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NOVEMBER 16, 2010
STATE OF NORTH DAKOTA

NO. 20100280

STATE OF NORTH DAKOTA

IN SUPREME COURT

First International Bank & Trust,

Plaintiff,

and

Village Homes at Harwood Groves, LLC a/k/a Village Homes at Harwood Groves Condominium Association, Danovic Properties, LLC, Marland Hoff, et al.,

Appellees,

vs.

D. Duane Peterson, MID AM Group, LLC, a North Dakota Limited Liability Company, and Mid Am Group Realty,

Appellants.

Appeal from Judgment
Cass County District Court, East Central Judicial District
The Honorable John C. Irby

Reply Brief of Appellants D.Duane Peterson, Mid Am Group, LLC, and Mid Am Group Realty

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ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT VILLAGE HOMES CONDOMINIUM ASSOCIATION WAS ENTITLED TO THE INSURANCE PROCEEDS.

[1] The District Court erred in its determination that the Association was entitled to the proceeds, as the Association and the Intervener unit owners who purchased their interest in Village Homes after the hail storm had no expectation or ownership interest in those proceeds. Since Mid Am owned 40 of 50 units at the time of the storm, Mid Am is entitled to at least 80% of the proceeds.

[2] Appellees set forth three arguments to suggest that the Association and units owners own the proceeds. Appellees claim: (1) the Condominium Documents require that the proceeds be applied to repair, or otherwise maintain and improve Village Homes; (2) that Mid Am has a fiduciary duty to apply the proceeds to repair and maintain the condominium building; and (3) that equity requires that the proceeds be used to repair Village Homes, or to otherwise benefit the unit owners. Each of these arguments will be addressed in turn.

A. To award Mid Am the insurance proceeds would not contravene the Village Homes Condominium Documents.

[3] Appellees contend that to allow Mid Am to take any part of the insurance proceeds would contravene the Condominium Documents; however, there are no provisions in the Documents that require that the proceeds be distributed in any particular manner.

[4] Appellees cite cases from other jurisdictions in which Courts held that a condominium board's duties should be performed by a developer until the board is elected. Here, Mid Am performed its obligations by acting as the de facto board and procuring property insurance in accordance with the Condominium Documents. Findings, ¶ 10, App. 88.

[5] The Documents provide that the Board must obtain and maintain insurance (Findings, ¶5, App. 86), but do not state how the proceeds should be paid out for a claim under the policy.

[6] At the time of the storm, as owner of 40 units, Mid Am suffered 80% of the harm. Subsequently, Mid Am's ownership interest in Village Homes was foreclosed by First International Bank before Mid Am was compensated for the damage to its portion of the property. Mid Am is entitled to 80% of the proceeds paid out in settlement of that claim.

[7] Appellees maintain that the Intervener unit owners took title to their condominiums with the understanding that the building would not be damaged and that the common areas would be maintained according to the covenants in the Condominium Documents. Those Interveners who took title after the foreclosure action, however, took ownership after the storm and after Mid Am lost its ownership interest in the property.

[8] At the time that such Interveners took ownership, First International held title to the units previously owned by Mid Am. Mid Am was no longer the de facto Board and had relinquished all rights arising from its ownership and operation of

Village Homes. The subsequent unit owners' expectations based on the Condominium Documents arose after the property damage and ensuing insurance claim.

[9] Since the harm to Village Homes occurred before all but ten unit owner Interveners took title to their condominiums, and before the Association was formed, at a time when Mid Am owned 40 of 50 units in the building, Mid Am is entitled to at least 80% of the proceeds.

B. Mid Am does not have a fiduciary duty to the unit owners who took title from First International Bank to repair or maintain Village Homes.

[10] Appellees contend that Mid Am had a fiduciary duty to the unit owners to apply the proceeds to repair and maintain Village Homes. Appellees note that the business judgment rule governs a condominium board's actions. See Agassiz West Condominium . Ass'n v. Solum, 527 N.W.2d 244, 248 (N.D. 1995) and Buckingham v. Weston Village Homesowners Ass'n, 1997 ND 237, ¶9, 571 N.W.2d 842 (N.D. 1997).

[11] Appellees assert that courts in other jurisdictions have found that condominium developers have a fiduciary duty to unit owners. They maintain that after the storm, Mid Am, as developer and de facto Board, was required to act in the unit owners' interest and subordinate its own rights to theirs.

[12] At the time of the storm, Mid Am was not only the developer, but also owned 80% of the condominiums. As acting Board, any duty owed by Mid Am to

the unit owners would also have been a duty to itself. Any action on the unit owners' behalf would have inured to Mid Am's benefit, and any breach to its detriment.

[13] Those Intervener unit owners who took title to their units from First International, or its transferee, had no interest in Village Homes at the time of the storm when Mid Am was acting as the Board. Below, the District Court held that First International was not entitled to any portion of the insurance proceeds (see Order on Cross-Motions for Summary Judgment, App. 52); it follows that any of First International's transferees who took title after the storm and foreclosure action also have no interest in those proceeds.

[14] In Buckingham, supra this Court said that a board must act "in good faith and in furtherance of the legitimate interests of the condominium, and may not [engage in] fraud, self-dealing, unconscionability, or other misconduct," citing Agassiz, supra at 248. Id. at ¶9. A "reasonableness" test governs whether a board's acts should be considered a breach of fiduciary duty. Id.

[15] In Riverside Park Condominiums Unit v. Lucas, 691 N.W.2d 862 ¶22 (N.D. 2005), the appellant alleged breach of fiduciary duty by a condominium association. This Court affirmed the District Court's holding that where a party shows no evidence of bad faith or "any legally cognizable damages other than the time he has spent in defending [the] action," or any "competent evidence to support his conclusory allegations" about "fraud, self-dealing, unconscionability and other misconduct," the claim should be dismissed.

[16] Appellees fail to allege any evidence of bad faith, or self-dealing by Mid Am, and present no evidence as to why the unit owners who took title from First International should be entitled to benefit from insurance proceeds stemming from damage that occurred before they held any interest in Village Homes.

[17] Mid Am did not engage in misconduct or unreasonable actions in serving as the Board of Managers. At the time of the storm, only Mid Am and the original ten unit owners had any interest in Village Homes, and Mid Am dutifully fulfilled its role as de facto Board.

[18] As Appellees' conclusory allegations present no actual showing of bad faith, unreasonableness or self-dealing by Mid Am, this Court should find that Mid Am has not breached any fiduciary duty to the unit owners and should be awarded the proceeds to which it is entitled.

C. Equity requires that 80% of the insurance proceeds be paid to Mid Am.

[19] Appellees argue that if the Court finds that the Association is not entitled to the proceeds, then equity requires that a contract be implied to uphold the District Court's decision so as to prevent the unjust enrichment of Peterson and Mid Am.

[20] The doctrine of unjust enrichment applies when "a person has and retains money or benefits which in justice and equity belong to another" (Schlichenmayer v. Luithle, 221 N.W.2d 77, 83 [N.D. 1974]), and "without justification, obtain[s] a benefit at the direct expense of [another]." A & A Metal Bldgs. v. IS, Inc., 274 N.W.2d 183, 189 (N.D. 1978).

[21] Appellees argue that the proceeds in dispute were intended to benefit the unit owners and repair the Village Homes roof, which the current unit owners should not have the burden of replacing. The unit owners, however, own the common elements of a condominium building as tenants in common. Agassiz, supra at 246. At the time of the storm, when Mid Am owned 40 of the condominium units and the common elements as a tenant in common with the other 10 unit owners, Mid Am sustained damages for which it has never been compensated. Then, when First International was awarded its foreclosure judgment, Mid Am lost any further interest in Village Homes.

[22] There would be no unjust enrichment should Mid Am be awarded the proceeds to which it is lawfully entitled. The Association has been unjustly enriched by the District Court's Order below and now, to Mid Am's detriment, holds the proceeds that rightfully belong to Mid Am.

[23] This Court has said: "[T]o receive equity [one] must 'do equity' and must not come into court with 'unclean hands.'" Sand v. Red River Nat'l Bank & Trust Co., 224 N.W.2d 375, 377-378 (N.D.1974). Here, the Association never had standing to sue in this action and intervened by contending that it was entitled to monies to which it has no legitimate claim. The Association has unclean hands; equity dictates that it should not be entitled to retain the proceeds unduly and unjustly awarded to it by the District Court.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE VILLAGE HOMES CONDOMINIUM ASSOCIATION AND THE UNIT OWNERS HAD STANDING.

[24] Appellees assert that because the District Court found that the Condominium Documents provided the Association and unit owners with a right to enforce their provisions, that the Association and unit owners therefore had standing to sue. Standing to enforce one's rights under the Documents, however, is not the same as standing to intervene in a law suit where the claim arose prior to the intervener having any interest in the matter.

[25] N.D.C.C. §47-04.1-08 permits an action for damages by an aggrieved condominium board or unit owner where the board fails to comply with the bylaws. Appellees contend that the Association had a right to intervene to seek enforcement of the Bylaws.

[26] In Nodak Mut. Ins. v. Ward County Farm Bureau, 676 N.W.2d 752, ¶11 (N.D. 2004), this Court said that a court will decide the merits of a dispute only after a party demonstrates that it has standing to litigate. This Court said: "Standing is the concept used 'to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court,'" citing Billey v. North Dakota Stockmen's Ass'n, 1998 ND 120, ¶7, 579 N.W.2d 171 (quoting Black's Law Dictionary 1405 [6th Ed.1990]).

[27] One must have "some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy," Nodak, supra at ¶11, citing State v. Rosenquist, 78 ND 671, 51 N.W.2d 767 (N.D. 1952). In Nodak, this Court cited V. Braucher, B. Jacobsthal & G. O'Gradney, Fletcher Cyclopedia of the Law of Private Corporations, § 4227, at pp. 47-49 (1999 Rev. Ed.), holding: "[T]he individual does not have standing unless the wrong done amounts to a breach of duty owed to the individual personally." Id. at ¶14.

[28] Here, First International commenced this suit claiming the proceeds by virtue of Mid Am's debt. Complaint, App. 7. Citing a single case from New Jersey, Appellees state that since the Association operates and maintains Village Homes, it had a right to intervene. While the Condominium Documents provide that the Association and unit owners have the right of enforcement (see Findings ¶19, App. 90), this right is not equivalent to standing.

[29] The Association did not exist when this action arose. It cannot now claim that it has any interest in monies paid in settlement of damage that occurred almost two years before its formation. Likewise, those unit owners who took title after the storm and foreclosure action also had no standing.

[30] Appellees argue that intervention was proper because North Dakota Courts favor intervention. They cite a Rhode Island case, Triton Realty Ltd. P'ship v. Almeida, 2005 WL 1984454 (R.I. Super. Aug. 17, 2005), where the Court held that

intervention was permissible where the interveners had a specific interest in the insurance proceeds. Here, Rhode Island law does not govern.

[31] Here, the District Court permitted all unit owners at the time of the motion to intervene (see Motion, App. 63) to join as parties, even though the majority of those owners took title after the storm damage, and after the District Court held that First International had no right to the proceeds.

[32] Except for the ten unit owners who held title at the time of the storm, the remaining Interveners took their ownership interest in Village Homes by transfers from First International or its transferees. The Condominium Documents' covenants run with the Village Homes property (see Findings ¶7, App. 87), so where First International was not entitled to the proceeds, any purchasers who bought from First International have no interest in those proceeds.

[33] Neither the Association, nor the unit owners who took title from First International suffered any harm, or held any interest in Village Homes at the time of the storm. The District Court erred in ruling that the Association or these Interveners had standing to sue.

III. THE DISTRICT COURT ERRED IN RELEASING APPELLANTS' COUNSEL'S ATTORNEY'S LIEN.

[34] An attorney has a lien where: "Money due the attorney's client [is] in the hands of the adverse party, or attorney of such party, in an action or proceeding in

which the attorney claiming the lien was employed, from the time of giving notice in writing to the adverse party." N.D.C.C. §35-20-08. The notice must state the amount claimed and the services performed by the attorney. Id.

[35] Appellees contend that the statute does not provide for a lien where money is due to another attorney's client. In fact, this is expressly the situation contemplated by the statute, which provides for a lien where "money due to attorney's client" is held by an "adverse party." Id.

[36] Appellants' counsel rightfully sought a lien. He served as Appellants' counsel in the action below and at least 80% of the proceeds awarded to the Association are owned by Mid Am.

[37] Appellants' counsel filed the attorney's lien on October 30, 3009, providing timely notice to Appellees. Counsel filed a lien for a 1/3 contingency plus expenses, which is permissible under state law. See Greenleaf v. Minneapolis St. Paul & S.S.M Railway Co., 30 ND 112, 151 N.W. 879 (N.D. 1915).

[38] Because the proceeds, at least 80% of which are owned by Appellants, are held by an adverse party, and because Appellants' attorney filed a timely notice of lien for work on Appellants' behalf, the attorney's lien meets the statutory requirements and should be honored.

CONCLUSION

[39] The Judgment of the District Court dated June 29, 2010 awarding the insurance proceeds of $215,503.22 plus costs to the Association should be reversed; and Appellants' counsel's attorney's lien should be honored by this Court.

Respectfully submitted this 16th day of November, 2010.

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s/ Paul A. Sortland

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ATTORNEY FOR APPELLANTS

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

First International Bank & Trust, **Plaintiff,** **Village Homes at Harwood Groves, LLC, et al.,** **Appellees/Intervener-Plaintiffs,** **vs.** **D. Duane Peterson, MID AM Group, LLC, et al.,** **Appellants/Defendants.**	**Supreme Court No. 20100280** **AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Paul A. Sortland, being first duly sworn on oath, deposes and states that he is a resident of the City of Golden Valley, Minnesota, of legal age, and not a party to the above entitled matter.

On November 16, 2010, affiant sent by electronic means a true and correct copy of the following:

Reply Brief of Appellants

A true and correct copy thereof was sent, via electronic means, to the following e-mail address:

Mr. Roger Minch (rminch@serklandlaw.com)
Ms. Stephannie N. Stiel (sstiel@conmylaw.com)

To the best of affiant's knowledge, the e-mail address above given is the actual address of the party intended to be so served as published in the North Dakota Supreme Court's on-line directory.

s/ Paul A. Sortland

Subscribed and sworn to before me
this November 16, 2010.

s/ Heather Janeen Nick

Notary Public - Minnesota
My Commission Expires January 31, 2013