NO. COA09-337

NORTH CAROLINA COURT OF APPEALS

Filed:17 August 2010

CHRISTOPHER CHLEBOROWICZ and wife, JAYME CHLEBOROWICZ; CLAUDE YOUNG ALEXANDER and wife LYNN ALEXANDER; WILLIAM WIVELL and wife MARY JO WIVELL; JAMES MYERS and wife MAGDALENE MYERS; SCOTT DONOVAN and wife, KIRSTEN DONOVAN; DAVID TYSON; PAUL COLLIE and wife, DENA COLLIE; MICHAEL RYAN and wife, NANCY RYAN; FRANK BRYSON and wife, BRIDGET BRYSON; CHARLES JACOBI and wife, ARLENE JACOBI; ROBERT HOWELL and wife LISA HOWELL; MARJORIE AHLQUIST,
Plaintiffs,

v. New Hanover County
No. 07 CVS 1479

INLET POINT HARBOR BOAT OWNERS ASSOCIATION, INC.; BOARD OF DIRECTORS OF INLET POINT OWNERS ASSOCIATION, INC.; SEAN SIMPSON DAVID GODBOLD and wife, DEBBIE GODBOLD; ROBIN TOONE and wife, KERRY TOONE; SCOTT GEROW and wife, KAREN GEROW; JOHN HUTCHINGS and wife, VANDA HUTCHINGS; ROBERT THORNTON and wife, TERRY THORNTON; WILLIE WILHELMSON and wife, LIV WILHELMSON; ANDREW FARMER; ARNE HANSEN and wife FRANCES HANSEN; LARRY D PRICE and wife, DENA PRICE, LARRY D. PRICE and wife, CHRISTINA PRICE; WAYNE LONG and wife TANYA LONG; VALERY STEIN and wife LARISA STEIN; EARNEST MANZELLA and wife, CAROLE MANZELLA; HENRY BOON and wife CHERYL BOON; MARK STACY and wife JEAN STACY; DONALD BRITTON

and wife BARBARA BRITTON; KEITH BRITTLE and wife, KATHRYN BRITTLE; DENNIS WOOTEN and wife CANDACE VOLZ; DANIEL MCINTYRE and wife THERESA MCINTYRE; KEVIN STONE and wife, ELAINE STONE; SAMUEL PROCTOR and wife; KAREN PROCTOR; STEVEN FONTANA and JULIE DUCLOS; ARCHIE BAILEY and wife ELAINE BAILEY; STEPHEN WHITE and wife JOANNE WOODALL-WHITE; WILLARD BUFFKIN JR. and wife BEVERLY BUFFKIN; THEODOR RICHMAN and wife TERRY RICHMAN; ALBERT H. BEST IV and wife SANDRA BEST; ANDREW CURTISS and wife KRISTA CURTISS; THOMAS WARING and wife, DAWN WARING; JOHN SWEETZ and wife ALEXIS SWEETZ; MARK WILSON; GLENN OVERTON and wife DONNA OVERTON; JEFFREY STEWART and wife, JENNIFER STEWART; DANFORTH MORTON and wife AMY MORTON; DOUGLAS ANDREWS and wife CHERYL ANDREWS; JOSEPH BUCK JR. and wife ROBYN BUCK; DON WILSON and wife JUNE WILSON; JOSEPH SOARES; KEVIN TRIMBLE; HOWARD RUSCETTI and wife J'NELLE RUSCETTI; HAYWOOD STANLEY RUDD and wife JILLA RUDD; ANTHONY CAPORALEITTI and ALVI LLC LIMITED PARTNERSHIP,
Defendants.

Appeal by Plaintiffs from order entered 20 August 2008 by Judge W. Allen Cobb, Jr., in Superior Court, New Hanover County.

Heard in the Court of Appeals 13 October 2009.

Christopher A. Chleborowicz, Pro Se Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Regan S. Toups and Norwood P. Blanchard, III, for Defendants-Appellees.

WYNN, Judge.

In a declaratory judgment action when a trial court fails to make the required findings of fact, the appellate court may order a new trial.[1] Here, Plaintiffs contend the trial court erroneously determined that costs associated with the repair of the bulkhead should be assessed against lot owners equally. Because the trial court failed to make the required findings of fact, we remand for further action.

This appeal involves Inlet Point Harbor, a residential waterfront community located in New Hanover County. When established, lots in Inlet Point Harbor were developed and sold as single family residences. A canal, bulkhead, and turning basin were created to provide community residents with easy access to the water.

Lot owners of property in Inlet Point Harbor community are subject to a number of restrictive covenants. The Inlet Point Harbor covenants provide rules that govern lot owners' access to the canal. "Mooring easements" allow some homeowners to construct docking facilities in areas adjacent to their homes. "Docking easements" allow other homeowners to share docking facilities in a limited common area.

Inlet Point Harbor's Declaration of Covenants provides that two non-profit corporations will maintain the common areas located within the community - Inlet Point Harbor Owners' Association, Inc.

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[1] *See Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520, 581 S.E.2d 94, 96 (2003).

and Inlet Point Harbor Boatowners' Association, Inc. ("Boatowners' Association"). Both entities collect fees from homeowners for the maintenance of the common areas. The Boatowners' Association's primary function is to collect fees for the purpose of maintaining piers, the bulkhead, floating docks and other water related areas.

In 2005, Inlet Point Harbor's bulkhead required significant repairs. After a special meeting, the Boatowners' Association sought to assess all members for the cost of repairing the bulkhead. Assessments were allocated based on three classes of property owners: "non waterfront slip owners," "waterfront slip owners," and "waterfront nonslip owners." Within each class, lot owners were assessed an equal amount for bulkhead repairs. Plaintiffs, several lot owners in the Inlet Point Harbor community, filed a Complaint and sought a Declaratory Judgment stating that the bulkhead was a limited common area and that as such costs associated with its repair should be "borne by the lot or lots to which the limited common area is assigned either according to linear footage [of waterfront property] or based upon some other calculation of the Court taking into account [the restrictive covenants] and the equities of the access, use and enjoyment of the lots . . . ."

Although Defendants filed a motion for Partial Summary Judgment in June 2007, the trial court instead entered a Declaratory Judgment in August 2008 on behalf of the Defendants. The trial court concluded that the bulkhead should be classified as a "water related common area", members of the Boatowners'

Association are to be assessed equally for the cost of repairing the bulkhead, and members of the Boatowners' Association may vote on a special assessment for the cost of repairing the bulkhead.

From the Declaratory Judgment, Plaintiffs appeal arguing that the trial court erred by (I) finding that the bulkhead is part of a water related common area; (II) finding that there was no genuine issue of material fact as to the vote required by the Inlet Point Harbor Covenants to change an allocation of special assessments; (III) determining that the costs associated with repairing the bulkhead are equal to all owners; and (IV) denying Plaintiffs' motion to exclude affidavits that addressed the intentions of the developers of the Inlet Point Harbor community. We affirm the trial court's actions on issues (I), (II), and (IV), but remand for additional findings on issue (III).

I.

First, Plaintiffs argue that the trial court's declaratory judgment erroneously failed to determine that the bulkhead is a limited common area. We disagree.

"Declaratory judgments may be reviewed in the same manner as other judgments." *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520, 581 S.E.2d 94, 96 (2003). Therefore, our Court will review the trial court's order to determine if it made adequate findings of fact and conclusions of law. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2007) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately

its conclusions of law thereon and direct the entry of the appropriate judgment."). When the trial court fails to make findings of fact, appellate courts may remand the case for a new trial. *See Quick v. Quick*, 305 N.C. 446, 457, 290 S.E.2d 653, 661 (1982). "Remand is unnecessary, however, where the facts of the case are undisputed and those facts lead to only one inference." *Cumberland Homes, Inc.*, 158 N.C. App. at 520-21, 581 S.E.2d at 96.

Here, the undisputed facts lead to the inference that the bulkhead is a "water related common area." The Inlet Point Harbor restrictive covenants define "water related common area" to include "all of the *bulkheads*, pilings, floating docks, piers and other property related to maintenance and use of the Inlet Point Harbor channel, basin, harbor and boating facilities." (emphasis added)

Plaintiffs argue that while the bulkhead is not expressly defined as a limited common area, the covenants have the effect of restricting the use of the bulkhead to waterfront lot owners. Plaintiffs cite an amendment to the Inlet Point Harbor Covenants reading: "The area in the Mooring Easements adjacent to lots bordering on the turning basin and channel shall be limited common area for the use only of the owner of the adjacent lot." However, "[i]n construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). The language expressly defining the bulkhead as a

common area has not been altered by amendment. Indeed, if the developers intended to define the bulkhead as a limited common area, they could have done so expressly.

In sum, we hold that the trial court properly determined that the bulkhead is a "water related common area."

II.

Next, Plaintiffs essentially argue that the Inlet Point Harbor Covenants require a 3/4 vote in order for the Boatowners' Association to assess the cost of repairing the bulkhead to all the lot owners. We disagree.

Here, the restrictive covenants allow the members of the Boatowners' Association and the Homeowners' Association to levy special assessments in addition to the annual assessment, stating in part:

> [T]he Association may levy, in any assessment year, a special assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon any Common Area, including fixtures and personal property related thereto . . . provided that any such assessment requires the same assent of the Members as provided in Section 4(b) of this Article."

Section 4(b) explains that an affirmative 2/3 vote is required for the approval of any increase in the annual assessment. As we detailed earlier, the trial court properly determined that the bulkhead is a "water related common area". Thus, the trial court correctly found that 2/3 of the vote must be in the affirmative to increase the annual assessment.

Nonetheless, Plaintiffs argue that a 3/4 vote is required to "change the method of determining the obligations, assessments, dues or other charges which may be levied against an Owner." However, "trial [courts] should not interpret a restrictive covenant in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant." *Cumberland Homes, Inc.*, 158 N.C. App. at 521, 581 S.E.2d at 97. Requiring an affirmative vote for a special assessment is not a change in the method of determining obligations. The declaration already provided the means by which the Boatowners' Association could collect additional funds for a special assessment. A plain reading of the Inlet Point Harbor covenants indicate that an affirmative vote of 2/3 is appropriate for a special assessment levied by the Boatowners' Association. Accordingly, we find no merit to Plaintiffs' contention.

III.

Plaintiffs next argue that the trial court erred by determining that costs associated with repairing the bulkhead are to be assessed equally amongst all members of the Boatowners' Association. We remand this issue for additional findings by the trial court.

As we held above, the declaration of restrictions filed by Inlet Point Harbor expressly defines the bulkhead as a "water related common area." Moreover, the trial court correctly determined that "[t]he members of the Inlet Point Harbor Boatowners' Association may vote on a special assessment for the

Inlet Point Harbor bulkhead that includes an allocation of costs, and such vote requires an affirmative vote of no less than 2/3 of all votes in order to pass."

In the instant case, the record indicates that the cost of repairing the bulkhead could be assessed with a special assessment. According to the restrictive covenants, an affirmative 2/3 vote from members of the Boatowners' Association is required for the Boatowners' association to levy a special assessment. The trial court made no findings that would allow this Court to determine if the members of the Boatowners' Association held a vote or the results of the vote.

"The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quotations and citations omitted). Without additional findings of fact, we are unable to determine if the trial court correctly determined that the costs associated with the repair of the bulkhead should be assessed equally to all association members.

IV.

Lastly, Defendants argue that the trial court erroneously considered evidence of several affidavits to determine the intent of the developers of Inlet Point Harbor. We disagree.

Our Supreme Court has held:

> [o]rdinarily [the covenanting parties' intent] must be ascertained from the deed itself, but when the language used is ambiguous it is proper to consider the situation of the parties and the circumstances surrounding their transaction. However, this intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent.

Stegall v. Housing Authority, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971). However, "[i]n a . . . hearing by the court without a jury . . . it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *Stanback v. Stanback*, 31 N.C. App. 174, 179-80, 229 S.E.2d 693, 696 (1976).

Here, the record indicates that trial court's Declaratory Judgment is based on a review of the Inlet Point Harbor covenants. Nothing affirmatively appears in the record to indicate that the trial judge was influenced by the admission of any incompetent evidence. Thus, as in *Stanback,* we presume that the trial judge disregarded any incompetent evidence that may have been admitted.

In sum we uphold the trial court's actions on I, II and IV; however, we remand issue III for additional findings of fact to support the trial court's conclusion.

Affirmed in part, remanded in part.

Judges McGEE and BRYANT, concurring.

Report per Rule 30(e).

Judge WYNN concurred in this opinion prior to 9 August 2010.