COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP940 **Cir. Ct. No. 2013CV855**

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

WALWORTH STATE BANK,

PLAINTIFF-RESPONDENT,

V.

ABBEY SPRINGS CONDOMINIUM ASSOCIATION, INC. AND ABBEY SPRINGS, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Abbey Springs Condominium Association, Inc. and Abbey Springs, Inc.[1] (collective Abbey Springs) appeal the circuit court's

[1] Abbey Springs Condominium Association, Inc., merged with Abbey Springs, Inc.

grant of summary judgment in favor of Walworth State Bank on Walworth's action for declaratory relief with regard to Abbey Springs' policy on the usage of Abbey Springs' recreational facilities, and on Walworth's claim for damages on the basis of unjust enrichment. The circuit court determined that Abbey Springs' policy was contrary to state law and that Abbey Springs had been unjustly enriched by amounts paid by Walworth in order for the owners of foreclosed-upon condominium units to utilize Abbey Springs' recreational facilities. For the reasons discussed below, we reverse and remand to the circuit court for further proceedings.

BACKGROUND

¶2 Abbey Springs is a condominium association of unit owners for fifteen separate condominiums located at the Abbey Springs development in the Village of Fontana on Geneva Lake. The fifteen separate condominiums were created over a period of twenty-nine years. The declaration for Abbey Springs Condominium No. 1 was recorded in 1971 and the declaration for Abbey Springs Condominium No. 15 was recorded in 2000. Each of the fifteen condominiums has separate common elements and separate budgets for maintaining their respective buildings and common elements; however, all fifteen condominiums contribute to the operational expenses of Abbey Springs via assessments.

¶3 For fees that are separate, and in addition to, the condominium assessments, Abbey Springs offers its members access to recreational facilities, which includes a clubhouse, golf course, yacht club, restaurants, boat storage and boat launching facilities. The declaration for Abbey Springs Condominium No. 14 provides that title to the recreational facilities "has been conveyed and is vested in Abbey Springs Condominium Association," and that the recreational facilities

"shall not be part of the common areas and facilities of this Condominium, Abbey Springs Condominiums 1-13, or any other numerically designated condominium." In December 2000, Abbey Springs Condominium No. 15 was formed and the recreational facilities were added to the common areas of that condominium. Abbey Springs' "Membership and Guest Policy" relating to the recreational facilities provides that "condominium owner(s)" are eligible for "unit owner privileges and the issuance of a 'membership card,'" but that "[i]f any regular monthly or special assessment against any Unit is delinquent for more than ninety (90) days past its due date, the owner or owners of that Unit, and any subsequent owners, shall automatically and without notice be suspended from any use or occupation of [the recreational facilities] until such time as assessments are paid in full."

¶4 In August 2012, Walworth initiated foreclosure proceedings against the owner of units 18 and 19[2] of Abbey Springs Condominium No. 1. Abbey Springs, which had a lien against units 18 and 19, was named a defendant in the action. A judgment of foreclosure was entered, which provided that Abbey Springs, and all persons claiming under it, were barred and foreclosed of all right, title, interest, lien, or equity of redemption in and to the property. Units 18 and 19 were sold at sheriff's sale to Walworth, who then sold the units to Douglas and Deborah Christensen.

¶5 In January 2013, prior to the sheriff's sale, Abbey Springs sent Walworth a letter notifying it that Abbey Springs had "adopted a policy to forbid

[2] Units 18 and 19 consist of a single-family residence located on two separate units or lots.

the use of [Abbey Springs'] recreational facilities to the owners or occupants of any [condominium] unit upon which assessments or other amounts owed to the Association are delinquent, regardless of whether or not the Association's lien rights were eliminated by the foreclosure." Abbey Springs stated in its letter that it had authority to deny use of the recreational facilities because the recreational facilities were "acquired [] by the Association from the developers after initial construction and sale of units" and are "not part of the common elements owned in common by all [the condominium] unit owners." In a follow-up letter in June 2013, Abbey Springs stated that "Abbey Springs, Inc. does not claim, and has never claimed, that Walworth [] or any grantee from Walworth [] is liable for past assessments due the Association. They are liable for future assessments accrued after the date the Court confirms the sale of the property," and that Abbey Springs has "not [] created a restriction on any use of the condominium unit, but have only restricted the use of certain facilities which are not part of the common element of the condominium."

¶6 On July 12, 2013, Abbey Springs issued a letter that provided: "All Monthly Charges and Monthly Assessments on Unit []18 & 19 of Abbey Springs will be paid in full through July 31, 2013, provided the seller pays Abbey Springs $13,225.32 which includes the balance of 2012 deficit assessment and prorated portion of 2013 Food and Bar Minimum, if applicable." The Christensens refused to close on the condominium units as scheduled on July 12 and Walworth's attorney demanded that Abbey Springs "provide clean title to the property, without any unpaid dues, assessments or liens, and without any Association imposed restrictions against use of the condominium's facilities." Abbey Springs responded that its July 12 letter was "a form letter" generated by Abbey Springs' bookkeeper "which [did] not address the specific foreclosure proceedings here in

issue" and that Abbey Springs' June 2013 letter "is the position of Abbey Springs [] in respect to this matter." On July 16, Walworth paid Abbey Springs, in "protest," the delinquent assessments owing on units 18 and 19, which amounted to $13,225.32, and the units were then sold to the Christensens.

¶7 In September 2013, Walworth filed an action for declaratory judgment, asking the circuit court to declare that Abbey Springs' policy forbidding the use of recreational facilities by the owners of any unit for which regular or special assessments are delinquent is unlawful as that policy applies to Walworth because the policy violates: (1) the judgment of foreclosure, which provided that Abbey Springs "'is forever barred and foreclosed of all right, title, interest, lien or equity of redemption'" in units 18 and 19; and (2) Wisconsin's Condominium Ownership Act, WIS. STAT. ch. 703 (2013-14).[3] Walworth also sought a judgment in the amount of the delinquent assessments that it had paid in protest, alleging that Abbey Springs had intentionally interfered with Walworth's contractual relationship with the Christensens and that Abbey Springs was unjustly enriched.

¶8 Walworth and Abbey Springs filed cross-motions for summary judgment. With regard to its action for declaratory judgment, Walworth asserted in its motion for summary judgment that Walworth is entitled to relief because Abbey Springs' policy "resurrects condominium assessments that were legally eliminated … by foreclosure," in violation of WIS. STAT. § 703.165(5)(b), which addresses the priority of an association's lien for unpaid assessments, and in violation of WIS. STAT. § 703.165(2), which address a condominium unit owner's

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

liability for "assessments." Walworth argued that, contrary to § 703.165(5)(b), Abbey Springs' policy "forces a new owner to pay assessments owed by the previous owner," which have been discharged by foreclosure, "in order to enjoy the common elements of the condominium," and is effectively a "ransom for debt that has legally been extinguished." Walworth further argued that under § 703.165(2), a unit owner can be jointly and severally liable for assessments under a voluntary grant, not an involuntary grant, and that because it took title to the property by involuntary grant, it cannot be held liable for the unpaid assessments. Walworth asserted that it was entitled to summary judgment on its unjust enrichment claim because it would be inequitable for Abbey Springs to retain funds to which Abbey Springs was not entitled.

¶9 Abbey Springs argued in its motion for summary judgment that Abbey Springs' policy does not violate WIS. STAT. § 703.165(5)(b), because that statute deals only with lien priority for condominiums, not the extinguishment of an association's lien. Abbey Springs also argued that its policy does not violate WIS. STAT. § 703.165(2) because "Abbey Springs' 'policy' does not make Walworth [] liable for [the delinquent] assessments." Abbey Springs asserted that its recreational facilities are not part of the common elements, that unit owners of Abbey Springs must pay to utilize the recreational facilities, and that the owners of units 18 and 19 were free to utilize other recreational facilities in the area rather than Abbey Springs'.

¶10 The circuit court granted summary judgment in favor of Walworth on its action for declaratory judgment and its claim for unjust enrichment. The court concluded that Abbey Springs' policy restriction on the use of Abbey Springs' recreational facilities by any owner of a condominium unit for which assessments are delinquent violates WIS. STAT. § 703.165(2) in that the policy

attempts to "resurrect[] assessments previously 'wiped out' or eliminated through foreclosure," and that the policy "constitutes more than a mere restriction on the use of the condominium units, and affects the quality of the units' title and marketability." The court further concluded that Abbey Springs did not intentionally interfere with Walworth's sale of the condominium units to the Christensens, but that Abbey Springs would be unjustly enriched if permitted to retain the $13,225.32 that Walworth paid Abbey Springs in protest. Accordingly, the court entered judgment in favor of Walworth for the amount of $13,225.32 plus interest and costs. Abbey Springs appeals.

DISCUSSION

¶11 Abbey Springs challenges the entry of summary judgment in favor of Walworth. Abbey Springs contends the circuit court erred in determining that Abbey Springs' policy restriction on the use of Abbey Springs' recreational facilities by the owner or owners of a unit for which assessments owing to Abbey Springs are delinquent is contrary to law. Abbey Springs also contends that the circuit court erred in determining that Abbey Springs was unjustly enriched from Walworth's payment of the delinquent assessments, and that summary judgment should have been entered in Abbey Springs' favor.

¶12 This case was determined on cross-motions for summary judgment based on undisputed facts. We review summary judgment de novo, applying the summary judgment methodology outlined in WIS. STAT. § 802.08. ***Apple Valley Gardens Assoc., Inc. v. MacHutta***, 2009 WI 28, ¶12, 316 Wis. 2d 85, 763 N.W.2d 126. A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Section 802.08(2).

¶13 The question on our de novo review is whether Walworth is entitled to summary judgment on its action for declaratory judgment and its claim for unjust enrichment. We therefore analyze Walworth's arguments as to why it is entitled to summary judgment.

¶14 As stated above, Walworth argues in its motion for summary judgment and on appeal that it is entitled to summary judgment on its declaratory judgment action because Abbey Springs' policy directly conflicts with WIS. STAT. §§ 703.165(5)(b) and 703.165(2), and is therefore unlawful.

¶15 WISCONSIN STAT. § 703.165(5)(b) provides that a lien for unpaid condominium assessments has priority over all other liens except "a first mortgage recorded prior to" a condominium lien. Walworth argues that Abbey Springs' "policy violates [] § 703.165(5)(b) because the policy forces [Walworth], or the new owner, … to pay … [a] debt ... extinguished by the foreclosure action" and "resurrects condominium assessments that were legally extinguished as to the property by foreclosure."

¶16 WISCONSIN STAT. § 703.165(5)(b) establishes the priority of an association's *lien* for unpaid assessments in relation to other liens on a condominium unit. Section 703.165(5)(b) does not address the issue of liability for *delinquent assessments*, nor does it address the effect of foreclosure on an association's lien. We fail to see how Abbey Springs' policy requiring the payment of delinquent assessments on a unit, even those assessments for which Abbey Springs' lien has been extinguished, in order to utilize Abbey Springs' recreational facilities, is contrary to § 703.165(5)(b), and Walworth has not

presented this court with a persuasive argument that it is, other than to assert in conclusory fashion that it does.[4]

¶17 WISCONSIN STAT. § 703.165(2) provides that the owner of a condominium unit shall be liable for assessments coming due while owning a unit and that:

> *In a voluntary grant, the grantee shall be jointly and severally liable* with the grantor *for all unpaid assessments against the grantor for his or her share of the common expenses* up to the time of the voluntary grant for which a statement of condominium lien is recorded, without prejudice to the rights of the grantee to recover from the grantor the amounts paid by the grantee for such assessments. (Emphasis added).

Walworth argues that Abbey Springs' policy violates § 703.165(2) because the statute provides that only those who take by voluntary grant are jointly and severally liable for unpaid assessments. Walworth argues that because Abbey Springs' policy holds those who take title after an *involuntary grant*, including itself and any other subsequent purchasers, jointly and severally liable for unpaid assessments, the policy violates § 703.165(2). We are not persuaded.

¶18 Walworth does not explain why § 703.165(2) applies here. Nothing in Abbey Springs' policy gave Abbey Springs the *right* to pursue recovery of the unpaid assessments from Walworth. The record establishes that Walworth, or any subsequent purchasers, were under no obligation to pay the delinquent assessments and were free to utilize other recreational facilities in the area. The policy merely created a pay-to-play requirement, and did not attempt to create

[4] We also observe that Walworth fails to differentiate between the underlying debt, in this case the delinquent assessments, and the lien, which was merely security for the debt.

joint and several liability in any respect. Therefore, Walworth's argument regarding joint and several liability is simply not on point.

¶19 On appeal, Walworth argues that it is also entitled to summary judgment on its declaratory judgment action because Abbey Springs' policy renders the "title [to units 18 and 19] unmarketable, or at the very least, adversely affects its marketability," contrary to WIS. STAT. § 703.10(6).[5] Section 703.10(6) prohibits condominium bylaws from affecting the transfer of title to a condominium unit. ***Bankers Trust Co. of California, N.A. v. Bregant***, 2003 WI App 86, ¶16, 261 Wis. 2d 855, 661 N.W.2d 498. As best as we can tell, Walworth is arguing that the title to the units is rendered unmarketable because Abbey Springs' policy does "not comport with … state … law." As discussed above, Walworth has asserted that Abbey Springs' policy violates WIS. STAT. §§ 703.165(5)(b) and 703.165(2). However, Walworth has not established that either of those statutes is violated by Abbey Springs' policy. In addition, Walworth has not presented any evidence that the unavailability of the recreational facilities, which were not part of the common area and were only available for an additional cost, rendered the title of the units unmarketable.

¶20 Our supreme court has stated that a title is marketable if the title "'can be held in peace and quiet; not subject to litigation to determine its validity; not open to judicial doubt.'" ***Apple Valley Gardens Assoc., Inc.,*** 316 Wis. 2d 85, ¶27 (quoted source omitted). In ***Apple Valley***, the supreme court addressed whether a condominium bylaw prohibiting the rental of condominium unit

[5] WISCONSIN STAT. § 703.10(6) provides: "Title to a condominium unit is not rendered unmarketable or otherwise affected by any provision of the bylaws or by reason of any failure of the bylaws to comply with the provisions of this chapter."

rendered the unit's title unmarketable. The court determined that although the restriction affected the use of the property, it did not affect the owner's ability to convey her title. ***Id.***, ¶28. The same is true in the present case. Although Walworth presented evidence that the recreational facility usage restriction reduced the market value of the units, there is no evidence that the restriction affected Walworth's ability to convey its title.

¶21 Walworth sought a declaratory judgment that Abbey Springs' policy was unlawful as applied to Walworth and, therefore, Walworth bore the burden of proving that to be the case. *See, e.g.,* ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 675, 239 N.W.2d 313 (1976) ("Because a declaratory judgment action may involve a reversal of the roles of the usual plaintiff and defendant, care must be taken in determining where the burdens of proof and persuasion lie."); ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶30, 290 Wis. 2d 514, 714 N.W.2d 155 (the party seeking to invalidate a provision of a contract has the burden of proving facts that justify a court's legal conclusion that the provision is invalid). Walworth likewise bore the burden on summary judgment to show that there are no disputed issues of material fact that require a trial. *See* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.,*** 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993) (a party that has the burden of proof at trial in connection with a claim has the burden on summary judgment to show that there are no disputed issues of material fact that require a trial). Walworth asserted that Abbey Springs' policy violated WIS. STAT. §§ 703.165(2) and 703.165(5)(b); however, Walworth did not establish that the policy violated either of those sections and has, therefore, not met its burden. Accordingly, we conclude that the circuit court erred in Walworth's motion for summary judgment on Walworth's declaratory judgment action.

¶22 We also conclude that the circuit court erred in granting summary judgment in favor of Walworth on Walworth's claim for unjust enrichment. To prevail on a claim of unjust enrichment, a plaintiff must prove: (1) a benefit was conferred on the defendant by the plaintiff; (2) the defendant appreciated or had knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to do so. ***Watts v. Watts***, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987). Walworth argues that it would be inequitable for Abbey to retain Walworth's payment for delinquent assessments because Abbey Springs' policy is unlawful as applied to it. As we explained above, Walworth has not established that the policy is unlawful. We therefore conclude that Walworth was not entitled to summary judgment on its unjust enrichment claim.

¶23 Abbey Springs argues that if we conclude that Walworth was not entitled to summary judgment, we should conclude that the circuit court should have granted Abbey Springs' motion for summary judgment. We agree. Walworth sought declaratory judgment based on its claim that Abbey Springs' policy violates WIS. STAT. §§ 703.165(5)(b) and 703.165(2). As we have explained above, the policy is not contrary to either of those statutes. Walworth did not assert that Abbey Springs' policy was contrary to law for any other reason. Accordingly, we conclude that Abbey Springs' motion for summary judgment should have been granted.

CONCLUSION

¶24 For the reasons discussed above, we reverse summary judgment in favor of Walworth and remand this case to the circuit court with directions to enter summary judgment in favor of Abbey Springs.

By the Court.—Judgment reversed and cause remanded with directions.

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