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

MAPLE BEACH ESTATES PROPERTY OWNERS ASSOCIATION, Appellant, v. NORMAN TROTZER and VIRGINIA TROTZER, husband and wife, Respondents.	)	No. 66963-0-I UNPUBLISHED OPINION FILED: June 13, 2011

Ellington, J. — Maple Beach Estates Property Owners' Association (Association) seeks review of the superior court's ruling that Virginia Trotzer is not a member and not otherwise obligated to pay for the maintenance, improvements, or insurance for the lake access lot over which she has an easement. We affirm.

BACKGROUND

Maple Beach is a small platted development in Mason County, created in 1964. Each of the 22 owners has an easement over the private internal roadways and over Lot 13, which provides access to Lake Isabella. A protective covenant in the plat provides that "[t]he cost of maintenance and future improvement of the Private Road shall be paid by the owners and purchasers of tracts in this plat."[1]

[1] Clerk's Papers (CP) at 394.

Virginia Trotzer acquired one-third of a subdivided lot in the development in1981.[2] In 1986, a "Declaration of Road Maintenance Agreement" was executed, which established a $50 annual assessment for maintenance and limited improvements to the private road.[3] Although Trotzer did not sign the agreement, she paid the annual assessments.

In 1988, Maple Beach property owners met to establish a nonprofit corporation to maintain the roadways and access lot. Those present voted to create the Association, elect officers, and amend the proposed bylaws. Trotzer did not attend this meeting or vote to create the Association. The Association filed its articles of incorporation in 1989, but never recorded its bylaws.[4]

At the next annual meeting, Association officers presented two proposals: to make certain repairs to the private road and for the Association to accept title to Lot 13. Trotzer attended the meeting and voted "in agreement" with both proposals.[5]

Although the Association has consistently sent Trotzer notices and minutes of annual meetings, the record indicates she attended only three other meetings, in 1991, 1992 and 2000. In 2000, she voted along with all other property owners to raise the annual road fund dues from $50 to $75.

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[2] Trotzer purchased the property under her maiden name, Virigina Calloran, and quitclaimed the property to herself after her marriage in 1989 to Norman Trotzer. Norman is now deceased.

[3] CP at 411-12.

[4] Among other things, the bylaws empower the Association to levy and collect assessments, place liens and foreclose on the land for nonpayment, and make membership compulsory and "inseparably appurtenant to tracts owned by the members." CP at 267.

[5] CP at 297-99.

In 2003, the Association voted to increase annual assessments to $225 in order to pay liability insurance premiums for the common areas, including the roads, dock, boat ramp and well house property. There is no indication that Trotzer was present or voted to approve the increase. Rather, Trotzer returned the assessment with a note indicating she would pay only $50 per year for road maintenance, as required by the road maintenance agreement.

The Association brought suit against Trotzer for unpaid assessments of $585, plus interest and fees, in 2005.[6] Trotzer denied she was a member of the Association and argued there was no legal basis for assessments for anything besides road maintenance. The parties filed cross motions for summary judgment. After several oral rulings and motions for reconsideration, a judge pro tempore of the superior court concluded that Trotzer was liable for her share of maintenance of the roadway and insurance related thereto, but is not a member of the Association and is not liable for maintenance or insurance for Lot 13. Because Trotzer's payment during the litigation was in excess of this liability, the court ultimately awarded her judgment in the amount of $60.30.

DISCUSSION

The Association appeals the court's order denying its motion for summary judgment and granting Trotzer's several motions. We review summary judgment orders de novo, engaging in the same inquiry as the trial court and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.[7]

[6] This action originated in district court, which determined it lacked jurisdiction because the matter affected title to real property.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[8]

Membership By Estoppel

The Association first contends Trotzer is estopped from denying her membership. It argues Trotzer's participation over 15 years evidences her ratification of her membership and the bylaws authorizing assessments for Lot 13. To support its position, the Association relies heavily on Ebel v. Fairfield Park II Homeowners' Association.[9] We find that case distinguishable.

In Ebel, several property owners in the Fairfield Park II subdivision sought a declaratory judgment that the homeowners' association (HOA) lacked authority and was not properly formed.[10] The 1969 plat for the subdivision referred to an HOA. Covenants, conditions, and restrictions (CCRs) were recorded in 1972, but no HOA was formed until 1998 when the original CCRs were amended to establish the association.[11] For several years thereafter, the plaintiff homeowners participated in the HOA to varying degrees.[12] Like Trotzer, they paid annual dues and attended meetings.[13] Some also requested HOA approval for property improvements, and others served on the board or on committees. Based in part on their history of involvement

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[7] Halleran v. Nu West, Inc., 123 Wn. App. 701, 709-10, 98 P.3d 52 (2004).

[8] CR 56(c).

[9] 136 Wn. App. 787, 150 P.3d 1163 (2007).

[10] Id. at 789.

[11] Id. at 789-90.

[12] Id. at 790.

[13] Id. at 794.

with the HOA, Division Three of this court held the plaintiff homeowners had ratified the CCR amendments and were estopped from challenging them.[14]

But such conduct alone is not enough to establish ratification:

> A person ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, she remains silent or continues to accept the contract's benefits. *A ratifying party must have acted voluntarily and with full knowledge of the facts*.[15]

In Ebel, "[t]he 1972 covenants put property owners on notice they had to comply with certain requirements or face legal action."[16] These restrictions "were not significantly changed" by the 1998 amendments at issue.[17] Thus, the plaintiff homeowners "had notice of the 1972 and 1998 CCRs and had full knowledge of all the relevant facts" when they chose to participate in the organization for several years.[18]

Nothing in the record before us suggests Trotzer had such notice. The Association never recorded its bylaws and there is no evidence they were provided to Trotzer or that she was ever informed the Association could levy assessments for expenses beyond road maintenance. And once Trotzer discovered the Association was billing her for insurance and improvements for Lot 13, she did not "remain[] silent or continue[] to accept the contract's benefits."[19] Instead, she wrote the Association to say

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[14] Id. at 793-94.

[15] Snohomish County v. Hawkins, 121 Wn. App. 505, 510-11, 89 P.3d 713 (2004) (emphasis added).

[16] Ebel, 136 Wn. App. at 793.

[17] Id.

[18] Id. at 794.

[19] See id. at 793-94.

she would not pay the assessment and would only pay the $50 per year as provided in the road maintenance agreement.

These undisputed facts do not establish ratification; Trotzer is not estopped from denying her membership.

Membership By Implication Or Operation Of Law

The Association next contends it has authority to enforce its bylaws against Trotzer under RCW 64.38.010(1), which provides:

> "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. "Homeowners' association" does not mean an association created under chapter 64.32 or 64.34 RCW.

The Association argues that when any group of property owners meets this definition, a homeowners' association is automatically created, and once created, has the powers enumerated in RCW 64.38.020.[20] Among other things, these powers include collecting

[20] RCW 64.38.020 provides:

> Unless otherwise provided in the governing documents, an association may:
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> (1) Adopt and amend bylaws, rules, and regulations;
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> (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;
>
> (3) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;
>
> (4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association;

assessments for common expenses. Since property owners in Maple Beach are obligated by the plat to pay expenses for the private road, the Association argues it has the powers "vested by" statute.

But RCW 64.38.010(1) is a definitional statute. It sets forth the possible activities of an association; it does not create or empower one. Rather, an association is empowered by its governing documents, including

> the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument *by which the association has authority to exercise any of the powers provided for in this chapter* or to manage, maintain, or

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(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common areas;

(7) Cause additional improvements to be made as a part of the common areas;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;

(9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;

(10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;

(11) Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;

(12) Exercise any other powers conferred by the bylaws;

(13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(14) Exercise any other powers necessary and proper for the governance and operation of the association.

otherwise affect the property under its jurisdiction.[21]

The Association bylaws authorized it to collect assessments. But that does not mean Trotzer is bound by them.[22]

Other Bases For Liability

The Association next argues that even if Trotzer is not a member, she is nevertheless obligated to pay for maintenance of the lake access lot either as a concurrent user of the easement or because she will otherwise be unjustly enriched. Both arguments assume that Trotzer uses the lake access lot and its improvements. Because that has not been established, the arguments fail.

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[21] RCW 64.38.010(2) (emphasis added).

[22] The Association cites several cases from other jurisdictions for the proposition that a homeowners' association may be formed by implication. But there is no dispute that the Association exists and may levy assessments against its members. The issue presented is whether the Association can compel Trotzer's membership under the circumstances here, where the Association formed subsequent to Trotzer's purchase, never recorded its bylaws or other covenants burdening her property, and never secured Trotzer's agreement to be bound. Most of the cited authority does not address that question. See Wisniewski v. Kelly, 175 Mich. App. 175, 437 N.W.2d 25 (1989) (association could exercise power to manage common areas when that right was reserved by subdivision grantor who died before granting it to association); Sea Gate Ass'n v. Fleischer, 211 N.Y.S.2d 767, 779 (N.Y.Sup.Ct. 1960) (association had right to levy assessments against nonmembers who "knew all of the existing conditions imposed upon ownership in the area" when they bought property); Lake Tishomingo Property Owners Ass'n v. Cronin, 679 S.W.2d 852 (Mo. 1984) (where amendments to recorded covenants were void, property owners in common interest community nevertheless had an equitable obligation to bear the costs of reasonable and necessary maintenance of common areas). The Pennsylvania Commonwealth Court held that a property owner who purchases property in a private development and has the right to travel the development roads and to access the waters of the lake is obligated to pay a proportionate share for maintenance and repair of the development's roads, facilities, and amenities. Spinnler Point Colony Ass'n Inc. v. Nash, 689 A.2d 1026, 1029 (Pa.Cmwlth.1997). We note that the association in that case existed prior to property owners' purchase. Id. at 1027. Although that fact does not figure in the court's analysis, which specifically notes the absence of any reference to property owners' association on the owners' chain of title, we find the fact a significant distinction from the case at hand.

The HOA cites Bushy v. Weldon for the proposition that concurrent users of an easement are obligated to share equally the cost of maintenance.[23] Bushy concerned two adjacent property owners sharing a driveway located on the dividing line between the properties.[24] Both parties relied on the driveway to access their lots. Where the easement burdened and benefited each party in equal measure, the requirement to share maintenance costs equally was "in the interests of both parties" and effected "a proper rule of simple justice."[25] Here, the record is devoid of evidence that Trotzer uses, or has ever used, the lake access lot, its dock, or other improvements made by the Association.

The Association also relies on the *Restatement (Third) of Property* section 4.13(4) (2000):

> The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitude have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portions of the servient estate.

No Washington case has adopted this section of the restatement.[26] Even if we were to do so now, its application depends on evidence that Trotzer "use[s] the same improvements or portion of the servient estate in the enjoyment of [her] servitude," not just that she holds an easement over Lot 13. There is no such evidence in the record.

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[23] 30 Wn.2d 266, 191 P.2d 302 (1948).

[24] Id. at 270-71.

[25] Id. at 272.

[26] Aside from pointing out that Washington courts have, on occasion, adopted other sections of the restatement, the Association offers no argument that we should do so here.

Finally, the Association contends Trotzer is liable in quasi-contract because the Association's maintenance and improvements on Lot 13 enhance the value of Trotzer's property and she would be unjustly enriched unless she is required to pay her share of expenses.

Unjust enrichment has three elements: (1) one party must confer a benefit on another, (2) the recipient must appreciate or know of the benefit, and (3) the recipient "must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value."[27]

The Association argues Trotzer has been enriched because its efforts have enhanced the value of her property.[28] The Association cites Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.[29] for the proposition that "a person who has the right of access to facilities, even in the absence of an exercise of the right, which enhances the value of that person's property, is unjustly enriched if allowed to retain the benefit of the maintenance of those facilities."[30]

But in Lake Limerick, the issue was whether the property owner, who acquired a lot subject to a homeowners' association's declaration of restrictions requiring payment of dues, was personally liable for unpaid homeowners' dues that were assessed against the lot itself.[31] Had Trotzer's lot been similarly burdened at the time of her

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[27] Pierce County v. State, 144 Wn. App. 783, 830, 185 P.3d 594 (2008).

[28] As evidence of this increase in value, the Association cites a real estate agent's declaration that "[h]aving direct access to Lake Isabella is very important and clearly increases the value of her lot. A dock, to use in association with that would also enhance the value of the access . . . particularly at the time of sale." CP at 234.

[29] 120 Wn. App. 246, 84 P.3d 295 (2004).

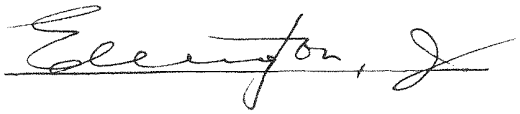
[30] Br. of Appellant at 23.

purchase, the equities might lay in the Association's favor. But here, the only basis for the unjust enrichment claim is an unquantified, if not entirely speculative, increase in property value that is incidental to the Association's efforts on its own behalf and not disclaimable by Trotzer. "Enhancement in value, standing alone, does not invoke the doctrine of unjust enrichment. A person who officiously confers a benefit upon another is not entitled to restitution therefor."[32] Under the circumstances, there is no unjust enrichment and no contract implied in law.

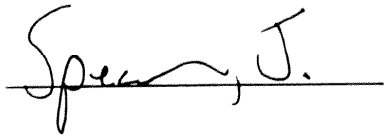
Attorney Fees

The Association seeks attorney fees and costs as provided in its bylaws. Because we hold that Trotzer is not a member of the Association, the bylaws do not apply.

Affirmed.



WE CONCUR:



[31] Lake Limerick, 120 Wn. App. at 252, 260.

[32] W.T. Watts, Inc. v. Sherrer, 89 Wn.2d 245, 254-55, 571 P.2d 203 (1977).