

IN THE EIGHTH CIRCUIT COURT FOR DAVIDSON COUNTY,
TENNESSEE, AT NASHVILLE

GERALD GRUBB,	*
	*
	* Case No. 19C613
	*
vs.	*
	*
VIRIDIAN CONDOMINIUM	*
ASSOCIATION	*
	* December 13, 2019
	* Honorable Kelvin D. Jones
* * * * *	

Transcript of proceedings

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A P P E A R A N C E S

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GERALD GRUBB

1 THE COURT: Grubb versus Veridian Condominium
2 Association.

3 Good morning. How are you?

4 (Unintelligible voices.)

5 THE COURT: Yeah, take your time. We've got
6 to wait for Ms. Walsh to get back anyway.

7 MR. HOWELL: Good morning, Your Honor, John
8 Craig Howell, Nashville Bar, representing the
9 defendants, Viridian Condominium Association.

10 This is my motion for summary judgment. I've
11 submitted it with two separate individual grounds for
12 dismissal. Both, individually, are -- are fatal to
13 Mr. Grubb's complaint of -- at the summary judgment
14 phase.

15 The -- the first one is that Mr. Grubb does
16 not have the 5 percent voting power required, as a
17 non-director member of the association, to bring this
18 lawsuit. It's a derivative action required under 48 --
19 or -- I'm sorry -- 48-58-401, that he have that
20 5 percent voting power.

21 It's undisputed that -- that he is a single
22 member, owns a single unit in the Viridian. It's
23 undisputed that the master deed provides one vote per
24 unit owner, and it's undisputed that of the 300-plus
25 units, he is -- he is but one, and therefore cannot

1 bring such a lawsuit.

2 As I was preparing today to argue and look at
3 potential counter arguments, I couldn't really find
4 any. It's - it's basically a statistical formula,
5 5 percent or not. Mr. Grubb is just one unit owner.

6 In his response, he cites to the master deed a
7 provision that lays out what is required to bring
8 litigation against the -- the HOA, by member. That's
9 accurate. There -- there is a process to do that.

10 However, once you bring a derivative lawsuit
11 like this, you're then under the statutory -- the
12 regulations and the Statute of 48-58-401, you need the
13 5 percent still. He's referring to the process of
14 bringing a matter toward -- to the board of the HOA
15 prior to filing a lawsuit. It's very common in -- in
16 governing documents of nonprofit and -- and for-profit
17 corporations.

18 But again, the statute is very clear on this
19 issue that yeah, you need the required voting power to
20 bring this sort of lawsuit.

21 It's undisputed that Mr. Grubb is bringing
22 this lawsuit on behalf of the association relating to
23 community property. It's an issue regarding fencing
24 around the rooftop pool there. It's not his own unit
25 or anything like that. He's bringing it, allegedly,

1 for the -- you know, the safety of the people that --
2 that occupy and use that area.

3 MR. GERALD GRUBB: Well, particularly little
4 children.

5 MR. HOWELL: Particularly children, yes. And
6 I'm not here today to argue whether it's safe, whether
7 it's unsafe, get into the weeds on that facts of that.
8 Just pure and simple, the first -- first grounds here
9 is that he does not have the standing to bring this
10 lawsuit.

11 The second issue is a statute of limitations
12 issue. He's alleging a nuisance in the -- the lack of
13 proper fencing here. This is a 3-year statute of
14 limitations. The fencing, or lack of fencing, whatever
15 it is, the issue as he's alleged, has existed at least
16 10 years.

17 I'll - I'll read from Mr. Grubb's deposition.
18 I believe this was submitted with -- with the motion.
19 I asked: "Can you describe what your concern is for
20 which you brought this lawsuit?"

21 "In simple, we have this 5-foot fence on each
22 side, and a minimum of 43 inches for anything that's
23 elevated. On the south end of the pool there's
24 walkways, places kids could play, and flowerbeds, just
25 go up walking surfaces. And there's nothing to protect

1 them from going over the end. It's unbelievable to me,
2 but that's it."

3 I followed up: "When did you first notice
4 this issue?"

5 "I'd say at least 6 or 7 years ago."

6 Later on I asked: "And there's no difference
7 in the condition now and back in 2007" -- when he first
8 moved in.

9 "There is no change, I would agree."

10 There is -- I believe Mr. Grubb is raising
11 that this is potentially a temporary nuisance, creating
12 a new statute of limitations every day.

13 That's more of an issue where operations or
14 management result in a dangerous condition daily. For
15 example, let's say there was a faulty lock on something
16 in the condominium, and management kept not fixing it,
17 or something like that, that's more of a temporary
18 nuisance.

19 What we're talking about here is the structure
20 of the building that's been the same for 10 years-plus
21 now. It's fencing. It's permanent. It's - it's much
22 more in line with a permanent nuisance than what could
23 be categorized as a temporary nuisance.

24 Another -- another way to determine whether
25 something is a permanent nuisance is if it's at once

1 capable of all the damage that can be created from that
2 issue. So the damage that could -- could happen here,
3 people falling over the edge of the rooftop of the
4 building, is the same as it was in 2007, 2008, all the
5 way up to filing this lawsuit.

6 There's been no change in how severe that
7 damage is, or how severe this alleged issue is; it's
8 simply the way the building is structured. And because
9 of its existence for so many years, 3-years statute of
10 limitations bars this lawsuit from being brought.

11 And again, another way to -- to address this:
12 Mr. Grubb is proposing additional construction to the
13 building, which is another -- that is another categoric
14 way of identifying this as a permanent nuisance.

15 It's not simply something that gets fixed;
16 he's - he's requesting an additional construction, an
17 additional improvement to the building, changing the
18 property itself. So it's not a matter of management or
19 operational issues; it -- it's the structure itself
20 that's been unchanged.

21 So we -- we've presented these two issues. We
22 think they're fairly straightforward. I -- I don't
23 plan to argue the -- whether this matter -- whether
24 this issue is dangerous, or -- or -- you know,
25 obviously someone falling off a rooftop is dangerous.

1 But this lawsuit, as we have it before us today, simply
2 cannot move beyond the summary judgment stage, for
3 these two reasons.

4 And the HOA may decide that they want to
5 address -- if there's an issue, they could address
6 that. However, bringing the lawsuit and -- and asking
7 the Court to force the HOA to do so is improper. And
8 summary judgment should be granted at this point in
9 litigation. Thank you.

10 THE COURT: All right, sir.

11 Mr. Grubb? And apparently, Mr. Grubb -- I
12 mean, I think there was -- did you mail in a response
13 or a reply?

14 COURT CLERK: No response has been filed.

15 THE COURT: No response has been filed. I
16 thought there was--

17 COURT CLERK: (Unintelligible).

18 MR. GERALD GRUBB: Your Honor, I'm a rookie at
19 this. And I'll - let me answer any question I can. I
20 gave my response to them. I didn't know if I should
21 mail something in or not.

22 THE COURT: Okay.

23 If you have a copy, we'll take a look at it.

24 MR. GERALD GRUBB: Do I have a copy of what?

25 THE COURT: Do you have the copy of your

1 response?

2 MR. GERALD GRUBB: Yes, I do.

3 THE COURT: Well, yeah, we'll - we'll take
4 them. Ms. Walsh will get it. You can talk about it.
5 We just don't have -- we don't - it's not in our
6 system.

7 MR. GERALD GRUBB: You can keep it -- all
8 these documents but No. 2.

9 COURT CLERK: Okay.

10 THE COURT: Okay. Go ahead, Mr. Grubb.

11 MR. GERALD GRUBB: Thank you, Your Honor.
12 Great to be here.

13 THE COURT: Thank you.

14 MR. GERALD GRUBB: Number one, I do own one
15 unit. And I'm following the master deed. It says, "An
16 owner may file a lawsuit."

17 I want to go to the second part of the
18 presentation. The Viridian rooftop pool deck has a
19 14-foot section of deck without a fence, without
20 guardrails. And the construction, which is at the
21 south end of the -- there are photographs of that in
22 the last three pages -- show wonderful places for kids
23 to play.

24 In 2006, if a family came -- 2007 -- and
25 brought their kids and family, they could have seen

1 these five open-sided walking surfaces with no
2 guardrails, with deadly dropoffs of 225 feet or
3 350 feet. But if you look at one of the next -- one of
4 the next photographs taken by drone camera, beautiful
5 flowers disguise and hide this danger, and are another
6 enticement as a place to play.

7 Also that construction at the south ends of
8 the rooftop pool deck is an egress from the west side
9 to the east side, back and forth. So in chaos, in
10 times of chaos, lots of people could run down there and
11 be traveling back and forth, and up on in it, and
12 decide to jump off, who would know what they'd decide
13 to do?

14 It will only cost under \$10,000 to add the
15 fence I'm requesting that would blend in with the fence
16 that's already there. And indeed, Metro Codes is clear
17 to call for a guardrail not less than 42 inches high,
18 that borders any kind of a dropoff more than 30 inches.

19 I contend this is a continuing nuisance. One
20 kid falls off today, if isn't corrected, and another
21 one tomorrow, who would know what the cost is?

22 THE COURT: Have you been in contact with
23 Codes regarding this?

24 MR. GERALD GRUBB: Oh, Your Honor, I went to
25 visit Codes. And he gave me the reference, and I

1 bought a Code book. And it's in the document, to show
2 what the codes are in terms of walking surfaces,
3 open-sided walking surfaces and height, "42 inches or
4 more."

5 So it's clear that this is a subtle violation,
6 or not-to-subtle violation of Codes. I don't know how
7 that happened. But I would like for this to go to
8 trial and see what Metro Codes and Metro Pool says. I
9 think that would be a great thing for this. But this
10 -- this is a deadly situation. We're talking about--

11 THE COURT: No, I understand that. Have you
12 invited Codes up to take a look, inspect the area?

13 MR. GERALD GRUBB: We had another trial in
14 which the Codes person came, and he got his tape
15 measure out and measured. The fence was 5 feet tall
16 -- but there is no fence. And then when I quizzed him
17 about this elevated play area and platforms, his
18 comment was: "I don't teach human behavior." He also
19 said that to me in his office.

20 But Your Honor, this structure is here. It's
21 deadly. It's potentially deadly. And--

22 THE COURT: So you're suggesting that Codes is
23 not interested in enforcing this particular regulation?

24 MR. GERALD GRUBB: Codes seemed to have no
25 interest. I've - I've had the -- Metro Health has a

1 pool section. I've-

2 THE COURT: Yes.

3 MR. GERALD GRUBB: -- had that person to come
4 out and inspect it. And I was there with him
5 personally when he inspected it. And a couple other
6 people were present.

7 And he said he would go back to his office and
8 see if he could get together with Metro Codes and work
9 out something. He wrote a letter back, which I have --
10 have copy of it -- not in this document. And he said,
11 "Well, you know, pool guidelines are there to keep
12 children out of the pool."

13 And I jokingly said to him, "You're expecting
14 aliens to come over to this area where there is no
15 fence and come in?" I mean, it doesn't make any sense.
16 Anyway, that hasn't happened.

17 So I've gone to the board. I met with the
18 board in October of 2018. They have never told me what
19 dangers they see or what they're going to do. They
20 just said they'd get back in touch.

21 And the thing that renewed my interest in this
22 was: We're talking about putting in grills and making
23 this a more family-friendly environment. So I'm asking
24 the Court to deny this motion, dismiss this motion for
25 summary judgment and proceed to court.

1 THE COURT: Thank you.

2 MR. GERALD GRUBB: It's simple. Thank you.

3 MR. HOWELL: Your Honor, the -- the Code issue
4 isn't -- isn't really on the record at this point. But
5 since you asked, the trial he's referring to is at
6 General Sessions. We had a representative of Codes
7 testify that everything was co-compliant. Again, I
8 didn't want to get into the weeds of that. We -- I
9 think we gave Your Honor two very good grounds to
10 dismiss this -- this lawsuit.

11 Some of the other issues raised that aren't on
12 the record -- and there are no disputed facts that were
13 raised in response to our statement of undisputed facts
14 -- but a cost analysis of what this addition to the
15 rooftop would be, there's no estimate from a
16 contractor, there's no architect drawing this up.
17 There's no other estimate, other than Mr. Grubb's, as
18 to how much it would cost to fix this or to address
19 this.

20 MR. GERALD GRUBB: I -- I did call the
21 contractor, and told him that the length of the fence
22 would have been, at most, 28 feet in all
23 (Unintelligible) --

24 THE COURT: Come up and stand -- please stand.

25 COURT CLERK: Can you stand up?

1 MR. GERALD GRUBB: Oh, I'm so sorry.

2 THE COURT: That's okay. That's good.

3 MR. GERALD GRUBB: Thank you. I did call a
4 contractor. And I had a different estimate. But
5 anyway, he said it would be about \$7,500, so that's why
6 I said "under 10,000."

7 It's a very inexpensive resolution to continue
8 the fence that's already there, that would provide us
9 supreme safety. And again, all we've got to do is put
10 in a few blocks.

11 MR. HOWELL: This isn't on the record, Your
12 Honor -- I mean, his phone call that -- to this
13 contractor isn't before the Court.

14 So I would just, again, submit, Your Honor,
15 that there are no disputed facts in response to our
16 disputed facts. I -- I -- I guess you have -- I didn't
17 know they weren't filed. But he admits to them. He's
18 argumentative in the responses, citing the dangers, and
19 that sort of thing, but they're -- they're not
20 materially disputed.

21 So based on that, you know, Rule 56, I think,
22 is lined up very nicely for you to dismiss this,
23 Your Honor.

24 THE COURT: Okay.

25 MR. HOWELL: Thanks.

1 THE COURT: All right.

2 All right. Based upon the arguments of the
3 parties, the evidence presented, and the entire record
4 as a whole, the Court does find that there is no
5 genuine issue of material fact; that the plaintiff has
6 known about the existence of the alleged nuisance
7 regarding the rooftop pool area on the -- of the
8 Viridian since 2007; and the rooftop pool area of
9 Viridian has not changed since plaintiff first knew of
10 the alleged nuisance.

11 So under Tennessee Code Annotated,
12 Section 28-3-105, a claim for an alleged nuisance must
13 be brought within 3 years from the accruing cause of
14 action. As plaintiff has filed his claim in 2019, the
15 claim is barred by the statute of limitations.

16 In addition, plaintiff has brought this suit
17 as a derivative action, pursuant to Tennessee Code
18 Annotated, Section 48-56-401. Plaintiff does not have
19 standing to bring this suit, . pursuant to
20 TCA Section 48-56-401, as plaintiff is not a director
21 of the condominium association, nor is -- is
22 plaintiff's claims brought on behalf of 5 percent or
23 more of the voting powers.

24 As such, the plaintiff's claim must be
25 dismissed. Court costs are attached to the plaintiff.

1 Motion for summary judgment is granted.

2 Thank you.

3 MR. HOWELL: Thank you, Your Honor.

4 Do you want me to prepare--

5 THE COURT: If you would, please.

6 MR. HOWELL: -- prepare the--

7 (End of recording.)

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1 STATE OF TENNESSEE)
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I, Laurie McClain, Transcriber,

DO HEREBY CERTIFY that the foregoing proceedings were transcribed by me from a Youtube video, and the foregoing proceedings constitute a true and correct transcript of said recording, to the best of my ability.

I FURTHER CERTIFY I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of this action.

Date 1/14/2020



Laurie McClain
Transcriber