

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1317

JK
JCW

OAK HARBOR PROPERTY OWNERS' ASSOCIATION, INC.

VERSUS

THE MILLENNIUM GROUP I, L.L.C.

Judgment Rendered: MAY 28 2013

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2010-15018

The Honorable Peter J. Garcia, Judge Presiding

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BEFORE: PARRO, WELCH, AND KLINE,¹ JJ.

¹Judge William F. Kline, Jr., retired, serving ad hoc by special appointment of the Louisiana Supreme Court.

RNP concurs without reasons

KLINE, J.

This is an appeal by defendant, The Millennium Group I, L.L.C. (Millennium), following the granting of a motion for summary judgment in favor of plaintiff, Oak Harbor Property Owners' Association, Inc. (Oak Harbor). In addition, the trial court awarded damages and struck affirmative defenses for failure to comply with discovery. We affirm.

FACTS AND PROCEDURAL HISTORY

Oak Harbor is a non-profit homeowners association for the residents of a development known as the Oak Harbor Subdivision, which is located south of the city of Slidell, Louisiana, in St. Tammany Parish. The Oak Harbor Subdivision is subject to certain restrictive covenants. Millennium purchased a total of twenty (20) different lots in the Oak Harbor Subdivision (Millennium lots) on August 20, 2003, and September 7, 2007. All of the properties purchased by Millennium are subject to several servitudes, including the "Restated Declarations of Covenants, Conditions and Restrictions for Oak Harbor Subdivision" (Restrictions) dated June 26, 1989. The Millennium lots are also subject to the "Supplementary Declaration of Covenants, Conditions, and Restrictions for Oak Harbor Boater Service Area" dated July 28, 1994 (Supplementary Declaration). The Restrictions set forth assessments for each lot owner. Should the assessments not be paid, Article VI provides for late charges to be assessed on delinquent assessments, as well as interest, costs, and attorney's fees incurred to bring any action at law or to perfect a lien to collect from the owner. Article VI of the Restrictions also provides for the process by which the lien may be perfected, as follows:

Section 3. Notice of Lien

No action shall be brought to foreclose the Assessment lien or to proceed under the power of sale herein provided until thirty (30) days after the date a Notice of Claim of Lien is deposited in the United

States mail, certified or registered, postage prepaid, to the Owner of said Unit, and a copy thereof is recorded by the Association in the proper public records of the Parish of St. Tammany, State of Louisiana, which shall then constitute the Assessment lien against that Member's Unit(s). The Notice of Claim of Lien may be filed at any time after the expiration of the thirty (30) day period following the Delinquency Date. The Notice of Claim of Lien must recite a good and sufficient legal description of any such Unit, the record Owner or reputed Owner thereof, the amount then claimed, which may include interest on the unpaid Assessment at the maximum rate permitted by law, late charges, costs, and attorneys' fees in connection with the debt secured by said lien, and the name and address of the Association.

Beginning with the 2004 annual assessment, Millennium did not pay any assessment for the twenty lots that it owns. On January 14, 2008, Oak Harbor recorded a Notice of Claim of Lien (Notice) in the Parish of St. Tammany for the amounts then due for assessments, late fees, future unpaid assessments, maintenance charges, interest, costs, and attorney's fees incurred by Oak Harbor. A copy of the Notice was mailed to Millennium on February 7, 2008, but was not sent by certified mail, registered mail, or personal delivery. A Notice showing the amounts due was mailed to Millennium by letter dated November 28, 2008, sent by certified mail, return receipt requested, to Millennium's agent for service of process. The letter was received on December 1, 2008. Additional correspondence and a second Notice showing the amounts due were mailed to Millennium's counsel of record certified mail, return receipt requested, on June 29, 2010; this letter and Notice were received on July 1, 2010. Oak Harbor filed suit on August 6, 2010, seeking judgment for then-outstanding assessments, late fees, any future unpaid assessments, special assessments, maintenance charges, late fees, interest, and for all costs, charges, and attorney's fees incurred in the filing of the lien.

After a Rule to Show Cause, the trial court ordered Millennium to respond to certain discovery within five days and to pay Oak Harbor's costs and attorney's

fees. Millennium failed to comply with the order of the court. As a result, the trial court struck the affirmative defenses contained in Millennium's answer to the petition and barred Millennium from raising those defenses at any trial or hearing of any motion.

Subsequently, Oak Harbor filed a motion for summary judgment, which the trial court granted, awarding damages. It is from this judgment that Millennium appeals.

ASSIGNMENTS OF ERROR

Millennium assigns the following as error:

- (1) that Oak Harbor's lien was recognized, even though the trial court found it to be defective;
- (2) that the trial court erred in finding no genuine issues of material fact and granting the summary judgment; and
- (3) that the trial court erred in striking the affirmative defenses of Millennium for failing to comply with a discovery order.

STANDARD OF REVIEW

In determining whether summary judgment is appropriate, appellate courts review summary judgment *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Brassette v. Exnicios*, 11-1439 (La. App. 1 Cir. 5/14/12), 92 So. 3d 1077, 1081, writ denied, 12-1583 (La. 11/9/12), 100 So. 3d 831 (citing *Sanders v. Ashland Oil. Inc.*, 96-1751 (La. App. 1 Cir. 6/20/97), 696 So. 2d 1031, 1035, *writ denied*, 97-1911 (La. 10/31/97), 703 So. 2d 29). Furthermore, an appellate court asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Brassette*, 92 So. 3d at 1081. Because it is the applicable substantive law that determines materiality, whether a particular fact

in dispute is material can be seen only in light of the substantive law applicable to the case. *Id.*

Further, when addressing legal issues, a reviewing court gives no special weight to the findings of the trial court. *Campbell v. Markel American Ins. Co.*, 00-1448 (La. App. 1 Cir. 9/21/01), 822 So. 2d 617, 620, *writ denied*, 01-2813 (La. 1/4/02), 805 So. 2d 204. Instead, after conducting its *de novo* review of questions of law, the reviewing court renders a judgment on the record. *Campbell* 822 So. 2d at 620.

LAW AND ANALYSIS

Whether Lien Complied with Legal Requirements

Millennium asserts that the lien filed by Oak Harbor is invalid, since Oak Harbor did not comply with the requirements of La. R.S. 9:1145 and La. R.S. 9:1146, which Millennium claims govern privileges on immovables for charges or dues of an association of owners. Louisiana Revised Statutes 9:1145 sets forth requirements, which include that the association of owners file a sworn detailed statement to perfect a privilege. Louisiana Revised Statutes 9:1146 details what is required to be contained in the sworn detailed statement and requires that the statement be “commensurate with the filing for the registry of the privilege” served upon the delinquent owner by certified mail, registered mail, or personal delivery.

Millennium claims that the lien was not sent to it “commensurate” with the filing of the Notice, and that Oak Harbor did not attempt to provide a sworn detailed statement until November 28, 2008, more than ten (10) months after the Notice was recorded. Furthermore, the detailed statement was not signed and verified by an officer or agent of Oak Harbor, as required by La. R.S. 9:1146. Therefore, Millennium claims Oak Harbor’s lien is invalid, there is no valid

privilege upon Millennium's property, and the motion for summary judgment should have been denied.

Oak Harbor's response is that it was not required to comply with La. R.S. 9:1145 and 9:1146, since its Restrictions contained provisions as to how to perfect a lien. Oak Harbor points out that La. R.S. 9:1141.3(A) states that only to the extent that restrictive covenants are **silent** do the provisions of the Louisiana Homeowners Association Act apply. See La. R.S. 9:1141.1, *et seq.*

Oak Harbor contends that its Restrictions are not silent, but contain provisions as to the implementation of assessments, the collection of assessments, and the enforcement procedures, and sets forth the numerous paragraphs in which this information is contained. The Restrictions contain a procedure different from the Louisiana Homeowners Association Act for perfecting a lien.

Millennium replies that La. R.S. 9:1141.3(A), which limits the Louisiana Homeowners Association Act to only those associations whose restrictive covenants are silent, does not apply to the present case, because it is in a different **Part** of the statute. La. R.S. 9:1141.3(A) provides as follows:

The provisions of **this Part** shall be applicable to existing and future residential planned communities whose declarations have been duly executed and filed for registry. However, **this Part** shall not be construed to affect the validity or superiority of any provision of a community document. Only to the extent the community documents are silent shall of the provisions of **this Part** apply.

La. R.S. 9:1141.3 (A) (emphasis added).

Millennium misconstrues the **Part** referred to above with a **SubPart**. A careful review of the Louisiana Homeowners Association Act reveals it is contained within **Part II(B)** of the general section entitled "Immovables." **Part II(B)** contains Subparts A, B, and C. Millennium attempts to limit the effect of La.

R.S. 9:1141.3(A) to only Subpart A, rather than to all of Part II(B). Louisiana Revised Statute 9:1141.3(A) refers to the entire Louisiana Homeowners' Association Act contained in **Part II(B)**, not just Subpart A, as proposed by Millennium. Furthermore, La. R.S. 9:1141.9 provides:

In addition to any other remedies provided by law or the community documents for nonpayment of assessments, a homeowners association as defined in this Part may utilize the provision of Part III of this Chapter to establish a privilege on lots of delinquent owners for nonpayment of assessments. (Emphasis Added).

Part III contains La. R.S. 9:1145 and 9:1146, upon which Millennium relies. Clearly, the legislature intended for a homeowners association to either provide in their restrictions the method for preserving a lien or rely upon the law set forth in La. R.S. 9:1145 and 9:1146. To reiterate, since the Restrictions in this matter are not silent on the perfection of a lien, the trial court correctly held that the Restrictions apply.

The question then becomes whether Oak Harbor correctly complied with its own requirements to perfect a lien. The Restrictions require that thirty (30) days must pass following the Delinquency Date, which is defined as the date an assessment is due and not paid,² before a Notice of Claim of Lien can be filed.³ The Notice of Claim of Lien must state a good and sufficient legal description of any unit; the amount claimed, which can include interest, late charges, costs, and attorney's fees; and the name and address of the association.⁴ Finally, the association cannot foreclose on the lien until thirty (30) days after the date a Notice of Claim of Lien is deposited in the United States mail, certified or registered.⁵

² Restrictions, Article VI, Section 1.

³ Restrictions, Article VI, Section 3.

⁴ Restrictions, Article VI, Section 3.

⁵ Restrictions, Article VI, Section 3.

Oak Harbor filed its Notice on January 14, 2008, in St. Tammany Parish. Although it purported to send a copy of the Notice to Millennium on February 7, 2008, the letter was not certified. However, on both November 28, 2008, and June 29, 2010, Oak Harbor sent a copy of the Notice to Millennium by certified mail, return receipt requested. Millennium's complaint is that the Notice was not sent "commensurate" with the filing of the lien or with a sworn, detailed statement, as required by La. R.S. 9:1146. However, as discussed above, Oak Harbor is not required to follow La. R.S. 9:1146, since it included the perfection of liens in its Restrictions. Oak Harbor did follow its own Restrictions and filed its suit on August 6, 2010, more than thirty (30) days from the mailing of the Notice.⁶ Therefore, this court finds that the lien was properly perfected by Oak Harbor.

Whether There are Genuine Issues of Material Fact

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *Gonzales v. Kissner*, 08-2154 (La. App. 1 Cir. 9/11/09), 24 So. 3d 214, 217. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); *Aucoin v. Rochel*, 08-1180 (La. App. 1 Cir. 12/23/08), 5 So. 3d 197, 200, *writ denied*, 09-0122 (La. 3/27/09), 5 So. 3d 143.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the

⁶ Regardless if the November 28, 2008 letter or the June 29, 2010 letter applies, the suit was filed more than thirty (30) days later.

motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); *Robles v. ExxonMobile*, 02-0854 (La. App. 1 Cir. 3/28/03), 844 So. 2d 339, 341.

Oak Harbor, the mover, supported its motion for summary judgment with the affidavit of Lynne Lagrossa, the Secretary/Treasurer and a member of the Board of Directors of Oak Harbor, with numerous attached documents. The evidence submitted by Oak Harbor established that: (1) Millennium is the owner of twenty (20) lots located in the Oak Harbor Subdivision, the majority of which were purchased in 2003; (2) the lots owned by Millennium are subject to the Restrictions of Oak Harbor, which have been in effect since June 26, 1989, and were supplemented on July 28, 1994; (3) the Restrictions require Millennium to pay an annual assessment to Oak Harbor; (4) Millennium failed to pay the amounts due, beginning with the 2004 annual assessment; (5) the amounts due were documented by the attachments to the affidavit of Lynne Lagrossa; (6) Oak Harbor recorded a Notice on January 14, 2008, for then-outstanding assessments, late fees, future unpaid assessments, special assessments, maintenance charges, interest, costs, and attorney's fees against Millennium; (7) a copy of the Notice was mailed to Millennium's agent for service of process on February 7, 2008, by regular mail; (8) on November 28, 2008, a Notice was mailed by certified mail, return receipt requested, to Millennium's agent for service of process; (9) on June 29, 2010, a

Notice was mailed by certified mail, return receipt requested, to Millennium's attorney of record; (10) Millennium has not paid the first annual assessment assessed in 2004 and has continuously failed to pay the annual assessments; and (11) the balance owed by Millennium is \$41,073.66.

In response to the motion for summary judgment, Millennium filed a Motion to Strike Plaintiff's Motion for Summary Judgment and Incorporated Memorandum in Support Thereof/Alternative Opposition to Plaintiff's Motion for Summary Judgment.⁷ Millennium argued in its opposition, as it does in this appeal, that Oak Harbor did not comply with the requirements of La. R.S. 9:1145 and 9:1146 to perfect its lien. For the reasons set forth above, it is the Restrictions, not La. R.S. 9:1145 and 9:1146, which control the filing of a lien in this matter.

Millennium supported its opposition to the summary judgment with an attached affidavit of Joseph Ascani, a representative of Millennium. The affidavit of Mr. Ascani stated that an unidentified member of the board of Oak Harbor informed Mr. Ascani that "there would be an abatement/and or agreement between the Association and members ... to pay any monies owed to the Association over an extended period of time without penalty."⁸ Mr. Ascani also stated that this same board member informed him the Association would not "attempt to assert a lien over any property owned by members ... for unpaid assessments due to the severe damage wrought by Hurricane Katrina."⁹ Mr. Ascani could not remember the name of the board member of Oak Harbor who made the statements about the abatement and that Oak Harbor would assert a lien.

⁷ The Motion to Strike was based upon Oak Harbors' failure to comply with Louisiana District Court Rule 9.10(2), which requires a list of essential legal elements and list of material facts not genuinely disputed. Oak Harbor filed a Reply Memorandum that contained all the requirements of Rule 9.10(2), curing any possible defect of the Motion for Summary Judgment.

⁸ See affidavit of Joseph Ascani attached to Millennium's Opposition to Motion for Summary Judgment.

⁹ See affidavit of Joseph Ascani attached to Millennium's Opposition to Motion for Summary Judgment.

Louisiana Code of Civil Procedure article 967(A) provides that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

When an affidavit is submitted to defeat a motion for summary judgment, it is necessary that the affidavit present factual evidence sufficient to establish that the non-moving party will be able to satisfy his evidentiary burden of proof at trial. *Lewis v. Four Corners Volunteer Fire Dept.*, 08-0354 (La. App. 1 Cir. 9/26/08), 994 So. 2d 696, 701; La. C.C.P. art. 966(C)(2). Affidavits that are devoid of specific underlying facts to support a conclusion of ultimate “fact” are not legally sufficient to defeat summary judgment. *Id.* at 700.

The affidavit submitted by Millennium contains the hearsay of an unnamed declarant, an unidentified member of the Oak Harbor Board of Directors. The affidavit of Mr. Ascani attempts to set forth the testimony of a member of the Oak Harbor Board of Directors without identifying the member or identifying whether this board member had the authority to bind the entire Oak Harbor Board of Directors. Millennium offers no evidence as to the position of the declarant or why one board member could orally alter the written restrictions. Millennium also does not present any evidence as to when the statements were made, how long the abatement was to last, or whether anyone else was present. There is no evidence in the record of any action taken by the Oak Harbor Board of Directors to abate the assessments owed by members or the length of the proposed abatement.

Millennium has **not** produced factual evidence sufficient to establish that it will be able to satisfy its evidentiary burden at trial that there was an abatement promise sufficient to create a genuine issue of fact. Furthermore, as our review is *de novo*, we must find that the hearsay statements made by Mr. Ascani are not

competent evidence. See *Thomas v. Comfort Center of Monroe, LA, Inc.*, 10-0494 (La. App. 1 Cir. 10/29/10), 48 So. 3d 1228, 1236. Therefore, summary judgment was appropriate.

Trial Court's Striking of Affirmative Defenses Appropriate

Millennium argues that the trial court erred in striking its affirmative defenses in response to Millennium's failure to follow an earlier discovery court order. La. C.C.P. art. 1471 allows a court to impose sanctions on a party that refuses to comply with a court's order. Those sanctions may include:

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

The trial court has much discretion in imposing sanctions for failure to comply with discovery orders, and its ruling will not be reversed absent an abuse of discretion. *Lirette v. Babin Farm, Inc.*, 02-1402 (La. App. 1 Cir. 4/2/03), 843 So. 2d 1141, 1143. When a failure to make discovery occurs, it becomes incumbent upon the disobedient party to show that his failure was justified or that special circumstances would make an award of expenses unjust. *Allen v. Smith*, 390 So. 2d 1300, 1302 (La. 1980).

There is nothing in the record that justifies the failure of Millennium to comply with the trial court's order of September 2, 2011, ordering Millennium to respond to certain discovery within five days and to pay certain costs and attorney's fees to Oak Harbor. Millennium offers no explanation for its failure to comply with the trial court's order. To further compound the matter, the trial court

had previously signed a consent judgment on June 1, 2011, wherein the parties agreed Millennium would provide responses to Oak Harbor's discovery and would pay the costs and attorney's fees associated therewith. Therefore, the September 2, 2011 judgment was the second time the trial court ordered Millennium to respond to the discovery of Oak Harbor.

The trial court appropriately imposed sanctions against Millennium according to La. C.C.P. art. 1471. Furthermore, the trial court **did allow** Millennium to raise its affirmative defenses in its memorandum and at the hearing on the motion for summary judgment. Therefore, this court finds Millennium has suffered absolutely no prejudicial effect due to the trial court's sanctions.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to appellant, The Millennium Group I, L.L.C.

JUDGMENT AFFIRMED.