IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE RESERVES MANAGEMENT, LLC, a Delaware limited liability company,	)	C.A. No. K12C-05-002 JTV
Plaintiff,	)	
v.	)	
BETHANY PARTNERS, LLC, a Delaware limited liability company,	)	
Defendant,	)	
and	)	
CHRISTOPHER GLENN,	)	
Nominal Defendant.	)	

Submitted: November 1, 2012
Decided: March 1, 2013

Steven Schwartz, Esq., Schwartz & Schwartz, Dover, Delaware. Attorney for Plaintiff.

Sheldon K. Rennie, Esq., Fox Rothschild, Wilmington, Delaware. Attorney for Defendant Bethany Partners.

Upon Consideration of Defendant's
Motion for Summary Judgment
GRANTED

VAUGHN, President Judge

Reserves Management v. Bethany Partners, et al.
C.A. No. K12C-05-002 JTV
March 1, 2013

ORDER

Upon consideration of defendant Bethany Partners, LLC's ("Bethany") Motion for Summary Judgment, the plaintiff's opposition, the parties' supplemental submissions to the Court, and the record of this case, it appears that:

1. This motion was filed as a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted. When the motion was presented, however, the Court indicated its willingness to consider matters outside the pleadings and gave the parties a full and fair opportunity to present any matter in connection with the motion that the party wished to present. The plaintiff objected to converting the Motion to Dismiss to a Motion for Summary Judgment before it had an opportunity to conduct discovery. Nonetheless, I am satisfied that under the facts and circumstances of this case, providing the parties with an opportunity to present matters outside the pleadings in support of and in opposition to the motion warrants converting the motion to one for summary judgment and addressing it at this point in the litigation.

2. In January 2006, Christopher Glenn acquired title to Lots Nos. 130-134 ("the lots") in The Reserves Resort, Spa and Country Club (the "Resort"), a planned residential community situated near Ocean View in Sussex County, Delaware. He continues to be the owner. At the time he acquired the lots, Glenn granted Bethany a first lien mortgage upon them in exchange for a loan in the principal amount of $750,000. The mortgage was duly recorded in the Office of the Recorder of Deeds in Georgetown, Delaware.

3. All lots in the Resort are subject to a Declaration of Restrictions (the "original declaration") that was recorded by The Reserves Development Corporation on August 13, 2001. Responsibility for enforcement of the restrictions was delegated to the plaintiff. The original Declaration provides, among other things, that all property owners in the Resort are obligated to pay assessments to Reserves as compensation for its continued maintenance of the lots.[1] An owner's failure to pay the assessments results in such unpaid assessments becoming a lien against the lot at issue; but, importantly, the assessment liens are "subordinate to the lien of any first mortgage on the Lot ."[2] The original declaration gave the plaintiff a general right to modify the restrictions and provided that any such modification would take effect when recorded.

4. On May 23, 2008, Reserves recorded a "First Amendment" (the "amended restrictions") to the original declaration. The amended restrictions nullified the original declaration's recognition that a first mortgage would have priority over the lien of assessments. Specifically, it provided that a first mortgage lien would have priority over the lien of assessments if, but only if, mortgagee required the mortgagor to establish an escrow to pay for assessments and the payments were made in a timely fashion.

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[1] The manager and sole member of Reserves, Abraham Korotki, stated that, "it was the intention of all lot owners that, unlike most housing subdivisions, all finished lots and adjacent open spaces . . . would be elegantly landscaped and perpetually maintained only by Plaintiff, and never by lot owners, and always in a manicured condition with scenic ponds and operating fountains." Korotki Aff. ¶ 4.

[2] Original Declaration, Article VII, § 7.

5. At some point after his purchase of the property, Glenn defaulted on his obligation to pay assessments. Reserves obtained a judgment against Glenn in the Kent County Superior Court on August 25, 2011 for non-payment of assessments as to each of the five lots for a total of $61,661.22 per lot.[3] On March 9, 2012, the judgment was recorded in the Office of the Sussex County Prothonotary after being transferred from Kent County by a writ of *testatum fieri facias*. Thus, the lien for unpaid assessments provided for in the restrictions became a judgment lien for a sum certain.[4] No part of the judgment has been paid.

6. In this case the plaintiff seeks a declaration that its lien for Glenn's unpaid assessments has priority over Bethany's mortgage as to those unpaid assessments which accrued after the recording of the amended restrictions in May 2008.

7. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[5] "[T]he moving party bears the burden of establishing the non-existence of material issues of fact."[6] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[7] In considering the

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[3] *Reserves Mgmt. LLC v. Glenn*, C.A. No. K11C-06-034, Young, J. (Del. Super. Aug. 25, 2011) (Judgment).

[4] *Reserves Mgmt. LLC v. Glenn*, C.A. No. S12J-03-056 (Del. Super. Mar. 9, 2012).

[5] Super. Ct. Civ. R. 56(c).

[6] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[7] *Id.*

motion, the facts must be viewed in the light most favorable to the non-moving party.[8] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[9] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[10]

8. Bethany contends that it cannot and should not be bound by the amended restrictions. It contends that they are unenforceable because Bethany did not have notice of their existence; that Delaware's pure race recording statute, 25 *Del. C.* § 2106, absolutely protects the earlier recorded mortgage's priority status against the later recorded judgment liens; that the amended restrictions only became effective at the time of their recording, and cannot alter the priority status of the mortgage; that Bethany justifiably relied upon the provision in the original declaration which recognized the priority status of a first lien mortgage; that this Court is bound by its holding in *Reserves Management Corp. v. 30 Lots, LLC,* that the amended restrictions are "unreasonable as a matter of law and invalid;"[11] and that the amended restrictions are unreasonable and invalid as applied in this case.

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[8] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[9] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[10] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

[11] 2012 WL 2367469, at *4 (Del. Super. June 22, 2012).

9. Reserves' contends that the priority altering provision in the amended restrictions is valid and enforceable when the "reasonableness" test articulated by this Court in *30 Lots* is applied.[12] The plaintiff contends that the amended restrictions were not only reasonable, but necessary to sustain the viability of the subdivision given the precarious situation that threatened the Resort at the time. In particular, Reserves contends that beginning in 2004 lots were sold at reduced prices to developers who contracted to complete site development infrastructure at their own expense; that many developers (including Glenn) failed to do so, and also defaulted on their obligations to pay assessments; that this left the financial burden of maintaining the lots on the shoulders of a few, innocent lot owners; that some developers engaged in fraudulent activities to avoid assessment and site development costs; that non-payment of assessments by defaulting lot owners threatened the viability of the subdivision and risked the investments of everyone involved—including mortgage lenders; that certain lenders failed to enforce mortgage provisions against lot owners; that Reserves has borrowed large sums to supplement the assessments paid in order to cover the maintenance costs; and that conditional modification of the priority of the mortgages was entirely consistent with the expectations of all parties. Reserves also specifically addresses Bethany's conduct, and contends that Glenn's mortgage obligated him to pay all assessments when due, but Bethany failed to enforce that obligation; that Bethany is the *de facto* owner of the property, and has only declined to foreclose on its mortgage to avoid liability for

[12] *Id.*

the assessments and other costs; and that Bethany has been unjustly enriched because the original declaration gave first mortgages priority over the assessment liens. The plaintiff lastly contends that the reservation of a right to amend the original Declaration put Bethany on constructive notice that lien priorities could be re-ordered.

10. As mentioned, this Court has considered the validity of certain provisions in the amended restrictions once before in *Reserves Management Corp. v. 30 Lots, LLC*. In *30 Lots*, the same plaintiff sought to collect assessments allegedly owed by the defendant, 30 Lots, LLC.[13] 30 Lots had acquired ownership of thirty lots in the Resort by way of a sheriff's deed following a mortgage foreclosure.[14] In the aftermath of the mortgage foreclosure, the amended restrictions were recorded.[15] Reserves, in the amended restrictions, attempted to create three new assessments, and modify and re-designate two existing assessments.[16] To examine the validity of these amendments, the Court conducted a reasonableness analysis tailored to situations where a developer unilaterally seeks to amend restrictions:

> In the original Declaration, Reserves Development reserved a generic right to modify the restrictions. However, the exercise of such a right is not unlimited. Where a developer seeks to enforce an amendment to

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[13] 2012 WL 2367469, at *1 (Del. Super. June 22, 2012).

[14] *Id.*

[15] *Id.* at *2.

[16] *Id.*

> restrictions against non-consenting owners who bought their lots before the amendment was effective, the amendment must be reasonable in light of the original intent of the developer and the lot owners. If it is not reasonable, it is invalid. Reasonableness may be ascertained from the declaration of restrictions and all of the attendant facts and circumstances relevant to the nature of the development.[17]

The Court found that "nothing in the declaration of restrictions or any of the attendant facts and circumstances suggests in any way that the power to amend would be used to create significant new monetary assessments or to reimpose assessments which had been discharged under the original declaration."[18] The "First Amendment" was held to be unreasonable as a matter of law and not binding upon the defendant's property.[19]

11. The defendant in *30 Lots* was an owner. The defendant in this case is a mortgage holder. The reasonableness analysis discussed in *30 Lots* does not apply to a mortgagee. Generally, the lien status of a first mortgage is absolute from the date of its recording and cannot be affected by subsequent events absent the mortgagee's agreement.[20] It is not contended that Bethany actually agreed to the amended

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[17] *Id.* at 4 (footnotes omitted).

[18] *Id.*

[19] *Id.*

[20] A statutorily prescribed exception to this doctrine is a purchase money mortgage that complies with the requirements of 25 *Del. C.* § 2108. *See Galantino v. Baffone*, 46 A.3d 1076, 1080 (Del. 2012) ("By its plain text, Section 2108 gives priority to a purchase money mortgage—even if it is not the first-filed.").

restrictions. Here, Reserves has attempted to "*unilaterally . . . create new rights for itself*" against Bethany without Bethany's consent.[21] The plaintiff does advance some argument that Bethany's constructive knowledge that the restrictions could be amended was an implicit agreement to amendments which might affect its lien status. I find that such an argument has no merit.

12. Reserves fails to create any genuine issue of material fact necessary to survive the defendant's motion. I accept Reserves' asserted facts as true for purposes of this motion, but they are largely irrelevant.

13. For the foregoing reasons, the Motion for Summary Judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[21] *See Sea & Pines Consolidation Corp. v. Ocean Ridge Ass'n*, 1993 WL 35973, at *4 (Del. Ch. Feb. 5, 1993) (discussing the validity of a homeowners association's purported amendment that sought to eliminate an easement expressly reserved in earlier recorded restrictions).