IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

Shelly S. Armstrong Payer, Plaintiff

v. Case No.: II-CA-88-M

David K. Chew and Barbara S. Chew, and Stirrup Key Homeowners Association, Inc., a Florida not for Profit Corporation,
Defendants
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ORDER GRANTING THE INTERVENORICOUNTER-DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING THE PLAINTIFF'S MOTION FOR PARTIAL **SUMMARY JUDGMMENT AGAINST THE CHEWS**

The Intervenor/Counter-defendants having moved for final summary judgment against the Plaintiff, and the Plaintiff having moved for partial summary judgment against David and Barbara Chew, the Court, having examined the record, the applicable law, and being otherwise informed in the premises, finds as follows:

This litigation is a result of a dispute between the Stirrup Key Homeowners Association, Inc., joined with David and Barbara Chew, two Association members, and Shelly S. Armstrong Payer, another member, Stirrup Key Subdivision, situated in Marathon, Monroe County, was created by the filing of a subdivision plat by William and Joyce Mills. Block "E" of the plat contained a manmade lagoon dedicated by the plat to the non-exclusive use of all owners in the subdivision. The land under the lagoon is owned by the Association. Lots on Block "E" were called "dock lots". Besides the restrictions and dedications in the plat, the subdivision is governed by the Association's Amended Restated Deed Restrictions. The original deed restrictions were amended and restated on May 30, 1996 by the Association's governing body, and were again amended and restated in 2008 by the Association's governing body. Shelly Armstrong Payer purchased subdivision lot 87 and dock lot D-57. The Chews, who own lot 69, and two dock lots, D-55 and D-56, placed a dock on their dock lots. Armstrong successfully brought suit to force the removal of the dock in 2004. In 2005, the Chews once again placed a dock, boat lift, and dolphin piling on their dock lot, this time with the approval of the appropriate Marathon city officials, and the Homeowners Association.

In March of 20 11, Ms. Payer commenced this action to force the Chews to remove the structures from their dock lots, alleging that the structures interfere with her riparian/littoral rights as a homeowner with land abutting the lagoon. The Association successfully moved to intervene. Payer's complaint against the Chews alone, filed on March 18, 2011, petitions for a permanent injunction requiring the Chews to remove the dock and other structures (Count I). In Count II, she alleges a cause of action sounding in trespass. In Count III, sounding in ejectment, she seeks an order awarding her possession of the disputed property and all of her claimed riparian rights. In Count IV, she seeks monetary damages. The Chews' answer included a claim that the relief sought by the Plaintiff was barred by the applicable statute of limitations.

The Association's intervenor complaint prays for a declaratory judgment determining that it owns the disputed property, declaring that the "improvements" installed by the Chews did not violate the Plaintiffs rights, and declaring that the Plaintiff s right to control the disputed property is inferior to that of the Association.

In response to the intervenor complaint, the Plaintiff claims the Association breached its fiduciary duty to homeowners (Court I), and breached its contract with homeowners to enforce deed restrictions (Count II).

Finally, the Association responded to the Plaintiff's two counts alleged, inter alia, by claiming that they are barred by the applicable statute of limitation.

The Association has now moved for final summary judgment. Payer has moved for partial summary judgment against the Chews.

Addressing the Association' motion for summary judgment, it alleges that the statute of limitations barred the action against it because, whether measured from the year 2000, when the original dock was constructed, or from the year 2005, when the replacement dock was constructed, either the statute of limitations of five years for a breach of contract cause of action, or the statute of limitations of four years for a breach of fiduciary obligations, bars both causes of action. The Plaintiff claims the benefit of the discovery doctrine, and contends that the 200S amended and restated deed restrictions was a contract which replaced the earlier deed restrictions.

Regarding the Plaintiffs reliance on the discovery doctrine, that rule provides that a party should not be penalized by the running of a statute of limitations before having the opportunity to discover the actionable conduct. 35 Fla. Jur. 2d Limitations and Laches §5S. She claims that she did not have that opportunity. Florida law, however, does not recognize the discovery rule in the contexts of breach of contract, or breach of fiduciary obligations. *Abbot Laboratories, Inc. v General Elec. Capital,* 765 So.2d 737 (Fla. 5th DCA 2000); *Patten v. Winderman,* 965 So.2d 1222 (Fla. 4th DCA 2007). Moreover, recognition of the discovery rule in this context would be inappropriate. The dock in question has spawned previous litigation. Its existence is readily apparent, and the Plaintiff has been free since the year 2005 to discover if any litigation was warranted. The discovery rule is not intended to protect this Plaintiff.

Regarding the claim that the statute of limitations did not begin to run until 2008, the Plaintiff contends that a prior contract, amended and restated deed restrictions, was replaced in that year by a later contract, amended and restate deed restricts.. The later document speaks of superseding and replacing the prior document as if it never existed.

The court rejects the claim that the cause of action did not accrue until the 2008 document was adopted. When the amended and restated deed restrictions took effect, the Association did not replace and nullify the previous deed restrictions, except as to the Association's and individual landowners' understanding of which the documents governed the Association. The Association did not contract in 2008 to replace and nullify its former contract (essentially a novation), because an entity cannot contract (or novate) with itself *Kumberg v. Kumberg,* 232 Kan. 692 (1983); *Eastman v. Wright,* 23 Mass. 316 (1828); 17A Amjur. Contracts §27. The Association could not agree with itself to vitiate a previous contract to which it was the only party. The alleged breach of contract and breach of fiduciary duty occurred in 2005 while the prior amended and restated deed restrictions were fully valid as a matter of contract law. Therefore, the causes of action for breach of contract and breach of fiduciary duty are barred by the applicable statutes of limitations.

Regarding the Plaintiffs motion for partial summary judgment against the Chews, contending that they are interfering with her littoral rights, she has only the riparian rights granted by the plat, not the more extensive rights afforded by common-law. Though the parties make much of the fact that the Plaintiffs land mayor may not touch the lagoon, the location of the border of the Plaintiffs property is of no moment. The lagoon is an artificial waterway, and, unlike property owners of land abutting natural waterways, those property owners of property abutting artificial waterways are not entitled to common-law riparian rights. *Kirk v. Hoge,* 123 Va. 519 (1918); *Anderson* v. *Bell,* 433 So.2d 1202 (Fla. *1983); Publix Super Markets, Inc.* v. *Pearson,* 315 So.2d 98 (Fla. 2d DCA 1975), except under circumstances not relevant here. In *Kirk,* the Supreme Court of Appeals of Virginia stated the rule as follows at page 121:

> There are some expressions in some of the authorities cited and relied on by appellees (citations omitted), and in other authorities on the subject, to the effect that rights may be acquired by landowners on artificial channels of water courses of which they cannot be deprived; but upon close consideration of such authorities it will be found that the rights which can be so acquired must be by prescription, or by grant, express or implied, and in no other way. We venture to say that no well-considered authority can be found which holds that such rights are natural rights, such as are possessed by a riparian landowner upon the natural course of a flowing stream, or that they can be acquired ----- otherwise than as aforesaid. .

Though *Kirk* concerned abutting property owners of a moving stream, *Anderson* (man-made lake) and *Publix* (water filled, abandoned quarry), *supra,* apply the rule to other artificial waterways. The Plaintiff here acquired her rights, if any, through a grant from the subdivision plat. *Kirk, supra.*

The Plaintiffs motion for partial summary judgment against the Chews is erroneously based on the premise that she is an owner of common-law littoral rights.

Additionally, the Plaintiff is attempting to enforce a covenant restricting land use in a subdivision. The use to which the Plaintiff complains was the Chews' use of the dock so as to violate the Amended and Restated Master Declaration of Restrictions for Stirrup Key, Article VI Section 6.3 and Section 6.10. A five-year statute of limitations applies to such actions. *Fox* v. *Madsen,* 12 So.2d 1261 (Fla. 4th DCA 2009). The dock and related structures were most recently placed in the water in the year 2005. This action was commenced in 2011, and is untimely.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that the Homeowners Association's motion is granted. Plaintiffs motion for partial summary judgment against the Chews is denied.

DONE in chambers in the City of Marathon, Monroe County, this the 27th day of July 2012.

signed: Ruth Becker, Acting Circuit Judge