DISTRICT COURT MONTEZUMA COUNTY, COLORADO Court Address: 109 West Main, Room 210, Cortez, CO, 81321-3190 Phone Number: (970) 565-1111 Plaintiff: **Cedar Mesa Ranches Homeowners Association** v. Defendant: **Craig D. Lyons**	DATE FILED: May 25, 2017 2:49 PM CASE NUMBER: 2016CV18 **COURT USE ONLY**
	Case No.: 2016CV18

SUMMARY JUDGMENT ORDER

Plaintiff Cedar Mesa Ranches Homeowners Association, Inc. ("CMR" or “Plaintiff”) brought suit against defendant Craig D. Lyons ("Lyons" or “Defendant”) in the Small Claims Division of the

Montezuma County Court in Docket No. 2016S16. CMR sought $799.00 in “unpaid dues, late payment fees, interest and court fees” because CMR’s “by-laws and covenants provide for a yearly fee assessed equally to all property owners.” (Notice, Claim and Summons at p. 1).

Lyons has filed counterclaims against CMR for: (1) declaratory judgment to determine if CMR has the authority to assess property owners for dues and other charges as alleged in the Notice, Claim and Summons, and (2) a claim of violation of the fraudulent document statute, C.R.S. § 38-33.5-109(3), based on the recording of an

earlier lien on Lyons's property.

Defendant's counterclaims resulted in the removal of this matter from the Small Claims Division of the Montezuma County Court to the Montezuma County District Court and this action.

The parties agreed to resolve this matter by cross motions for summary judgment and submitted a Joint Notice of Stipulated facts with accompanying exhibits on December 29, 2016 (a corrected Exhibit 3 was submitted on January 3, 2017).

Plaintiff filed its Plaintiff's Cross-Motion for Summary Judgment on January 3, 2017. Defendant filed his Defendant's Motion and Brief in Support of Summary Judgment on January 3, 2017. Each party filed a Response on January 24, 2017 and a Reply on February 7, 2017.

The Court set this matter for a hearing and heard argument on March 4, 2017.

The Court has reviewed this matter carefully and with great consideration. The attorneys for the parties have presented their positions skillfully and effectively.

STIPULATED FACTS

The Joint Notice of Stipulated Facts filed by the parties on December 29, 2016 has been accepted by the Court as findings of fact. The Joint Notice of Stipulated Facts stipulated to by the parties reads in the following paragraphs 1-13 as follows (paragraphs 1-13 are copied into this pleading verbatim from the Joint Notice of Stipulated Facts) (the exhibits are attached to the December 29, 2016 pleading and are incorporated into this Order by reference):

1. Defendant Craig D. Lyons is the record title owner of that property legally described as: "Lot 99, Cedar Mesa Ranches Subdivision, according to the Plat thereof filed for record Sept 9, 1998 in Book 13 at Page 138," and known as 10755 Road 35.6, Mancos CO (the "Property.")

2. The Property is located within the boundaries of the Cedar Mesa Ranches Subdivision,

(the "Subdivision"), such subdivision having been formed with the recording of a plat by the original declarant, the Redstone Land Company, on September 9, 1998 with the Montezuma County Clerk and Recorder at Reception No. 473996 (the "Plat.") A copy of the Plat is attached hereto as Exhibit 1.

3. The Plat contains 32 covenants and property restrictions under the heading "Covenants, Easements and Restrictions" and the Property is subject to and governed by those Covenants, Easements and Restrictions. A copy of those Covenants, Easements and Restrictions taken directly from the plat is attached hereto as Exhibit 2.

4. Articles of Incorporation for Plaintiff, Cedar Mesa Ranches Homeowners Association, Inc. (the "HOA") were filed with the Colorado Secretary of State's office on August 3, 1998, thus creating the HOA. That document is not recorded with the Montezuma Clerk and Recorder. Nothing on the Plat makes specific reference to the Articles of Incorporation, but the Plat makes reference to the existence of the HOA. A copy of the Articles is attached hereto as Exhibit 3. No separate declaration of covenants for the subdivision was recorded by the original declarant when the Plat was recorded.

5. The covenants contained on the Plat do not specifically mention the assessment of dues.

6. On or about November 1, 2005, a document entitled "Covenants of Cedar Mesa Ranches Homeowners Association, Inc." was recorded with the Montezuma County Clerk and Recorder at Reception No. 535880 (the "2005 Amendment"). The 2005 Amendment was not signed by Redstone Land Company, nor is there any evidence that Redstone Land Company approved or initiated the document. A copy of the 2005 Amendment is attached hereto as Exhibit 4.

7. In an Order dated April 25, 2012 in Montezuma County District Court Case No 11CV200, this Court determined that the HOA was not a "CCIOA Community" and thus was not

subject to the statutory governing provisions of the Colorado Common Interest Ownership Act ("CCIOA"). Neither party is challenging this determination in the current action. A copy of the Order setting forth that determination is attached hereto as Exhibit 5.

8. On March 19, 2014, the Board of the HOA, adopted a "Resolution Regarding Public Notice of Applicability of CCIOA" that was drafted by the HOA's then attorney, Erin J. Johnson, with the intention of bringing the HOA within the scope of CCIOA.

9. On or about April 14, 2014, the "Resolution Regarding Public Notice of Applicability of CCIOA" was recorded by the HOA with the Montezuma County Clerk and Recorder at Reception No. 593995 (the "2014 Resolution"). A copy of the 2014 Resolution is attached hereto as Exhibit 6.

10. On or about May 22, 2015, Gregory Kemp, president of the HOA, recorded a "Notice of Statutory Lien," which purported to be in conformity with CCIOA, with the Montezuma County Clerk and Recorder at Reception # 600157 (the "2015 Lien Notice.") The 2015 Lien Notice was recorded against the Property and claimed to provide notice of an HOA lien on the Property for "dues owed Feb. 15, 2015 in the amount of $550.00, late charges of $50.00, and filing costs of $22.00, with interest accruing at 9% annually thereon until paid." A copy of the Notice is attached hereto as Exhibit 7.

11. On or about September 9, 2015, the HOA received notice from an attorney for two other owners of property in the Subdivision alleging that liens filed on those properties at the same time and under the same basis as the lien on the Property were invalid. That caused the HOA to retain new counsel to evaluate the status of those liens.

12. After consulting with new counsel, the HOA released the 2015 Lien Notice and all other similarly situated liens.

13. There is a current and actual dispute between the HOA, the Defendant and other property owners within the Cedar Mesa Ranches Subdivision as to the authority of the HOA and the obligations of the property owners under the governing documents of the HOA.

ADDITIONAL FACTS

The Court makes the following additional findings of fact in accordance with the Exhibits filed by the parties:

A. The roads in the Subdivision are private roads.

B. The private roads in the Subdivision were not dedicated to Montezuma County or any other government or private entity.

C. The ownership of the private roads in the Subdivision is undetermined.

D. Use of the private roads in the Subdivision is necessary for access to the lots and homes in the Subdivision.

E. The private roads in the Subdivision are the common property of the Subdivision – despite the undetermined ownership. It is obvious that the roads were intended by the developer to be common property.

F. Plat covenant number 27 of the "Covenants, Easements and Restrictions" (referenced in paragraph 2 of the stipulated facts hereinabove) reads as follows:

> Maintenance of the private access roads in the subdivision shall be the sole responsibility of those lot owners which adjoin said private roads and are members of the Cedar Mesa Ranches Homeowners Association, Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Lot owners will maintenance roads in common with others in a suitable condition for two wheel drive vehicular traffic.

POSITIONS OF THE PARTIES

Plaintiff argues that CMR has the authority to assess property owners for dues and other

charges and that CMR did not violate C.R.S. § 38-33.5-109(3) with the earlier lien recording. Plaintiff requests that the Court enter declaratory judgment stating that CMR has the authority to assess owners for dues and other charges.

Defendant argues that the Court should enter a declaratory judgment stating that CMR lacks the authority to assess property owners for dues and other charges and Defendant requests that an injunction be entered by the Court enjoining CMR from assessing property owners for dues and other charges. Defendant also demands a judgment for Defendant and against the HOA of no less than $1,000.00 in statutory damages for the filing of a spurious lien against Defendant's property by CMR.

The allocation of CMR dues is unclear to the Court. However, it is evident that road maintenance is a primary use for the CMR dues and a dispute over road maintenance is at the heart of this matter.

Lyons asserts that the "documents that govern the Subdivision and that have been properly recorded with the Montezuma County Clerk and Recorder, thereby giving proper notice of such to Defendant, do not provide the HOA with the power to assess property owners any kind of fee and no other document or authority provides the HOA with any such power or right." (See p.4 *Defendant's Motion and Brief in Support of Summary Judgment).* At oral argument, Defendant made his position evident – to maintain the roads of the subdivision:

1. The residents may negotiate agreements to maintain the roads on their own; and/or
2. Pursuant to Plat Covenant 27, each lot owner must maintain the private access road adjacent to their individual lot. Presumably, other lot owners could sue a neighbor who failed to maintain the private access road adjacent to their individual lot – requesting specific performance and/or damages.

APPLICABLE LAW

Summary judgment is proper pursuant to C.R.C.P. Rule 56(c), "when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law." Franklin Bank, N.A. v.Bowling, 74 P.3d 308, 311 (Colo. 2003); Thorpe v. State, 107 P.3d 1064, 1068 (Colo. App. 2004). "The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail." Luttgen v. Fischer, 107 P.3d 1152, 1154 (Colo. App. 2005)(citing Peterson v. Halsted, 829 P.2d 373, 375 (Colo. 1992).

The seminal Colorado case applicable to this matter is Evergreen Highlands Ass'n v. West, 73 P.3d 1 (Colo. 2003). In Evergreen Highlands, the Colorado Supreme Court, in an opinion authored by current Chief Justice Rice, held that a homeowners association, as a common interest community by implication, had power to collect assessments.

The subdivision in Evergreen Highlands was created and its plat filed in 1972. The 63 lot subdivision had a 22.3 acre park owned by the homeowners association of the subdivision. Between 1976 and 1995 the association relied on voluntary assessments to maintain the park area. In 1995, the Evergreen Highlands association amended the covenants to require the payment of assessments and to impose liens on the property of any owners who failed to pay their assessment. The Evergreen Highlands opinion relies extensively on the Restatement (Third) of Property: Servitudes in reaching its conclusion. Justice Rice wrote:

> Although many subdivisions have covenants which mandate the payment of assessments for this purpose, others, such as Evergreen Highlands, do not. Without the implied authority to levy assessments, these latter communities are placed in the untenable

> position of being obligated to maintain facilities and infrastructure without any viable economic means by which to do so. In order to avoid the grave public policy concerns this outcome would create, we today adopt the approach taken by many other states as well as the Restatement of Property, which provides that "the power to raise funds reasonably necessary to carry out the functions of a common interest community will be implied if not expressly granted by the declaration." Restatement (Third) of Property: Servitudes § 6.5 cmt. b (2000). We therefore hold that, even in the absence of an express covenant mandating the payment of assessments, the Association has the implied power to levy assessments against lot owners in order to raise the necessary funds to maintain the common areas of the subdivision.

Evergreen Highlands at 4.

Relying on the Restatement, the Colorado Supreme Court held that the subdivision in Evergreen Highlands was a common interest community by implication:

> We accordingly adopt the position taken by the Restatement and many other states, and hold that the declarations for Evergreen Highlands were sufficient to create a common interest community by implication. The Association therefore has the implicit power to levy assessments against lot owners for the purpose of maintaining the common area of the subdivision. Respondent, as a lot owner, has an implied duty to pay his proportionate share of the cost of maintaining and operating the common area.

Evergreen Highlands at 9.

The Evergreen Highlands Court took a proactive judicial approach to protecting property owners in subdivisions when developers failed to adequately provide for the maintenance of common areas. This is an acknowledgement of the realities of our modern "subdivision society".

CONCLUSION

The private access roads within the Cedar Mesa Ranches Subdivision are private roads. Although ownership of the roads was not conveyed to the Subdivision, the Court finds that they are common areas within the Cedar Mesa Ranches Subdivision. Well maintained roads are necessary for access to property within the Subdivision and the health, safety, and welfare of the

residents of the Subdivision. If the Colorado Supreme Court deemed the inability of a subdivision to maintain a park to be a "grave public policy concern" - then certainly the inability to maintain private access roads within the Subdivision meets the "grave public policy concern" standard. Without well maintained private access roads, the lots in the Subdivision could become inaccessible and property values would be adversely affected. The safety of residents could be jeopardized.

Defendant's position - that residents could negotiate to maintain the roads on their own and that a lot owner could be sued for failure to maintain their section of private road – is completely untenable in a modern society. The only beneficiaries of Defendant's position would be the attorneys retained to litigate and the local automotive repair establishments specializing in alignment, shocks, and struts.

This Court chooses to follow the precedent established by Evergreen Highlands. The Cedar Mesa Ranches Homeowners Association is a common interest community by implication. The declarations of CMR are sufficient to establish a common interest community by implication. In 2012, this Court determined that the Subdivision was not a "CCIOA Community" and thus was not subject to the statutory governing provisions of the Colorado Common Interest Ownership Act ("CCIOA") (Montezuma County District Court case 11CV200) . A finding that the Subdivision is a common interest community by implication is not incompatible with the holding in 11CV200. A finding that the Subdivision is a common interest community by implication does not make the statutory provisions of CCIOA applicable to CMR or the Cedar Mesa Ranches Subdivision.

CMR has the authority to make and collect assessments **to maintain the common areas of the Subdivision – including the private roads**.

Because the Subdivision is not and was not a "CCIOA Community", the lien provision relied on by CMR in CRS 38-33.3-316 to file a lien against Defendant's property is not applicable. Accordingly, the lien filed against Defendant was spurious. Judgment is entered against Plaintiff and for Defendant in the amount of $1,000. The Court deems Plaintiff to be the prevailing party in this litigation because the primary issue in this case was the dispute over the ability of Plaintiff to make and collect assessments. Accordingly, an award of attorney fees against Plaintiff based on the lien filing would in inequitable – especially when the lien was released.

It is equitable to require each party to bear their own attorney fees and costs.

The Court recognizes that without the lien provisions of CCIOA, CMR will likely have to sue lot owners who fail to pay assessments and that CMR will have to obtain liens through a more time consuming, intensive procedure; however, this is an acceptable result under the circumstances.

Done and Signed this May 25, 2017.

/s/ Todd Jay Plewe

District Court Judge
Todd Jay Plewe