IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SANDRA LAKE, Appellant, v. WOODCREEK HOMEOWNERS ASSOCIATION, a Washington homeowners association; GLEN R. CLAUSING, a single man, Respondents.	)	No. 59211-4-I UNPUBLISHED OPINION FILED: March 26, 2012

Ellington, J. — In December 2007, we heard this matter and ruled on a dispositive issue, holding that the Horizontal Property Regimes Act (HPRA), chapter 64.32 RCW, required the Woodcreek Homeowners Association to obtain unanimous consent of its members in order to approve an addition to an individual unit. The Supreme Court granted review, held that the statute did not require unanimous consent, and returned the case to us with instructions to decide all issues not addressed by the petition for review. We do so here.

We now affirm the trial court's ruling that an owner who did not opt for a bonus room during initial construction of the project was not precluded from later seeking to do so. We also affirm the trial court's exercise of discretion in permitting Woodcreek to amend its answer. We decline to address Lake's new argument, made for the first time

after remand, that approval of Clausing's bonus room was incurably improper because the homeowner's association had not first approved an amendment to the condominium declaration and cannot do so retroactively. We also rule on motions made to this court on remand.

We affirm summary judgment, and remand to the trial court to support its fees award with adequate findings for review, and to award fees on appeal to Clausing.

BACKGROUND

The material facts in this case are not in dispute.[1] Woodcreek Condominiums in Bellevue was built in the mid-seventies. For some units, the developer offered an optional "bonus room" above the garage. Some purchasers opted for bonus rooms at the time of construction. Over the years, owners of similar units have approached the homeowners association board of directors seeking permission to build bonus rooms. The board has liberally granted permission.

Glen Clausing and Sandra Lake own townhomes in Woodcreek. Clausing's unit is one of those for which a bonus room was originally an option. In mid-May 2004, Clausing obtained approval from the board of directors to add a bonus room. When construction began, Lake realized the new room would affect her natural light and block part of her territorial view. She formally objected, but the board refused to withdraw its approval.

Lake filed this action against Clausing and Woodcreek, arguing that approval and construction of a bonus room violated the HPRA and the Woodcreek declaration.

[1] See Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 523-25, 243 P.3d 1283 (2010).

She sought an order requiring Clausing to remove the room, or an order requiring the Woodcreek board of directors to obtain unanimous consent of the Woodcreek owners for Clausing's addition, or an award of damages.

Initially, Woodcreek admitted liability to Lake and filed a cross claim against Clausing. Lake and Clausing filed cross motions for summary judgment. One week before the hearing on the motions, Woodcreek sought leave to amend its answer to disclaim liability and to withdraw its cross claim against Clausing. The court granted the motion. Woodcreek then joined Clausing's cross motion against Lake. The court granted summary judgment dismissing Lake's action and awarded fees and costs to Clausing.

On appeal to this court, Lake argued:

(1) The court erred by dismissing her case on summary judgment because

> (a) permitting the bonus room changed the percentage ownership in common areas, which triggered the requirement of both RCW 64.32.090(13) and the condominium declaration that unanimous consent of the homeowners be obtained. The board improperly approved the bonus room without obtaining such consent; and
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> (b) the declaration authorizes the addition of a bonus room only to "purchasers," and Clausing is an "owner," not a "purchaser"; and

(2) The court erred by allowing Woodcreek to amend its answer one week before the hearing on summary judgment without allowing Lake time for additional discovery; and

(3) The court erred by granting Clausing attorney fees and costs and by refusing to grant fees and costs to Lake.

We agreed with Lake's first argument and reversed, holding that unanimous consent of the homeowners was required. We did not address Lake's other arguments.

The Supreme Court disagreed, reversed, and remanded to us with instructions to consider Lake's remaining arguments and to determine whether Clausing should receive attorney fees on appeal.[2]

The parties disagree as to the scope of our remaining tasks and have filed various motions and objections. We have heard oral arguments on remand.

DISCUSSION

Issues Properly Before This Court

Under RAP 13.7(b), "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."

The Supreme Court considered only two issues:

> Two questions are presented. Does the HPRA or Woodcreek's declaration bar the division of a condominium's common areas? Does the HPRA or Woodcreek's declaration require the unanimous consent of condominium owners to combine a portion of the common area with the owner's apartment? We answer no to both questions.[3]

The court also characterized its inquiry as answering (1) whether the Woodcreek declaration allows the combination of a common area with a private apartment, and (2) whether the statute required unanimous consent of the Woodcreek homeowners for the board to approve construction of Clausing's bonus room.[4]

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[2] Lake, 169 Wn.2d at 536. The court also held the Woodcreek declaration allows the combination of a common area with a private apartment. Id. at 530, 536.

[3] Id. at 521.

[4] Id. at 525, 530, 536.

Clausing first contends the Supreme Court "affirmed" the trial court's dismissal on summary judgment, thus barring Lake's arguments. This is incorrect. The Supreme Court did not affirm the trial court's ruling, and would have had no reason to remand to this court if it had.

Lake renews her arguments that (1) bonus rooms are available only to original purchasers who so elect at the time of purchase, and (2) that the trial court erred in permitting Woodcreek to amend its answer.

Lake also argues, however, that the board improperly approved Clausing's bonus room without first amending Woodcreek's declaration. Clausing correctly points out that this is a new argument, and is thus barred.[5] Under RAP 2.5, this court may refuse to review any claim of error not raised to the trial court.[6] Lake's argument, below and here, focused entirely on her theory that *unanimous consent* was a mandatory prerequisite to such an amendment.

Lake claims the argument is nonetheless proper because the Supreme Court discussed the issue in the following passage: "Because RCW 64.32.090(13) applies only to declaration amendments, a threshold question is whether *an amendment* to the Woodcreek declaration was required before the construction of Clausing's second-story addition was permissible."[7]

Lake misreads the opinion. The court did not discuss the need for amendment

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[5] Lake contends she offered this argument in at least two places in her reply brief, as well as in her revised opening brief and supplemental brief. Even if true, these contentions do not demonstrate this argument was before the trial court.

[6] Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

[7] Lake, 169 Wn.2d at 531 (emphasis added).

except as necessary to determine whether construction of a bonus room alters the value of a unit, thus triggering the statutory requirement for unanimous consent of the owners. The court plainly did not address whether an amendment to the declaration is required before an alteration of square footage.

Lake did not present this argument to the trial court or to this court. We decline to address it.

The following issues thus remain from the original appeal: (1) Whether the court erred by dismissing Lake's case on summary judgment because the Woodcreek declaration offers the option of a bonus room only to "purchasers," and Clausing cannot now be a "purchaser"; (2) Whether the court erred by allowing Woodcreek to amend its complaint just one week before the hearing on summary judgment without allowing Lake time for additional discovery; and (3) Whether the court erred by granting Clausing attorney fees and costs. At the direction of the Supreme Court, we also address whether Lake or Clausing is entitled to fees on appeal.

Owner or Purchaser

Lake argues the intent of the Woodcreek declaration was to authorize only the original "purchaser" of a unit to construct a bonus room, and because Clausing is an "owner," he is not eligible for the bonus room option. This, Lake argues, creates a genuine issue of material fact, making summary judgment inappropriate. The usual standard for summary judgment applies.[8]

[8] Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). This court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. Overton v. Consol. Ins.

Lake relies on section 4 of the 1976 amended declaration, the apartment description, which provides: "[T]here is designed in the plans for Type L [and] M units a room designated as the 'bonus room.' At the option of the *purchaser* the floor plans . . . will include an additional area to be situated directly above the car garage."[9] Lake contends the developer was offering to add bonus rooms at the time of construction, not authorizing owners of those types of units to add bonus rooms at any time.

A "declaration" is an instrument drafted by the condominium developer that submits the property to the requirements of the HPRA.[10] The developer of Woodcreek amended the declaration at each phase of construction, including a 1977 amendment that listed the six units whose purchasers had opted for bonus rooms at the time of construction.

The declaration mentioned bonus rooms only in connection with original purchasers; it says nothing about whether owners would later be allowed to seek permission to build such rooms in the space designed for them. The declaration offers no hindrance to such owners, and Lake submitted no evidence supporting her interpretation of the declaration. The trial court did not err.

Amendment to Woodcreek's Answer

Woodcreek filed an answer to Lake's complaint in which Woodcreek agreed the board acted outside its authority when it approved Clausing's bonus room, and

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Co., 145 Wn.2d 417, 429, 38 P.3d 322 (2002).

[9] Clerk's Papers at 386 (emphasis added). The declaration was amended in 1977 so J-style units like Clausing's could also have bonus rooms. Clerk's Papers at 395.

[10] RCW 64.32.010(9).

Woodcreek asserted any liability should fall solely on Clausing.[11] While the motions for summary judgment were pending, Woodcreek sought to amend its answer to agree with Clausing's position that the board had the authority to approve a bonus room.[12] The court granted the motion to amend. Lake contends the court abused its discretion by permitting Woodcreek to amend its answer at that stage, and argues she should have been afforded additional time for discovery under CR 56(f) because of Woodcreek's changed position on liability.[13]

Generally, courts freely allow parties to amend their pleadings unless the nonmoving party will be prejudiced.[14] An order permitting an amended pleading is reviewed for abuse of discretion.[15]

Woodcreek's change of position created no new questions of law or fact relevant to the pending motions. Clausing and Lake had briefed the issues for summary judgment. Woodcreek simply joined Clausing's motion and made no additional argument. Lake has shown no prejudice resulting from the amendment, nor do we discern any. Further, Lake's argument that she should have been afforded additional time for discovery under CR 56(f) fails because she never sought such relief below.[16]

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[11] Clerk's Papers at 13-23, 38-39.

[12] Clerk's Papers at 617-37.

[13] CR 56(f) states, "Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

[14] CR 15(a); Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

[15] McDonald v. State Farm Fire and Cas. Co., 119 Wn.2d 724, 737, 837 P.2d 1000 (1992).

[16] In fact, Lake agreed to allow the court to rule on Clausing's motion for

The trial court did not abuse its discretion when it granted leave to amend.

Attorney Fees

RCW 64.34.455 grants the trial court discretion to award attorney fees to the prevailing party in an appropriate case:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

Whether a case is appropriate for an award of attorney fees is within the discretion of the trial court.[17] The court must liberally administer the statute's provision for attorney fees.[18]

Lake argues Clausing was not entitled to fees because he was not the party seeking to enforce HPRA and because there was no finding by the trial court that her lawsuit was frivolous. But the statute authorizes fees to the prevailing party, whether that party is the plaintiff or the defendant.[19] It does not require a finding that the lawsuit was frivolous. The court had discretion to award fees.

Clausing is a practicing attorney. The court's award included fees for work done by him as well as his counsel of record, Charles Watts. Lake contends the award of

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summary judgment and to refile her motion for summary judgment against Woodcreek if necessary. Clerk's Papers at 794-95.

[17] Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 715, 9 P.3d 898 (2000).

[18] Id. at 713.

[19] RCW 64.34.010; Eagle Point, 102 Wn. App. at 713 (either plaintiff or defendant may prevail). RCW 64.34.455, although not part of the HPRA, applies to condominiums built before July 1, 1990.

fees for Clausing's own work was an abuse of discretion. But Lake cites no authority prohibiting an award of fees to a practicing attorney who does reasonable and necessary legal work on his own behalf.[20]

We agree, however, that the findings and conclusions as to the amount of the fees award are inadequate to permit appellate review. Clausing sought $57,286.25 in fees, of which $8,288.75 was attributable to his retained counsel. The court determined $30,000 was a reasonable award. The findings and conclusions do not reveal the basis for this determination. Also, the court found the attorneys' rates to be reasonable, but did not determine a reasonable number of hours. We are thus unable to review the fees award. We remand to the trial court for additional findings.[21]

Clausing is a prevailing party on appeal, and we award attorney fees and costs to him under RAP 18.1, including those incurred in the Supreme Court. The trial court on remand shall also determine fees on appeal.

Motions Before This Court

Extension of Time. Lake essentially answered Clausing's motion to determine remaining issues on appeal in her briefing. We decline to grant Lake an extension of time to answer Clausing's motion.

Motion to Strike Additional Evidence. When an appellate court reviews an order on summary judgment, it considers only evidence called to the attention of the trial court.[22] We grant Lake's motion to strike new evidence submitted by Woodcreek on

[20] Lake complains that Clausing filed no notice of appearance. She does not address why Watts' notice of appearance on Clausing's behalf should not suffice.

[21] Eagle Point, 102 Wn. App. at 715-16 (citing Mahler v. Szucs, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998)).

remand. However, because the additional evidence was in response to Lake's new argument that the Woodcreek declaration needed to be amended before approval of the bonus room,[23] we deny Lake's request for fees associated with the motion to strike.

CONCLUSION

We affirm dismissal of Lake's complaint. We remand for redetermination of the trial court's fee award and entry of findings and conclusions thereon, and for determination of fees on appeal.

Ellington, J.

WE CONCUR:

Cox, J.

Grosse, J.

[22] RAP 9.12.

[23] RAP 18.9(a) provides this court may order a party who fails to comply with the rules to pay compensatory damages to any other party who has been harmed by that violation.