Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-452

MAY TERM, 2007

Michael R. Diemer II, Jill Diemer and Diemer Holdings, LLC	}	APPEALED FROM:
v.	}	Chittenden Superior Court
Kevin E. Sleeper, Margaret Sleeper, Kevin Sleeper, James H. Wick, Doug Fisher and Debi Fisher	}	DOCKET NO. S1345-5-CnC
		Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendants in this dispute among members of a condominium association appeal from a superior court judgment enforcing the association's vote in favor of a special assessment to replace the roof of a unit owned by plaintiffs Michael and Jill Diemer. Defendants contend the court erred in concluding that the Diemers were legally distinct from Diemer Holdings, LLC, their single-member limited liability corporation, for voting purposes. We affirm.

The dispute concerns a nine-unit condominium development that was created by a Declaration of Condominium in 1984. The property consists of two attached buildings on North Street in the City of Burlington. Unit 9 occupies the entire front building, an older refurbished Victorian. Units 1 through 8 are located in the rear building, constructed in 1984. The Diemers own Unit 9, which they purchased in 1999 for use as their primary residence, and Unit 3 in the back building. In 2003, plaintiff Diemer Holdings, LLC, a limited liability company whose sole members are the Diemers, obtained title to Units 4 and 6. Defendants Kevin E. and Margaret Sleeper own units 2 and 7. Their son, defendant Kevin Sleeper, owns unit 8. Defendant Jim Wick owns Unit 1, and defendants Doug and Debi Fisher own Unit 5.

Under the Declaration, the Diemers' ownership of Units 9 and 3 entitles them to an undivided voting interest of 37.07 percent. Diemer Holding's interest totals 17.74 percent, for a total combined interest of 54.81 percent. In 2004, a meeting of the condominium association resulted in the enactment of a special assessment to replace the roof of Unit 9. Plaintiffs voted in favor of the assessment, resulting in its passage. All of the other owners (defendants) voted against. When defendants refused to pay, claiming that the proposed replacement was too costly, plaintiffs initiated this declaratory relief action. Defendants filed a counterclaim, alleging that plaintiffs had violated the Declaration and that the vote should not be enforced.

Plaintiffs moved for summary judgment. In their opposition to the motion, defendants challenged the validity of the vote on the ground that the Diemers' sole ownership of Unit 9, described in the Declaration as consisting of "four (4) rental units," violated another provision of the Declaration which provides that "[n]o owner of any rental unit may own more than two (2) units at any one time." Defendants also claimed that the former owner of Unit 9 had historically maintained

the unit separately from the back building.

In July 2006, the court issued a written decision, granting plaintiffs' motion. The court rejected defendants' claims, finding that the Declaration "does not appear to contemplate ownership of individual units within unit 9," and that the Diemers' sole ownership did not therefore violate the provision against ownership of more than two units. The court also found that the Declaration specifically obligated all owners to maintain exterior surfaces such as roofs, and further provided that no provision could be abrogated or waived by a failure to enforce. Hence, the court found no basis for a waiver of the maintenance obligation based upon prior conduct.

Finally, the court rejected defendants' assertion, apparently raised in their counterclaim, that the prohibition against ownership of more than two rental units was violated by the Diemers' ownership of two units while also being the sole members of Diemer Holdings, LLC, which owns another two units. The court noted that, under 11 V.S.A. § 3021, a limited liability company "is a legal entity distinct from its members," and thus concluded as a matter of law that no person owned more than two units. The court acknowledged that, in limited circumstances, courts may ignore the corporate form to avoid its fraudulent misuse or "in furtherance of the ends of justice." Agway, Inc. v. Brooks, 173 Vt. 259, 263 (2001). It concluded, however, that "[i]n the absence of any allegation of fraud or other misuse of the business form in this case" the Diemers and Diemer Holdings, LLC were separate entities. This appeal followed.

Defendants' sole claim on appeal is that the court erred in failing to look beyond the business form of Diemers Holdings in the interest of justice. It is well settled, however, that claims not raised below may not be raised for the first time on appeal. Jordan v. Nissan North America, Inc., 2004 VT 27, ¶ 10, 176 Vt. 465. Plaintiffs did not raise this argument in their opposition to the motion for summary judgment and in their counterclaim they merely asserted without more that Diemer Holdings was a misuse of the business form. As the court here observed, defendants did not allege that the Diemers had created the limited liability company to perpetrate a fraud or that it was a mere shell designed solely to defeat the provisions of the Declaration and should therefore be ignored in the interests of justice. See, e.g., Winey v. Cutler, 165 Vt. 566, 567-8 (1996) (mem.) (holding that where corporate form is, in effect, a "shell" unrelated to legitimate business ends it may be ignored). We have consistently held that to preserve an issue for appeal a party must "present the issue with specificity and clarity in a manner that gives the trial court a fair opportunity to rule on it." In re White, 172 Vt. 335, 343 (2001). Defendants' fleeting allegation in their counterclaim did not satisfy this requirement. Accordingly, we conclude that the claim was waived for review on appeal.

Affirmed.

BY THE COURT:

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice

_____

Brian L. Burgess, Associate Justice