

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0944

AYMOND DEVELOPMENT, L.L.C.

VERSUS

**HIGHLAND OAKS HOMEOWNERS ASSOCIATION, INC.
AND SUSAN ESTAPA**

Judgment Rendered: February 10, 2012

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2010-15449

The Honorable Martin E. Coady, Judge Presiding

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Inc. and Susan Estapa

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

for Gaidry, J concurs

HUGHES, J.

This is an appeal of a judgment dismissing the plaintiff's action on the basis of res judicata. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

This case arises out of a dispute between a subdivision developer, Aymond Development, L.L.C. ("Aymond Development"), its "member/manager," A. David Aymond,¹ and the homeowners of the Highland Oaks Estates subdivision. The factual history underlying this case was recited by this court in **Highland Oaks Estates Homeowners Association, Inc. v. Estapa**, No. 2009-13799, 2009 WL 6633892 (trial court order) (La. 22nd J.D.C. 10/26/09), affirmed, 2010-0146, pp. 2-3 (La. App. 1 Cir. 6/11/10) (unpublished), 39 So.3d 854 (table), 2010 WL 2342830 (text), writ denied, 2010-2311 (La. 12/10/10), 51 So.3d 730, as follows:

David Aymond is the owner of Aymond Development, which developed Highland Oaks Estates, a residential community in St. Tammany Parish. Highland Oaks Estates is comprised of approximately 84 lots. On October 28, 2003, a document titled "Dedication of Servitudes, Easements and Restrictive Covenants" ("the restrictive covenant document") was filed in the public records of St. Tammany Parish with regard to the 84 lots in Highland Oaks Estates. The restrictive covenant document provided that Aymond Development was developing Highland Oaks Estates and that it had formed or intended to form the HOEHAI [(Highland Oaks Estates Homeowner's Association, Inc.)] as a non-profit corporation for the purpose of carrying out the powers and duties afforded it by the restrictive covenants and dedications contained in the document. With regard to the HOEHAI, Article V of the restrictive covenant document provided as follows:

Section 1. For the purpose of controlling, regulating and maintaining the common facilities for the general use and benefit of all Lot Owners, each and every Lot Owner, by accepting a deed and purchasing a Lot or entering into a contract with regard to any Lot in HIGHLAND OAKS ESTATES does agree to and binds himself to be a Member of and be subject to the obligations and du[l]ly enacted ByLaws and rules, if any, of the Association.

¹ In an affidavit filed in the trial court, A. David Aymond stated that he is "the member/manager of Aymond Development."

The Association is specifically authorized and empowered to assess individual Lot Owners, and to provide for the collection of said assessments in accordance with LSA 9:1145 et seq.

Section 2. Membership. The Association shall have two classes of voting membership:

A) Every person, group of persons, corporation, partnership, trust or other legal entity, or any combination thereof, who becomes a record owner of a fee interest in any Lot by transfer from the Developer which is or becomes subject to this act of dedication shall be a Class A member of the Association. Each Class A member of the Association shall be entitled to one (1) vote for each Lot to which Class A membership is appurtenant, and the vote shall be cast in accordance with the bylaws of the Association.

B) There shall be Eighty-four (84) Class B memberships, all of which shall be issued to the Developer or its nominee or nominees. The Class B members shall be entitled to one (1) vote for each Class B membership so held, however, each Class B membership shall lapse and become a nullity upon the occurrence of any one of the following events:

i) thirty (30) days following the date upon which the total authorized issued and outstanding Class A memberships equal eighty-four (84); or

ii) on January 1, 2015; or

iii) Upon surrender of said Class B memberships by the then holders thereof for cancellation on the books of the Association.

Upon the lapse and/or surrender of all the Class B memberships, as provided for in this Article, the Developer shall continue to be a Class A member of the Association as to each and every Lot in which the Developer holds the interest otherwise required for such Class A membership.

On April 12, 2007, Susan Estapa and her husband purchased a lot in Highland Oaks Estates. There is no dispute that by the end of April 2007, Aymond Development had completed the sales of the 84 lots in Highland Oaks Estates. In April 2008, Susan Estapa was elected president of HOEHAI. On May 15, 2009, a meeting of the HOEHAI was held. Susan Estapa, as president, attended the meeting, as well as Kathleen Piccolo, the vice-president. David Aymond also attended the meeting. According to the minutes of that meeting, David Aymond announced that he was in control of the HOEHAI and

the subdivision and would appoint directors and officers to the HOEHAI at his discretion with no input from the homeowners. Thereafter, he nominated himself and his daughter to the board, and indicated that he wanted Susan Estapa and Kathleen Piccolo to stay involved in the HOEHAI. At a subsequent meeting of the board of directors, David Aymond appointed himself as president of HOEHAI.

Apparently, without the knowledge of or notice to the lot owners in Highland Oaks Estates, on July 19, 2005, Aymond Development filed, with the Secretary of State, the Articles of Incorporation for HOEHAI.^[FNI] Prior to that time, the homeowners association existed and functioned, but was not registered as a legal entity with the Secretary of State.] With regard to membership in HOEHAI, paragraph A of the articles of incorporation (which provided for Class A membership in the HOEHAI), was almost identical to section 2(A) of the restrictive covenant document. However, paragraph B of the articles of incorporation (which provided for Class B membership in the HOEHAI) was vastly different than section 2(B) of the restrictive covenant document. Specifically, paragraph B of the articles of incorporation provided:

B. There shall be two hundred (200) class B memberships, all of which shall be issued to the Developer or its nominee or nominees. The class B members shall be entitled to one (1) vote for each class B membership so held, however, each class B membership shall lapse and become a nullity upon the occurrence of any one of the following events:

(i) On January 1, 2015; or

(ii) Upon surrender of said class B memberships by the then holders thereof for cancellation on the books of the Association.

Thus, the articles of incorporation changed the number of Class B memberships (and votes) to be issued to the developer from eighty-four to two hundred. Additionally, the provisions contained in section 2(B)(i) of the restrictive covenant document, which concerned the lapse and nullification of Class B memberships thirty days following the date upon which the total authorized issued and outstanding Class A memberships equaled eighty-four, was eliminated in its entirety.

As the purported president of HOEHAI, David Aymond demanded that Susan Estapa turn over the corporate checking account to him. However, Susan Estapa refused, contending that she was still the president of HOEHAI. She then moved the funds from that checking account to another bank. David Aymond then instituted this action against Susan Estapa for conversion and sought a preliminary injunction seeking to prohibit Susan Estapa from transferring, moving, or disposing of the assets of HOEHAI. Susan Estapa responded by

filing an answer and a third party demand against Aymond Development and David Aymond for breach of the restrictive covenants, fraud, misrepresentation, unfair trade practices, and defamation. She thereafter filed a motion for summary judgment seeking the dismissal of the suit against her on the basis that David Aymond was not entitled to vote at the May 15, 2009 meeting, (because he had no voting rights after May 2007), that his attempt to take over the board and/or the presidency of HOEHAI was illegal, and that she was still the president, and therefore, the suit brought against her was without authority from the governing body of the HOEHAI and should be dismissed. By judgment signed on October 26, 2009, the trial court granted Susan Estapa's motion for summary judgment and dismissed the suit, thereby rendering the request for preliminary injunction moot. From this judgment, HOEHAI, through its purported president David Aymond, and Aymond Development appeal[ed].

On June 11, 2010, the trial court decision in **Highland Oaks Estates**

Homeowners Association, Inc. v. Estapa was affirmed by this court, which held:

In this case, since the material facts are not in dispute, we look solely to the legal question presented by Susan Estapa's motion for summary judgment, i.e., whether David Aymond and/or Aymond Development was entitled, as a matter of law, to vote at the meeting of the HOEHAI on May 15, 2009. We find that he was not.

* * *

. . . Based on our review of the restrictive covenant document, we find that the intent with regard to membership in the HOEHAI is clear--that each lot owner shall be a Class A member of HOEHAI and shall be entitled to one vote for each lot to which Class A membership is applicable. Additionally, it is clear that Aymond Development, as the developer, was entitled to be issued eighty-four Class B memberships in the HOEHAI and that each of these Class B memberships would lapse and become a nullity upon the following events: (1) 30 days following the date upon which the total authorized issued and outstanding Class A memberships equaled 84; (2) on January 1, 2015; or (3) upon the surrender of the Class B memberships by the then holder for cancellation on the books of the HOEHAI.

According to the affidavit of Susan Estapa, by April 2007, Aymond Development had completed the sales of all 84 lots in Highland Oaks Estates. Thus, by the terms of the restrictive covenant document, Aymond Development's Class B memberships (and its right to vote) lapsed and became null 30 days thereafter (or by May 2007). Accordingly, at the meeting of the HOEHAI on May 15, 2009, neither Aymond Development nor David Aymond held any Class B memberships. As there was no evidence offered to establish that either Aymond Development or David Aymond held any Class A membership in HOEHAI, neither Aymond Development nor David Aymond was entitled to vote at that meeting; therefore, David

Aymond was not entitled to appoint himself to the board of directors of HOEHAI or to appoint himself as its president. Therefore, we find, as did the trial court, that David Aymond was without authority to bring this suit against Susan Estapa on behalf of the HOEHAI.

After a de novo review of the record, we find that the trial court properly granted summary judgment in favor of Susan Estapa, dismissing this suit brought by HOEHAI, through its purported president David Aymond and rendering its request for a preliminary injunction moot.

See Highland Oaks Estates Homeowners Association, Inc. v. Estapa, 2010-0146 at pp. 6-8 (footnote omitted).

Aymond Development filed the instant suit on August 25, 2010, against the Highland Oaks Estates Homeowners Association, Inc. (HOEHAI)² and Susan Estapa, asserting, in summary: that it retains HOEHAI membership rights under the July 19, 2005 Articles of Incorporation (hereinafter “2005 Articles”); that A. David Aymond was duly elected president of the HOEHAI on May 26, 2009; that on or about October 28, 2009 Ms. Estapa, without authority, “purport[ed] to assume the title of President” of the HOEHAI and caused to be filed in the parish public records an amendment of the “Dedication of Servitudes, Easements and Restrictive Covenants” (hereinafter “Restrictive Covenants”) applicable to the subdivision (hereinafter “Estapa Amendment”); that the Estapa Amendment is null and void, as it is in direct contravention of the 2005 Articles, “clouds” the public record, and misrepresents and creates confusion as to voting rights and provisions regulating the HOEHAI; that Ms. Estapa has disseminated falsehoods and misrepresentations about Aymond Development; that the voting rights of Aymond Development have been ignored, requiring a declaration as to these voting interests “in conformity with the [2005] Articles;” and that these actions have caused Aymond Development damages.

² We note that Aymond Development denominated the HOEHAI in his petition and that the exceptions filed by HOEHAI denominated itself as “Highland Oaks Homeowners Association, Inc.,” but that in its brief on appeal the HOEHAI states that it was incorrectly identified as such in the trial court, denominating itself on appeal as “Highland Oaks Estates Homeowners Association, Inc.”

In response to the suit, the defendants filed exceptions of res judicata, no right of action, and no cause of action. After a November 10, 2010 hearing on the defendants' exceptions, the trial court signed a judgment on November 16, 2010, granting the exception of res judicata and dismissing the plaintiff's case; the exceptions of no right of action and no cause of action were held to be moot.³ Aymond Development has appealed this judgment.

On appeal, this court, in reviewing the trial court ruling and record presented on appeal, noted *ex proprio motu*, that the trial court relied upon the prior **Highland Oaks Estates Homeowners Association, Inc. v. Estapa** case as the basis for its ruling on the res judicata exception; however, the **Highland Oaks Estates Homeowners Association, Inc. v. Estapa** trial court record was not included in the appellate record for the current appeal. Accordingly, this court issued an order on November 14, 2011 ordering the trial court to supplement this appellate record with the **Highland Oaks Estates Homeowners Association, Inc. v. Estapa** trial court record. The trial court complied with this court's order, and the record was supplemented on November 30, 2011. Aymond Development unsuccessfully applied to the supreme court for review regarding this supplementation. See **Aymond Development, L.L.C. v. Highland Oaks Homeowners Association, Inc.**, 2011-0944 (La. App. 1 Cir. 11/14/11) (unpublished order), writ denied, 2011-2576 (La. 11/23/11).

³ At the conclusion of the November 10, 2010 hearing, the trial court ruled as follows in open court:

I certainly was in the other, Judge Garcia's court when we reviewed the briefs filed by both counsel, I reviewed the record in the Division "D" case and more importantly I have reviewed the First Circuit opinion and certainly central to their -- in their findings revolved around the ownership of the shares between the parties and all the parties appeared in some capacity within that. That was litigated, that was determined. That's a final judgment. I believe this is a case in which res judicata does apply. I do grant the exception.

A court may take judicial notice of its own proceedings. **Pinegar v. Harris**, 2006-2489, p. 3 (La. App. 1 Cir. 5/4/07), 961 So.2d 1246, 1249.

LAW AND ANALYSIS

On appeal, Aymond Development asserts that the trial court erred in sustaining the exception of res judicata. The doctrine of res judicata is governed by LSA-R.S. 13:4231, which states that “[e]xcept as otherwise provided by law,”⁴ a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: (1) if the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment; (2) if the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action; (3) a judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that

⁴ Some of these exceptions are found in LSA-R.S. 13:4232, which provides:

A. A judgment does not bar another action by the plaintiff:

(1) When exceptional circumstances justify relief from the res judicata effect of the judgment;

(2) When the judgment dismissed the first action without prejudice; or,

(3) When the judgment reserved the right of the plaintiff to bring another action.

B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R.S. 9:2801, the judgment has the effect of res judicata only as to causes of action actually adjudicated.

judgment.⁵

In the suit currently before the court, Aymond Development has raised some issues that were previously litigated between these parties in the prior suit (**Highland Oaks Estates Homeowners Association, Inc. v. Estapa**);⁶ i.e., whether it had the authority to make changes to the Restrictive Covenants applicable to Highland Oaks Estates subdivision, after its Class B membership in the homeowner's association had allegedly expired pursuant to the terms of the Restrictive Covenants, and whether Mr. Aymond was legally elected president of the HOEHAI by Aymond Development's purported casting of 200 votes, which the defendant claimed it did not legally possess. The trial court in **Highland Oaks Estates Homeowners Association, Inc. v. Estapa**, in granting summary judgment in favor of Ms. Estapa in the prior suit,⁷ gave the following reasons in open court:

⁵ Louisiana Revised Statute 13:4231 provides in full:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

⁶ Although Aymond Development contends that the two suits at issue herein did not involve the same parties, we disagree. Even though the prior suit was brought in the name of HOEHAI (by Mr. Aymond, who was purportedly acting as the president of HOEHAI), upon the trial court's finding in **Highland Oaks Estates Homeowners Association, Inc. v. Estapa** that Mr. Aymond was not legally elected president of the HOEHAI (since Aymond Development did not possess the HOEHAI voting rights to so elect Mr. Aymond that it contended it held), appeals from the summary judgment dismissing that suit were brought by Mr. Aymond and Aymond Development. Further, upon this court's affirmance of the trial court decision, this court taxed both Mr. Aymond and Aymond Development with costs. See **Highland Oaks Estates Homeowners Association, Inc. v. Estapa**, 2010-0146 at p. 8.

⁷ A judgment *granting* a motion for summary judgment is a definitive judgment and will support a plea of res judicata. **Ken Lawler Builders, Inc. v. Delaney**, 36,865, p. 3 (La. App. 2 Cir. 3/5/03), 840 So.2d 672, 674; **Young v. Dupre Transport Company**, 97-0591 (La. App. 4 Cir. 10/1/97), 700 So.2d 1156, 1157; **Snipes v. Southern Baptist Hospital**, 243 So.2d 298, 301 (La. App. 4 Cir. 1971). Contrarily, we note that the *denial* of a motion for summary judgment is an interlocutory judgment, which the trial court may change at any time up to final judgment, therefore, an interlocutory judgment cannot serve as the basis for a plea of res judicata. **Saizan v. Pointe Coupee Parish School Board**, 2010-0757, p. 8 (La. App. 1 Cir. 10/29/10), 49 So.3d 559, 563, writ denied, 2010-2599 (La. 1/14/11), 52 So.3d 905.

In reviewing the evidence and the stipulated testimony, I find that third party defendant, Aymond Development, the developer of the subject property herein, did not have the authority to appoint [Mr. Aymond] as an officer and director of the Highland Oaks Estates Homeowner's Association.

The restrictive covenants, which must be strictly construed, expressly set forth the means by which they may be supplemented or amended. The procedure was not followed, either the restrictive covenants or the Articles of Incorporation, and the restrictive covenants have not been amended or supplemented prior to the recent October amendment.

Accordingly, I find that Aymond could not amend or supplement the restrictive covenants by preparing the Articles of Incorporation purport[ing] to give them greater rights than originally set forth in ... those restrictive covenants.

Therefore, the vote taken May 15, 2009, was not proper, and I would therefore grant the Motion for Summary Judgment dismissing this suit and rendering the request for preliminary injunction unnecessary for me to address.

This ruling by the trial court was affirmed by this court. See Highland Oaks Estates Homeowners Association, Inc. v. Estapa, 2010-0146 at pp. 6-8 (footnote omitted).

Therefore, to the extent Aymond Development has raised in this suit any issue or claim based on its retention of HOEHAI membership and accompanying voting rights (including the validity of Mr. Aymond's election as president of the HOEHAI), or the rights to unilaterally amend the Restrictive Covenants affecting the Highland Oaks Estates subdivision, the prior rulings on these matters are res judicata. The decision rendered in **Highland Oaks Estates Homeowners Association, Inc. v. Estapa** established with finality that Aymond Development no longer has any membership or voting rights in HOEHAI, did not legally elect Mr. Aymond as president of the HOEHAI, and did not validly accomplish an amendment of the Highland Oaks Estates subdivision Restrictive Covenants in 2005, as asserted. Thus, the exception of res judicata was properly granted by the trial court in this case as to the following claims currently asserted, and these claims were properly dismissed: that Aymond Development retains HOEHAI membership and voting rights; that A. David Aymond was duly elected president

of the HOEHAI in May, 2009; and that the voting rights of Aymond Development were improperly ignored, requiring a declaration as to these voting interests “in conformity with the [2005] Articles.”

However, we note that some of the claims asserted by Aymond Development in the instant suit arose after the October 26, 2009 trial court judgment in **Highland Oaks Estates Homeowners Association, Inc. v. Estapa** was rendered; these claims were therefore not litigated in that suit: that on or about October 28, 2009 Ms. Estapa, without authority, “purport[ed] to assume the title of President” of the HOEHAI and caused to be filed in the parish public records an amendment of the “Dedication of Servitudes, Easements and Restrictive Covenants” (“Restrictive Covenants”) applicable to the subdivision (hereinafter “Estapa Amendment”); that the Estapa Amendment is null and void, “clouds” the public record, and misrepresents and creates confusion as to voting rights and provisions relative to the HOEHAI; that Ms. Estapa has disseminated falsehoods and misrepresentations about Aymond Development; and that these actions have caused Aymond Development damages. With respect to these claims only, the defendants’ right to assert res judicata was not sufficiently established; therefore, these claims should not have been dismissed on that basis, and we reverse the dismissal of these claims.

CONCLUSION

For the reasons assigned herein, the judgment of trial court is affirmed in part and reversed in part, as stated hereinabove; we remand for further proceedings consistent with the foregoing. Each party is to bear his own costs of this appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.