NO. COA11-942
NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2012

FAIRWAY FOREST TOWNHOUSES ASSOCIATION, INC., a North Carolina nonprofit corporation; VINCE ZARZACA, BURTON BLOOM, FRANK WALKER, and LARRY MORGAN, each individually and as members of the Board of Directors of Fairway Forest Townhouses,
Plaintiffs,

v.

Jackson County
No. 10 CVS 657

FAIRFIELD SAPPHIRE VALLEY MASTER ASSOCIATION, INC., a North Carolina nonprofit corporation,
Defendant.

Appeal by plaintiffs from order entered 23 May 2011 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 23 January 2012.

*The Dungan Law Firm, P.A., by Robert E. Dungan and Alicia Gaddy Vega, for plaintiffs-appellants.*

*Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr. and W. Carleton Metcalf, for defendant-appellee.*

MARTIN, Chief Judge.

Plaintiffs Fairway Forest Townhouses Association, Inc. ("the Townhouse Sub-Association") and Vince Zarzaca, Burton Bloom, Frank Walker, and Larry Morgan, both individually and as members of the Board of Directors of Fairway Forest Townhouses, appeal from the trial court's order granting summary judgment in favor of defendant Fairfield Sapphire Valley Master Association, Inc. ("the Master Association") and dismissing the action. We affirm.

The Master Association is the North Carolina non-profit corporation which owns and manages various properties within the Fairfield Sapphire Valley development ("the Development"), located in Sapphire, Jackson County, North Carolina. The Development includes twenty-five different communities, one of which is Fairway Forest Townhouses ("the Townhouse Community"). The Townhouse Sub-Association is the North Carolina non-profit corporation which serves as the "operating entity" of the Townhouse Community. The Townhouse Community is a "planned community," as defined in N.C.G.S. § 47F-1-103(23), and consists of 110 units, each of which is divided into fifty weekly timeshare intervals.[1] Thus, the Townhouse Community is comprised

[1] The remaining two calendar weeks are reserved for unit maintenance.

of 5,500 weekly timeshare intervals, and each timeshare interval is designated for occupancy during a particular calendar week on a permanently repetitive annual basis. According to the recorded declaration for the Townhouse Sub-Association ("the Declaration"), each owner of a weekly timeshare interval within the Townhouse Community "shall become" a member of both the Townhouse Sub-Association and the Master Association.

Plaintiffs alleged that Fairfield Communities, Inc. ("FCI"), a successor-in-interest to the original developer of the Development, "owned the property on which the amenities for the twenty-five (25) different communities within [the Development] are located," and levied fees for maintaining the amenities in the Development "against all of the members" of the Master Association, which included owners of timeshare intervals within the Townhouse Community. In 1990, FCI filed for bankruptcy and, as a result of adversarial proceedings brought by both the Master Association and the Townhouse Sub-Association against FCI arising out of this bankruptcy action, the Master Association and the Townhouse Sub-Association each entered into settlement agreements with FCI in order to resolve all matters pending in their respective actions. However, according to the terms of the settlement agreement between FCI and the Master Association ("the Master Settlement Agreement"), the Master

Settlement Agreement would "not become effective and binding" until it "ha[d] been approved by . . . a majority of the members of the Master Association" and "each sub-association ha[d] approved and agreed to comply with the terms of this Settlement Agreement and agreed to dismiss with prejudice all proofs of claim claiming ownership, vested easements, liens and other rights in the Sapphire Valley amenities, *including, without limitation, those filed by . . . [the Townhouse Sub-Association] . . . .*" (Emphasis added.) Thus, as plaintiffs concede, pursuant to the terms of its own 1993 settlement agreement with FCI ("the Townhouse Settlement Agreement"), the Townhouse Sub-Association "was obligated to [and did] consent to the terms" of the Master Settlement Agreement.

Among its terms, the Master Settlement Agreement recognized and identified amendments to the Master Association's bylaws, which added an Article IX, entitled "Budget and Assessments," providing in relevant part:

> All costs of maintaining and operating any amenities and any golf course operating subsidy, shall be allocated so that each timeshare owner of a Unit or Lot pays 1/9 of an equal Unit share for each week owned and a whole ownership interest pays 9/9 of an equal share. Owners of double timeshare Units shall bear costs at the rate of 1/6th as opposed to 2/9ths.

Plaintiffs do not dispute that, according to the terms of the

Townhouse Settlement Agreement, the members of the Townhouse Sub-Association agreed to "immediately consent in writing to the [Master Settlement Agreement]," which included these modified amenity fee formulas. Additionally, plaintiffs alleged that, according to the terms of both settlement agreements, the Townhouse Sub-Association "is supposed to serve as a collection agent to collect the amenity fees from the members of the [Townhouse Sub-Association] for the use of the amenities in [the Development] and deliver the amenity fees to the [d]efendant Master Association."

In 2009, based on "repeated demands" from the Townhouse Sub-Association, the Master Association "began to review the allocation of amenity fees." The Master Association's Board of Directors hired a consulting group to independently assess the "equality of the amenities fee rates[,] taking into consideration the current stratification of the rates between different classifications of members (e.g., lot/condominium/townhouse owners, timeshare owners, etc.)." As a result of its review, the consultants found that, "[d]ue primarily to changes in the membership base occurring since 1993 (the implementation year for the current amenities fee rate configuration), . . . a disparity in the amenities fee rate for [the increasing number of residential lot and

condominium/townhouse] owners vs. the rates for the timeshare owners has arisen." Thus, the consulting group recommended that a "new approach should be explored for the determination of the stratification of amenities fee rates between lot/condominium/townhouse owners (the 'whole owners') and the timeshare owners."

Walter Green, the president of the Master Association, testified by deposition that, as a result of the study, the Master Association's Board of Directors "voted to approve an amendment to the Master Association's Bylaws that would allocate seventy-five percent (75%) of the cost of operation and maintenance of the amenities to owners of lots, townhouses, and condominiums, with the remaining twenty-five percent (25%) being allocated to timeshare owners." However, in June 2010, before any such amendment was submitted to the Master Association's full membership for a vote, the Townhouse Sub-Association informed the Master Association that it "would not make additional [amenity fee] payments for 2010." Thus, because the Townhouse Sub-Association "refuse[d] to remit the amenity fees" to the Master Association, in September 2010, the Master Association notified the Townhouse Community owners that they were "declared to be in violation of the By-Laws" and that their "rights to use the amenities owned by the Master Association

ha[d] been revoked." Although the Townhouse Sub-Association tendered a payment to the Master Association for the amenities fees due from the timeshare interval owners scheduled for occupancy during the last week of September 2010, the Master Association notified the Townhouse Sub-Association that, "in order to gain access to the amenities, the [p]laintiffs must pay the outstanding balance in full[,] not on a week-by-week basis[,] to be a member in good standing."

Plaintiffs filed a Verified Complaint against the Master Association requesting the following relief: that the trial court declare the Master Association's "current system of levying amenity fees is inequitable, arbitrary, capricious, and fundamentally unfair"; that the court enter a constructive or resulting trust against the Master Association for amenity fees collected over the last six years and reimburse said fees to plaintiffs; that the court enjoin the Master Association from denying plaintiffs and their guests the use of amenities in the Development during the pendency of the litigation; and that the trial court declare that "no covenant exists to authorize the [d]efendant Master Association to levy and enforce assessments against members of [the Townhouse Sub-Association] or to compel [the Townhouse Sub-Association] to act as its collection agent."

The Townhouse Sub-Association then amended its Declaration

pursuant to a majority vote by its own members. As a result, the Master Association filed a counterclaim, alleging that "[t]he purpose of these amendments was . . . to attempt to delete provisions of the Declaration pertaining to [the Townhouse Sub-Association's] duty to collect the Amenity Fees from [the Townhouse Sub-Association] members." The Master Association then requested that the trial court declare the Townhouse Sub-Association's amendments to its Declaration "void and of no effect," and asked that the court order the "Declaration, including those provisions requiring [the Townhouse Sub-Association] to collect Amenity Fees from its members on behalf of the Master Association, remain in full force and effect."

The Master Association moved for summary judgment. After considering the affidavits and arguments of counsel, the court decreed that plaintiffs "shall have and recover nothing under its Complaint and Amended Complaint and that all claims for relief therein be and the same hereby are denied." The court also ordered that the Townhouse Sub-Association's amendments to its Declaration, "which were enacted without the consent of the [Master Association]," are "declared to be null and void and the By-Laws enacted pursuant to the [Master Settlement Agreement] and the formulas therein for allocating amenity fees to

timeshare owners in [p]laintiff's townhouses remain valid and binding unless and until the same are amended in accordance with the terms of said By-Laws." The court further decreed that the provisions requiring the Townhouse Sub-Association "to collect and remit to the Master Association amenity fees assessed in accordance with the By-Laws of the Master Association which, in all respects, remain in full force and effect . . . are binding on the [Townhouse Sub-Association] and its members." Plaintiffs appealed.

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I.

Plaintiffs first contend the trial court erred when it decreed that the Townhouse Sub-Association's 2011 amendments to its Declaration are "null and void." We disagree.

"The term amend means to improve, make right, remedy, correct an error, or repair." ***Armstrong v. Ledges Homeowners Ass'n***, 360 N.C. 547, 558, 633 S.E.2d 78, 87 (2006). "[A] provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent." ***Id.*** at 559, 633 S.E.2d at 87. Thus, "[i]n the same way that the powers of a homeowners' association are limited to those powers granted to

it by the original declaration, an amendment should not exceed the purpose of the original declaration." *Id.* at 558, 633 S.E.2d at 87. "[T]he court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community." *Id.* at 559, 633 S.E.2d at 88.

In the present case, plaintiffs assert that the Townhouse Sub-Association's 2011 amendments "merely" "removed any obligation of [the Townhouse Sub-Association] to collect the recreational assessments on behalf of the Master Association." However, a closer review of the substantive changes implemented by the amendments belies plaintiffs' assertion. For instance, in addition to deleting the provision specifying that "recreational fee[s]" "shall be collected by the [Townhouse Sub-Association] along with the [Townhouse Sub-Association] assessments provided for herein," the amendments also deleted the requirement that all weekly timeshare interval owners pay the mandatory fees "for the use, enjoyment and continual maintenance of the recreational facilities at Sapphire Valley," by removing the restriction that kept owners from exempting themselves from the maintenance fee by waiving the use of the recreational facilities. The amendments also struck a non-

payment enforcement provision that gave "the Developer" the right to place a lien on a Townhouse Community owner's property "for unpaid recreational fees." Additionally, although plaintiffs argue that only "the Developer" could object to the amendments because the Declaration provided that "[n]o amendment or supplement shall change the rights and privileges *of the Developer* without the Developer's written approval," (emphasis added), the Townhouse Sub-Association's amendments struck this provision in its entirety. Further, the amendments removed the provision providing that "[e]ach Lot Owner and Lot Week Owner . . . shall be conclusively held to have covenanted to pay the [Master Association] or its designee all charges that the [Master Association] shall make pursuant to any paragraph or sub-paragraph in this Declaration or its By-laws."

Thus, despite plaintiffs' assertion to the contrary, the 2011 amendments effectively removed from the Declaration all provisions that obligated the Townhouse Community timeshare interval owners to pay mandatory amenity fees to the Master Association upon ownership in the Development by way of the Townhouse Sub-Association and to pay other charges deemed necessary by the Master Association in its bylaws. Moreover, these changes to the Declaration were promulgated without the participation or agreement of either the Developer (or its

successor-in-interest) or the Master Association, both of which were signing entities that approved of and executed the original Declaration. Thus, "in light of the contracting parties' original intent," based on the "language of the original declaration of covenants" and other "objective circumstances," *see Armstrong*, 360 N.C. at 559, 633 S.E.2d at 87–88, we conclude that it is unreasonable that a majority of the Townhouse Sub-Association could remove all of the aforementioned obligations by which it originally agreed to be bound to both the Master Association and the Developer without the participation or agreement of either the Developer (or its successor-in-interest) or the Master Association. Accordingly, we conclude the trial court did not err when it declared that the 2011 amendments are null and void.

II.

Plaintiffs next contend the trial court erred when it granted the Master Association's motion for summary judgment with respect to plaintiffs' claims for declaratory relief, in which plaintiffs asked the court to declare that the Master Association's "current system of levying amenity fees is inequitable, arbitrary, capricious, and fundamentally unfair," and that "no covenant exists to authorize [the Master Association] to levy and enforce assessments against members of

the [Townhouse Sub-Association] or to compel the [Townhouse Sub-Association] to act as its collection agent." Nevertheless, plaintiffs alleged in their complaint that all Townhouse Community owners are members of both the Townhouse Sub-Association and the Master Association, and that both associations entered into settlement agreements with the successor-in-interest to the Developer, FCI, which owned and operated the recreational facilities. Plaintiffs also alleged that the amenity fee formulas that they now challenge as "inequitable, arbitrary, capricious, and fundamentally unfair" were incorporated as a provision of the Master Settlement Agreement to which the parties agreed. Although plaintiffs allege that the Townhouse Sub-Association itself was "not a party to the Master Settlement Agreement and was not involved in the negotiations surrounding the Master Settlement Agreement," the following excerpt from the minutes of the Townhouse Sub-Association's June 1992 Annual Meeting included in the record belie these assertions:

> The 1981 document filed by [FCI] which established the amenity fee speaks to a uniform charge. Mr Dungan[, the Townhouse Sub-Association's attorney,] is approaching this as a legal issue in that the timeshare owners have not been paying a "uniform" fee and should be entitled to a refund. *The Board [of the Townhouse Sub-Association] is working presently with the Master [Association's] Board to also reach a*

> *resolution of the matter* once the Master Association becomes the owner of the amenities [as a consequence of its settlement agreement with FCI]. The amenities will need a certain level of funding and it is opined that a proper and reasonable compromise can be established. The level of fee to assist in the upkeep of the amenities and various areas to be paid by interval owners will be in keeping with a proper proportionate share to a whole ownership fee.

(Emphasis added.) Additionally, according to the express terms of the Master Settlement Agreement and the Townhouse Settlement Agreement, and as plaintiffs alleged in their complaint, the Townhouse Sub-Association "was obligated to [and did] consent to the terms of the Master Settlement Agreement," which incorporated the amenity fee formulas plaintiffs now challenge as "fundamentally unfair." Finally, plaintiffs further alleged that, pursuant to the terms of both settlement agreements and according to its Declaration, the Townhouse Sub-Association "is supposed to serve as a collection agent to collect the amenity fees from the members of the [Townhouse Sub-Association] for the use of the amenities in [the Development] and deliver the amenity fees to the [Master Association]." In other words, according to the terms of the Declaration, the settlement agreements with which plaintiffs alleged they were "obligated to consent," and the record before us, plaintiffs participated in the process of devising proportional amenity fee formulas for

the timeshare interval owners in the Townhouse Community, consented to contracts that identified the proportional amenity fee formulas with which they have complied since their implementation in 1992, and further consented to pay all such amenity fees to the Townhouse Sub-Association as a collecting agent for the Master Association. Plaintiffs neither alleged nor argued that the terms of these settlement agreements are unclear or ambiguous. "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). "A court cannot grant relief from a contract merely because it is a hard one." *Id.* at 720, 127 S.E.2d at 541. Accordingly, we conclude the trial court did not err when it granted summary judgment on plaintiffs' claims for declaratory relief in favor of the Master Association, and we overrule this issue on appeal.

We have reviewed and considered the remaining assertions in plaintiffs' brief and conclude that they are without merit.

Affirmed.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).