IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2011-CV-19-A-O
Lower Court Case No.: 2010-SC-2222-O

HIAWASSEE ORLANDO, LLC,

Appellant,

v.

DAVID J. ROSENBERG,

Appellee.
_____/

Appeal from the County Court, for Orange County,
Antoinette D. Plogstedt, County Judge.

Benjamin A. Webster, Esquire, for Appellant.

Derek B. Brett, Esquire, for Appellee.

Before LUBET, MURPHY, O'KANE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT'S FINAL JUDGMENT

Appellant, Hiawassee Orlando, LLC ("Hiawassee") timely appeals the trial court's order of Final Judgment rendered on July 6, 2010 in favor of Appellee, David J. Rosenberg ("Rosenberg"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Facts and Procedural History

As gathered from the court record, in 1990, Rosenberg purchased a home in the Palma Vista subdivision in the Metro West development from J. Paul Construction that had acquired the plot of land from the developer, Debra Inc. Soon thereafter, Rosenberg suggested that Debra Inc. install security gates for the subdivision. However, at that time Debra Inc. declined the suggestion whereupon Rosenberg purchased a similar security system for his own home. Subsequently, in 1993, Debra Inc. decided to go ahead with the installation of a gated security system for the subdivision. Debra Inc. and Rosenberg entered into an agreement for Rosenberg to execute a quitclaim deed, joinder, and consent to Debra Inc. that was needed for installation of the subdivision security system. In exchange, Debra Inc. agreed to reimburse Rosenberg for all costs he incurred as part of his homeowner's assessments in connection with construction and maintenance of the security gates, the sidewalks, and the roads encompassed within the gates. This agreement was memorialized in a letter ("1993 Letter") that was signed by Louis Sybold on what appeared to be MetroWest letterhead. Mr. Sybold's title on the Letter was Executive Director of Construction and Development, but it did not state specifically the entity that he was the director of. The Letter was addressed to Rosenberg and provided the following:

> If you execute the Quit Claim Deed and Joinder and Consent on Tuesday, October 19, 1993, we agree that your consent would be conditioned on the removal of the Palma Vista pavement behind your house and installation of landscaping, both at the expense of MetroWest. Additionally, MetroWest would contribute your share of the additional community association expense associated with the privatization of the roadways, until a transfer of ownership occurs for your lot.
>
> The removal of the pavement at Palma Vista Way would require City of Orlando approval, and our offer is conditioned on their approval.

The terms of the agreement were honored between Rosenberg and Debra Inc. Upon receiving the yearly budget from the homeowner's association ("HOA") and paying his homeowner dues, Rosenberg sent a demand letter to Debra Inc. for reimbursement of the portion of his dues paid related to the subdivision security gates system. Per the demand letter, Debra Inc. reimbursed Rosenberg the requested sum of money.

Throughout the following years the "developer" of MetroWest changed several times. Thus, the ownership of the common areas was conveyed and assignments were executed accordingly. The ownership of the common areas did not revert to the Palma Vista Homeowners Association ("HOA"). Title of the common areas passed from Debra Inc. to Leslie, LLC in 2000, to Alliance, LLC in 2005, and ultimately to Hiawassee in June 2009. According to Rosenberg, each time the developer changed hands, he had to pursue legal remedies to obtain reimbursement of the portion of the HOA dues paid per the 1993 Letter. It is unclear from the record as to the legal remedies Rosenberg pursued except for the default judgment he obtained against Alliance, LLC. After ownership of the common areas was conveyed to Hiawassee, Rosenberg met with the sole proprietor, manager, and registered agent for Hiawassee, Carl Shakarian ("Shakarian"). At the meeting, Shakarian refused to reimburse Rosenberg per the 1993 Letter. Rosenberg then filed a Statement of Claim in the county court to compel payment from Hiawassee.

On June 17, 2010, a non-jury trial was held. On July 6, 2010, the trial court rendered its judgment in favor of Rosenberg and ordered Hiawassee to pay Rosenberg the total amount of $1,900.40 with interest. Following this verdict, Hiawassee filed a motion for rehearing that was denied. On March 14, 2011, Hiawassee filed its notice of appeal and on June 23, 2011 filed its initial brief premised on the contention that the trial court erred as a matter of law by

finding Hiawassee liable under the 1993 Letter. Subsequent to the filing of the notice of appeal, Rosenberg filed his motion to dismiss or quash the appeal that was denied by this Court on July 29, 2011.

Standard of Review

The issue in this appeal is whether the trial court erred in granting the Final Judgment in favor of Rosenberg. The standard of review for final judgment is de novo and the court's actual findings are reviewed to determine whether they are supported by competent substantial evidence. An appellate court will not disturb a final judgment if there is competent substantial evidence to support a ruling on which a judgment is based. *Berges v. Infinity Insurance Co*., 896 So. 2d 665, 676 (Fla. 2004). It is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. Interpretation of a contract is a question of law, and an appellate court may reach a construction contrary to that of the trial court. *Gowni v. Makar*, 940 So. 2d 1226, 1229 (Fla. 5th DCA 2006); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983); *Whitley v. Royal Trails Property Owners' Ass'n, Inc.*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005).

Arguments on Appeal

Hiawassee argues that 1) The trial court incorrectly applied the law by ruling that Hiawassee assumed by assignment the obligations created by the 1993 Letter; 2) The trial court's ruling was not supported by competent substantial evidence showing that Debra Inc. was a party to the 1993 Letter nor that any successor developer, including Hiawassee, assumed any obligations under the Letter; 3) The trial court incorrectly shifted the burden of

proof to Hiawassee by essentially requiring Hiawassee to prove that the Master Declaration of Protective Covenants and Restrictions ("Master Declaration") did not obligate the developer to pay Rosenberg and to prove that Hiawassee had not assumed the obligations of the prior developers; and 4) The trial court abused its discretion by admitting and relying upon inadmissible evidence including inadmissible parole evidence and self-serving hearsay testimony.

Conversely, Rosenberg first renews his motion to quash the appeal. He claims that Hiawassee failed to present any additional grounds upon which to predicate a valid basis for appellate review. Rosenberg argues that Hiawassee filed an appeal in an effort to reargue points already determined by the trial court and that Hiawassee relied upon false premises rejected by the Court. The arguments presented by Rosenberg in his answer brief are: 1) Hiawassee waived its right to review the inclusion of evidence by failing to file proper objections at the trial level; 2) The trial court's ruling was substantiated by extrinsic evidence used in accordance with the parole evidence rule. Specifically, he argues that the 1993 Letter was an agreement made subsequent to the Master Declaration and not subject to the restrictions of the parole evidence rule. The 1993 Letter and Master Declaration both contained vague and ambiguous terms which required extrinsic evidence for proper interpretation by the court; 3) Absent proof of an abuse of discretion, the trial court's ruling must be affirmed; and 4) Hiawassee assumed the liabilities associated with the 1993 Letter through both a novation and an equitable assignment when it acquired control of MetroWest. He argues that extrinsic evidence provided proof of an equitable assignment existing between Hiawassee and Rosenberg.

This Court's Analysis and Findings

At the trial, there was no testimony from Louis Sybold, the person who executed the 1993 Letter. The only testimony provided was from Rosenberg and Shakarian. Both Rosenberg and Shakarian testified that the 1993 Letter was not recorded in the official records. Therefore, the 1993 Letter did not appear in the record chain of title as to the common areas in the Palma Vista subdivision. Further, Shakarian testified that he did not become aware of the 1993 Letter until December of 2009 when Rosenberg demanded payment (after the assignment from Alliance, LLC occurred). The evidence admitted and considered by the trial court included the 1993 Letter and the Assignment and Assumptions of Declarant's Rights and Obligations ("Assignments") between the developers up through the assignment to Hiawassee. However, the Master Declaration was not submitted into evidence and reviewed by the trial court. Therefore, it appears that the trial court's ruling was based upon testimony from Rosenberg and Shakarian, the 1993 Letter, and the Assignments.

Upon conclusion of the trial, the trial court ruled that Hiawassee was liable to Rosenberg per the 1993 Letter and the Assignment from Alliance, LLC to Hiawassee. However, the trial court did acknowledge that the 1993 Letter was not drafted well. The trial court also ruled that the 1993 Letter need not be recorded to be enforceable because it was not a liability running with the land, but instead it was an express agreement to assume liabilities under the terms of the Master Declaration.

Rosenberg cites in his initial brief, *Caulk v. Orange County*, 661 So. 2d 932 (Fla. 5th DCA 1995) where the Fifth District Court of Appeal addressed covenant language in a deed. The Fifth District provided an analysis between real covenants which run with the land binding heirs and assigns of the covenantor and personal covenants which bind only the

covenantor personally. The Fifth District explained and held that:

> A covenant running with the land differs from a personal covenant in that the former concerns the enjoyment of the property conveyed. *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798 (Fla. 3d DCA 1958). A personal covenant is collateral to or is not immediately concerned with the property granted. *Id.* A covenant must have a relation to the land or the interest conveyed in order that a covenant may run with the land. *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 310 (Fla. 2d DCA 1966). The thing required to be done must be something which touches the land, interest, or estate and the occupation, use, or enjoyment of it. *Id.*
>
> The covenant in Caulk's deed to Hibbard is incapable of running with the land. Although the covenant "concerns" the land, it does so only tangentially. Unlike covenants respecting mineral rights and crops, for example, which directly impact the use of the land, the covenant in the instant case has no effect whatever on the land. The only thing the covenant in the instant case really "touches" and "concerns" is the intangible personal property, namely cash, that may be paid by a condemnor.
>
> Further, even if this covenant could run with the land, nothing in the deed suggests it was intended to do so. Rather, the language suggests the opposite. First, the language does not indicate that the obligation is to run with the land, nor does it state that it is binding on heirs and assigns. Second, it refers to the "grantee *herein* ", i.e., Hibbard (emphasis added). Third, the alternative provisions in the covenant sound personal. Under one scenario Caulk was to receive condemnation proceeds, but, under another, Hibbard, the "grantee herein", would receive the proceeds. If this covenant were running with the land, the incongruous result would be that any subsequent purchaser, whose land was fenced in by the government, would have to pay the proceeds of the condemnation to Hibbard.

Caulk at 394.

Applying the analysis in *Caulk* to the instant case, the 1993 Letter appears to be hybrid in nature. Because the Letter provides reimbursement to Rosenberg for a portion of HOA dues and does not directly involve the use or enjoyment of land, the Letter resembles a personal covenant. However, Rosenberg also claims that the assignees who subsequently acquire the common area property originally conveyed by Rosenberg to Debra Inc. are bound by the terms of the 1993 Letter. Therefore, the 1993 Letter also resembles a covenant running

with the land. Further, unlike in *Caulk*, the 1993 Letter was not recorded. Rosenberg argues that the 1993 Letter was a personal debt that did not need to be recorded, but he also argues that the Letter should bind subsequent assignees until he transfers ownership of his home. Rosenberg's arguments contradict each other. Basically, he expects to receive the benefit of binding assignees to the terms of the Letter, like a covenant running with the land, but without complying with the requirement to record it. The trial court concurred with Rosenberg's arguments and ruled that the 1993 Letter was a personal debt, but also ruled that it was an express agreement for assignees to assume liabilities under the terms of the declaration. Further, the trial court ruled that the 1993 Letter did not run with the land thus it need not be recorded to be enforceable against Hiawassee.

The 1993 Letter related to real estate in the Palma Vista subdivision. Rosenberg claimed that the terms of the Letter were intended to endure as long as he retained ownership of his real estate in the subdivision regardless of the changes in ownership by subsequent developers of the common areas. The Assignments between the developers, including the assignment from Alliance, LLC to Hiawassee provided for the assumption of liabilities arising from the Master Declaration. There were no amendments made to the Master Declaration regarding the 1993 Letter nor was the Letter ever recorded in the official public records where it would have become part of the chain of title.

Assuming that Rosenberg's testimony was true as to the terms of the 1993 Letter and its duration, if the 1993 Letter was an express agreement to assume liabilities under the terms of the Master Declaration and to bind successor developers it should have been recorded as is required with covenants running with the land. Thus, although the formalities of a witnessed and notarized document are generally not required for a contract to be enforceable, the 1993

Letter should have been recorded in the official records along with the quitclaim deed, joinder, and consent provide by Rosenberg to Debra inc. or recorded as an amendment to the Master Declaration.

In Shunk v. Palm Beach County, 420 So. 2d 394 (Fla. 4th DCA 1982), the issue involved the enforceability of a contract to provide water and sewer service that was not recorded with the warranty deed and the ownership of the property involved had changed after the contract was entered into.[1] The Fourth District Court of Appeal affirmed the trial court's ruling and held that the issue was one of black letter law. The Court stated:

> Covenants affecting land may also be created by contract between the owner and another without the necessity of a formal deed. But to constitute constructive notice such collateral agreements must be duly recorded." Furthermore, "[t]he weight of authority seems to be that the owner of land is bound by restrictive covenants only if they appear in his own chain of title.

Shunk at 395. (also quoting 7 G. Thompson, *Real Property* §§ 3150 and 3152 (1962). Further, the Fourth District ruled that since the evidence was undisputed that the purported covenant did not appear in the record chain of title, the covenant could not run with the land. *Shunk* at 395-396.

[1] In *Shunk*, Guardian Investment Properties Ltd. owned parcels of real property and a water and sewage treatment plant. In 1969, Guardian sold parcel B of the property to Lillian Porter. As part of the transaction Guardian and Porter entered into a contract whereby Guardian would provide water and sewage service to the Porter's property line. Neither the contract nor an acknowledgment of it was recorded with the deed. Subsequently, in 1971 Guardian sold the remaining property parcel A including the water and sewage treatment plant to Ken Partiss and Jack Steinberg with a contract that they would acknowledge the validity of the provision providing water and sewage service to Porter. Like the Porter contract, the Partiss and Steinberg contract nor acknowledgment of it was recorded with the deed. On November 1, 1973, Porter sold parcel B to Robert Shunk and the deed made no mention of the water and sewer rights. However, a few days after the conveyance occurred, Porter assigned Shunk her rights per the contract with Guardian, but the assignment was not recorded. In April 1977, Shunk conveyed a portion of parcel B to Gary Garrison and again the deed made no mention of the water and sewage rights. In 1977, Partiss and Steinberg's parcel A mortgaged property was foreclosed on and conveyed to the mortgagee, First National Bank of Atlanta that subsequently conveyed the property to Palm Beach County. However, the property conveyed to Palm Beach County did not include the water and sewage treatment plant and there was no mention of the Porter contract. Shunk sued Palm Beach County for specific performance to gain water and sewer rights or alternatively for damages. The court entered a summary judgment in favor of Palm Beach County based upon the failure of the various deeds to mention the water and sewer rights thus precluding as a matter of law a finding of a covenant running with the land.

Conclusion

In the instant case, substantive competent evidence was lacking in support of the trial court's ruling. There was no testimony provided by Mr. Sybold who executed the 1993 Letter nor was the Master Declaration admitted as evidence and reviewed by the trial court. Further, applying *Caulk* and *Shunk*, the trial court erred as to the interpretation and enforceability of the 1993 Letter and by ruling that the obligations under the Letter were assignable to Hiawassee despite that the fact that neither the Letter or an amendment to the Master Declaration pertaining to the Letter was recorded in the official records. Lastly, the findings as to the arguments involving the interpretation and enforceability of the 1993 Letter are dispositive, therefore, it is not necessary that the other arguments in this appeal be addressed herein.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Final Judgment entered on July 6, 2010 is **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion and Rosenberg's renewed motion to quash the appeal is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 13th day of January, 2012.

/S/
MARC L. LUBET
Circuit Judge

/S/
MIKE MURPHY
Circuit Judge

/S/
JULIE H. O'KANE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail to: **Benjamin A. Webster, Esquire**, Morgan & Morgan, P.A., 20 North Orange Avenue, 10th Floor, Orlando, Florida 32801 and **Derek B. Brett, Esquire,** The Brett Law Firm, 231 East Colonial Drive, Orlando, Florida 32801 on this 13th day of January, 2012.

/S/
Judicial Assistant