NO. COA01-186

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

FAIRVIEW FOREST HOMEOWNERS' ASSOCIATION, INC.,
Plaintiff

v. Buncombe County
No. 99 CVD 4842

GERALD DEAN,
Defendant

Appeal by plaintiff and cross appeal by defendant from judgment entered 17 November 2000 by Judge Earl J. Fowler, Jr. in District Court, Buncombe County. Heard in the Court of Appeals 6 December 2001.

*Philip J. Roth for plaintiff.*

*Matney & Associates, PA, by Peter R. Henry, for defendant.*

McGEE, Judge.

Gerald Dean (defendant) purchased a residence located in the Fairview Forest subdivision in Buncombe County on or about 30 March 1979.

The trustees of the Fairview Forest Trust, a developer of Fairview Forest subdivision, executed a document entitled "Restrictive Covenants, Conditions and Easements" (restrictive covenants), establishing restrictive covenants applicable to certain lots owned by Fairview Forest Trust, which was recorded in

the Office of Register of Deeds in Buncombe County in October 1988. The restrictive covenants stated in part that they were made and entered into

> by and among FAIRVIEW FOREST TRUST, hereinafter referred to as "Owner" of that certain property described in Exhibit "A" attached hereto, which property shall be hereinafter referred to as "Property[,]" and all future purchasers and owners of Property, hereinafter referred to as "Future Owners[.]"
>
> . . .
>
> WHEREAS, Owner is the owner of that certain Property described in Exhibit "A" attached hereto located in Fairview Township, Buncombe County, North Carolina[.]
>
> . . .
>
> 8. A Homeowners Association is hereby established[.]. . . Any portion of the Property acquired by a Future Owner shall be subject to the rules and regulations of the Homeowners Association and shall be assessed an annual fee for the maintenance and administration of the Association's Property and the rights-of-way providing ingress, egress and regress within the Property. . . . Owner shall until such time as all of the Property is sold and/or transferred, not be responsible for the payment of any assessment. . . .
>
> . . .
>
> 10. The Homeowners Association as provided for herein shall be responsible for collection of all assessments. Any assessment not paid within 90 days of the due date shall bear interest from the due date at the rate of 12% per annum. Any unpaid assessment shall constitute a lien against the property of the Owner personally obligated to pay same. The Homeowners' Association and/or any Owner or Future Owner may bring an action at law against the Owner personally obligated to pay an assessment or foreclose a lien of such assessment against the Property which the

> assessment has been levied. . . . Should the Homeowners Association be requir[e]d to foreclose the lien of any assessment, the Owner personally obligated to pay such assessment shall be responsible for the expenses incurred by the Homeowners Association including but not limited to court costs and attorney's fees[.]

Defendant's residence was not originally included in the properties listed in Exhibit "A," but he agreed to subject his property to the restrictive covenants in an agreement recorded on 26 July 1989.

Defendant acquired an option to purchase additional properties in Fairview Forest from the Fairview Forest Trust in 1992, which he exercised in January 1993. On 30 June 1993, Stephen Barnwell, defendant's attorney at that time, sent a letter to the Fairview Forest Homeowners Association, Inc. (plaintiff) stating that defendant "is responsible only for assessments for" his residence, not the additional properties defendant purchased in 1993.

Plaintiff filed an action against defendant in 1996 and defendant filed a counterclaim; plaintiff and defendant entered into a settlement agreement on 12 August 1996 "resolv[ing] the allegations raised in the claims and counterclaims in the action [numbered] 96 CVS 01673[.]" The settlement agreement also stated that plaintiff "agrees and accepts that [defendant], his successors, or assigns are the successor 'Owner' as that term is used in the Restrictive Covenants[.]"

Defendant failed to pay annual assessments to plaintiff beginning in 1995. Plaintiff filed a claim of lien against defendant's residence on 20 September 1999. Plaintiff filed this action on 26 October 1999, seeking $1,878.92 in unpaid assessments,

as well as late charges, interest, attorneys' fees, and costs. Plaintiff also sought enforcement of the lien filed against defendant's residence. In his answer, defendant admitted he had not paid the assessments.

Lot owners who were members of the homeowners' association, by a favorable vote of at least 67 percent, amended the restrictive covenants on 15 December 1999 to include a provision applying the North Carolina Planned Community Act, N.C. Gen. Stat. § 47F-1-101 *et seq.*, to the planned community of Fairview Forest.

The trial court heard this action in a non-jury trial on 1 November 2000. Counsel for plaintiff filed with the court an affidavit dated 13 November 2000 regarding attorneys' fees and costs, stating that "[i]n prosecuting this action, my client has incurred costs in the amount of $111.45" and "attorneys fees in the amount of $7,641.00."

The trial court entered judgment for plaintiff on 17 November 2000 and made the following pertinent findings of fact:

> 3. In 1979 Defendant purchased real property in Fairview Forest which is located at 102 Weeping Cherry Forest Road (hereinafter, "Residence"). . . .
>
> 4. Defendant acquired an Option to Purchase additional properties in Fairview Forest from a previous subdivision developer, Fairview Forest Trust . . . . Defendant exercised the option in January[] 1993.
>
> 5. The Fairview Forest subdivision and its property owners are subject to a set of restrictive covenants called the [Restrictive Covenants] which were recorded in October[] 1988[.]
>
> 6. In October[] 1988 Defendant agreed,

along with other property owners, to subject his Residence to the Restrictive Covenants in an Agreement which was recorded in July[] 1989[.]

7. Paragraph 8 of the Restrictive Covenants authorizes [plaintiff] to assess members annually for common expenses. Paragraph 10 of the Restrictive Covenants authorizes [plaintiff] to assess a 12% interest rate against any assessments which remain unpaid after 90 days; Paragraph 10 further authorizes [plaintiff] to file a lien against [members'] properties based on unpaid assessments and to charge a Lien Fee of $50 for each such lien; [plaintiff] is also authorized to bring an action at law or to foreclose a lien of such assessments and to obtain reimbursement of attorneys' fees and costs in prosecuting the action. [Plaintiff] has in due course made annual assessments since 1990 against all of the properties within the purview of the Restrictive Covenants.

8. In accordance with his 1988 Agreement to subject his Residence to the Restrictive Covenants, Defendant honored his obligation to pay to Plaintiff assessments for the years 1990, 1991, 1992, 1993 and 1994. Defendant has not paid assessments for the years 1995 through the 2000-2001 assessment.

9. Acting through his attorney in June[] 1993 - after Defendant acquired the Development Properties - Defendant reaffirmed his obligation to pay assessments on his Residence.

10. By Agreement dated August 12, 1996, Plaintiff and Defendant settled an unrelated lawsuit upon the following two relevant terms: Plaintiff agreed to remove all liens then existing on Defendant's properties in Fairview Forest; and the parties thereto agreed that Defendant was the "Owner" of Fairview Forest as that term is described in the Restrictive Covenants.

11. . . . Plaintiff has properly approved the . . . assessments and duly notified Defendant as to his obligations

> respecting the same. Defendant has not paid the assessments on his residence to date[.]
>
> 12. . . . Plaintiff properly filed . . . a Claim of Lien upon Defendant's residence. . . .
>
> . . .
>
> 15. Defendant's failure to pay assessments on his Residence following the date of the 1996 Settlement Agreement . . . including lien fees and interest calculated at 12% per year, amounts to $1,895.55.
>
> 16. A provision of the [North Carolina] Planned Community Act . . . as well as the Restrictive Covenants themselves authorize [plaintiff] to foreclose upon the lien as provided by Article 2A of Chapter 45 of the North Carolina General Statutes.
>
> 17. In prosecuting this action Plaintiff has incurred costs in the amount of $111.45 and attorneys' fees in the amount of $7,641.00.

The trial court concluded as a matter of law that

> 18. Through the 1988 Agreement, Defendant subjected his Residence to the terms and conditions of the Restrictive Covenants.
>
> 19. Defendant's later acquisition of his Development Properties from Fairview Forest Trust did not extinguish his obligations under the Restrictive Covenants with respect to his Residence.
>
> 20. The 1996 Settlement Agreement between the parties involved claims which are unrelated to the present action; hence, Plaintiff is not estopped from raising its claims in this matter. However, the Settlement Agreement discharged Defendant from his obligation to pay any assessments, lien fees and interest then owing and due as of the date of the Agreement. The Settlement Agreement did not discharge Defendant from his obligation to pay assessments on his Residence which came due after the Settlement Agreement.

> 21. Defendant has defaulted in his obligations to pay assessments on his Residence for the years 1997 through 2000. . . . Defendant is currently liable to Plaintiff in the amount of $1,895.55.
>
> 22. Under the Restrictive Covenants, Defendant is liable for the reimbursement of attorneys['] fees and costs Plaintiff incurred in prosecuting this action.
>
> 23. In addition, under the . . . [North Carolina] Planned Community Act . . . Plaintiff is entitled to reimbursement for the reasonable attorneys['] fees and costs incurred in prosecuting this action.

The trial court entered judgment for plaintiff in the principal amount of $1,895.55 for past due assessments, costs totaling $111.45, and attorneys' fees in the amount of $750.00. From this judgment, plaintiff appeals and defendant cross appeals.

We first address defendant's cross appeal in which he raises seven assignments of error.

I. Defendant's Cross Appeal

A.

By his first assignment of error, defendant argues that the trial court erroneously relied on the 30 June 1993 letter from his attorney, Stephen Barnwell, in concluding that defendant is obligated to pay assessments on his residence. Defendant claims that the trial court improperly relied upon the letter because "[t]estimony was presented by [d]efendant to the trial court that [d]efendant was unaware of the letter issued by Barnwell until some years later. The lack of knowledge or authorization on the part of [d]efendant may lead to having the letter set aside and not considered." We disagree. Upon review, the trial court's

"findings of fact are conclusive on appeal if supported by any competent evidence, and a judgment supported by such findings will be affirmed, notwithstanding the fact that evidence to the contrary may have been offered." *Smith v. Butler Mtn. Estates Property Owners Assoc.*, 90 N.C. App. 40, 43, 367 S.E.2d 401, 405 (1988), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989) (citing *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E.2d 417 (1971)).

In this case, the trial court found that "[a]cting through his attorney in June[] 1993 - after Defendant acquired the Development Properties - Defendant reaffirmed his obligation to pay assessments on his Residence." There is no evidence before us, other than the unsupported statement in defendant's brief that he was unaware of the letter written by his attorney. Further, there is no evidence in the record, nor does defendant refer to any, that suggests the letter written by his attorney is not competent evidence upon which the trial court properly relied. We therefore hold that this finding of fact is conclusive on appeal because it is supported by competent evidence in the record before us. Defendant's first assignment of error is overruled.

B.

By his second and fifth assignments of error, defendant contends the trial court erred in determining that the North Carolina Planned Community Act applies to this action and allows for plaintiff's recovery of attorneys' fees and costs.

Defendant first argues the trial court erred in finding of fact number 16 because the North Carolina Planned Community Act

does not apply to this case. In finding of fact number 16, the trial court found that "[a] provision of the [North Carolina] Planned Community Act . . . as well as the Restrictive Covenants themselves authorize [plaintiff] to foreclose upon the lien . . . ." The restrictive covenants at issue authorize foreclosure of a lien against property for unpaid assessments in paragraph ten, as set forth above. Defendant does not contest the validity of this provision in the restrictive covenants.

The trial court concluded as a matter of law that "[t]hrough the 1988 Agreement, Defendant subjected his Residence to the terms and conditions of the Restrictive Covenants." However, the trial court did not conclude as a matter of law that plaintiff was permitted to foreclose upon its lien against defendant's property pursuant to the North Carolina Planned Community Act. Therefore, we find no error.

Next, defendant argues the trial court erred in its conclusion of law number 23 that the North Carolina Planned Community Act allows for plaintiff's recovery of attorneys' fees and costs in this case.

"As a general rule, a party cannot recover attorneys' fees 'unless such a recovery is expressly authorized by statute.'" *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 756, 522 S.E.2d 317, 320 (1999) (quoting *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980)).

In Chapter 47F of the General Statutes of North Carolina, the North Carolina Planned Community Act, N.C. Gen. Stat. § 47F-3-116

(e) (1999) provides that "[a] judgment, decree, or order in any action brought under this section shall include costs and reasonable attorneys' fees for the prevailing party." This subsection applies to "actions arising on or after the effective date" of the Act on 1 January 1999. 1998 N.C. Sess. Laws ch. 199, § 3.

N.C. Gen. Stat. § 6-21.2 (1999) provides that:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt[.]
>
> . . .
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing on said note, contract, or other evidence of indebtedness.

In this case, the restrictive covenants contain a provision allowing for attorneys' fees "[s]hould the Homeowners Association be requir[e]d to foreclose the lien of any assessment[.]"

The trial court found that "[i]n prosecuting this action Plaintiff has incurred costs in the amount of $111.45 and attorneys' fees in the amount of $7,641.00." The trial court concluded that under both the restrictive covenants and the North Carolina Planned Community Act, plaintiff is entitled to attorneys' fees and costs incurred. The trial court entered judgment ordering

defendant to pay costs of $111.45 and attorneys' fees in the amount of $750.00.

We are unable to determine from the order of the trial court whether it awarded attorneys' fees based upon the provision in the restrictive covenants and N.C.G.S. § 6-21.2, or whether it awarded attorneys' fees pursuant to the North Carolina Planned Community Act. Therefore, we remand this issue for appropriate findings as to whether the trial court awarded attorneys' fees under the restrictive covenants and N.C.G.S. § 6-21.2, or whether it awarded attorneys' fees based upon the North Carolina Planned Community Act.

C.

Defendant argues by his remaining assignments of error that the trial court erred in determining that the 1996 settlement agreement did not eliminate defendant's obligation to pay assessments for his residence and thus erred in entering judgment for plaintiff.

Defendant first contends that the 1996 settlement agreement extinguished any obligation defendant had to pay assessments because the agreement "accepts [defendant] as 'Owner' as the term is applied in the Restrictive Covenants[.]" As a consequence, defendant argues that as "Owner" he is relieved "from the obligation to pay assessments as long as all of the property within the Fairview Forest Subdivision has not been sold [and] [a]ll of the property has not been sold." We disagree.

At the time the restrictive covenants were adopted and

recorded in October 1988, Fairview Forest Trust was referred to as "Owner." "Owner" is defined by the restrictive covenants as "the owner of that certain Property described in Exhibit 'A[,]'" (hereinafter Trust Property). The restrictive covenants exempted the "Owner" from paying assessments on the Trust Property. Defendant does not contend that his property was Trust Property. As plaintiff argues, "since Fairview Forest Trust did not own [defendant's] residential property, it could not have either assessed or exempted from assessment that parcel."

Defendant did not subject his property to the restrictive covenants until July 1989, when he became responsible for payment of annual assessments. When defendant was recognized as "Owner" in the 1996 settlement agreement, he stepped into the shoes of Fairview Forest Trust as "Owner" of the Trust Property and thus was only exempted from paying assessments on that property. Thus, defendant was still required to pay assessments on his residence.

Defendant also argues that plaintiff's claim is barred by *res judicata* because the 1996 settlement agreement "is a compromise of disputed claims" and "[t]he clear implication of the Settlement Agreement was that it resolved all issues going forward." Defendant argues that "[i]t is illogical to believe that th[e] Settlement Agreement was not intended to be prospective as well as retrospective."

> [T]o successfully assert the doctrine of res judicata, a defendant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the

parties or their privies in the two suits.

*Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) (citing *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E.2d 513 (1983)).

We find that *res judicata* does not bar the present action. There is no evidence in the record before us to show that the causes of action are identical in this action and the prior action. The only evidence in the record referring to the earlier action is the settlement agreement which states the title of the action and its case number; however, this evidence is insufficient to show that the identical parties or their privies are involved in this action. Further, as plaintiff argues, "even if we assume the [prior] action concerned assessments allegedly due [plaintiff] from [defendant], there is no basis from which we can infer that the action concerned not only assessments then owing, but also, assessments that might be levied in the future." Defendant admits in his brief that "[t]he matter of future assessments clearly should have been included in the Settlement Agreement . . . but it was not."

For the reasons set forth herein, we hold that there is competent evidence in the record to support the trial court's findings. The trial court's findings support the legal conclusion that defendant is responsible for assessments on his residence for the years 1997 through 2000. Defendant's remaining assignments of error are overruled.

II. Plaintiff's Appeal

Plaintiff contends in its appeal that the trial court abused its discretion in its award of attorneys' fees because the attorneys' fees awarded by the trial court were "a mere fraction of that supported by the undisputed evidence and because the trial court failed to make detailed findings to support its award[.]" We have already determined that the trial court's award of attorneys' fees must be remanded for appropriate findings and we need not further address this issue.

Affirmed in part, remanded in part.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).