14-0637

BERKELEY COUNTY
2014 APR 25 PM 2:06

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

WEBBER SPRINGS OWNERS ASSOCIATION, INC.,
Plaintiff,

v.

Civil Action No. 11-C-1091
Judge Yoder

JAMES R. FLEET,
JAMILA J. FLEET,
and JAMES LAMPLEY,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' CLASS ACTION COUNTERCLAIMS AND ORDER ON DEFENDANTS' MOTION FOR JUDICIAL REVIEW OF LIENS

This matter came before the Court by way of Plaintiff filing of a Motion for Summary Judgment on Defendants' Class Action Counterclaims and the Defendants' Response thereto. The Defendants also filed a Motion for Judicial Review of Documentation Purporting to Create a Lien and the Plaintiff responded thereto. The Court after reviewing the briefs of the parties set down a hearing for oral argument on these two motions on January 27, 2014.

Whereupon the Court, upon reading the briefs and having heard oral argument on the briefs, does issue the following:

FINDINGS OF FACT

1. On November 19, 2003, the Developer and Declarant of Webber Springs Subdivision filed in the Berkeley County, West Virginia land records, its Declaration of Conditions, Covenants, Restrictions and Easements of Webber Springs Subdivision.

2. The Declaration was duly recorded and can be found at Book 00748, p. 00140 in the Book of Deeds. In pertinent part, the Declaration expressly provides that delinquent unpaid

assessments are both liens against the real estate and the personal obligation of the owner. These congruent liabilities are not mutually exclusive. The Declaration makes the assessment a personal obligation of the owner in addition to a burden upon the land. The salient provision reads:

> ARTICLE X
>
> Covenant for Maintenance Assessments
>
> 1. . . . The annual, special and default assessments, together with such interest thereon, and costs of collection thereof as hereinafter provided, shall be a charge on the land and shall be a continuing lien upon the property against which each such interest thereon in costs of collection thereof as hereinafter provided, shall also be the personal obligation of the person who was the Owner of such property at the time when the assessment fell due.

3. Section 9 of Article X of the Declaration permits an action at law against the owner personally obligated to pay. That Section reads:

> ARTICLE X
>
> Covenant for Maintenance Assessments
>
> 9. Effect ... If the assessment is not paid within thirty (30) days after the delinquency date, the assessment shall bear interest from the date of delinquency at the maximum rate permitted by law and the Association may bring an action at law against the owner personally obligated to pay the same or to foreclose the lien against the property, ...

4. At its inception, Webber Springs, via operation of law, and through its Declaration, exempted itself from the application of the Uniform Common Interest Ownership Act. Its assessments are capped in accordance with West Virginia Code § 36B-1-203. Webber Springs is therefore a Limited Expense Liability Planned Community.

5. The Fleet Defendants acquired title to real property within the Webber Springs Owners Association, Inc. by Deed dated May 6, 2005. The Deed expressly provides that the conveyance is subject to "all rights, ways, utility line easements and restrictive covenants of record."

6. Additionally, the Fleet Defendants in a signed document titled "Planned Unit Development Rider" reiterated their legal obligation to pay homeowners dues and assessments and even promised their lender they would pay.

7. The Lampley Defendant acquired title to real property within the Webber Springs Owners Association, Inc. by Deed dated February 25th, 2005. The Deed expressly provides that the conveyance is subject to "all those reservations, restrictions, easements and other matters of record . . . ."

8. Additionally, the Lampley Defendant in a signed document titled "Planned Unit Development Rider" reiterated his legal obligation to pay homeowner's dues and assessments and even promised his lender he would pay.

9. Due to non-payment of assessments, Webber Springs filed suit against the Defendants seeking a monetary damage award for the Defendants' breach of their personal obligations to pay.

10. It is undisputed that the Fleet Defendants did not pay their annual assessments for the years 2006 through 2011.

11. It is undisputed that the Lampley Defendant did not pay his annual assessments for the years 2007 through 2011.

12. The Notices of Liens for unpaid assessments are in compliance with the governing documents, inclusive of the Declaration of Covenants that have run with the land since its recording on October 19, 2003.

13. As the Fleet Defendants failed to pay annual assessments the Plaintiff filed Notices of Liens against the Fleet Defendants in Berkeley County on February 27, 2008 in Book 02236, Page 00127 and on January 8, 2010 in Book 02442, Page 00075.

14. As the Lampley Defendant failed to pay annual assessments the Plaintiff filed Notices of Liens against the Lampley Defendant in Berkeley County on March 10, 2008 in Book 02241, Page 00391.

CONCLUSIONS OF LAW

I. Counts I through V of the Defendants' Counterclaims fail to state a claim against Webber Springs.

1. All counts in the First Amended Answer and Counterclaims attempt to set forth various violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). All of these claims taken individually, and as a whole, fail to set forth cognizable claims against Webber Springs. These claims are premised upon the applicability of the WVCCPA. However, this Court concludes that as a matter of law the WVCCPA does not apply in this factual setting.

2. This Court finds as a matter of law that the WVCCPA does not apply to Webber Springs. The very title of the Act illustrates that it does not apply to Webber Springs. Webber Springs in the normal course of its business does not extend credit to any entity. It is a managerial organization for the common benefit of the people who own homes in the community.

3. The Court concludes that the Defendants' legal obligation to pay homeowners dues is derived from the covenants and agreements set forth in the Declaration, Article X, Covenant for Maintenance Assessments.

4. The Defendants have not produced any evidence or provided any factual basis that they engaged in any type of credit transaction with Webber Springs. Webber Springs never lent money to the Defendants. The Defendants never borrowed money from Webber Springs. Webber Springs never sold any product to the Defendants. Webber Springs has never provided the availability of funds from any type of financial institution or under a letter of credit to any homeowner. Accordingly, this Court rules as a matter of law that Webber Springs and the Defendants never entered into a "consumer credit sale" such that the application of the WVCCPA would apply.

5. This Court is well aware that the WVCCPA is to be construed liberally. Syl. Pt. 2, *Thomas v. Firestone Tire & Rubber Co.* 164 W.Va 763, 263 S.E.2d 905 (1980). West Virginia Code §46A-2-122 definition of the word "claim" is broad and expansive and states that a claim means any obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or service that is the subject of the transaction is primarily for personal, family or household purposes. However, this Court finds that the Declaration at issue in this case provides that any assessments levied by Webber Springs shall be used exclusively for the purpose of road and street maintenance, promoting the recreation, health, safety, and welfare of its residents. The Court concludes that even applying a liberal construction of the word "claim," the purpose of Webber Springs' dues is for recreation, health, and safety for the

community and that by definition, it would not be a "claim" as contemplated under the WVCCPA.

6. Alternatively, this Court also concludes as a matter of law that even if the WVCCPA applied, all of the claims lodged in the Counterclaims would still nevertheless be time-barred. West Virginia Code § 46A-5-101 provides the limitations of actions under the WVCCPA. West Virginia Code § 46A-5-101 in pertinent part reads:

> With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in Article 6 [§§ 46A-6-101 *et seq.*] of this chapter, no action pursuant to this section may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no other action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

7. The Court finds that there is no charge account or revolving loan account between the Defendants and Webber Springs. Thus, the four year statute of limitations could not apply. Any assessments owed by the Defendants are not revolving loan accounts. A "revolving loan account" is a loan that is renewed at maturity. *Black's Law Dictionary* 948 (7th ed. 1999). A "charge account" is defined as a credit arrangement by which a customer purchases goods and services and pays for them periodically or within a specified period of time. *Black's Law Dictionary* 227 (7th ed. 1999). The deed and the Declaration have not created a charge account or a revolving loan account. In fact, the deed and declaration have not created any "loan" at all. Thus, this Court concludes as a matter of law that the four year statute of limitations does not apply.

8. The resulting default provision in the WVCCPA allows for a one year limitations period. Here, the Defendants' Counterclaims are premised upon alleged "claims" collectively filed on January 8, 2010, February 27, 2008, and March 10, 2008. *See* First Amended Answer and Class Action Counterclaims, ¶¶ 15 and 16. The Defendants in this case did not assert their Counterclaims until March 20, 2012, well past the statute of limitations. Accordingly, this Court rules that even if the WVCCPA were applicable, the Counterclaims must be dismissed with prejudice as the statute of limitations has run.

9. The Defendants have argued to this Court that under W. Va. Code § 46A-5-10 there would be no time limits as they have asserted counterclaims under W. Va. Code § 46A-5-10. However, the West Virginia Supreme Court of Appeals has limited such an expansive view as espoused by the Defendants. In *Tribeca Lending Corp. v. McCormick*, 231 W.Va. 455, 745 S.E.2d 493 (2013), the Defendants claimed that they were permitted to assert counterclaims and that the counterclaims were not subject to the statute of limitations. The Court in *Tribeca* focused on the word "consumer" and opined that Tribeca was not pursuing any claims on a "consumer loan". *Id.*, at 501. The Court looked to the definition found in § 46A-1-102 (15) which defines a consumer loan as a loan made by a person regularly engaged in the business of making loans. *Id.* Here, as in the *Tribeca* case, Webber Springs is not engaged in the business of making loans. At oral argument, the Defendant presented no evidence or witnesses to establish that Webber Springs is engaged in the business of making loans.

10. In that even after viewing all of the evidence in the light most favorable to the non-moving party, this Court finds that there are no material facts in dispute, the Court will grant Webber Springs' Motion for Summary Judgment on all counterclaims.

II. This Court finds as a matter of law that the Notices of Liens filed by Webber Springs are consensual and not fraudulent.

1. The definition of a nonconsensual common law lien is defined by W. Va. Code §38-16-106. W. Va. Code §38-16-106 reads:

> "Nonconsensual common law lien" means a fraudulent lien that is misrepresented as a valid lien because it:
>
> (1) Is not provided for by a specific statute
> (2) Does not derive its existence from the consent of the owner of the affected property; and
> (3) Is not an equitable lien or other lien imposed by a court of competent jurisdiction.

2. Webber Springs at its inception opted to exempt itself from the majority of the Uniform Common Interest Ownership Act (West Virginia Code Chapter 36B), thus Plaintiff cannot rely upon the statutory authority to file liens granted to homeowners associations by West Virginia Code 36B-3-116. Therefore, to enforce a declaration by placing a lien upon the property for failure to pay dues, there must be either a judgment from a court of competent jurisdiction or consent of the owner of the affected property.

3. A dedication of Protective Covenants executed and placed on record by the owner of the subdivision, for which lots are sold, becomes an agreement between said owners and the purchasers of lots and when such agreement is plain and unambiguous, it will be applied, not construed. *See* Syl Pt. 1, *Nisbet v. Watson*, 162 W.Va. 522, 251 S.E.2d 774 (1979).

4. Because Webber Springs derives its ability to assess liens from the dedicatory instrument, and the homeowners are bound by the covenants in the deed, the liens cannot be nonconsensual in nature. The very definition indicates that it is not a nonconsensual common law lien, but is instead a "consensual common law lien."

II. This Court finds as a matter of law that the Notices of Liens filed by Webber Springs are consensual and not fraudulent.

1. The definition of a nonconsensual common law lien is defined by W. Va. Code §38-16-106. W. Va. Code §38-16-106 reads:

> "Nonconsensual common law lien" means a fraudulent lien that is misrepresented as a valid lien because it:
>
> (1) Is not provided for by a specific statute
> (2) Does not derive its existence from the consent of the owner of the affected property; and
> (3) Is not an equitable lien or other lien imposed by a court of competent jurisdiction.

2. Webber Springs at its inception opted to exempt itself from the majority of the Uniform Common Interest Ownership Act (West Virginia Code Chapter 36B), thus Plaintiff cannot rely upon the statutory authority to file liens granted to homeowners associations by West Virginia Code 36B-3-116. Therefore, to enforce a declaration by placing a lien upon the property for failure to pay dues, there must be either a judgment from a court of competent jurisdiction or consent of the owner of the affected property.

3. A dedication of Protective Covenants executed and placed on record by the owner of the subdivision, for which lots are sold, becomes an agreement between said owners and the purchasers of lots and when such agreement is plain and unambiguous, it will be applied, not construed. *See* Syl Pt. 1, *Nisbet v. Watson*, 162 W.Va. 522, 251 S.E.2d 774 (1979).

4. Because Webber Springs derives its ability to assess liens from the dedicatory instrument, and the homeowners are bound by the covenants in the deed, the liens cannot be nonconsensual in nature. The very definition indicates that it is not a nonconsensual common law lien, but is instead a "consensual common law lien."

5. Webber Springs does not need statutory authority from the Uniform Common Ownership Act, it has proper legal authority from the Declaration. The Declaration already of record in fact imposes the lien wherein in reads: ". . . the annual, special and default assessments, together with such interest thereon, and costs of collection thereof as hereinafter provided, shall be a charge on the land and shall be a continuing lien upon the property . . . ." Like a notice of lis pendens, therefore, the notices of liens in question here are merely an additional public record (beyond the Declaration) filed for the purpose of similarly warning all prospective purchasers and encumbrances that the interest in the real estate acquired by them may be later called upon by the Association to satisfy an obligation or duty owing under the Declaration.

6. Further, this Court concludes as a matter of law that Webber Springs' liens would not be implicated by Chapter 38. W. Va. Code § 38-16-201(3) which reads:

> Bona fide liens are not affected by this article. Regardless of whether such liens may also be considered to be common law liens, nothing in this article is intended to affect:
>
> . . .
>
> (3) Consensual liens now or hereafter recognized by the common law of this state."

7. This Court cannot find that the complained of liens and notices of liens represent non-consensual common law liens or otherwise fraudulent liens.

8. Webber Springs does not allege that it has obtained a judgment lien but rather that the authority arises out of its own Declaration and that the deeds to said property demonstrate the consent of the owner of the affected property.

9. Both the Lampley and Fleet Defendants accepted ownership of their subject properties as Grantees in the deeds and have retained ownership of it knowing they are bound by the Declaration, which grants authority to file the notices of liens.

10. The Court finds that all of the liens complained of derive their existence from the originating Declaration of record and run with the land with the consent of the owners of the affected property and thus the liens are not non-consensual common law liens.

11. The Court finds that all of the documentation or instruments attached to the motion herein is asserted against real or personal property or an interest in real or personal property and is created by implied or express consent or agreement of the obligors, debtor, or the owner of the real property.

12. This Court finds that the Defendants have never disputed the validity of the deed or that they signed the PUD, or that they did not consent to or were unaware of the homeowners association dues. The Defendants failed to introduce any evidence to substantiate the Defendants' legal argument that Webber Springs filed fraudulent liens. In fact, as the record demonstrates, the Defendants did not come to this court complaining of the notices of liens as fraudulent when they received them years ago, nor upon the initiation of this action. Instead, the Defendants asked this court only to find the claim for the recovery of the association dues to be unenforceable as the statute of limitations had run on the notices of lien and hence the Association dues being sought should be time-barred as well.

13. This Court concludes as a matter of law that the Declaration is a covenant running with the land and gives Webber Springs the authority to file additional Notices of Liens, and that these liens are consensual and do not trigger the application of Chapter 38.

Therefore, with respect to the nature of the status of the liens or Notices of Liens, this Court concludes as a matter of law that the Notices of Liens or liens or filed by Webber Springs in this instant action are bona fide and consensual.

Further, with respect to Plaintiff's Motion For Summary Judgment on Defendants' Class Action Counterclaims, in that the Defendants have not presented any genuine issues of material fact, and in that the Counterclaims fail to state causes of action against the Plaintiff even viewing the evidence in the light most favorable to the Defendants, the Plaintiff's Motion for Summary Judgment on Defendants' Class Action Counterclaims is hereby GRANTED.

The Notices of Liens and liens against the Defendants in this case are bona fide and consensual liens.

The Counterclaims are all dismissed with prejudice.

The Court notices all objections by any party to this Order.

The Clerk shall enter the foregoing as of the day and date herein below and provide attested copies to all counsel of record.

ENTERED: 4/24, **2014**

The Honorable John C. Yoder
Cir. Court of Berkeley County, W.Va.

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: Martha Mehrl
Deputy Clerk