

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY,
FLORIDA

PICKETT DOWNS UNIT IV
HOMEOWNER'S ASSOCIATION,
INC.,

CASE NO.: 2011-CA-004399

Plaintiff,

vs.

STUART W. OLSON,

Defendant.

_____ /

**MOTION FOR PROCEEDINGS SUPPLEMENTARY
AND THE APPOINTMENT OF A POST-JUDGMENT RECEIVER
BY DEFENDANT / JUDGMENT CREDITOR, STUART W. OLSON**

DEFENDANT / JUDGMENT CREDITOR, STUART W. OLSON (hereinafter "OLSON") hereby seeks proceedings supplementary and the appointment of a receiver to manage the affairs of the plaintiff, PICKETT DOWNS UNIT IV HOMEOWNERS ASSOCIATION, INC. (hereinafter the "ASSOCIATION") for purposes of satisfying the current, outstanding judgment in favor of OLSON and against the ASSOCIATION, and as grounds therefore state as follows:

I. INTRODUCTION

1. The ASSOCIATION is a Florida corporation, not-for-profit, operating as a homeowner association pursuant to Chapter 720, Florida Statutes. The ASSOCIATION is governed by that certain set of "Covenants and Restrictions" recorded December 17, 1986, in O.R. Book 1799, page 1087, Public Records of Seminole County, Florida (hereinafter the "Declaration"). Said Declaration was revitalized

and preserved pursuant to that certain "Affidavit of Compliance" recorded May 31, 2016, in O.R. Book 8697, page 1542 of the Public Records of Seminole County, Florida.

2. Said ASSOCIATION manages that certain platted residential subdivision known as Pickett Downs Unit IV comprised of 88 lots whose owners are mandatory members of the ASSOCIATION pursuant to the Declaration and who are further obligated to pay annual assessments to the ASSOCIATION which, if unpaid, constitute a lien on the lot of any owner so delinquent. See §720.301(9), Florida Statutes.

3. The ASSOCIATION levies an annual assessment against its members on the first day of every year. The owners have a thirty (30) day grace period to pay the annual assessment. The ASSOCIATION levied an annual assessment for 2018 in the amount of \$399.00 per lot, for a budget of \$35,112.50.

4. The only property owned by the ASSOCIATION is Tract "C" - a designated drainage feature found on the plat for Pickett Downs Unit IV. This tract is a designated drainage feature by the St. Johns River Water Management District ("SJRWMD") and is without marketable value. The ASSOCIATION's budget is mainly devoted to maintenance, repair and replacement of roadway and drainage easements, which easements are located on individual lots. The ASSOCIATION does not own any roadways or drainage features (other than Tract "C") but, rather, is charged, pursuant to the Declaration, with the duty to maintain, repair and replace same through the levy of mandatory assessments.

5. The ASSOCIATION sued Mr. OLSON on November 7, 2011, to cause the removal of a buried corrugated steel culvert running along the 150' length of his front yard parallel to the adjacent roadway and restore a ditch which had been there before. Mr. OLSON had leveled off this ditch and buried the culvert at issue back in March 1996.

6. Mr. OLSON prevailed at trial with the rendering of the this court's Final Judgment on October 8, 2015 (Docket #152). However, this Court initially refused to award prevailing party attorney fees or costs to either party. On appeal, Mr. OLSON again prevailed, with the 5th DCA ordering this Court to award Mr. OLSON his reasonable attorney fees and costs incurred both in the lower court and on appeal (Docket #414).

7. This Court, thereafter, rendered its "Final Judgment Awarding Defendant Trial Court and Appellate Court Attorney Fees and Costs" on August 19, 2017 (Docket #426; hereinafter the "Final Judgment") awarding OLSON reasonable attorney fees and costs totaling **\$238,499.70**, plus interest at prevailing rates. A certified copy of said Final Judgment was recorded September 29, 2017, in O.R Book 8997, page 354, Public Records of Seminole County, Florida.

8. Effective January 1, 2018, the prevailing interest rate for civil judgments in Florida is 5.53%. Interest is accruing on the Final Judgment at the rate of \$36.13 per day (\$13,189.60 per year).

9. Mr. OLSON, as judgment creditor, possesses a Writ of

Execution which remains unsatisfied. He filed a "Notice of Filing Affidavit by Counsel for Judgment Creditor to Initiate Proceedings Supplementary" on December 22, 2017, and attached thereto said unsatisfied Writ of Execution.

10. To date, despite recently having levied its annual assessment for 2018, the ASSOCIATION has paid nothing toward satisfying said Final Judgment (other than a credit due to the ASSOCIATION for Mr. OLSON's 2017 and 2018 annual assessments, which Mr. OLSON has no intention of paying given the magnitude of the debt owed to him).

11. Moreover, it appears unlikely that the ASSOCIATION, using the powers at its disposal, will ever satisfy said judgment. Even assuming that the current judgment rate of interest (5.53%) remains constant for the next several years, and further assuming that the entire budget of the ASSOCIATION were to be devoted solely to paying the outstanding judgment, it would take nine (9) years, and cost the ASSOCIATION some \$50,685.00 in interest, for the Final Judgment to be paid off.

12. Much more likely, given (i) expected increases in judgment interest rates, (ii) the impossibility of the ASSOCIATION devoting its entire budget for this purpose, and (iii) the likelihood that the ASSOCIATION will never fully fund any annual budget, it will take 15 or 20 years for the ASSOCIATION to satisfy said Final Judgment, at a cost of tens of thousands of dollars of interest and long term, constant disruption of its budget.

13. For these reasons, the appointment of a receiver

authorized to (i) levy and collect a special assessment, or series of such assessments, for purposes of satisfying the outstanding Final Judgment; (ii) levy and collect sufficient assessments to manage the day-to-day affairs of the ASSOCIATION; and (iii) paying a reasonable fee to the receiver, is critically necessary under these circumstances.

II. LEGAL ARGUMENT

A. OLSON IS STATUTORILY ENTITLED TO THE APPOINTMENT OF A RECEIVER.

14. Mr. OLSON is entitled to proceedings supplementary to the rendering of the Final Judgment in accordance with §56.29, Florida Statutes, which states as follows:

(1) When any judgment creditor holds an unsatisfied judgment or judgment lien obtained under chapter 55, the judgment creditor may file a motion and an affidavit so stating, identifying, if applicable, the issuing court, the case number, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, and thereupon the judgment creditor is entitled to these proceedings supplementary to execution.

§56.29(1), Florida Statutes.

15. Mr. OLSON's judgment creditor's affidavit, filed in this cause December 22, 2017, satisfies the requirements of §56.29(1), Florida Statutes. As a judgment creditor holding an unsatisfied Writ of Execution, Mr. OLSON has an absolute right to these proceeding supplementary. *See, e.g., Bleidt v. Lobato*, 664 So. 2d 1074, 1075 (Fla. 5th DCA 1995) (judgment creditor need only possess a writ of execution which remains unsatisfied in order to be entitled to proceedings supplementary).

16. Mr. OLSON is further entitled to appointment of a

receiver. §56.10, Florida Statutes, states as follows:

If an execution cannot be satisfied in whole or in part for lack of property of the corporate judgment debtor subject to levy and sale, on motion of the judgment creditor the circuit court in chancery within whose circuit such corporate judgment debtor is or has been doing business, or in which any of its effects are found, may sequester the property, things in action, goods and chattels of the corporate judgment debtor for the purpose of enforcing the judgment, and may appoint a receiver for the corporate judgment debtor. A receiver so appointed is subject to the rules prescribed by law for receivers of the property of other judgment debtors. His or her power shall extend throughout the state.

§56.10, Florida Statutes.

17. Authority for the appointment of a receiver is also found in Chapter 617, the not-for-profit corporations act, as follows:

(2) The court may appoint a natural person or a corporation authorized to act as a receiver or custodian. The corporation may be a domestic corporation or a foreign corporation authorized to transact business in this state. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(a) The receiver:

1. May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and
2. May sue and defend in his or her own name as receiver of the corporation in all courts of this state.

(b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its members and creditors.

§617.1432(2) & (3), Florida Statutes.

18. "[A]fter the entry of a final judgment, the considerations dictating a cautious approach to the appointment of a receiver may carry less weight.

'The reasons for arguing against a receiver have disappeared. After all, the judgment creditor can now simply send the sheriff out to the judgment debtor's business with the unsatisfied writ of execution and levy against all property of the judgment debtor in sight and, thereby, effectively put the debtor out of business. In this circumstance, where the judgment creditor elects the less drastic remedy of a receiver to take charge of the debtor's accounts receivable, the debtor can hardly be heard to argue that the receiver is more harsh than the levy.'

U.S. Bank Nat. Ass'n v. Cramer, 113 So. 3d 1020, 1023 (Fla. 2d DCA 2013), quoting *Warshall v. Price*, 617 So.2d 751, 752 (Fla. 4th DCA 1993) (judgment creditor not required to show exigent circumstances to support request for appointment of receiver; unsatisfied writ of execution was all the judgment creditor needed to be entitled to the appointment of a receiver).

19. As noted above, the ASSOCIATION does not own real or personal property subject to levy. Moreover, it is charged with the important task of maintaining subdivision infrastructure, including roadways and drainage easements. With judgment interest rates likely to escalate over time, it is critically important that the ASSOCIATION avoid unnecessary interest charges by empowering a receiver to levy assessments against the members of the ASSOCIATION sufficient to satisfy the Final Judgment as expeditiously as possible.

20. For his part, after years of onerous litigation, Mr. OLSON is entitled to satisfaction of the Final Judgment expeditiously, and without any further delay.

B. THIS COURT HAS INHERENT POWER TO AUTHORIZE THE RECEIVER TO LEVY ASSESSMENTS AGAINST THE MEMBERS SUFFICIENT TO SATISFY THE FINAL JUDGMENT.

21. "A member [of a not-for-profit corporation] may become liable to the corporation for dues, assessments, or fees as provided by law." §617.0604(2), Florida Statutes.

22. In this instance, each member of the ASSOCIATION is liable for his or her proportionate share of the Final Judgment (except Mr. OLSON who, pursuant to paragraph 11 of the Final Judgment, is exempted from payment of any portion of said judgment "through levy of assessments by plaintiff").

23. The ASSOCIATION is specifically empowered to levy assessments pursuant to Article IV of the Declaration, and further empowered, as necessary, to levy special assessments and/or adopt an amended budget to pay common expenses such as judgments rendered against the ASSOCIATION. *See, e.g., Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So. 2d 4, 5-6 (Fla. 1994)* (condominium association may enforce a special assessment imposed to pay judgment, attorney fees and costs incurred in connection with a lawsuit brought by unit owners against the association which the association lost).

24. Any owner complaining that it was improvident, or even reckless, for the ASSOCIATION file suit over a 15-year old improvement to Mr. OLSON's property is not absolved from liability to pay his or her share of common expenses arising from the unsurprising, adverse result. *Id; see, also, Coral Way Condo. Investments, Inc. v. 21/22 Condo. Ass'n, Inc., 66 So. 3d 1038 (Fla.*

3d DCA 2011) (allegation that special assessment would not have been necessary were it not for association's breach of fiduciary duty was not a defense to owner's obligation to still pay the special assessment).

“[I]f the officers or directors of an association act in an unauthorized manner, the unit owners should seek a remedy through elections or, if factually supported, in an action for breach of fiduciary duty.” *Id.* Thus, ... although allegations relating to [improprieties of] the Association are the proper subject of an independent, affirmative claim for breach of fiduciary duty against the Association, those allegations are not a valid defense or avoidance to payment of the special assessment.”

Id., quoting *Ocean Trail Unit Owners Ass'n, Inc. v. Mead*, 650 So. 2d 4, 5-6 (Fla. 1994).

25. In this case, the Final Judgment rendered herein is a valid common expense of the ASSOCIATION, for which the members are liable. Such members may seek independent recourse against the ASSOCIATION, and/or its principals and agents, based on matters leading up to the rendering of the adverse Final Judgment, but they are nevertheless independently obligated to pay assessments levied for purposes of satisfying same.

26. The ASSOCIATION, for its part, acting through its board, has obdurately refused to address satisfaction of the Final Judgment, even after collecting the annual assessment which came due for 2018.

27. Under these circumstances, the Court is empowered to appoint a receiver and direct same, while under the supervision and guidance of the Court, to manage the affairs of the ASSOCIATION levy sufficient assessments against the members of the ASSOCIATION

so as to satisfy said Final Judgment in the most efficient and expeditious manner possible.

28. Mr. OLSON also requests, either in the form of a supplemental final judgment or payment directed by the receiver, reimbursement of his reasonable attorney fees and costs incurred in bringing the instant application.

WHEREFORE, defendant OLSON, as judgment creditor, respectfully requests that the Court appoint a receiver (to be determined) empowered by the Circuit Court to manage the ASSOCIATION's affairs for purposes of levying sufficient assessments against the members of the ASSOCIATION to (i) satisfy in full, as soon as possible, the outstanding Final Judgment and any supplemental judgment(s); (ii) manage the affairs of the ASSOCIATION; and (iii) pay a reasonable fee for the receiver's services, and that the Court award Mr. OLSON his costs and reasonable attorney fees in seeking the appointment of a receiver in the form of a supplemental judgment awarding same, and that the Court afford such other and further relief as it deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 21, 2018, I electronically filed the foregoing with The Florida Courts E-Filing Portal by using the ECF system. A true and correct copy was delivered via E-Mail to: Theodore D. Estes, Esq. (tdestes@divineestes.com,

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