[Cite as *Millstone Condominiums Unit Owners Assn. v. 270 Main St.*, 2012-Ohio-2562.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MILLSTONE CONDOMINIUMS UNIT OWNERS ASSOCIATION, INC., et al.,	:	**O P I N I O N**
	:	**CASE NO. 2011-L-078**
Plaintiffs-Appellees,	:	
- vs -	:	
270 MAIN STREET, et al.,	:	
Defendant-Appellant,	:	
ROSEANNA BELON, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 000789.

Judgment: Affirmed.

Cullen J. Cottle, Kaman & Cusimano, 50 Public Square, #2000, Cleveland, OH 44114 (For Plaintiff-Appellee Millstone Condominiums Unit Owners Association, Inc.).

Robert S. Rosplock, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Plaintiff-Appellee Patricia J. Nicholson).

Donald A. Richer, 270 Main Street, #160, P.O. Box 1575, Painesville, OH 44077-1575 (For Defendant-Appellant 270 Main Street).

Gerald R. Walker, Redmond, Walker & Murray, 174 North St. Clair Street, Painesville, OH 44077-4091 (For Defendants-Appellees Roseanna Belon, Jacqueline K. Bohley, Edward E. Bolyard, Diana L. Braunlich, Dominic J. Cacolici, Geri Ann Cochrac, Dave Cook, Judy A. Davidson, Kevin M. Ford, Wesley A. Forbes, Crystal Forbes, Christopher A. Gallupe, Gerald D. Hobson, Virginia Hobson, Susan D. Jacob, Daniel M. Kovach, Denise Kovach, Stacey R. Kovalchuk, Christopher Lyttle, Lesley E. Mapes, Sandra K. Nadenbush, Daniel L. Nicholson, Edwin Pina, Nereida Rosario-Pina, Chris Rivers, Lorena Rivers, Arthur E. Sekki, Marlyss Sekki, Donna J. Smrdel, Dale A. Smrdel, Susan C. Tackett, Renee M. Wojkowski).

Nicholas D. Donnermeyer and *Brad J. Terman,* Lerner, Sampson & Rothfuss, 120 East Fourth Street, Cincinnati, OH 45201-5480 (For Defendant-Appellee Countrywide Home Loans, Inc.).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, 270 Main Street, Inc., appeals the summary judgment entered against it and in favor of appellees, Millstone Condominium Unit Owners Association, Inc. ("the association") and Patricia Nicholson, on their complaint for partition of the Millstone Condominiums. Appellees, Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender and Mers as its nominee, KeyBank National Association and Fannie Mae, have also filed a brief in support of the trial court's summary judgment. At issue is whether the trial court erred in ordering that the subject real property be sold at public auction as opposed to a private sale. For the reasons that follow, we affirm.

{¶2} The statement of facts that follows is derived from the evidentiary materials submitted during the course of summary judgment proceedings.

{¶3} The association is a non-profit, Ohio corporation, which was organized to provide a corporate entity for the operation of 38 condominium units within the Millstone Condominium in Painesville, Ohio. The association's unit members own their own units plus a 2 12/19 per cent undivided interest, as tenants in common, in the common areas of the condominium. By accepting deeds to their units, all unit owners became members of the association and are bound by the association's Declaration of Condominium Ownership and its By-Laws. Appellee, Patricia Nicholson, is the title owner of unit 33 of the condominium. Appellant is the title owner of unit 34. Appellant was the original developer of the property. In 2002, unit owners other than appellant became members of the Board of Managers, and appellant turned over management of the property to the new board.

{¶4} On or about July 28, 2006, the Grand River, which is next to the condominium, flooded, substantially damaging and destroying the condominium units and common areas. Since the flood, no resident has been able to reside in any part of the condominium due to its uninhabitable condition. The association lacked sufficient funds and insurance proceeds to repair and restore the condominium property after the flood.

{¶5} The city of Painesville determined that all of the units in the association had been substantially damaged and destroyed by the flood and that the cost of repair would exceed 50 per cent of the property's value. On September 8, 2006, the city notified the unit owners that, due to this determination, if the unit owners decided to rebuild, they would have to conform with the city's flood damage prevention regulations.

{¶6} On or about October 24, 2006, pursuant to the condominium's Declaration, a vote of the unit owners was taken as to whether, in light of the substantial damage caused by the flood, the property should be restored. Thirty-five of the 38 unit owners voted not to restore the property. The percentage of residents who voted not to restore the property was more than the 75 per cent required by the condominium's Declaration to decide that the property would not be restored.

{¶7} Subsequent to the flood, the city and the association took action to allow the city to acquire all property and common areas within Millstone Condominiums through federal grants for the purpose of creating open space and recreational areas for the benefit of the city's residents.

{¶8} With the assistance of state and federal agencies, including the Federal Emergency Management Agency ("FEMA"), the city applied for and was approved for participation in the Hazard Mitigation Grant Program ("HMGP"). Pursuant to this

approval, the city secured funding to purchase all units within the Millstone Condominiums at their pre-casualty fair market value in order to demolish all structures on the property, convert the property to open space for public use, and create a buffer zone to minimize future flood damage to other vulnerable areas in the community.

{¶9} Subsequently, all unit owners, with the exception of appellant, consented to participate in the buyout program. Because participation in the HMGP must be voluntary, appellant's refusal to participate in the program has meant that no other unit owner within the association can benefit from the pre-casualty-value-buyout program.

{¶10} As a result, on March 6, 2008, the association and Patricia Nicholson commenced this partition action pursuant to the association's Declaration and By-Laws. The objective of the suit was to obtain an order requiring a public sale so that the city could purchase the property using federal, state, and local funds under the HMGP.

{¶11} After the defendants, including appellant, filed their answers, on February 2, 2009, the association and Nicholson filed a joint motion for summary judgment seeking a partition order to authorize the sale of the property at public auction.

{¶12} By agreement of the parties, on April 5, 2010, the trial court entered a judgment reciting that the parties had agreed that a writ of partition should issue with respect to the property. Pursuant to statute, the court appointed three persons to act as commissioners to render an opinion as to whether the property, including the common areas, was subject to partition without manifest injustice to the respective units and if it could not be so partitioned, to return such finding to the court and give a just valuation of the combined units and all common areas, reflecting their current market value. As a result of the parties' agreement, the purpose of the association and Patricia Nicholson's

motion for summary judgment was accomplished, and the trial court denied the motion as moot.

{¶13} On July 16, 2010, the commissioners filed their amended report in which they found that the property could not be partitioned and that, due to the poor condition of the property following the flood, only the land retained value, the current value of which was $195,000. Pursuant to the parties' stipulation, the trial court entered judgment finding that the current value of the Millstone Condominiums is $195,000.

{¶14} On August 9, 2010, pursuant to R.C. 5307.09, Patricia Nicholson, defendant Wesley A. Forbes, and appellant filed separate notices of their election to purchase the Millstone Condominium property for the appraised amount of $195,000. Thereafter, on August 13, 2010, defendant Mary Clare Buenger also filed a separate election to purchase the property at its appraised value.

{¶15} On August 16, 2010, appellant filed a motion to confirm a private sale to the four unit owners who had filed elections for a total price of $195,000. The association and Patricia Nicholson filed a brief in opposition to appellant's motion to confirm a private sale, arguing that, due to the multiple, competing elections, the property must be sold at public auction.

{¶16} On August 18, 2010, the trial court entered an order requiring the parties to address the distribution of the sale proceeds by: (1) stipulating to the proportionate share held by each unit owner; (2) filing a motion for summary judgment on the issue; or (3) advising the court that testimony was required on the issue.

{¶17} In response to the court's order, on August 31, 2010, appellant filed an alternative motion for judicial sale by private auction restricting bidders to only those who had filed elections to purchase the property.

{¶18} Later that same date, the association and Patricia Nicholson filed a joint motion for summary judgment on the issue of the owners' proportionate interest in the condominium property. They demonstrated, by reference to a schedule in the association's Declaration, that each unit owner has an equal 2 12/19 per cent interest in the condominium's common areas. Consequently, they argued that the distribution of any proceeds resulting from the sale of the Millstone Condominium property must be in accordance with said proportionate interest. Appellant did not file a brief in opposition to the association and Patricia Nicholson's joint motion for summary judgment.

{¶19} On January 4, 2011, the trial court entered judgment granting the association and Patricia Nicholson's joint summary-judgment motion. The court found that, because Patricia Nicholson and three of the defendants had filed separate, conflicting elections, the property must be sold at public auction. The court ordered a praecipe to be prepared indicating the sale price shall not be less than two-thirds of the $195,000 stipulated value. The court also denied: (1) appellant's motion to confirm the sale to electors and (2) appellant's alternative motion for judicial sale by private auction. The court found that, pursuant to the condominium's Declaration: (1) each of the 38 condominium unit owners has a 2 12/19 per cent interest in Millstone's common areas; (2) when damaged or destroyed condominium property is sold by partition, the net sale and insurance proceeds shall be distributed to the unit owners in proportion to their respective percentages of interest in the common areas; and (3) each unit owner is entitled to 2 12/19 per cent of the net sale and insurance proceeds. Pursuant to the court's summary judgment, the association and Patricia Nicholson filed a praecipe for order of sale.

{¶20} On February 2, 2011, appellant filed its original notice of appeal. This court dismissed that appeal for lack of a final appealable order. On June 20, 2011, the trial court found there was no just cause for delay pursuant to Civ.R. 54(B), and appellant filed its second notice of appeal. On June 22, 2011, the trial court granted appellant's motion to stay execution of judgment provided it posted a bond in the amount of $2,336,583 made payable to the collective unit owners. To date, appellant has not posted such bond.

{¶21} The Millstone Condominiums was sold at public auction on June 27, 2011. Using funds obtained through FEMA and HMGP, Painesville purchased all condominium units, together with each unit's percentage interest in the common areas, for the pre-casualty value of $2,343,640.

{¶22} Appellant appeals the trial court's award of summary judgment, asserting two assignments of error. For its first assigned error, it alleges:

{¶23} "The trial court erred to the defendant's prejudice in denying defendant's motion to confirm the sale to the electors and ordering a public sale instead."

{¶24} Appellant argues that the trial court erred in granting summary judgment to the association and Patricia Nicholson because, appellant argues, it should have been permitted to purchase the condominium property jointly with the other three unit owners who filed separate elections. We do not agree.

{¶25} The declaration and bylaws of a condominium represent a contract among the unit owners and also a contract between the unit owners and the association. *Big Turtle Condominium Unit Owners' Ass'n v. Burke*, 11th Dist. No. 89-L-14-039, 1990 Ohio App. LEXIS 3083, *17-*18 (July 27, 1990).

{¶26} The interpretation of a contract is a question of law that we review de novo. *Allstate Indemn. Co. v. Collister*, 11th Dist. No. 2006-T-0112, 2007-Ohio-5201, ¶15, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). Our primary goal is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos*., 86 Ohio St.3d 270, 273 (1999). We presume the intent of the parties to a contract resides in the language used in the written instrument. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus.

{¶27} Similarly, "this court reviews a trial court's interpretation and application of a statute under a de novo standard of appellate review." *State v. Phillips*, 11th Dist. No. 2008-T-0036, 2008-Ohio-6562, ¶11. "Statutory interpretation involves a question of law; therefore, we do not give deference to the trial court's determination." *Id.* "The principles of statutory construction require courts to first look at the specific language contained in the statute, and, if unambiguous, to then apply the clear meaning of the words used." *Roxane Laboratories, Inc. v. Tracy*, 75 Ohio St.3d 125, 127 (1996). A court may interpret a statute only where the statute is ambiguous. *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs*., 32 Ohio St.3d 24, 27 (1987). A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513 (1996).

{¶28} The Declaration of Condominium Ownership for Millstone Condominiums, Article XV(D) provides, in pertinent part:

> **{¶29}** In the event of substantial damage to or destruction of more than 50 % of the Units, the Owners by the affirmative vote of those entitled to exercise not less than * * * 75 % of the voting power may

> elect not to repair or restore such damage or destruction. Upon such election, all of the Condominium Property shall be subject to an action for sale as upon partition at the suit of any Owner. In the event of any such sale * * *, the net proceeds of the sale together with * * * the net proceeds of insurance, if any, * * * shall be considered as one fund and shall be distributed to all Owners in proportion to their respective percentages of interest in the Common Areas and Facilities.

{¶30} A partition proceeding has been defined as a judicial separation of the respective interests in land of joint owners or tenants in common thereof so that each may take possession of his separate estate. Barron's Law Dictionary 361 (1999). Partition is thus the dissolution of the unity of possession existing between the common owners of the property. *Id*. If a partition cannot equitably be accomplished, a court may order a sale, in which case the proceeds from the sale are distributed to the co-owners in the same proportion as their interest in the real property. *Id.*

{¶31} R.C. 5307.04 provides, in pertinent part:

{¶32} If the court of common pleas finds that the plaintiff in an action for partition has a legal right to any part of the estate, it shall order partition of the estate in favor of the plaintiff or all interested parties, appoint one suitable disinterested person to be the commissioner to make the partition, and issue a writ of partition. The court on its own motion may * * * appoint one or two additional suitable persons to be commissioners.

{¶33} R.C. 5307.09 provides, in pertinent part:

{¶34} When the * * * commissioners are of [the] opinion that the estate cannot be divided according to the demand of the writ of partition without manifest injury to its value, the * * * commissioners shall return that fact to the court of common pleas with a just valuation of the estate. If the court approves the return and if one or more of the parties elects to take the estate at the appraised value, it shall be adjudged to them * * *.

{¶35} Ohio courts have addressed R.C. 5307.09 or its statutory predecessor on several occasions. In *Burch v. Brooks*, 15 Ohio C.C. (n.s.) 443, 1909 Ohio Misc. LEXIS 394, affirmed without opinion by the Ohio Supreme Court at 82 Ohio St. 441 (1910), the Sixth Circuit, which then included the same counties that are today included in the Sixth Appellate District, held: "It is not error in an action for partition for the court to refuse to accept inconsistent and conflicting elections by parties in interest, and in lieu thereof adopt the procedure of ordering a sale." *Id*. at paragraph one of the syllabus. In analyzing the statutory predecessor to R.C. 5307.09, the Sixth Circuit held:

{¶36} The statute is a blank as to what proceedings shall be taken in case of conflicting elections. In speaking of one or more of the owners electing to take the property and the order of the court for a deed to such purchaser electing, the Legislature either contemplated the individual election by one of the tenants in common, or the joint election by one or more, but it did not contemplate the election by one to take the whole of the property for himself and the election by another to do the same, because, of course, that sort of a proceeding would defeat itself. It would be impossible to carry it out,

> and under such circumstances the courts have, I think, uniformly adopted the procedure of ordering a sale, refusing all the conflicting elections. *Id*. at 444.

{¶37} Two years later, the Supreme Court of Ohio in *Darling v. Darling*, 85 Ohio St. 27 (1911), adopted the same approach, stating that a public sale is required when two or more separate elections are filed. The court stated:

> **{¶38}** If Willard E. Darling, on confirmation of the report of the commissioners appraising all the estate, had elected to take the * * * land at the appraised value, he could have properly done so, as it had a separate value. However[,] the right to elect did not abide alone in Willard, but any one or more of the co-tenants had the same right. They stood as equals in relation to that right, and if two or more had elected to take this tract of land at the appraised value, *a public sale of the same would have been required.* (Emphasis added.) *Id*. at 32-33.

{¶39} In *Broadsword v. McClellan*, 17 Ohio L. Abs. 389 (7th Dist.1934), the Seventh District held:

> **{¶40}** Under 12034, GC [the statutory predecessor to R.C. 5307.09], the right of election to take property at its appraised value is given to one party entitled to a part thereof, or to two or more parties who agree jointly to make the election, but the statute makes no provision for a case where two or more adverse parties claim the right to elect to take the property. *Id.* at syllabus.

{¶41} Thereafter, in *Rankin v. Coffer*, 4th Dist. No. 255, 1960 Ohio App. LEXIS 822 (Mar. 4, 1960), the Fourth District stated:

> **{¶42}** The primary object of a partition proceeding is to effect an actual division of the property among the owners, if such can be done without manifest injury and it is only where such partition cannot be made that an election to take or a sale is allowed. It has been held that the right to elect does not abide alone in one cotenant, but any one or more of the cotenants has the same right. They stand as equals in relation to that right, and *if two or more have elected to take the land at the appraised value, a public sale of the same will be required. See Darling*[, *supra*].
>
> **{¶43}** *The necessity of a sale in case of conflicting elections arises from the impossibility of carrying out the statute in such case, and under such circumstances the courts have, it seems, uniformly adopted the procedure of ordering a sale, refusing all the conflicting elections. See Burch[, supra].* (Emphasis added.) *Rankin*, *supra*, at *5-*6.

{¶44} Further, in *Cotruvo v. Cotrufo*, 9th Dist. No. 8728, 1978 Ohio App. LEXIS 8023 (June 7, 1978), a partition action, two tenants in common filed respective elections to take the subject real property at the appraised value. The trial court rejected both elections, and ordered the property sold at public sale. Citing *Darling*, *supra*, the Ninth District held the trial court did not err in denying the appellant-tenant in common's election to take the property at its appraised value. *Id*. at *4.

{¶45} More recently, in *Weber v. McGowan-Young*, 2d Dist. No. 07-CA-89, 2008-Ohio-4147, ¶14, the Second District held: "The law is well settled that when two or more parties separately elect to take property at its appraised value, a public sale is required. *Darling*[, *supra*]."

{¶46} Thus, during the last 100 years, the Ohio Supreme Court and Ohio Appellate Courts have repeatedly and uniformly held that when multiple parties separately elect to take the property, a public sale is required.

{¶47} We note that appellant has failed to cite even one Ohio case in which any Ohio Appellate District has not followed the Supreme Court's ruling in *Darling* or even suggested that the court's ruling in *Darling* violated R.C. 5307.09.

{¶48} Contrary to appellant's argument, the Ohio Supreme Court's ruling in *Darling* requiring a public sale when separate elections are filed does not conflict with R.C. 5307.09 because that statute can reasonably be held to apply only when the multiple electors propose to purchase property jointly. As the Sixth Circuit held in *Burch, supra*, in enacting the statutory predecessor to R.C. 5307.09, the legislature either contemplated the individual election by one of the tenants in common or the joint election by one or more, but it did not contemplate the election by one to take the whole of the property for himself and the election by another to do the same, because such proceeding would defeat itself. Further, the Seventh District in *Broadsword, supra,* held that the statutory predecessor to R.C. 5307.09 does not apply when multiple adverse parties make an election. As the Fourth District in *Rankin*, *supra,* and the Sixth Circuit in *Burch, supra*, held, the need for a public sale in case of conflicting elections arises from the impossibility of carrying out the purpose of the partition statute in such case because the result would be multiple parties being entitled to the entire parcel.

However, when multiple electors represent only one purchaser, the purpose of the partition statute can be accomplished and a public sale is unnecessary. Based on our review of the foregoing case law, we find it does not conflict with R.C. 5307.09.

{¶49} Appellant attempts to avoid the foregoing jurisprudence by arguing that the unit owners who filed elections here intended to file a joint election. However, there is no evidence in the record to support such position. In fact, the evidence supports only the opposite conclusion. Each elector filed a separate election and each was represented by separate counsel. None of the electors expressed a desire in his or her election to jointly purchase the property with anyone else. None of them expressed a willingness to own or possess the property jointly. Each elector submitted an affidavit stating that he or she is financially able to purchase the property in his or her own right without contribution from anyone else.

{¶50} In a further effort to avoid the foregoing case law, appellant argues that its election constituted a joint election because it included a provision in its election that it was made jointly with any other unit owner who elected to purchase the condominium property. However, while appellant could agree to purchase the property jointly, it could not impose such agreement on the other electors to jointly purchase the property. The argument therefore lacks merit.

{¶51} Further, appellant argues it should be permitted to purchase the property with the other electors because real estate projects often involve numerous parties owning fractional interests in the land. However, the argument lacks merit for two reasons. First, R.C. 5307.09 does not provide that separate electors can purchase fractional interests. Second, such joint ventures are created by parties who intend to purchase fractional interests. Here, none of the electors has expressed the intent to

purchase only a fractional interest in the property. To the contrary, each expressed his or her intent to buy the entire property for $195,000. If we were to adopt the position advocated by appellant, not only would it violate R.C. 5307.09, it would potentially compel unwilling persons to purchase and use their property in common with others, giving rise to endless strife and disagreement.

{¶52} Finally, appellant argues that dividing $195,000 among the 38 unit owners would be more beneficial to the community than dividing $2,343,640 by 38. If we were to accept appellant's argument, appellant would potentially reap a huge profit for a relatively small investment. However, the financial consequences to the remaining 37 unit owners and the community at large would be disastrous: appellant would be permitted to purchase the property for $195,000, and the remaining unit owners would be forced to settle their catastrophic losses for about $5,000 each. In contrast, if the sale of the property to the city is confirmed, the unit owners would recover the pre-casualty value of their units. Moreover, the property would be put to a use that would benefit the city's residents as open space and surrounding communities as a buffer against future flooding.

{¶53} Appellant's first assignment of error is overruled.

{¶54} For its second assigned error, appellant contends:

{¶55} "The trial court erred to the defendant's prejudice in granting plaintiffs' motion for summary judgment."

{¶56} In order for summary judgment to be granted, the movant must prove that no genuine issue as to any material fact remains to be litigated, the movant is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing such evidence most strongly in favor of

the nonmoving party, that conclusion is adverse to that party. *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996).

{¶57} The Supreme Court stated in *Dresher v. Burt*, 75 Ohio St.3d 280, 296 (1996) that the movant bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact. "The 'portions of the record' to which we refer are those evidentiary materials listed in Civ.R. 56(C) * * * that have been filed in the case." *Id*.

{¶58} If the movant satisfies its burden, then the nonmoving party has the burden to provide evidence demonstrating an issue of fact. If the nonmoving party does not satisfy this burden, then summary judgment is appropriate. Civ.R. 56(E).

{¶59} A trial court's decision granting summary judgment, like other questions of law, is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). A de novo review requires the appellate court to conduct an independent review without deference to the trial court's decision. *Mack v. Ravenna Men's Civic Club*, 11th Dist. No. 2006-P-0044, 2007-Ohio-2431, ¶12.

{¶60} Appellant argues that, while the association and Ms. Nicholson referred to the affidavit of Dan Nicholson in their joint motion for summary judgment on the issue of the unit owners' proportionate interest in the property, filed August 30, 2010, that affidavit was not attached to the motion. Appellant also argues that the motion was not supported by any other Civ.R. 56(C) evidentiary materials. As a result, it argues the association and Ms. Nicholson did not meet their initial burden on summary judgment, and appellant was not required to respond to the motion. Again, we do not agree.

{¶61} The Supreme Court of Ohio in *Dresher, supra*, held that the movant's initial burden is met by identifying Civ.R. 56(C) materials "that have been filed in the case." There is no specific requirement that the materials supporting summary judgment be attached to the motion for summary judgment as long as they have been filed in the case prior to the entry of judgment. The association and Patricia Nicholson filed Dan Nicholson's affidavit, which authenticated Millstone Condominium's Declaration and other exhibits, on February 2, 2009, as part of their prior joint motion for summary judgment on the issue of whether a writ of partition should issue. These evidentiary materials were therefore already part of the record when the court ruled on the August 30, 2010 motion for summary judgment. Because these evidentiary materials were "filed in the case," the trial court was entitled to consider them in ruling on the later summary-judgment motion.

{¶62} Further, even if the copy of the condominium's Declaration attached to the later motion for summary judgment had not previously been verified, the trial court would still have been entitled to consider it because appellant never objected to it. Appellant failed to oppose the association and Ms. Nicholson's later summary-judgment motion. Improper summary judgment evidence may be considered by the trial court *if no objection is made to it. Spagnola v. Spagnola*, 7th Dist. No. 07 MA 178, 2008-Ohio-3087, ¶39; *Brown v. Ohio Casualty Ins. Co*., 63 Ohio App.2d 87, 90 (8th Dist.1978). Thus, even if the Declaration had not previously been verified in appellees' first summary-judgment motion, because appellant failed to object to the unverified copy of the Declaration attached to the later motion for summary judgment, the trial court would have been entitled to consider it when ruling on the later motion. *Id*. at 91.

{¶63} Next, contrary to appellant's argument, the association and Ms. Nicholson submitted evidentiary materials regarding the unit owners' proportionate interest in the condominium's common areas. The Declaration, filed on February 2, 2009, as an attachment to the association and Patricia Nicholson's first motion for summary judgment, included the schedule of the unit owners' percentage interests in the common areas. As noted above, the Declaration was verified in that motion by Dan Nicholson. Further, appellant never challenged the authenticity of the Declaration or the ownership schedule. For these reasons, the trial court was entitled to consider the schedule, as it obviously did, in ruling on the later motion for summary judgment.

{¶64} As a final note, it does not escape our attention that appellant does not argue that the 2 12/19 per cent interest in the common areas attributed to each unit owner in the Declaration is incorrect. As a result, any error did not affect appellant's substantial rights and was harmless. Civ.R. 61.

{¶65} Appellant's second assignment of error is overruled.

{¶66} For the reasons stated in this opinion, the assignments of error are without merit. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.