[Cite as *Country Club S. Homeowners Assn., Inc. v. Warren Country Club Villas Condo Unit Owners Assn., Inc.*, 2012-Ohio-5835.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

COUNTRY CLUB SOUTH HOMEOWNERS ASSOC., INC.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2012-T-0001**
- vs -	:	
WARREN COUNTRY CLUB VILLAS CONDOMINIUM UNIT OWNERS ASSOC., INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2010 CV 02914.

Judgment: Affirmed.

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiff-Appellant).

Daniel P. Thomas, DelBene, LaPolla & Thomas, 155 Pine Avenue, N.E., P.O. Box 353, Warren, OH 44482 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, taken from a final judgment of the Trumbull County Court of Common Pleas. Appellant, Country Club South Homeowners Association, Inc., challenges the merits of the trial court's legal determination regarding the continuing enforceability of an agreement governing the costs of maintaining certain real property. Specifically, appellant submits that the trial court erred in concluding that

appellee, Warren Country Club Villas Condominium Unit Owners Association, Inc., was entitled to terminate the maintenance agreement under the controlling statutory law.

{¶2} Country Club South is a residential development which is located near a private country club in Warren, Ohio. Started originally at some point in the late 1990's, the development contains traditional homes and condominium units. Access to both the homes and condominiums is obtained through an entrance roadway which enters the development from a major city thoroughfare.

{¶3} At the outset of the project, when only a few of the homes had been sold, the developers and the existing homeowners took the required steps to form appellant, the homeowners association. Similarly, when the condominium units began to sell, the developers and the unit owners formed appellee, the condominium association. Since the majority of the proposed homes and condominium units remained unsold during the early phase of the development, the developers had control over some of the positions on the respective boards of the two associations.

{¶4} In November 2000, the homeowners association and the condominium association executed a written agreement concerning the maintenance of the property adjacent to the entrance roadway. In addition to providing for the formation of certain committees regarding maintenance issues, the agreement had a specific term as to the payment of the various costs. That term stated that the homeowners association would be responsible for 40 percent of the related expenses, while the condominium association had to pay the remaining 60 percent.

{¶5} The two associations complied with the maintenance agreement over the ensuing nine years. During that time frame, the developers continued to exert control

over the board of the condominium association. However, in early 2010, the developers relinquished control of the condominium board to the condominium unit owners. Soon thereafter, the new condominium board chose to discontinue its regular payment of its share of the maintenance expenses. Although never officially voted upon by the board or the condominium unit owners, the condominium association decided not to renew the maintenance agreement.

{¶6} In November 2010, the homeowners association instituted the underlying case against the condominium association. In its amended complaint, the homeowners association asserted two claims for relief. First, the homeowners sought a declaratory judgment as to the continuing enforceability of the maintenance agreement. Second, the complaint alleged that the condominium association had breached the agreement by refusing to pay for 60 percent of the maintenance costs; therefore, the homeowners sought compensatory damages covering the amount of the unpaid costs.

{¶7} After the condominium association had answered the amended complaint, the parties were able to stipulate as to all pertinent facts in the case, including the total amount the condominium association would have owed if it had continued to follow the terms of the maintenance agreement. Hence, the case was submitted to the trial court for determination of the legal question of whether the condominium association had the ability under R.C. 5311.25(D) to essentially terminate the maintenance agreement once the developers had relinquished control over the condominium board. In its written brief before the trial court, the homeowners association contended that the statute only gave a condominium association the power to not renew a "management" agreement. In its response brief, the condominium association asserted that the statutory authority to not

renew an existing agreement extended to any type of contract executed by a developer in behalf of the association.

{¶8} In its final judgment, the trial court basically ruled against the homeowners association regarding the continuing enforceability of the maintenance agreement; i.e., it was held that R.C 5311.25(D) permitted the condominium association to decide not to renew any type of contract, including a "maintenance" agreement, which had previously been executed by the original developers. However, the trial court further held that the decision not to renew could not take effect until one year after the condominium owners had taken control of the condominium association. Thus, the court concluded that, even though the maintenance agreement was no longer legally enforceable as of June 2011, the condominium association was liable for the maintenance costs covering the period from July 2010 until June 2011.

{¶9} In appealing the foregoing determination, the homeowners association, as the appellant in this matter, has raised one assignment of error for review:

{¶10} "The trial court erred in finding that R.C. 5311.25(D), eff. 10/1/78, applied to contracts other than management contracts; and in entering judgment accordingly."

{¶11} Under this assignment, appellant essentially submits that the trial court's interpretation of R.C. 5311.35(D) was not supported by the plain wording of the statute. While acknowledging that the cited provision does allow a condominium association to terminate an agreement which was executed before the unit owners took control of the association's board, appellant maintains that the provision was only intended to apply to one type of contract: i.e., one relating to the actual management of the association itself. Appellant further maintains that, since the agreement between it and the condominium

association did not pertain to the management of that association, the agreement was not subject to rescission and would remain binding on both parties indefinitely into the future.

{¶12} R.C. Chapter 5311 governs the development and use of Ohio real estate as condominium property. Our review of the legislative history of this chapter indicates that R.C. 5311.25 was originally passed into law in 1978. The legislative history further indicates that the 1978 version of that statute has only been amended by the General Assembly on one occasion, and that amendment took effect in October 2004.

{¶13} Before the trial court, the parties in this action stipulated that the disputed maintenance agreement was executed in November 2000. Based upon this, the parties also agreed that the 1978 version of R.C. 5311.25 would be applicable to the disputed agreement. Under that version, R.C. 5311.25 delineated a list of "provisions" which a developer was obligated to include in any condominium instrument pertaining to the development. Division (D) of the statute then set forth one of the required provisions:

{¶14} "Neither the unit owners association nor the unit owners will be subject to any management contract or agreement executed prior to the assumption of control required by division (C) of this section for more than one year subsequent to that assumption of control unless such a contract or agreement is renewed by a vote of the unit owners pursuant to the bylaws required by section 5311.08 of the Revised Code."

{¶15} In attempting to interpret the foregoing provision, appellant asserts that the term "management" must be construed to modify both the word "contract" and the word "agreement." Building upon this, appellant argues that the provision was only meant to apply to a contract or agreement relating to the actual management of the condominium

association. In its legal analysis, the trial court reached the exact opposite conclusion; i.e., the final judgment held that the "non-renewal" provision was intended to apply to any type of contract or agreement previously executed by the developer. In support of this holding, the trial court relied solely upon certain language contained in the Supreme Court's opinion in *Belvedere Condo. Unit Owners' Assn. v. R.E. Roark Companies, Inc.*, 67 Ohio St.3d 274 (1993).

{¶16} In *Belvedere Condo.*, the primary issue before the Supreme Court of Ohio concerned whether the developer of a condominium complex owed a fiduciary duty to the individual unit owners. *Id.* at 279. Prior to addressing that particular issue, though, the Court gave a detailed explanation of the problems the General Assembly attempted to resolve in enacting the 1978 amendments to the "condominium" statutory scheme. *Id.* at 280-282. At the start of this discussion, the Court noted that the developer has an inherent conflict of interest during the infancy phase of a development, in that the developer can exert total control over the condominium association while still trying to sell new units to the public. *Id.* at 280. The Court then emphasized that R.C. 5311.25 and two other statutory sections were created in 1978 "to protect condominium owners and purchasers from developer abuse." *Id.*

{¶17} In relation to division (D) of R.C. 5311.25, the *Belvedere* court stated that the provision was particularly relevant to the facts of that case. Upon quoting division (D) in its entirety, the Supreme Court indicated:

{¶18} "We believe, and the parties appear to agree, that this provision entitles the board of the owners' association, once fully elected by the individual unit owners, to cancel contracts entered into by the developer-controlled board. This provision protects

unit owners from inequitable contracts and agreements, including those similar to the lease that led to this litigation." *Id.* at 281.

{¶19} In the last sentence of the foregoing quote, the *Belvedere* court expressly stated that the "non-renewal" provision of R.C. 5311.25(D) could be applied to a lease agreement. Moreover, the quoted analysis does not contain any reference to the term "management." Accordingly, it is apparent that the Supreme Court did not conclude that the term "management" was intended to modified both "contracts" and "agreements" in division (D); hence, under the *Belvedere* analysis, the ability to "cancel" a developer's contract extends to any type of legal agreement.

{¶20} Although appellant's brief cites the opinion in *Belvedere Condo.*, the brief does not attempt to distinguish the case or otherwise explain why its legal analysis of R.C. 5311.25(D) should not be followed in this instance. Instead, appellant predicates its argument upon a law review article which was published immediately following the original enactment of R.C. 5311.25(D) in 1978. *See* Ohio Condominium Law Reform; A Comparative Critique, 29 Case W.R Law Rev., (1978). According to appellant, the two writers of the article concluded that the 1978 version of R.C. 5311.25(D) would have to be amended by the legislature before it could be applied to any other type of agreement besides a "management" contract.

{¶21} In regard to the precedential value of *Belvedere Condo.*, this court would note that the Supreme Court's analysis of R.C. 5311.25(D) was not cited in the syllabus of the case; thus, it is arguable that the analysis in question was only dicta in the opinion and is not necessarily binding for purposes of future cases. *See Connor & Murphy, LTD. v. Applewood Village Homeowners' Assn.*, 12th Dist. No. CA2007-09-213, 2009-

Ohio-1447. Nevertheless, it must also be noted that the R.C. 5311.25(D) analysis was not a mere "footnote' in the *Belvedere* decision; i.e., the Supreme Court fully discussed the underlying reasons for the enactment of the new statute. In addition, this court would reiterate that the Supreme Court specifically stated that R.C. 5311.25(D) was pertinent to the facts of that case. *Belvedere, supra*, at 281. In this respect, it can be said that the proper interpretation of the statutory provision was a building block for the Supreme Court's ultimate conclusion that a condominium developer did not owe a fiduciary duty to the unit owners.

{¶22} More importantly, this court concludes that, even if we were to hold that the precedential value of the *Belvedere* analysis was limited due to its status as dicta in the opinion, that analysis should still be followed because it is persuasive. That is, we conclude that the 1978 version of R.C. 5311.25(D) must be interpreted to apply to any type of agreement executed by a developer. As to this point, if the statute was construed to only apply to a management contract, this would mean that, as to any type of legal agreement, the developer would have the authority to bind a condominium association for an indefinite period of time. In fact, as part of its argumentation before the trial court, appellant admitted that if R.C. 5311.25(D) was interpreted as having no application except as to a management contract, it would mean that appellee would be bound by the terms of the maintenance agreement *forever*. To the extent that such an interpretation would totally defeat the stated purpose of stopping developer abuse of the unit owners, it must be rejected. *See AT&T Communications of Ohio, Inc. v. Lynch*, 2012-Ohio-1975, ¶18.

{¶23} Given the persuasiveness of the Supreme Court's analysis in *Belvedere*,

appellant's reliance upon the 1978 law review article is unpersuasive. For these reasons, the trial court did not err in basing its interpretation of R.C. 5311.25(D) solely upon the existing *Belvedere* precedent.

{¶24} As a separate argument regarding the correct interpretation of the original version of R.C. 5311.25(D), appellant submits that the nature of the amendments to the statute in 2004 gives an indirect indication of how the Ohio legislature intended for the original version to be applied. In support of this point, appellant notes that the present version of R.C. 5311.25(D) sets forth a separate rule for management contracts and a separate rule for other types of agreements. According to appellant, this new distinction demonstrates that the General Assembly only meant for the original version of the "non-renewal" provision to apply to management contracts.

{¶25} As enacted in October 2004, the present version of R.C. 5311.25(D) now provides:

{¶26} "(D) Unless a contract or other agreement is renewed by a vote of the unit owners exercising a majority of the voting power of the unit owners association, neither the unit owners association nor the unit owners shall be subject to either of the following:

{¶27} "(1) For more than ninety days subsequent to the date that the unit owners other than the developer assume control of the unit owners association, any management contract executed prior to that assumption of control;

{¶28} "(2) For more than one year subsequent to an assumption of control, any other contract executed prior to that assumption of control, except for contracts for necessary utility services."

{¶29} Upon duly considering the foregoing quote, this court concludes that the present version of R.C. 5311.25(D) does not provide any proper guidance as to how the Ohio legislature intended for the prior version to be applied. At best, the new wording only indicates that the legislature has decided that a condominium association should be bound to a management contract for only ninety days, while the time limit for any other type of contract should remain at one year. Under the 1978 version of the statute, there was no need to refer to management contracts and other types of agreements in separate subdivisions because the one-year limit was applicable to both sets. To this extent, it cannot be said that the *Belvedere* analysis of the prior version of the provision must now be viewed as legally flawed in light of the wording of the present version.

{¶30} As the trial court correctly held that the 1978 version of R.C. 5311.25(D) could be applied to the 2000 maintenance agreement between appellee and appellant, it follows that appellee could chose not to renew that agreement. Furthermore, since it was stipulated that appellee never voted to renew the agreement, it was only binding on appellee for one year after the unit owners took control of the condominium association. Therefore, because the agreement was no longer enforceable, appellee was entitled to prevail on appellant's declaratory judgment claim.

{¶31} Pursuant to the foregoing discussion, appellant's sole assignment of error lacks merit. It is the order and judgment of this court that the judgment of the Trumbull County Court of Common pleas is affirmed.

TIMOTHY P. CANNON, P.J.

DIANE V. GRENDELL, J.,

concur.