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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WINDSOR PARK HOMEOWNERS ASSOCIATION, Plaintiff-Appellant, vs. COOPER HOMES, INC., JAMES H. COOPER and ALLENE A. COOPER, Defendants-Appellees.	)	Filed March 24, 1981 1-36 2-65373

Appeal from Polk District Court - Ray Hanrahan, Judge.

Plaintiff association appeals from judgment denying its claim for maintenance assessments and penalties from defendants. AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Eugene Davis and Donald Gonnerman of Davis, Grace & Vernon, Des Moines, Iowa for plaintiff-appellant.

Gene Olson and William J. Lillis of Connolly, O'Malley, Lillis & Hansen, Des Moines, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff association appeals from judgment denying its claim for maintenance assessments and penalties from defendants. Plaintiff claims that the written agreement governing administration of the complex requires defendants to pay assessments on their unimproved lots as well as on their improved lots, that the agreement allows the higher assessments imposed by plaintiff, and that defendants should pay certain fines and penalties for refusing to pay the assessments. The case having been tried in equity, our review is **de novo.** Iowa R. App. P. 4; Wyckoff v. A. & J. Home Benevolent Ass'n., 254 Iowa 653, 119 N.W.2d 126 (1963). We affirm in part, reverse in part, and remand.

According to plaintiff's petition filed May 21, 1979, defendants James and Allene Cooper incorporated plaintiff Association to oversee the administration and maintenance of the complex. The individual defendants also serve as the officers of defendant Cooper Homes, Inc., the developer which was responsible for drafting the covenants and restrictions governing the residents and lot owners in the complex. On April 27, 1979, plaintiff notified defendants that they owed $36,572 in past due assessments. Defendants refused to make payment. This action followed and trial to the court was on November 14, 1979. The court, in its findings and conclusions of April 15, 1980, held that, under the covenants and restrictions, defendants were not required to pay assessments for unimproved lots owned by them and the new assessments fixed by plaintiff, effective June 1, 1979, were excessive. The court also refused to assess pre-judgment penalties against defendants. In response to plaintiff's motion for correction and amendment of findings, the court allowed interest on plaintiff's judgment and increased the amount of the judgment to reflect assessments recently incurred by defendants but not paid. This appeal followed.

I. Plaintiff first argues that the covenants require defendant Cooper Homes to pay assessments on undeveloped lots owned by it. We agree with the trial court in holding to the contrary. The pertinent part of the covenant states that "[t]he Developer, for each Lot and Living Unit owned by it, hereby covenants, and each Owner of any Lot or Living Unit, . . . shall be deemed to covenant and agree to pay the Association: (1) annual assessments or charges . . ." (emphasis added). We interpet this to mean that an "owner" of an undeveloped lot would have to pay assessments on it because such lot would be encompassed by the disjunctive language "Lot or Living Unit." In defining the developer's obligation, the conjunctive language "Lot and Living Unit" is employed. We cannot conclude that the difference in language thus employed was

accidental. The distinction is carried forward to other parts of the written agreement as well. This consistency in using different language to describe the obligations of parties who enjoy a different status under the agreement (individual owners vs. developers) communicates an intention that these parties be treated differently rather than similarly with respect to the subject to which the language relates.

When considered in this matter, we believe that the trial court's interpretation of the developer's obligations to pay assessments is correct. In reaching this result, we have considered plaintiff's argument as to all of the benefits which the developers achieve from the acts of the association. But we find these arguments unpersuasive for two reasons. First, the purpose of the assessments would appear to relate to the type of benefits which would not fall equally on improved and unimproved lots. While it might be reasonable to assess individual lot owners on unimproved lots as an incentive to complete construction, similar considerations do not apply to unsold lots owned by the developer. Secondly, and of more importance, is the fact that all of plaintiff's arguments go to show what they feel the agreement should have provided. Such arguments are of little assistance in determining what it did in fact provide. The trial court determined this from the language of the agreement and we do not disturb that result. The intention expressed in the instrument prevails over secret intentions of the parties. First Northwestern National Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1980).

II. Plaintiff next claims that the trial court erred in holding that its increase in required assessments effective June 1, 1979, was invalid. We agree with plaintiff on this issue.

That portion of the covenant regarding the payment of assessments stated in part as follows:

> (a) From and after the 1st day of January, 1975, the year immediately following the conveyance of the first Lot or Living Unit from Developer to an Owner, the maximum annual assessment shall not be more than Four Hundred Eighty Dollars ($480.00) per Lot and Living Unit, except as hereinafter provided, and not less than Three Hundred Dollars ($300.00) per Lot and Living Unit as determined by the Board of Directors of the Association.
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> (b) From and after January 1 of the year immediately following the conveyance of the first Lot or Living Unit by Developer to an Owner, the maximum annual assessment may be increased each year not more than ten per cent (10%) above the maximum annual assessment permitted hereunder for the previous year, as determined by the Board of Directors of the Association. (emphasis added)

Prior to June 1, 1979, the monthly assessment was $38 per lot. Had the Board exercised its option of increasing assessments by ten percent each year since 1975 and had it begun in 1975 with the maximum initial annual assessment of $480 (or $40 per month), annual assessments for 1978 would have been $638.88 per lot, or more than $53 per month. Effective June 1, 1979, the monthly rate was increased from $38 to $50--representing more than a ten percent increase from the actual prior assessment but well within the permissible range assuming the maximum increases were enacted for the previous years.

The trial court concluded that the ten percent limitation is applicable to the actual assessment of the previous year and therefore invalidated that portion of the new assessment in excess of $41.80 per month (110% of $38, the old rate). We cannot agree with this result. The covenant clearly allows a ten percent increase over what would be the maximum permissible rate for the previous year under the above arrangement--the increase is not tied to what the rates actually were in the previous year.

Defendants argue that the concluding language of paragraph (b) quoted above, "as determined by the Board of Directors of the Association," indicates an intent to have the actual rates for the previous year serve as the base for calculating the ten percent increase. We disagree. Such a conclusion would render the language referring to the maximum assessments permitted for the previous year a nullity. We conclude that the "as determined" language refers to the Board's current determination of assessment rates and not that of the previous year.

III. Finally, plaintiff claims that the trial court erred in not imposing on defendants a penalty of $3 per day per lot for failure to pay assessments past due. The covenants clearly provide for such penalties; however, the trial court concluded that no such penalties would be allowed prior to the date of its decree. Again, we agree with plaintiff. We have already concluded that the increase in assessments from $38 to $50 per month was valid. Although defendants paid the assessments for the period up to and including March, 1979, they gave no reason for refusing to pay any assessments thereafter. We see no reason why plaintiff should not recover penalties for nonpayment accruing from April 1, 1979, the time defendants ceased paying the assessments.

In summary, we affirm the trial court's conclusion that defendant Cooper Homes need not pay assessments on its undeveloped lots. We reverse the court's conclusions that the June, 1979 assessment increase was invalid and that prejudgment penalties should be disallowed. We remand to the trial court for a redetermination of assessments and penalties owing to plaintiff consistent with this opinion and for entry of appropriate judgment.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.