

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP84
STATE OF WISCONSIN**

Cir. Ct. No. 2016CV131

**IN COURT OF APPEALS
DISTRICT II**

ROBERT CONWAY AND JILL CONWAY,

PLAINTIFFS-APPELLANTS,

V.

**LAKE PARK PRESERVE, LLC, FREDERICK P. BERSCH AND LAKE PARK
CONDOMINIUM ASSOCIATION, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Robert and Jill Conway appeal from a circuit court order granting summary judgment as to two claims and dismissing one of their claims. We affirm the circuit court in all respects.

¶2 Since 2009, the Conways have owned a condominium unit in a development declared by a predecessor to Lake Park Preserve, LLC (hereafter the declarant). The development abuts a lake and includes a pier with boat slips.

¶3 On appeal, the Conways pursue two claims the circuit court rejected on summary judgment: (1) the authority of the declarant and the Lake Park Condominium Association, Inc. (hereafter the Association) to require that unit owners rent a boat slip annually and (2) the authority of the Association to enter into an agreement with a neighbor of the Conways to construct a patio and outdoor entertainment area on a common element grassy area near the Conways' unit.

¶4 In addition to the claims rejected on summary judgment, the Conways pursue their breach of contract claim relating to the declarant's auditing practices. The circuit court dismissed this claim because the Conways complaint failed to state a claim.

¶5 We address the boat slip and patio summary judgment rulings first. We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not "repeat it here except to observe that 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." *Id.* at 496-97.

Boat Slip

¶6 In the circuit court, the Conways argued that by requiring unit owners to rent a boat slip annually for \$300, the Association and the declarant illegally restricted the use of the boat slips which are common elements for the use and enjoyment of all unit owners. The circuit court rejected this claim on summary judgment after concluding that there were no material facts in dispute, and the condominium declaration and the bylaws permit the Association to charge unit owners for use of the boat slips.

¶7 The following facts are undisputed. During the negotiations attending the purchase of their condominium unit, the Conways sought a guaranty that they would have access to a boat slip. The declarant's predecessor advised that unit owners could rent a boat slip for \$300 annually as set forth in the Association's rules. The Conways reached an agreement to purchase their unit and contemporaneously signed a \$300 boat slip lease. The Conways have leased a boat slip each year since.

¶8 On appeal the Conways argue that the boat slips are common elements and the applicable Wisconsin Statutes and Association documents do not permit the Association to restrict access to common elements by leasing them for individual use. The declarant and the Association counter with a compelling argument that the statutes and Association documents authorize such management of the boat slips.

¶9 It is undisputed that the boat slips are common elements of the condominium in which "[e]very unit owner owns an undivided percentage

interest.” WIS. STAT. § 703.13(1) (2015-16).¹ Several statutes are relevant to the treatment of common elements. “[E]xcept as provided in the condominium instruments or bylaws, the common elements are subject to mutual rights of support, access, use and enjoyment by all unit owners.” WIS. STAT. § 703.14(1). Condominium instruments include “the declaration, plats and plans of a condominium together with any attached exhibits or schedules.” WIS. STAT. § 703.02(5). The Association may “[r]egulate and impose charges for the use of common elements,” WIS. STAT. § 703.15(3)(b)2., and may “[r]eceive any income derived from payments, fees or charges for the use, rental or operation of the common elements,” Sec. 703.15(3)(b)6.²

¶10 The Conways argue that there is no provision in the declaration, plat or bylaws that gives the Association the power to allocate exclusive use of the boat slips via a lease agreement. We disagree. Paragraph 7.04(a) of the declaration authorizes the Association to manage and control the common elements. Section 6.01(c) of the bylaws empowers the Association’s board of directors to “[m]anage ... operate and regulate the Common Elements.” Section 6.01(k) of the bylaws authorizes the Association’s board of directors to “[a]dopt, amend, and repeal rules and regulations governing the operation, maintenance, and use of any portion of the Condominium.” Article V, sections 5.01 to 5.02 of the Rules and Regulations of the Association govern leasing boat slips to unit owners and provide that the Board of Directors sets the annual boat slip lease fee (\$300).

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The Conways do not cite any case law construing the statutes discussed below. Therefore, we rely upon the plain statutory language.

¶11 The foregoing statutes, condominium instruments, rules and regulations establish that the Association had authority to lease the common element boat slips to unit owners for an annual fee. In the absence of disputed material facts, the circuit court properly granted summary judgment on the Conways' claim that the Association lacked the authority to lease the boat slips.³

The Patio

¶12 The Conways make similar arguments about the Association's power to act with regard to another common element, a former grassy area near their unit. The dispute arises from an October 2009 agreement entered into between the Association and George and Regina Richards (hereafter Richards), owners of a neighboring unit. Under the agreement, "Common Element Patio Use Restrictions and Obligations" (the patio agreement), the Association and Richards agreed that Richards could construct and maintain a new patio and outdoor entertainment area on a grassy area common element which was adjacent to Richards' unit-adjacent patio. The agreement defines the new patio as a common element and grants Richards nonexclusive, perpetual use of the new patio. The Conways claim that the new patio deprives them of a common element, the former grassy area, and impedes their view and should be removed.

¶13 On summary judgment, the circuit court rejected the Conways' challenge to the new patio because the Association had authority to permit construction of the new patio.

³ Although not necessary to our decision, we note that in 2009, when the Conways negotiated the purchase of their unit, they did not succeed in obtaining a guaranteed boat slip, they were informed that the boat slip had to be leased, and they have leased a boat slip since then.

¶14 The Association has the authority to “[c]ause additional improvements to be made as part of the common elements,” WIS. STAT. § 703.15(3)(b)3., and the Association may make contracts, § 703.15(3)(b)1. Section 6.01(c) of the bylaws grants the Board of Directors the power to “[m]anage, maintain, repair, replace, improve, operate and regulate the Common Elements.”

¶15 The premise of the Conways’ appellate argument is that the Association converted a common element, the former grassy area, to Richards’ personal use as a limited common element. This premise is flawed for two reasons. First, the Association-Richards new patio agreement clearly states that the new patio remains a common element over which Richards has nonexclusive use. Second, the Conways place great emphasis on the fact that the new patio is attached to Richards’ unit-adjacent limited common element patio.⁴ The Conways argue that the proximity of the new patio to Richards’ limited common element patio converts the new patio to a limited common element patio in violation of provisions in Wisconsin law and the Association’s documents governing the treatment of common elements. We agree with the declarant and the Association that the position of the new patio adjacent to Richards’ limited common element patio does not convert the new patio into a limited common element. The declaration defines limited common element patios as “patios attached to, leading directly to or from, or adjacent to each Unit.” The new patio is adjacent to the Richards’ limited common element patio, not directly adjacent to their unit. The new patio remains a common element.

⁴ Unit-adjacent patios are limited common elements per the declaration which defines them as “patios attached to, leading directly to or from, or adjacent to each Unit.”

¶16 The Conways rely upon *Newport Condominium Ass'n v. Concord-Wisconsin, Inc.*, 205 Wis. 2d 577, 556 N.W.2d 775 (Ct. App. 1996), to support their argument that reclassifying the common element grassy area to a limited common element new patio reduced the value of other condominium units due to the loss of use of a common element. We need not address this case because, as we held above, the Conways' argument that the former grassy area has been converted to a limited common element patio is unsupported in the record.

¶17 We conclude that the circuit court did not err in granting summary judgment on the Conways' patio claim.

Audit claim

¶18 The circuit court dismissed the Conways' breach of contract claim arising from the declarant's alleged failure to have a professional auditor or other independent examiner audit the Association's accounts and records. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). On a motion to dismiss, the court is limited to the allegations in the complaint and reasonable inferences therefrom; the "court cannot add facts in the process of construing a complaint." *Id.* "[A] complaint must plead facts, which if true, would entitle the plaintiff to relief." *Id.*, ¶21.

¶19 The Conways' complaint alleged breach of contract because the declarant did not comply with Article IX, section 9.02 of the Association's bylaws governing audits of the Association's financial accounts and records. The Conways alleged that the first condominium unit was sold in 2006, the declarant did not form an audit committee until 2013, and no professional auditor or other independent examiner has reviewed the accounts and records since 2007. The

Conways demanded that a professional and independent auditor audit the Association's accounts and records from 2007 forward.

¶20 The declarant moved to dismiss for failure to state a claim upon which relief could be granted because the Conways' complaint was insufficient. Among the deficiencies identified by the declarant are: the complaint fails to allege that the Conways owned their unit during any unaudited period, and the complaint fails to allege any period for which an audit was not performed, including after the alleged creation of an audit committee in 2013.

¶21 At the hearing on the declarant's motion to dismiss, the circuit court considered the language of Article IX, sec. 9.02 of the Association's bylaws: "The [audit] committee shall retain such professional auditors and other independent examiners as it deems appropriate."⁵ We conclude that the requirement to retain professional auditors and independent examiners is triggered by the existence and action of the audit committee, which the Conways allege was not created until 2013. Furthermore, the bylaws' reference to professional auditors and other independent examiners only addresses years in which an audit was actually conducted. The absence of such professional services prior to the alleged creation in 2013 of the audit committee does not constitute breach of contract because the audit committee did not fail to undertake what it agreed to do. No breach of contract claim is stated. See *Brew City Redevelopment Grp. v. Ferchill Grp.*, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582 (the elements of breach

⁵ The circuit court concluded that this language confers discretion on the audit committee to seek professional auditors and other independent examiners. We are not bound by the circuit court's analysis. The construction of bylaws presents a question of law that we determine independently of the circuit court. *Keane v. St. Francis Hosp.*, 186 Wis. 2d 637, 649, 522 N.W.2d 517 (Ct. App. 1994).

of contract are: the existence of a contract, the failure of a party to undertake what the party agreed to do, and damages), *aff'd*, 2006 WI 128, 297 Wis. 2d 606, 724 N.W.2d 879.

¶22 In addition, because the Conways do not allege that they owned their unit during any period for which an audit was not performed, including after the alleged creation of the audit committee in 2013, the complaint does not allege any injury to the Conways.

¶23 We affirm the circuit court's dismissal of the Conways' audit claim.

Conclusion

¶24 We affirm the circuit court's grant of summary judgment on the Conways' boat slip and patio claims. We affirm the circuit court's dismissal of the Conways' audit claim.

By the Court.—Order affirmed.

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

