

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

TAMMY DESCH,

Appellant,

v.

SOUTH FORK OF HILLSBOROUGH COUNTY II
HOMEOWNER'S ASSOCIATION, INC.,

Appellee.

No. 2D22-1584

June 16, 2023

Appeal from the County Court for Hillsborough County; Leslie K. Schultz-Kin, Judge.

Dennis M. Hudson, Jr., of Hudson Law Association, P.A., Lakeland, for Appellant.

Matthew D. Stefany of Allen Norton & Blue, P.A., Tampa; and Nathan Frazier and Gregory S. Grossman of Frazier & Bowles, PLLC, Tampa, for Appellee.

SILBERMAN, Judge.

Tammy Desch appeals a final summary judgment in a foreclosure action on an assessment lien filed by South Fork of Hillsborough County II Homeowner's Association, Inc. (the HOA). Desch contends that there was no evidence of a properly levied individual assessment against her and that the HOA had no valid lien to foreclose. Because the HOA failed

to prove that the HOA's Board of Directors actually levied an individual assessment against Desch, we reverse the order granting summary judgment, the final judgment of foreclosure, and the amended final judgment of foreclosure. We remand for the trial court to grant Desch's cross-motion for summary judgment as a matter of law and to enter summary judgment in her favor. Based on this disposition, we need not reach any of the other arguments Desch makes on appeal.

Factual and Procedural Background

The HOA incurred an attorney's fees expense of \$475.50 for the filing of an answer and affirmative defenses in a mortgage foreclosure action Deutsche Bank filed against Desch. The HOA's attorneys invoiced the HOA on July 3, 2019. The HOA ledger for Desch's account shows an entry on July 9, 2019, for "Attorney Fees-Collections" of \$475.50 and references an invoice number. On August 1, 2019, the HOA sent Desch a courtesy notice of a delinquent balance of \$517.75 which included the \$475.50 plus a late fee, interest, and delinquency letter fee. On September 10, 2019, the HOA sent Desch a "Notice of Intent to Record a Claim of Lien," asserting that Desch owed \$846.60 and attaching the account ledger and claim of lien. On November 21, 2019, the HOA sent Desch a "Delinquent Assessment" letter and account ledger advising that a claim of lien had been filed and that the HOA intended to foreclose on that lien unless the amount of \$1,698.45 was paid.

On May 4, 2020, the HOA filed its complaint for (1) lien foreclosure and (2) breach of obligation to pay assessments. The HOA alleged that it "ha[d] made assessments against the Property" and that Desch "ha[d] failed to pay these assessments as they became due and payable." Attached to the complaint was a copy of an HOA account ledger showing

the entry on July 9, 2019, for \$475.50 and the subsequent fees and interest. The HOA also filed its notice of lis pendens.

As to the complaint's allegation that the HOA "ha[d] made assessments against the Property," Desch responded in her answer: "Denied that any authorized assessments were made against the Defendant's property." Desch asserted in her affirmative defenses, among other things, that the HOA levied an "assessment" against her without any basis or authority under the HOA's governing documents or applicable statutes.

The parties filed cross-motions for summary judgment. The HOA attached to its memorandum in support of its motion and in opposition to Desch's motion the "Declaration of Covenants, Conditions and Restrictions for South Fork of Hillsborough County II Homeowners Association" (the Declaration), which included as exhibits the HOA's articles of incorporation and bylaws.

In her cross-motion for summary judgment, Desch asserted that in its complaint "the HOA fail[ed] to specifically identify the source, origin or basis of any assessment against Desch's property." She further asserted that the "HOA failed to comply with the procedural requirements of Florida Statutes and the governing documents with respect to levying special/individual assessments against member/homeowners."

The trial court conducted a summary judgment hearing and entered an order granting the HOA's motion for summary judgment as to liability and denying Desch's motion for summary judgment. In its order, the trial court stated:

2. The Court finds as a matter of law that the \$475.00 in attorneys' fees incurred by the Association in defense of the bank foreclosure pertaining to the same subject property as the instant case, filed by Deutsche Bank under Hillsborough

County Case No. 2019-CA-002289 ("the bank foreclosure"), did constitute a "loss to the Association," as that term is used in Article VI(4)b of the Association's Governing Documents, and was subject to reimbursement through an Individual Assessment being placed on Defendant's account ledger.

3. Two of the Purposes for which Individual Assessments can be used to reimburse the Association for a loss per the Governing Documents at Article VI(2), are "(a) payment of the Association operating expenses," (attorneys' fees are an operating expense of the Association per the Affidavit of Alba Sanchez, LCAM filed with the Court); and/or (i) "employment of accountants, attorneys, and other professionals to represent or advise the Association" which is what occurred in the bank foreclosure case.

Thus, the trial court implicitly determined that "an Individual Assessment being placed on Defendant's account ledger" was a proper levy of an individual assessment for attorney's fees.

Standard of Review

We conduct a de novo review of a trial court's ruling that grants summary judgment. *G & G In-Between Bridge Club Corp. v. Palm Plaza Assocs., Ltd.*, 356 So. 3d 292, 297 (Fla. 2d DCA 2023) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Effective May 1, 2021, we construe and apply rule 1.510 under the federal summary judgment standard. *Id.*; *In re Amends. to Fla. R. Civ. P. 1.510*, 309 So. 3d 192, 192 (Fla. 2020). "A movant is entitled to summary judgment if no reasonable finder of fact could return a verdict for the nonmoving party." *Palm Plaza Assocs.*, 356 So. 3d at 297 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue

concerning "the construction of a written instrument and the legal effect to be drawn therefrom" is a question of law that is "determinable by entry of summary judgment." *Joy v. Oaks Club Corp.*, 343 So. 3d 632, 636 (Fla. 2d DCA 2022) (quoting *Angell v. Don Jones Ins. Agency*, 620 So. 2d 1012, 1014 (Fla. 2d DCA 1993)).

Analysis

On appeal, Desch argues that despite discovery requests and her cross-motion for summary judgment, the HOA never produced any evidence that the Board of Directors actually levied an individual assessment against her property. The HOA argues that under article VI of the Declaration Desch is responsible for individual assessments that the HOA may levy against her to reimburse the HOA for loss/damage to the HOA, for HOA operating expenses, and to employ attorneys "to represent or advise the Association." But the HOA spends little time refuting Desch's argument that the Board of Directors failed to actually levy an assessment. The HOA merely relies on the July 9 ledger entry and the affidavit of Alba Sanchez, who describes herself as an agent of the HOA. Her affidavit asserts:

It has always been the practice of [the HOA] to place the legal cost incurred in filing defenses in any mortgage foreclosure action on the account ledger o[f] the member being foreclosed as an individual assessment in the same manner as an abatement should the association have to cure a violation by a homeowner.

The HOA's governing documents show that the practice of relying on a ledger entry is insufficient to levy an individual assessment for attorney's fees.

Article VI of the Declaration governs annual assessments, special assessments, individual assessments, and onetime initial assessments.

Article VI.1.a states that "[s]aid assessments shall be fixed, established and assessed as herein provided. Assessments, together with such interest and late charges as shall be imposed by the Board at its discretion, and the cost of collection thereof, . . . shall be a charge and a continuing lien" on the assessed property, and the assessment and related costs are also the personal obligation of the property's owner.

Article VI.4.b, entitled "Individual Assessment," specifically provides:

The Board may levy an individual assessment against any Owner and that Owner's Lot and any Dwelling located thereon in order to cover costs incurred by the Association due to that Owner's failure to maintain its Lot or Dwelling pursuant to the standards set forth in this Declaration, or to reimburse the Association for loss or damage to the Association or to any Common Property, Area of Common Responsibility or easement area caused by that Owner or his lessee, agent, contractor or guest, and not covered by insurance, or for any other purpose expressly permitted by this Declaration.

(Emphasis added.) Other purposes allowed under article VI.2 include payment of the HOA's "operating expenses" and to employ attorneys "to represent or advise the Association."

The HOA's bylaws further provide in article VII, section 1.(c) that "[t]he Board of Directors shall have power . . . to establish, levy and assess, and collect assessments or charges in accordance with the Declaration." The HOA's bylaws address "Directors' Meetings" in article VIII. Article VIII, section 7 provides:

Board Quorum and Voting. The majority of the Board of Directors shall constitute a quorum thereof. Every act or decision done or made by a majority of the Directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

Article VIII, section 6 of the bylaws provides that "[a]ction of the Board of Directors may be taken without a meeting upon the written consent signed by all members of the Board." However, the HOA does not assert that there was a signed, written consent in this case.¹ Moreover, the HOA made no assertion that the Board of Directors made any decision concerning the individual assessment against Desch.

At the summary judgment hearing, the HOA asserted that the ledger attached to the complaint "does walk through the July assessment, the attorney's fees that were put on the account for the mortgage foreclosure defense." Desch argued that assessments have to be levied by the Board of Directors and that there was no record here that the assessment "was ever discussed much less actually imposed." Instead, Desch contended that it could be inferred from the facts that after the HOA got a bill from its attorneys, the HOA's "property manager" placed the charge on Desch's account. The HOA never asserted that the

¹ Chapter 720, Florida Statutes (2019), governs homeowners' associations and addresses association powers, duties, and limitations. See § 720.303(1) ("The powers and duties of an association include those set forth in this chapter and, except as expressly limited or restricted in this chapter, those set forth in the governing documents."). For instance, section 720.303(2)(a) contains requirements for board meetings, in part, as follows:

Members of the board of administration may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail. A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. Meetings of the board must be open to all members, except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege.

Board of Directors made any kind of decision to levy an individual assessment.

Sanchez's affidavit that the HOA relies upon asserts that the HOA had developed a "practice" of "plac[ing] the legal cost incurred in filing defenses in any mortgage foreclosure action on the account ledger o[f] the member being foreclosed as an individual assessment in the same manner as an abatement should the association have to cure a violation by a homeowner." We note that in article XIV.1 on remedies for violations of the Declaration, the Declaration addresses individual assessments for abating a violation:

[W]henever there shall have been built or there shall exist on any Lot any structure, thing or condition which violates this Declaration, Declarant or the Association (but not any Owner) shall have the right, but not the obligation, to enter upon the Lot where such violation exists and summarily to abate and remove the same, all at the expense of the Owner of such Lot, which expense *shall constitute* an individual assessment to be treated and collected as set forth in Article VI.

(Emphasis added.) Thus, the Declaration itself authorizes individual assessments without Board action when the HOA incurs expenses to abate a violation. The problem with the HOA relying on its assessment "practice" for abatements is that we are not dealing in this case with an abatement as defined in article XIV.1 concerning a "structure, thing, or condition" on a lot.

The HOA has pointed to nothing in the governing documents that would allow a property manager or any agent or employee of the HOA to levy an individual assessment for attorney's fees in a foreclosure action. Based on the absence of any evidence that the Board of Directors levied an assessment against Desch, she requests that we reverse the order granting summary judgment and that summary judgment be granted in

her favor. We agree that Desch was entitled to a judgment as a matter of law because the HOA's "practice" does not comply with the HOA's governing documents that give the Board of Directors the power to levy individual assessments.

For the foregoing reasons, we reverse the order granting summary judgment in favor of the HOA, the final judgment, and the amended final judgment. We remand for the trial court to grant Desch's cross-motion for summary judgment as a matter of law on the basis that the Board of Directors failed to levy an assessment against Desch and to enter summary judgment in her favor.

Reversed and remanded.

LUCAS and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.