WILLOUGHBY ESTATES,
Appellant,
v.
BANKUNITED,
Appellee.

Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division.
Case No. 2014AP000015.
Division AY. L.T. Case No. 2012CC008117.
June 23, 2015.
Appeal from the County Court in and for Palm Beach County, Judge Debra Moses Stephens.

(PER CURIAM.)

We find this appeal lacks merit and thus affirm the trial court's final judgment. We write only to address one point, namely to what extent this Court will read provisions into a declaration that are not included in the text of the declaration itself.

Background

On June 30, 2006, a homeowner executed a note and mortgage in favor of Bankunited for $304,000.00 to purchase a property located in the Willoughby Farms sub-development ("Property"). Article VI, Section 1 of the community's governing document, the Declaration of Covenants, Restrictions, Conditions and Easements of Willoughby Estates ("Declaration") included the following:

> The Declarant . . . hereby covenants . . . and each Owner of any Lot by acceptance of a deed therefor . . . is deemed to covenant . . . and agrees to pay to [Willoughby Estates Homeowner's Association, Inc.]: (1) any regular assessments or charges; and (2) any special assessments . . . and (3) any regular assessments or charges to effect payment of property taxes . . . The regular and special assessments, together with such interest thereon and costs of collection thereof, including attorney's fees, as hereinafter provided and any applicable late fee imposed by [Willoughby Estates Homeowner's Association, Inc.], shall be a charge on the Property and shall be a continuing lien upon any Lot against which each such assessment is made, and said lien may be enforced in the same manner in which mortgages are enforced.

The Declaration also included Article XII, Section 4 which provided in relevant part:

> Any Institutional First Mortgagee of a Lot on the Property who obtains title to a Lot pursuant to the remedies provided in said Mortgagee's Institutional First Mortgage on that Lot, or obtains title by deed in lieu of foreclosure, shall not be liable for any unpaid assessment or charges accrued against said Lot prior to the acquisition of title to said Lot by such Mortgagee.

By 2011, the homeowner was behind on her mortgage and Bankunited instituted foreclosure proceedings against her, ultimately buying and taking title to the Property at a foreclosure sale on July 25, 2011. Shortly after Bankunited purchased the Property, Willoughby Estates Homeowner's Association, Inc., ("the Association"), presented Bankunited with an estoppel certificate indicating that $11,252.79 in unpaid assessments, interest, attorney's fees, and costs remained outstanding on the Property.

Bankunited paid the Association the outstanding amount, but stated that the payment was "made under protest and with full reservation of rights" and should "not be construed or deemed to constitute a waiver of rights."

Shortly thereafter, Bankunited brought the underlying action seeking to recover the payment, arguing that Article XII, Section 4 of the Declaration absolved it from any duty to pay any unpaid assessments that accrued prior to the date it acquired title to the Property and the Association breached the Declaration by holding Bankunited accountable for them. The Association countered that Article VI, Section 1 of the Declaration, the provision that grants the Association a continuing lien on the Property for any unpaid assessments, must be read in conjunction with Article XII, Section 4. The Association argued that these provisions make clear that Bankunited could only benefit from the protections of Article XII, Section 4 if it had joined the Association as a defendant to its foreclosure proceedings which it failed to do. The case proceeded to a bench trial in which the trial court found that the Association breached Article XII, Section 4 of its Declaration by demanding Bankunited pay the unpaid assessments that accrued prior to Bankunited taking title to the Property notwithstanding Bankunited's failure to join the Association as a defendant in the foreclosure proceedings. This timely appeal followed.

Standard of Review

The trial court's interpretation of a declaration or contract is reviewed *de novo*. *Straub v. Muir-Villas Homeowners Ass'n, Inc.*, 128 So. 3d 885, 887 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a]. Any factual determinations made by the trial court in examining a contract are entitled to deference if they are "supported by competent, substantial evidence." *Klinow v. Island Court at Boca W. Prop. Owners' Ass'n. Inc.*, 64 So. 3d 177, 180 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1404b].

Analysis and Legal Conclusions

The Association argues the trial court erred in finding that it breached Article XII, Section 4 of the Declaration because it claims that the declaration, when read as a whole, makes clear that in order for a first mortgagee to utilize the protections of Article XII, Section 4, the first mortgagee must join the Association as a defendant in any foreclosure proceeding. Specifically, the Association contends that the trial court overlooked the import of Article VI, Section 1, the provision granting the Association a continuing lien for any unpaid assessments, and focused only on Article XII, Section 4.

"[T]he intentions of the parties to a contract govern its construction and interpretation." *Royal Oak Landing Homeowner's Ass'n, Inc. v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993). When determining intent, courts first look to "the plain language of the contract." *Id.* However, a court must ensure that the language being construed is "read in common with other provisions of the contract." *Id.*

Article VI, Section 1 by its plain language creates a continuing lien on the Property for any unpaid assessments. Article XII, Section 4 by its plain language exempts institutional first mortgagees from liability for any unpaid assessments that arose prior to the date the institutional first mortgagee took title to the Property. The parties stipulated that Bankunited was an institutional first mortgagee. When read in harmony, these provisions create a continuing lien on the Property for any unpaid assessments in favor of the Association, but absolve Bankunited from liability for any unpaid assessments that accrued prior to the date Bankunited took title to the Property.

The Association contends that in order for Bankunited to benefit from Article XII, Section 4, Bankunited needed to join the Association as a defendant in its foreclosure action. Because Bankunited failed to do so, Willoughby argues the assessment lien was still outstanding and Bankunited was liable for the unpaid assessments. The Declaration does not contain any indication that this was the intent of Article XII, Section 4. It is true that in order for a junior lien to be wiped out as a result of a senior lien foreclosure, the senior lien holder must join the junior lien holder as a defendant to the senior lien foreclosure action; a failure to do so leaves the junior lien intact and the junior lien holder in the same position as if no foreclosure took place. *See, e.g.*, *Abdoney v. York*, 903 So. 2d 981, 983 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1246a]. While this point of law means that Bankunited was required to join the Association as a defendant in its foreclosure proceedings if Bankunited wished to wipe out the Association's lien, it does not conflict with or contradict the protections Bankunited is granted under Article XII, Section 4. Absent Article XII, Section 4, the

Association could enforce its lien against Bankunited. But, the Association specifically relinquished that right in Article XII, Section 4. The Association chose in the unambiguous language of its Declaration to relinquish its right to collect unpaid assessments from entities such as Bankunited.

Accordingly, the decision of the trial court is AFFIRMED. The Association's Motion for Appellate Attorneys' Fees is DENIED. Bankunited's Motion for Attorney's Fees is GRANTED, and the matter is remanded to the lower court to determine the reasonable amount thereof. (SASSER, HAFELE, and ARTAU, JJ. concur.)

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