



## Confirming a Relative Nullity: The Significance of “Subject to” Language

*Cusimano v. Port Esplanade Condominium Assn.*, 10-0477 (La. App. 4 Cir. 1/12/11), \_\_\_ So.3d \_\_\_.

Plaintiffs filed suit to rescind an amendment to the condominium declarations that had been enacted and publicly recorded years before they purchased units in the condominium regime. In 2002, a condominium association had adopted an amendment to the condominium declarations by a vote of 69.96 percent of the ownership interests that, among other things, re-designated certain common elements as the limited common elements of a group of units. The amendment was then recorded in the public records. The Hardcastle Trust, the plaintiffs’ common predecessor-in-title, owned the remaining 30.04 percent ownership interests but did not consent to the amendment.

Subsequently, the Trust transferred its ownership interest to a third party, and that transfer was expressly “made, executed and accepted subject to” the publicly recorded amendment. Between 2005 and 2008, plaintiffs purchased their respective units from the third party. Again, each of the plaintiffs’ acts of sale was made, executed and accepted “subject to” the publicly recorded amendment.

Despite this language, plaintiffs later

filed suit to rescind the amendment, asserting that it was invalid because such a change in ownership of the common elements required the unanimity of all unit owners. The association argued that the amendment was valid because (1) the declaration requires a vote of only 66 percent of the ownership interests to adopt an amendment; or, alternatively, (2) the amendment was a relative nullity that was confirmed by the terms of the Trust’s sale to the third party and, in due course, each plaintiff.

Both parties moved for summary judgment. The district court found the amendment to be valid, granted summary judgment in favor of the association and dismissed the plaintiffs’ suit with prejudice. On appeal, the 4th Circuit affirmed the dismissal.

The court first addressed the legal and conventional requirements for transferring or re-designating common elements to limited common elements in a Louisiana condominium regime. Citing Professor Yiannopoulos, the court stated that each owner of an “individual unit has an undivided interest in the common elements, which is a right of co-ownership.” These common elements are held in indivision by all of the condo unit owners, and use and management of common elements are to be determined by agreement of all the co-owners. Based on these precepts, the court held that re-designation of common elements to limited common elements would deprive a co-owner in indivision of his right of use; thus, unanimous consent is required to transfer or re-designate the common elements.

Turning to the issue of whether the amendment was adopted with the requisite unanimity, the court characterized the amendment as a relative nullity under La. Civ.C. arts. 2030 and 2031. The

amendment, as adopted, violated a rule intended for the protection of a private party, *i.e.*, the Trust’s consent to the amendment and transfer of its ownership interest in the common elements. Because the amendment was only relatively null, the Trust could expressly or tacitly confirm it under La. Civ.C. art. 1842.

The court held that when the Trust sold its interest to the third party, it expressly and validly confirmed the publicly recorded amendment by conditioning the sale on the “made, executed and accepted subject to” language in the act of sale. The court reviewed controlling cases on the binding effect of the “subject to” language and explained that the Trust’s inclusion of this language in the act of sale cured the deficiency:

[T]he Trust’s express stipulation that its sale to Mr. Wilkinson was “made, executed and accepted subject to” the Second Amendment constitutes the Trust’s confirmation of the Second Amendment — supplying the requisite unanimity of consent for this change. The effect of the Trust’s confirmation is retroactive to the date of the adoption of the Second Amendment...

Consequently, the amendment, having been validly confirmed, was binding and enforceable with respect to the immovable property, the third party and each of his successors-in-title, the plaintiffs.

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