the Prestwick Planned Unit Development" in at least three places on its face. *Volume of Exhibits*, Plaintiff's Exhibit J. We conclude from this that by the time KFT purchased Prestwick Villas in 2003 at the bankruptcy sale, the annexation was a *fait accompli*. By that time, Prestwick CSA had provided services to Prestwick Villas for several years and Forefront, owners of Prestwick Villas, had paid Prestwick CSA's assessments. An owner of Prestwick Villas had even served as a member of Prestwick CSA's Board of Directors as a representative of Prestwick Villas. Moreover, regardless of any technical deficiencies in Prestwick Villa's Final Plat, including the complained-of failure to incorporate by direct reference the 1975 Declaration of the Prestwick CSA, the information provided on the Final Plat was sufficient to put KFT on notice of the obligation to pay Prestwick CSA's assessments. *See Kuchler v. Mark II Homeowners Assoc.*, 412 N.E.2d 298; *cf. Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n*, 819 N.E.2d 55, 65 (Ind. 2004) (subsequent purchaser, who had knowledge that the property was part of a PUD, was "charged with knowledge that 'conditions' had been *or could have been* imposed and might not be of record," failed to examine the publicly available records and therefore was subject to the Prestwick P.U.D. restrictions) (emphasis supplied).

In summary, Prestwick Villas was successfully annexed into the Prestwick CSA pursuant to the 1995 Final Plat approved by the Hendricks County Plan Commission and recorded in the Hendricks County Records Office. When KFT purchased Prestwick Villas in 2003, it did so subject to the restrictions and obligations for which the Final Plat put it fairly on notice. Such included the obligation to pay assessments to Prestwick CSA for managing and maintaining the common areas of its property. The trial court did not err in so holding.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur