State of New Hampshire
Supreme Court

NO. 2006-0463

2006 TERM

OCTOBER SESSION

Bruce Buchholz & Erin O'Neill Buchholz

v.

Waterville Estates Association

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF DEFENDANT WATERVILLE ESTATES ASSOCIATION

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QUESTION PRESENTED

I. Did the superior court properly grant Waterville Estates Association's motion for summary judgment when there were no material facts that could not be inferred from the allegations in both parties' pleadings, and Waterville Estates Association is entitled to judgment as a matter of law?

II. Did the superior court properly refuse to consider the consumer protection statute, as it has no bearing on the issues raised in this case?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In this petition to quiet title, Erin and Bruce Buchholz claim that property they bought within the Waterville Estates condominium cannot be assessed condominium association fees because the condominium form of property ownership was extinguished by the existence of a town tax deed.

In early 2002 the Town of Campton acquired 114 properties by tax deeds in a condominiumized development registered and recorded as Waterville Estates. RSA ch. 80; 16 P. Loughlin, *New Hampshire Practice, Municipal Law and Taxation*, ch. 42 (Supp. 2005). A few months later, the Town held a public auction at which Erin and Bruce Buchholz purchased one of the properties.

The public notice, giving the time and place of the auction, was accompanied by a number of disclosures. The public notice document reported that the auctioneer has been "retained by the Campton Board of Selectmen to sell the 119 properties taken for non-payment of taxes." The notice continued: "There are 114 properties located in Waterville Estates, a four-season resort community. . . . The 114 properties in Waterville Estates include 106 individual homesites located throughout the community, . . . a condominium unit at 27 Condo Drive, and a partially built home on *Bell Valley Road*." The notice listed the street names on which the "[f]ive other properties located outside of Waterville Estates" are located. The last line of the notice said that "[a]uction information can also be found at: www.waterville-estates.com. PUBLIC AUCTION, ***appx***. at 20 (emphasis added).

A second notice, also providing the time and place of the auction, noted that "[t]he Town of Campton will convey the premises to the buyer by a duly executed quitclaim deed with no

covenants at the closing." It ensured that "[s]uccessful bidders do not have to pay the back taxes due." The notice also said: "For more information about Waterville Estates, go to their website at: www.waterville-estates.com." The notice informed prospective buyers that "[t]he website contains information about deed restrictions, easements, covenants, and bylaws." It also disclosed that "[t]he Waterville Estates Association assesses a one-time Capital Improvement Fund fee of $1,000.00 on all lot sales." Finally, the notice warned in capital letters that "prospective bidders should thoroughly research and inspect any and all properties prior to the auction." INFORMATION FOR PROSPECTIVE BIDDERS, *appx.* at 19.

The deed by which Ms. and Mr. Buchholz took the property notes it is a "quitclaim deed with no covenants." It describes the land as "L/O Homesite F-14, Map/Lot 05.003.19." QUITCLAIM DEED WITH NO COVENANTS, *appx.* at 36. The designation "L/O" is commonly understood in real estate parlance to mean "land only." The designation "F-14" refers to the particular locus in the condominium declaration documents on file in the county registry which the trial court was entitled to infer would have shown the land had been condominiumized as part of Waterville Estates in 1973. *See Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506 (1982). Had the Buchholzes done their due dilligence, they would have been fully apprized of the ownership status of the land.

Ms. and Mr. Buchholz nonetheless claim they were unaware that the land they purchased was within Waterville Estates. They claim they were surprised when Waterville Estates Association [hereinafter WEA] assessed them a $1,000 initial improvement fund fee (which was mentioned in the auction notice), and association fees (which pay for maintenance of the condominium common areas of which they are common owners). They claim that the

assessments and being part of the condominium constitute clouds on their title, and thus filed in the Hillsborough County (North) Superior Court a petition to quiet title. PETITION TO REMOVE CLOUD FROM TITLE TO REAL ESTATE AND FOR RELIEF UNDER RSA 358-A (Aug. 31, 2005), ***appx.*** at 2. Waterville Estates Association filed a counterclaim for the amount of the unpaid dues and assessments. ANSWER TO PETITION TO REMOVE CLOUD FROM TITLE TO REAL ESTATE AND FOR RELIEF UNDER RSA 358-A AND COUNTERCLAIM BY WATERVILLE ESTATES ASSOCIATION FOR UNPAID DUES AND ASSESSMENTS AND FOR CHANGE OF VENUE (Nov. 29, 2005), ***appx***. at 12. The court (***Gillian L. Abramsom***, J.) granted WEA's motion for summary judgment, ORDER (May 8, 2006), ***appx.*** at 60, and this appeal followed.

SUMMARY OF ARGUMENT

Waterville Estates Association (WEA) first argues that because the condominium form of ownership runs with the land, unlike a mortgage which just effects the equity of the owner, it transcends a tax sale. Thus, the condominium form of ownership remains intact after a tax deed. It also points out that if the opposite were true, the condominium form of ownership would implode state-wide, because any unit owner with a tax deed in the chain of title would not be required to pay assessments, resulting in fewer and fewer members bearing the entire cost of the condominium. WEA also suggests that its existence is not a cloud on the title to condominium land, but is a valuable feature.

WEA then notes that the only material issue in this case – whether the plaintiffs' land is within the condominium boundaries – was not preserved. It argues that even if it were, the court was entitled to make the inference, based on specific facts and details in the record, that the land was within the boundaries. WEA also points to obvious and manifest fixtures on the land that gave the plaintiffs notice that their land was part of an organized community.

Finally, WEA suggests that this case does not implicate either the consumer protection laws nor the constitution.

ARGUMENT

I. Condominium Form of Ownership Transcends a Tax Sale

A. Condominium Form of Ownership

A condominium is a special form of real estate ownership, not recognized at common law, and created entirely by statute. *See Wentworth Hotel, Inc. v. Town of New Castle*, 112 N.H. 21, 25 (1972) (condominiums differ from apartments in type of ownership); *see* John M. Payne, *Condominiums and the Ancient Estates in Land: New Context for Old Learning*, 14 REAL EST. L.J. 291 (1986).

> An owner of a condominium home, which can be an ordinary house, a town house, or an apartment in a large building, actually has a fee simple title to the underlying land. This is true even if his particular unit is many floors above the ground on which it rests. His fee simple title is granted to the condominium owner by law and like any land title is certified by a deed that is on file at the county land records office. The fee simple title that is involved in a condominium is different, however, in some respects from that which is found in the traditional land ownership situation. While the title includes a resulting individual ownership of the particular dwelling unit in question, as would any fee simple land title, it also includes an undivided joint ownership, along with all the other owners in the same condominium complex, in all the land that is part of the complex. This title also includes a resulting undivided joint title to all those areas and parts of the building or buildings that are intended to be used by more than one owner. Thus a condominium owner, while he acquires many of the same rights and privileges of any fee simple land owner, also acquires certain rights and obligations with respect to the other owners in the same condominium complex. These additional rights and obligations arise due to the very nature of condominium ownership and can be imposed either by law or by the particular condominium agreement in question.

Patrick E. Kehoe, COOPERATIVES AND CONDOMINIUMS 12 (1974).

The New Hampshire Condominium Act, RSA 356-B:1, creates these arrangements. A "condominium" is defined as "real property, and any interests therein, lawfully submitted to this chapter by the recordation of condominium instruments [when] the undivided interests in the

common area are vested in the unit owners." RSA 356-B:3, V. A "condominium unit" is "a unit together with the undivided interest in the common area appertaining to that unit." RSA 356-B:3, VII. A condominium owner owns "an equal undivided interest in the common areas." RSA 356-B:17, II. In accord with the statute and the association's governance documents, all owners are liable for expenses associated with the common areas. RSA 356-B:45. Undoing the condominium form of ownership requires compliance with statutory procedures, including a vote of at least 80 percent of unit owners. RSA 356-B:34.

Although the Buchholzes bought a parcel of land, in some configurations a condominium unit owner can be seen to have a fee simple interest in a "cube of air, the tangible boundaries of which are usually the finished side of the interior sheetrock, ceilings and floors." R. Powell, *Powell on Real Property* § 54A.01[2], at 11-12 (2004). Everything else is owned in common with the condominium community.

Likewise, the condominium community as a whole has mutual interests with each unit owner. The "interest in the common area is . . . akin to an easement," which run with the land and cannot be extinguished except upon a vote of two-thirds of the unit owners. *Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 509-10 (1982).

B. The Condominium Form of Ownership Runs With the Land, Unlike a Mortgage Which is Merely a Security Evidenced by a Deed

Because condominiums are a type of real estate, the traditional tax lien process applies to them. *Berube v. Belhumeur*, 139 N.H. 562 (1995). Ms. and Mr. Buchholz claim that a tax sale, however, extinguishes the condominium form of ownership, and somehow reverts their deed to a fee simple.

They base their argument on *First NH Bank v. Town of Windham*, 138 N.H. 319 (1994). There, a landowner had several lots on which it failed to pay property taxes. The bank, which held mortgages on them, received notice of the town's liens and its right to redeem, but was not provided notice of the ultimate tax deed and auction two years later. The bank offered to pay the tax arrearages in exchange for reconveyance of the lots, but the town declined. The bank sued, claiming that "its mortgages had priority over the tax liens, and that the lots remained encumbered by the mortgages."

This Court held that tax liens are superior to mortgages because "[t]he lien, like the property tax obligation itself, attaches to the land, not to the landowner's equity." *First NH Bank*, 138 N.H. at 322. A mortgage, however, is merely a security, evidenced by a transfer of deed. *Lund v. Lund*, 1 N.H. 39, 41 (1817) ("At common law a mortgage is defined to be a deed conveying lands conditioned to be void upon the payment of a sum of money, or the doing of some other act."). A mortgage does not run with the land; rather it is "a conditional estate [which] vests in the mortgagee." *Ellison v. Daniels*, 11 N.H. 274, 279 (1840). *See Generally*, 17 C. Szypszak, *New Hampshire Practice, Real Estate* §4.01, at 65-67 (2003). Also citing the tax statutes, this Court held: "Consistent with the construction that the tax lien is superior because it attaches to the land itself, … the tax title derived from this lien breaks up all previous titles." *First NH Bank*, 138 N.H. at 324 (quotation and citation omitted).

The system of mutual easements and common interests which comprise the condominium form of ownership, however, run with the land. They are not like a mortgage, which is merely a security interest and does not run with the land. Extinguishing a mortgage affects just the equity belonging to the owner of the particular unit. Providing a new condominium owner with a fee

simple deed after a tax sale, however, would extinguish the entire system of mutual cross-easements which comprise the condominium form of ownership, and would affect the property rights of the entire condominium community of which it is part. Because of the vast differences between a mere mortgage, and the condominium form of property ownership, it is apparent that *First NH Bank* is factually and legally unrelated to the Buchholzes situation.

C. Superior Court's Contract Analysis Reached the Correct Result

The court below, citing the condominium statute, used contract analysis to arrive at the correct result. It wrote, "condominium unit owners possess an undivided interest [in] all portions of the condominium other than the unit itself." ORDER (May 8, 2006) (citing RSA 356-B:17), *appx.* at 62. The superior court then distinguished the Buchholz's *First NH Bank* argument by explaining that "condominium fees and dues are more akin to charges for services rendered than to security interests in the land itself." *Id.*, *appx.* at 62-63. Because all owners necessarily use the common areas on a continual basis, all are liable for their cost. On that grounds the court properly granted WEA's motion for summary judgment.

D. Chaos in Condoville

To do as the plaintiff suggests here would bring about preposterous results.

All condominium unit owners necessarily enjoy common areas. By merely stepping outside one's "cube of air" into the hallway or out the door, a condo resident uses a portion of that which is owned in common. If a condominium association were divested of its units by the mere existence of a tax lien – and as the 114 units sold at the auction in this case shows, tax liens are unfortunately common – the holders of a tax deed would have no compunction to pay for the common areas and amenities they are entitled to use. Beyond the unfairness of two neighbors

using the same common areas with only one paying, there would soon be a critical mass of divested units that would make the assessments on the remaining owners unbearably high, resulting in the dissolution of the condominium association. Repeated, this would ultimately lead to a state-wide divestiture of the condominium form of ownership, which is clearly not the result the legislature intended when it enacted Condominium Act in 1977. Such a situation would also leave uncertain the question of exactly who owns common areas in the event that all the units in a particular condominium had a tax deed in their chain of title.

E. Plaintiff's Miscellaneous Arguments

The Buchholzes make a number of additional arguments which should be addressed.

1. Quitclaim Deed With No Covenants

They point out that their deed is captioned "Quitclaim Deed with No Covenants." *Buchholz Brief* at 5, 9. They claim that "no covenants" means their ownership is free of WEA's property interests and of unit-owners' obligations outlined in WEA's organizing documents. First, it is unclear whether the benefits and obligations of condominiumized land constitutes a "covenant." Second, they place too much import on the caption of the deed, which courts routinely ignore in favor of what the deed actually says. *See e.g., C & G, Inc. v. Rule*, 25 P.3d 76 (Idaho 2001) (deed captioned "right of way" irrelevant when body of deed revealed intent to convey fee simple interest). Third, the "no covenant" language does not extinguish all pre-existing encumbrances that run with the land (such as, for instance, utility easements); rather it is intended to merely restate it is an as-is conveyance and that the deed carries no warrantees of good title:

A quitclaim deed only purports to release and quitclaim whatever interest the

> grantor possesses at the time. He does not thereby affirm the possession of any title, and he is not precluded from subsequently acquiring a valid title and attempting to enforce it. If he does not possess any title, none passes; and he may subsequently deny that any passed, without subjecting himself to any imputation of a want of good faith.

Cummings v. Parker, 61 N.H. 516 (1881). Fourth, a deed without covenants is often understood to mean that the grantor expressly does not warrantee against the existence of encumbrances. *De Rochemont v. Boston & M. R. R.*, 64 N.H. 500 (1888); *Dunklee v. Wilton Railroad Company*, 24 N.H. 489 (1852); *Haynes v. Stevens*, 11 N.H. 28 (1840); *Prichard v. Atkinson*, 3 N.H. 335 (1826). Thus, the "no covenants" caption put the plaintiffs on notice to investigate the existence of easements or other restrictions on the property. Fifth, when the town exercised its lien on the property it was already condominiumized. Thus the quitclaim deed the town conveyed to the plaintiffs was for already-condominiumized property. For all these reasons, the "no covenant" language in the deed's caption does not defeat the fact that the land the Buchholzes bought is part of the condominium.

2. Assessments Against Town

The plaintiffs point out that WEA did not make assessments against the Town during its short period of ownership, and try to use that fact to show they should likewise not have to pay. *Buchholz Brief* at 14-15. First, the town was a transitory owner. It acquired the land on January 28, 2002, and sold it at auction on August 24, 2002. Second, municipalities are exempt from transfer taxes, RSA 78-B:2, I, and therefore presumably from condominium assessments due to a tax sale. Third, municipalities are restricted in their ability to profit from tax sales, RSA 80:88, and also from incurring similar liabilities because of a tax sale. 16 P. Loughlin, *New Hampshire Practice, Municipal Law and Taxation* §43.11A (Supp. 2005 at 147). Fourth, during the time in

which a town has a tax lien on a piece of property, it is not truely an owner; the property is subject to redemption by its owner for two years after the lien arises. RSA 80:32. Fifth, although condominium associations may assess owners, they cannot assess public bodies, RSA 80:69, and WEA's interest in maintaining positive relations with the Town in which it is situated would not be facilitated by billing the town. Finally, how Ms. and Mr. Buchholz are prejudiced by this showing of comity is not clear.

3. Misconstruction of 100 Percent Language

The statute allowing municipalities to issue tax deeds provides that, "[t]he [tax] collector shall execute to the municipality, county or state only a *100 percent common and undivided interest in the property* and no portion thereof shall be executed in severalty by metes and bounds." RSA 80:61 (emphasis added). Although not clearly spelled out in their brief, it appears that the plaintiffs understand the italicized language to mean "fee simple," and argue that if the town received that interest, its quitclaim deed must have conveyed the same to them. *Buchholz Brief* at 12-13. The argument, however, is based on a misconstruction of the statute.

For over a century in New Hampshire, town tax collectors were able to exercise liens on an entire parcel of property to satisfy a tax debt. In *White v. Wolfeboro*, 131 N.H. 1 (1988), however, this Court held that under existing law towns could only sell that segmented portion of a property necessary to satisfy the amount of the lien. The legislature responded with several substantial amendments to the tax lien statute, including the language cited above. Read in its context, it is apparent that the language does not operate the way the plaintiffs imagine. Rather, the language restores the pre-*White v. Wolfeboro* practice, and clarifies that towns may exercise tax liens on the entire parcel and are not confined to selling just a small portion. *See* 16 P.

Loughlin, *New Hampshire Practice, Municipal Law and Taxation* §43.03 at fn. 10 (Supp. 2005) ("The provisions allowing for the sale of only 100% of the common and undivided interest in the property avoided the problems that surfaced in *White v. Wolfeboro* under the former tax lien statute which could be interepreted to allow the sale only of a partial interest in the property.").

The plaintiffs have thus pulled the language out of its context, and it bears no relation to this case.

4. Failure to Redeem

The plaintiffs suggest that in order for WEA to maintain the condominiumization of their land, WEA would have had to exercise its purported right of redemption provided in the tax lien statute. *Buchholz Brief* at 12. This argument fails for several reasons. First, WEA never owned the unit the plaintiffs bought, and therefore is not the correct party to redeem. Second, WEA does not want to *own* the plaintiff's unit; it is only interested in the ordinary condominium assessments associated with being a member of the association. Third, if the plaintiffs' suggestion were the law, and condominium associations had to buy every unit that becomes subject to a tax lien in order to protect the integrity of their boundaries, they would quickly run out of money. This would lead to the dissolution of the condominium form of ownership, which is not what the legislature intended.

5. Perfecting WEA's Lien

The plaintiffs allude to some unspecified insufficiency in how WEA perfected the lien against them for collection of the condominium assessments. *Buchholz Brief* at 16. First, although the plaintiffs argue that WEA's affidavit did not state that its lien had been adequately perfected, nowhere do they allege that there was anything the matter with how the lien was

perfected. Second, whether or how the lien was perfected is irrelevant here because this suit was initiated by the Buchholzes on a petition to quiet title, not by WEA on its lien. Third, even if the lien was improperly perfected, there is no dispute regarding the amount of dues and assessments owed by each property within WEA.

6. Assessments After Tax Sale

To the extent that Ms. and Mr. Buchholz are concerned that they will be assessed for dues before they were owners, *Buchholz Brief* at 11, WEA concedes that arrearages and unpaid dues which existed at the time of the tax sale were extinguished, in accord with *First NH Bank v. Town of Windham*, 138 N.H. 319 (1994). Upon purchase, however, dues again began to run, and WEA has been assiduous in only assessing amounts that arose after the tax sale.

F. Being a Member of Waterville Estates Association is Not a Cloud on Plaintiffs' Title

Even if the plaintiffs' legal arguments regarding the status of their deed were all correct, they still have not explained how being a member of WEA constitutes a cloud on their title. Certainly buying a unit of condominiumized land carries with it obligations for dues and assessments. But one of the common advantages of condominiums is the ability of a group to pool resources so that amenities no one could afford alone can be bought and enjoyed. *See* Patrick E. Kehoe, COOPERATIVES AND CONDOMINIUMS at 26-27.

The list of amenities enjoyed by WEA unit owners is considerable. Among them are a ski area, pool, library, function hall, recreation center, tennis courts, basketball courts, decks, roads, grounds maintenance, a water system, events held summer and winter, WEA ANNUAL MEETING NOTES (June 26, 2005), *appx.* at 74; WEA ANNUAL MEETING MINUTES (Jan. 22, 2006), *appx.* at

78, three pools, two hot tubs, a pond, a beach, paddle boats, and hiking trails. As this Court has noted, WEA "holds title to several parcels of real estate, known as the common property … [which] contain various recreational facilities, including a community center, an indoor swimming pool, a ski lift, a ski lodge, and other buildings." *Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 507 (1982).

Access to and ownership of these luxuries are hardly clouds on the plaintiff's title; rather they are valuable features to many buyers.

II. The Buchholzes Purchased Property Within the Boundaries of Waterville Estates, Making WEA Entitled to Judgment as a Matter of Law

A. Only Material Issue is Whether the Property is Within Waterville Estates

"In reviewing the trial court's grant of summary judgment," this Court "consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." If the "review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law," summary judgment will be affirmed. *Gordonville Corp. N.V. v. LR1-A Ltd. Partnership*, 151 N.H. 371, 373 (2004). "An issue of fact is 'material' if it affects the outcome of the litigation." *Horse Pond Fish & Game Club, Inc. v. Cormier*, 133 N.H. 648, 653 (1990) (quotations omitted).

"The opponent of a motion for summary judgment has the burden of contradicting facts in the proponent's affidavits or risking them being deemed admitted for purposes of the motion." *D'Antoni v. Department of Health and Human Serv's*, __ N.H. __ (decided June 14, 2006), slip Op. at 4. The party opposing the motion must do more than merely issue denials; it must "set forth specific facts showing a genuine issue for trial." *Gamble v. University System of New Hampshire*, 136 N.H. 9 16-17 (1992). "Mere denials in an opposing affidavit are not sufficient to raise an issue of fact for trial." *Arsenault v. Willis*, 117 N.H. 980, 983 (1977).

> There is always, of course, a possibility that a party opposing summary judgment may unwittingly supply what the moving party requires but has failed to provide, since summary judgment is to be granted or denied based on the entire record before the court.

Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 491 (1989).

While the parties here may dispute a number of tangential issues, there are only two material facts necessary to determine whether the Buchholzes are liable for condominium

assessments: (1) that they bought property, and (2) that the property is within the boundaries of Waterville Estates. *See Buchholz Brief* at 6. Because Ms. and Mr. Buchholz nowhere dispute the amount of the assessments, nor that they bought property, if it is determined that what they bought is within Waterville Estates' boundaries, WEA is entitled to a judgment as a matter of law.

B. Issue of Whether the Property is Within Waterville Estates was Not Preserved

The Buchholzes failed to preserve the issue of whether the land they bought was within the boundaries of Waterville Estates.

In their initial petition, they do not address whether the property is within WEA's boundaries. PETITION TO REMOVE CLOUD FROM TITLE TO REAL ESTATE AND FOR RELIEF UNDER RSA 358-A (Aug. 31, 2005), *appx* at 2. The lower court's order granting WEA's motion for summary judgment recites that the "land is located in a development operated by . . . Waterville Estates Association." ORDER (May 8, 2006), *appx.* at 60. In their motion to reconsider, the Buchholzes are silent regarding this portion of the order. MOTION FOR RECONSIDERATION, *appx.* at 64. Thus the issue was never raised in the trial court.

The purpose of issue preservation is to give the lower court an opportunity to correct any mistakes. *Star Vector Corp. v. Town of Windham*, 146 N.H. 490, 494 (2001) ("We require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance."). Because the issue of whether the Buchholzes property is within the boundaries of WEA was not brought to the attention of the superior court, it was not preserved. Rather, the plaintiffs dispute the matter for the first time on appeal, precluding this Court from reaching the it. *Drop Anchor Realty Trust v.*

Town of Windham, 134 N.H. 81 (1991). Accordingly, the court's grant of summary judgment should be affirmed.

Even if the issue were properly preserved, the plaintiffs have nowhere attempted to show that their land is *not* within WEA boundaries. Rather they have only alleged that WEA has not adequately shown that it is. *Buchholz Brief* at 6, 7, 8, 10. And had the matter gone to trial, none of the witnesses or exhibits listed by the plaintiffs, WITNESS AND EXHIBIT LIST (Apr. 20, 2006), are pertinent to the matter.

III. The Property the Buchholzes Bought is Within Waterville Estates

There were sufficient facts alleged and conceded that allowed the trial court to make a well-founded determination that the property the Buchholzes bought was within Waterville Estates, and that the they had actual or constructive notice that their property was part of the Association.

A. Property on Bell Valley Road for Sale at Auction is in Waterville Estates

There is no dispute that parcel F-14 purchased by the Buchholzes is situated on Bell Valley Road. NOTICE OF ASSOCIATION LIEN (Aug. 31, 2005) (emphasis added), ***appx.*** at 40 (submitted to court by plaintiffs as attachment to their objection to motion for summary judgment); PRETRIAL SUMMARY STATEMENT (Apr. 7, 2006), ***appx.*** at 43.

The notice of public auction states that among "[t]he 114 properties in Waterville Estates" is one "on Bell Valley Road." PUBLIC AUCTION, ***appx.*** at 20 (emphasis added). Moreover, the auction notice states "[f]ive other properties located outside of Waterville Estates include … Alden Drive, … Ellsworth Hill Road … Quimby Road, and … 2 condominium units on Red Sleigh Road." PUBLIC AUCTION, ***appx.*** at 20 (emphasis added). The notice makes clear which of the properties up for auction were ***not*** in Waterville estates, and Bell Valley Road is ***not*** among them.

Based on these details, the trial court was entitled to make the inference that the plaintiff's property on Bell Valley Road is in Waterville Estates, and that they had actual or constructive notice of that fact.

B. Number of Properties in Waterville Estates Plus Number Outside of Waterville Estates Equals the Total Number up for Auction

The notice of public auction says that the "Campton Board of Selectmen to sell the 119 properties taken for non-payment of taxes. There are 114 properties located in Waterville Estates. . . . Five other properties located outside of Waterville Estates" are then listed. PUBLIC AUCTION, *appx*. at 20 (emphasis added).

Presumably the trial court can do the simple math: 119 -114 = 5. Because the plaintiff's property is not among the 5 specified as being *outside* WEA, it must be among the 114 that are *inside* WEA.

Based on this detail, the trial court was entitled to make the inference that the plaintiff's property is in Waterville Estates, and that they had actual or constructive notice of that fact.

C. Condominium Unit Number on Deed

The Condominium Act requires that to initially create a condominium, the declarant must file a map of the condominiumized land, RSA 356-B:20, which was clearly done by Waterville Estates at its inception. *Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 508 (1982). The Act also assures that a deed to condominium property sufficiently identifies the property if it includes the unit number. RSA 356-B:9; *Berube v. Belhumeur*, 139 N.H. 562 (1995).

The deed for the property the Buchholzes bought describes their purchase as "Homesite F-14." QUITCLAIM DEED WITH NO COVENANTS, *appx*. at 36. Although the plaintiffs made no effort to make the map filed in the registry part of the record, the deed plainly contains the unit number.

Based on this detail, the trial court was entitled to make the inference that the plaintiff's

property is in Waterville Estates, and that they had actual or constructive notice of that fact.

D. Disclosures in Auction Postings

Tax sales conducted by auction must be noticed by, among other things, postings that specify "the place, day and hour of the sale." RSA 80:21. The postings, which are facially sufficient, suggested that prospective buyers should contact the auctioneer for "a bidder's information packet containing property descriptions, maps, directions, and detailed auction information." The postings suggested a visit to Waterville Estates's website, and provided the correct internet address. They contained an advisory that the website "contains information about deed restrictions, easements, covenants, and bylaws," disclosed that "[t]he Waterville Estates Association assesses a one-time Capital Improvement Fund fee of $1,000 on all lot sales," and warned (in all-capital letters) that "prospective bidders should thoroughly research and inspect any and all properties prior to the auction." *See* INFORMATION FOR PROSPECTIVE BIDDERS, ***appx.*** at 19; PUBLIC AUCTION, ***appx***. at 20. Moreover, the website contains a map showing the boundaries of Waterville Estates. Had the Buchholzes done their due diligence, they would have been aware of these matters, and should be estopped from asserting lack of notice.

Based on these details, the trial court was entitled to make the inference that the plaintiff's property is in Waterville Estates, and that they had actual or constructive notice of that fact.

E. Inferences From WEA's Affidavit

The affidavit attached to WEA's motion for summary judgment contains a number of allegations. Sworn by the association's accounts manager, it attested to the plaintiffs' obligation to pay dues and assessments for "said property as required in the chain of title for the condominiums at Waterville Estates and as further required by the Bylaws and Restrictions,

Easements and Covenants of the Waterville Estates Association." AFFIDAVIT (Feb. 22, 2006), *appx.* at 24 ¶3.

Based on this affidavit, the trial court was entitled to make the inference that the plaintiff's property is in Waterville Estates, and that they had actual or constructive notice of that fact.

F. Inferences From Pleadings

Various pleadings in the record supply a number of necessary and pertinent facts. In its pre-trial statement, WEA noted it is a duly organized condominium, with restrictions, easements, and covenants that require payment of assessments by property owners. It listed potential trial exhibits which would have included its documents allowing assessments, and listed potential trial witnesses who would have been able to testify regarding what land is within WEA's boundaries. PRETRIAL SUMMARY STATEMENT (Apr. 7, 2006), *appx.* at 43.

Attached to the plaintiffs' own pleadings was the notice of WEA's lien on their property. *Brown v. John Hancock*, 131 N.H. 485 at 491 ("possibility that a party opposing summary judgment may unwittingly supply what the moving party requires but has failed to provide"). The lien references documents on file at the county registry which would show WEA's restrictions, easements, and covenants running with the land pertaining to the Buchholzes property. NOTICE OF ASSOCIATION LIEN (Aug. 31, 2005), *appx.* at 40.

Based on these pleadings, the trial court was entitled to make the inference that the plaintiff's property is in Waterville Estates, and that they had actual or constructive notice of that fact.

G. Inferences From Existing Fixtures Comprising Waterville Estates

In addition to the inferences and notice given the plaintiffs by the various documents associated with this case, it is obvious from the actual fixtures comprising Waterville Estates that they were buying into part of a larger facility which carried with it obligations and duties in common with others.

As noted, Waterville Estates includes many existing fixtures – a ski lift, ski lodge, library, function hall, recreation and community center, tennis courts, basketball courts, decks, roads, grounds maintenance, a water system, and events held summer and winter, WEA ANNUAL MEETING NOTES (June 26, 2005), *appx.* at 74; WEA ANNUAL MEETING MINUTES (Jan. 22, 2006), *appx.* at 78; *Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 507 (1982), three pools, two hot tubs, a pond, a beach, paddle boats, and hiking trails. As reported at the 2006 annual meeting, "We have 427 living sites in WEA. We're like a little city, with a water and highway department." WEA ANNUAL MEETING MINUTES (Jan. 22, 2006), *appx.* at 78.

Purchasers of property are deemed to be aware of conditions of the property that can be learned upon examination. *Sawin v. Carr*, 114 N.H. 462 (1974). When the conditions of the land are apparent on the land, one cannot claim lack of notice. Notice is implied when items have "obvious and manifest likelihood to attract the attention of a purchaser of the land." *Herbert v. Odlin*, 40 N.H. 267 (1860).

The fixtures comprising the commonly-owned improvements of Waterville Estates are large and apparent, obvious and manifest, such that they would be hard for any observer to miss. Thus the plaintiffs' cannot reasonably claim they were not aware that their property is part of a larger facility.

H. Trial Court Properly Inferred that the Buchholzes Property is Within WEA, and Properly Granted Summary Judgment

Given the various documents comprising the record in this case, the trial court made the justified inference (which was not objected-to below) that the Buchholzes' "unit is located in a development operated by … Waterville Estates Association." ORDER (May 8, 2006), *appx.* at 60. Given those same documents, and the condition of the land itself, it is plain that the plaintiffs knew or should have known, had they done their due diligence, that the property they purchased was part of WEA. Accordingly, given the totality of facts in the record, this Court should affirm the judgment of the court below.

Generally cases of this sort arising in New Hampshire have been decided by summary judgment, including the case relied on by the plaintiffs. *First NH Bank v. Town of Windham*, 138 N.H. 319 (1994) (tax deed). *See also, e.g., Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n*, 153 N.H. 194 (2006) (condo); *Cricklewood on the Bellamy Condominium Ass'n v. Cricklewood on the Bellamy Trust*, 147 N.H. 733 (2002) (condo); *Gordonville Corp. N.V. v. LR1-A Ltd. Partnership*, 151 N.H. 371 (2004) (tax deed); *Drop Anchor Realty Trust v. Town of Windham*, 134 N.H. 81 (1991) (tax deed).

"The purpose of summary judgment is to end litigation expeditiously when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Kukene v. Genualdo*, 145 N.H. 1, 5 (2000). As there are no further material facts not otherwise included in the pleadings which could be adduced by holding a trial, the superior court properly granted summary judgment, and this Court should affirm.

IV. There Have Been No Violations of the Consumer Protection Act or of Due Process

Ms. and Mr. Buchholz have alleged that WEA is liable for violations of the Consumer Protection Act, which addresses "unfair or deceptive act[s] or practice[s] in the conduct of any trade or commerce." RSA 358-A:2. The plaintiffs' initial petition, however, does not specify what actions are allegedly in violation of the Act, and its contentions in subsequent pleadings are not consistent. It is thus not clear what actions the Buchholzes are claiming are unfair or deceptive, nor how the Consumer Protection Act applies to this case. To the extent that the allegations in the Buchholzes' brief are not consistent with those made below, they are not preserved for appellate review.

If the Buchholzes' claim is that they were not given documents they requested, PETITION TO REMOVE CLOUD FROM TITLE TO REAL ESTATE AND FOR RELIEF UNDER RSA 358-A (Aug. 31, 2005), *appx* at 3; *Buchholz Brief* at 18-19, no unfair or deceptive trade practice occurred. Had they done the title work, visited the premises, or otherwise sought to discover what they were buying, the plaintiffs would have learned that the documents initially forming WEA as a condominium were filed in the registry in accord with RSA 356-B:35. *See Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 508 (1982). The Condominium Act requires that a list of owners be available to them, RSA 356-B:37, and as owners and members of the association, the Buchholzes are welcome to peruse WEA's files anytime they like, in accord with the normal operation of WEA's offices. OBJECTION TO MOTION FOR RECONSIDERATION (May 26, 2006), *appx*. at 83. Much of what it appears the Buchholzes requested, such as bylaws, is available to all the world on WEA's website. From the meeting minutes, which the plaintiffs made part of the record, it appears that annual budgets and other documents are regularly available at association

annual meetings. WEA ANNUAL MEETING NOTES (June 26, 2005), *appx.* at 74; WEA ANNUAL MEETING MINUTES (Jan. 22, 2006), *appx.* at 78.

Even if the Buchholzes' claim is that WEA improperly assessed them and exercised its lien against them, no unfair or deceptive trade practice occurred. The Condominium Act provides for liens for unpaid assessments, and gives condominium associations remedies for collection. RSA 356-B:46, RSA 356-B:46-a. Doing so is consistent with WEA's own organizing documents, and is necessary given the WEA Board of Director's fiduciary duties to the Association and its members. Nothing in the Consumer Protection Act says anything to the contrary.

If the Buchholzes' claim is that WEA assessed them the wrong amount or breached its fiduciary duties with regard to the assessments, OBJECTION TO MOTION FOR SUMMARY JUDGMENT (Mar. 31, 2006), *appx.* at 26, no unfair or deceptive trade practice occurred. Documents placed in the record by the plaintiff show past-due assessments of $5,167.79, STATEMENT (Feb. 17, 2006), *appx.* at 38-39. There has been no allegation that the assessment was wrongly calculated or is otherwise incorrect.

If the Buchholzes' claim is that WEA took action that "caus[ed] likelihood of confusion or misunderstanding as to affiliation, connection or association with another, OBJECTION TO MOTION FOR SUMMARY JUDGMENT (Mar. 31, 2006), *appx.* at 32 ¶30, the facts giving rise to this allegation have not been made known to WEA, and WEA does not know to what the plaintiffs allude. It is understood, however, that the portion of the consumer protection laws referred to is intended to address when someone holds themselves out as being affiliated with an organization or business with which they have no connection. The citation is thus inapposite.

In any event WEA's only action was making an assessment against one of its members for

dues and fees associated with the condominium. There was nothing unfair or deceptive about its action, and therefore no Consumer Protection Act violation. If the plaintiffs' are troubled by the quality of their tax deed, their complaints should be directed toward the Town, not WEA.

Finally, the plaintiffs make a passing reference to an alleged violation of their due process rights. *Buchholz Brief* at 20-21. WEA is unaware of any actions that would violate due process. Moreover, WEA is a private party, not an arm of the government, and thus incapable of violating anyone's constitutional rights. *See Duffley v. New Hampshire Interscholastic Athletic Ass'n, Inc.*, 122 N.H. 484 (1982).

Accordingly, this court should either ignore the plaintiffs' Consumer Protection Act and due process allegations, or merely affirm the ruling of the court below.

CONCLUSION

Based on the foregoing, Waterville Estates Association respectfully requests this honorable Court to affirm the grant of summary judgment, deny the plaintiffs' claims, declare that Waterville Estates Association is entitled to lien the plaintiffs' property and to collect assessments accruing from their membership, and declare that Waterville Estates Association has not violated either the Consumer Protection Act or the plaintiffs' due process rights. Further, Waterville Estates Association requests this honorable Court to grant its counterclaims for arrearages in the amount of $5,167.79, attorneys fees and costs, as well as interest.

Respectfully submitted,

Waterville Estates Association,
By its Attorney,

Law Office of Joshua L. Gordon

Dated: October 13, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Waterville Estates Association requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument. This case involves a question that is unanswered in New Hampshire, and its outcome has the potential to cause chaos in the organization and maintenance of every condominium in the State. Accordingly, there ought to be an opportunity for the parties to address the court's questions.

I hereby certify that on October 13, 2006, copies of the foregoing will be forwarded to Kevin E. Buchholz, Esq., and to Scott D. McGuffin, Esq.

Dated: October 13, 2006

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