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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-139

OCTOBER TERM, 2006

Paul Bouchard, Marsha Leete, Elizabeth Yates and Milton Yates	}	APPEALED FROM:
v.	}	Franklin Superior Court
Cioffi Real Estate, Robert Cioffi, Robert Cioffi II, Nancy Cioffi, Town of St. Albans, and Eastview Planned Residential Development, Inc.	}	DOCKET NO. S236-05 Fc

Trial Judge: Geoffrey Crawford

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

Plaintiffs appeal from the trial court=s order granting summary judgment to defendants on their complaint in this dispute over the ownership of the Acommon elements@ of a planned residential development. Plaintiffs raise numerous claims of error. We affirm.

Plaintiffs own units in the Eastview Planned Residential Development (PRD). According to a 1993

declaration filed in the Town of St. Albans= land records, the Eastview Planned Residential Development, Inc. (AAssociation@) was the fee simple owner of the development, and both the property and the unit owners were subject to the terms of the declaration. Under the terms of the declaration, every owner had Aa right and easement of enjoyment in and to the Common Elements,@ subject to certain specified conditions. The Acommon elements@ were defined as Aall of the property@ except for the units, and Aall of the real estate owned by the Association for the common use and enjoyment of the Unit Owners.@ Section 7.3 of the declaration also provided that each owner understood and acknowledged that the Association Ahas deeded or otherwise dedicated, or will deed or otherwise dedicate, a parcel of ten (10) acres, more or less, easterly of the power lines on the Planned Residential Development to the Town of St. Albans for a permanent recreation area for Town residents or for members of the general public.@

In 1993, developers Robert and Nancy Cioffi conveyed certain units by three warranty deeds. The first deed contained the following provision: ASaid conveyance to further include an undivided interest in the common elements and the limited common elements as set forth in Eastview Planned Residential Development, Inc., Declaration and By-laws dated June 15, 1993.@ The two remaining deeds provided: ASaid conveyance to further include a pro-rata interest in the common elements and the limited common elements as set forth in the Eastview Planned Residential Development, Inc., Declaration and By-Laws . . . .@ In 1994, after the declaration was amended as described below, these three grantees conveyed their properties back to the Cioffis, who then reconveyed the lots to the grantees with deed language that eliminated the Apro-rata interest in common areas@ and added language stating that the three deeds were subject to the amendment. None of these deeds are within plaintiffs= chain-of-title.

As noted above, an amendment to the declaration was filed in January 1994, which superceded and replaced certain provisions of the declaration. Robert and Nancy Cioffi, rather than the Association, were named as the declarants. The term Acommon elements@ was amended to include the phrase Aall of the real estate owned by the Association for the common use and enjoyment of the Unit Owners including but not limited to all infrastructures on, over or under the Property until such time as such infrastructure is deeded to the City of St. Albans.@ Like the first declaration, the amendment created an easement in the common elements subject to

the right of the Association to transfer all or part of the common elements to the town if the instrument was signed by at least two-thirds of the unit owners. It also contained the same provision requiring that the common elements Aremain undivided.@ Finally, it contained the same provision regarding the owners= recognition that 10.89 acres would be deeded to the town. Plaintiffs purchased their units after the 1994 amendment.

In May 2005, plaintiffs sued the Cioffis and the Town of St. Albans after the Cioffis attempted to convey 10.89 acres of the development to the town for recreational purposes. Plaintiffs sought declaratory relief regarding their ownership interest in the common elements, as well as injunctive relief preventing the Cioffis from asserting that they owned a vested interest in the common elements of the PRD. Plaintiffs also alleged breach of fiduciary relationship as well as bad faith based on the Cioffis= refusal to acknowledge plaintiffs= rights.

In August 2005, plaintiffs moved for Apartial summary judgment or adjudication of the issues,@ asking the court to declare that the Condominium Ownership Act (COA), 27 V.S.A. ' 1301, et seq., and the Vermont Common Interest Ownership Act (UCIOA), 27A V.S.A. ' 1-101, et. seq., applied to their claims. The Cioffis opposed the motion, asserting that it was clear from the evidence that they intended to create a planned residential development not a condominium. The Cioffis also moved to dismiss plaintiffs= complaint, arguing that plaintiffs were not entitled to a pro rata fee interest in the common areas, as they claimed, because each of plaintiffs= deeds incorporated the terms of the declaration, which clearly articulated that the Association was the owner of all of the common elements.

In November 2005, plaintiffs filed an amended complaint, which included the Association as a defendant. Defendants Cioffis then renewed their motion to dismiss, reiterating that all of plaintiffs= deeds were subject to the covenant that acknowledged the transfer of the 10.89 acres to the town. In response, plaintiffs asserted that this covenant was ambiguous and it conflicted with other provisions in the declaration. In December 2005, the Association moved for summary judgment, arguing that there were no material facts in dispute as to plaintiffs= claim for declaratory relief, and a judgment in their favor on this claim rendered all of plaintiffs= other causes of action moot. According to the Association, plaintiffs= deeds did not purport to convey any pro-rata fee interest in the common elements or limited common elements, and all of the deeds were subject to the declaration and

amendments thereto. The Association also argued that there was no factual or legal basis to support plaintiffs= assertions that the COA or UCIOA applied to the PRD. The Cioffis filed a memorandum in support of the motion. Plaintiffs opposed the Association=s motion, although it agreed that most of the facts were undisputed. While plaintiffs characterized certain facts as Adisputed,@ they raised legal arguments about the effects of certain facts, but they did not provide any evidence that there were any genuine disputes of fact. The only additional evidence that plaintiffs offered in support of their opposition motion was a copy of the purchase and sale agreement of Elizabeth and Milton Yates for their condominium and a copy of the minutes from a town zoning board meeting. The latter was intended to show that the Cioffis had used the word Acondominium@ when seeking the town=s approval of the PRD.

In February 2006, the court granted the Association=s motion for summary judgment, and it denied all of plaintiffs= legal and equitable claims. The court found no support for plaintiffs= claim that they had a pro rata property interest in the common elements of the development. It explained that the declaration, as amended, unambiguously granted each unit owner an easement of use and enjoyment in the common elements, and it did not grant the unit owners any fee simple interest in the common elements. None of the deeds conveyed by the Cioffis between 1994 and 2003 contained a provision granting the unit owners an interest in the common elements. Rather, they provided that the conveyed premises were Asubject to all the terms, conditions and obligations of certain restrictive covenants@ in the declaration and amendment. By accepting the deeds, the court explained, the grantees acknowledged copies of both of these documents. The court further found that ' 7.3 of the amended declaration clearly and unambiguously reserved to the Cioffis the right to deed or dedicate Aa parcel of ten (10) acres, more or less, easterly of the power lines on the Planned Residential Development to the Town of St. Albans for a permanent recreation area.@

The court rejected plaintiffs= assertion that the COA and the UCIOA applied to the PRD, thereby rejecting their argument that because the PRD was a Acondominium,@ the Cioffis were prohibited from conveying any of the common elements to the town because Aindividual unit owners are tenants in common under the law@ with respect to the common areas of a condominium. The court found that the COA did not apply because the declaration, amendments, and deeds did not comply with numerous requirements of that act. The court

explained that the UCOIA did not apply because the creation of the PRD predated Vermont=s adoption of this act, and the act specifically limited its application to Aevents and circumstances occurring after the effective date of this law.@ 27A V.S.A. ' 1-204(a). The court thus concluded that all of plaintiffs= claims were without merit, and it declared that pursuant to ' 7.3 of the declaration, the Cioffis could convey the 10.89 acre parcel to the town free and clear of any claim of plaintiffs. Plaintiffs appealed.

Plaintiffs raise numerous arguments as to why summary judgment was inappropriately granted to defendants. They maintain, among other things, that: (1) the Association failed to properly support its request for summary judgment with affidavits and documentary evidence; (2) the Association failed to comply with the Abest evidence@ rule, V.R.E. " 1002, 1005; (3) the court erred by deciding issues that were not contained within the Association=s statement of undisputed material facts; and (4) the court erred in concluding that the PRD was not a condominium. All of plaintiffs= arguments are without merit.

We review a grant of summary judgment using the same standard as the trial court. Richart v. Jackson, 171 Vt. 94, 97 (2000). Summary judgment is appropriate Aif the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the [statements of undisputed material fact under V.R.C.P. 56(c)(2)], show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.@ V.R.C.P. 56(c)(3).

The trial court properly granted summary judgment to defendants here. As the trial court explained, plaintiffs= deeds incorporated the terms of the amended declaration, and the language of the declaration is clear and unambiguous. AWhen the meaning of a restriction in a deed is clear and unambiguous, there is no room for construction and the instrument must be given effect according to its terms.@ Creed v. Clogston, 2004 VT 34, & 13, 176 Vt. 436. The Cioffis are plainly authorized to transfer the ten acre parcel to the town under ' 7.3 of the declaration. The unit owners possess only the Aright and easement of enjoyment in and to@ the common elements, subject to the conditions set forth in the declaration. There is no basis for plaintiffs= assertion that they own a pro rata share of the common elements.

The trial court also correctly concluded that, based on the undisputed facts, the PRD was not subject to either the COA or the COIA. It thus properly rejected plaintiffs= claim, based on this assertion, that the Cioffis were prohibited from conveying any of the common elements of the development to the town. As the trial court noted, the provisions of the COA are applicable only when Athe sole owner or all of the owners of [the property] make the property subject to this chapter by duly executing and recording a declaration as herein provided.@ 27 V.S.A. ' 1303. Section 1311 sets forth the requirements necessary for such a declaration. We agree with the trial court that the amended declaration does not satisfy all of these requirements. See, e.g., 27 V.S.A. ' 1311(3), (6). As the trial court explained, the amended declaration created and described a residential community in which some common features are shared by residents. The condominium form of ownership also contains property used in common by the residents. The condominium reaches this end through pro rata ownership of the common areas; the PRD at issue here followed a different path in which the Association, not the individual residents, held title to the common area. The fact that the two forms of ownership are broadly similar in purpose does not make the PRD a condominium.

The court also properly concluded that the UCIOA did not apply because the creation of the development predated Vermont=s adoption of the UCIOA. See 27A ' 1-204(a); Alpine Haven Prop. Owners Assoc., Inc. v. Deptula, 2003 VT 51, & 9, 175 Vt. 559, 830 A.2d 78 (mem.) (recognizing that under ' 1-204(a) of the UCIOA, preexisting common interest communities are subject to the Act in part, but Aonly with respect to events and circumstances occurring after the effective date of this law,@ and holding that act did not apply where none of the events and circumstances at issue occurred after the effective date of the act). Given our conclusion that plaintiffs are not entitled to a pro rata interest in the common elements of the PRD, their remaining claims, which were dependent on this claim, must also fail. The trial court therefore did not err in granting summary judgment to defendants on all of plaintiffs= claims.

None of plaintiffs= arguments on appeal undermine this conclusion. Plaintiffs argue, for example, that the Association failed to support its summary judgment motion with appropriate evidence. As reflected above, however, all of the relevant evidence was both undisputed and properly before the trial court, whether through plaintiffs= or defendants= filings in the case. See V.R.C.P. 56(c)(3). The Association was not obligated to

provide affidavits to support its motion. See V.R.C.P. 56(b). Moreover, once a party has moved for summary judgment, the opposing party must then demonstrate that there are genuine disputes of material fact; it may not rest on mere allegations and denials but rather must set forth specific facts showing that there is a genuine issue for trial, either by affidavits or as otherwise provided in Rule 56. V.R.C.P. 56(e). Plaintiffs failed to comply with this requirement, and thus all of the material facts set forth by the Association were deemed admitted. V.R.C.P. 56(c)(2) (AAll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.@). The proper interpretation of the terms of the declaration, including ' 7.3, was plainly before the court. Moreover, contrary to plaintiffs= claim that the applicability of the COA and UCOIA raise disputed questions of fact, we note that it was plaintiffs who moved for summary judgment on this issue. As discussed above, the trial court correctly concluded that, based on the undisputed facts, neither act applied.

All of plaintiffs= remaining arguments are equally without merit. The record shows, for example, that plaintiffs Milton and Elizabeth Yates raised their assertion about the Abest evidence@ rule in the context of the purchase and sale agreement for their unit. They provided the trial court with a Atrue and correct@ copy of this document, authenticated by an affidavit from Milton Yates; they also asked the court to compel the Cioffis to produce the original version of this document Aat the time of any hearing or at the time of trial.@ The terms of this agreement do not appear to be disputed, and any error in the court=s reliance on the Atrue and correct@ copy of this document provided by plaintiffs is harmless.

Plaintiffs spend much time discussing the three deeds that are not within their chain-of-title. They complain, for example, that defendants failed to produce the Acorrected@ deeds referenced by the trial court in its decision. Yet plaintiffs failed to provide any evidence that there were disputes of fact concerning these deeds. V.R.C.P. 56(e). More importantly, these deeds are simply not relevant to the issues before the court. Plaintiffs= assertions that these deeds somehow rendered the UCIOA applicable to their claims is without merit. We similarly reject plaintiffs= assertion that it is immaterial that these deeds are outside their chain-of-title because Aall of the present unit owners are tenants in common of the Common Elements.@ This assertion rests on plaintiffs= argument that the PRD is a condominium, which we have rejected. For this reason, we also

reject plaintiffs= assertion, which appears to be raised for the first time, that the court erred by failing to include the individual unit owners and mortgagees as parties. We similarly reject plaintiffs= argument that they were entitled to a hearing before the court rendered its summary judgment decision, or that somehow judgment was entered against them without proper notice. We have considered all of plaintiffs= arguments and none undermine the trial court=s conclusion in this case. Summary judgment was properly granted to defendants on all of plaintiffs= claims.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice