IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John R. Goodreau and Anne C. Goodreau, husband and wife	:	
v.	:	No. 35 C.D. 2011 Argued: September 16, 2011
Beech Mountain Lakes Association, Inc., Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge (P.)

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** October 18, 2011

Appellant Beech Mountain Lakes Association, Inc. (the Association), appeals from an order of the Court of Common Pleas of Luzerne County (trial court), which granted summary judgment in favor of Appellees John R. Goodreau and Anne C. Goodreau (Homeowners) and against the Association, relating to a breach of contract and declaratory judgment action filed by Homeowners against the Association. For the reasons discussed below, we now reverse the trial court's order.

We begin with a recitation of the relevant procedural history and averments contained in the pleadings. Homeowners filed a civil complaint against the Association, setting forth causes of action for breach of contract and declaratory judgment. Homeowners averred in their complaint that on or about

July 11, 1998, they purchased two contiguous pieces of real property situate in Butler Township, Luzerne County, Pennsylvania, identified as Lot Nos. 32 and 33, Section 3, of the Beech Mountain Lakes Subdivision (the Property). The Property is subject to a Declaration of Protective Covenants, Exceptions, Reservations and Conditions for Beech Mountain Lakes (the Covenants), attached to Homeowners' complaint as Exhibit "B". Section 13.16 of the "General Use Restrictions" of the Covenants provides that "[n]o [u]nit shall be divided or split and no [u]nits or portion thereof combined, without the express written consent of the [Association's Architectural Control Committee]" (ACC). (Reproduced Record (R.R.) at 15a.)

Homeowners aver that on July 20, 1998, they applied for and obtained approval from the Association through its ACC to construct a single-family residential dwelling unit in the middle or center of both properties pursuant to Section 13.16 of the Covenants. Homeowners attached to their complaint as Exhibit "A" a copy of what they characterized as the ACC's "written approval," which they also characterize as a "survey map." Exhibit A depicts Lot Nos. 31, 32, 33, and 34. As to Lot Nos. 32 and 33, a dwelling unit is drawn in the center of the two lots, with square footage, some dimensions, distances from outer most property lines, and the location of a driveway depicted. As to the line dividing Lot Nos. 32 and 33, there is a notation that reads "line to be removed." Also, Exhibit A is stamped "APPROVED, BEECH MOUNTAIN LAKES ARCHITECTURAL COMMITTEE," with lines provided to insert the "DATE" and name of the "CHAIRMAN." The date is hand-written "7/20/98," and there is a signature next to the word "CHAIRMAN."

At or around the same time, Homeowners obtained approval from Butler Township for the construction of the single-family dwelling unit at the

location depicted in Exhibit A. Homeowners thereafter constructed the single-family residential dwelling unit in the location depicted on Exhibit A.

Section 1.51 of the Covenants provides that, with Association approval, if a residential dwelling is constructed on a parcel consisting of more or less than one lot, then the parcel shall be deemed to be one unit.[1] Section 7.4 of the Covenants, as amended and revised by Section 2.7(a) of the Covenants, provides that the Association's assessment for each owner shall vary according to the type of property, and a residential dwelling unit shall have a ratio of 1.0.

Homeowners further aver that on or about December 27, 2004, they received notice from the Association that they would be assessed as having multiple units beginning in the calendar year 2005. Beginning in 2005, the Association began assessing Homeowners for each original lot despite the fact that the Homeowners developed the Property with the construction of a residential dwelling in the middle or center of both lots, thereby allegedly "creating one unit for assessment purposes under the Covenants." (Complaint at ¶ 13.)

As noted above, Homeowners set forth counts for breach of contract and declaratory judgment. As to the breach of contract action, Homeowners aver that the Association has a contractual obligation to assess Homeowners for only one unit by virtue of the Covenants, and the Association breached its contractual obligation by assessing Homeowners for two units beginning in 2005. As to the declaratory judgment action, Homeowners seek a declaration of the respective rights of the parties under the Covenants and a determination as to whether the

[1] Section 1.51 of the Covenants specifically provides, in relevant part, that "[a] unit shall include a subdivided Lot as shown on a recorded Plan, except that, if with Association approval, a residential dwelling is constructed on a parcel consisting of more or less than one lot, then the parcel shall be deemed to be one Unit hereunder." (R.R. at 14a.)

Homeowners are entitled to reimbursement for assessments they paid based on a second unit.

The Association filed an answer, admitting that the Homeowners (or their builder) obtained approval for a plan to construct a residential dwelling in the middle of two lots, but specifically denying that the ACC's "approval" to construct the structure in the middle of two contiguous lots constituted approval of the creation of one unit. The Association "denied as stated" Homeowners' averment that they "obtained the approval of Butler Township for the construction of the single-family dwelling unit in the location depicted on Exhibit A." (Answer at ¶ 5.) Instead, the Association answered that, on August 4, 1998, Homeowners, through their contractor, applied for a building permit, which was granted contingent upon a reverse subdivision being approved. The Association also "denied as stated" that Homeowners obtained the consent of the ACC. The Association admitted only that the Homeowners obtained the consent of the ACC "to erect a structure on two contiguous lots." (Answer at ¶ 9.) The Association further answered that Homeowners only obtained consent based on a quasi-contract or implied contract, whereby the Association consented, but only with the condition that dues would continue to be paid on each lot. (*Id.*) In fact, the Association notes that Homeowners have paid assessments for two units since 1998. (Answer at ¶ 12, 18.)

Following the close of the pleadings, Homeowners engaged in written discovery, but did not take any depositions. The Association did not engage in any discovery. It is worth noting Homeowners' Interrogatory No. 3 and the Association's answer thereto, which provide:

> 3. With respect to Paragraph 4 of the Complaint, please identify with specificity why [the Association's ACC]

> granted approval for [Homeowners] to construct a residence in the center of both properties?
>
> It is unknown whether the [ACC] granted approval. Anita Reber, member of the ACC signed building plans. It is believed that [Homeowners'] Counsel's office was located in same office with Ms. Reber, a realtor, when properties were transferred and approval granted, and therefore, [it] may have been discussed among them. It is assumed by [the Association] that approval was granted because a subdivision had already been approved by the Township.

(The Association's brief, Appendix B-1.)

Homeowners filed a motion for summary judgment, in which they reiterated the averments of their complaint. Homeowners noted that they served interrogatories and a request for production of documents, for which they received answers. Homeowners directed the trial court to the Association's answer to Homeowners' Interrogatory No. 3, wherein the Association acknowledged that Anita Reber, a member of the ACC, signed the Homeowners' building plans (Exhibit A of Homeowners' complaint) and that the Association assumes that approval was granted by the ACC because a subdivision had already been approved by Butler Township. Homeowners contend that based on Exhibit A to the complaint, it is clear that the ACC approved their plans to construct a residence in the center of both properties. Pursuant to Section 1.51 of the Covenants, therefore, the parcel shall be deemed to be one unit.

The Association filed an answer to Homeowners' motion for summary judgment, in which it reiterated what is summarized above. In addition, the Association contended that Homeowners entered into a "Contract for Deed to Real Estate" for both Lot Nos. 32 and 33, which indicated that they will continue to pay maintenance fees (the Association's assessments) on each lot. Also,

although it appears that the Homeowners obtained some type of "approval" from the ACC, the Association specifically denied that one unit was created for assessment purposes. The Association answered that the ACC "neither controls the ability and right to subdivide, inversely or otherwise," and it has "no right or authority to alter obligations" pursuant to the Covenants that run with the land, or to preempt the requirements of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202, or the Butler Township Code of Ordinances. (R.R. at 55a.) The Association also answered that "from on or about the date of the turnover of the developer . . . to the [Association], on or about January of 1998, the [ACC] has never approved the inverse subdivision of Lots located in the Beech Mountain Lakes Development. It was the policy of the developer to only grant such approval with the condition that dues would be paid on both lots." (R.R. at 55a-56a.) The Association submitted affidavits in support of those statements. (R.R. at 65a-74a.)

Based on the pleadings and briefs, without argument, the trial court granted Homeowners' motion for summary judgment. The entirety of the trial court's "opinion/order" provides:

> Plaintiffs' Complaint for Breach of Declaratory Judgment alleges violations of Defendant's Declaration of Protective Covenants. It is alleged that the Defendant, by its 2004 Notice of Additional Assessment for the Year 2005 and Thereafter for "multiple units" of Plaintiffs violated the Declaration Sections 13.16, 1.51 and 7.4, as amended by 27(a). The court finds the facts as set forth and supported by *depositions* filed hereto support the Plaintiffs' claim that Defendant breached the aforesaid Protective Covenants. The Plaintiffs hereto complain their two (2) units, with the Association's approval, established their residential dwelling ". . . deemed one (1) unit (See: Protective Covenant 13.16 and 1.51), as the Plaintiff parcels were deemed one unit pursuant to the

> approval of the Defendant's Construction Committee on July 20, 2998 [sic]. The Defendant's attempt to assess Plaintiffs' dwelling as multiple units beginning in 2005 is void.

(Emphasis added.) The Association appealed the trial court's order to this Court.

On appeal,[2] the Association raises several issues, all of which may be characterized as arguing that the trial court erred in granting Homeowners' motion for summary judgment when genuine issues of material fact exist.[3]

Pennsylvania Rule of Civil Procedure No. 1035.2 provides, in part, that a "party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." A court, therefore, may grant a motion for summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bronson v. Horn*, 830 A.2d 1092, 1094 (Pa. Cmwlth. 2003), *affirmed*, 577 Pa. 653, 848 A.2d 917 (2004), *cert. denied*, 543 U.S. 944 (2004). The right to judgment must be clear and free from doubt. *Id.* In reviewing the granting of a motion for summary judgment, this

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[2] This Court's standard of review of an order of a trial court granting summary judgment is limited to considering whether the trial court erred as a matter of law or abused its discretion. *Stein v. Pa. Tpk. Comm'n*, 989 A.2d 80, 86 (Pa. Cmwlth. 2010).

[3] The Association raises the following issues on appeal: (1) whether the trial court erred by granting summary judgment based on facts allegedly supported by non-existent depositions filed in support of Homeowners' claim; (2) whether the trial court erroneously granted Homeowners' motion for summary judgment where there exists a myriad of genuine issues of material fact; (3) whether Homeowners' alternative claims are mutually exclusive, and, therefore, an issue of material fact exists as to whether either of their claims is valid; and (4) whether the statements in Homeowners' pleading that only beginning in 2005 they were assessed for dues on the second lot is patently false, raises an issue of material fact, and should weigh heavily against them in determining whether summary judgment was appropriate.

Court must "view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Pappas v. Asbel*, 564 Pa. 407, 418, 768 A.2d 1089, 1095 (2001), *cert. denied* sub nom *U.S. Healthcare Sys. of Pa., Inc.*, 536 U.S. 938 (2002).

In support of its over-arching argument that genuine issues of material fact exist such that the granting of summary judgment was improper, the Association focuses its attention largely on the facts and circumstances surrounding the so-called "written approval" allegedly obtained by the Homeowners from the Association's ACC. The Association argues that the document stamped "approved" by the ACC with the purported signature of one of the ACC members does not establish that Homeowners obtained the "written approval" of the ACC, as required by Section 13.16 of the Covenants, before combining their lots into one unit for development purposes. The Association contends that the ACC did not approve the location of a residential dwelling because that would have been the responsibility of the Butler Township Zoning Hearing Board, and that the ACC's document merely "approved" the plans for the building—not the inverse subdivision. The Association takes the position that there is nothing on Exhibit A to indicate that a request for permission to inversely subdivide was ever specifically requested, and there is nothing on Exhibit A to indicate that the ACC expressly consented to the inverse subdivision. The Association maintains that the Covenants require "express written consent" from the ACC to reverse subdivide.

In further support of that position, the Association directs the Court's attention to its answer to Interrogatory No. 3, set forth above. In opposition to

Homeowners' assertion that the ACC granted approval for one unit, the Association presented affidavits signed by two general managers of the Association and two members of the ACC (not Ms. Reber) who served at or about the time that the Homeowners contend the approval was granted. (R.R. at 65a-74a.) The affidavits indicate that the Association and/or ACC neither granted approvals for reverse subdivisions, nor granted approvals to construct dwellings on more than one lot. The affidavits also indicate that if requests were made for construction of a residence upon two lots, it was clearly understood by the property owners that they would be required to continue to pay dues on both lots.

In still further support of its position that the ACC did not grant written approval for the combining of the lots, the Association argues that Homeowners contend falsely that they were not charged dues on their second lot until 2005. The Association asserts that since 1998, the Association charged Homeowners assessments on both lots, and Homeowners paid those assessments, suggesting that the Association did not give Homeowners express written consent to inversely subdivide. Moreover, this circumstance further indicates that when the ACC "approved" the building plans, Homeowners understood that it did not absolve them of their responsibility to pay dues on both of their lots, again suggesting that the Association did not provide the "written approval" required by Section 13.16 of the Covenants.

The Association also argues that the Homeowners' "alternative claims" are mutually exclusive, thereby creating genuine issues of material fact. The Association again questions what type of approval the Homeowners' sought. It contends that because Exhibit A includes the language "lines to be removed," the ACC could not have granted approval to build on more than one lot because the

plan indicates that the lot line was to be removed, thereby creating one lot. One could find, therefore, that the ACC merely approved building plans to construct a dwelling on a single lot which was combined at the sole and exclusive discretion of Homeowners. Conversely, the Association notes that Homeowners contend that, with the approval of the ACC, a residential dwelling was constructed on a parcel consisting of more than one lot. The Association points out that these alternative claims are mutually exclusive and are dependent upon differing or alternative sets of facts or interpretations of Exhibit A to the complaint, again demonstrating that material facts are in dispute.

Based on the above, the Association contends that the document stamped "approved" by the ACC, particularly in light of the actions of the parties, creates issues of material fact because it is unclear exactly what was being approved and by whom. We agree. Homeowners attempt to counter the arguments raised by the Association by providing their own arguments as to what the facts are and the inferences to be drawn from those facts. Regardless of how the parties attempt to couch the evidence, however, one fact becomes clear—genuine issues of material fact exist as to whether the Association or its ACC granted approval for Homeowners to combine their two lots into one unit for purposes of assessments, and, if so, whether any conditions were placed on the approval. Given the existence of genuine issues of material fact, the trial court erred in granting summary judgment. *See Bronson*, 830 A.2d at 1094.[4]

[4] The Association also argues that the trial court erred in granting summary judgment based on facts allegedly supported by *depositions*, given that depositions were not taken and that deposition testimony of the moving party is generally insufficient to establish the absence of a genuine issue of material fact. *See Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A.2d 523 (1932). Homeowners suggest that the trial court's reference to depositions was likely a clerical error or some other harmless error, or that the issue is moot because the record reveals that there are no issues of material fact with regard to Homeowners' claim that the Association

Accordingly, the order of the trial court is reversed.[5]

P. KEVIN BROBSON, Judge

breached the Covenants. Because we agree with the Association that genuine issues of material fact exist, we need not consider the ramifications of the trial court's reference to non-existent depositions.

[5] In so reversing the trial court's order, we make no judgment as to who should ultimately prevail in this case. We simply conclude, particularly given our duty to view the evidence in light most favorable to the non-moving party when considering a motion for summary judgment, *Pappas*, 564 Pa. at 418, 768 A.2d at 1095, that genuine issues of material fact exist, which makes summary judgment improper.

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O R D E R

AND NOW, this 18th day of October, 2011, the order of the Court of Common Pleas of Luzerne County, is hereby REVERSED.

P. KEVIN BROBSON, Judge