

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2008

David R. Schanker
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. 2007AP2878

Cir. Ct. No. 2006CV165

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOSEPH NIMMER,

PLAINTIFF-APPELLANT,

v.

HIDDEN RIDGE RESORT CONDOMINIUMS ASSOCIATION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joseph Nimmer appeals a summary judgment granted to Hidden Ridge Resort Condominiums Association, Inc. The judgment dismissed Nimmer's slander of title action and his request for a declaratory judgment that Hidden Ridge's "off season occupancy rule" was contrary to WIS.

STAT. ch. 703.¹ Because Nimmer waived his right to challenge Hidden Ridge's allegations against him, and because the rule is not contrary to the statutes, we affirm the judgment.

Background

¶2 Hidden Ridge filed its first condominium declaration in January 1987. The resort was developed as an "RV park," although unit owners are permitted to add 360 square feet as a deck or sunroom and 360 square feet of heated living space.

¶3 In December 1997, Hidden Ridge filed an amended condominium declaration that stated, in part: "No recreational vehicle located on any Unit in the Condominium shall be occupied on a continuous year-round basis or used as a permanent abode or place of residence." This declaration was filed to clarify the resort's intent to be for seasonal recreational use only.² The 1997 declaration also stated owners would have year-round access to their units. Nimmer purchased his unit in 2001.

¶4 In 2005, Hidden Ridge's board of directors passed an "off season occupancy rule." This rule states that "no unit may be occupied for more than nine consecutive days during any thirty day period during the off season; neither shall a unit be occupied for more than thirteen days in aggregate during any thirty day period during the off season." The rule establishes procedures for

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The "off season" runs from November 1 to April 30.

enforcement and a \$100 per day fine for its violation, and provides for an evidentiary hearing if an allegation is contested.

¶5 Hidden Ridge believed that Nimmer had violated the occupancy rule between November 2005 and April 2006. In December 2005, after the first violation, Hidden Ridge sent notice to Nimmer and scheduled an evidentiary hearing after Nimmer contested the complaint. Nimmer failed to appear for the hearing and did not contest subsequent violations. He testified he did not attend because “I felt that by complying with this procedure, I would give credence to its validity and I did not want to be accused of agreeing with what they accused me of by complying with the procedure that they put forth.” In February and June 2006, Hidden Ridge filed liens against Nimmer’s property.³ In July, his attorney sent a letter to Hidden Ridge, opining the occupancy rule was unenforceable and demanding Hidden Ridge release the liens. When Hidden Ridge refused, Nimmer brought the underlying action. Hidden Ridge counterclaimed for a money judgment on the fines and foreclosure on the liens.

¶6 Nimmer moved for summary judgment declaring the off season occupancy rule invalid and dismissing Hidden Ridge’s counterclaims. He argued that because the 1997 declaration permits year-round access to the property, the occupancy rule was inconsistent with the deed, contrary to WIS. STAT. § 703.30(4).⁴ Hidden Ridge filed a cross-motion for summary judgment. In

³ WISCONSIN STAT. § 703.165 provides that fines levied in accordance with association bylaws may constitute liens.

⁴ WISCONSIN STAT. § 703.30(4) provides, in part, “If there is any conflict between any provisions of a declaration and provisions of a condominium plat or any provisions of the bylaws, the provisions of the declaration shall control.”

February 2007, the court determined the rule was consistent with the declarations and bylaws and not contrary to § 703.30(4), and denied Nimmer's motion. The court also concluded that whether Nimmer had violated the rule was disputed and a matter for trial, and it denied Hidden Ridge's motion.

¶7 Hidden Ridge moved to postpone the trial and filed a new motion for summary judgment. It argued Nimmer had waived his right to a trial because he refused to comply with Hidden Ridge's review procedure. Nimmer filed another motion for summary judgment as well, arguing that the off season rule was vague and Hidden Ridge had not shown any evidence of violations.

¶8 The court granted Hidden Ridge's motion. Although uncertain of the appropriate standard of review and level of deference, the court ultimately concluded that Nimmer should have followed Hidden Ridge's remedial procedures as provided in the bylaws before seeking judicial review. Had Nimmer persuaded the board there was no violation, litigation would have been unnecessary. Instead, Nimmer bypassed the hearing procedure, "gave up an opportunity for him to confront the allegations," and did not give Hidden Ridge an opportunity to consider his arguments or evidence. Nimmer appeals.

Discussion

¶9 We review summary judgments de novo, using the same methodology as the circuit court. *Hardy v. Hoefferle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶10 We first address whether Nimmer has waived his right to challenge the board's determination that he violated an association rule. Nimmer asserts that regardless of whether he "followed the procedure set forth in the [association] Rule, he has not waived any of his rights to challenge the decisions and actions of Hidden Ridge in the courts." Further, he contends, nowhere does the rule indicate "that any determination made by the Board of Directors is final and binding upon a unit owner, or limits or precludes any right of a unit owner to seek relief in a court of law." In short, Nimmer asserts he need not follow association procedures for challenging a determination against him. The statutes, however, dictate otherwise.

¶11 WISCONSIN STAT. § 703.10(1) requires every unit owner to "comply strictly with the bylaws and with the rules adopted under the bylaws...." Here, the occupancy rule states, in relevant part: "If the unit owner contests the written complaint, the Board of Directors shall hold a hearing within twenty days of receipt of the written response.... At the hearing, the complainant and the unit owner shall have the opportunity to present their evidence to the Board." If the unit owner fails to respond, or if the board finds a violation occurred, the owner is subject to an off season fee and the daily fine.

¶12 Thus, because strict compliance with the bylaws is mandated, Nimmer was required to participate in Hidden Ridge's review procedure before proceeding to circuit court. Nimmer began this participation by sending a written response to the first allegation against him, but then abandoned the process by failing to attend the hearing set for him. We need not reach the discussion of whether judicial review is available after this review process, although Hidden Ridge concedes it is, or whether the business judgment rule protects the board's

actions, because we cannot absolve Nimmer of his statutory obligation to comply with the bylaws under WIS. STAT. § 703.10(1).

¶13 Moreover, Nimmer bought his unit after the 1997 declaration prohibiting year-round occupancy. He was therefore fully aware of the seasonal use limitation when he purchased his condo, even if the current rule codifying the limitation was passed after his purchase. Nimmer offers no compelling reason why a purchaser, who knows at the time of purchase that the condominium has use limits, should not be required to exhaust association remedies related to those limits before seeking judicial intervention. Because he declined to follow the association rules as a first step in seeking a remedy, Nimmer waived the right to challenge the board's determination that he committed violations of the off season occupancy rule.⁵

¶14 Nimmer also argues the board acted oppressively or unreasonably by virtue of the occupancy rule itself, because the rule specifically places fines on some unit owners and not others, and because Hidden Ridge "cannot establish an actual violation of the rule." The rule applied to some unit owners and not others because, when the new condominium declaration was filed, unit owners at the time were "grandfathered" in, and not forced to follow the seasonal use restriction.⁶ However, the declaration seeks "to eventually eliminate" year-round residency, and this privilege terminates when owners sell their units or after a single generation of inheritance. We conclude it is not arbitrary or oppressive to

⁵ We therefore need not address the contention that the business judgment rule protects the board's actions from review.

⁶ Residents who occupy their units year-round are subject to an additional fee that other residents do not pay.

apply a new rule prospectively and to gradually phase out those following the prior set of rules. And, again, Nimmer knew when he purchased his unit that the restrictions would apply to the unit but that other units were “grandfathered” in under the prior declaration.

¶15 As to establishing a violation, the board had evidence presented to it by residents charged with enforcing the occupancy rule. This evidence included Nimmer’s car in the driveway, tire tracks in fresh snow, and lights on in the unit. If Nimmer wanted to challenge the inference of occupancy this evidence supports, or present an alternate meaning of the evidence, he had an opportunity to do so at the hearing the board scheduled for him. He declined to appear. Absent other information or evidence to the contrary, the board was free to infer Nimmer was occupying his unit.

¶16 More fundamentally, Nimmer argues the board cannot prevent him from using his property in any manner he deems fit. He complains that “access” to the property, which is permitted year-round under the declaration, is the same thing as “occupancy” of the property, and thus the rule contradicts the declaration, contrary to WIS. STAT. § 703.30(4). We agree with the circuit court, however, that “access” does not have the same connotation as “occupancy.” Hidden Ridge permits owners to access their property at any time. It even permits short terms of occupancy. But the rule simply prohibits extended occupancy, consistent with the fact that Hidden Ridge does not provide services for residents year-round. Contrary to Nimmer’s interpretation, the law does, in fact, permit the board to place limits on property use. The bylaws “may contain any other provision regarding the management and operation of the condominium, including any restriction or requirement respecting the use and maintenance of the units and the

common elements.” WIS. STAT. § 703.10(3). The rule regarding seasonal occupancy is not inconsistent with the statutes, nor with the 1997 declarations.

By the Court.—Judgment affirmed.

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

