

*Judge Teachout*

STATE OF VERMONT  
WINDSOR COUNTY, SS.

TimberHawk Owners Association, Inc.	)	
	)	Windsor Superior Court
v.	)	Docket No. 563-12-03 Wrcv
	)	
HIMR, Inc. d/b/a	)	
Hawk Inn & Mountain Resort, and	)	
Hawk Resorts International, L.P.	)	

**CROSS MOTIONS FOR SUMMARY JUDGMENT**  
**Memorandum of Decision**

Plaintiff TimberHawk Owners Association, Inc. (TimberHawk) seeks payment of assessed member fees on Lots 58 and 61 of the TimberHawk at Riverbend Colony. The named defendants are Hawk Resorts International, L.P. (Hawk Resorts International), the record titleholder, and HIMR, Inc. (HIMR), a related operating company. The parties have filed cross motions for summary judgment, each asserting that there are no material facts in dispute. The primary issues for the court are (1) whether the Defendants' obligation to pay TimberHawk the assessments is affected by existing contracts to sell the lots to third parties, and (2) the extent to which Plaintiff's right to collect past assessments is limited by an applicable statute of limitations, and which statute of limitations applies.

**Undisputed Facts**

Plaintiff TimberHawk is a nonprofit, nonstock membership corporation, located in Stockbridge, Vermont. TimberHawk is the association of owners contemplated by Section 12 of the TimberHawk Protective Covenants dated April 7, 1976, and recorded in Book 34 Page 442 of the Town of Stockbridge Land Records.

Defendant HIMR is a Vermont Corporation doing business as Hawk Inn & Mountain Resort. HIMR is understood to be the operating company for Defendant Hawk Resorts International. Hawk Resorts International is a Vermont Limited Partnership with its principal place of business in Plymouth, Vermont.

In 1996, Hawk Resorts International's predecessor in title, Hawk Mountain Corporation, defaulted on a mortgage held by Dartmouth Bank, and Dartmouth Bank foreclosed upon the mortgage. The mortgage was a blanket mortgage on land, improvements and other assets known as the Hawk Inn and Mountain Resort. Dartmouth Bank then went into receivership. The Federal Deposit Insurance Corporation (FDIC) then managed and marketed the assets of the resort.

On March 6, 1996, Hawk Resorts International purchased a majority of the assets of Hawk

**FILED**  
APR 26 2004

Windsor County Clerk

Mountain Corporation from the FDIC, which was acting as receiver for Dartmouth Bank. The Quitclaim Deed from the FDIC to Hawk Resorts International is recorded in Book 52, Pages 589-94 of the Town of Stockbridge Land Records.

The assets that Hawk Resorts International purchased from the FDIC included the Hawk Inn & Mountain Resort, numerous promissory notes, mortgages and land sale contracts for properties located in Plymouth, Rochester and Stockbridge, and real estate. Schedule A to the FDIC Quit Claim deed, listing assets of the purchase, includes Lots 58 and 61, as follows:

- ¶ 4. Being *Lot 58* which is part of the so-called *Timber Hawk at Riverbend Colony*.  
... (original emphasis).
- ¶ 5. Being *Lot 61* which is part of the so-called *Timber Hawk at Riverbend Colony*.  
... (Original emphasis).

The FDIC Quit Claim Deed conveyed, to Hawk Resorts International, record title to Lots 58 and 61, which lots lie within and are a part of the development sometimes known as "TimberHawk at Riverbend" and which lots are subject to the TimberHawk Protective Covenants.

Under paragraph 12 of the Timber Hawk Protective Covenants, the property owner of Lots 58 and 61 is obligated to pay any and all assessments on those lots, duly authorized by Timber Hawk.

Article II of the By-Laws of the Timber Hawk Owners' Association includes the following sections:

Section 1. "Association" shall mean and refer to Timber Hawk Owners' Association, Inc., a Vermont non-profit corporation, its successors and assigns.

Section 2. "Lot(s)" shall mean and refer to any one or more of the lots described in the Articles of Association.

Section 4. "Property Owner" shall mean and refer to those owners (whether individually or concurrently, as joint tenants, tenants by the entirety or tenants in common) of any of the lots described in Section 2 hereof.

Article III of the By-Laws of the Timber Hawk Owners' Association includes the following section:

Section 3. Assessments. Each Member is obligated to pay, in accordance with the rules and regulations of the Association, to the Association annual and special assessments representing his pro-rata share of the total operational and capital costs of the Association. No Member may waive or otherwise escape liability for the assessments provided for herein by nonuse of the common land or abandonment of

his lot, including taxes, maintenance of common land, roads and water systems, etc.

TimberHawk has demanded payment of the assessments on Lots 58 and 61 from Hawk Resorts International, but Hawk Resorts International has not paid the amounts assessed. TimberHawk has submitted Schedules of Assessments Not Paid for Lots 58 and 61. TimberHawk seeks payment from both HIMR and Hawk Resorts International. Defendants dispute the amount of the assessments and ask for further discovery on the amount.

Under Timber Hawk By-Laws, Article III, Section 4(a), unpaid assessments delinquent for a period of thirty days bear interest "from the date of delinquency at the highest rate permitted by law." The By-Laws further provide for recovery of any costs of litigation, including attorney's fees, which are reasonable and necessary for the enforcement of delinquent assessments.

Included in the assets purchased by Hawk Resorts International were land sale contracts with Preben A. Nilsson (Nilsson), and with Sergio and Olga de Arcetti (Arcetti), for undeveloped Lots 58 and 61 located at TimberHawk. Each land sales contract is dated in 1977, and each contract states that the "[b]uyer shall be responsible for and pay all real estate taxes assessed upon and other expenses incurred in connection with the premises on a pro-rata basis from the date of this contract." Each contract also calls for transfer of possession and delivery of the deed to occur upon receipt of payment in full.

Each contract also provided that, if the buyer failed to comply with the terms of the contract, then the contract would terminate and any monies paid under the contract would be forfeited to and retained by the seller as liquidated damages. Each contract also provided that the closing date of the sale would be held on or before March 15, 1982, or within 30 days from the completion of the payment provisions.

Nilsson and Arcetti have not made payments under their land sales contracts for over 15 years. Hawk Resorts International, although successors in interest to the holders of the contracts, is barred by the statute of limitations from enforcing the land sale contracts against Nilsson and Arcetti.

Hawk Resorts International has been the subject of prior legal action by the Town of Stockbridge in the Windsor County Small Claims Court, for delinquent real estate taxes on Lots 58 and 61. See Findings and Order, *Town of Stockbridge v. Hawk Resorts International, L.P.*, Nos. 309-6-97 and 310-6-97 Wrsc (Robert M. Hartwell, Acting Judge, December 11, 1997). The Small Claims Court found that, as the titleholder to the two lots, Hawk Resorts International was liable to the Town for taxes. Hawk Resorts International has paid the real estate taxes assessed by the Town of Stockbridge pursuant to the small claims judgment.

TimberHawk filed its Complaint against HIMR and Hawk Resorts International on December 4, 2003. At this time, any interest that HIMR may hold in the land sale contracts for Lots 58 and 61 is unclear. The precise relationship between HIMR and Hawk Resorts International is also unclear.

## Conclusions

TimberHawk seeks payment of member fees on Lots 58 and 61 for a period of years. Under paragraph 12 of the Timber Hawk Protective Covenants, TimberHawk has a right to collect assessed fees from the "property owner." Hawk Resorts International denies that it is the owner, even though it acquired title from the FDIC as part of the Quit Claim Deed dated March 6, 1996.

TimberHawk suggests that Hawk Resorts International's ownership of the two lots was conclusively established by the earlier small claims cases. In general, "[c]ollateral estoppel, or issue preclusion, prevents a party from relitigating an issue that has necessarily been decided in a previous action." *Cold Springs Farm Development, Inc. v. Ball*, 163 Vt. 466, 468 (1995) (citing *Berisha v. Hardy*, 144 Vt. 136, 138 (1984)). However, Vermont courts do not give preclusive effect to small claims adjudications in subsequent regular superior court trials, because to do so "would be inconsistent with maintaining the simplicity and informality of small claims procedures." *Id.* at 471 (quoting *Village Supply Co. v. Iowa Fund, Inc.*, 312 N.W.2d 551, 554 (Iowa 1981)). Thus, Hawk Resorts International is not procedurally barred from denying ownership of the two lots.

Hawk Resorts International bases its denial on the contracts with Nilsson and Arcetti. Hawk Resorts International asserts that those contracts effectively conveyed the parcels to Nilsson and Arcetti, and that they are the owners under a doctrine of equitable mortgages, citing *Tromblay v. Dacres*, 135 Vt. 335 (1977). In *Tromblay*, the Supreme Court described the doctrine as follows:

The doctrine of equitable mortgages does apply to agreements denominated as a "contract for a deed" or, in older usage, "bond for a deed." These agreements are entered into, in many instances, where the prospective purchaser cannot raise the difference between the price of the property and an acceptable mortgageable balance. The prospective purchaser *occupies the premises* and makes the payments until the point of delivery of the deed and execution of the mortgage is reached. Since the payments are applied to the purchase obligation as they accumulate, an equity, though perhaps small, comes into being. It is this interest that is referred to as the equitable mortgage interest that requires foreclosure. . . .

*Tromblay*, 135 Vt. at 339 (citations omitted)(emphasis added).

However, the contracts at issue here are unlike those in the descriptive passage from *Tromblay*. In the Nilsson and Arcetti contracts, the seller (Hawk Mountain Corporation) retained possession of the premises until delivery of the deed. Also, if the buyers failed to make payment in full under those contracts, then the contract would terminate and any of the contract monies paid would be forfeited as liquidated damages.

Moreover, the facts and holding of *Tromblay* do not support Hawk Resort International's claim that it has no obligation to pay the assessments. The court in *Tromblay* simply noted that a buyer under a contract for deed has an equitable interest that must be foreclosed before the owner



can obtain all legal interest in the premises. The court held that on the facts of the case, no equitable interest arose under a lease with an option provision. That does not in any way provide authority for a principle that the owner of property under a contract for deed is relieved of all obligations of the record title holder, such as to pay property taxes or other contractual obligations of the owner. Even if the original contracts provided that as between Hawk Mountain Corporation and Nilsson or Arcetti, Nilsson or Arcetti had the obligation to pay the assessments, such contractual terms do not relieve Hawk Resorts International as property owner from an obligation to pay them to TimberHawk under the terms of the TimberHawk Protective Covenants.

Based on the undisputed evidence in the record, including the Quit Claim Deed from the FDIC, Hawk Resorts International is the "property owner" under Article II of the TimberHawk By-Laws. Hawk Resorts International is obligated to pay the assessment fees on Lots 58 and 61.

The next question is whether there is a statute limiting TimberHawk's right to collect past assessments to a particular number of years. TimberHawk has submitted schedules listing 17 years of unpaid assessments on Lot 58, plus 16 years of unpaid assessments on Lot 61, plus interest at 12% per year on each unpaid assessment. The parties have set forth various arguments in favor of various statutes of limitations.

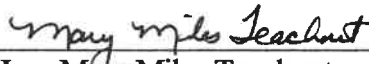
After considering the alternatives, the court concludes that the appropriate limitations period is eight years under 12 V.S.A. § 505 (covenants other than warranty or seisin). TimberHawk's action is based on the landowner's covenant, or agreement, to pay assessments. That covenant is one of the "TimberHawk Protective Covenants" which run with the land, and Hawk Resorts International had notice of the document, which is recorded in the Stockbridge Land Records. Under the statute, TimberHawk's claim against a property owner is limited to the eight years prior to the filing of the complaint (*i.e.* assessments subsequent to December 4, 1995). Hawk Resorts International acquired the lots on March 6, 1996, and is therefore liable for assessments since that date. There is, however, neither a factual nor legal basis for imposing liability on HIMR, based on the undisputed facts.

The motions primarily addressed the issue of liability. Defendants have requested time for discovery as to specific amounts, and should have it. *Doe v. Doe*, 172 Vt 533 (2001).

### Order

Plaintiff's Motion for Summary Judgment is *granted* with respect to liability of Defendant Hawk Resorts International, and  
Defendants' Motion for Summary Judgment is *denied*.

Dated this 22nd day of April, 2004.

  
\_\_\_\_\_  
Hon. Mary Miles Teachout  
Superior Judge

**FILED**  
APR 26 2004

Windsor County Clerk