STATE OF MICHIGAN

COURT OF APPEALS

WALNUT GROVE VILLAS OF SOUTHFIELD CONDOMINIUM ASSOCIATION,

Plaintiff-Appellee,

v

JESSIE JEFFERSON and PATRICIA A. JEFFERSON,

Defendants-Appellants.

UNPUBLISHED
July 19, 1996

No. 182862
LC No. 93-463825

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10) and awarding plaintiff attorney fees. We affirm in part and reverse in part.

This case arises because defendants, co-owners of a condominium unit, had removed a second story deck attached to their unit without the approval of plaintiff's board, and were delinquent in paying a special assessment to plaintiff condominium association. Defendants do not dispute that they removed their second story deck and were delinquent in paying their assessment, but instead contend that plaintiff was responsible for repairing the structural supports to their deck and that they had justifiably refused to pay the assessment until an accounting of their overpaid account was performed.

Defendants first argue that the court erred in finding that their entire second story deck was a limited common element, and thus, that they were responsible for repairing the entire deck. We agree. Pursuant to the master deed defendants are responsible for repairing all portions of the deck that are considered limited common elements. "Deck" is not defined in the master deed. However, part of the deck, according to drawing number five to exhibit B attached to the condominium's master plan, is a general common element and the rest of the deck is a limited common element. Drawing number five

* Circuit judge, sitting on the Court of Appeals by assignment.

must be considered in analyzing this issue because a co-owner should be allowed to rely on documents contained in the master deed which, in this case, included drawing number five. MCL 559.166; MSA 26.50(166); MCL 559.108; MSA 26.50(108); MCL 559.184a; MSA 26.50(184a). Thus, defendants correctly argue that they should not be held responsible for the entire repair of the second story deck attached to their unit. Instead, they should only be responsible for repairing portions of the deck considered limited common elements. According to the bylaws, all maintenance, repair and replacement costs not specifically described in the bylaws are to be borne by the Association. The maintenance, repair, and replacement costs for the portions of the deck that are general common areas are not described in the bylaws and, accordingly, must be borne by the association.

However, a genuine issue of material fact does exists regarding what portion of the deck is a general common area. Although it appears from drawing number five that the general common area of the deck would consist of the deck joists only, plaintiff's expert witness stated that drawing number five depicted the entire deck which would include not only the structural elements, but also the deck planking. Therefore, summary disposition was improper. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).

Defendants next argue that the court erred in awarding plaintiff attorneys fees incurred in collecting a special assessment because they had withheld payment in good faith. Specifically, defendants claim that they withheld payment of the assessment until they were credited for a previous overpayment. This argument lacks merit.

In general, in Michigan an award of attorneys fees as an element of costs or damages, absent express authorization by either statute or court rule, is prohibited. *Newport West Condominium Association v Veniar*, 134 Mich 1, 17; 350 NW2d 818 (1984). However, express authorization for attorneys fees for an alleged default by a co-owner is found in the Condominium Act. MCL 559.206(b); MSA 26.50(207)(b); *Newport West*, *supra*, 134 Mich 17.

The Condominium Act does not grant a co-owner the self-help remedy of withholding part or all of the co-owners' assessed fees. *Newport West*, *supra*, at 11. Knowledge of the law is presumed. *Grand Rapids Independent Publishing Co v Grand Rapids*, 335 Mich 620, 630; 56 NW2d 403 (1953). Thus, even if defendants did, in good faith believe that they had previously overpaid, this does not excuse their default, and accordingly, attorney fees were properly awarded. Moreover, defendants presented no evidence that they had notified plaintiff of their belief that they were entitled to a setoff for fees already paid, until after plaintiff filed the instant lawsuit. Thus, it does not appear that defendants acted in good faith.

Defendants also contend that the court erred in awarding attorneys fees for their bylaws violation. Pursuant to MCL 559.206; MSA 26.50(206):

> [i]n a proceeding arising because of an alleged default by a co-owner, the association of co-owners, if successful, may recover the costs of the proceeding and such reasonable attorneys' fees as may be determined by the court.

Here, the trial court found that defendants had defaulted when they removed their second story deck and thereby altered the exterior appearance of their unit without board approval. The trial court found that plaintiff was entitled to costs and attorneys fees for the bylaws violation. We find that the trial court abused its discretion.

Defendants alleged that they removed the deck because it had rotted. Defendants further alleged that they were willing to replace the deck, but believed that the deck joists had rotted and should be repaired by plaintiff prior to their replacement of the deck. Defendants had made their position known to plaintiff as early as September 22, 1992. As was previously found, defendants' position has merit. Thus, although defendants may have violated the bylaws when they removed their second story deck without prior approval and did not replace the deck, we find that the trial court abused its discretion in awarding plaintiff attorneys fees when plaintiff shared the responsibility to repair the deck.

We affirm the award of attorneys fees for the collection of the delinquent assessment, but reverse the order granting summary judgment and the award of attorneys fees for the collection of the bylaws violation.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin