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NO. COA11-566  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

THOMAS D. BOWERS, HERMAN R.  
GUTHRIE and DOROTHY G. GUTHRIE,  
Plaintiffs

v.

Carteret County  
No. 10 CVS 943

WAYNE TEMPLE; STEVE HARGIS; JAMES  
FITTS; CORKY JONES; and WILLIAM  
WHALEY, in personam and as The  
Board of Directors of Leeward  
Harbor Homeowner's Inc. and  
LEEWARD HARBOR HOMEOWNER'S INC.,  
Defendants

Appeal by plaintiffs from order entered 20 December 2010 by  
Judge Paul L. Jones in Carteret County Superior Court. Heard in  
the Court of Appeals 25 October 2011.

*Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R.  
Wheatly, III and Claud R. Wheatly, Jr., for plaintiff-  
appellants.*

*Cranfill Sumner & Hartzog, LLP, by Regan S. Toups and  
Angela W. DiNoto, for defendant-appellees.*

CALABRIA, Judge.

Thomas D. Bowers ("Bowers"), Herman R. Guthrie and Dorothy  
G. Guthrie (collectively "plaintiffs") appeal from an order

granting summary judgment in favor of Wayne Temple, Steve Hargis, James Fitts, Corky Jones, and William Whaley, in personam<sup>1</sup> and as The Board of Directors of Leeward Harbor Homeowner's Inc. ("the Board") and Leeward Harbor Homeowner's Inc. ("HOA") (the Board and HOA are collectively "defendants"). We affirm.

### I. Background

Leeward Harbor is a waterfront condominium complex, consisting of thirty-six units and marina facilities with boat slips, located in Morehead City, North Carolina. Plaintiffs are unit owners at Leeward Harbor. Leeward Harbor's original Declaration Creating Unit Ownership of Property under the provisions of N.C. Gen. Stat. § 47A ("Declaration"), designated the marina facilities as common areas and gave each unit owner an undivided interest in the common areas. Art. IV, Section D of the Declaration stated:

All marina facilities shall be common areas; provided, however, that the owner or owners of each unit in LEEWARD HARBOR shall be entitled to the exclusive use of one (1) boat slip in the marina. The Board of Directors shall determine the slip which each unit's owner(s) shall be entitled to

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<sup>1</sup> In their brief, plaintiffs indicate they are not pursuing claims against the individual Board members.

use; and the use of that slip shall thereafter be appurtenant to the use of such unit, and may not be severed therefrom unless agreeably exchanged between the owners of the units. In the event owners of units reach an agreement of exchange, such exchange shall not be effective until and unless approved by the Board of Directors.

In February 1986, approximately five months after the original Declaration was recorded, an amendment was passed ("1986 amendment"). One of the provisions of the 1986 amendment deleted Art. IV, section D, and replaced it with this language:

All marina facilities shall be common areas; provided, however, that the owner or owners of each unit in Leeward Harbor shall be entitled to the exclusive use of one boat slip in the marina. The Board of Directors shall determine the slip which each unit's owner(s) shall be entitled to use. The use of that slip shall thereafter be controlled by the Board of Directors. At the discretion of the Board, any slip may subsequently be reassigned.

At the time plaintiffs purchased their units, the 1986 amendment was already in effect.

The Declaration did not restrict the unit owners from leasing their units. However, in the spring of 2008, based on the language of the 1986 amendment which allowed the BOD to control the use of the boat slips and reassign the slips at their discretion, the BOD ruled that lessees were denied the use of the boat slips. Bowers had executed a lease for his unit

which was to begin on 1 May 2007 and continue for two years. In May 2008, the BOD notified Bowers that the lessee of his unit must remove her boat by 31 May 2008 or the HOA would remove the boat and store it at Bowers's expense.

Subsequent to the BOD's ruling, Bowers filed an action ("first action" or "prior action") against the HOA and BOD seeking a declaratory judgment and a preliminary injunction. This first action alleged, *inter alia*, that, the HOA's new rule was contrary to the provisions of the Declaration, denied him the right to lease his property, caused him to lose rental income, and he suffered damages as a result of the loss of rental income of his unit. The court found the HOA was without authority to deny lessees the use of the boat slips and awarded Bowers \$2,400 in damages as a result of the HOA's unlawful act.

Prior to the resolution of the first action, Bowers filed a separate motion for partial summary judgment regarding the validity of the 1986 purported amendment. After a hearing, the Judge declared the 1986 purported amendment void because it "lack[ed] an adequate acknowledgment and therefore was unlawfully recorded and said document [wa]s without validity and fail[ed] to provide notice to the public." ("2009 judgment") Neither judgment was appealed.

On 28 May 2010, the HOA held a membership meeting to enact another amendment to the original Declaration ("2010 amendment"). Again, the HOA sought to delete the original Art. IV, Section D and replace it with the following new language:

All marina facilities shall be common areas; provided, however, that, the Owner or Owners of each unit in LEEWARD HARBOR shall be entitled to the exclusive use of (1) one boat slip in the marina as long as the leased marina property remains under lease for the use and enjoyment of the LEEWARD HARBOR Owners. The Board of Directors shall determine the slip that each unit's Owner(s) shall be entitled to use. A list of the slip designations will be provided to the Owners annually. Owners may request a current designation list from the Harbor Master at any time. The specific slip designated for use by the Owner(s) may be changed at the discretion of the Board of Directors.

The 2010 amendment only applied to unit owners who voted in favor of the amendment and to future owners. Those who voted against the 2010 amendment were exempt from the terms of the amendment unless they voluntarily accepted it or voluntarily or involuntarily conveyed or transferred their unit.

On 21 July 2010, plaintiffs filed the current action ("current action" or "second action") seeking a declaratory judgment requesting the court to declare that the 2010 amendment was void. Plaintiffs alleged that because the court declared an

amendment that deleted Art. IV, Section D of the Declaration was void in the 2009 judgment, and the 2010 amendment also deleted and replaced Art. IV, Section D of the Declaration, the doctrine of *res judicata* applied. Plaintiffs also requested that the court enjoin defendants from attempting to enact amendments to the Declaration that destroyed owner's vested rights unless all unit owners unanimously agreed by a written agreement.

Defendants timely filed an answer and motion to dismiss. On 19 October 2010, plaintiffs filed a motion for summary judgment. During a hearing on plaintiffs' motion, defendants also made a motion for summary judgment. On 21 December 2010, the court entered an order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment. The court held that the doctrines of *res judicata* and collateral estoppel did not apply. In addition, the court found there was no actual or justiciable controversy regarding the leasing of units in Leeward Harbor and upheld the validity of the 2010 amendment. Plaintiffs appeal.

## II. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact

and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

### III. Res Judicata and Collateral Estoppel

Plaintiffs argue that the trial court erred in denying their motion for summary judgment, granting defendants' motion for summary judgment and finding the doctrines of *res judicata* and collateral estoppel did not apply. Specifically, plaintiffs allege that *res judicata* and collateral estoppel apply to the 2010 amendment because the 2009 judgment required unanimous consent of owners before an amendment seeking to destroy ownership interests could be enacted, and the 2010 amendment sought to destroy ownership interests without unanimous consent. We disagree.

Initially, we note that plaintiffs alleged in their complaint in the current action that *res judicata* applies because of the judgments from the first action. However, on appeal, the only issues remaining are whether the 2010 amendment, or any future amendments, are valid if, as plaintiffs allege, they attempt to destroy elements of ownership without the unanimous consent of all the owners. Therefore, our review

only focuses on whether *res judicata* and collateral estoppel apply to the 2010 amendment as a result of the 2009 judgment.

A. *Res judicata*

*Res judicata* and collateral estoppel are companion doctrines that were developed "for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). *Res judicata* applies "where the second action between two parties is upon the same claim." *Id.* at 492, 428 S.E.2d at 161. "The prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action." *Id.* To prove *res judicata*, a party must show "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 262 (2005). There is no dispute that the 2009 judgment was a final judgment. However, plaintiffs have the burden to show that the second element of *res judicata* applies in the second action.

In the instant case, plaintiffs contend that the 1986 amendment and the 2010 amendment are essentially the same amendment, even though they were enacted at separate times, and *res judicata* applies. We disagree. While both amendments delete the original Art. IV, Section D and replace it with a new section, the 2010 amendment differs from the 1986 amendment.

Bowers brought the first action because the 1986 amendment allowed the BOD to stop Bowers from leasing his unit with the boat slip, which resulted in a loss of rental income. The 2010 amendment does not hinder Bowers from either leasing his unit or allowing his lessee to use the boat slip. In the second action, plaintiffs claim the 2010 amendment takes away their ability to sell or bequeath their unit with the accompanying boat slip. While both amendments gave the BOD some power to assign the boat slips, the 2010 amendment does not apply to owners, such as plaintiffs, who voted against the amendment. Therefore, unless plaintiffs voluntarily subject themselves to the 2010 amendment, the BOD may not take away plaintiffs' use of the boat slips until they convey or transfer their units.

In *Tar Landing Villas v. Town of Atlantic Beach*, the petitioners claimed that "a previous judgment involving an earlier annexation by the Town of the land in question barred

the Town from annexing petitioners' lands under the doctrine of...*res judicata*." 64 N.C. App. 239, 240, 307 S.E.2d 181, 183 (1983). There, the Court held that *res judicata* was inapplicable because the second annexation ordinance was enacted subsequent to the first judgment, and therefore its validity had not been determined in the prior action. *Id.* at 242, 307 S.E.2d at 184.

Here, the second action regarding the 2010 amendment is different than the first action because the amendments are different. The 1986 amendment gave the BOD the power to deny unit owner lessees the use of the boat slips, but the 2010 amendment only applied to unit owners who voted in favor of the amendment and to future owners. In addition, the 2010 amendment was passed after the court declared the 1986 amendment was void. Just as the Court found in *Tar Landing*, that the validity of the second ordinance had not been determined in the prior action, the validity of the 2010 amendment in the instant case was not determined in the prior action.

Plaintiffs failed to show the second element of *res judicata* applies. Since all elements are required to prove *res judicata*, and the second element is not present here, it is unnecessary for us to determine whether the third element of *res*

*judicata* applies. Since the doctrine of *res judicata* does not apply in the instant case, the prior 2009 judgment does not bar the litigation in the present action.

B. Collateral Estoppel

Although *res judicata* does not apply, we must also determine whether collateral estoppel applies. When the second action involves a different claim, collateral estoppel bars relitigation of "issues actually litigated and determined in the original action." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161. Offensive collateral estoppel "occurs when a plaintiff attempts to prevent a defendant from relitigating issues it previously and unsuccessfully litigated." *Tar Landing*, 64 N.C. App. at 244, 307 S.E.2d at 185. There are four requirements to determine whether collateral estoppel is applicable to specific issues:

- (1) The issues to be concluded must be the same as those involved in the prior action;
- (2) in the prior action, the issues must have been raised and actually litigated;
- (3) the issues must have been material and relevant to the disposition of the prior action; and
- (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

*King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973). The court should consider "judicial economy and

fairness to the other party" when applying collateral estoppel. *Tar Landing*, 64 N.C. App. at 244, 307 S.E.2d at 185.

1. Issues Must be Identical, Raised and Actually Litigated  
in Both Actions

For purposes of collateral estoppel, the issues in both matters must be identical, "if they are not identical, then the doctrine of collateral estoppel does not apply." *Williams v. Peabody*, \_\_ N.C. App. \_\_, \_\_, \_\_ S.E.2d \_\_, \_\_ (2011) (citations and internal brackets omitted). "[A]n issue is actually litigated...if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined." *Id.* (citations and internal brackets omitted).

In the first action, Bowers raised the issues of whether the HOA could amend the Declaration without unanimous consent of the owners and whether the 1986 amendment destroyed his ownership interests in his property. Bowers also contended the amendment was not properly recorded in accordance with statutory guidelines. The court included a statement in the 2009 judgment: "the law forbids amendments to declarations and by-laws that strike elements of ownership and rights of use of owners of units unless there is unanimous consent of unit owners" and the 1986 amendment "attempted to delete article 4, section D of the

declaration and thereby destroy vested rights and interests of unit owners, including the Plaintiff's."

In the second action, plaintiffs alleged that the original Declaration provided owners with possessive use of a boat slip which could not be severed without the owner's permission. In addition, they contended the 2010 amendment deprived the condominium owners of their right to transfer title for both their unit and boat slip. Therefore, plaintiffs requested that the court declare the 2010 amendment was void.

In both actions, the issues to be concluded were the validity of the amendment, the nature of the owners' interests in the boat slips, and the actions necessary for the HOA to change those interests. Plaintiffs sought determination of whether the Declaration can be amended without unanimous consent of the owners and whether the 2010 amendment destroyed ownership interests in their property. The issues in both actions are identical and both were raised and litigated in the first action. Therefore, plaintiffs are correct that the first two requirements of collateral estoppel apply.

## 2. Material, Relevant, Necessary and Essential

Since there are four requirements to determine whether collateral estoppel applies, we must also determine whether all

issues raised and litigated in the first action were also "material and relevant to the disposition" as well as "necessary and essential to the resulting judgment." *King*, 284 N.C. at 358, 200 S.E.2d at 806. In the first action, Bowers sought a partial summary judgment declaring the 1986 amendment was void on two separate bases. He alleged that the 1986 amendment conflicted with the Declaration because it destroyed ownership interests without the required consent by the owners and restricted his use of the property. In addition, Bowers contended the amendment was not properly recorded in accordance with statutory guidelines.

In the first action, the trial court determined that amendments to the Declaration were controlled by N.C. Gen. Stat. § 47C-2-117, the North Carolina Condominium Act ("NCCA"). The NCCA provides that "[e]very amendment to the declaration must be recorded in every county in which any portion of the condominium is located and is effective only upon recordation." N.C. Gen. Stat. § 47C-2-117(c) (2011).

Therefore, the threshold question in determining the validity of the 1986 amendment in the first action was whether it was properly recorded. In the 2009 judgment, the judge declared the 1986 purported amendment void, stating that it

"lack[ed] an adequate acknowledgment and therefore was unlawfully recorded and said document [wa]s without validity and fail[ed] to provide notice to the public."

Once the court found that the 1986 amendment was void on the basis that it was improperly recorded, it was unnecessary for the court to determine the merit of Bowers's other arguments.<sup>2</sup> However, the court included a statement regarding amendments to declarations in the 2009 judgment, the court found: "the law forbids amendments to declarations and by-laws that strike elements of ownership and rights of use of owners of units unless there is unanimous consent of unit owners" and the 1986 amendment "attempted to delete article 4, section D of the declaration and thereby destroy vested rights and interests of unit owners, including the Plaintiff's." Although the court stated unanimous consent by the owners was required and stated the 1986 amendment's effect on owners' rights, the trial court's statements in the 2009 judgment were superfluous to its finding that the 1986 amendment was void due to improper recordation.

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<sup>2</sup> In addition, we note that the NCCA indicates that no action may be brought to challenge the validity of an amendment more than one year after the amendment is recorded. N.C. Gen. Stat. § 47C-2-117(b) (2011). Therefore, since Bowers challenged the 1986 amendment twenty-two years after it was enacted, he could only challenge the validity of the 1986 amendment on the basis that it was improperly recorded.

Therefore, the only issue in the first action that was "material and relevant to the disposition" and "necessary and essential to the resulting judgment" was whether or not the 1986 amendment was properly recorded. *King*, 284 N.C. at 358, 200 S.E.2d at 806. See also *Templeton v. Apex Homes, Inc.*, 164 N.C. App. 373, 378, 595 S.E.2d 769, 772 (2004) (where the Court concluded that, because plaintiffs won on one of their breach of contract claims and were awarded the only remedy plaintiffs sought, trial court's ancillary determinations that plaintiffs lost on two other breach of contract claims were not "necessary" to the judgment).

In the second action, the recording of the 2010 amendment was not an issue. The reason plaintiffs requested a declaratory judgment for the court to decide the validity of the 2010 amendment was because plaintiffs alleged the 2010 amendment severed the owner's possessive use of their boat slip without the owner's permission and deprived the condominium owners of their right to transfer title for both their unit and boat slip. The court's statements in the 2009 judgment were superfluous and therefore not necessary or essential for the court to declare that the 1986 amendment was void. Therefore, the determination of the issues was also not "material and relevant to the

disposition" or "necessary and essential to the resulting judgment." *King*, 284 N.C. at 358, 200 S.E.2d at 806.

While we recognize that both the first and second actions discuss amendments, the reason the 1986 amendment was declared void was because it was improperly recorded. Plaintiffs have failed to prove that the issues in the second action were "material and relevant" and "necessary and essential" to the 2009 judgment. We therefore hold that collateral estoppel does not bar the issues presented in the second action. We affirm the ruling of the trial court.

#### IV. Validity of 2010 Amendment

Plaintiffs next contend that the HOA has no authority to enact the 2010 amendment, and therefore it must be declared void. We disagree.

As a preliminary matter, we must determine which act governs the validity of the 2010 amendment, the NCCA, N.C. Gen. Stat. § 47C, or the Unit Ownership Act ("UOA"), N.C. Gen. Stat. § 47A. Leeward Harbors was built in 1985 and its Declaration was created pursuant to the UOA. However, the 2009 judgment indicated that amendments to the Declaration were governed by the NCCA.

In general, when a "prior judgment was based on an erroneous determination of law or fact" it may still be used for purposes of collateral estoppel. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986). Consequently, an erroneous ruling binds courts for *res judicata* and collateral estoppel purposes. *Id.* However, there is no requirement that all future issues between the same parties must be adjudicated in the same manner when *res judicata* and collateral estoppel do not apply.

Since we have determined that neither *res judicata* nor collateral estoppel apply to the second action, the rule stated in *McInnis*, that all erroneous judgments are binding for *res judicata* and collateral estoppel, also does not apply in this situation. The Court is free to use the appropriate statute to determine the validity of the 2010 amendment.

Plaintiffs contend that the NCCA is the appropriate act to use to determine the validity of the 2010 amendment. However, since Leeward Harbor was formed prior to 1 October 1986, its' Declaration was created pursuant to the UOA. While there are specific provisions of the NCCA that automatically apply to condominiums created prior to 1 October 1986, none of those apply in the instant case. However, the NCCA also states:

The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

N.C. Gen. Stat. § 47C-1-102(b) (2011).

This Court has interpreted N.C. Gen. Stat. § 47C-1-102(b) and held that "an owners association may amend its declaration so as to conform to NCCA provisions, even if the amendments would not have been permitted under the UOA." *Ceplecha v. Pine Knoll Townes Phase II Ass'n*, 176 N.C. App. 566, 569-70, 626 S.E.2d 767, 769-70 (2006) (holding that amendment to declarations enacted under the UOA was void where it failed to conform to the applicable NCCA provision). Therefore, when a conflict occurs, the NCCA trumps the UOA even though the condominiums were enacted under the UOA. Nevertheless, amendments to declarations enacted under the UOA must still be "adopted in conformity with the procedures and requirements

specified by those instruments and by [the UOA]." N.C. Gen. Stat. § 47C-1-102(b) (2011).

In the instant case, the original Declaration indicated that "the owner of each unit shall also own...an undivided interest in the common areas and facilities of LEEWARD HARBOR." All marina facilities were designated as common areas. Each owner also had exclusive use of one, specific, boat slip. Here, the 2010 amendment does not alter the percentage of ownership of the marina common area or boat slips. Each owner is still allocated one boat slip and has full use of the marina common area under both the original Declaration and the 2010 amendment.

Since the 2010 amendment maintained equal ownership in the marina facilities, it did not change the allocated interest of a unit. Therefore, the NCCA requirement that 100% of unit owners must approve changes to the allocated interest of a unit does not apply in the instant case.

Since the 2010 amendment does not conflict with the provisions of the NCCA, we must determine if it was enacted in conformity with the provisions of the UOA. The UOA indicates that, "all agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established" by the declaration "shall be

deemed to be binding on all unit owners." N.C. Gen. Stat. § 47A-28 (2011).

Art. IX, Section A of the Declaration requires that once an amendment is proposed, it must be approved by 66% of members owning units in the condominium in order to become effective. Art. IX, Section B states that "no alteration in the percentage of ownership in common areas and facilities appurtenant to each unit...shall be made without the prior written consent of all of the owners of all of the units." Plaintiffs contend that Section B applies, while defendants argue Section A applies. Since the 2010 amendment does not alter the percentage ownership in the common areas and facilities, but rather grants an equal percentage to all owners, Art. IX, Section A of the Declaration applies. Therefore, in order to enact the 2010 amendment, 66% approval was required. The 2010 amendment was approved by members of Leeward Harbor owning 69.44% of the condominium units.

The 2010 amendment meets the requirements set forth in the Declaration and therefore complies with the law of N.C. Gen. Stat. § 47A. Consequently, Leeward Harbor and its members had the authority to enact the 2010 amendment and there is no reason for this Court to reverse the trial court and render it void.

V. Conclusion

Since the court in the first action declared the 1986 amendment was void on the basis that it was not properly recorded, the claims presented by plaintiffs in the second action were not the same as those determined in the first action. Therefore, the trial court correctly held *res judicata* did not apply. Since only some but not all issues in the second action were previously litigated in the first action, collateral estoppel does not apply in the second action. In addition, based on the language of N.C. Gen. Stat. § 47A and the Declaration, the 2010 amendment is valid and the HOA had the authority to enact the amendment. We affirm.

Affirmed.

Judge McGEE and Judge HUNTER, Robert C. concur.

Report per Rule 30(e).