

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-1132

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

CHANNEL WALK HOMEOWNERS
ASSOCIATION, INC.,
Plaintiff,

v.

New Hanover County
No. 05 CVS 599

MARK SHEFFIELD,
Defendant.

Appeal by defendant from order entered 10 April 2006 by Judge John E. Nobles in New Hanover County Superior Court. Heard in the Court of Appeals 21 March 2007.

Ward and Smith, P.A., by Alexander C. Dale, for plaintiff appellee.

William Norton Mason for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from an order granting partial summary judgment to plaintiff. We affirm.

FACTS

Plaintiff Channel Walk Homeowners Association, Inc. ("the Association") is a North Carolina nonprofit corporation. Defendant Mark Sheffield ("defendant") is the owner of Lot 9 in Channel Walk Townhomes and thus is a member of the Association.

In December 2003, a meeting of the members of the Association was held and a vote was taken on a proposal to replace the siding on the townhomes in Channel Walk, the cost of which would be assessed to the members. After the vote, the president of the Association announced that the proposed siding assessment did not pass. A short time later, the president announced that the proposal had passed when written proxy votes were counted. The total sum of \$12,430.00 was owed by each unit owner for the siding project assessment. Defendant paid an initial portion of the assessment in the amount of \$3,505.00, but he failed to pay the remaining principal amount of \$8,925.00. As a basis for not paying the entire amount owed, defendant said that he believed the vote of the siding project assessment did not pass.

In 2004, defendant applied to the Association's architectural committee for approval for a covered deck he proposed to build on his townhome and approval was granted. After construction of the deck was completed, the Association's Board of Directors contended that the deck was not constructed according to the approved plans. The Board of Directors voted unanimously to require defendant to repair the deck. The Board claimed defendant failed to repair the deck, so the Association retained a contractor to bring the deck into conformity with the plans submitted to and approved for construction by the Association. A neighbor contacted defendant and told him of the contractor's actions, and the neighbor called the Wrightsville Beach Police Department. The police told the contractor to leave defendant's lot. On 4 February 2005, the

Association, by letter from its counsel, demanded that defendant repair the deck to bring it into conformity with the plans approved by the Association. Defendant refused to repair or remove the deck.

On 16 February 2005, the Association filed a complaint against defendant. Among other things, the complaint sought the unpaid portion of the siding project assessment and a mandatory injunction requiring defendant to repair or remove the constructed deck. The complaint also sought unpaid monthly installments of the annual assessment. An order granting partial summary judgment was entered in favor of the Association. Defendant appeals the terms of that order, and the remaining issues for trial in this action were stayed pending appeal.

On 3 November 2006, the Association filed several motions to dismiss the appeal. On 6 November 2006, the Association moved to amend the record on appeal to include the Declaration of Covenants, Conditions and Restrictions for Channel Walk and moved for this Court to take judicial notice of the Declaration. Defendant responded to all of the Association's filings. We allow the Association's motion to amend the record on appeal. The remaining motions filed by the Association are moot as a result of our opinion.

I.

Defendant contends the trial court erred when it granted partial summary judgment to the Association on the Association's claim that defendant failed to pay assessments. Specifically,

defendant asserts there were contested issues of material fact as to whether the Association had properly obtained authority from its members to levy the siding assessment and whether defendant owed the claimed monthly installments of the annual assessment. We disagree.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675, *disc. review denied*, 361 N.C. 166, 639 S.E.2d 649 (2006). On appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999).

A. Siding Project Assessment

Defendant received new siding as a result of the siding project assessment, but defendant has not presented any evidence that the vote on the siding project assessment did not pass. In his brief, defendant states he was of the opinion that the siding assessment did not pass. In defendant's amended affidavit, he states he believed the siding project assessment did not pass.

“Rule 56(e) clearly precludes any party from prevailing against a motion for summary judgment through reliance upon such conclusory allegations unsupported by facts.” *Lowe v. Bradford*, 305 N.C. 366, 371, 289 S.E.2d 363, 367 (1982) (citation omitted). Accordingly, we agree with the trial court regarding the siding assessment.

B. Monthly Installment of Annual Assessment

Defendant admits in his answer that the Association, pursuant to the Declaration, imposes on him and other members of the Association an annual assessment, payable as monthly dues. In his brief, defendant states that he does not owe the claimed dues payment because he was forced to make repairs to his townhome when the Association failed to make some needed repairs. However, no provision of the Declaration provides defendant any authority for not paying his monthly dues. In addition, defendant offers no case authority supporting his assertion that, because the Association failed to repair damage to his townhome after his requests, he can deduct the cost of the repairs from his monthly dues. Accordingly, we disagree with defendant.

II.

Defendant contends the trial court erred when it granted partial summary judgment to the Association allowing a mandatory injunction requiring defendant to remove the deck or bring the deck into conformity with plans and specifications. We disagree.

Article V of the Declaration provides:

No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been *submitted to and approved in writing* as to the harmony of external design and location in relation to surrounding structures and topography *by the Board of Directors of the Association*[.]

(Emphasis added.) Initially, defendant was granted approval by the Association to build a deck on his townhome. In his affidavit filed in response to the Association's motion for summary judgment, defendant stated that the Wrightsville Beach Building Inspector required changes to the deck plans due to structural requirements of the building code. Defendant also stated that an individual Board member viewed the changes to the deck plan and approved the changes. In his brief, defendant essentially asserts that he relied on a Board member's statement that the altered deck was approved and that he relied on the Board member's approval to complete the deck. Further, defendant asserts that an issue of material fact exists as to whether the Board of Directors, through their member, gave approval of the deck precluding the grant of partial summary judgment.

We conclude there is no genuine issue of material fact precluding summary judgment in favor of the Association. First, nothing in the record tends to show that defendant obtained written approval from the Board of Directors of the Association to build the altered deck. Second, although not expressly stated in his

brief, defendant seems to rely on an equitable estoppel theory. "An essential element of . . . [equitable estoppel] is reasonable reliance" *Adkins v. Adkins*, 82 N.C. App. 289, 291, 346 S.E.2d 220, 221 (1986). Even taking defendant's statement in his affidavit as true, defendant's reliance on an individual Board member's approval of the altered deck as though the entire Board of Directors approved it is unreasonable, especially since it appears defendant knew that he needed the entire Board's approval because he obtained the Board's approval for the initial design of the deck. Accordingly, we disagree with defendant's contention.

III.

Defendant contends the trial court erred by applying the North Carolina Planned Community Act to the Association to satisfy the lien of the judgment. We dismiss this contention.

Defendant did not properly assign error to this contention. The North Carolina Rules of Appellate Procedure state that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal" N.C. R. App. P. 10(a). Here, defendant included two assignments of error in the record on appeal. Although defendant's contention was argued in his brief under section III, which included defendant's contention we discussed above under part II of our opinion, neither of the assignments of error properly assigned error to this contention. Accordingly, defendant's contention is dismissed.

Affirmed.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).