

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

DEER CREEK, LTD.,
a Florida limited partnership,

Plaintiff,

vs.

Case No.: 05CA-1643
Section: 04

RONALD BIRCKHEAD, an individual,

Defendant.

**FINAL ORDER AND JUDGMENT ON DEFENDANT'S FIFTH AFFIRMATIVE
DEFENSE AND COUNTS II AND III OF DEFENDANT'S COUNTERCLAIMS**

Defendant's Fifth Affirmative Defense and Counts II and III of the Defendant's Counterclaims were tried before the court in an evidentiary hearing on August 19, 2009, and continued on August 24, 2009. On the evidence presented and arguments propounded by counsel for the Plaintiff and the Defendant, and after reviewing the written materials, statutes, and cases referenced by counsel in their arguments, it is adjudged that:

1. This matter concerns the Declaration of Restrictions and Covenants Relating to Deer Creek Golf and Tennis RV Resort Phase Three-A, as amended, recorded in Official Records Book 3961, Page 1685 of the Public Records of Polk County, Florida (the "Declaration of Covenants").

2. On the matter of the Defendant's Fifth Affirmative Defense, which asserts that the Plaintiff does not have standing to collect assessments, file a lien, enforce covenants, or maintain any portion of the instant suit, the Court finds for the Plaintiff. The Plaintiff has standing to bring the counts set forth in its Complaint against the Defendant because the provisions that Plaintiff seeks to enforce survive this Final Judgment and Order subject to the findings set forth below. The Plaintiff's Motion to Strike Defendant's Fifth Affirmative Defense is therefore granted.

3. On the matter of Count II of the Defendant's Counterclaim, which asserts that certain provisions of the Declaration of Covenants at issue in this matter violate Fla. Stat. § 720.309, the Court finds for the Plaintiff. The Defendant has failed to show by a preponderance of the evidence that the Declaration of Covenants at issue in this matter violate Fla. Stat. § 720.309 because Fla. Stat. § 720.309 does not apply to this particular case.

4. On the matter of Count III of the Defendant's Counterclaim, which asserts that certain provisions of the Declaration of Covenants at issue in this matter are unconscionable and therefore unenforceable, the Court finds for the Plaintiff in part and for the Defendant in part. In particular, the Court finds as follows:

a. Defendant proved by a preponderance of the evidence that there was procedural unconscionability involved in securing the closing on the property at issue because Defendant was under the belief that the attorney who handled his closing was acting on his behalf. Mr. Birckhead's belief was reasonable as he was recommended to this attorney by Defendant. This attorney acted at the time as general counsel for Defendant, Deer Creek, Ltd. Birckhead was charged an attorney's fee on the closing statement and was not given any legal advice regarding the Declaration of Restrictions and Covenants.

b. Defendant proved by a preponderance of the evidence that certain portions of the Declaration of Covenants are substantively unconscionable or may be subject to interpretation in a substantively unconscionable way. The provisions which the Court finds substantively unconscionable and the remedies therefore are set forth below.

5. Paragraph 6 of the Declaration of Covenants enables the Manager to prosecute violations of the Declaration of Covenants. The second sentence of such paragraph reads as follows:

"Costs of such proceedings, including reasonable attorney's fees, shall be paid by the Lot Owner."

This sentence is unconscionable because it does not require the Manager to be the prevailing party in such a proceeding before it is entitled to collect fees and costs. Therefore, the Court exercises its power to interpret this provision to avoid an unconscionable result and will require that Manager be the prevailing party in any such proceeding before it is entitled to collect the fees and costs indicated. The Court will interpret this sentence to read as follows:

"Costs of such proceedings, including reasonable attorney's fees, shall be paid by the Lot Owner, if the Manager is the prevailing party."

6. The Court makes the same finding, for the same reason, with respect to the third sentence of paragraph 4.9 of the Declaration of Covenants. As-written the sentence states:

"In any such action or other action to enforce the provision of this lien, including appeals, the Manager shall be entitled to recover its reasonable attorney's fees and costs and interest at the highest rate permitted by law."

To avoid an unconscionable result, the Court will interpret this sentence to read:

"In any such action or other action to enforce the provision of this lien, including appeals, the Manager shall be entitled to recover its reasonable attorney's fees and costs and interest at the highest rate permitted by law, if the Manager is the prevailing party."

7. The Court makes the same finding, for the same reason, with respect to the final sentence of paragraph 5 of the Declaration of Covenants. As-written the sentence reads:

"Each Owner shall not interfere with any prospective or existing contractual relationship involving the Manager and a customer of Manager and any breach of the provisions of this paragraph by a [sic] Owner shall entitle the Manager to bring an action for injunction and for damages against the Owner and Manager shall be entitled to recover reasonable attorney's fees, court costs and all other expenses of litigation."

To avoid an unconscionable result, the Court will interpret this sentence to read:

"Each Owner shall not interfere with any prospective or existing contractual relationship involving the Manager and a customer of Manager and any breach of the provisions of this paragraph by a [sic] Owner shall entitle the Manager to bring an action for injunction and for damages against the

Owner and Manager shall be entitled to recover reasonable attorney's fees, court costs and all other expenses of litigation, if the Manager is the prevailing party."

8. The Court finds that the Declaration of Covenants states as follows, and the Court calls particular attention to this provision, which is contained in paragraph 4.10 on pages 20-21:

"Purchasers of Lots, by the acceptance of their deed, together with their heirs, successors and assigns, agree to take title subject to and be bound by these Declarations and all amendments thereto, and to pay the charges and increases of such charges as set forth. All Owners by acceptance of a deed to their Lot approve the Declarations including specifically the charges and assessments and increases thereto provided for herein and explicitly acknowledge that such charges and assessments and permitted increases thereof, are reasonable and fair, taking into consideration the nature of the Subdivisions and all other benefits to be derived by the Owners as provided for herein."

9. Paragraphs 4.3 and 4.4 of the Declaration of Covenants set forth various charges and fees which may be charged to Owners by the Manager. These provisions may be subject to an unconscionable interpretation if the Manager has the unfettered discretion to charge unreasonable amounts for these charges. However, because paragraph 4.10 of the Declaration of Covenants specifically requires the Owner to certify that these charges are "reasonable and fair," the Court will interpret paragraphs 4.3 and 4.4 to require that the charges set forth therein be "reasonable and fair" so that the certification contained in paragraph 4.10 will, in fact, be true. Such an interpretation avoids an unconscionable result and reconciles paragraphs 4.3 and 4.4 with paragraph 4.10 without the Court "rewriting" the Declaration of Covenants.

10. The second sentence of paragraph 8 of the Declaration of Covenants is substantively unconscionable. It reads:

"Any inconsistency, vagary or ambiguity in these Declarations shall be resolved solely by the Manager in writing and shall be recorded as an amendment hereto which shall have the effect of amending these Declarations."

This sentence is stricken from the Declaration of Covenants.

11. The third sentence of paragraph 8 of the Declaration of Covenants is substantively unconscionable on its face and inasmuch as it violates § 720.3075(1)(a), Florida Statutes. It reads:

“The Manager reserves the right to amend at any time these Declarations for the purposes of establishing such further restrictions or modifying existing restrictions as it deems necessary in its sole and absolute discretion to carry out the spirit and intent of these Declarations.”

To avoid an unconscionable result and to comply with § 720.3075(1)(a), Florida Statutes, this sentence shall be interpreted to permit amendment by the Manager until the point of transition of control of the homeowners' association has occurred, as set forth in § 720.307, Florida Statutes. After such point, this provision shall be null and void. At this time the Court has not made any findings with respect to whether turnover has occurred.

12. Except as set forth herein, the Defendant has not shown by a preponderance of the evidence that any other provisions of the Declaration of Covenants are substantively unconscionable. In particular, the Court declines to find that paragraph 2.22 of the Declaration of Covenants is substantively unconscionable.

13. This Final Judgment and Order resolves the matters set forth above and is the final order of this Court on Defendant's Fifth Affirmative Defense, Counts II and III of Defendants' Counterclaims, and Plaintiff's affirmative defenses to those counts. The remaining causes of action and the defenses asserted by Plaintiff and Defendant shall remain at issue and set for trial as set forth in prior Orders of this Court.

ORDERED on Oct. 1, 2009

Dick Prince

Dick Prince
Circuit Court Judge

cc: J. Kemp Brinson, Esquire
Paul R. Linder, Esquire