

DEER CREEK HOMEOWNERS : IN THE SUPERIOR COURT OF
ASSOCIATION : PENNSYLVANIA
:
v. :
:
R. SCOTT COCHRANE AND SUZY :
COCHRANE :
:
APPEAL OF: R. SCOTT COCHRANE : No. 956 EDA 2012

Appeal from the Order Entered February 22, 2012
In the Court of Common Pleas of Montgomery County
Civil Division at No. 10-01292

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J. AND SHOGAN, J.

MEMORANDUM BY BENDER, J:

Filed: January 15, 2013

R. Scott Cochrane appeals *pro se* from the February 22, 2012 order granting summary judgment in favor of Deer Creek Homeowners Association in the amount of \$56,608.79, and for foreclosure and sale of Cochrane's townhouse located in the Deer Creek Planned Community.¹ For the reasons stated below, we affirm.

The trial court provided the following factual and procedural history of this matter:

On July 26, 1996, Deer Creek, Inc. filed a Declaration for the Deer Creek Planned Community ("Deer Creek"), which was recorded in the Montgomery County Office of the Recorder of Deeds on August 2, 1996 (the "Declaration"). Deer Creek then was formed pursuant to the Declaration. [Cochrane] is a Deer Creek homeowner and resides on the Property.

¹ By agreement, Suzy Cochrane was dismissed as a party to this lawsuit on March 21, 2011

On August 14, 2008, Deer Creek's Board of Directors passed a Special Assessment Resolution at a special meeting relating to the repair of the exterior and roofs of townhomes in Deer Creek (the "Resolution"). The Resolution was reaffirmed by the Board on December 22, 2008. The Resolution provided that a special assessment be levied upon each townhome owner, including [Cochrane], to pay the cost of the repairs. Under the Resolution, any unit owner who failed to timely pay would be assessed a late fee of \$500 and a fine of \$20 a day until the assessment was paid in full.

On October 21, 2008, [Deer Creek] notified [Cochrane] of a special assessment issued pursuant to the Resolution for roof repairs for his townhome in the amount of \$26,000. Payment of 60% of this amount was due on or before October 1, 2009. The remaining 40% was due on November 16, 2009. [Cochrane] failed to pay any monies toward the assessment by October 1, 2009, and [Deer Creek] notified [Cochrane] of same. On March 24, 2010, [Deer Creek] again notified [Cochrane] of his failure to pay for the assessment.

[Deer Creek] filed a Writ of Summons against [Cochrane] on January 22, 2010 and then a Complaint for Mortgage Foreclosure on April 9, 2010. [Deer Creek] sought an *in rem* judgment for the late payment penalty, the continuously accruing daily fine, and reasonable attorney's fees in accordance with the Uniform Planned Community Act, 68 Pa.C.S. § 5101, *et seq.* (the "UPCA"). [Cochrane] filed an Answer to the Complaint on April 29, 2010. [Deer Creek] filed its first Motion for Summary Judgment on June 7, 2010, and [Cochrane] consequently requested discovery. Judge Albright dismissed the Motion without prejudice for [Deer Creek] to file another Motion at the close of discovery. On May 11, 2011, the parties agreed upon a discovery management order, signed by Judge Albright, which established a discovery deadline of July 15, 2011.

[Deer Creek] filed its second Motion for Summary Judgment on August 25, 2011. The parties had not engaged in any formal discovery. Oral argument occurred before this Court on February 17, 2012. Subsequently, on February 21, 2012 and pursuant to the Declaration, the Resolution and the UPCA, this Court granted [Deer Creek's] Motion and entered an *in rem* judgment in [Deer Creek's] favor in the amount of \$56,608.79, and for foreclosure and sale of the property.

[Cochrane] filed a Notice of Appeal of the judgment on March 22, 2012. On March 27, 2012, this Court directed [Cochrane] to file a Concise Statement of Errors Complained of on Appeal within twenty-one (21) days. [Cochrane] filed his timely Concise Statement on April 17, 2012.

Trial Court Opinion, 7/10/12, at 1-3.

On appeal, Cochrane raises three issues for our review:

1. Did the Lower Court err or abuse its discretion in granting [Deer Creek's] motion for summary judgment as a matter of law by accepting the unquestioned testimony of a moving party's witness instead of submitting questions of credibility to a jury?
2. Did the Lower Court err or abuse its discretion in granting [Deer Creek's] motion for summary judgment as a matter of law by assuming facts not in evidence or questions of personal knowledge to be decided by a jury in the [Deer Creek] Board's August 14, 2008 Resolution and special meeting minutes?
3. Did the Lower Court err or abuse its discretion by refusing to review [Deer Creek's] assessment as a matter of law?

Cochrane's brief at 3.²

"Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion." ***Universal Health Services, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Assoc.***, 884 A.2d 889, 892 (Pa. Super. 2005) (citation omitted).

The entry of summary judgment is proper whenever no genuine issue of any material fact exists as to a necessary element of the cause of action. The moving party's right to summary judgment must be clear and free from doubt. We examine the record, which consists of all pleadings, as well as any

² Because Cochrane's discussion of his issues is interrelated, we address them together.

depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and we resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

LJL Transp., Inc. v. Pilot Air Freight Corp., 599 Pa. 546, 962 A.2d 639, 647 (Pa. 2009) (citations omitted).

Krapf v. St. Luke's Hospital, 4 A.3d 642, 649 (Pa. Super. 2010), *appeal denied*, 34 A.3d 831 (Pa. 2011).

Cochrane appears to contend that the court erred by granting Deer Creek's second motion for summary judgment in that it relied on the affidavit of Michael McGrath, who was the president of the Deer Creek Board. Specially, Cochrane argues that the affidavit fails to indicate that the special meeting initially adopting the Resolution was held by email, and required "signed consent in writing from *all* board members according to the Deer Creek By-Laws." Cochrane's brief at 11 (emphasis in original). Cochrane further contends that the record does not contain any signed consents and that even without contradicting evidence, the statements in McGrath's affidavit cannot support the grant of summary judgment. Cochrane also challenges McGrath's credibility in regard to the Board's right to assess a \$20.00 a day fine for nonpayment of amounts due Deer Creek, because the Declaration does not allow for such a fee. In the same vein, Cochrane attacks the use by Deer Creek of the minutes from the August 14, 2008 Board meeting at which the Resolution was purportedly passed, contending that no copy of the Resolution signed by all five Board members

is in the record. As a result, he asserts that the evidence contained in these types of documents or the absence of certain documents in the record present questions of fact that must be resolved by a jury. Therefore, Cochrane challenges the grant of summary judgment because he claims that issues of fact remain, which must be presented to a jury.

In response to Cochrane's allegations, Deer Creek explains that it exercised its rights and responsibilities for maintenance and repair of the exterior and roofs of the townhouses by levying the special assessment on the owners of each townhouse and that it gave notice to all unit owners including Cochrane. Deer Creek also asserts that the Resolution is valid and binding on Cochrane in that it was passed by a 4/5 majority on August 14, 2008, and was reaffirmed by a 4/5 majority on December 22, 2008, because one of the Board members was not in attendance. To support the sufficiency of the vote that all five Board members were not required to vote in favor of the Resolution, Deer Creek cites an amendment to the Deer Creek Declaration, which superseded the prior requirements in the Declaration. The amendment provides that:

In addition to its powers to assess homeowners for Common Area expenses, [t]he Board of Directors, by a majority vote of the full Board, shall have the power and duty to levy Maintenance Assessments on all Owner-members of the Community for repair, replacement and/or maintenance obligations of the Association for individual dwelling units.... Maintenance Assessments and Special Project Assessments shall be the owner's personal obligation until paid, and shall be enforceable in the same manner as an unpaid Common Expense Assessment.

Fifth Amendment to the Declaration of Deer Creek Homeowners Association, Article 6.9 (emphasis added). Also, in response to Cochrane's reliance on the Bylaws, Deer Creek notes that the Bylaws indicate that if any conflict arises between the Declaration and the Bylaws, the Declaration controls. Deer Creek further explains its right to impose a late payment penalty, the daily penalty and attorney's fees and costs, which were specifically provided for in the Resolution and are permitted under 68 Pa.C.S. § 5302(a)(11) (allowing the imposition of "charges for late payment of assessments" and the levying of "reasonable fines for violations of the declaration, bylaws and rules and regulation of the association"), and under 68 Pa.C.S. § 5315(g) (providing that "[a] judgment or decree in any action or suit brought under this section shall include costs and reasonable attorney fees for the prevailing party"). Thus, Deer Creek asserts that the Resolution is valid and binding on Cochrane and that the actions taken were proper.

In addition, Deer Creek quotes the following from Pa.R.C.P. 1035.3, the rule that governs responses to motions for summary judgment. Rule 1035.3 states in pertinent part that:

the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa.R.C.P. 1053.3(a). In reliance upon this rule, Deer Creek notes that Cochrane did not submit any competent evidence to refute the motion for summary judgment, to which Mr. McGrath's affidavit was attached. Then, relying on *Kirby v. Kirby*, 687 A.2d 385 (Pa. Super. 1997), Deer Creek contends that Mr. McGrath's affidavit "authenticates the Assessment Resolution" and, therefore, the affidavit "is documentary, not testimonial" evidence. Deer Creek's brief at 17. For this proposition, Deer Creek discusses what has become to be known as the "**Nanty-Glo** rule," which Cochrane appears to rely on even though he did not specifically raise it in the court below.

In *Nanty-Glo Boro. v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932), our Supreme Court held that testimonial, not documentary, affidavits of the moving party or his witnesses, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the jury. *See also Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 176, 553 A.2d 900, 903 (1989).

Kirby, 687 A.2d at 388. However, the *Kirby* court further explains that an "affidavit is not testimonial, but documentary; it authenticates the documents attached to it." *Id.* at 389. Thus, if Cochrane does not identify what part of Mr. McGrath's affidavit gives rise to issues of material fact, he cannot defeat the motion for summary judgment.

Lastly, Deer Creek asserts that Cochrane failed to take discovery and that, therefore, Cochrane presented no competent evidence, such as depositions, interrogatories, admissions or supporting documents to counter Deer Creek's motion for summary judgment. ***See Washington v. Baxter***, 719 A.2d 733, 735 n.4, 737 (Pa. 1998) (stating "[i]n order to withstand a motion for summary judgment, a non-moving party 'must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'").

We agree that Deer Creek has properly presented the law as it applies to the issues before this Court. It is evident that even though the trial court provided for a period of discovery, Cochrane did not conduct any discovery and simply relied on his responses in his answer to the complaint. This action is simply an insufficient response to Deer Creek's motion for summary judgment. Cochrane has failed to provide evidence that genuine issues of material fact are present and, therefore, the grant of summary judgment is affirmed.

Order affirmed.