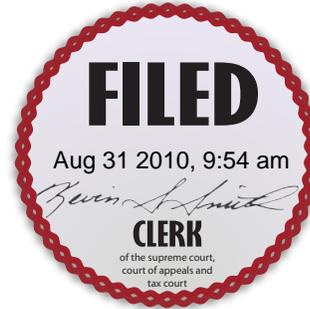


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LOREN D. ALDRICH¹ and JAMES R. MEIER,)
)
Appellants-Defendants/Counter-Plaintiffs,)

vs.)

No. 64A05-1001-CP-25

HOMEOWNERS OF MALLARD'S)
LANDING, INC.,)
)
Appellee-Plaintiff/Counter-Defendant.)

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0111-CP-9864

August 31, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

¹ Aldrich is not pursuing an appeal of the trial court's order and has not filed a brief. Pursuant to Indiana Appellate Rule 17 (A), however, a party of record in the trial court is a party on appeal.

STATEMENT OF THE CASE

Appellant-Defendant/Counter-Plaintiff, James R. Meier (Meier), appeals the trial court's grant of summary judgment in favor of Appellees-Plaintiffs/Counter-Defendants, Home Owners of Mallards Landing, Inc. (Association), and the members of the board, individually, when it decided that Meier had not suffered actual damages on his property.

We affirm in part, reverse in part, and remand with instructions.

ISSUE

Meier raises two issues for our review, which we consolidate and restate as the following single issue: Whether the trial court erred in determining that Meier did not suffer actual damages.

FACTS² AND PROCEDURAL HISTORY

Mallard's Landing (Subdivision) is a residential subdivision located in Porter County, Indiana. This Subdivision is governed by the "Declaration of Covenants and Restrictions for Mallard's Landing" (Restrictive Covenants). When the Subdivision was initially formed, a homeowners association was formed to govern the development; however, that association was administratively dissolved by the secretary of state for failing to file necessary paperwork. Thereafter, various homeowners in the Subdivision created the Association to continue the operations of the original homeowners association.

² We remind the Appellant that the statement of facts should not be argumentative. *See County Line Towing, Inc., v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 289-90 (Ind. Ct. App. 1999), *trans. denied*.

In 1995, Loren Aldrich (Aldrich) made a loan to Meier. As collateral for the loan, Meier conveyed to Aldrich Lots 40 and 51, (collectively, the Lots), which were vacant and located in the Subdivision. Sometime after Aldrich obtained ownership of the Lots, he began receiving maintenance fees from the Association for failing to mow the grass on the Lots. In an effort to collect nonpayment of dues and for the costs incurred in mowing, the Association filed and recorded notices of “Assessment Liens” on the Lots. (Appellant’s App. pp. 22-24). Between 1999 through 2001, the Association filed six liens against the Lots for a total of \$9,000.28. The liens were recorded on June 30, 1999; September 13, 2000; and July 12, 2001. At the time the liens were recorded, Aldrich held title to the Lots. As a result of the liens, on July 22, 2001, Aldrich conveyed ownership of the Lots back to Meier.

On November 27, 2001, the Association filed a complaint to foreclose the liens against the Lots, naming Aldrich as the owner. Upon learning of the conveyance of the Lots to Meier, the complaint was later amended to include Meier as a defendant. In the complaint, the Association alleged that Aldrich and Meier failed to pay the assessments imposed on the Lots. On January 28, 2002, Aldrich and Meier filed a counterclaim and third-party claim challenging the validity of the formation of the Association and the current and acting directors of the Association: Sherri Harbrecht, Brian Cload, and Teodoro Gutierrez. The counterclaim alleged fraud, conspiracy to commit fraud, and slander of title.

On October 10, 2003, the Association filed a motion for partial summary judgment, which was denied by the trial court on March 4, 2004. On December 21, 2005, the Association filed a second motion for partial summary judgment on the issue that the

Association was the legally constituted and validly existing homeowners association under the Restrictive Covenants for the Subdivision and had the authority to act regarding all matters delegated to the Association by the Restrictive Covenants. On January 23, 2006, Meier filed a cross motion and response to the Association's second motion for partial summary judgment and claimed that the Association was not validly formed. On May 11, 2006, the trial court held a hearing on the motions and subsequently denied both motions on August 24, 2006, but stated that with respect to Meier's motion with respect to the Association's validity, "that there are genuine issues of material fact regarding [Meier's] motion which precludes the granting of that motion." (Appellant's App. p. 232).

On December 26, 2008, the Association filed a motion for summary judgment claiming that Meier had not incurred or suffered actual damages on the Lots arising out of his previous allegations. On November 5, 2009, the trial court held a hearing on the motion and on November 13, 2009, the trial court entered an Order granting the Association's motion. On December 11, 2009, Meier filed a motion to correct error, which the trial court denied on December 18, 2009.

Meier now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Summary Judgment

This cause comes before this court as an appeal from a grant of summary judgment. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In

reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008). Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* at 608. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claims. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id.*

II. *Damages*

Meier asserts that the trial court erred in finding that there were no genuine issues of material fact as to whether he suffered damages. Specifically, he argues that Lot 40 suffered water damages due to actions of the Association and that because the Association was improperly formed, it did not have the authority to place liens on Lots, which have rendered his property unmarketable.

A. Drainage System

Meier contends that the trial court erred in finding that he had not suffered water damages on Lot 40. Specifically, he argues that due to actions of the Association, Lot 40 suffered water damage from an adjacent pond and is currently unbuildable.

In cases of injury to real property, the measure of damages depends on whether the injury is temporary or permanent. *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89, 91 (Ind. Ct. App. 1995). Permanent injury to unimproved land occurs where “the cost of restoration exceeds the market value . . . prior to injury.” *Id.* If the injury is permanent, the measure of damages is limited to the difference between the fair market value of the property before and after the injury, based on the rationale that “economic waste” results when restoration costs exceed the economic benefit. *Id.* at 91-92. For a temporary injury the proper measure of damages is the cost of restoration. *Id.* at 92.

Meier testified in his deposition that Lot 40 is roughly an “acre and three quarters,” and that when he acquired the property, “twenty percent of it [was] wetland,” rendering that area of the Lot unbuildable. (Appellant’s App. p. 273). He claims that the Association failed to properly maintain flood control and the drainage system, and, as a result, water now backs up 50 feet onto Lot 40 making it impossible to build a house on the Lot.

We find that Meier failed to prove permanent injury to Lot 40. First, the designated evidence reflects that when Meier originally obtained the Lots, he stated that they were each worth somewhere between \$20,000 and \$30,000. When Meier initially put the Lots for sale, he received offers from buyers in that price range. When asked how much the Lots are

currently worth, Meier stated “I haven’t had them appraised.” (Appellant’s App. p. 272). However, he went on to admit that if he were to sell the Lots now, he would ask \$30,000 for each Lot. Based on his statements, any alleged decrease in the value of the property is purely speculative. As such, Meier has not demonstrated permanent damages.

With respect to temporary injury, which is measured by the cost of restoration, when asked whether he has incurred any expenses to repair damages caused on Lot 40, Meier stated, “I can say no because I haven’t done anything on the [L]ots[.]” (Appellant’s App. p. 274). Meier has not actually incurred repair costs; thus, he cannot claim temporary damages. In sum, Meier has failed to prove both permanent and temporary injury to the Lots.

B. *Marketability of Title*

Meier also argues that the liens, totaling over \$19,000, were improperly filed by the Association, which did not have the authority to do so, and have rendered his Lots unmarketable. We have previously stated that a “title ‘which has no defects of a serious nature, and none which affect the possessory title of the owner, ought to be adjudged marketable.’” *Staley v. Stephens*, 404 N.E.2d 633, 635 (Ind. Ct. App. 1980) (quoting *Kenefick v. Shumaker*, 64 Ind.App. 552, 565, 116 N.E.2d 319, 323 (1917)). We have also noted that this traditional formulation of marketable title also includes that “a purchaser will ‘not [be] bound to accept a doubtful title, or one that would likely be involved in litigation,’” qualifying this to mean not any litigation, but rather only litigation “arising out of problems of unclear title.” *Humphries v. Ables*, 789 N.E.2d 1025, 1033 (Ind. Ct. App. 2003) (quoting *Staley*, 404 N.E.2d at 635).

Because the trial court determined that there were genuine issues of material fact with respect to whether the Association is a legally and validly existing homeowners association under the Restrictive Covenants of the Subdivision, we cannot determine whether Meier is entitled to damages for unmarketable title. We find that the trial court erred in granting the Association's summary judgment, as the preliminary issue in this case is determining whether the Association was validly formed. Consequently, after the trial court has made this determination, it can then decide whether certain damages are appropriate.

CONCLUSION

Based on the foregoing, we find that the trial court erred in granting the Association's summary judgment without first determining the validity of the Association's formation.

Affirmed in part, reversed in part, and remanded with instructions.

KIRSCH, J., and BAILEY, J., concur.