

NO. A10-1108

State of Minnesota
In Court of Appeals

Superior Shores Lakehome Association,

Appellant,

vs.

Jensen-Re Partners, a Minnesota General Partnership
and Joseph Re, individually,

Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondents' Brief does not dispute that Unit 57 has been physically subdivided as Unit 57A and Unit 57B; that each unit has a separate entryway and separate cooking facilities; there is no ingress or egress between them; and each is being sold as separate living facilities. Respondents also do not dispute that this division occurred as a result of the former owner of Unit 57 petitioning the Board for the subdivision and the Board allowing subdivision, and incurring capital expenses to build the separate walkway and lighting to accommodate the subdivision in exchange for the extra unit paying an additional Association fee, which had been paid right up to the time the Respondents purchased the two units. This was all done in accordance with Section 2.6 of the Condominium Declaration. What Respondents do deny is that they owe the Association dues for each unit because a legal requirement as to the manner of execution of the subdivision did not occur, namely the Amendment of the Condominium Declaration.

The Respondents' approach is wrong because it ignores the tenets and spirit of the Uniform Condominium Act ("the Act") [Minn. Stat. §515A, et seq.], which encourages courts to correct ministerial errors in order to effectuate the good faith intentions of the parties. The strict construction approach of Respondents, if successful, also creates problems for Respondents because it leaves the court no option but to order Units 57A and 57B restored to a single unit as explained herein.

ARGUMENT

I. The Uniform Condominium Act Offers Several Approaches to Meet the Parties' Intentions.

The Achilles heel to Respondents' approach is that it ignores that in fact the unit is subdivided and all parties have lived up to the division agreement for nearly twenty years. Secondly, it totally ignores certain sections of the Uniform Condominium Act ("the Act") [Minn. Stat. §515A, et seq.] that invite the Court to rectify the situation to reflect the intentions of the parties.

The re-analysis of Respondents' Brief begins with certain undisputed facts:

- Unit 57 was divided in the early 1990s in accordance with the provisions of Sections 2.3 and 2.6 of the Declaration, whereby subdivision into two entirely separate units (57A and 57B) was allowed by the Board. The Board not only agreed to the subdivision but also built a walkway with lighting for the additional entrance and maintained same since. The condition for this, per Section 2.3(f) of the Declaration was payment of two Association fees, which until Respondents purchased the two units were always paid (as were double dues of other divided units).
- Units 57A and 57B have been and continue to be offered for separate rental and separate sale as indicated in the sales materials for Respondents contained in Addendum to this brief as ADD-1-4 taken from the Appendix, A-43-46 (note also the offering materials under Association dues presumes each is obligated to pay an Association due [8 x \$59.88]).
- When Respondents purchased the two units they were advised by the offering materials (ADD-5, Appendix at A-65) that the units paid two Association dues - \$9600.
- Note also that the purchase price for the two units together paid by Respondents was **\$369,000** whereby given the benefit of Units 57A

and 57B being two separate units is now allowing Respondents to sell interval interests in the units for a total of **\$751,900**.

- Finally, there is no dispute that the mistake not to complete the Amendment to the Declaration was the Boehlands (the former owners), not the Board.

The next step in deciding the case is to recognize that Respondents' brief acknowledges the key directive for this Court, namely, "Courts primary role is to ascertain and give effect to the intention of the parties." *Swanson v. Parkway Estates Townhouse Assn.*, 567 N.W.2d 767, 768 (Minn. Ct. App. 1997). (Brief p. 4). Fortunately the Act in its wisdom seeks to enforce this mantra because it has several provisions, ignored by Respondents, to "ascertain and give effect to the parties' wishes" to subdivide Unit 57 despite a lack of an Amendment to the Declaration.

Those provisions which provide a basis for this Court to rectify the situation are §515A.1-108 which expressly indicates the law of equity supplements the Act; §515A.1-113 which imposes an obligation of good faith in interpretation of the Act; and §515A.1-114 which indicates that all remedies under the Act are to be "liberally administered so as to the end that the aggrieved party is put in as good a position as though the other party had performed."

These directives offer several solutions for this Court which is reviewing the matter *de novo* and cloaked with equitable powers:

- It could construe the Act with its emphasis on good faith liberal interpretations to determine the Act should be liberally administered to the end that the aggrieved party is "put in as good a position as if the other had performed" and conclude the failure to Amend an

oversight and to immediately order the Amendment was done and effective at the time of the agreement.

- It could, as Justice Amdahl did in *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984), reform a totally flawed easement which excluded the names of the proper parties. In so doing Justice Amdahl indicated:

“It [reformation] is also the appropriate remedy when parties reach a valid agreement but their agreement is invalid for failure to comply with some legal requirement as to the manner of execution.

...

In the matter before us, the parties through a mutual mistake failed to comply with the legal requirements for a valid easement. . . .This is exactly the type of mistake that reformation exists to remedy.”

Unjust enrichment as a remedy is also appropriate because the trial court’s decision in essence provides Respondents with the benefit of two separate properties that can be rented separately and sold separately and for which the Association has continuously provided capital improvements in the form of an asphalt walkway and lighting, but allows Respondents not to pay for those benefits, appearing to establish an unjust enrichment claim, and the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant (in equity and good conscience) should pay. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996).

Respondents argue that unjust enrichment claims must demonstrate that Respondents did something illegal to support the claim. That is not true. All that must be shown is that a party was unjustly enriched in the sense that the term

“unjustly” could mean illegally or unlawfully (emphasis supplied). *First National Bank v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981). Moreover, the Respondents in this case have received the above described benefit of separate units because of an Agreement that they argue is “illegal” because the Amendment to the Declaration was never amended (*see* Brief p. 15).

II. There is a Legal Basis to Return Unit 57 to a Single Unit.

If the strict construction of the Act urged by Respondents leads to the conclusion that no subdivision occurred, the same construction leads to the conclusion that Units 57A and 57B must be restored as a single Unit 57. The trial court dismissed this result in one sentence as “having no legal basis” without any discussion, and Respondents do the same in their Brief. However there are several legal bases.

To deny the reality of the subdivision the Respondents must engage in a strict construction of the Act that requires if the ministerial act of amending the Declaration is not performed the subdivision is invalid and/or null and void. However, the same strict construction augurs for return of Unit 57 to one unit. This is because Units 57A and 57B, according to the Act, are two units by definition as they are intended for separate ownership.

“Unit means a portion of the condominium, whether or not it contains, solely, or partially within a building, **designated for separate ownership**, the boundaries of which are described pursuant to Section 515A.2-110.” Minn. Stat. §515A.1-103(19).
[emphasis added]

This means there are 47 units in the Condominium and the Declaration (which Respondents argue must be strictly construed) only allows for 46 total and only one for Unit 57 (Declaration A-145).

Additionally, since the court ruled the subdivision process was not completed and was therefore invalid and null and void, then the approval of the Board to subdivide the units as required by Section 2.6 of the Declaration, which states in pertinent part:

“2.6. Requirements for Subdivision.

(a) Procedure. If any Unit Owner desires to subdivide or convert, relocate the boundaries of, **or alter**, his Unit, the procedure set out in this Section 2.6 shall be followed. . . [emphasis added].

(f) Conditions. The Board or, on appeal, the Association, may impose conditions on any consent to such work (alteration, subdivision, etc.) to protect the Common Elements, Units and the Condominium. . .”

(A-17) is also a nullity and void.

Unjust enrichment also favors restoration of Unit 57. As described in detail above, the division of Unit 57 into two units provides Respondents with benefits not available to other owners such as separate rentals and separate sales, while also having the benefits of the improvements necessary to facilitate those benefits without paying for them.

III. Attorney Fees and Interest.

As the court concluded, the Bylaws and the Act provide that the prevailing party is entitled to attorney fees. Therefore if Appellant is successful they request attorney fees at the trial court level and here.

SUMMARY

The Uniform Condominium Act and the equitable remedies it espouses provide this Court with great latitude in resolving this matter fairly and with regard to the intentions and actions of the parties relative to the division of Unit 57. One solution may be to order that, subject to securing the necessary vote from the other unit owners, the Declaration be amended to reflect the division of Unit 57, and the document be deemed reformed to reflect the agreement that the division of Unit 57, and reallocation of common expenses over the new number of units. Alternatively, the Court could order that, since Respondents have argued the agreement to allow the subdivision of Unit 57 is null and void and without effect because of lack of an Amendment of the Declaration, then the Unit must be restored to its original condition. This will likely lead Respondents to agree to participate in Amendment of the Declaration to reflect the additional unit and to pay the overdue assessments, rather than dismantle the unit to restore it to its original condition.

(Signature on Next Page)

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Respectfully submitted,

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