IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-736

Filed: 16 April 2019

Mecklenburg County, No. 17 CVS 8935

SLOK, LLC, Plaintiff,

v.

COURTSIDE CONDOMINIUM OWNERS ASSOCIATION, INC., Defendant.

Appeal by plaintiff from order entered 16 January 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 January 2019.

Scarbrough & Scarbrough, PLLC, by Madeline J. Trilling, for plaintiff-appellant.

Sellers, Ayers, Dortch & Lyons, P.A., by Michelle Massingale Dressler, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Slok, LLC appeals from the trial court's order granting summary judgment in favor of Defendant Courtside Condominium Owners Association, Inc. ("the Association") on Plaintiff's claims for declaratory judgment; breach of contract; unfair trade practices; breach of the covenant of good faith and fair dealing; unjust

enrichment; and rescission, and on the Association's counterclaims for judicial foreclosure, injunctive relief, breach of contract, and declaratory judgment.[1] We affirm in part and vacate in part.

Background

Courtside Condominium ("the Condominium") was created by recordation of Declaration in the Mecklenburg County Registry on 20 February 2006. The Association is a non-profit corporation organized pursuant to Chapter 47C of the North Carolina General Statutes ("the Condominium Act"), and is tasked with maintaining and administering the Condominium.

The Condominium comprises 106 Residential Units and one Commercial Unit. Plaintiff is the current owner of the Condominium's Commercial Unit, which it purchased from Transocean Investments, Inc. ("Transocean") in July 2014. Ms. Mekeisha M. Vicks is Plaintiff's sole member. Ms. Vicks's husband, Mr. Jason Vicks, was formerly Transocean's president and served as its representative on the Condominium's Board of Directors from the time that it purchased the Commercial Unit in November 2007 until August 2012.

Prior to Plaintiff's purchase of the Commercial Unit, the Condominium's Declaration designated the Condominium's "common trash area" as a common

[1] The Association also asserted a counterclaim to recover its attorney's fees spent in defending Plaintiff's "frivolous and malicious" unfair trade practices claim, pursuant to N.C. Gen. Stat. § 75-16.1. The trial court's summary judgment order did not resolve the Association's claim for attorney's fees, instead designating that it "shall be brought on at a later date."

element for all of the units. The Declaration, however, designated the "trash chute connected to the common trash area" as a limited common element for the collective and exclusive use of the Residential Units. In addition, the Declaration obligated the Association to provide for the "maintenance, repair and operation (including collection services) of the common trash facility," with "the Residential Units and Commercial Unit[] . . . each be[ing] assessed for its respective share of the costs associated with such repair, maintenance and operation." The Association would "determine the costs associated with such maintenance and repair activities and specially assess the Residential Units and the Commercial Unit[ ] for each groups [sic] proportionate or actual share (to the extent actual costs can be allocated) of such costs and expenses."

In 2009, Transocean began planning to upfit the Commercial Unit for use as a restaurant, at which point Mr. Vicks informed the Association that the common trash area was inadequate, because it was not easily accessible from the Commercial Unit. Mr. Vicks and the Association agreed that Transocean could construct a new trash room in the Condominium's parking garage for Transocean's sole use ("the Commercial Trash Room"). Accordingly, the Association and Transocean executed an "Amendment to the Declaration of Condominium for Courtside Condominium Reallocating Limited Common Element," which was recorded in the Mecklenburg County Registry on 25 July 2012 ("the Trash Room Amendment"). The Association's

Board of Directors voted to approve the Trash Room Amendment, but it was not presented to the remaining unit owners for approval.

The Trash Room Amendment allocated the new Commercial Trash Room as a limited common element for the exclusive use of the Commercial Unit, and simultaneously "redesignated" the common trash area as a limited common element for the exclusive use of the Residential Units. The Trash Room Amendment provided that the Association would "provide for the maintenance, repair and operation (including collection services)" of the trash rooms pursuant to the following new arrangement:

> [T]he Residential Units and the Commercial Unit shall each be assessed for the costs associated with the repair, maintenance and operation of the trash rooms and facilities allocated to their exclusive use. . . . The Association shall determine the costs associated with such maintenance and repair activities and specifically assess the Commercial Unit for the costs associated with the maintenance of the trash room allocated and designated as a Limited Common Element of the Commercial Unit.

The Association hired a private trash service to provide collection services for the Commercial Trash Room, and assessed the Commercial Unit accordingly.

According to the Association, by 2010, "Jason Vicks and [Transocean] were severely delinquent in the payment of assessments to the Association" for the servicing of the Commercial Trash Room. Collection actions were commenced against Transocean, and in October 2012, Ms. Nia Thomas replaced Mr. Vicks as

Transocean's representative on the Association's Board of Directors. Upon Plaintiff's purchase of the Commercial Unit, Ms. Thomas continued to serve as the Commercial Unit's representative on the Association's Board from 2012 until April 2016, at which point Ms. Vicks was designated as the new Board representative. However, the outstanding assessments had continued to accrue against Plaintiff—totaling $66,833.03 by June 2017—and the Association commenced foreclosure proceedings against the unit. Plaintiff subsequently paid the outstanding assessments in full, and the foreclosure proceeding was dismissed.

In addition to the Commercial Trash Room assessments, Plaintiff had accrued significant fines for violations of certain terms of the Condominium's Declaration. On 10 October 2016, the Association sent Plaintiff a notice of hearing that alleged various violations, including:

> Nuisance-a. Trash—Unable to properly roll in and out trash bins due to furniture being stored in the commercial trash room.

The Executive Board found the violation to exist and required that Plaintiff "remove the furniture and other stored items from the trash room by November 9, 2016 or a fine would be imposed at $100 per day." Plaintiff failed to remove the personal items from the Commercial Trash Room, resulting in fines which were secured by the filing of a Claim of Lien by the Association on 31 August 2017. The fines for the violations totaled $42,500.00 as of January 2018.

On 7 August 2017, Plaintiff commenced the instant action by filing an amended complaint against the Association. Plaintiff alleged that the Association's assessments for servicing the Commercial Trash Room had been "excessive and unnecessary," in that the Association had "unilaterally decided to hire an expensive private trash service instead of utilizing the free service offered by the City of Charlotte." Plaintiff asserted claims for declaratory judgment, breach of contract, and unjust enrichment to that effect, seeking recovery of the assessments that Plaintiff had paid.

Plaintiff also alleged that the Trash Room Amendment itself was void, in that it "reallocate[d] part of the Common Elements in violation of the Defendant Association's governing documents," i.e., without a vote of all members of the Association. Plaintiff further alleged that the Association had "deni[ed] and impair[ed] . . . Plaintiff's rights regarding participation on the Defendant Association's Board" and withheld "access to common areas and mailboxes."

In addition to its claims for breach of contract and unjust enrichment, Plaintiff asserted claims for unfair trade practices pursuant to N.C. Gen. Stat. § 75-1.1, breach of the covenant of good faith and fair dealing, and rescission. Plaintiff's declaratory judgment action sought declarations (1) "that the [Trash Room] Amendment is void"; (2) "that the trash room is a Limited Common Element appurtenant to the Property"; (3) "that [Plaintiff] is entitled to certain participation rights as to voting and

governance within the Defendant Association, and that Plaintiff should not be excluded from holding a seat on the Board"; (4) "that [Plaintiff] is entitled to access the Common Areas within the Defendant Association, including without limitation its mailbox"; and (5) "that [Plaintiff] is entitled to recover monies paid to the Defendant Association for excessive and unnecessary trash service fees."

On 6 September 2017, the Association filed an answer wherein it maintained that it had at all times complied with the relevant provisions of the Declaration, Bylaws, and North Carolina statutes. The Association also asserted counterclaims against Plaintiff for (1) judicial foreclosure on its Claim of Lien for the fines imposed for the Declaration violations; (2) injunctive relief "requiring Plaintiff to cure all Violations found to exist and directing Plaintiff to notify the Association as soon as all Violations have been corrected"; (3) breach of contract for failure to pay the assessed fines related to the violations; (4) attorney's fees accrued in defending Plaintiff's "frivolous and malicious" Chapter 75 claim; and (5) a declaratory judgment that the Association "has not violated the Declaration, Bylaws or the laws of the State of North Carolina with respect to the matters set forth" in Plaintiff's above claims for declaratory judgment. With Plaintiff's consent, on 27 November 2017, the Association amended its answer to include the affirmative defenses of lack of standing, estoppel, and statute of limitations.

On 8 December 2017, the Association filed a motion for summary judgment on both of the parties' claims and counterclaims. The Association attached to its summary judgment motion the transcript of the deposition of Ms. Vicks; the affidavit of Association Vice President Jan Slaven, with accompanying exhibits; and the Association's Requests for Admissions. Plaintiff did not respond in any manner to the Association's counterclaims or motion for summary judgment, nor did it otherwise provide any materials purporting to oppose the Association's motion for summary judgment.

By order entered 16 January 2018, the trial court granted summary judgment on all claims in favor of the Association.[2] Plaintiff filed written notice of appeal on 13 February 2018.

Standard of Review

A trial court's summary judgment ruling is reviewed *de novo*. *Happ v. Creek Pointe Homeowner's Ass'n*, 215 N.C. App. 96, 102, 717 S.E.2d 401, 405 (2011). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "The moving party bears the burden of proving there are no genuine disputes of material fact."

[2] Excluding the Association's claims for attorney's fees.

Happ, 215 N.C. App. at 101, 717 S.E.2d at 404. "If the moving party files papers, including testimonial affidavits which show there is not a triable issue, the opposing party pursuant to Rule 56(e) and (f), must file papers which show there is a triable issue or the moving party will be entitled to summary judgment." *Nye v. Lipton*, 50 N.C. App. 224, 227, 273 S.E.2d 313, 315, *disc. review denied*, 302 N.C. 630, 280 S.E.2d 441 (1981). "The non-moving party 'may not rest upon the mere allegations or denials of his pleading[s], but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' " *Happ*, 215 N.C. App. at 102, 717 S.E.2d at 404-05 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)).

Discussion

The trial court granted summary judgment in favor of the Association as to Plaintiff's claims challenging the validity of the Trash Room Amendment on two grounds: (1) that Plaintiff "is barred from challenging the Trash Room Amendment by N.C.G.S. § 47C-2-117(b)," and (2) that Plaintiff "is estopped from challenging the Trash Room Amendment." The trial court also granted summary judgment in favor of the Association on Plaintiff's claims pertaining to the alleged "excessive and unnecessary" Commercial Trash Room assessments, concluding that the Association "has properly assessed Plaintiff's Commercial Unit in accordance with the Declaration and the Trash Room Amendment." In granting summary judgment in

favor of the Association on its counterclaims, the trial court ordered Plaintiff to remove all personal property from the Commercial Trash Room, concluded that "[t]he fines imposed by [the Association] against Plaintiff are valid and enforceable," and authorized the Association "to proceed with judicial foreclosure of the full amount of the fines levied" in the event that Plaintiff failed, within thirty days, to remove the personal property from the Commercial Trash Room and pay the fines, which the trial court reduced to $27,400.00. Plaintiff maintains that the trial court erred in each of these respects. We address each claim in turn.

I. Estoppel

a. Trash Room Amendment

Plaintiff's amended complaint alleges that the Trash Room Amendment is void in that it was not approved by the requisite number of unit owners, and asserts various claims for relief to that effect, including declaratory judgment, breach of contract, and rescission. The Association argued in its summary judgment motion that Plaintiff "is estopped from challenging the Trash Room Amendment because the Owners of the Commercial Unit have used the [Commercial] Trash Room and received the benefit of the [Commercial] Trash Room since 2010." The trial court

ultimately dismissed Plaintiff's amended complaint, in part, on the ground that Plaintiff "is estopped from challenging the Trash Room Amendment."[3] We agree.

"Broadly speaking, estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004) (citation and quotation marks omitted). Equitable estoppel, which is one of the many interrelated estoppel doctrines, is primarily "designed to promote fairness between the parties." *Id.* at 17, 591 S.E.2d at 881. Our courts have "also recognized that branch of equitable estoppel known as 'quasi-estoppel' or 'estoppel by benefit.' " *Id.* at 18, 591 S.E.2d at 881. The quasi-estoppel doctrine provides that "a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Id.* at 18, 591 S.E.2d at 881-82. "[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions." *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81,

[3] Although the Association did not plead estoppel as an affirmative defense in its initial answer and counterclaims, it is well settled that "[u]npled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer[,] at least where both parties are aware of the defense." *Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E.2d 856, 857-58 (1980), *rev'd on other grounds*, 302 N.C. 437, 276 S.E.2d 325 (1981); *see also Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E.2d 375, 377 (1976) ("[U]npleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment."). The Association raised estoppel as an affirmative defense in its motion for summary judgment. Prior to that, the Association also filed a motion to amend its answer "to include the affirmative defenses of standing, estoppel and statute of limitations," to which Plaintiff consented.

88, 557 S.E.2d 176, 181 (2001), *disc. review denied*, 355 N.C. 283, 560 S.E.2d 795 (2002).

In the instant case, Plaintiff took title to the Commercial Unit with full knowledge of the Trash Room Amendment, including both Plaintiff's obligations and the benefits that it would receive thereunder. Although the original Declaration provided the Commercial Unit with a right to use the common trash area, it was not easily accessible from the Commercial Unit and the sole "trash chute [that] connected to the common trash area" was designated a limited common element to be used "collectively and exclusively" by the Residential Units. The Association thus allowed Transocean to construct the Commercial Trash Room and the two parties executed the Trash Room Amendment, thereby allowing each subsequent owner of the Commercial Unit easy access to trash disposal, which it otherwise would not have. Plaintiff therefore received the benefit of the Trash Room Amendment under its deed from Transocean, and its challenges are inconsistent with that prior acceptance. *Cf. Ocracomax, LLC v. Davis*, 248 N.C. App. 532, 537, 788 S.E.2d 664, 669 (2016) ("The record does not reveal that plaintiff received a benefit under the purchase agreement or that plaintiff is taking a position inconsistent with a prior acceptance of that or any other instrument.").

Accordingly, we affirm the trial court's order granting summary judgment in favor of the Association as to Plaintiff's challenges pertaining to the validity of the Trash Room Amendment.

b. Commercial Trash Room Service Assessments

Next, Plaintiff's amended complaint alleges that the "Association's conduct has resulted in unnecessary expenses for private trash services totaling $85,300.00 from 2008 to 2015." Plaintiff's claims regarding the trash service assessments are based upon its allegation that the Association "unilaterally decided to hire an expensive private trash service instead of utilizing the free service offered by the City of Charlotte."

Initially, we note that Plaintiff offered little to refute the allegations of the Slaven Affidavit, which the Association produced in support of its motion for summary judgment.[4] Plaintiff cites no materials in the record that would contradict the statement in the Slaven Affidavit that "[t]he information available to the Board is that the trash and recyclables from the Commercial Unit are in excess of the [512 gallon per week] limitation[] by the City of Charlotte; thereby requiring the use of a

[4] Plaintiff argues that the Association's affidavits "are chock-full of . . . assertions that are not based upon personal knowledge, or inadmissible hearsay testimony." However, Plaintiff did not object to the affidavits submitted by the Association, and thus the facts set forth therein "were competent evidence to be considered by the trial court in ruling upon the motion[] for summary judgment." *Lindsey v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 436, 405 S.E.2d 803, 805 (1991); *see also Insurance Co. v. Bank of N.C., N.A.*, 36 N.C. App. 18, 26, 244 S.E.2d 264, 269 (1978) ("[A]s is true of other material introduced on a summary judgment motion, . . . otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection.").

private vendor for disposal of such." In addition, Plaintiff did not effectively rebut the allegation of the Slaven Affidavit that "[Plaintiff] has failed to provide the Board with any specific detail regarding the expected trash volume for the [Commercial Unit]; therefore, the Board has been required to estimate the use for purposes of its contract with the vendor." Plaintiff merely pointed to the deposition of Ms. Vicks, wherein she states, "I do not *think* that [the Commercial Unit generated] more than 512 gallons," but "I do not know." (Emphasis added). *See Insurance Co.*, 36 N.C. App. at 24, 244 S.E.2d at 268 ("[W]hen a motion for summary judgment is made and supported as provided by Rule 56, an adverse party['s] . . . response, by affidavits or as otherwise provided in the rule must set forth *specific facts* showing that there is a genuine issue for trial.").

We further conclude that Plaintiff is estopped from challenging the allegedly "excessive and unnecessary" Commercial Trash Room service assessments that accrued between 2008 and 2015. The Slaven Affidavit provided that, through 2015, "[a]s members of the Board of Directors, Jason Vicks and Nia Thomas participated in the budget process through which the . . . Commercial Trash Room expense assessments were set," and that those budgets were approved by either Mr. Vicks or Ms. Thomas during the period in which they represented the Commercial Unit Owner on the Association's Board of Directors. Plaintiff has offered nothing to contradict the fact that the Commercial Unit Owners approved the assessments that Plaintiff now

seeks to invalidate.[5] In light of this unequivocal prior approval, and the benefit that Plaintiff received by virtue of the trash services provided, we agree with the trial court that Plaintiff is estopped from challenging the validity of the assessments. *See Whitacre P'ship*, 358 N.C. at 18, 591 S.E.2d at 881-82; *see also Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998) ("Where there is but one inference that can be drawn from the undisputed facts of a case, the doctrine of equitable estoppel is to be applied by the court."). Thus, the Association was entitled to summary judgment, and the trial court properly dismissed Plaintiff's claims for relief related to the Commercial Trash Room assessments.

II. Plaintiff's Remaining Claims

The remaining claims asserted in Plaintiff's amended complaint relate to the Association's alleged "denial and impairment of Plaintiff's rights regarding participation on the Defendant Association's Board," and the Association's alleged "withholding [of] access to common areas and mailboxes." We conclude that the trial court properly granted summary judgment in favor of the Association as to these claims.

First, Plaintiff's amended complaint alleges that "[d]espite consistent attempts to exercise the rights to participate on the Board . . . , the [Association] refused to

[5] In its brief, Plaintiff contends "that the Association unlawfully deprived . . . it of its rights to participate in the foregoing budget process." However, not only is this contention not supported by the record, but it was not pleaded in Plaintiff's amended complaint as a basis for relief from the Commercial Trash Room assessments.

allow [Ms. Vicks] to have a seat on the Board," and that the Association "has conducted several meetings without alerting [Ms. Vicks] of the time and place." However, the Slaven Affidavit provided that "[i]n April of 2016, Keisha Vicks provided a Corporate Resolution from [Plaintiff] designating her as the corporate representative for the Commercial Unit." According to the Affidavit, "[s]ince providing the Corporate Resolution, Keisha Vicks has been notified of all Board Meetings and able to participate," and she "has been provided notice for the budget meeting each year after the April 2016 corporate resolution." Plaintiff submitted no materials to rebut this assertion. In fact, Ms. Vicks admitted in her deposition that she has been permitted to sit on the Board since she provided the Association with the requisite Corporate Resolution. Therefore, the trial court properly granted summary judgment in favor of the Association as to Plaintiff's claims regarding Board participation.

Lastly, Plaintiff's amended complaint alleges that "[o]n or about November 5, 2015, Plaintiff specifically requested a means of access via key fobs to gain entry to common areas and the mailboxes," but the Association "refused to supply any such means of access to Plaintiff." However, Plaintiff's amended complaint did not specify the common areas to which it was allegedly denied access beyond "the mailboxes." Our review of the record reveals that the only mailbox referenced in the Declaration is "one (1) mailbox facility in the elevator lobby area," which is designated a limited

common element of "the Residential Units collectively and exclusively." Although Plaintiff argues in its brief that "it was denied lawful access to the [Commercial] Trash Room because the Association only allows it access over an easement which it is not lawfully entitled to utilize," the amended complaint makes no reference to any such "easement." In any case, we are unable to discern from the record any support for Plaintiff's assertion that the Association has prevented Plaintiff from accessing the Commercial Trash Room. Accordingly, we conclude that no genuine issue of material fact existed regarding Plaintiff's claims involving the alleged "withholding access to common areas and mailboxes," and the trial court thus properly granted the Association's summary judgment motion on those claims.

III. Counterclaims

The Association asserted counterclaims against Plaintiff for the outstanding fines imposed for Plaintiff's storage of personal property in the Commercial Trash Room, as secured by the 31 August 2017 Claim of Lien. The Association's third counterclaim asserted breach of contract for Plaintiff's failure to pay the fines. Though titled "Judicial Foreclosure," the Association's first counterclaim primarily sought the ordering of an execution sale, pursuant to Section 1-302 and Article 29B of our General Statutes, upon the Association's Claim of Lien "in the amount of the fines actually accrued through the date Final Judgment is entered." In the

alternative, the Association requested an order that the Commercial Unit be sold via judicial sale, pursuant to Article 29A of our General Statutes.

In its summary judgment order, the trial court concluded that "[t]he fines imposed by [the Association] against Plaintiff are valid and enforceable." The trial court ordered:

> 11. The fine imposed against Plaintiff for storing Plaintiff's personal property in the Commercial Trash Room is reduced from $42,500 to $27,400 so long as Plaintiff does the following within thirty days of the execution of this Order: (1) makes full payment to [the Association] in the amount of $27,400; and (2) removes all personal property from the Commercial Trash Room.
>
> 12. In the event Plaintiff does not make full payment to [the Association] in the amount of $27,400; and . . . remove all personal property from the Commercial Trash Room [within thirty days of the execution of this Order], then [the Association] is authorized to proceed with judicial foreclosure of the full amount of the fines levied against Plaintiff.

Were judicial foreclosure to proceed pursuant to paragraph 12 of the summary judgment order, the trial court outlined, in subsections (a)-(h) of paragraph 12, what Plaintiff argues to be an impermissible "hodge-podge of remedies" that "pick[s] and choos[es] provisions from Article 29A and 29B of Chapter 1, power of sale foreclosures under Chapter 45, and even from the [Condominium] Act." In addition, Plaintiff argues that the trial court erred in imposing the fines "because [it] did not violate any provisions of the governing documents." Lastly, Plaintiff maintains that the trial

court's order "is void as a 'conditional' or 'alternative' judgment, because it conditions Plaintiff's obligations on the occurrence or nonoccurrence of some future act . . . and therefore, is not self-executing." We first address the propriety of the fines.

a. The Association's Authority to Levy Fines

Article 3 of the Condominium Act authorizes a condominium association to "levy reasonable fines not to exceed one hundred dollars [per day] . . . for violations of the declaration, bylaws, and rules and regulations of the association," pursuant to the procedures outlined in Section 47C-3-107.1. N.C. Gen. Stat. § 47C-3-102(a)(11).

In the instant case, the Association's Executive Board concluded after its hearing that Plaintiff had committed various violations, as follows:

> Nuisance-a. Trash— Unable to properly roll in and out trash bins due to furniture being stored in the [Commercial Trash Room].
>
> b. Nuisance— Loud partying and music over labor day weekend and over the weekend of October 8th and 9th
>
> c. Signs— Unapproved signs being placed in the windows
>
> Courtside Condominium Declarations state: Article VII Section 7.2 Nuisance: "No obnoxious, offensive, or unlawful activity shall be conducted within any Unit, or on or about the Common Elements, nor shall anything be done thereon or therein which may be or which may become an annoyance or nuisance to the other Owners, or endanger the health and safety of any Owner."

On appeal, Plaintiff only challenges the levying of fines for its storage of personal property in the Commercial Trash Room. Specifically, Plaintiff argues that

the storage of personal property within the Commercial Trash Room can "hardly" be said to "endanger the health and safety of any Owner," or otherwise fall within the Nuisance Restriction contained in Article VII, Section 7.2 of the Declaration. Plaintiff, however, offers no authority in support of its contention that its conduct in blocking entry to the Commercial Trash Room "hardly" constitutes a nuisance as defined in Section 7.2 of the Declaration. We therefore affirm that portion of the trial court's summary judgment order concluding that the fines imposed by the Association "are valid and enforceable."

Also regarding the fines, the Association listed in the record as a proposed issue on appeal, and likewise argues in its brief, that the trial court erred by reducing the amount owed by Plaintiff from $42,500.00 to $27,500.00. This issue, however, is not one that the Association may raise without filing an independent notice of appeal, which the Association did not do.

"Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court *that deprived the appellee of an alternative basis in law for supporting the judgment*, order, or other determination from which appeal has been taken." N.C.R. App. P. 28(c) (emphasis added); *see also* N.C.R. App. P. 10(c). However, "the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different

kind of judgment should have been entered is a cross-appeal." *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002).

Here, the Association's argument that the trial court erred in reducing the fines does not present "an alternative basis in law *for supporting* the judgment," N.C.R. App. P. 28(c) (emphasis added); rather, the Association's argument *attacks* the judgment. Accordingly, because the Association did not file a separate cross-appeal as to this issue, we decline to address its merits. *See Bd. of Dirs. of Queens Towers Homeowners' Ass'n v. Rosenstadt*, 214 N.C. App. 162, 168-69, 714 S.E.2d 765, 770 (2011).

b. Conditional Order

Finally, Plaintiff argues that the remaining portion of the summary judgment order is void as a conditional order, notwithstanding Plaintiff's argument concerning the impermissibility of the procedures outlined therein. We agree.

"A conditional judgment is one whose force depends upon the performance or nonperformance of certain acts to be done in the future by one of the parties . . . ." *Hagedorn v. Hagedorn*, 210 N.C. 164, 165, 185 S.E. 768, 769 (1936). Because such orders are "not self-executing," they are void. *Cassidy v. Cheek*, 308 N.C. 670, 673-74, 303 S.E.2d 792, 795 (1983).

In the instant case, paragraphs 11 and 12 of the summary judgment order, which reduce the fines from $42,500.00 to $27,400.00 and authorize a "judicial

foreclosure," are void in that they are conditioned upon Plaintiff's failure to pay the Association and remove all personal property from the Commercial Trash Room within thirty days of the order's entry. *See, e.g.*, *id.* ("[T]he order of [the trial judge] was dependent upon plaintiff's failing to produce the discovery materials previously ordered. The order is not self-executing. It is, therefore, conditional and void.").

Accordingly, we vacate those portions of the trial court's order. The matter is remanded for further disposition on the Association's counterclaims for the unpaid fines. The trial court may hear additional arguments on remand in its discretion.

Conclusion

We affirm those portions of the trial court's summary judgment order dismissing each of Plaintiff's claims against the Association, ordering Plaintiff to remove all personal property from the Commercial Trash Room, and concluding that the Association's fines against Plaintiff are valid and enforceable.

However, we vacate those portions of the order that are conditioned upon Plaintiff's failure to pay the reduced fine of $27,400.00 to the Association and to remove all personal property from the Commercial Trash Room within thirty days, and remand this matter to the trial court.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).