O/A 10-29-86

IN THE SUPREME COURT
STATE OF FLORIDA

PROVIDENCE SQUARE ASSOCIATION, INC.,

Defendant/Petitioner,

-vs-

CONNIE BIANCARDI,

Plaintiff/Respondent.

Case No.: ~~68,304~~

Fifth District Court
of Appeal No.: 84-461

Trial Court Case
No.: 84-6844-CA-03

APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA

AMENDED REPLY BRIEF OF PETITIONER

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I. ISSUE

THE DISTRICT COURT ERRED IN HOLDING THAT CONDOMINIUM DECLARATIONS ARE NOT SUBJECT TO REFORMATION ON ACCOUNT OF MISTAKE OR SCRIVENER'S ERROR.

The fact that there was a scrivener's error in the Declaration of Condominium regarding the percentage of ownership of the common elements and share of insurance proceeds was clear and uncontroverted at trial. The Developer, James Jordan, testified at trial that the condonimium project was originally conceived of and planned as a four unit office complex. He later decided to divide one end unit into two equal units. The following trial testimony shows that unit 4 and unit 5 ownership interest in the common elements was intended to be 12.5% per unit but that the attorney who drafted the documents erred by copying another Declaration of Condominium prepared for the same developer on another project.

> Q. Were you involved in arranging for the preparation of the necessary condominium documents to be recorded in the public records?
>
> A. Yes, I was. Where it started at is I, first of all, helped develop another unit in Deltona called Pickford Square on Deltona Boulevard which was a ten unit professional office condominium and then, from there I located the land over on Providence Boulevard and put together a five unit office condominium over there through an attorney down in Orlando.
>
> Q. Were you involved in arranging for the Articles of Condominium or the Declaration of Condominium, the Articles of Incorporation and the By-laws in Pickford Square Condominium?
>
> A. Yes.
>
> Q. Did the same attorney draft those documents as the attorney that drafted the Providence Square documents?

A. Yes, Alex McKinnon did.

Q. And, did you request that he do that?

A. Yes.

Q. Are you aware, at this time, that these documents provided for, let me just find the page, that each unit owner is entitled to share in the common elements twenty percent each?

A. I am aware of it now after the situation that has happened in this association.

Q. Were you aware of it at the time it was drafted?

A. No, I was never made aware of it. I think that the problem was, is Alex McKinnon, who originally drafted the ten unit condominium office project at Pickford Square, more or less used the same condo document of Declaration of Condominium and just changed the legal and the name on it and just ran it off again.

Q. Have you read both sets of documents?

A. I have gone through both sets, but I do not remember them word for word. I read through them when he first did them.

Q. What I am saying is, are they essentially identical, meaning, the Pickford Square documents and Providence Square documents?

A. Well, I had mentioned to Alex McKinnon in his office one day how come he was charging me the same rate for Providence Square as Pickford Square since he was just essentially running off the same material, again, and he said he is the one who instigated the material to begin with, so that's why he was entitled to the same charge.

Q. I want to have you look at Page 6 of the Declaration of Condominium Providence Square and ask if you know the purpose that Unit IV and Unit V provide for a twenty percent interest in the common elements when they are half the square footage of the other units.

A. I was made aware of this after the problem had arisen. I don't think anybody caught this. I think it was an error by an attorney who originally drafted the document.

Q. What was the purpose that originally showed two separate interests for Unit IV and Unit V on that document?

A. The reason why, there were two separate units to begin with, with two separate mortgages on them, but a half a unit each and I wanted two separate mortgages on it because we were selling it. Basically, what it boils down to is, I was buying one myself and I didn't want a full unit.

Q. Can you tell me what the intent, at the time of the drafing of that documents was, with regard to voting rights of the condominium?

A. I went to Alex and sat down with Alex at the time and asked him as far as the voting was concerned because I had been through it with Pickford Square, but owning a half of a unit in a condominium association, if you only had a half a vote you would have no say-so at all in the running of the condominium association. So, I asked him, at the time, how could I get a full vote in there in regards to common elements, improvements, interpainting, (sic) the sign change, but I guess most important of all is future tenants that would come in and, also, the selling of units, you know, so I would have some say-so on who was coming into the condiminium association and I was advised at the time that all I had to do was pay a full capital assessment of the three hundred dollars originally to get a full vote in the association only, but not in ownership ability. all I was still owning was a half a unit because the maintenance was still only half, the taxes were only half. Everything was still only half. All I had was a half of a unit with a full vote, so I would have a say-so in the association.

Q. Are you aware that these documents seem to provide that Unit IV and Unit V owners have an equal interest in the common elements as to each of the other units?

A. Like I said before, I think an attorney messed up, he made an honest mistake.

Q. Was that your intention at the time you requested these documents to be drafted?

A. No, it wasn't.

Respondent argues in her Answer Brief that the error is not a scrivener's error but an error in the substance of the entire Declaration of Condominium as it relates to ownership interest

(Brief of Respondent at page 6 and 7). The testimony cited above and other testimony before the Trial Court clearly established the scrivener's error and the Trial Court properly so found. The Trial Court as the trier of fact was in a superior position to review the testimony, evidence and demeanor of the witnesses in making such a finding.

Petitioner urges that the issue is not whether a scrivener's error or mistake of the parties existed but whether such error or mistake is capable of being corrected through reformation by Circuit Court action.

II ISSUE

SINCE A SCRIVENER'S ERROR OR MISTAKE EXISTED IN THE DECLARATION OF CONDOMINIUM, THE TRIAL COURT HAD JURISDICTION TO REFORM THE DOCUMENT TO CORRECT SUCH ERROR.

In response to Petitioner's argument that Clearwater Key Association - South Beach, Inc. v. Thacker, 431 Sso.2d 641 (Fla. 2d DCA 1983) stands for the proposition that declarations of condominium are subject to reformation, the Respondent argued at page 11 of her Answer Brief that the Clearwater Key case actualy supports her position. This reasoning is presumably because the Court there denied reformation. Reformation was denied in that case, however, only because to reform the document as requested would conflict with Florida Statute 718.104(4)(g). Such conflict is not an issue in the case before this Court.

Respondent also argues in her Answer Brief, at page 3, that the Second District Court has cleared any confusion and apparent

(sic) diversity of opinion, by rendering its decision in Beau Monde, Inc. v. Bramson 446 So.2d 164 (Fla 2d DCA 1984). This conclusion of Respondent is without merit. Beau Monde dealt with a suit by a condominium association and Unit owners seeking to cancel the recreational lease and maintenance agreement. The facts of Beau Monde do not involve a mistake or scrivener's error for which reformation was sought.

The majority of Respondent's argument dealt with proper procedure for **amending** the Declaration of Condominium. Likewise, the decision of the District Court in the instant case seems to be based upon the fact that a statutory remedy exists for **amending** condominium declarations.

Petitioner would agree that the Statutory remedy would probably provide an exclusive remedy for **amending** condominium declarations. Petitioner urges this Court to find that when a mistake or scrivener's error exists, as the testimony in the instance case clearly established, reformation is a proper remedy to correct such error. Especially when the error results in the advantage to a unit owner who realizes the error but will not consent to an amendment as provided by Statute.

Florida Statute 718.110(4) does provide for **amending** declarations of Condominium but requires consent of all record owners when the amendment will change the ownership interests of the prospective record owners. This provision does not contemplate a scrivener's error but simply an agreement to amend.

Florida Statute 718.110(5) which does contemplate a scrivener's error provides a remedy when the undivided share of the common elements or interest in the common surplus either have

not been totally distributed, total less than 100% of the common elements/common surplus or total greater than 100% of the common elements/common surplus.

In such instance of a scrivener's error, the error may be corrected by filing an amendment to the declaration approved by a majority of the unit owners. F.S. 718.110(5). In the instant case, an amendment to the declarations could not be made for approval by a majority of the owners as the condominium ceased to exist when totally destroyed by fire. A majority of unit owners did desire to amend as reflected by the vote of all remaining unit owners to file suit for reformation. This was reflected in the trial testimony of all unit owners other than Respondent.

Petitioner submits that neither F.S. 718.110(4) or 718.110(5) apply to the facts of the case before this Court as F.S. 718.110(4) deals with amending declarations in the absence of error and 718.110(5) deals with correcting a scrivener's error when the interest in common elements/surplus does not equal 100%. In the case before this Court, such ownership interest does equal 100%.

In addition to Clearwater Key, the case of Beach-Place Joint Venture v. Beach Place, 458 So.2d 439 (Fla. 2d DCA 1984), holds that reformation is a proper remedy to correct mistakes in condominium documents. Beach Place involved facts strikingly similar to the case before this Court, Providence-Square. In Beach Place, the condominium plat contained an error regarding common ownership of an office and mechanical equipment room. After construction, the developer decided to add a unit on

the third floor to be used as a mechanical equipment room. The condominium plat failed to reflect this change through error of the developer. The Declaration fo Condominium referred to the recorded Condominium plat which had been recorded in error.

In Beach Place, a complaint was filed for declaratory action and the Defendant owners plead affirmative defenses of waiver and estoppel (the same defenses raised by the Petitioner herein). The Defendants also counterclaimed for reformation (as did the Petitioner herein). The Beach Place, developers argued that the recorded error should not be used to provide a windfall to the condominium owners (the same argument of Petitioner herein) and the Second District Court agreed (unlike the Fifth District Court in the instant case).

The Beach place court held at page 442 that:

> In the absence of a showing of prejudice to the purchasers represented by appellee, appellee is not entitled to an interest in the additional unit. It would be improper to deprive appellant of the additional space created because of a technical error, when the purchasers nonetheless received substantially the same interest they bargained for.

In Providence Square, the trial testimony clearly established that Respondent was only intended to have a 12.5% interest per unit ownership rather than 20%. This testimony included testimony from the developer that Respondent was informed that her share of the common expenses was only one-half per unit ($115.00) than that of the other unit owners. The evidence included the following testimony of the developer:

> Q. Did she ever ask you how come the combined taxes for Unit IV and Unit V were a little more than the taxes on Units I, II and III?

A. Yes. That's what I just explained because my front unit was valued a little bit more than the rear unit.

Q. I'm just trying to establish, she asked that question?

A. Yes. And, plus, we went into the point of maintenance at the time and she only paid half maintenance on each one of the units, too, which was prorated on the closing statement, plus, I had explained to her and then during the processs of the sale she realized that there was a maintenance involved.

Q. Did you explain to her, at that time, that the combined maintenance fees for Unit IV and Unit V equal the maintenance fees for I, II and III?

A. Yes, and she knew it, too. She knew it from the listing she had taken on the back unit besides.

The Respondent admitted this knowledge in her deposition when she testified as follows:

Q. I'm not really asking you about what they did or didn't do in the passed (sic) or what you did or didn't do. I'm asking, after you sat down and read these documents, what was your understanding, you said you read them and understood, what was your understanding of what the monthly maintenance fee was or the quarterly maintenance fee was?

A. Well,I know that the other -- it's per unit, it's per unit ownerhsip.

Q. So, it's one hundred fifteen dollars per unit owner?

A. Yes, that was in my case because otherwise it's two hundred thirty dollars. (R-440).

At trial, the Respondent testified that she could not recall what the developer, Mr. Jordan, had told her (R-167).

That testimony is extremely valuable to Petitioners' argument when the following additional provisions of the Condominium Declarations are considered:

4.3 Liability for Common expenses. Each unit owner shall be liable for a proportionate share of the common expenses, such share being the same as the undivided share in the common elements appurtenant to his unit. (R 307-339).

Paragraph 5.2(a) provides that the maintenance and operation of the common elements shall be the responsibility of the Association and a common expense.

> 5.2 Common elements.
>
> > (a) by the association. the maintenance and operation of the common elements shall be the responsibility of the assocation and a common expense.

In providing for the assessments against the unit owners necessary to pay the common expenses, the Declarations provide:

> 6. Assessments. the making and collection of assessments against unit owners for common expenses shall be pursuant to the By-Laws and subject to the following provisions:
>
> > **6.1** Share of common expense. Each unit owner shall be liable for a proportionate share of the common expenses, and shall share in the common surplus, such shares being the same as the undivided share in the common elements appurtenant to the units owned by him (R 307-339).

In paying and being responsible for the common expenses of the Association, it is obvious from the above provisions, that such payment and liability is tied directly to each owners undivided share in the common elements and common surplus. See paragraph 4.3 of Declarations (R 307-339). Since the Respondent only paid one-half the quarterly association fees for her respective units 4 and 5, it is mica clear that she felt she was only responsible for one-half the common expenses and therefore only entitled to one-half of the common elements and surplus. The evidence was uncontroverted that she only paid one-half of the expenses for her units. The quarterly assessment fees were discussed with Respondent prior to closing, charged at closing,

and shown on her closing statement (R 185). The testimony was clear that she understood she was paying one-half the quarterly association fees of the other unit owners (R 184-185).

By reverse logic, since Respondent read the Declaration of Condominium as testified to by her, she was aware that her interest in the common elements and common surplus was equal to her proportionate share and obligation for payment of the common expenses. The testimony was uncontroverted that she was only responsible for one-half of the common expenses compared to the other unit owners and therefore, she must have been fully aware that she was only entitled to a proportionate share of the common elements and common surplus. The evidence indicated above showing her knowledge that she paid only 12.5% of the common expenses per her unit of ownership was provided through the trial testimony of the developer as well as the deposition testimony of Respondent wherein she acknowledged that the developer informed her that she was only required to pay $115.00 per quarter, per unit toward the common expenses whereas the other unit owners were required to pay $230.00 per quarter, per unit.

The most important of the common expenses is the expense of the very casualty insurance policy which proceeds are the subject of this appeal. Paragraphs 8 and 8.1 of the Declaration of the Condominium provides that insurance policies upon the condominium property shall be purchased by the Association. (R 307 339). Paragraph 8.2(a) provides in part:

> 8.2 Coverage.
>
> a. Casualty. All buildings and improvements upon the land shall be insured in an amount equal to the maximum insurable replacement

> value, excluding foundation and excavation costs, and all personal property included in the common elements shall be insured for its value, all as determined annually by the board of directors of the Association. Such coverage shall afford protection against: (R 307 339).

Paragraph 8.3 of the same declrations provide in part:

> 8.3 Premium. Premiums upon insurance policies purchased by the Association shall be paid by the Association as a common expense.

It is the purpose of insurance to provide compensation for actual losses, not for an inequitable windfall to a person because of a fire. The Condominium was worth considerably less to the Respondent while standing than it was after being destroyed by fire if the Respondent's postition were accepted by this Court.

Other authority for reformation of the Condominium Declaration is found in Rohan and Reskin's, Condominium Law and Practice, §13.02(2)(a) wherein it cites a Supreme Court of Oregon case, Dickey v. Barnes, 519 P.2d 1252 (Oregon 1974) which court held that reformation by juducial decree was the proper remedy for correcting errors in condominium documents. Condominium Law and Practice, further provides at page 13-10 that "The Dickey case is of critical importance for several reasons. First and foremost, it points the way toward judicial correction of faulty condominium documentation".

III ISSUE

THE PETITIONER HAS MET THE REQUISITES REQUIRED BY LAW TO REFORM THE DECLARATION.

The Respondent argues that the Petitioner has not met the

requisites required by law to reform the documents because it has not shown a mutual mistake nor has it made a demand for reformation. As argued at trial and on appeal, and as found by the trial court, the Respondent and other Association members were under the mutual mistake that units 4 and 5 enjoyed a 12.5% interest respectively in the common element and surplus as was evidenced by their normal course of dealings. (R 385-388). Paragraph 7 of the Final Judgment entered in the instance case specifically finds that these mistakes were not discovered until after the fire. (R 307-339). See also paragraph B. of said Final Judgment under Conclusions of Law (R 385-388). Further, the case of Florida Cranes Inc. v. Florida East Coast Properties-Inc. 324 So.2d 721 (Fla. 3rd DCA 1976), held at page 721 that "....equity can correct a unilateral mistake where said mistake is committed by an employee of the Respondent, and constitutes a simple but honest mistake which could lead to an unconscionable result."

A case which clearly holds that predecessors in interest have standing to seek reformation of instruments to which they were not actual parties is General Development Corporation-v. Kirk, 251 So.2d 284 (Fla. 2nd DCA 1971). In that case a predecessor in title was found to have standing to sue for reformation of an instrument even though the Plaintiff was not himself a party to the instrument. In fact, the Plaintiff in General Development was not even the immediate predecessor in title as there were a number of other parties who were ahead of it in the

chain of title. The General Development court stated, at page 286:

> It is not "privity" but a ligitimate interest warranting invocation of the judicial power of the state which ought to determine standing to sue.... In this case it is clear that General Development reasonably contends that the extent of the property conveyed to the Conways determined the extent of that conveyed to Florida West Coast Land Company, it's predecessor in title. We think the courts of Florida should be open to the presentation of such a contention as this.

IV ISSUE

THE COURT PROPERLY FOUND PETITIONER TO BE THE PREVAILING PARTY WHEN PETITIONER PREVAILED BOTH IN THE ACTION FOR DECLARATORY RELIEF FILED BY THE RESPONDENT AND ON THE COUNTER-CLAIM FOR REFORMATION FILED BY THE PETITIONER.

The Petitioner prevailed on Respondent's Complaint in that the trial Court found Respondent was not entitled to the relief sought thereby; certainly the Respondent was not the prevailing party. The Final Judgment of Reformation in no way amended the provision regarding attorney's fees which had always existed in the Declaration (R 307-339), R 385-388).

V ISSUE

DID THE TRIAL COURT APPLY THE APPROPRIATE BURDEN OF PROOF.

Petitioner concedes that the burden of proof in a reformation action is by clear and convincing evidence rather than by a preponderance of the evidence. This was not raised by the Respondent before the District Court and was first raised before this Court. The District Court did not rule on the appropriate burden of proof.

Counsel for Petitioner prepared the Final Judgment for signature by the trial court and incorrectly inserted the proof

to be by a preponderance of the evidence. This Court should permit the Trial Court to correctly apply the burden of proof met at trial as found by the Trial Court on remand or reinstate the Trial Court's finding since the issue was not properly raised below.

CONCLUSION

The trial testimony of the condominium developer clearly established a scrivener's error in the declaration of condominium. The scrivener's error consisted of a mistake in the percent of ownership in the common elements and common surplus for Units 4 and 5.

The condominium documents provide in paragraph 6.1 that the share of common expense to which each owner is responsible is equal to his share in the common surplus/common elements appurtenant to his unit. The trial testimony was unrefuted that Respondent was aware that her share of the common expense, through the quarterly maintenance fees was $115.00 per unit compared to $230.00 for each of units 1, 2 and 3. This was told to Respondent by the developer and pro-rated as such on her closing statement. This amount, $115.00 per unit, is 12.5% of the total quarterly fees and one-half that of the other units.

Both Clearwater Key and Beach Place held that errors in condominium declarations such as in the instant case, can be reformed by proper court action. This was also the position of the Supreme Court of Oregon in Dickey.

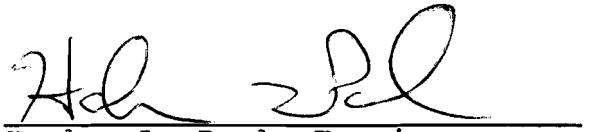
The developer and its successor, the Providence Square Condominium Association, Inc., and the individual unit owners of Providence Square were under the mutual mistake that Unit 4 and

Unit 5 enjoyed a 12.5% interest respectively in the common elements and surplus rather than a 20% interest.

The Respondent brought her action seeking enforcement of the condominium declarations as interpreted by her and did not prevail. Petitioner did prevail on the action filed by Respondent.

The Final Judgment prepared by Petitioner's counsel incorrectly finds that the evidence was established by a preponderance of the evidence rather than by clear and convincing evidence and this Court should either remand the case to the Trial Court for proper determination of the weight of evidence or Quash the decision of the District Court without remand since the burden of proof was not initially raised on appeal.

Respectfully submitted,

BY: 

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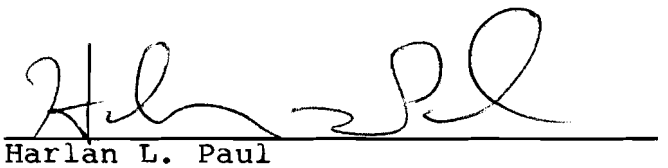
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioners' Reply Brief has been furnished by U. S. Mail delivery to Michael S. May, Esquire, 218-E East New York Avenue, DeLand, Florida, 32724, and Patrick W. Gillen, Jr., Esquire, 345 N. Woodland Blvd., DeLand, Florida, 32720, this 7th day of August, A. D. 1986.



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