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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA
CIVIL DIVISION

ESCALANTE-TARPON COVE LIMITED
PARTNERSHIP, a Florida limited partnership,

Plaintiff,

Case No. 07-4868-CA

vs.

WIGGINS BAY FOUNDATION, INC., a Florida not-for-profit corporation,

Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court on November 12, 2009, upon ESCALANTE-TARPON COVE LIMITED PARTNERSHIP'S ("Escalante") Motion for Summary Judgment (the "Motion"). The Court, having reviewed (i) the Motion and Exhibits, (ii) Defendant's Response to Plaintiff's Motion, and (iii) Plaintiff's Answer to Defendant's Response, having heard and considered the arguments of counsel and being otherwise duly advised with respect to this matter, FINDS as follows:

1. The Assignment, dated February 12, 1986, recorded at O.R. 1600, Page 2261, as such Assignment was amended and restated by the Amended Assignment, dated to be effective as of February 12, 1986, recorded at O.R. 1643, Page 561 (the Assignment and Amended Assignment together referred to herein as the "Assignment") is a valid exercise by WBA of the rights and powers reserved to Declarant under Section 2.06 of the Wiggins Bay Declaration of Covenants, recorded in the Official Records of Collier County, Florida at O.R. 1088, Pages

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1536-1560¹ (referred to hereinafter as the "Declaration") and is a valid assignment of rights under Florida law.

2. The Assignment is a valid exercise by WBA of the rights and powers reserved to Declarant under Section 7.06 of the Declaration and does not "... substantially impair the Wiggins Bay "General Development Plan", defined in Declaration Section 1.09 as "... Declarant's plan of Wiggins Bay as it may be amended from time to time by Declarant, showing the land uses and Property Units assigned by Declarant to the various portions of the Property...."

3. The Assignment transferred to the owner of Tract 3, Phase 1, of the Wiggins Bay Subdivision in Collier County, Florida ("Tract 3"), as a right appurtenant to such ownership, any and all WBA rights which in any way pertain to Tract 3, its use, development and improvement, and any and all rights which could be reasonably inferred from such rights (collectively, such rights referred to as the "Tract 3 Rights") including, but not limited to, those rights granted and reserved in the following:

- Under Ordinance 82-121, adopted by the Collier County Commissioners on December 28, 1982, and recorded in Secretary of State Book 016, Page 283 (hereinafter referred to as the "PUD Ordinance"), including, but not limited to the right to operate a commercial recreation service on Tract 3;
- Under the Plat designated "Wiggins Bay Phase I" approved by the Collier County Commissioners on June 15, 1984 and recorded in Plat Book 13 at Pages 89-90 of the Official Records of Collier County including, but not limited to, the easements and rights reserved to WBA and its assigns under the Plat Dedication; and

¹ All recording references are to the Official Records of Collier County, Florida unless otherwise stated.

- Those rights, powers and privileges with respect to Tract 3 under the Declaration, including, but not limited to, those rights, powers and privileges under Sections 2.04, 2.06, 4.01, 4.05, 7.06, 8.01, 8.02 and 8.03, whether reserved to “WBA”, “Declarant” or the “Class B Member”.

4. Plaintiff, as sole owner of Tract 3, holds exclusively all right, power and authority created or provided for under the Declaration with respect to Tract 3. Because Plaintiff is the sole owner of Tract 3, Defendant does not possess any right, power or authority created or provided for under the Declaration with respect to Tract 3, including, but not limited to any Article III enforcement powers.

5. Defendant has, since June 1, 2007, held all of the right, power and authority created or provided for under the Declaration with respect to Tracts 1, 2, and 4-11 pursuant to the Assignment of Developer Rights dated June 1, 2007 and recorded at O.R. 4250, Page 1765.

6. Declaration Sections 4.01(c) and 4.05(d) prohibit Defendant from implementing rules and regulations affecting use of the Foundation Common Area without Plaintiff's written approval of such rules and regulations.

7. Defendant properly exercised its rights and powers as “the Foundation” when, in the summer of 2007, Defendant developed the “New Security System at Wiggins Bay Gate” and promulgated the “Guidelines and Procedures” related thereto (together referred to as the “Gate Rules”).

8. When on the evening of November 21, 2007, Defendant blocked Plaintiff's business invitees from crossing the Foundation Common Area by implementing these Gate Rules without having first obtained Plaintiff's written approval, Defendant violated Declaration Sections 4.01(c) and 4.05(d) and acted without authority.


9. Defendant's conduct in blocking Plaintiff's business invitees from crossing the Foundation Common Area breached Defendant's duties under the Declaration, violated Plaintiff's rights as Declarant, violated Plaintiff's Tract 3 Rights and violated Plaintiff's Declaration Section 4.01(a) and Section 8.02 access rights.

Accordingly:

IT IS HEREBY ORDERED AND ADJUDGED:

1. Plaintiff's Summary Judgment Motion is GRANTED.
2. The Temporary Injunction issued by this Court on December 26, 2007 is by this Order made Permanent and Plaintiff's \$15,000.00 bond posted with this Court is hereby released.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida on this 15 day of December, 2009.


CYNTHIA A. PIVACEK
Circuit Court Judge

copies furnished to the following:

Thomas B. Garlick, Esq.
Jason Hamilton Mikes, Esq. *m 12/15/9*
Barry A. Postman, Esq.