COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1032 **Cir. Ct. No. 2011CV826**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

TRINKE ESTATES PROPERTY OWNERS' ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

V.

TERRENCE LIMITED PARTNERSHIP, A/K/A SCHAUL LIMITED PARTNERSHIP AND RICHARD SCHAUL,

DEFENDANTS-APPELLANTS,

RICHARD C. CRANDALL, JOHN THOMPSON, ROY L. LEEDLE, STEVEN H. GAINES AND GARY THOMPSON,

DEFENDANTS.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. A waterfront property owner appeals an order following the circuit court's grant of declaratory relief and an injunction to a property owners' association. We affirm.

¶2 This case was commenced by the Trinke Estates Property Owners' Association against the Terrence Limited Partnership, also known as Schaul Limited Partnership, and Richard Schaul, among others. We will refer to these defendants collectively as "Schaul." The amended complaint alleged that Schaul was violating an Association rule regarding the use of boat slips. The Association sought declarations, an injunction, and other relief. Eventually, on summary judgment, the circuit court ruled in favor of the Association by declaring the Association's rule valid and enforceable, and by enjoining Schaul from renting or loaning boat slips to nonmembers of the Association who are not members of Schaul's immediate family. Schaul appeals.

¶3 Summary judgment methodology is well established, and need not be repeated here. *See, e.g.*, ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. On review, we apply the same standard the circuit court is to apply. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶4 We first review the amended complaint. As substantive facts, it alleged that Trinke Estates is an incorporated subdivision, and that the Association was incorporated in 1953, is empowered to enact rules and regulations, and has enacted by-laws. The complaint further alleged that the Association's by-laws are a covenant that runs with the property, and that documents conveying the property to Schaul properly indicated as much.

¶5 The complaint alleged that in 1964 the Association adopted a rule stating: "Boat slips in the lagoons are for the use of the members or the members of the immediate family and are not to be loaned or rented to non-members." It further alleged that in 2006 Schaul began leasing slips on his pier to persons who were neither family members nor Association members. The complaint alleged that in 2008 the Association mailed copies of the rules to all members, including a reminder that the rules prohibit the renting of slips to non-members. It alleged that in 2010 Richard Schaul appeared before the Association's board and stated that he would continue to lease slips to non-members.

¶6 Schaul's answer admitted all of the above allegations, except to assert that he began leasing slips to non-members before 2006. Schaul also pled as affirmative defenses "riparian rights," laches, and waiver.

¶7 Schaul characterized his riparian rights argument as an affirmative defense. As best we can discern, however, it is an argument that the complaint fails to state a claim because the rule it attempts to enforce is legally invalid. Schaul's riparian argument does not rely on factual assertions beyond the complaint and its attached documents, and therefore is in the nature of a motion to dismiss that tests the legal sufficiency of the complaint. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979).

¶8 Schaul argues that the rule is invalid because the use of piers is a riparian right, and a property owner is not permitted by law to separately convey riparian rights to another, without conveyance of the real property itself. Schaul argues that, to the extent the formation of the Association and its by-laws placed control of the waterfront owners' piers under the authority of the Association, that formation was an invalid conveyance of riparian rights.

¶9 In support of this argument, Schaul relies mainly on ***Anchor Point Condominium Owner's Association v. Fish Tale Properties***, 2008 WI App 133, 313 Wis. 2d 592, 758 N.W.2d 144. In that case, we considered an agreement allowing a non-waterfront property owner to use a neighboring property's piers in perpetuity, with the agreement to run with the land. ***Id.***, ¶3. We held that the agreement was a violation of WIS. STAT. § 30.133(1) (2011-12),[1] which provides in relevant part: "Beginning on April 9, 1994, … no owner of riparian land that abuts a navigable water may grant by an easement or by a similar conveyance any riparian right in the land to another person." We held that the agreement was invalid because the riparian right of pier use was transferred apart from the riparian land itself. ***Id.***, ¶19.

¶10 We first note that Schaul does not explain how this statute, which appears to have first become effective for transfers in 1994, would apply to the formation of the Association in 1953. However, that point has not been argued, and so we move on.

¶11 We reject Schaul's argument because he does not cite any law that classifies the creation of this type of subdivision association as a conveyance of a riparian property interest from owners to the Association. Schaul does not cite any law that prevents riparian property rights from being subject to regulation under such an arrangement. Schaul does not cite any law showing that, when the Association obtained the right to regulate the use of riparian property, the riparian property rights themselves were transferred. Therefore, we reject Schaul's

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

argument that the Association rule regulating the use of piers is invalid because it is based on an unlawful conveyance of a riparian property right.

¶12 With the riparian argument disposed of, we conclude that the complaint states a claim. Schaul's answer admitted all necessary elements for the Association to prevail in its claim, in the absence of an affirmative defense. Therefore, we turn next to Schaul's affirmative defense arguments.

¶13 Schaul argues that the Association rule was modified by a process that amounted to waiver by the Association. Schaul argues that its rule regarding piers does not apply to his property, but instead applies only to certain other piers that are referred to as "assigned" piers. According to Schaul, the assigned piers are those used by Association members who do not themselves own waterfront property. Schaul appears to recognize that the language of the rule itself, as quoted above, is not limited to only the assigned piers. Instead, he bases the argument on various documents. We now explain why we conclude that these documents do not support Schaul's arguments.

¶14 Schaul relies on a 1990 exchange of correspondence between Terrence Schaul and the Association. Terrence expressed concern about a judgment that had been entered in litigation between Association members who did not own waterfront property and the Association. According to Terrence's letter to the Association's attorney, the judgment declared that the Association has "the permanent and exclusive right to control and regulate pier, boat slips, shore station, or other mooring facility placement in the lagoon." Terrence's letter asserted that the Association had not in the past claimed any right "to regulate such pier placement in front of my property," and he asked that the judgment be amended to clarify that it related to only the assigned piers, rather than to those of

lagoon-front property owners. In response, the Association's attorney stated that the Association board agreed "that the intent of the Association is to assert pier placement rights only over" the assigned piers, and that the judgment is "not intended to affect the owners of the five lots which have frontage on the lagoon."

¶15 Schaul argues that in this exchange the Association acknowledged that it has no authority to regulate, in any way, the piers of the lagoon-front property owners. That is not a reasonable reading of the letters. The only subjects discussed in the letters were "pier placement" and the judgment. The letters did not discuss the validity of the rule about pier *use or rental*, and nothing in the Association's response relinquished or limited in any way the Association's authority to enforce the rule at issue in this case. Nor did anything in the letters call into question the Association's general authority to regulate riparian activities at the lagoon-front properties.

¶16 In a similar vein, Schaul relies on a 1988 letter from the Association president. The letter was to Terrence Schaul regarding an earlier telephone discussion. The subject of the letter is "the 'Doerr Pier' and its placement." The Association president's letter asserts that "no infringement or trespass was intended," and explains why a pier installer placed the pier in a certain way that apparently was a concern to Terrence. Contrary to Schaul's argument, this letter cannot reasonably be read as waiving any Association right or otherwise acknowledging or admitting any point that is of use to Schaul in this case.

¶17 Schaul also relies on a 1974 document from the Association president. The document is a message to members stating that "several complaints" had been received, and reminding members of certain policies. Regarding piers, the document stated that it is "inconsiderate to occupy a pier not

assigned to you without prior consent of that member," and that members should "use the pier assigned to you." It further stated: "Also, a non-member is not permitted the use or rental of assigned piers for an extended length of time." Schaul notes that, in contrast to the Association's rule, this document focuses on only the assigned piers. Schaul argues that this emphasis on the assigned piers is evidence that the Association knew that its rule did not apply to the piers of the riparian owners such as Schaul, but applied only to the assigned piers.

¶18 We do not agree that this is a reasonable reading of the document. We agree that the document appears on its face to refer only to the assigned piers. However, it is an unreasonable leap to infer that it did so because the Association believed it had no authority over piers of riparian owners. There is no other support in the document for that interpretation. The document was apparently written in response to complaints about specific conduct involving assigned piers, and there is no indication that it was intended to be a general statement about the Association's authority or a modification of existing rules. The only reasonable inference that can be drawn from its limited focus on assigned piers is that the complaints that were received related only to assigned piers.

¶19 Schaul also argues that the Association intentionally waived, or acquiesced in the relinquishment of, its right to enforce the pier rule by not seeking to enforce it in court before now. We reject the argument. Schaul has not presented any evidence from which it is reasonable to infer an intentional acquiescence to violations or relinquishment of the right to enforce the rule by the Association.

¶20 Finally, Schaul argues that the circuit court erred by finding facts on summary judgment. However, on appeal, we have reviewed the summary

judgment materials without deference to the circuit court, and we have independently concluded that summary judgment was properly granted to the Association. That is sufficient to affirm the circuit court, regardless of whether it made "findings."

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.