

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**OPINION OF JULY 12, 2019, WITHDRAWN**

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000091-MR

EDWARD C. KLEMAN; AND  
CYNTHIA J. KLEMAN

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 13-CI-00640

LAKE CUMBERLAND RESORT  
COMMUNITY ASSOCIATION, INC.;  
AMERICA'S WHOLESALE LENDER;  
NATIONSTAR MORTGAGE, LLC;  
SALENE FINANCE, LP; AND  
MGTLQ INVESTORS, LP

APPELLEES

AND

NO. 2018-CA-000100-MR

C.J. KLEMAN, LLC

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 13-CI-00643

LAKE CUMBERLAND RESORT  
COMMUNITY ASSOCIATION, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, NICKELL, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: Edward and Cynthia Kleman (collectively, “the Klemans”) and C.J. Kleman, LLC (“the LLC”) appeal from judgments of the Pulaski Circuit Court following bench trials. The court awarded judgments in favor of the Lake Cumberland Resort Community Association, Inc. (“the LCRCA”) for residential association assessments on property owned by the Klemans and the LLC. The Klemans and the LLC primarily argue that the trial court erred in finding that they were estopped from challenging the LCRCA’s authority to collect those assessments. In addition, they argue that the LCRCA failed to prove the amounts owed and that the trial court abused its discretion by accepting the LCRCA’s proof as to the amounts owed. We conclude that the trial court’s factual findings regarding estoppel and damages were supported by substantial evidence and that its evidentiary rulings did not amount to an abuse of discretion.

The LLC separately argues that the trial court lacked subject-matter jurisdiction over the LCRCA’s claims against it and that the court abused its

discretion by conducting a joint trial in this matter. We find that the court properly exercised subject-matter jurisdiction over a matter relating to enforcement of a lien against real property. We also find that there were common issues of law and fact which warranted a joint trial. Hence, we affirm the judgments.

### **I. Facts and Procedural History**

Except as noted, the relevant facts of this action are not in dispute. The LCRCA was organized as a Kentucky non-profit corporation on October 12, 1995. Lake Cumberland North Community Association, Inc. (North) was organized as a Kentucky non-profit corporation on September 24, 1996. Both corporations were tasked with the management and maintenance of the common areas in their respective residential communities near Lake Cumberland. On July 1, 2007, Articles of Merger were filed purporting to merge North and other Lake Cumberland Association groups into the LCRCA. There is considerable dispute over the validity of that merger. However, the parties agree that North has not conducted any independent business since the merger.

The Klemans are the owners of a developed lot within the current boundaries of the LCRCA. The LLC is the owner of an adjoining, undeveloped lot. Cynthia Jo Kleman was the sole member of the LLC, which was administratively dissolved in 2014. At the time of purchase, both lots were subject

to North's association requirements. Those requirements included annual assessments, which were subject to enforcement as liens against the property.

The Klemans and the LLC paid all required assessments on both lots from 2007 through 2011 and made partial payments in 2012. They stopped paying their required dues to the LCRCA in 2012, taking the position that the North's Board of Directors lacked the authority to effect the merger without consent of its members. The Klemans also argued that the lots had been consolidated and were not subject to separate assessments.

In 2013, LCRCA brought this action for payment of the dues and enforcement of the liens securing those dues.<sup>1</sup> The matter proceeded to separate bench trials in 2017. The contested issues concerned the validity of the merger of North into LCRCA and the payment, assessment and calculation of the amounts due to LCRCA. With respect to the first issue, the trial court found that North's bylaws required notice and a 2/3 vote of its members to approve a merger. In the

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<sup>1</sup> In the action below, the LCRCA named America's Wholesale Lender (AWL) as the mortgage holder of the Klemans' property. Nationstar Mortgage, LLC filed a motion to substitute as the assignee of AWL and filed a foreclosure cross-claim to recover the funds advanced to cover the LCRCA's assessment lien. The Klemans counterclaimed, asserting that Nationstar failed to investigate the validity of the LCRCA's lien. The trial court granted summary judgment to Nationstar, concluding that it had no obligation to investigate the LCRCA's lien and that the Klemans were obligated Nationstar for any funds advanced on their behalf. Thereafter, MGTLQ Investors, LP was substituted as a successor-in-interest to Nationstar's mortgage. Although the Klemans do not appeal from this judgment, MGTLQ Investors remains a nominal party to this appeal.

absence of notice and a vote, the court concluded that the action by North's Board of Directors approving the merger was invalid.

Nevertheless, the trial court found that the Klemans were estopped from challenging the validity of the merger through their acceptance of the privileges and rights of membership in the LCRCA. The court first noted that the Klemans paid their common assessment dues without objection from 2007 through 2011. Second, Edward Kleman served as a member of the LCRCA Board of Directors for several years during this period. And third, the LLC contracted to provide landscaping and snow removal services to the LCRCA, including the common areas where their lots were situated. The court noted that the Klemans' refusal to pay dues coincided with the LCRCA's cancellation of that contract. Based on their prior acquiescence to the merger, the court concluded that the Klemans were estopped from challenging the merger. Consequently, the court found that the Klemans' properties were subject to the LCRCA's assessments. The trial court went on to find that the LCRCA had properly calculated the assessments and that the Klemans and the LLC were liable for those assessments and attorney fees associated with collection. The Klemans and the LLC each filed notices of appeal from the judgment. Additional facts will be set forth below as necessary.

## II. Jurisdictional Issue.

As an initial matter, the LLC argues that the trial court lacked subject-matter jurisdiction to enter a judgment because LCRCA's claim against it did not meet the minimum jurisdictional amount of the court. We disagree. The circuit court has original jurisdiction of all justiciable causes not exclusively vested in some other court. KRS<sup>2</sup> 23A.010(1). The district court, on the other hand, has exclusive jurisdiction in civil cases in which the amount in controversy does not exceed \$5,000, exclusive of interest and costs, "except matters affecting title to real estate and matters of equity[.]" KRS 24A.120(1).

It is well-established that the circuit court has exclusive jurisdiction over enforcement of lien and foreclosure actions. Although the LCRCA's claim against the LLC did not exceed \$5,000 at the time it filed the complaint, its claims for enforcement of the lien, foreclosure and other equitable relief brought the action within the circuit court's subject-matter jurisdiction. *See Cubar v. Town & Country Bank & Tr. Co.*, 473 S.W.3d 91, 93 (Ky. App. 2015). Furthermore, since the LLC has been administratively dissolved, it is no longer subject to any individual liability for the assessments. Consequently, LCRCA's claims are only enforceable against the encumbered property.

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<sup>2</sup> Kentucky Revised Statutes.

### **III. Consolidation of Actions**

In a related matter, the LLC next argues that the trial court erred by consolidating the LCRCA's complaints into a single action. There is no indication in the record that any party objected to the consolidation of the actions below. Thus, the LLC's objection to the joint trial is not preserved for review. In any event, CR<sup>3</sup> 42.01 permits consolidation for a joint hearing or trial in actions involving common questions of law or fact. LCRCA's separate claims against the Klemans and the LLC clearly presented such common issues of fact and law. Furthermore, the trial court conducted separate trials in the claims against the Klemans' property and the LLC's property. Consequently, the trial court did not abuse its discretion by consolidating the actions. *See Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 359 (Ky. App. 2007).

### **IV. Estoppel**

In both appeals, the Klemans and the LLC primarily argue that the trial court erred in finding that they were estopped from challenging the validity of the merger. The trial court noted that a party may be estopped from denying the existence of a corporate entity through his prior practice of contracting with or dealing with an association as a corporation. *McGuire v. Bastian Blessing Co.*, 275

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<sup>3</sup> Kentucky Rules of Civil Procedure.

Ky. 622, 122 S.W.2d 513, 515 (1938). The Klemans and the LLC contend that their conduct in this case did not amount to a recognition of the merger of North into LCRCA.

Estoppel is a question of fact to be determined by the circumstances of each case. *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban Cty. Gov't*, 265 S.W.3d 190, 194-95 (Ky. 2008). The party asserting estoppel has the burden of proving it by clear and convincing evidence. *Byerly Motors, Inc. v. Phillips Petroleum Co.*, 346 S.W.2d 762, 765 (Ky. 1961). As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. CR 52.01. It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). We review the trial court's conclusions of law *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

Absent some evidence that the Klemans or the LLC were aware of the defects in the process of merging North into the LCRCA, their mere payment of assessments from 2007 to 2011 would not be sufficient to warrant an estoppel. But as the trial court found, their post-merger relationship with the LCRCA was much more extensive. Edward Kleman served on the LCRCA Board at some point during this period. Likewise, the LLC contracted to provide services to the



LCRCA, including the area where its lot was located. Consequently, their active participation in the merged association constitutes an acknowledgement of its authority over the lots.

As was the case in *McGuire*, the Klemans and the LLC accepted the benefits of membership in the LCRCA. Indeed, their close association with the LCRCA indicates that they had the opportunity to inquire into the validity of the merger. Furthermore, the Klemans and the LLC conceded that the LCRCA continued to provide all services and amenities that North had been required to provide. Their actions in dealing with and contracting with the LCRCA constituted an implicit recognition of the merger of North into LCRCA.

The Klemans separately argue that the LCRCA has unclean hands and should not be permitted to benefit from the doctrine. The unclean hands doctrine is a rule of equity that forecloses relief to a party who has engaged in fraudulent, illegal, or unconscionable conduct but does not operate so as to “repel all sinners from courts of equity.” *Duncombe v. Amfot Oil Co.*, 201 Ky. 290, 256 S.W. 427, 429 (1923). “The transaction with respect to which there was misconduct must be connected with the matter in litigation in order for the doctrine of unclean hands to apply.” *Eline Realty Co. v. Foeman*, 252 S.W.2d 15, 19 (Ky. 1952). *See also Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. App. 2007).

The Klemans generally allege fraud by the developer in approving the merger of the separate associations into the LCRCA. However, they did not present any evidence of such fraud at trial. Under the circumstances the trial court did not clearly err in finding that the Klemans and the LLC were estopped from denying the LCRCA's authority as a successor to North.

#### **V. Amendment of Pleadings to Conform to Proof**

In a related matter, the Klemans and the LLC also argue that the trial court erred by amending the LCRCA's pleadings to allow LCRCA to assert the estoppel claim. We disagree. A trial court has broad discretion to grant leave to amend the pleadings to conform to the evidence presented at trial. CR 15.02. Where an issue has been tried by express or implied consent, the trial court's discretion to allow amendment will not be reversed except on a showing of clear abuse. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 145 (Ky. 1991). As the trial court noted, the issue of estoppel was squarely addressed at trial. Other than a general argument, the Klemans and the LLC make no showing of actual prejudice caused by the amendment of the pleadings to incorporate the estoppel issue. Therefore, we cannot find that the trial court abused its discretion in this regard.

## VI. Sufficiency of Proof of Damages

Lastly, the Klemans and the LLC argue that they were entitled to directed verdicts because the LCRCA failed to prove the amounts owed. The Klemans further argue that the trial court erred by allowing LCRCA to submit documentary evidence of unpaid dues and assessments after trial. Under the circumstances presented in this case, we find no error or abuse of discretion.

Prior to trial, the court excluded LCRCA's records concerning the amounts owed because it failed to comply with the court's discovery deadline. However, Steve Halpin, the treasurer of the LCRCA, testified that the Klemans were in arrears in the payment of their association fees plus interest and late fees in the amount of \$12,333.13. Halpin separately testified that the LLC owed \$5,249.63. The trial court found these amounts to be credible. The court further noted that additional amounts and interest had accrued since the trial. Consequently, the court directed the LCRCA to present supplemental evidence of any additional amounts owed.

A trial court has broad discretion to enforce its pretrial discovery orders. *See Berrier v. Bizer*, 57 S.W.3d 271, 278 (Ky. 2001). A trial court also has broad discretion in ruling on the admissibility of evidence, and our standard of review is limited to whether the trial court abused its discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). Here, the court

excluded the documentation due to the LCRCA's failure to comply with the discovery order. But it allowed Halpin to use the documentation to refresh his memory concerning the amounts owed. KRE<sup>4</sup> 612.

The Klemans and the LLC do not identify where in the record they objected to Halpin's testimony on this matter or his use of the documentation to refresh his memory or how these issues were preserved for appeal. CR 76.12(4)(c)(v). Furthermore, the Klemans do not dispute that Halpin was qualified to testify concerning the LCRCA's assessments. In addition, he was subject to cross-examination on these matters. Although the Klemans and the LLC challenged the LCRCA's method of calculating assessments before the trial court, they do not raise this issue on appeal. Finally, the trial court noted that Halpin testified that interest on the amounts due continued to accrue. Since the trial court found that these amounts were owed, we conclude that it did not abuse its discretion by allowing the LCRCA to supplement its proof on that matter.

Lastly, the Klemans and the LLC suggest that they were entitled to an offset for the amounts paid by the mortgage holder to satisfy the liens. However, they do not identify where in the record they sought such relief or how this issue is preserved for appeal. Therefore, we decline to address the issue further.

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<sup>4</sup> Kentucky Rules of Evidence.

## **VII. Conclusion**

Accordingly, we affirm the judgments of the Pulaski Circuit Court.

ALL CONCUR.

### **BRIEFS FOR APPELLANTS**

Edward C. Kleman and Cynthia J. Kleman; and C.J. Kleman, LLC:

Tommie L. Weatherly  
London, Kentucky

### **BRIEFS FOR APPELLEE**

Lake Cumberland Resort Community Association, Inc.:

Joseph F. Grimme  
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**BRIEF FOR APPELLEE MGTLQ  
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Brian Robert Pollock  
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