COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO.

Middlesex County

TRUSTEES OF CAMBRIDGE POINT CONDOMINIUM TRUST.
Plaintiff/Appellant

vs.

CAMBRIDGE POINT LLC, NORTHERN DEVELOPMENT, LLC, CDI COMMERCIAL DEVELOPMENT, INC., GIUSEPPE FODERA, FRANK FODERA, FRANK FODERA, JR. and ANAHID MADIROS,
Defendant/Appellees

ON DIRECT APPELLATE REVIEW FROM A JUDGEMENT OF DISMISSAL ENTERED IN THE MIDDLESEX COUNTY SUPERIOR COURT

AMICUS BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PLAINTIFF/APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

The Amicus Curiae, the Community Associations Institute ("CAI"), is a national non-profit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide the most effective guidance for the creation and operation of condominiums, cooperatives and homeowner associations. CAI represents more than 17,000 homeowners, community associations, community managers and affiliated professionals and service providers in fifty-seven (57) chapters. The local chapter of CAI, CAI New England, is headquartered in Wellesley, Massachusetts. CAI's industry data estimates that as of 2012, there are approximately 63.4 million Americans living in 25.9 million housing units within over 323,600 community associations. This number constitutes roughly 21% of the population of the United States, assuming a population of 300 million. In fact, in 2015 there were 12,200 community associations in Massachusetts containing 2,450,000 residents.

Community associations are property developments

in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. Community associations present a unique form of ownership where responsibility for the submitted property is shared, on some level, between the individual owners or members on the one hand, and an association, trust or corporation on the other. Community associations are usually governed by not-for-profit incorporated (or sometimes unincorporated) entities pursuant to Articles of Incorporation (or a similar document) and/or By-laws, or through a trust pursuant to a Declaration of Trust.

The case under consideration by this Court is one of substantial import to the body of law regarding the protection of unit owners and the unit owner organizations which govern the common property that they own in common with each other.

It is incumbent on CAI to seek judicial declarations to prevent unscrupulous developers and wrong doers from causing financial harm to innocent consumers through contracts and actions that are

unconscionable or worse. Such is the situation in this case where the unwary are given pre-prepared lengthy legal documents, without explanation, containing traps for those consumers.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI submits this brief for the Court's consideration.

STATEMENT OF ISSUES

The Amicus adopts the Appellant's statement of Issues as though the same had been fully and adequately set forth herein and makes the same a part hereof by reference.

STATEMENT OF THE CASE

The Amicus adopts the Appellant's statement of the Case as though the same had been fully and adequately set forth herein and makes the same a part hereof by reference.

STATEMENT OF FACTS

The Amicus adopts the Appellant's statement of Facts as though the same had been fully and adequately set forth herein and makes the same a part hereof by reference.

SUMMARY OF ARGUMENT

The trial court erred in focusing only on the issue of whether the applicable provision of the condominium bylaws which requires the affirmative vote of the holders of 80% of the beneficial interest prior to the filing (of a complaint) was procured by overreaching or fraud. The court should have focused on whether this provision, especially as applied, was void as being against public policy; was illegal; was unconstitutional; was violative of statutory law (M. G. L. C. 183A); was part of a contract of adhesion; was violative of principles of equity and was an open door to wrongdoing without remedy. It also erred in its finding that there was no overreaching.

Unlike other states, when a condominium unit is being sold by a declarant in Massachusetts, there is no requirement that the seller give a disclosure statement. Therefore, the prospective purchaser may or may not be given a voluminous set of legal documents pre-prepared by the seller which contains a lot of "legalese". The purchaser has the option of either buying the unit subject to whatever language is in those documents or simply refusing to

purchase. However, the purchaser has absolutely no bargaining position with regard to the language in the documents. Accordingly, from the outset of the transaction, the bargaining position is inherently unequal, tilting overwhelmingly in favor of the condominium's declarant.

While the doctrine of constructive notice as to what is contained in recorded documents is alive and well in Massachusetts, it cannot be said that the average purchaser has any actual knowledge of the contents of those documents. Similarly, it cannot be said that the purchaser understands those contents and is willingly and intentionally waiving any rights he may have in relation to the transaction. As shall be discussed below, those rights are constitutionally and statutorily guaranteed. In fact, the rights allegedly being waived are the rights of a third party, i.e. the condominium trust.

Further, when the declarant takes control of the condominium trust, as is almost always the case until an independent board is elected or appointed by virtue of this provision the declarant automatically agrees not to institute litigation unless he obtains the affirmative vote of the

holders of 80% of the beneficial interest. Thus, if such a vote cannot be obtained, the (possibly) unintended result is that the declarant is automatically putting himself/herself into a position of breach of trust. Clearly, such a provision buried in a set of condominium documents operates to gives a declarant license to be negligent (or worse) in a transaction which is not subject to negotiation; is clearly a contract of adhesion and should be declared void as being against public policy.

The trial court erred in finding that there was no overreaching on the part of the declarant and in finding that on its face the Complaint filed in this case was dismissible because there was absolutely no way a legally cognizable cause of action could be derived from the allegations.

It is the argument of this Amicus that the provision in question, buried as it was in the condominium documents which are full of legalese violates the rights of unit owners in condominiums and condominium associations in a way that is unintelligible and vague and that it operates to waive rights which can only be waived through

knowing and intelligent actions. Such a scenario should be declared void as against public policy.

ARGUMENT

1. The trial court erred in focusing only on the issue of whether the applicable provision of the condominium bylaws that requires 80% approval prior to filing (of a complaint) was procured by overreaching or fraud.

The court should have focused on whether this provision, especially as applied, was void as being against public policy; was illegal; was unconstitutional; violated statutory law (M. G. L. C. 183A); was part of a contract of adhesion; violated principles of equity and was an open door to wrongdoing without remedy. As is argued below, these issues amount to a clear overreaching which could have been developed through discovery and trial.

2. The Massachusetts Constitution at the Declaration of Rights requires that the provision in question be declared invalid for the following reasons.

Article XI of the Massachusetts Declaration of Rights provides, "Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and

without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws."

Further within the Declaration Article XVI provides, in pertinent part: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless . . . the [L]egislature shall hereafter find it necessary to alter it."

Assuming arguendo that the Appellants entered into a contract with the Declarant by purchasing a unit in the condominium governed by the Declarant's documents, it cannot be said that by accepting the unit deed they waived their right to participate (through the organization of unit owners) in litigating a claim "involving property". Nor can it be said that that they are on constructive notice that they are waiving constitutionally protected rights merely because of the recording at the Registry of Deeds of a writing containing language

hidden somewhere in lengthy documents written in "legalese" unless that waiver is somehow brought to their attention so that they can knowingly waive those rights. This is not to say that the doctrine of constructive notice is impaired in general but it must give way where, as shall be seen from the discussion below, such waiver must be knowing and willful and not merely passive or imputed to a condominium unit purchaser/owner simply by virtue of having been recorded.

If a "trial by jury" for property claims is a basic fundamental right under the Massachusetts Declaration of Rights, surely it cannot be waived by a provision that was written to prevent a unit owners' organization from bringing such a controversy before a court. To the extent the Declarant can prevent access to the court by relying on the "poison pill" provision and stating that the unit owners agreed to it by purchasing a unit in the development, the Superior Court Judge is effectively stating that they waived their rights to seek redress in court for any claim involving the very property they were purchasing.

While constitutional rights can be waived, such waivers must be knowing, voluntary and intentional. As such, it cannot be presumed from the acceptance of a deed that relates to the document that operates to waive such right. CMJ Management Company v. Patricia Wilkerson, 16-P-426 (2017) citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)

Waivers of constitutional rights must be voluntary and must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. It is black letter law that to be valid, a waiver of a right must be voluntary as well as intentional. Garrity v. Conservation Com'n of Hingham 462 Mass.779, 971 N.E.2d 748 ,788 (2012) Roseman v. Day 345 Mass.93, 185 N.E.2d 650.

In holding that an individual's waiver of a statutory right derived from a statute cannot be implied, in a case that is being cited as merely persuasive, the Superior Court stated in Wasserman v. Registrar of Motor Vehicles, 18 Mass.L.R. "The voluntary, knowing, and intelligent standard

"applies only to [an individual's] 'consent' to the actual relinquishment of [a] constitutional *right.*" Although there are no standards for determining what is a knowing and voluntary waiver of fundamental rights in a situation such as this, in discussing the waiver of a constitutional right to counsel, the Appeals Courts held that "it was appropriate to look to the criminal law to determine the validity of a purported waiver of counsel in a proceeding which operates to terminate parental rights." Adoption of William, 38 Mass.App.Ct.661,664 (1995)., While the present case clearly does not involve an adoption proceeding, nevertheless the standard for waiver of fundamental rights such as those provided in the Massachusetts Declaration of Rights, ought to be viewed under the same standard.

3. **The provision in question is merely a waiver of the right to sue the declarant for whose benefit it was drafted because it permits almost any other type of litigation.**

The provision at issue as drafted into the condominium documents was modified therein by the following exceptions. "The provisions of this paragraph (o) shall not apply to litigation by the

Condominium Trust against Unit Owners with respect to the recovery of overdue Common Expenses or Special Assessments or to foreclose the lien provided by Chapter 183A, Section 6, and Chapter 254, Sections 5 and 4, or to enforce any of the provisions of the Master Deed, or the Declaration of Trust of the Condominium Trust, or these By-Laws or Rules and Regulations thereto, or the unit deed, against Unit Owners."

After all those exceptions, there was very little left except a prohibition on suits against the declarant unless the 80% threshold was reached.

4. The provision in question should be declared void as against public policy and unenforceable because the provision is part of an adhesion contract which is unconscionable and overreaching.

Whenever a person is presented with a contract which contains terms on a take it or leave it basis in which they have no right of negotiation and in which all power is vested in the hands of the draftsperson in whose favor unilateral conditions have been laid down, such provisions are deemed part of a contract of adhesion. In holding a waiver provision contained in a loan guarantee to be enforceable, the Court in Chase Commercial Corp.

v. Owen, 32 Mass. App. Ct. 248, 253, (1992) enunciated the rule to be applied in determining whether or not a contract was contract of adhesion. "The documents could well be described as a contract of adhesion in that it is unlikely that the parties actually negotiated most of the provisions."

Contracts of adhesion may be deemed void as against public policy if they are unconscionable or offend public policy or are shown to be unfair in the particular circumstances. "When construction of such an agreement is in issue, it is to be construed strictly against the drafter. See Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 720-721, 277 N.E.2d 503 (1972). Generally, however, such contracts are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances. Id. at 721 n. 3, 277 N.E.2d 503." Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248, 253, (1992).

While Massachusetts has not adopted the Restatement of Contracts the Chase Court discussed the principle underlying determination of contracts of adhesion. "The section of the Restatement

dealing with enforceability of adhesion contracts now provides that such contracts are generally enforceable but not as to a term to which the party who drafted the agreement had reason to believe that the other party would not have assented had he known the writing contained the term in issue. Restatement (Second) of Contracts § 211 (1979)." Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248, 253, (1992).

In the instant case, it defies the imagination to believe, without an evidentiary hearing, that the average person purchasing a condominium unit would be willing to give license to a developer to do harm to the condominium. If the purchaser knew that should it be discovered later, after an independent Board was in control, that the Developer could block litigation for the remediation of defects he caused, simply by maintaining a sufficient percentage interest to avail himself of his "poison pill" provision, common sense dictates that a reasonable person would never assent to the same. Why would a purchaser allow himself to become financially responsible for his share of a two million dollar

remediation bill (as alleged in the complaint) if he were aware that the Developer had shielded himself from liability by simply holding (either directly or indirectly) sufficient beneficial interest? In fact by inserting this self-serving "poison pill" provision the Declarant could maintain control over a sufficient percentage interest until the applicable statutes of limitation and repose expired. In this fashion, the appellees are completely depriving the appellant the right to a trial by jury or any redress whatsoever as required under the Declaration of Rights in the Massachusetts Constitution. In most of the cases in which the contractual term was not enforced, however, the court found "gross inequality in the bargaining positions of the parties." Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248, 255, 588 N.E.2d 705, 709 (1992.) The facts of this case as alleged in the Complaint clearly demonstrate that there was gross inequality in the bargaining positions of the parties. As a direct consequence of the dismissal of this case evidence could not be obtained to determine whether or not "the party who drafted the agreement had reason to believe that

the other party would not have assented had he known the writing contained the term in issue." In addition to the constitutional issues mentioned above, the issue of contracts of adhesion demands a reversal of the dismissal. Of even greater importance to the Amicus is that the case calls for a declaration that such exculpatory provisions are overreaching and unconscionable and, therefore void as against public policy unless there is an independent writing evidencing that the person purchasing a condominium unit not only understood what he was giving up but that he did so knowingly and voluntarily.

5. **There are equitable maxims which have the force of law which are applicable to this case.**

They are as follows.

A. Equity will not suffer a wrong to be without a remedy.

Consistent with the constitutional provisions cited above, as stated by this Court in Recinos v. Escobar, 473 Mass.734 (2016) "a fundamental maxim of equity jurisprudence is that equity will not suffer a wrong to be without a remedy." While there are no cases specifically applying this equitable maxim as

to this type of exculpatory clause, it is inequitable to permit a person or entity to, in effect, be forced to release third parties, i.e. the future independent Board of Trustees, from any as yet unknown potential future liabilities so that the Board and the unit owners are left with no remedy. The Complaint on its face alleges that the Declarant, either directly or indirectly maintains in excess of 20% of the beneficial interest. As previously discussed, a fair reading of the Complaint shows that through this provision the Declarant could prevent litigation until the applicable statutes of limitation and repose had run out. It is just such a provision that violates the maxim that equity will not suffer a wrong to be without a remedy and should be found to be unconscionable on its face. At a bare minimum, it is the position of the Amicus that the Complaint should have been allowed to proceed in order to establish through discovery if indeed that was the Declarant's intent in drafting the provision.

B. Equity will not permit a party to profit by his own wrong doing.

In a Superior Court opinion, Judge Gants did refuse to allow a Developer to avail himself of an exculpatory clause drafted by him for his benefit. Harris v. McIntyre, 2000 WL 942559, (Mass. Super. June 27, 2000 Unreported). In that case the trial court recognized that there is a need "for close judicial scrutiny when a developer totally dominates the Trust and effectively attempts to act as its fiduciary." While the trial court decision is unreported, nevertheless the thoughtful analysis of the equitable maxim of estoppel whereby a party is not permitted to profit by his own wrong doing is illustrative of the application of this maxim to this issue. "Equitable estoppel is a doctrine created by the courts to prevent results contrary to good conscience and fair dealing. *Mackeen v. Kasinkas,* 333 Mass. 695, 698 (1956); Stated simply, it means that the law will not permit a party to be better off by acting badly. See *Harrington v. Fall River Housing Auth.,* 27 Mass.App.Ct. 301, 307 (1989) (stating that "[e]stoppel is an equitable doctrine created to prevent one from benefitting

from his own wrongdoing and to avoid injustice"). Harris v. McIntyre supra. Equity will not permit a Defendant to act in a wrongful manner and then hide behind the protection of his self-written exculpatory clause. However, the allegation in the complaint is that the Appellant did just that.

6. **G.L.C. 93A prohibits unfair and deceptive business practices. The insertion of the subject provision into these documents is an unfair and deceptive business practice.**

Here, a person engaged in the commercial business of selling condominium units to consumers inserted a non-negotiable provision into the middle of voluminous documents filled with legal verbiage which provides a mechanism for him to effectively shield himself from liability without emphasizing that language in any way or otherwise bringing that provision to the consumer's attention. Such language should be declared unenforceable as a violation of the protections afforded to consumers under the statute. As such, it should be prohibited.

7. **The trial court erred in finding that there was no overreaching.**

As set forth above, in the instant case, a person engaged in a commercial business of selling

condominium units to consumers inserted a non-negotiable provision into the middle of voluminous documents filled with legal terminology. This not only violates the Massachusetts Consumer Statute as discussed above but is an example of overreaching by effectively providing the seller with a procedure whereby the seller is shielded from liability without emphasizing that language in any way or otherwise bringing that provision to the consumer's attention. It is fair to suggest that if a purchaser were told of the existence of the language in issue which meant that he could be responsible for his share of millions of dollars to remediate issues caused by the seller, the purchaser might opt out of that scheme. Thus, to rule that there was no overreaching in the face of such allegations was error.

The failure to disclose and bring such a material fact to the attention of the purchasers in what is a business transaction may well be determined to be overreaching after a trial.

8. **Massachusetts G.L.c. 183A § 10 (B)(4) mandates that the organization of Unit Owners *shall* (emphasis added) have the right "to conduct litigation and to be subject to suit as to any course of action involving the common areas and facilities or arising out of the enforcement of**

the by-laws, administrative rules or restrictions in the master deed."

The subject provision would deny the organization owners this essential legislatively mandated right.

In the case of Berish v Bornstein 437 Mass. 252, 263-264 (2000) the Court noted that ownership of a residential condominium involves a form of property ownership different from ownership of a house. "Ownership of a condominium unit is a hybrid form of interest in real estate, entitling the owner to both exclusive ownership and possession of his unit, G.L. c. 183A, § 4, and ... an undivided interest [as tenant in common together with all the other unit owners] in the common areas" (citing cases) . . . This division between individual and common rights is basic to the theory of condominium ownership." (again citing cases). . . In keeping with this division of property ownership, condominium unit owners cede the management and control of the common areas to the organization of unit owners, which is the only party that may bring litigation relating to the common areas of the condominium development on their behalf. G.L. c. 183A, § 10 (*b*) (4). See *Strauss v. Oyster River*

Condominium Trust, 417 Mass. 442, 445, 631 N.E.2d 979 (1994). "Only the trustees have the right to conduct litigation concerning 'common areas and facilities'.

It is abundantly clear that the organization of unit owners, in this case the Trust, is a separate legal entity, a third party distinct from the owners. Yet the Superior Court's decision in this case would create the anomalous situation wherein the owners as individuals can waive the statutory rights of this third party, the Trust, even when the Trustee is the Declarant. While clearly such a holding is a benefit to the Declarant, it is unfathomable how it can be said to operate in advance of and be binding upon the independent Trustees' board not yet in existence at the time the provision was drafted. They, when accepting their positions as Trustees, could potentially automatically be violating their fiduciary duty to the Trust as a whole if they agreed to be bound by such a crippling restriction on their statutory powers. As previously stated, they would be utterly without any ability to seek redress of the Trust's otherwise valid claims for damage to Trust property

which claims only they are legally empowered to bring as a board. Surely such an illogical result should not be allowed to stand.

In fact, merely by taking a position of Trustee with such a provision already in the Trust or Master Deed, when the Declarant takes the Trusteeship and exercises sole control prior to turning it over to an independent Board, the Declarant puts himself in a position of automatic breach of fiduciary duty. By maintaining control, directly or indirectly, of twenty percent or more of the beneficial interest he will fail in his capacity as Trustee board to get the 80% vote necessary to bring suit against himself in his capacity as Developer.

9. The Motion to Dismiss should not have been allowed as the Complaint was not defective on its face.

"The outdated notion that the pleadings must proceed on a specific theory, and that recited facts will not be sufficient against a motion to dismiss if the theory is deemed inapplicable, is not the law of this Commonwealth" *Nader v. Citron,* 372 Mass. 96, 98 (1977), quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). "Decisions under the analogous Federal rule

hold that a complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely may not be appropriate." Janke Constr. Co. v. Vulcan Materials Co.,527 F.2d 772 (7th Cir.1976); United States v. Howell, 318 F.2d 162 (9th Cir.1963); Builders Corp. of America v. United States, 259 F.2d 766, 771-772 (9th Cir.1958); Dotschay v. National Mut. Ins. Co., 246 F.2d 221, 223 (5th Cir.1957). *(Conley v. Gibson has since been abrogated).*

Massachusetts is a notice pleading state and the issues of unconscionability, public policy, fairness and equity are apparent from the allegations in the Complaint. Thus, at the very least, the motion to dismiss should not have been allowed because the complaint is not defective on its face. "In evaluating the allowance of a motion to dismiss, we are guided by the principle that a complaint is sufficient 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron supra.

Amicus believes it would be appropriate for this Court to enunciate a specific standard to be applied when reviewing Developer language inserted in condominium documents which language is, for all intents and purposes, an exculpatory clause providing a mechanism for a Developer to shield himself from liability.

10. The clause in issue is void as it violates public policy.

The Amicus wishes to emphasize here that while Justice Knapp either failed to see the problem presented by the clause in issue or ignored its implications which at least three of his colleagues on the bench have addressed in opinions holding developer exculpatory clauses which shield a developer from liability for his actions as developer to be void as violative of public policy. We ask this Court to adopt the reasoning set forth in the unreported case of Board of Gates of Greenwood Home Owners' Trust v. Gates of Greenwood Trust, 31 Mass.L.Rptr. 637 (copy appended in Addendum) In Greenwood Justice Curran, while acknowledging that exculpatory clauses are strictly construed in trusts if they

are not a product of overreaching or fraud went on to quote the following from *Marsman v Nasca.30 Mass.App.Ct. 789, 799-800 (1991)*:

> ("Although exculpatory clauses are not looked upon with favor and are strictly construed, such provisions inserted in the trust instrument without any overreaching or abuse by the trustee of any fiduciary or confidential relationship to the settlor are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary."

Justice Curran then went on to refer to the opinions of the two other Superior Court judges who found exculpatory clause in condominium trusts to be violative of public policy and void.

> "At least two Justices of the Superior Court, however, have found "exculpatory clauses in condominium trust to be void as violative of public policy with the developer drafted the condominium documents and served as the original trustee. See Knowles v. Classic Bldgs., LLC No. HDCV2009 -00245 slip op. at 4-6 (Mass. Super. November 8, 2012 (Josephson, J.; Harris v. McIntyre, 2000 Mass. Super. LEXIS 181 at *32-*35 (Mass. Super. June 27, 2000) (Gants, J.)".

In discussing Justice Gants' explanation of a developer's competing duties of loyalty, i.e. to the condominium trust and to the developer himself, Justice Curran quoted extensively from

Justice Gants' opinion in Harris. "[t]here is a need for careful judicial scrutiny when a developer totally dominates the [t]rust and effectively attempts to act as it's fiduciary.' Id. At *33-*34 citing Ravens Cove Town homes, Inc.v. Knuppe Dev Co, 171 Cal.Rptr. 334 (1981) and Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop Ass'n, Inc 441 A.2d 956, 964 (D.C.Ct. App. 1982. Such exculpatory clauses cannot survive careful judicial scrutiny when the provision is enacted by the developer to protect the officers it selects to manage the [t]rust from liability. If such a provision were allowed to survive, a trust would have no recourse against a trustee selected by the developer if he continually favored the developer's interests over those of the trust but fell short of engaging in willful malfeasance. For all practical purposes, this provision would diminish the duty of loyalty owed by the developer-sponsored trustee to the unit owners to little more than a duty not to steal. Given the conflicting loyalties that are inherent when a developer-sponsored trustee is responsible for protecting the interests of unit owners, this enfeebled duty of loyalty is inadequate as a matter of public policy. Id at *34-35; see also *Knowles* No. HDCV2009-00245 Slip Op. at 6-6 (adopting reasoning outlined in Harris).

In deciding Greenwood, Judge Curran unambiguously followed the reasoning of his fellow Superior Court justices and declared that the indemnification clause in the trust was "void as a matter of public policy". Justice Curran stated as follows:

> Here, Greenwood drafted the condominium documents at the very same time it served as the sole trustee and developer. Thus, Greenwood's fiduciary duties to the Trust conflicted with Greenwood's own self-interest. These competing self-

interests denigrated the unquestionable duty Greenwood owed to the Trust and mandate that the indemnification clause be rendered unenforceable.

Further, this Court notes that the Indemnification clause at issue here is particularly troublesome. The indemnification clause is not an innocuous effort by a developer and unit owners 'to agree on the details of administration and management of the condominium.' See Barclay v.DeVeau,384 Mass. 676, 682-83 (1981). By inserting the clause, Greenwood attempted to insulate itself from all liability and make the Trust and unit owners financially liable for its malfeasance. If the clause were enforceable, Greenwood as trustee would be able to breach the duty owed to the Trust in favor of protecting its own interests and then make the Trust and unit owners responsible for all damages awarded to the Trust. Thus, not only with the Trust have no recourse against Greenwood, but the Trust would also be unlikely to challenge even Greenwood's willful malfeasance out of fear that it or the unit owners would bear the ultimate financial burden for Greenwood's wrongful actions. Cf, Board of Trustees of the Sea Grass Village Condo.v. Berquist 2009 WL 1900424 at*6 (Mass.App.Div. June 25, 2009) (finding trial judge did not err in refusing to award condominium trust defense costs despite clause allowing trust to recover attorneys fees and costs in regard to any claim brought by a unit owner noting the potentially jarring and unfair effect' of the clause). Under the particular and peculiar facts presented here, such a clause simply violates public policy."

CONCLUSION

For any one or all of the above reasons, while affirming the doctrine of constructive notice, this court should declare that in instances such as this when a person inserts language which he can then utilize to exculpate himself from liability in complex legal documents drafted for his benefit, unless such language is clearly disclosed to the purchaser so as to enable him to make an informed decision, said language is void against public policy because it is unconscionable, overreaching, a product of inequality in the bargaining position of the parties, is unfair and amounts to an unknowing waiver of constitutional rights.

Respectfully submitted,
COMMUNITY ASSOCIATIONS INSTITUTE

By its counsel

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Certification Under Mass. R. App. P. 16(k)

I, Henry A. Goodman, counsel for Amicus Community Associations Institute, hereby certify that this brief complies with the rules of Court that pertain to the filing of amicus briefs, including without limitation Mass. R. App. P. 17 and Mass. R. App. P. 20.

Dated: April 12, 2017.

/s/Henry A. Goodman
Henry A. Goodman

ADDENDUM

Adoption of William A1

Aetna Ins. Co. v. Kennedy v. Same, et al v. Same. . B1

Dotschay, Nick v. National Mutual Insurance Company.C1

Board of Trustees of the Gates of Greenwood Home Owners' Trust v. Gates of Greenwood, LLC. D1

Harris, Alfreda, et al v. McIntyre, Thomas, et al. v. A.A. Will Corporation, et al. E1

Janke Construction Company, Inc. v. Vulcan Materials Company F1

Board of Trustees of the Sea Grass Village Condominium v. Bergquist, James S., et al G1

Raven's Cove Townhomes, Inc. et al v. Knuppe Development Company, Inc., et al. H1

Wasserman, Carol v. Registrar of Motor Vehicles . . I1

Wisconsin Avenue Associates, Inc., et al v. 2720 Wisconsin Avenue Cooperative Association, Inc. et al v. 2720 Wisconsin Avenue Cooperative Association, Inc., et al J1

Original Image of 651 N.E.2d 849 (PDF)

38 Mass.App.Ct. 661
Appeals Court of Massachusetts,
Plymouth.

ADOPTION OF WILLIAM.

No. 94-P-1737.
Submitted May 11, 1995.
Decided June 23, 1995.
Further Appellate Review Denied Sept. 6, 1995.

Department of Social Services (DSS) filed petition to dispense with need for parental consent to adoption of child. The Probate and Family Court Department, Plymouth Division, Anna H. Doherty, J., entered decree dispensing with need for parental consent to adoption. Father appealed. The Appeals Court, Jacobs, J., held that: (1) indigent father acted knowingly and intelligently in waiving his right to counsel, and (2) although father had right to be present during entire proceeding, exclusion of father during examination of social worker on issue of mother's fitness and during argument on evaluation of prospective adoptive parents did not have due process significance.

Decree affirmed.

West Headnotes (6)

Change View

1 **Adoption** Examination and Approval by Court
Indigent parent has constitutional right to counsel in proceeding to dispense with need for parental consent to adoption of child. U.S.C.A. Const.Amend. 14; M.G.L.A. Const. Pt. 1, Art. 10; M.G.L.A. c. 210, § 3.

1 Case that cites this headnote

2 **Adoption** Examination and Approval by Court
Waiver of indigent parent's right to counsel in proceeding to dispense with need for parental consent to adoption of child must be voluntary, unequivocal, knowing and intelligent. U.S.C.A. Const.Amend. 14; M.G.L.A. Const. Pt. 1, Art. 10; M.G.L.A. c. 210, § 3.

3 Cases that cite this headnote

3 **Trial** Presence of Parties and Counsel
Party challenging effectiveness of relinquishment of right to counsel has burden of proving by preponderance of evidence that waiver was not valid.

1 Case that cites this headnote

4 **Trial** Presence of Parties and Counsel
Validity of waiver of right to counsel depends on particular facts and circumstances of each case.

5 **Adoption** Examination and Approval by Court
Indigent father acted knowingly and intelligently in waiving his right to counsel in proceeding to dispense with need for parental consent to adoption of child; father was aware of seriousness and consequences of proceeding and of disadvantages of self-representation, father's prior involvement with criminal justice system made him sensitive to important role of counsel, and father's educational level, statements and writings indicated capacity to make waiver. U.S.C.A. Const.Amend. 14; M.G.L.A. Const. Pt. 1, Art. 10; M.G.L.A. c. 210, § 3.

1 Case that cites this headnote

6 **Adoption** Examination and Approval by Court
Constitutional Law Adoption
Although indigent father appearing pro se had right to be present during entire proceeding to dispense with need for parental consent to adoption of child, exclusion of father during brief examination of social worker on issue of mother's fitness and during argument on motion for independent evaluation of prospective adoptive parents did not have due process significance; father was present during receipt of all evidence relating to his fitness and to best interests of child, including suitability of adoption plan, and was given full opportunity to challenge evidence. U.S.C.A. Const.Amend. 14; M.G.L.A. Const. Pt. 1, Art. 10; M.G.L.A. c. 210, § 3.

2 Cases that cite this headnote

Attorneys and Law Firms

***850* **661* Ann Wagner, Boston, for the father.

Susan Walewicz, Boston, for Dept. of Social Services.

Jacqueline L. Freeman, Somerville, for the minor.

Before ARMSTRONG, JACOBS and PORADA, JJ.

Opinion

JACOBS, Justice.

William's father[1] appeals on two grounds from a decree entered pursuant to G.L. c. 210, § 3, dispensing with the need for parental consent to a petition for the adoption **662* of William.[2] He claims that his waiver of his right to counsel was invalid and his exclusion, by a Probate Court judge, from a portion of the trial violated his constitutional right to due process of law. We reject these claims and affirm the decree.

1. *Waiver.* The petition underlying this appeal was filed by the Department of Social Services (DSS) in February, 1992. After being served with notice of the proceeding, the father, in May, 1992, filed a motion objecting to the petition and asking for the appointment of counsel. At approximately the same time, he wrote to a DSS social worker asking that certain of his relatives be considered as adoptive parents and requesting the appointment of a lawyer "so I can make sure my child is in good hands." An attorney was appointed for the father on October 27, 1992.

On the day scheduled for trial, January 27, 1994, during hearings on pretrial motions, ***851* the father's attorney indicated to the court that the father wished to represent himself. Shortly thereafter, the father was asked his reasons for wanting to dismiss his attorney and represent himself. During that inquiry, the transcript of which is set forth in the appendix, the judge informed the father of his right to counsel, the possible outcome of the case and the "complicated" nature of the issues involved. The judge then explained that she was appointing the father's attorney to act as "stand-by counsel, to be available to you for consultation should you ask for it." The judge then asked the father to execute a waiver explaining that his signing indicates "that you have been informed of your rights to counsel and to have counsel appointed for you at every stage of this proceeding; and you elect to proceed **663* without counsel and waive your right to that appointment." At that point, the father signed the waiver form.

From 1980 through 1991, the father had been arraigned in various District and Superior Courts on twenty-three occasions in cases involving a wide variety of criminal charges. The dispositions in nine of those cases involved prison sentences. At the time of trial, he was serving concurrent Massachusetts and Federal sentences. In an affidavit of indigency filed with the court, the father stated that the highest grade he attained in school was the eleventh. At trial, he testified to currently taking "pre-college courses."

1 2 An indigent parent in a G.L. c. 210, § 3, proceeding has a constitutional right to counsel. *Department of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 2-5, 393 N.E.2d 406 (1979). Probate Court Uniform Practice Xa. 7 (1989). No cases have been brought to our attention explicating the criteria for determining the validity of the waiver of that right. Given that the severance of a parent's relationship with his or her child may be as severe a deprivation to that parent as the loss of personal freedom, see *Custody of a Minor (No. 1)*, 377 Mass. 876, 884, 389 N.E.2d 68 (1979), it is appropriate that we look to the criminal law to determine the validity of a purported waiver of counsel in a proceeding which operates to terminate parental rights. Similar resort to criminal cases has been made with respect to analysis of claims of ineffective assistance of counsel in custody and termination proceedings. See *Care & Protection of Stephen*, 401 Mass. 144, 149, 514 N.E.2d 1087 (1987); *Adoption of Mary*, 414 Mass. 705, 712-713, 610 N.E.2d 898 (1993). That analogous authority leads us to the conclusion that a waiver of counsel in a G.L. c. 210, § 3, proceeding must be voluntary, unequivocal, knowing and intelligent **664* and causes us to seek guidance for the interpretation of that standard in relevant criminal proceedings in which a defendant's waiver of counsel is in issue. See *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Commonwealth v. Barnes*, 399 Mass. 385, 390, 504 N.E.2d 624 (1987); *Commonwealth v. Mott*, 2 Mass.App.Ct. 47, 51, 308 N.E.2d 557 (1974); *Commonwealth v. Stovall*, 22 Mass.App.Ct. 737, 739, 498 N.E.2d 126 (1986).

3 4 A party challenging the effectiveness of his relinquishment of the right to counsel has the burden of proving by a preponderance of the evidence that his waiver was not valid. *Commonwealth v. Lee*, 394 Mass. 209, 218, 475 N.E.2d 363 (1985). *Commonwealth v. Higgins*, 23 Mass.App.Ct. 552, 556, 503 N.E.2d 1326 (1987). There is no " 'particular piece of information that is essential to an effective waiver of counsel.' *Maynard v. Meachum*, 545 F.2d 273, 279 (1st Cir.1976). The validity of a defendant's waiver depends on the particular facts and circumstances of each case. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)." *Commonwealth v. Barnes, supra* at 390-391, 504 N.E.2d 624. ***852 Commonwealth v. Moran*, 17 Mass.App.Ct. 200, 208, 457 N.E.2d 287 (1983). A determination that a party validly has waived his right to counsel "turns not simply on the state of the record, but on all of the circumstances of the case." *Maynard v. Meachum, supra* at 278.

No issue is presented, nor is it argued, that the father's waiver of counsel was involuntary. While his initial decision to represent himself may have been stimulated by his desire to address the court, he maintained that position after the judge explained that he would have the opportunity to testify under examination by his attorney. His decision, therefore, hardly was driven by the "Hobson's choice" of not being able to address the court except by representing himself. Compare *Commonwealth v. Cavanaugh*, 371 Mass. 46, 53-54, 353 N.E.2d 732 (1976). There is no claim by the father nor any indication in the record that he believed his appointed attorney was either incompetent or unprepared or that he sought substitute counsel. He clearly articulated a desire to "handle this situation" himself. His decision was unequivocal and voluntary.

**665* We focus our review, therefore, on the father's "subjective understanding of his decision and its consequences.... We must be confident that [he] was 'adequately aware of the seriousness of the [proceedings], the magnitude of his undertaking, the availability of advisory counsel, and the disadvantages of self-representation.' *Commonwealth v. Jackson*, 376 Mass. 790, 795, 383 N.E.2d 835 (1978)." *Commonwealth v. Barnes, supra* at 391, 504 N.E.2d 624. Material to this analysis is both the trial record and the father's background and experience including " 'such factors as his involvement in previous criminal trials, his representation by counsel before trial, and the continued presence of advisory counsel at trial in determining whether he understood what he was getting into.' " *Commonwealth v. Barnes, ibid.*, quoting from *Maynard v. Meachum, supra* at 279.

5 Viewing the father's waiver in the context of the entire proceeding, we are convinced that he acted knowingly and intelligently. The judge, without the benefit of prescribed questions, see *Commonwealth v. Barnes, supra* at 390, 504 N.E.2d 624, sufficiently explored the father's reasons for wanting to represent himself and adequately explained the "pitfalls in proceeding pro se." *Commonwealth v. Mott, supra*

at 52, 308 N.E.2d 557. His attempt to suggest certain of his relatives as prospective adoptive parents and his presence during a hearing of a pretrial motion to dismiss during which his standing to object to the adoption of William was thoroughly argued, coupled with the judge's warning to him that the petition, if allowed, "will cut off your rights concerning the adoption of this child," emphatically indicate that the father was aware of the seriousness and consequences of the proceeding. Not only was the father apprised of the existence of complicated issues with respect to which he might need to consult counsel, the record indicates that at one point he expressed his discomfort in speaking to a guardian ad litem for the child before he had an opportunity to discuss the case with his attorney. These factors are reflective of the father's awareness of the magnitude and disadvantages of self-representation. The judge's several expressions of concern over the father representing himself and her appointment of standby counsel could not fail to impress *666 him with the importance of his undertaking. See *Commonwealth v. Lee*, 394 Mass. at 218-219, 475 N.E.2d 363. Moreover, the father's frequent involvement with the criminal justice system was likely to make him sensitive to the important role counsel plays in court proceedings having serious consequences. The father's educational level and his various statements and writings in the record convince us that he had the capacity to make an intelligent waiver.[4] See *Maynard v. Meachum, supra* at 279 ("[a]n intelligent waiver does not require that the accused have the skill or knowledge of a lawyer").

2. *Exclusion from proceedings.* In addition to the father, three witnesses testified at the trial. The father was present and actively participated in the proceedings during all **853 of the testimony of two of those witnesses. He was also present during most of the testimony of a third witness, a DSS social worker, and engaged in cross-examination of that witness. After the judge declared the hearing closed as it pertained to the father and excluded him from the courtroom, the DSS social worker was permitted to resume the stand and gave testimony relating solely to the mother's fitness and covering less than five pages of transcript. Upon completion of testimony, the judge heard argument on the motion of William's attorney for an independent clinical evaluation of the prospective adoptive parents. No witnesses were presented during this hearing, which covered approximately eleven pages of transcript, and the argument of counsel was focused on testimony which had been given while the father was in the courtroom. The judge denied the motion.

6 Since the DSS petition sought to dispense with the consent of *both* parents, the father, who objected to the petition and conducted himself appropriately while acting as his own attorney, had a right to be present throughout the trial.[5] Nevertheless, his exclusion during the brief examination of the *667 social worker and the argument of the motion for an independent evaluation, in the circumstances, does not have due process significance. See *Commonwealth v. Burbank*, 27 Mass.App.Ct. 97, 105-106, 534 N.E.2d 1180 (1989); contrast *Commonwealth v. Mott, supra* at 52, 308 N.E.2d 557. The father was present during the receipt of all evidence relating to his fitness and the best interests of William, including the suitability of the DSS adoption plan, and was given full opportunity to challenge that evidence. His inability to hear or challenge the brief testimony that overwhelmingly established the mother's unfitness did not harm his interests. With respect to the motion for an independent evaluation filed in William's behalf, it is significant that the judge, during a pretrial conference, agreed to the suggestion by William's attorney, that it be heard after the completion of the G.L. c. 210, § 3, evidence. The father's attorney who was present and had participated in the pretrial proceedings did not object to that scheduling of the motion. Thus relegated to a segment of the process following the close of evidence, the hearing on the motion for an independent evaluation had no direct bearing on the G.L. c. 210, § 3, determination, and even had the motion been allowed, the evaluation would pertain principally to the prospective adoption, which is a separate and independent proceeding. *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 635 n. 3, 328 N.E.2d 854 (1975). *Petition of the Dept. of Pub. Welfare to Dispense with Consent to Adoption*, 371 Mass. 651, 656 n. 6, 358 N.E.2d 794 (1976). See G.L. c. 210, § 5A. In any event, the record indicates that the DSS adoption plan was entered as an exhibit at the trial, fully considered by the judge in accordance with G.L. c. 210, § 3(c), and found by her to serve

William's best interests. Compare *Petition of Dept. of Pub. Welfare to Dispense with Consent to Adoption*, 6 Mass.App.Ct. 477, 479-480, 377 N.E.2d 708 (1978).

Decree affirmed.

ATTACHMENT

**668* APPENDIX.

THE JUDGE: "Now, why are you asking to remove attorney Milne?"

THE FATHER: "Because I want to say what I have to say, ma'am, and I see that this is the only way I can do it."

THE JUDGE: "Do you understand, Mr. _______, that you certainly have the opportunity to take the stand, to be examined by your attorney and cross examined by other attorneys?

You have the right to counsel in this matter. You have the constitutional right to be represented by counsel at every stage of this particular proceeding, which will cut off-If it's allowed, it will cut off your rights concerning the adoption of this child."

***854* "So you constitutionally have the right to counsel."

THE FATHER: "Uh huh."

THE JUDGE: "Now, if you're asking to continue without counsel, I'd like to know first of all why."

THE FATHER: "Because I would like to handle this situation myself."

THE JUDGE: "You want to represent yourself?"

THE FATHER: "Yes, ma'am, I would."

THE JUDGE: "I'm concerned, sir, that you will require the chance to consult counsel as the proceedings go by. There are a number of rather complicated, especially eviden[t] iary, issues involved in this situation and you may need to consult counsel.

I am willing to allow you certainly to represent yourself in the matter, but I will be asking that attorney Milne remain in the case as stand-by counsel, to be available to you for consultation should you ask for it."

THE FATHER: "Yes, ma'am."

THE JUDGE: "All right. Now, if you wish to represent yourself, you must execute this waiver which says that you have been informed of your rights to counsel and to have counsel appointed for you at every stage of this proceeding; and you elect to proceed without counsel and waive your right to that appointment."

"And if you wish to execute that waiver, and file it with the Court and also file an appearance, I will allow you to represent yourself in the hearing. But I'm going to require attorney Milne to stand by as stand-by counsel."

All Citations

38 Mass.App.Ct. 661, 651 N.E.2d 849

Footnotes

1 The record indicates that William's "father" generally was referred to as the "putative father" in the proceedings below, and that he did not file a parental responsibility claim pursuant to G.L. c. 210, § 4A. For ease of reference, however, we refer to him as the father.

2 William was born on September 13, 1991, with a positive drug screen for cocaine. The father was incarcerated at the Plymouth house of correction on the day of William's birth, and was a prisoner at the Massachusetts

KeyCite Yellow Flag - Negative Treatment
Distinguished by New Generation Produce Corp. v. New York Supermarket, Inc., E.D.N.Y., March 26, 2014

57 S.Ct. 809
Supreme Court of the United States

AETNA INS. CO.
v
KENNEDY, 3d, to Use of BOGASH.
SPRINGFIELD FIRE & MARINE INS. CO.
v.
SAME.
LIVERPOOL & LONDON &
GLOBE INS. CO., LIMITED,
v.
SAME.

Nos. 753—755.
|
Argued April 30, 1937.
|
Decided May 17, 1937.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suits by John M. Kennedy, 3d, to the use of Anna L. Bogash, against the AEtna Insurance Company, against the Spring-field Fire & Marine Insurance Company, and against the Liverpool & London & Globe Insurance Company, Limited, which were tried together. Judgments for defendants were reversed, and the cases were remanded by the Circuit Court of Appeals with directions to give judgments for plaintiff (87 F.(2d) 683), and defendants bring certiorari.

Judgments of Circuit Court of Appeals modified in accordance with opinion.

West Headnotes (14)

[1] Trial
By both parties
Plaintiff and defendant who respectively request peremptory instructions and do nothing more, thereby assume facts to be undisputed and in effect submit to trial judge determination of inferences properly to be drawn therefrom.

7 Cases that cite this headnote

[2] Appeal and Error
Direction of verdict
Fact finding by trial court in action wherein both parties request preemptory instructions and do nothing more, must stand, on review, if record discloses substantial evidence to support finding.

1 Cases that cite this headnote

[3] Jury
Evidence of waiver
Courts indulge every reasonable presumption against waiver of right of jury trial, since right is fundamental.

423 Cases that cite this headnote

[4] Trial
By both parties
Parties respectively may request peremptory instruction and on refusal of court to direct verdict, have submitted to jury all issues as to which opposing inferences may be drawn from evidence.

2 Cases that cite this headnote

[5] Trial
By both parties
Parties to suits on fire policies who respectively requested peremptory instructions did not waive right of jury trial or authorize District Court to decide any issue of fact, where parties submitted with requests other requests for instructions in respect of parties' rights to cancel and receive notice of cancellation of policies, since such requests amounted to applications that, if peremptory instructions were not given, cases be submitted to jury.

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5 Cases that cite this headnote

[6] Federal Courts
Directing Judgment in Lower Court
Jury
Re-examination or other review of questions of fact tried by jury

Where plaintiff moved for new trials after unconditional verdicts for defendants but not for judgments notwithstanding the verdicts, and District Court denied motions and entered judgments for defendants, Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with Seventh Amendment, to direct District Court to give judgments for plaintiff. Const. Amend. 7.

41 Cases that cite this headnote

[7] Federal Civil Procedure
Notwithstanding Verdict;Judgment as Matter of Law

Where District Court, before submission of cases to jury, denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding verdicts for defendants, plaintiff was entitled to recover.

3 Cases that cite this headnote

[8] Federal Courts
Substance or procedure; determinativeness

Under Conformity Act, federal courts follow practice authorized by state statutes if there be nothing in statutes that is incongruous with courts' organization or fundamental procedure or in conflict with congressional enactment. Conformity Act, 28 U.S.C.A. § 724.

Cases that cite this headnote

[9] Federal Civil Procedure
Motion for Judgment

Where parties to suits in Pennsylvania District Court respectively requested peremptory instructions, and after verdicts for defendants, plaintiff moved for new trials but not for judgments notwithstanding the verdicts, District Court did not err in failing to give plaintiff judgments notwithstanding the verdicts, in absence of motions for such judgments in accordance with Pennsylvania practice. 12 P.S.Pa. § 681; Conformity Act, 28 U.S.C.A. § 724.

4 Cases that cite this headnote

[10] Federal Courts
Appealability;standard of review

Conformity Act, under which federal courts follow practice authorized by state statutes, does not extend to Circuit Court of Appeals. Conformity Act, 28 U.S.C.A. § 724.

1 Cases that cite this headnote

[11] Insurance
Evidence
Insurance
Burden of proof

Where period for which fire policies were written had not expired when loss occurred, insurers had burden to show that insurance was not in force at that time.

4 Cases that cite this headnote

[12] Insurance
Third persons

Mortgagee clause in fire policies created contract of insurance between first mortgagee and insurer and effected separate insurance on his interest, as respects second mortgagee's right to cancel policies without first mortgagee's consent.

2 Cases that cite this headnote

[13] Insurance

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Third persons

In suits by successor to first mortgagee's interest on fire policies which had been canceled by second mortgagee, evidence held insufficient to support finding that first mortgagee intended building to become or remain uninsured, or authorized second mortgagee to act for him in respect of his insurance, or that he consented, acquiesced in, or ratified surrender or cancellation of policies.

3 Cases that cite this headnote

[14] Federal Courts
Appealability;standard of review

Conformity Act, under which federal courts follow practice authorized by state statutes, does not extend to Circuit Court of Appeals. Conformity Act, Fed.Rules Civ.Proc. 28 U.S.C.A.

1 Cases that cite this headnote

Attorneys and Law Firms

**810 *390 Messrs. Horace M. Schell and Robert T. McCracken, both of Philadelphia, Pa., for petitioners.

Mr. Harry Shapiro, of Philadelphia, Pa., for respondent.

Opinion

Mr. Justice BUTLER delivered the opinion of the Court.

Kennedy had a first mortgage and a bank a second mortgage on old brewery property in Pennsylvania owned *391 by a distilling company. The bank procured from petitioners fire insurance policies covering the building. Each policy states it is understood that the insured building is under foreclosure by the bank; the premium being paid by the bank, it is agreed that in event of loss, same will be adjusted with the bank and paid to it and Kennedy, mortgagee, as interest may appear. Each provides for cancellation upon request of the insured and that the company may cancel by giving insured five days' written notice. It includes the standard mortgagee clause which provides: Loss or damage shall be **811 payable to Kennedy as mortgagee as interest may appear; insurance as to the interest of the mortgagee shall not be invalidated by any act of the mortgagor or owner; in case the mortgagor or owner shall neglect to pay premium the mortgagee shall, on demand, pay the same. The company reserves the right to cancel the policy at any time as provided by its terms, but in such case the policy is to continue in force for the benefit of the mortgagee for ten days after notice to him.

After the bid at sheriff's sale in the foreclosure proceedings, the bank abandoned its interest in the property as worthless, notified Kennedy that it intended to cancel the policies, and suggested that he buy them. He declined to do so or to pay the bank any part of the premiums and expressed intention not to advance any money in respect of the insured building. The bank surrendered the policies for cancellation; petitioners paid it the unearned premiums. Later, and within the period for which petitioners had insured it, the building burned. Bogash acquired Kennedy's interest and, to recover on the policies, brought these suits. Upon the statements of claim and affidavits of defense, there arose questions whether Kennedy consented to or acquiesced in the surrender and cancellation of the policies and whether they were in force when the loss occurred or had been surrendered and canceled before that time.

*392 The parties, having introduced their evidence and agreed that the amount of the loss was $11,000, submitted their points for charge to the jury. Plaintiff requested the court to instruct the jury in respect of notice to Kennedy of cancellation and surrender of the policies, consent by him that they be canceled, and to direct verdicts in favor of plaintiff for the agreed amount. Defendants requested the court to instruct the jury in respect of the right of cancellation under the policies; that, if the jury should find facts specified in the proposed instructions, its verdicts should be for defendants, and to direct the jury that, upon the pleadings and evidence, the verdicts must be for defendants. The court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial, but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants.

Plaintiff appealed; the Circuit Court of Appeals held the trial court erred in refusing to charge on points concerning

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notice of cancellation to Kennedy, reversed the judgments of the District Court and ordered new trials. Kennedy to Use of Bogash v. AEtna Ins. Co., 87 F.(2d) 683. But on plaintiff's application for rehearing it held that, by their requests for peremptory instructions, plaintiff and defendants assumed the facts to be undisputed and submitted to the trial judge the determination of the inferences to be drawn from the evidence and so took the cases from the jury. The court also held that the evidence was not sufficient to sustain verdicts for defendants, denied the petition for rehearing, and remanded the cases to the District Court with directions to give plaintiff judgments for the agreed amount of the loss. 87 F.(2d) 684.

Questions presented are: Whether, by their request for directed verdicts, the parties waived their right to trial *393 by jury; whether, by reversing the judgments for defendants and directing judgments for plaintiff, the Circuit Court of Appeals deprived defendants of that right; and, whether the evidence was sufficient to sustain a finding that Kennedy consented to the cancellation of the policies.

[1] [2] [3] [4] [5] 1. The Circuit Court of Appeals erred in holding that, by their requests for peremptory instructions, the parties took the cases from the jury and applied to the judge for decision of the issues of fact as well as of law. The established rule is that where plaintiff and defendant respectively request peremptory instructions, and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences properly to be drawn from them. And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it. [1] But, as the **812 right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. [2] And unquestionably the parties respectively may request a peremptory instruction and, upon refusal of the court to direct a verdict, have submitted to the jury all issues as to which opposing inferences may be drawn from the evidence. [3] Here neither the plaintiff nor the defendants applied for directed verdicts without more. With their requests for peremptory instructions they submitted other requests that reason *394 ably may be held to amount to applications that, if a peremptory instruction is not given, the cases be submitted to the jury. Indeed, we find nothing in the record to support the view that the parties waived their right of trial by jury or authorized the judge to decide any issue of fact.

[6] [7] 2. The verdicts were taken unconditionally. Plaintiff moved for new trials, but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding the verdicts plaintiff was entitled to recover. Slocum v. New York Life Ins. Co., 228 U.S. 364, 387, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas.1914D, 1029. Our decision in Baltimore & C. Line v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636, is not applicable.

[8] [9] [10] There is another reason why the direction of judgments for plaintiff cannot stand. Under the Conformity Act, 28 U.S.C. s 724 (28 U.S.C.A. s 724), federal courts follow the practice authorized by state statutes if there be nothing in them that is incongruous with their organization or their fundamental procedure or in conflict with congressional enactment. [4] The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requiresting binding instructions has been reserved or declined, *395 the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered, either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. [5] As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the District Court did not err in failing to give plaintiff judgment notwithstanding the verdicts. [6] The Conformity Act does **813 not extend to the Circuit Court of Appeals. [7] In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff.

[11] [12] 3. Was the evidence sufficient to sustain a finding that, as to Kennedy's interest, the insurance terminated before the fire? As the period for which the

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policies were written had not expired when the loss occurred, defendants had the burden to show that the insurance was not in force at that time. Kennedy was not merely a designated beneficiary to whom was payable, as specified, insurance obtained by the bank. The mortgagee clause created a contract of insurance between him and the company and effected separate insurance upon his interest. [8] *396 Defendants do not claim that they gave Kennedy any notice of intention to cancel his insurance or that the policies had been surrendered by the bank in accordance with their terms or otherwise.

[13] The evidence shows: After bids were received at foreclosure sale, the bank's attorney asked Kennedy to take over the policies and, upon his refusal so to do or to pay the bank anything on account of unearned premiums, informed him that the bank intended to surrender the policies. He expressed no objection, authorization, or consent. There is no evidence that before the fire Kennedy had been notified by the bank or by the defendants, or knew, that the bank had surrendered the policies or received return premiums or that defendants attempted to cancel his insurance. The evidence is not enough to support a finding that he intended the building to become or remain uninsured or authorized the bank to act for him in respect of his insurance, or that he consented to, acquiesced in, or ratified the surrender or cancellation of the policies. Defendants do not claim that they canceled Kennedy's insurance by giving him notice in accordance with the policies. The Circuit Court of Appeals rightly reversed the judgments of the District Court, but erroneously directed judgments for plaintiff.

The judgments of the Circuit Court of Appeals are accordingly modified by eliminating the directions to enter judgments for plaintiff and by substituting orders for new trials. It is so ordered.

Modified.

All Citations

301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177

Footnotes

1 Beutell v. Magone, 157 U.S. 154, 157, 15 S.Ct. 566, 39 L.Ed. 654; Sena v. America Turquoise Co., 220 U.S. 497, 501, 31 S.Ct. 488, 55 L.Ed. 559; American Nat'l Bank of Nashville v. Miller, 229 U.S. 517, 520, 33 S.Ct. 883, 57 L.Ed. 1310; Williams v. Vreeland, 250 U.S. 295, 298, 39 S.Ct. 438, 63 L.Ed. 989, 3 A.L.R. 1038; Oppenheimer v. Harriman Nat'l Bank & Trust Co., 301 U.S. 206, 57 S.Ct. 719, 81 L.Ed. 1042.

2 Hodges v. Easton, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed. 169; Slocum v. New York Life Ins. Co., 228 U.S. 364, 385, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas.1914D, 1029; Patton v. United States, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263; Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603, 95 A.L.R. 1150; Foust v. Munson S. S. Line, 299 U.S. 77, 84, 57 S.Ct. 90, 81 L.Ed. 49.

3 Empire State Cattle Co. v. Atchison, etc., Ry. Co., 210 U.S. 1, 8, 28 S.Ct. 607, 52 L.Ed. 931, 15 Ann.Cas. 70; Sampliner v. Motion Picture Patents Co., 254 U.S. 233, 239, 41 S.Ct. 79, 80, 65 L.Ed. 240.

4 Henderson v. Louisville, etc., Railroad, 123 U.S. 61, 64, 8 S.Ct. 60, 31 L.Ed. 92; Amy v. Watertown, No. 1., 130 U.S. 301, 304, 9 S.Ct. 530, 32 L.Ed. 946; Barrett v. Virginian Ry. Co., 250 U.S. 473, 475, 39 S.Ct. 540, 63 L.Ed. 1092; Baltimore & C. Line v. Redman, 295 U.S. 654, 658, 55 S.Ct. 890, 892, 79 L.Ed. 1636. Cf. Nudd v. Burrows, 91 U.S. 426, 441, 23 L.Ed. 286; Indianapolis, etc., R.R. Co. v. Horst, 93 U.S. 291, 300, 23 L.Ed. 898.

5 Act of April 22, 1905, P.L. 286, s 1, as amended by Act April 9, 1925, P.L. 221, s 1, 12 Purdon's Penna. Statutes Annotated, s 681. Quoted in Slocum v. New York Life Ins. Co., 228 U.S. 364, 375, 376, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas.1914D, 1029.

6 West v. Manatawny Mut. F. & S. Ins. Co., 277 Pa. 102, 120 A. 763; Cox v. Roehler, 316 Pa. 417, 419, 420, 175 A. 417.

7 Camp v. Gress, 250 U.S. 308, 318, 39 S.Ct. 478, 63 L.Ed. 997.

8 Syndicate Ins. Co. v. Bohn (C.C.A.) 65 F. 165, 178, 27 L.R.A. 614; Insurance Co. of North America v. International Trust Co. (C.C.A.) 71 F. 88, 91; Newark Fire Ins. Co. v. Truck (C.C.A.) 6 F.(2d) 533, 535, 43 A.L.R. 496; Westchester Fire Ins. Co. v. Norfolk Building & Loan Ass'n (C.C.A.) 14 F.(2d) 524, 526; Queen Ins. Co. v. People's Union Sav. Bank (C.C.A.) 50 F.(2d) 63, 64; Kimberley & Carpenter v. Fireman's Fund Ins. Co. (C.C.A.) 78 F.(2d) 62, 64; 4 Joyce, Law of Insurance (2d Ed.) s 2795, p. 4776; Richards, Law of Insurance (4th Ed.) s 279, p. 478; Vance on Insurance (2d Ed.) s 170, p. 657.

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246 F.2d 221
United States Court of Appeals Fifth Circuit.

Nick DOTSCHAY, for the use and benefit of Olympia ALFONSO, and Nick Dotschay, individually, Appellants,
v.
NATIONAL MUTUAL INSURANCE COMPANY of the DISTRICT OF COLUMBIA, Appellee.

No. 16398.
|
June 10, 1957.

Action for alleged breach of duty of a liability insurer to compromise a claim. Judgment of dismissal without prejudice in the United States District Court for the Southern District of Florida, Emett C. Choate, J., and the plaintiffs appealed. The United States Court of Appeals, Rives, Circuit Judge, held that, where the district court in dismissing the action, stated that if the cause of action existed for the plaintiff, it was not one upon which the suit was brought, dismissal was error.

Reversed and remanded.

West Headnotes (4)

[1] Insurance
⇐ Insurer's settlement duties in general

Under Florida law, liability insurer is under a duty at least to exercise good faith in the settlement of the claim against the insured.

4 Cases that cite this headnote

[2] Federal Courts
⇐ Withholding Decision;Certifying Questions

In a diversity case, where the State Supreme Court had not decided the question involved, the federal court would not decide the question in advance of state courts, where the jurisdiction of the federal district court permitted it to declare the rights of the parties and grant further necessary or proper relief. 28 U.S.C.A. 2202.

2 Cases that cite this headnote

[3] Federal Civil Procedure
⇐ Insufficiency in general

A complaint is not to be dismissed in a federal court because the plaintiff has misconceived the proper legal theory of the claim, but it is sufficient, if it shows that the plaintiff is entitled to any relief, which the court can grant, regardless of whether it asks for the proper relief. Fed.Rules Civ.Proc. rules 8(a)(2), 12(b)(6), 54(c), 28 U.S.C.A.

67 Cases that cite this headnote

[4] Federal Civil Procedure
⇐ Insurance actions

In suit based on alleged breach of duty of a liability insurer to compromise a claim, where the district court in dismissing the action, stated that if the cause of action existed for the plaintiff, it was not one upon which the suit was brought, dismissal was error, in view of the liberal rules of federal practice, under which a complaint is not to be dismissed, because the plaintiff has misconceived the proper legal theory of the claim. Fed.Rules Civ.Proc., rules 8(a)(2), 12(b)(6), 54(c), 28 U.S.C.A.

24 Cases that cite this headnote

Attorneys and Law Firms

*222 Harry Zuckerman, Gerard Ehrich, Miami, Fla., for appellant.

Henry Burnett, Miami, Fla., Fowler, White, Gillen, Yancey & Humkey, Miami, Fla., of counsel, for appellee.

Before RIVES, JONES and BROWN, Circuit Judges.

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Opinion

RIVES, Circuit Judge.

The complaint was based on the alleged breach of duty of a liability insurer to settle or compromise a claim. The district court was of the opinion that the insured could not use for the use of the injured party, that the cause of action on the part of the insured himself did not accrue until he had satisfied the judgment against him, and since that had not been done, the court dismissed the action 'with prejudice as to the plaintiff Nick Dotschay for the use and benefit of Olympia Alfonso,' and 'without prejudice as to the plaintiff Nick Dotschay, individually.' This appeal ensued

[1] It is clear that in Florida a liability insurer is under a duty at least to exercise good faith in the settlement of a claim against the insured, [1] and that is not disputed.

[2] The Florida Supreme Court has not decided the question of whether an insured's right of action to recover damages for a breach of that duty accrues only upon his payment of the excess judgment and decisions of that question from other states are in conflict. [2] We do not find it necessary to decide that question in advance of the State courts, for the jurisdiction of the federal district court was more elastic than simply to award damages. It could declare the *223 rights of the parties, [3] and grant further necessary or proper relief. [4]

[3] In dismissing the action without prejudice as to the plaintiff Nick Dotschay, individually, the district court expressed the opinion that 'if a cause of action exists for the plaintiff Nick Dotschay it is not one upon which suit was brought herein.' Again, in colloquy with counsel, the court stated: 'I think Nick Dotschay probably could bring an action for declaratory relief * * *.' It seems to us that the district court overlooked our liberal rule of federal practice under which the complaint is not to be dismissed because the plaintiff's lawyer has misconceived the proper legal theory of the claim, but is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief. [5]

[4] We hold, therefore, that the court erred in dismissing the complaint as to the plaintiff Nick Dotschay, individually. It is not necessary upon this appeal to decide whether Nick Dotschay could properly maintain the suit for the use and benefit of Olympia Alfonso. However, since the dismissal of that part of the complaint was 'with prejudice,' out of an abundance of precaution, lest it might be claimed that the judgment of dismissal became res judicata against Olympia Alfonso, the entire judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion. See 28 U.S.C.A. § 2106.

Reversed and remanded.

All Citations

246 F.2d 221

Footnotes

1 Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852, 859; American Fidelity & Casualty Co. v. Greyhound Corp., 5 Cir., 232 F.2d 89, 93; Tully v. Travelers Insurance Co., D.C.N.D.Fla., 118 F.Supp. 568, 569.

2 Payment not a prerequisite: Southern Fire & Casualty Co. v. Norris, 35 Tenn.App. 657, 250 S.W.2d 785; Schwartz v. Norwich Union Ind. Co., 212 Wis. 593, 250 N.W. 446.
Payment required: American Mutual Liability Ins. Co. of Mass. v. Cooper, 5 Cir., 61 F.2d 446, 448; State Automobile Mut. Ins. Co. of Columbus, Ohio v. York, 4 Cir., 104 F.2d 730; Dumas v. Hartford Acc. & Indemnity Co., 92 N.H. 140, 26 A.2d 361. See, also, Annotation 40 A.L.R.2d 190, et seq.

3 '§ 2201. Creation of remedy
'In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.' 28 U.S.C.A. § 2201.

4 '§ 2202. Further relief
'Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.' 28 U.S.C.A. § 2202.

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5 Rules 8(a)(2), 12(b)(6), and 54(c), Federal Rules of Civil Procedure, 28 U.S.C.A.; Keiser v. Walsh, 73 App.D.C. 167, 118 F.2d 13, 14; Kansas City, St. L. & C.R. Co. v. Alton R. Co., 7 Cir., 124 F.2d 780, 783; Hawkins v. Frick-Reid Supply Corporation, 5 Cir., 154 F.2d 88, 89; Schoonover v. Schoonover, 10 Cir., 172 F.2d 526, 530; Blazer v. Black, 10 Cir., 196 F.2d 139, 147; Hutches v. Renfroe, 5 Cir., 200 F.2d 337, 340; Driggers v. Business Men's Assurance Co. of America, 5 Cir., 219 F.2d 292, 297; 6 Moore's Federal Practice, 2nd ed., Para. 54.60, pp. 1203, 1204.

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C3

31 Mass.L.Rptr. 637
Superior Court of Massachusetts,
Middlesex County.

BOARD OF TRUSTEES OF the GATES OF GREENWOOD HOME OWNERS' TRUST
v.
GATES OF GREENWOOD, LLC et al.[1]

No. MICV201304714F.
|
Feb. 6, 2014.

MEMORANDUM OF DECISION AND ORDER

DENNIS J. CURRAN, Associate Justice.

*1 The plaintiff Board of Trustees of the Gates of Greenwood Home Owners' Trust moves to strike multiple counts of defendant Gates of Greenwood LLC's third-party complaint under Mass.R.Civ.P. 14(a). The Trust brought this condominium construction defect action against Greenwood alleging, among other causes of action, a breach of fiduciary duty stemming from Greenwood's role as the original trustee of the Trust. Greenwood responded by filing a third-party complaint seeking indemnification from various parties, including the unit owners of the condominium pursuant to an indemnification clause contained in the condominium's declaration of trust. The Trust moves to strike the third-party complaint against the unit owners, arguing that the indemnification clause is void as a matter of public policy.

BACKGROUND

Greenwood sought to develop a twenty-four-unit condominium in Wakefield.[2] To that end, Greenwood, as developer and declarant, was responsible for creating and recording a master deed and declaration of trust. The declaration of trust, dated September 24, 2008, established the Trust as the organization of unit owners of the condominium. The declaration of trust provided:

> (c) No Trustee appointed or elected as hereinbefore provided shall under any circumstances or in any event be held liable or accountable out of his personal assets or be deprived of compensation by reason of any action taken, suffered or omitted in good faith or be so liable or accountable for more money or other property than he actually receives, or for allowing one or more of the other Trustees to have possession of the Trust books or property, or be so liable, accountable or deprived by reason of honest errors of judgment or mistakes of fact or law by reason of the existence of any personal or adverse interest or by reason of anything except his own personal and willful malfeasance.
>
> (d) *The Trustees and each of them shall be entitled to indemnity both out of the Trust property and by the owner(s) of the lands subject to this Declaration, against any liability incurred by them* or any of them in the execution hereof, including without limiting the generality of the foregoing, liabilities in contract and in tort and liabilities for damages, penalties and fines.

Declaration of Trust of The Gates of Greenwood Home Owners' Trust and Declaration of Easements, Covenants and Restrictions, § I(C)(4)(c)-(d) (emphasis added).

Under the terms of the condominium documents, Greenwood was named the original trustee of the Trust. From the creation of the condominium until November 2012, Greenwood served as the sole trustee. During that time, construction of the condominium was completed and various units were sold. Thereafter, unit owners of the condominium became elected or appointed as trustees.

After Greenwood relinquished its role as trustee, the Trust engaged an engineering consultant to investigate potential defects in the condominium's common areas and facilities. The consultant identified a number of defects, including issues with the condominium siding, roofs, windows, and doors.

*2 On October 29, 2013, the Trust sued Greenwood. Count II of the complaint for breach of fiduciary duty pertains only to Greenwood's performance of its role as trustee. The complaint alleges that Greenwood breached its fiduciary duty to the Trust by transferring the common areas and facilities of the condominium in a deficient condition and by failing to address or remediate these defects. Further, the complaint alleges that Greenwood breached its fiduciary duty by causing the Trust, over which it had exclusive control, to refrain from pursuing

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the Trust's claims with respect to the defects or taking any other action concerning the defects:

Greenwood brought a third-party complaint against various entities that designed and/or constructed the condominium and the unit owners for indemnification. As to the unit owners, Greenwood is only seeking indemnification with respect to its alleged breach of fiduciary duty. See Gates of Greenwood LLC's Third–Party Complaint, Counts XXXI–LIII. The third-party complaint alleges that under section I(C)(4)(d) of the declaration of trust, the unit owners are required to indemnify Greenwood.

DISCUSSION

I. STANDARD

Pursuant to Mass.R.Civ.P. 14(a), a party may move to strike a third-party complaint. A court has considerable discretion in deciding whether to allow the motion to strike. See *Old Republic Ins. Co. v. Concast, Inc.*, 99 F.R.D. 566, 568 (S.D.N.Y.1983); see also *Cronin v. Strayer*, 392 Mass. 525, 535 (1984) (Massachusetts courts "look to [f]ederal decisions interpreting the Federal Rules of Civil Procedure for guidance" in interpreting the Massachusetts Rules of Civil Procedure). "When making this decision, the [c]ourt should look to see if the claim is 'obviously unmeritorious and can only delay or prejudice the disposition of plaintiff's claim.' " *Truong v. Pageau*, 2013 U.S. Dist. LEXIS 164510 at *6 (D.Mass. November 19, 2013), citing *Perez Cruz v. Fernandez Martinez*, 551 F.Sup. 794, 799 (D.P.R.1982).

II. VOID AS A MATTER OF PUBLIC POLICY

The parties have presented the Court with a purely legal question: whether the indemnification clause contained in the declaration of trust is void as a matter of public policy. If the clause is void and unenforceable, the third-party claims against the unit owners for indemnification must necessarily fail, and the Trust's motion to strike should be granted.

Individuals and legal entities enjoy a freedom to contract —a freedom into which we should be loath to interfere. See *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 320 (1996). This principle, however, like many legal principles, is not absolute. See *id.* "It is 'universally accepted' that public policy sometimes outweighs the interest in freedom of contract, and in such cases the contract will not be enforced." *Feeney v. Dell, Inc.*, 454 Mass. 192, 199–200 (2009). " 'Public policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." *Id.* at 200, quoting *Beacon Hill Civic Ass'n*, 422 Mass. at 321.

*3 Exculpatory clauses, such as the clause at issue in this case, are generally held to be enforceable, absent overreaching or fraud. See *Marsman v. Nasca*, 30 Mass.App.Ct. 789, 799–800 (1991) ("Although exculpatory clauses are not looked upon with favor and are strictly construed, such provisions inserted in the trust instrument without any overreaching or abuse by the trustee of any fiduciary or confidential relationship to the settlor are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary." [Internal quotations omitted]).

At least two Justices of the Superior Court, however, have found exculpatory clauses in condominium trusts to be void as violative of public policy where the developer drafted the condominium documents and served as the original trustee. See *Knowles v. Classic Bldgs., LLC*, No. HDCV2009–00245 slip op. at 4–6 (Mass.Super. November 8, 2012) (Josephson, J.); *Harris v. McIntyre*, 2000 Mass .Super. LEXIS 181 at *32–*35 (Mass.Super. June 27, 2000) (Gants, J.). As Justice Gants explained, in these instances, the developer would have two competing duties of loyalty: one to the condominium trust and one to the developer. See *Harris*, 2000 Mass.Super. LEXIS 181 at *33. Thus, there is a "need for careful judicial scrutiny when a developer totally dominates the [t]rust and effectively attempts to act as its fiduciary." *Id.* at *33–*34, citing *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 171 Cal.Rptr. 334 (1981), and *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 441 A.2d 956, 964 (D.C.Ct.App.1982). Such exculpatory clauses:

> cannot survive careful judicial scrutiny when the provision is enacted by the developer to protect the officers it selects to manage

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> the [t]rust from liability. If such a provision were allowed to survive, a[t]rust would have no recourse against a[t]rustee selected by the developer if he continually favored the developer's interests over those of the [t]rust but fell short of engaging in willful malfeasance. For all practical purposes, this provision would diminish the duty of loyalty owed by the developer-sponsored [t]rustee to the unit owners to little more than a duty not to steal. Given the conflicting loyalties that are inherent when a developer-sponsored [t]rustee is responsible for protecting the interests of unit owners, this enfeebled duty of loyalty is inadequate as a matter of public policy.

Id. at *34–*35; see also *Knowles,* No. HDCV2009–00245 Slip Op. at 5–6 (adopting reasoning outlined in *Harris*).

This Court agrees with its fellow Justices' reasoning and finds that the indemnification clause contained in the declaration of trust is void as a matter of public policy. Here, Greenwood drafted the condominium documents at the very same time it served as the sole trustee and developer. Thus, Greenwood's fiduciary duties to the Trust conflicted with Greenwood's own self-interest. These competing self-interests denigrated the unquestionable duty Greenwood owed to the Trust and mandate that the indemnification clause be rendered unenforceable.

*4 Further, this Court notes that the indemnification clause at issue here is particularly troublesome.[3] The indemnification clause is not an innocuous effort by a developer and unit owners "to agree on the details of administration and management of the condominium." See *Barclay v. DeVeau,* 384 Mass. 676, 682–83 (1981). By inserting the clause, Greenwood attempted to insulate itself from all liability and make the Trust and unit owners financially liable for its malfeasance. If the clause were enforceable, Greenwood as trustee would be able to breach the duty owed to Trust in favor of protecting its own interests and then make the Trust and unit owners responsible for all damages awarded to the Trust. Thus, not only would the Trust have no recourse against Greenwood, but the Trust would also be unlikely to challenge even Greenwood's willful malfeasance out of fear that it or the unit owners would bear the ultimate financial burden for Greenwood's wrongful actions. *Cf. Board of Trustees of the Sea Grass Village Condo. v. Bergquist,* 2009 WL 1900424 at *6 (Mass.App.Div. June 25, 2009) (finding trial judge did not err in refusing to award condominium trust defense costs despite clause allowing trust to recover attorneys fees and costs in regard to any claim brought by a unit owner noting the "potentially jarring and unfair effect" of the clause). Under the particular and peculiar facts presented here, such a clause simply violates public policy.

ORDER

For these reasons, the Trust's motion to strike Counts XXXI–LIII of Greenwood's third-party complaint is ALLOWED.

All Citations

Not Reported in N.E.3d, 31 Mass.L.Rptr. 637, 2014 WL 861307

Footnotes

1 Third-party defendants Saunders Drilling & Blasting Co., Inc., Charles River Express, LLC; Earthworks Landscaping Company, Inc.; Joseph Landry, d/b/a Masonry Builders; Maisons Building Corporation; Jovanne Mourao; Tucci & Son Corp.; Moynihan Lumber of Beverly, Inc.; Yankee Pine Corporation; Fred Mendez; Anchor Insulation Co., Inc.; Independent Insulation, Inc.; New England Gutters, Inc.; Martha MacInnis; Integrity Building & Design, Inc.; Meghan Walsh; Matthew M. Ryan; Mary Ellen S. Ryan; Sivaraman Dandapani; Viji Kalyanasundaram; Clarence Chuny–Yuen Lee; Scott M. McIsaac; Lingling Zhou; Xiang Ma; Anthony DeAngelis; Melissa D. DeAngelis; Dalines R. Torres; Alexander A. Colarusso; Kelly S. Colarusso; James J. Garvey; Bernice A. Owen–Garvey; Christopher Hevey; Laura Senenko; Alberto E. Soyano; Daymary Pinero–Aguilar; Kenny Y. Chan; Hilary A. Chan; Mary D. Bucci; Yunpeng Zhang; Lan Zhang; Paul Bruno; Marjan Bruno; Brian R. Lippman; Wendy H. Lippman; Claudio Evangelista; Lucia Evangelista; Claud–Alix Jacob;

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Nicole C. Jacob; James DeSimone; Theresa L. DeSimone; June W. Sheridan; Gerry L. Marcus; Warren T. Bambury, and Karen H. Bambury.

2 In its opposition to the current motion, Greenwood suggests that a more complicated procedure was used to create the condominium/condominiums in question. Because Greenwood's assertions, if true, would not affect this Court's analysis, this Court recites the background facts as articulated in the pleadings.

3 The indemnification clause is broader than the clauses at issue in *Knowles* and *Harris,* which stated that a trustee would not be personally liable except for the trustee's own willful malfeasance. *See Knowles,* No. HDCV2009–00245 slip op. at 4; *Harris,* 2000 Mass.Super. LEXIS 181 at *32–*35. Here, the clause entitled the trustees to indemnity for "*any* liability incurred by them." Declaration of Trust, § I(C)(4)(d) (emphasis added). Under the clause's plain terms, this would include even liability incurred due to a trustee's willful malfeasance.

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D4

Only the Westlaw citation is currently available.

Superior Court of Massachusetts.
Alfreda HARRIS, Roger Dow, Linda Percy, Randy Meyers Wolfson and Mary Urban, as Trustees of the Back of the Hill Townhouses Condominium Trust, Plaintiffs,
v.
Thomas McINTYRE, as Trustee of the Back of the Hill Townhouses Condominium Trust, Bricklayers and Laborers Non-Profit Housing Company, Inc., William L. Rawn Associates, Architects, Inc., and Turner Construction Company, Inc., Defendants,
and
Turner Construction Company, Third-Party Plaintiff,
v.
A.A. Will Corporation, E.M. Duggan, Inc., Hartford Roofing Co., Inc., Manganaro Corporation, New England, and The Waterproofing Co., Third-Party Defendants.
No. 94-3597-H.

June 27, 2000.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

GANTS.

*1 In 1987, construction commenced on the Back of the Hill Townhouses Condominium ("BOTH"), a 165 unit condominium mixed-income townhouse complex that sprawls over eight residential streets in the Roxbury and Jamaica Plain communities of Boston. BOTH's developer was a non-profit company-the defendant Bricklayers and Laborers Non-Profit Housing Company, Inc. ("Bricklayers"), whose President was the defendant Thomas McIntyre ("McIntyre"). As developer, the Bricklayers retained the defendant Turner Construction, Inc. ("Turner") as its general contractor and the defendant William Rawn Associates Architects, Inc. ("Rawn") as its architect. All eight phases of construction took place in 1988 and 1989, when construction was substantially completed.

On December 12, 1988, as required by G.L. c. 183A, the Bricklayers created the Back of the Hill Townhouses Condominium Trust ("the Condominium Trust" or "Trust") as the Organization of Unit Owners to manage and regulate BOTH, which it had created by a Master Deed that same day. The Bricklayers installed McIntyre, its President, and Patrick Walsh, its Treasurer, as the Original Trustees of the Condominium Trust.[FN1] On March 29, 1991, McIntyre and Walsh resigned as Trustees, their resignation becoming effective on the date their resignation was recorded at the Registry of Deeds, which did not take place until September 11, 1991. They were replaced by the Trustees elected by BOTH's unit owners at a Special Meeting on December 10, 1990-the plaintiff Trustees Alfreda Harris, Roger Dow, Linda Percy, Mary Urban, and Randy Meyers Wolfson ("the plaintiffs" or "the plaintiff Trustees").

FN1. All appear to agree that Walsh was only nominally a Trustee and that McIntyre essentially served as the sole Original Trustee.

These elected Trustees, on behalf of the Condominium Trust, brought this action against the defendants on July 5, 1994, alleging eleven counts:

Count I: Breach of fiduciary duty against McIntyre

Count II: Breach of contract against Bricklayers

Count III: Negligence against Bricklayers

Count IV: Breach of implied warranty against Bricklayers

Count V: Negligence against Turner

Count VI: Breach of implied warranty against Rawn

Count VII: Negligence against Rawn

Count VIII: Violations of G.L. c. 93A against Bricklayers

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Count IX: Violations of G.L. c. 93A against McIntyre

Count X: Breach of implied warranty against Turner

Count XI: Violations of G.L. c. 93A against McIntyre [FN2]

FN2. Count XI was actually added in the amended complaint, and is identical in substance to Count IX except that Count XI adds allegations of knowing and willful behavior, of violations of regulations, and of McIntyre's failure to make an offer of settlement in reply to the demand letter. In addition, Count IX alleges a violation of G.L. c. 93A, § 11, while Count XI alleges a violation of G.L. c. 93A, § 9.

The crux of their complaint is that "[t]he common areas of the condominiums, as designed, constructed, and delivered, are replete with myriad defects and deficiencies," including, but not limited to:

a. "water penetration through improper construction and installation of walls, windows.

b. improper and deficient roofing installation and construction as to flashing, siding, trimming, and gutter installation.

c. improper and deficient siding installation, including a lack of vapor barrier, and improper caulking and flashing.

d. improper and deficient construction of ventilation ducts.

*2 e. improper and deficient installation of plumbing fixtures including outside faucets.

f. improper and deficient site grading as to porches, balconies and associated stairways.

g. improper and deficient construction of porches, balconies and associated stairways."

Amended Complaint at ¶ 19. The plaintiffs blame Bricklayers, Rawn, and Turner for creating these defects through their negligence, and McIntyre for failing to investigate, discover, and disclose these defects.

The defendants have each moved for summary judgment as to all counts.[FN3] Their motions raise many difficult legal issues, which I shall resolve in turn.

FN3. The third-party defendants have filed memoranda in support of defendant Turner's motion for summary judgment.

Turner's Motion for Summary Judgment

The Negligence Claim (Count V)

Turner rests its motion for summary judgment on the negligence claim on the argument that this claim is time-barred under the three year statute of limitations established in G.L. c. 260, § 2B, which provides in pertinent part:

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property ... shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

G.L. c. 260, § 2B. Since the complaint was filed on July 5, 1994, this Court must determine whether there is any genuine issue of material fact as to whether the negligence cause of action against Turner accrued before July 5, 1991.

In order to reach that determination, this Court must first determine, as a matter of law, when the cause of action accrued. In *White v. Peabody Construction Co., Inc.*, 386 Mass. 121 (1982), the Supreme Judicial Court determined when a cause of action accrued on a negligence claim in a construction case:

> In all cases the statute of limitation begins to run

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> when the injured person has notice of the claim. The "notice" required is not notice of every fact which must eventually be proved in support of the claim ... Rather, "notice" is simply knowledge that an injury has occurred.

Id. at 130. However, the Court recognized the existence of the "discovery rule under which certain causes of action based on inherently unknowable wrongs do not accrue until the plaintiff learns, or reasonably should have learned, that he has been harmed by the defendant's conduct." *Id.* at 129.

Turner argues that the discovery rule is triggered only when the plaintiffs did not know (and reasonably should not have known) that they had been injured. The plaintiff Trustees argue that the discovery rule is triggered when the plaintiffs know of an injury but do not know (and reasonably should not know) that the injury was caused by the defendant's negligence. Both arguments find support in the Supreme Judicial Court's language in *White.* In *White,* the plaintiffs sued the developer and general contractor of a housing project for design and construction defects that caused water to leak into the common areas of the project. *Id.* at 122-123. The Court held that the discovery rule did not apply in *White* because the plaintiffs admitted that the building had been plagued with serious leakage from its inception and this knowledge was sufficient to put the plaintiffs on notice that they had been injured. *Id.* at 129. Turner focuses on this language in arguing that the plaintiffs' cause of action accrued when they had knowledge of serious leakage, regardless of whether or not they understood the cause of the leakage. However, the Court in *White* later declared that the discovery rule did not apply in that case because the plaintiffs "should reasonably have known that widespread water leaks in a newly constructed building are almost certainly the result of design or construction defects." *Id.* at 130. The plaintiff Trustees seize upon this language to argue that the plaintiffs' cause of action did not accrue until they knew or reasonably should have known that the leakage was the result of design or construction defects.

*3 In order to resolve this debate, this Court looks to the Supreme Judicial Court's more complete discussion of when a cause of action accrues in another type of negligence case-where medical malpractice is alleged. Under G.L. c. 260, § 4, as with G.L. c. 260, § 2B, a malpractice action against a physician must be commenced within three years "after the cause of action accrues." In 1980, in *Franklin v. Albert,* the Supreme Judicial Court for the first time declared that a cause of action for medical malpractice did not accrue until the "patient learns, or reasonably should have learned, that he has been harmed as a result of a defendant's conduct." 381 Mass. 611, 612 (1980). More recently, in *McGuinness v. Cotter,* the Supreme Judicial Court clarified that a malpractice cause of action accrues when the patient: "(1) knew or had sufficient notice that she was harmed; and (2) knew or had sufficient notice of the cause of the harm." 412 Mass. 617, 627 (1992). Notice is sufficient to start the limitations clock when the plaintiff possessed sufficient information or was aware of such suspicious circumstances that she recognized (or a reasonably prudent person in the plaintiff's position should have recognized) that the medical treatment she received from the defendants may have caused her harm. See *McGuinness v. Cotter,* 412 Mass. at 627 (cause of action accrues when plaintiff had "knowledge or sufficient notice that the obstetrical care she received from the defendants may have caused [plaintiff's] disabilities."); *Bowen v. Eli Lilly & Co.,* 408 Mass. 204, 207 (1990) (must be "significant notice of causation" such that "a reasonable person in the position of the plaintiff would have been on notice that her mother's ingestion of DES may have caused the plaintiff's cancer"); *Fidler v. Eastman Kodak Co.,* 714 F.2d 192, 199 (1st Cir.1983)("notice of likely cause is ordinarily enough to start the statute running"); *Malapanis v. Shirazi,* 21 Mass.App.Ct. 378, 383 (1986) ("the three-year limitations period commences to run when a reasonably prudent person (in the tort claimant's position), reacting to any suspicious circumstances of which he might have been aware (what the Court of Appeals in *Fidler* called 'likely cause'), should have discovered that he had been harmed by his physician's treatment").

This Court does not believe there is any sound reason for the standard as to when a cause of action accrues to be different in a construction case than a medical malpractice case. Nor does this Court believe that the Supreme Judicial Court intended to articulate different standards. This Court concludes that, regardless of whether the substance of the claim is the alleged negligence of a general contractor, an architect, or a physician, a cause of action does not accrue until the plaintiff (1) knows or should know that she was harmed, and (2) possesses sufficient information or

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becomes aware of such suspicious circumstances that she recognizes or should recognize that the defendant's conduct may have caused the harm.

*4 Identifying the amount of information needed to trigger this duty of inquiry is no simple task. Certainly, the information need not be so great that it demonstrates negligence. McGuinness v. Cotter, 412 Mass. at 627; Bowen v. Eli Lilly & Co., 408 Mass. at 208. Nor need it demonstrate the full extent of the causal connection. White v. Peabody Construction Co., Inc., 386 Mass. at 130 ("The 'notice' required is not notice of every fact which must eventually be proved in support of the claim."); Malapanis v.. Shirazi, 21 Mass.App.Ct. at 386. It must, however, be significant enough to alert a person of ordinary prudence in the plaintiff's position of the reasonable likelihood that the injury was caused or substantially worsened by another's conduct.. See Bowen v. Eli Lilly & Co., 408 Mass. at 207 (statute of limitations starts to run when "an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury"); Hendrickson v. Sears, 365 Mass. 83, 89 (1974) ("cause of action accrues on the happening of an event likely to put the plaintiff on notice").

It is in the application of this standard that the Supreme Judicial Court appears to distinguish between cases alleged medical negligence and those alleging negligence in the design and construction of newly-built structures, and for sound reasons. A physician does not create the human body he is treating, so ailments following his treatment cannot always so readily be attributed to his conduct. A developer, general contractor, and architect, in new construction, do literally create the buildings from scratch, so problems that emerge following the completion of construction often reasonably alert the owner or occupants to the reasonable likelihood that the problems are the result of design or construction defects. That is why the Supreme Judicial Court, as a matter of law, can declare in *White v. Peabody Construction Co., Inc.* that the plaintiffs "should reasonably have known that widespread water leaks in a newly constructed building are almost certainly the result of design or construction defects." 386 Mass. at 130.

In determining when the cause of action accrues, this Court must also determine *whose* knowledge shall be deemed the knowledge of the plaintiff Trustees. The plaintiff Trustees were all unit owners but they were not elected until December 10, 1990, did not assume the duties of Trustees until the resignation of McIntyre and Walsh on March 29, 1991, and did not formally become Trustees until the resignations of McIntyre and Walsh were recorded at the Registry of Deeds on September 11, 1991. They argue that it is their own collective personal knowledge which must be considered in determining when the cause of action accrued. The defendant Turner argues that it is the knowledge of any unit owner which governs, since every unit owner held the power to assert these claims through a derivative action. See Cigal v. Leader Development Corp., 408 Mass. 212, 219 (1990). This Court finds that it is the collective knowledge of the Trustees and their agents that constitutes the knowledge of the Trust for purposes of identifying when a cause of action accrues.

*5 While the plaintiffs are the Trustees, the true plaintiff in interest is the Condominium Trust. The Trustees in this action are acting solely on behalf of the Condominium Trust and it is the Trust that will be the beneficiary of any judgment procured by its Trustees. See G.L. c. 183A, § 10 (unit owners trust is empowered to conduct litigation regarding common areas and facilities); Declaration of Trust at § 2.4 (Trustees hold all common areas and facilities in trust for beneficial interest of unit owners). Indeed, the Trust is the only entity that can litigate claims for negligent construction of the common areas. Cigal v. Leader Development Corp., 408 Mass. at 219. Therefore, it is the Trust's knowledge that is determinative of when a cause of action accrues.

A cause of action is deemed to accrue upon knowledge of a potential claim because the knowledge allows the putative plaintiff to act upon that knowledge by filing suit. Therefore, the knowledge that matters for a Trust is the knowledge of those who may act on behalf of the Trust. A Trust routinely may act through its Trustees. In addition, the Condominium Trust was specifically authorized by the Declaration of Trust to employ agents as deemed appropriate to manage the Trust property and conduct the business of the Trust. Declaration of Trust at § 5.1.15. Pursuant to this authority, on December 15, 1988, just three days after the execution of the Declaration of Trust that created the Condominium Trust and empowered the Trustees, the Trust entered into a Management Agreement with Barkan

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Management, Inc. ("Barkan") in which it retained Barkan as its agent to supervise the operation and management of the common areas and facilities. It is a well-accepted precept of agency law that a principal is bound by the acts and knowledge of its agent. See generally *Restatement (Second) of Agency, § 272 (1957)*; *Sarvis v. Boston Safe Deposit and Trust Company, 47 Mass.App.Ct. 86, 96 (1999)*; *United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir.1987)*. Indeed, a principal may be bound by his agent's actions even if the agent violated his instructions and acted in a manner expressly forbidden by the principal. See generally *Restatement (Second) of Agency §§ 8A, 160, 161, and 194* and associated commentary (1957); Alperin & Shubow, 14 Massachusetts Practice: Summary of Basic Law, §§ 1.26, 1.30, and 1.32. Therefore, it is hardly unfair to conclude that a Trust is deemed to have notice of a claim if either a Trustee or its agent has notice of a claim.

This Court recognizes that the individual unit owners can assert claims regarding common areas directly through a derivative action. *Cigal v. Leader Development Corp., 408 Mass. at 219*. However, in order to file a derivative action in Massachusetts, the plaintiff unit owner must allege with particularity the efforts he made to cause the Trustees to file the action or, if no such efforts were made, the reasons why such efforts were futile. See Mass.R.Civ.P. 23.1. He also must establish that he fairly and adequately represents the interests of the similarly situated unit owners. *Id.* The mere fact that a unit owner could, in theory, litigate a claim on behalf of the Trust is not sufficient to attribute his knowledge to that of the Trust, because a unit owner does not have the same fiduciary duty to the Trust as a Trustee or an agent, and a unit owner is restricted by law in his ability to bring such a claim. Indeed, if a unit owner's knowledge alone were enough to deem a cause of action to have accrued, a Trust may be foreclosed from bringing suit on a claim on statute of limitations grounds when a single unit owner, and nobody else, had notice of the claim more than three years earlier. Therefore, this Court finds that the collective knowledge of the Trustees and its age nt-Barkan-constitutes the knowledge of the Trust for purposes of determining when a cause of action accrues.

*6 In examining the collective knowledge of the Trustees and Barkan before July 5, 1991, the date three years before the filing of the complaint on July 5, 1994, it is plain that McIntyre and Barkan had a great deal of knowledge about unit owners' complaints regarding water leaking into units through the foundation and roofs, and about concrete steps pulling away from the foundation. McIntyre specifically concedes this knowledge in his affidavit. McIntyre even admits that a subcontractor, A.A. Will Corporation, was retained to install a french drain to prevent water from penetrating some building foundations and that he did not bill the cost of the french drain to the Trust because he "felt the problem was a construction cost and not a maintenance cost." He also conceded that he caused persons to be hired to caulk the steps that were separating from the building foundations and that he did not bill the Trust for this work because he "felt the problem was construction cost and not a maintenance cost." McIntyre recognized the roof leak problems to be serious enough to cause persons to be hired to caulk the roofs, though he viewed these as maintenance costs and billed their work to the Trust. All of this work was completed before July 5, 1991, so the problems had to have been known before that date. Knowledge of these problems prior to July 5, 1991 is supported by more than simply McIntyre's affidavit. There are numerous maintenance requests and complaints from unit owners to McIntyre and Barkan complaining of roof, ceiling, and gutter leaks, and separation of the front stairs from the foundation. There were interoffice memoranda between McIntyre and Barkan about the need for roof and stairs caulking. The plaintiff Trustees, in both questionnaires and depositions, admitted to knowing before July 5, 1991 about serious problems of water leaks and stair separation.

The plaintiffs make three arguments why their negligence claim should not be deemed to have accrued before July 5, 1991 despite this knowledge. First, they contend that McIntyre held most of this information, and he breached his fiduciary duty to the unit owners by failing to act upon it. This argument will be discussed at length later in this decision in considering the plaintiffs' claims against McIntyre individually and the Bricklayers. It suffices here to say that this argument cannot be used against Turner, with whom McIntyre had no affiliation.

Second, they contend, in the alternative, that neither McIntyre nor the Trustees had enough information to be on notice that the source of the water leak problems and stair separation were design or construction

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defects rather than maintenance problems. This Court is mindful that, in considering summary judgment, "the question when a plaintiff knew or should have known of his cause of action is one of fact which in most instances will be decided by the trier of fact." *Riley v. Presnell*, 409 Mass. 239, 240 (1991); *Castillo v. Massachusetts General Hospital Chelsea Memorial Health Care Center*, 38 Mass.App. 513, 515 (1996). This Court is also mindful that, in evaluating a summary judgment claim, I am obliged to rely only on facts not in dispute and disputed facts viewed in the light most favorable to the party opposing summary judgment, which in this case are the plaintiffs. *Beal v. Board of Selectmen of Hingham*, 419 Mass. 535, 539 (1995). Yet, I am also mindful that the Supreme Judicial Court has declared, in evaluating whether the discovery rule applies to a claim otherwise barred by the statute of limitations, "Inherent unknowability is not a fact, but rather a conclusion to be drawn from the facts." *Melrose Housing Authority v. New Hampshire Insurance Co.*, 402 Mass. 27, 31 n. 4 (1988). Most importantly, I recognize that the Supreme Judicial Court in *White v. Peabody Construction Co., Inc.*, which presented facts on summary judgment quite similar to those presented here, found as a matter of law that the plaintiffs "should reasonably have known that widespread water leaks in a newly constructed building are almost certainly the result of design or construction defects." 386 Mass. at 130. Relying on that controlling precedent, this Court finds, as a matter of law, that the Trust had sufficient information prior to July 5, 1991 to alert a person of ordinary prudence in the plaintiffs' position of the reasonable likelihood that the leaks and stair separation were caused by design or construction defects. *Id.* As a result, the negligence cause of action accrued before that date and is barred by the three year statute of limitations.

*7 The plaintiffs' third argument is that, even if the knowledge of the Trust may bar some share of its claims against Turner, it does not bar all of its claims. Specifically, the plaintiffs seek to salvage two types of damage to BOTH's common areas: (1) defective design and installation of flashing and vapor barrier in the brick masonry cavity, and (2) balcony settlement. Notice of one type of design or construction defect does not necessarily constitute notice of all design or construction defects. *Campanile v. Suffolk Construction Company, Inc.*, 1994 WL 879741 (Mass.Super.1994)(Fremont-Smith, J.). At the same time, notice of one problem that may result from a design or construction defect may provide notice as to another problem likely to emanate from the same design or construction defect. In this case, the separation of the stairs from the foundation provided notice of the reasonable likelihood of settlement defects, which properly should have triggered inquiry into their cause. The problems of balcony settlement were simply another manifestation of the alleged settlement defects. The fact that the balconies did not sag from the settlement problems until after July 5, 1991 does not mean that the Trust did not have notice of the settlement defects before that date. Since the Trust had knowledge of facts which should have provided notice of the settlement defects, a negligence cause of action based on the balcony settlement is also foreclosed by the statute of limitations.[FN4]

FN4. This Court is aware that one of the plaintiff Trustees, Roger Dow, testified at deposition that, beginning in June 1990, he observed the balconies on Ellingwood Street "bending out into the street." However, the Court does not rest its statute of limitation finding with respect to the balcony settlement on this testimony because there was contrary evidence that the balcony settlement problems did not surface until after June 5, 1991. There is, however, no genuine dispute that the stairway settlement problems had surfaced before June 5, 1991, and it is solely on that basis that this Court bars the negligence cause of action to the extent that it alleges settlement defects in design or construction.

It is far less plain that knowledge of the water leaks provided notice of the reasonable likelihood of defects in the design and installation of flashing and vapor barrier in the brick masonry cavity, so this Court will deny summary judgment on this portion of the negligence claim. The evidence in the record reflects that these alleged defects were reasonably likely to have been the source of water condensation in the walls, but there is little evidence that condensation problems were known to be widespread at BOTH before July 5, 1991. Since there are genuine issues of material fact as to whether the water condensation problems were well known to the Trust before July 5, 1991 and whether the well known water leak problems provided notice of the reasonable likelihood of defects within the brick masonry cavity,

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these statute of limitations issues cannot be decided as a matter of law and properly should be decided by the trier of fact. See Riley v. Presnell, 409 Mass. at 240. Therefore, Turner's motion for summary judgment on the negligence claim (Count V) is allowed except to the extent the claim alleges negligence in the design or construction of the flashing and vapor barrier in the brick masonry cavity.

The Breach of Implied Warranty Claim (Count X)

The plaintiffs contend that, even if their negligence claim against Turner were to fail on statute of limitations grounds, their breach of implied warranty claim nonetheless survives because it sounds in contract, with its six year statute of limitations period. The breach of implied warranty claim, however, in substance is simply a negligence claim dressed as a contract claim. The complaint alleges that the breach of implied warranty is Turner's failure "to construct the buildings in a good and workmanlike manner," which is different phraseology for claiming that Turner was negligent in its construction.

*8 The three year statute of limitations set forth in G.L. c. 260, § 2B in "[a]ctions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property" cannot be avoided simply by framing the allegations as a breach of implied warranty. McDonough v. Marr Scaffolding Co., 412 Mass. 636, 642 (1992). As in *McDonough*, "[t]he plaintiffs' breach of warranty claims essentially allege the same elements as the negligence claims .... " *Id.* "To allow the plaintiffs to recast their negligence claim in the form of a warranty claim in order to circumvent the operation of [§ 2B] would nullify the purpose of [that statute] altogether." FN5 *Id.* at 642-643. See also Klein v. Catalano, 386 Mass. 701, 719-720 (1982) (when plaintiff is barred under G.L. c. 260, § 2B from bringing a negligence claim, he cannot bring essentially the same claim under a breach of implied warranty theory); Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 823 (1986) ("A plaintiff may not, of course, escape the consequences of a statute of repose or statute of limitations on tort actions merely by labeling the claim as contractual.").

FN5. The Supreme Judicial Court in *McDonough* was focused on preserving the repose provisions of § 2B, but its rationale applies with equal force to the limitation provision of that statute, which also reflects the Legislature's "balance between the public's right to a remedy and the need to place an outer limit on the tort liability of those involved in construction." *Id.* at 643 quoting Klein v. Catalano, 386 Mass. 701, 710 (1982). Indeed, if the plaintiffs' arguments prevailed here, the effective statute of limitations for such claims would be six years, the same length of time established in the statute of repose in § 2B. The Legislature plainly did not intend the statute of limitations and the statute of repose to be identical.

Therefore, Turner's motion for summary judgment on the plaintiffs' breach of implied warranty claim (Count 10) is allowed to the same extent as its motion for summary judgment on the plaintiffs' negligence claim-it is allowed except to the extent the claim alleges a breach of implied warranty in the design or construction of the flashing and vapor barrier in the brick masonry cavity.

Rawn's Motion for Summary Judgment

The entirety of the discussion above regarding Turner's motion for summary judgment on the claims of negligence and breach of implied warranty apply with equal force to the claims against Rawn of negligence (Count VII) and breach of implied warranty (Count VI). However, there is one substantial difference between Turner and Rawn that requires that Rawn's motion for summary judgment on statute of limitations grounds be allowed in its entirety and not simply in large part-all claims against Rawn, as a matter of contract, accrued on the date of substantial completion, which was long before July 5, 1991.

Section 11.3 of the Standard Form of Agreement Between Owner and Architect, executed by the Bricklayers and Rawn on July 2, 1987, provides:

> As between the parties to this Agreement, as to all acts or failures to act by either party to this Agreement, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the relevant Date of Substan-

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tial Completion of the Work, and as to any acts or failures to act occurring after the relevant Date of Substantial Completion, not later than the date of issuance of the final Certificate for Payment.

The plaintiffs concede that the Date of Substantial Completion of the Work was no later than April 1989. However, they contend that this contractual agreement regarding the accrual date does not apply to them, since Bricklayers, and not the Trust, was the signatory to this Agreement and the Bricklayers never assigned its interest in this Agreement to the Trust.

*9 It is true that the Bricklayers never formally assigned to the Trust its interest in the Agreement but the Trust, with respect to its relationship to the architect, is nonetheless pragmatically a successor in interest to the Bricklayers. Under G.L. c. 183A, § 8, the Master Deed that creates a condominium must include the name of the trust through which the unit owners will manage and regulate the condominium. The Trust, upon its creation, may litigate all claims regarding the common areas and facilities. G.L. c. 183A, § 10(b)(4); *Cigal v. Leader Development Corp.*, 408 Mass. at 219. In short, only the developer can litigate claims against the architect regarding construction defects before the Master Deed is executed creating a condominium, but both the developer and the trust can litigate such claims after the Master Deed is executed.

Moreover, after the condominium is created, the financial interest in the condominium also passes from the developer to the unit owners, represented by the Trust. When a person purchases a condominium unit, he receives an undivided interest in the common areas and facilities, as set forth in the Master Deed, roughly approximate to the relation of the fair value of his unit to the fair value of all units. G.L. c. 183A, § 5. The unit owner's interest in the trust is equal to his proportionate interest in the common areas and facilities. G.L. c. 183A, § 10. Therefore, at the beginning of the condominium, when the developer still owns all or most of the units, the developer controls the trust. As more and more units are sold to unit owners, the developer's interest in the trust diminishes until, when all the units are sold, the developer's interest in the trust equals or approaches zero. Therefore, the trust, for all practical purposes, becomes the successor in interest to the developer both in terms of its power to litigate and its financial stake in the condominium.

As the successor in interest to Bricklayers, the Trust must abide by the accrual date contractually contained in the Agreement unless public policy prohibits the enforcement of such a provision. It does not. Where the parties to an agreement, as here, are sophisticated business entities engaged in a negotiated arms length transaction, Massachusetts courts have recognized the right of parties to enforce contractual provisions which limit liability. See *Canal v. Westinghouse Electric Corp.*, 406 Mass. 369, 374-375 (1990) (enforcing a provision excluding consequential damages); *Deerskin Trading Post, Inc. v. Spencer Press, Inc.*, 398 Mass. 118, 123-124 (1986) (upholding a limitation of damages provision contained in a final price quotation). Under these circumstances, consensual allocation of risk is not contrary to Massachusetts public policy. *Minassian v. Ogden Suffolk Downs, Inc.*, 400 Mass. 490, 493 (1987). Indeed, since the Massachusetts Supreme Judicial Court has enforced contractual provisions completely releasing a defendant from all liability, it is not apparent why a contractual provision that simply limits and defines the accrual date for statute of limitations purposes should not be enforceable. See *Cormier v. Central Mass. Chapter of the Nat'l Safety Council*, 416 Mass. 286, 287-289 (1993) ("[t]here is no rule of general application that a person cannot contract for exemption from liability for his own negligence and that of his agents and servants.").

*10 This accrual date provision should not be deemed void against public policy, especially when agreed to by sophisticated parties of roughly equal bargaining power, as found here. Since the statute of limitations can be extended through application of the discovery rule, this provision provides both parties with the certainty of knowing the true deadline for bringing suit based on conduct that pre-dates the Date of Substantial Completion. Under the circumstances found in this case, there is no sound reason to bar parties from agreeing to such a limitation. That is why it is not surprising that this contractual accrual date provision, which is part of the Standard Form of Agreement Between Owner and Architect used throughout the nation, has been found enforceable in every reported decision by every court that has considered this argument. *Harbor Court Associates v. Leo A. Daly Co.*, 179 F.3d 147, 151 (4th Cir.1999) and cases cited. See also *Seal Harbor III Condomini-*

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um Trust v. Add Inc., Civil No. 93-4535 (Suffolk Super. Ct. November 19, 1997).

Since the accrual date provision in the Standard Form of Agreement Between Owner and Architect applies to the Trust as the effective successor in interest to the Bricklayers, all the Trust's claims accrued no later than April 1989 and expired under the three year limitations period long before the complaint was filed in this case on July 5, 1994. Therefore, Rawn's motion for summary judgment is allowed in its entirety as to both the negligence claim (Count VII) and the breach of implied warranty claim (Count VI).

McIntyre's Motion for Summary Judgment

McIntyre's motion for summary judgment on the claims against him individually for breach of fiduciary duty (Count I) and violations of G.L. c. 93A (Counts IX and XI) raises new issues.

Breach of Fiduciary Duty (Count I)

McIntyre contends that the scope of his personal liability on a claim of breach of fiduciary duty is sharply limited by Section 3.6 of the Declaration of Trust, which provides in pertinent part:

> No Trustee shall be personally liable or accountable to be deprived of compensation by reason of any action taken, suffered or omitted in good faith, or ... by reason of honest errors of judgment, mistakes of fact or law, the existence of any personal or adverse interest, or by reason of anything except his own willful malfeasance and default.

This Court finds that this provision, as applied to McIntyre, who throughout his term as Trustee was also the President of the Bricklayers, is void as violative of public policy.

The Declaration of Trust, like most condominium declarations of trust, was written by the developers-the Bricklayers. Under the Declaration of Trust, the Bricklayers select the two Original Trustees, who continue to serve until the earliest of two events: (1) four months after the conveyance of 75 percent of the units by the Bricklayers, or (2) six years after the conveyance of the first unit. Declaration of Trust, § 3.1. Therefore, for all practical purposes, the Original Trustees, both of whom were officers of the Bricklayers, would likely remain as the only trustees until at least 75 percent of the units were sold, when the unit owners would select replacement trustees. During this initial period, the Original Trustees would have duties of loyalty both to the Trust as Trustees and to the Bricklayers as officers, and it was foreseeable that those duties may occasionally be in conflict. Section 3.6 of the Declaration of Trust attempts to limit the Trustees' duty of loyalty to the Trust to nothing more than a duty not to engage in "willful malfeasance and default," but it does nothing to limit their duty of loyalty to the Bricklayers.

*11 Although the evaluation of this provision appears to be a question of first impression, other courts have recognized the need for careful judicial scrutiny when a developer totally dominates the Trust and effectively attempts to act as its fiduciary. See *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.,* 114 Cal.App.3d 783, 171 Cal.Rptr. 334 (1981); *Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Association, Inc.,* 441 A.2d 956, 964 (D.C.Ct.App.1982). If this provision had been enacted by the unit owners to protect their elected Trustees from liability, it may survive judicial scrutiny. But it cannot survive careful judicial scrutiny when the provision is enacted by the developer to protect the officers it selects to manage the Trust from liability. If such a provision were allowed to survive, a Trust would have no recourse against a Trustee selected by the developer if he continually favored the developer's interests over those of the Trust but fell short of engaging in willful malfeasance. For all practical purposes, this provision would diminish the duty of loyalty owed by the developer-sponsored Trustee to the unit owners to little more than a duty not to steal. Given the conflicting loyalties that are inherent when a developer-sponsored Trustee is responsible for protecting the interests of unit owners, this enfeebled duty of loyalty is inadequate as a matter of public policy. See *Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Association, Inc.,* 441 A.2d at 964.

Having found that this provision is void as violative of public policy, what should be put in its place? The duties of a trustee to condominium unit owners are analogous to the duties owed by a corporate officer or director to a corporation's shareholders. See *Cigal v. Leader Development Corp.,* 408 Mass. at 219. There-

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fore, it is appropriate to define a developer-sponsored trustee's duty of loyalty to unit owners in the same way that Massachusetts law defines an officer or director's duty of loyalty to shareholders-by applying the business judgment rule set forth in G.L. 156B, § 65. Cf. *Pederanzi v. Guerriere,* 1995 Mass.Super. LEXIS 188 (Mass.Sup.Ct.1995)(Hely, J.). Under that statutory standard, an officer or director "shall perform his duties ... in good faith and in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances." G.L. 156B, § 65. However, when there is a conflict between the interests of the officer or director and that of the corporation, that conflict must be disclosed and the burden of proof rests on the officer or director to show that the decision substantively was fair to the corporation. *Demoulas v. Demoulas Super Markets, Inc.,* 424 Mass. 501, 531 (1997). This Court would apply that same standard to the developer-sponsored trustee of a condominium trust-the trustee must perform his duties in good faith and in a manner he reasonably believes to be in the best interests of the unit owners, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. When matters arise in which the interests of the developer and the unit owners diverge, the trustee must disclose the conflict and, if the trustee proceeds to act on behalf of the trust after such disclosure, the trustee must act in a manner that substantively is fair to the unit owners.

*12 Applying this standard to the evidence in the summary judgment record, viewing that evidence in the light most favorable to the plaintiffs (as I must on summary judgment), this Court finds that there are material factual issues in dispute which prevent this Court from determining on summary judgment whether McIntyre satisfied this standard during his tenure as Trustee.FN6

> FN6. Even if the standard were willful malfeasance, genuine issues of material fact would still remain in view of McIntyre's admissions in his affidavit that the cost of the french drain and the caulking of the building steps were construction costs rather than maintenance costs. This admission permits the inference that he recognized that the problems the french drain and caulking were designed to cure emerged from construction defects, but still failed to investigate either their source or their magnitude, instead limiting his efforts to remedy these defects to these two relatively small expenditures.

McIntyre further argues that, even if there are genuine issues of material fact that otherwise preclude summary judgment, he is still entitled to summary judgment on the breach of fiduciary duty claim on statute of limitations grounds, since the plaintiff Trustees were on notice of this claim before July 5, 1991. This Court, for three independent reasons, denies summary judgment on this ground.

First, McIntyre was the Trustee of the Condominium Trust until September 11, 1991, when the formal resignation he executed on March 29, 1991 was recorded at the Registry of Deeds. Even though the plaintiff Trustees assumed his duties on March 29, 1991, legally he remained as Trustee until September 11, 1991, and legally he and Walsh were the only persons who, without initiating a derivative action, could bring litigation on behalf of the unit owners regarding common areas and facilities. See *Cigal v. Leader Development Corp.,* 408 Mass. at 219. McIntyre can hardly claim that the statute of limitations has run out on the Trust's claims against him because he, as Trustee, had notice of these claims before July 5, 1991.

Second, a cause of action for breach of fiduciary duty "does not accrue until the trustee repudiates the trust *and* the beneficiary has actual knowledge of that repudiation." *Demoulas v. Demoulas Super Markets, Inc.,* 424 Mass. at 518 (emphasis in original). There remain genuine issues of material fact as to whether the plaintiff Trustees personally had actual knowledge of McIntyre's alleged repudiation of the trust before July 5, 1991.

Third, there is a genuine issue of material fact as to whether the elements of equitable estoppel have been satisfied. Equitable estoppel is a doctrine created by the courts to prevent results contrary to good conscience and fair dealing. *Mackeen v. Kasinkas,* 333 Mass. 695, 698 (1956); Stated simply, it means that the law will not permit a party to be better off by acting badly. See *Harrington v. Fall River Housing Auth.,* 27 Mass.App.Ct. 301, 307 (1989) (stating that "[e]stoppel is an equitable doctrine created to prevent one from benefitting from his own wrongdoing and

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to avoid injustice"). Equitable estoppel of a statute of limitations defense is appropriate when "the defendants made representations they knew or should have known would induce the plaintiffs to put off bringing a suit and .... the plaintiffs did in fact delay in reliance on the representations." White v. Peabody Construction Co., Inc., 386 Mass. at 134. See also Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 123 (1992); Tardanico v. Aetna Life & Casualty Company, 41 Mass.App.Ct. 443, 446 (1996). There is evidence in the record to support a finding that McIntyre, while wearing the dual hats of President of the developer Bricklayers and Trustee of the Trust, concealed from the plaintiff Trustees the magnitude of the problems at BOTH and misrepresented these problems to be maintenance concerns rather than design or construction defects. There is also evidence in the record that the plaintiff Trustees relied on these representations by delaying any inquiry into the source of these problems, which delaying the bringing of this action.

*13 Since there remain genuine issues of material fact as to whether McIntyre committed a breach of fiduciary duty and since these three reasons are sufficient to deny summary judgment to McIntyre on statute of limitation grounds, McIntyre's motion for summary judgment as to the breach of fiduciary duty claim (Count I) is denied.

The G.L. c. 93A Claims (Counts IX and XI)

McIntyre argues that he is entitled to summary judgment on the G.L. c. 93A counts, since he was not acting "in trade or commerce" as a Trustee and therefore falls outside the scope of Chapter 93A. "Chapter 93A 'is not available where the transaction is strictly private in nature, and is in no way undertaken in the ordinary course of a trade or business.' " Planned Parenthood Federation of America, Inc. v. Problem Pregnancy of Worcester, Inc., 398 Mass. 480, 491 (1986) quoting Lantner v. Carson, 374 Mass. 606, 608 (1978). In determining whether parties are engaged in trade or commerce, the Court looks to the following factors: "(1) the nature of the transaction, (2) the character of the parties, (3) the activities participated in, and (4) whether the transaction was motivated by business or personal reasons." Planned Parenthood Federation of America, Inc., 398 Mass. at 491.

Courts have uniformly held that a condominium trust is not involved in trade or commerce, and that claims made against such a trust may not be brought under c. 93A. See, e.g., Granby Heights Association, Inc. v. Dean, 38 Mass.App.Ct. 266, 270 (1995); *Trustees of the Harwichport Resort Club Condominium Trust v. Henry Connor*, No. 93-1006 (Mass.Sup.Ct. Jan. 25, 1995) (O'Neill, J.) at 5. Therefore, Count IX, which alleges a violation of G.L. c. 93A, § 11, cannot survive summary judgment because it requires a showing that the plaintiff Trust is engaged in trade or commerce.

Count XI, which alleges a violation of G.L. c. 93A, § 9, also cannot survive summary judgment, but for different reasons. A claim brought by a stockholder against a corporation with respect to the internal governance of the corporation is beyond the scope of c. 93A, because the stockholder and corporation are not deemed to be in trade or commerce with each other with respect to issues of corporate governance. Riseman v. Orion Research, Inc., 394 Mass. 311, 313-314 (1985). Since the relationship between the stockholders and a corporation is similar to the relationship between the unit owners and a condominium trust, it must also be the law that a claim brought by a unit owner against a condominium trust regarding issues of condominium governance is also beyond the scope of c. 93A. See, e.g., *Barbara Betzger, as Trustee of Skyline Heights Condominium Trust v. Robert Chin and Annie Chin*, No. 94-1613 (Mass.Sup.Ct. March 24, 1995) (Connolly, J.) at 9. This Court recognizes that the c. 93A, § 9 claim in Count XI is not brought by a unit owner against the Trust but rather is brought by the Trust against a former Trustee. This claim nonetheless falls within the corporate governance analogy because the Trust is acting on behalf of the unit owners so, effectively, the unit owners are suing a former trustee for his alleged misconduct as Trustee.

*14 Another analogy further demonstrates the inapplicability of c. 93A to claims like these. A claim under c. 93A may not be brought by an employer against an employee regarding disputes arising out of the employment relationship. Manning v. Zuckerman, 388 Mass. 8, 12-15 (1983). Since a trustee performs duties on behalf of the condominium trust, albeit generally without pay, a trustee is analogous to an employee and a trust to his employer. Since this claim arises out of the trustee relationship that McIn-

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tyre had with the Trust, this claim, like those arising out of the employment relationship, falls outside the scope of c. 93A.

The plaintiff Trustees contend that this case is distinguishable because McIntyre was a developer-sponsored Trustee and is alleged to have made misrepresentations in part to protect the interests of the developer from the remedies that would be sought by the Trust. This Court is not persuaded. Allegations of self-dealing and conflict of interest commonly arise in disputes involving corporate governance and employment but these allegations do not transform the relationship between the shareholders and the officers or directors, or between the employer and employee, into one involving trade or commerce. Indeed, if courts were to look in each case to the specific allegation brought by a shareholder against a corporation or by an employer against an employee to determine whether it may be brought under c. 93A, the present clarity in the law would soon be lost.

For all these reasons, McIntyre's motion for summary judgment is allowed as to the G.L. c. 93A claims (Counts IX and XI).

Plaintiffs' Motion to Supplement Response to Interrogatory 30

Finally, McIntyre contends that the plaintiffs' claim against him for breach of fiduciary duty should be limited to the amount of the repair bills for waterproofing and caulking that he submitted for payment to the Trust. He argues that this limitation is warranted by plaintiffs' response to Interrogatory 30, which asked the plaintiffs to state the factual basis for their allegation that McIntyre had acted in bad faith. The plaintiffs replied that "McIntyre, or his agents, completed 'waterproofing' and other repairs to the Condominium and charged these repairs to the Condominium when they should have been construction costs." McIntyre contends that the plaintiffs' motion to supplement this interrogatory response should be denied, since he had relied on this response and the requested supplementation is not timely, coming after the close of discovery.

Although this response was probably not complete even when made and could have been supplemented after McIntyre's deposition, this Court will permit the supplementation of the response, since it finds that the delay in supplementation was not strategic in intent and that McIntyre is not unfairly prejudiced by its timing. The complaint itself alleges that McIntyre failed adequately to investigate the alleged construction defects, that he initiated inadequate repairs of these defects, and that in doing so he misrepresented that these defects could be effectively remedied by these repairs. In view of the complaint, McIntyre had fair notice that the damages sought against him were greater than the cost of these repairs. While I understand why he would want to take advantage of the plaintiffs' error in answering Interrogatory 30, he can hardly be surprised by the scope of the supplemented response. Therefore, the plaintiffs' motion to supplement the response to Interrogatory 30 is allowed.

Bricklayers' Motion for Summary Judgment

*15 The plaintiffs have alleged four causes of action against the Bricklayers: breach of contract (Count II), negligence (Count III), breach of implied warranty (Count IV), and violations of G.L. c. 93A (Count VIII). The breach of contract claim alleges a breach of the individual purchase and sale agreement to the original unit purchasers "by delivering common areas and facilities which have material and substantial defects, and do not conform to building codes." Amended Complaint at ¶ 25. The summary judgment record, however, contains no evidence of any express warranty to this effect in the purchase and sale agreements. Consequently, Count II must be recognized as a claim of implied warranty, identical for all practical purposes to Count IV, and subject to the same three year statute of limitations for negligence in construction and design set forth in G.L. c. 260, § 2B.

The Bricklayers attempt to piggy-back on Turner's arguments that the statute of limitations on these claims has expired. The difference from Turner, however, is that Turner did not control the Trust and its President and Treasurer were not its sole trustees. Stripped to its essence, the Bricklayers contend that, since its President and Treasurer had notice of these claims before July 5, 1991 and failed to bring suit against the non-profit corporation they controlled, the Trust should be barred on statute of limitations grounds from ever bringing these claims.

This Court will not permit a developer to prevail on statute of limitations grounds against a condominium

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trust when the trustees the developer appointed and continued to employ failed timely to sue the developer. "If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action." G.L. c. 260, § 12. See also *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. at 517-521. Consequently, if McIntyre, the President of the Bricklayers, had concealed from the Trustees its cause of action against the Bricklayers, the time period of that concealment would be tolled. In the case at bar, McIntyre, the President of the Bricklayers, was for all practical purposes the only active Trustee. Certainly, if the law requires the statute of limitations period to be tolled when one conceals a cause of action from the person entitled to bring that action, it must also toll the statute of limitations period when the only person entitled to bring the cause of action fails to do so because of a conflict of interest, and fails to request others who are disinterested from making this judgment on behalf of the Trust. In addition, as stated earlier, there is evidence in the record of concealment and misrepresentations sufficient to support a finding of equitable estoppel. Therefore, the Bricklayer's motion for summary judgment on statute of limitations grounds is denied.

*16 The Bricklayers' contend that summary judgment is required on the G.L. c. 93A claim because there is no evidence of anything but negligence. In fact, there is evidence in the record that McIntyre, the Bricklayers' President, knowingly concealed the existence of design and construction defects and misrepresented the source of building problems in order to protect the Bricklayers from suit. Finally, the Bricklayers argue that its relationship to the Trust is not in trade or commerce within the meaning of c. 93A. Since the developers sold the units in BOTH to the unit owners and since the Trust represents the unit owners with respect to all common areas and facilities, this Court concludes that the Bricklayers are indeed in trade or commerce with the Trust with respect to matters relating to the design and construction of the property purchased by the unit owners. Consequently, the Bricklayers' motion for summary judgment on the c. 93A claim is denied.

ORDER

For the reasons stated above, this Court hereby *ORDERS* as follows:

1. Turner's motion for summary judgment on the negligence claim (Count V) is ALLOWED except to the extent the claim alleges negligence in the design or construction of the flashing and vapor barrier in the brick masonry cavity.

2. Turner's motion for summary judgment on the plaintiffs' breach of implied warranty claim (Count X) is ALLOWED to the same extent as its motion for summary judgment on the plaintiffs' negligence claim-it is allowed except to the extent the claim alleges a breach of implied warranty in the design or construction of the flashing and vapor barrier in the brick masonry cavity.

3. Rawn's motion for summary judgment is ALLOWED in its entirety as to both the negligence claim (Count VII) and the breach of implied warranty claim (Count VI).

4. McIntyre's motion for summary judgment is DENIED as to the breach of fiduciary duty claim (Count I).

5. McIntyre's motion for summary judgment is ALLOWED as to the G .L. c. 93A claims (Counts IX and XI).

6. Plaintiffs' motion to supplement the response to Interrogatory 30 is ALLOWED.

7. The Bricklayers' motion for summary judgment is DENIED.

Mass.Super.,2000.
Harris v. McIntyre
Not Reported in N.E.2d, 2000 WL 942559 (Mass.Super.)

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KeyCite Yellow Flag - Negative Treatment
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527 F.2d 772
United States Court of Appeals,
Seventh Circuit.

JANKE CONSTRUCTION COMPANY, INC., Plaintiff-Appellee,
v.
VULCAN MATERIALS COMPANY, Defendant-Appellant.

No. 75—1120.
|
Argued Sept. 12, 1975.
|
Decided Jan. 6, 1976.

Subcontractor appealed from a judgment of the United States District Court for the Western District of Wisconsin, Samuel M. Rosenstein, J., 386 F.Supp. 687, awarding contractor damages in action based on subcontractor's failure to supply appropriate pipe for marine construction project. The Court of Appeals, Perry, Senior District Judge, held that where subcontractor through its agents intentionally represented to contractor up to time of contractor's filing of bid that it would supply pipe required for project and where contractor acted in justifiable reliance upon such representations and was required, upon project engineers' refusal to allow subcontractor to substitute pipe not listed in specifications for project, to purchase specifications-meeting pipe at higher price, contractor was entitled to recover such amount in damages under the theory of promissory estoppel.

Affirmed.

West Headnotes (5)

[1] Federal Civil Procedure
⇔ Theory of claim
Fact that plaintiff misconceived legal theory of its case did not preclude it from obtaining relief under another legal theory. Fed.Rules Civ.Proc. rule 8(a)(2), 28 U.S.C.A.

26 Cases that cite this headnote

[2] Estoppel
⇔ Pleading as element of cause of action
Complaint which asserted that subcontractor studied requirements of marine construction project and agreed to provide pipe for project for certain amount, that subcontractor represented to contractor that its pipe would meet project specifications, that contractor, in reliance thereon, used subcontractor's quoted price in its successful bid on project, that pipe supplied by subcontractor did not meet listed specifications and was not approved by project engineers and that contractor was forced to purchase specifications-meeting pipe from another subcontractor at an additional cost set forth claim upon which relief could be granted under theory of promissory estoppel.

9 Cases that cite this headnote

[3] Estoppel
⇔ Future events;promissory estoppel
For plaintiff to prevail in an action founded on doctrine of promissory estoppel, he must establish that defendant made a definite promise with reasonable expectation that promise would induce action of definite and substantial character on part of plaintiff, that promise induced such action, that plaintiff acted in justifiable reliance upon promise to his detriment and that injustice can be avoided only by enforcement of promise.

13 Cases that cite this headnote

[4] Federal Civil Procedure
⇔ Effect
Even though counsel for contractor stated at pretrial hearing that action against subcontractor arising out of the failure to supply pipe meeting specification requirements for marine construction project was to be tried on contractual theories of

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express warranty and implied warranty of fitness for particular purpose, where facts which contractor stated and relied upon to support its claim and to which subcontractor responded in entering defense gave rise to application of doctrine of promissory estoppel, trial court did not err in deciding the case on theory of promissory estoppel.

16 Cases that cite this headnote

[5] Estoppel

⇐ Future events;promissory estoppel

Where subcontractor through its agents intentionally represented to contractor up to time of contractor's filing of bid that it would supply pipe required for marine construction project and where contractor acted in justifiable reliance upon such representations and was required, upon project engineers' refusal to allow subcontractor to substitute pipe which did not meet specifications listed for project, to purchase specifications-meeting pipe at higher price, contractor was entitled to recover such amount in damages from subcontractor under theory of promissory estoppel.

7 Cases that cite this headnote

Attorneys and Law Firms

*773 Claude J. Covelli, Madison, Wis., for defendant-appellant.

John W. Kelley, Wausau, Wis., for plaintiff-appellee.

Before STEVENS, Circuit Justice, * PELL, Circuit Judge, and PERRY, Senior District Judge. **

Opinion

PERRY, Senior District Judge.

This is an appeal from a judgment of the District Court in favor of the plaintiff below, Janke Construction Company, Inc. (hereinafter 'Janke'), in an action for damages resulting from the failure of defendant below, Vulcan Materials Company (hereinafter 'Vulcan'), to provide Janke with appropriate subaqueous pipe and fittings for a marine construction project upon which Janke was the successful bidder. The complaint alleged that prior to March 10, 1970 Janke received an invitation to submit a sealed bid at 2:00 P.M. that date for State Bureau of Engineering Project No. 6512—38 on behalf of the Regents of the University of Wisconsin for marine construction work in accordance with printed drawings, specifications and other contract documents; that prior to and on the aforesaid date Vulcan studied the requirements of the project and agreed to provide Janke, on a per unit cost, with pipe and fittings for water transmission lines required for the project for $149,754.10; that prior to and on the aforesaid date Vulcan expressly warranted and represented to Janke that Vulcan's products would meet the specifications required for the project; that in reliance thereon Janke used Vulcan's quoted prices in bidding on the marine part of the project and was awarded the contract; that, following the award, Vulcan's products were not approved by the project engineers because they did not meet specifications; and that Janke was thereby forced to purchase specifications-meeting pipe and fittings from another pipe manufacturer, at an additional cost of $39,992.40.

On August 1, 1974, the action was tried to the District Court without a *774 jury. After hearing all the evidence, the court granted Vulcan's motion that post-trial briefs be submitted by the litigants prior to the decision of the court.

In an Opinion and Order entered on October 21, 1974, the District Court, finding Vulcan liable on the grounds of promissory estoppel, ordered judgment entered in favor of Janke in the amount of $39,942.40 (sic) plus costs. The court found that the facts which Janke pleaded and relied upon to support its claim and to which Vulcan responded in entering its defense, gave rise to the application of the doctrine of promissory estoppel as expressed in Section 90 of the Restatement of the Law of Contracts. The court found that Janke had established that Vulcan had made a definite promise with the reasonable expectation that its promise would induce action of a definite and substantial character on Janke's part; that Janke had acted in justifiable reliance upon the promise to Janke's detriment; and that injustice could be avoided only by enforcement of the promise.

On October 31, 1974, Vulcan filed a motion to alter or amend judgment, or in the alternative for a new

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trial. The District Court denied the motion in an order entered December 6, 1974. On December 27, 1974, Vulcan appealed from the judgment entered against it, and from the order denying Vulcan's post-judgment motion.

The facts, as found by the District Court, are as follows:

Janke, a Wisconsin corporation with its principal offices near Wausau, Wisconsin, had been engaged in various types of construction work, including highway, sewer, airport and marine projects. Vulcan, a New Jersey corporation, operates quarries and has sand, gravel, aggregate and redi-mix concrete plants in several states. In 1970, it also operated a concrete-pipe manufacturing plant located in Illinois.

In February 1970, the State Bureau of Engineering, on behalf of the Regents of the University of Wisconsin, publicly invited submission of sealed bids for the construction of condenser water transmission lines, lake piping and a pumping station for the University of Wisconsin—Milwaukee campus. The project was intended to provide the University with its own cooling system. The bids were to be opened at 2:00 P.M., on March 10, 1970, in Madison, Wisconsin.

The general construction, land, marine and electrical work portions of the project were to be bid on separately, each portion requiring a separate lump sum bid. The marine portion of the work included the furnishing and installation of water intake and return lines into Lake Michigan. The materials required for marine piping included concrete subaqueous pipe in full compliance with either AWWA Specification C300 or AWWA Specification C301. The main contract also contained an 'or equal' clause, permitting use of non-specified materials of equal quality to those specified if they were considered equally acceptable to and approved by the project engineers.

Janke, intending to bid on the marine work, obtained price quotations from suppliers of the various materials required for that portion of the project. On March 5, 1970, Jerry Janke, then vice president of Janke, received price quotations by telephone from a Vulcan representative for the various concrete pipe items to be used in the marine work. Janke made a memorandum of the prices quoted, but did not inquire during this conversation whether Vulcan proposed to supply C300 or C301 pipe, nor did the caller specify the quality or type of pipe Vulcan intended to furnish. Vulcan's quoted prices were $40,000 below prices quoted by Interpace, another subaqueous concrete pipe supplier.

On the evening of March 9, 1970, Jerry Janke and his brother, James Janke, owner of Janke, checked in at a Madison hotel for the purpose of submitting their bid the next day. Around midnight they were visited in their hotel room by Alex Barry, then general manager of Vulcan's Wisconsin operations, and Peter W. Fox, a salesman for Vulcan's sand, gravel, crushed limestone and redi-mix concrete.

*775 While it is not clear whether the visit was only social or included some discussion of Vulcan's ability to furnish the pipe for the project, all parties present at the visit agreed that there was no reference to the particular specifications or type of pipe that Vulcan proposed to supply. The next day, shortly prior to submitting his bid, James Janke met Mr. Barry in the hallway of the State Office Building. James Janke testified that he was concerned because of the disparity in the prices quoted by Vulcan and Interpace. He requested and received assurance from Mr. Barry that Vulcan could furnish the pipe for the project. During the meeting Mr. Barry also placed a telephone call to someone at Vulcan who confirmed his assurance.

According to Mr. Barry, Mr. Janke merely inquired at this meeting whether Vulcan could reduce its quoted prices on the pipe, and his telephone call to Vulcan's vice president was made only to confirm his statement that prices would not be reduced.

Mr. Janke, who had relied upon Vulcan's quoted pipe prices in calculating his prime bid, thereupon submitted the bid and was subsequently awarded the contract.

Within the week after the bid opening, Janke received a written quotation from Vulcan setting forth the same prices that were quoted to Jerry Janke over the telephone on March 5th, but stating that the quotation was for AWWA C302 pipe. The writing was dated March 6th, but it is not known when it was mailed.

The record does not indicate the date when Janke discovered that Vulcan was offering to supply C302 pipe and not the pipe listed in the specifications. Between March 10th and March 23rd, however, James Janke met three times in Milwaukee and in Madison with the engineers for the State of Wisconsin, a representative from the University, and Alex Barry and Art Littva of Vulcan's

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engineering department, in an effort to persuade the State to accept the C302 pipe. Mr. Littva then sent James Janke specifications and shop drawings showing use of the C302 pipe on the marine project and requested Janke to submit them under the 'or equal' clause. The plans were submitted as requested, and were rejected by the State's project engineers as not approved.

In response to James Janke's inquiry as to why the pipe did not meet specifications, the engineers stated that the pipe was not AWWA C300 or C301 as specified; was not steel cylinder type; was not designed for an internal pressure of 50 psi; and did not have a beam strength equal to the pipe specified.

The engineers subsequently requested Janke to submit shop drawings using design conditions and materials as specified, stating that time was critical. Janke was then forced to buy the specified pipe from Interpace at a cost of $197,093.50, which was $39,942.40 (sic) over the $157,101.10 it would have paid for Vulcan's pipe in accordance with the latter's quotation.

The University of Wisconsin-Milwaukee project was first opened for bidding on May 21, 1969, but at that time it had to be bid on as an entire unit. Janke had bid as a subcontractor with a prime contractor on the marine portion, using Vulcan's prices in preparing its bid; however, there was a dispute at the time between the University and the City of Milwaukee as to whether the University should connect to the city's water system and, although the bids were opened, the contract was never awarded.

According to the normal bidding practices in the construction industry in the area, a contemplated project is generally listed or advertised in trade magazines and in the 'Dodge Reports', a daily construction news service which lists proposed construction activity for various areas of the country. A subscriber to the 'Dodge Reports' for a particular area may inspect the plans for a project in any Dodge plan room located in that area. The University of Wisconsin-Milwaukee project plans were available in Dodge plan rooms located in the Wisconsin cities of Milwaukee, Madison, Green Bay and Eau Clair. An interested materials *776 supplier checks the plans and specifications to determine if he can supply any of the required materials. He then submits a quotation by telephone, mail, or both, to the contractors interested in bidding on the project. It is in this manner that contractors usually obtain quotations from competing suppliers and subcontractors. These quotations are then used by the contractors to estimate their own costs in preparing their bids. Normally, the twenty-four hour period preceding the prime bid deadline is one of great activity, with the subcontractors and suppliers making the rounds of the contractors who are still preparing their bids. By this time the first quotations have generally become known and the quoted prices are often revised downward at the last minute, with the prime contractors revising their bids accordingly.

The contractor usually purchases the materials from the supplier upon whose prices he relied in preparing his bid; however, a contract to purchase the materials is not entered into until after the contractor has been awarded the contract and the project engineers have approved the materials, if such approval is needed. The supplier then prepares the shop drawings for the project after the successful bidder signs a letter of intent to purchase the materials.

The Janke brothers testified that the supplier normally submits a price on material that will meet the specifications; however, Jerry Janke testified that if the supplier were offering non-specified material under the 'or equal' clause he would, in the normal course of trade, alert the contractor to that fact so that the contractor, if he relied upon the quotation, would note on his bid that he proposed to supply substitute material under the 'or equal' clause and that his bid is based on the substitute material. In this manner the contractor protects himself from having to perform on the bid, if it is accepted, in the event that the project engineers reject the non-specified (substitute) material as unsuitable.

Jerry Lapish, a marine contractor appearing for Vulcan, testified that when a quotation is received it is customarily the contractor's responsibility to check the specifications listed for the material on the quotation against the specifications listed in the project contract to determine for himself whether

the supplier is offering non-specified material.

Did the Court Err in Deciding the Case on the Theory of Promissory Estoppel?

Vulcan first contends that the District Court erred in deciding the case on the theory of promissory estoppel in that Vulcan,—in reliance upon the statement of

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Janke's counsel at the pre-trial conference that Janke was trying the case on the contractual theories of express warranty and implied warranty of fitness for a particular purpose, and in further reliance upon the District Court's conclusion at said conference that only a narrow contractual issue was presented,—prepared, tried and briefed the action solely on said contract theories and was consequently prejudiced by being deprived of the opportunity, prior to judgment, to present a defense to the theory of promissory estoppel. We do not agree.

[1] We concur with the District Court that the fact that Janke misconceived the legal theory of its case does not preclude it from obtaining relief under another legal theory. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading which contains a claim for relief requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief.' As the court held in Dotschay v. National Mutual Ins. Co., 246 F.2d 221, 223 (5th Cir. 1957):

> . . . It seems to us that the district court overlooked (in dismissing the complaint) our liberal rule of federal practice under which the complaint is not to be dismissed because the plaintiff's lawyer has misconceived the proper legal theory of the claim, but is sufficient if it shows that the *777 plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief. [1]

In Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 696, 133 N.W.2d 267, 274 (1965), the Supreme Court of Wisconsin expressly adopted the doctrine of promissory estoppel. There the court found that defendants had promised to establish plaintiffs as franchise operators of one of their stores in a certain town if they would invest a specific amount of capital and fulfill other conditions. During a two-year period of negotiations, plaintiffs, relying upon defendants' promise, and in fulfillment of the conditions, sold their bakery and grocery businesses and a building, moved to another town, incurred moving expenses, made a down payment on a lot, and paid one month's rent on a home in the town where they had been led to believe that a franchised store would be available. Negotiations finally broke off after defendants demanded a larger capital investment than originally requested. The court found that the factual elements of promissory estoppel were present and concluded that injustice would result if plaintiffs were not granted some relief because of defendants' failure to keep their promises which induced plaintiffs to act to their detriment. The court stated:

> Because we deem the doctrine of promissory estoppel, as stated in sec. 90 of Restatement, 1 Contracts, is one which supplies a needed tool which courts may employ in a proper case to prevent injustice, we endorse and adopt it. 26 Wis.2d at 696, 133 N.W.2d at 274.

The Hoffman court held that a promise actionable under section 90 of the Restatement [2] need not have all the elements of an offer that would result in a binding contract between the parties if the promisee were to accept the same. Said the court:

Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract. See Williston, Contracts (1st ed.), p. 307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise? (Footnote omitted.)

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We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action.

26 Wis.2d at 697—98, 133 N.W.2d at 275.

Although Hoffman did not involve the applicability of the doctrine of promissory *778 estoppel to construction bidding cases, courts of other jurisdictions have applied the doctrine in such cases. For example, Drennan v. Red Star Paving Company, 51 Cal.2d 409, 333 P.2d 757 (1958), involved an oral bid by a subcontractor for certain work at a school project on which the plaintiff, the general contractor, was about to bid. Since defendant's bid was the lowest, plaintiff computed his own bid on the basis of defendant's bid price. Plaintiff was the successful bidder but was informed the next day by defendant that defendant would not do the work at its quoted price. The California Supreme Court applied the doctrine of promissory estopped to prevent defendant's revocation of its bid, stating:

. . . The very purpose of section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange.' (See 1 Corbin, Contracts 634 et seq.) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding.

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer. . . .

333 P.2d at 760.

Likewise, in Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943), the court said, in applying the doctrine of promissory estoppel:

. . . Obviously it would seem unjust and unfair, after appellant was declared the successful bidder and imposed with all the obligations of such, to allow respondents to then retract their promise and permit the effect of such retraction to fall upon the appellant. . . .

10 N.W.2d at 883.

Other cases in which the courts have applied the doctrine of promissory estoppel in construction bid cases are listed in the margin.[3]

[2] After carefully examining the pleadings, we conclude that Janke's complaint *779 set forth a claim upon which relief could be granted under a theory of promissory estoppel. We have examined the testimony of all of the witnesses with equal care and we conclude therefrom that the record fully supports the findings of the District Court, paraphrased as follows:

(1) Jerry Janke received a definite offer by telephone on March 5, 1970 from Vulcan to supply the concrete subaqueous pipe required for the University of Wisconsin-Milwaukee project at the quoted prices. At no time prior to the awarding of the contract was Janke informed that Vulcan was proposing to furnish anything other than the pipe specified in the project plans. Furthermore, throughout its course of dealing with the Janke brothers on this particular bid, Vulcan intentionally, and successfully, represented to Janke through its agents that it 'would supply the pipe for the job', that is, the pipe specified in the project engineers' plans.

(2) The Janke brothers, not unreasonably, relied upon the representations of Vulcan's Wisconsin representative, Alex Barry, whom they knew from previous business

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dealings, and who continued to assure them up to the bid deadline that Vulcan could and would supply the required pipe. Accordingly, the Jankes, men of limited formal education and with no engineering or technical experience in concrete subaqueous piping, were never alerted to the fact that they were relying upon a bid which was based on non-specified material. If they had known that Vulcan was offering pipe under the 'or equal' clause, they would have conditioned their bid in like manner if they still wanted to use Vulcan's pipe.

(3) Janke acted with reasonable care and prudence in relying on Vulcan's offer, and this offer included, as represented to Janke, a proposal to furnish the specified concrete subaqueous pipe.

(4) Janke suffered substantial detriment by acting in reliance upon defendant's bid. It was compelled to go forward on the contract and supply the specified pipe when Vulcan's products were rejected as unsuitable. Upon Vulcan's refusal or inability to furnish the required material, Janke had to purchase the material from Interpace, the other pipe supplier, at a price which was $39,992.40 over Vulcan's bid.

(5) Vulcan's contention that Barry lacked authority to make representations on its behalf concerning its offer to supply Janke with pipe lacks credibility under the circumstances herein. Barry's actions, including his midnight call on the Janke brothers, his meeting with them the next day prior to the bid deadline, his last minute call to Vulcan to confirm its offer, and his participation in meetings with Janke and state representatives after the awarding of the contract in an attempt to obtain approval for use of Vulcan's C302 pipe, all belie Vulcan's disclaimers as to his agency status.

[3] We thus agree with the District Court that Janke presented substantial evidence to support each of the elements of promissory estoppel, viz., (1) defendant made a definite promise to plaintiff with the reasonable expectation that the promise would induce action of a definite and substantial character on the part of plaintiff; (2) that the promise induced such action; (3) that plaintiff acted in justifiable reliance upon the promise to its detriment; and (4) that injustice can be avoided only by enforcement of the promise.

[4] In view of the foregoing, we conclude that the District Court correctly found that the facts which Janke had pleaded and relied upon to support its claim, and to which Vulcan responded in entering its defense, gave rise to the application of the doctrine of promissory estoppel. We hold accordingly that the District Court did not err in deciding the case on the theory of promissory

*estoppel. *780 Was There Substantial Evidence To Support Recovery Upon a Theory of Promissory Estoppel?*

[5] Vulcan next contends that there was no substantial evidence to support recovery upon a theory of promissory estoppel because: (1) there was no credible evidence that Vulcan promised to supply Janke specified materials; (2) there was no credible evidence that Janke acted in justifiable reliance upon any promise made by Vulcan; and (3) Janke failed to establish any reliance damages. Again we disagree.

The District Court found, in accordance with evidence amply supported by the record, that throughout the course of Vulcan's dealings with the Janke brothers, Vulcan intentionally and successfully represented to Janke, through Vulcan's agents, that Vulcan 'would supply the pipe for the job', that is, pipe specified by the project engineers; that Alex Barry continued to assure the Janke brothers, up to the time they filed their bid, that Vulcan could and would supply the required pipe; that accordingly the Janke brothers, who were men of limited formal education and with no engineering or technical experience in concrete subaqueous piping, were never alerted to the fact that they were relying upon a bid based on non-specified material; and that the Janke brothers, had they known that Vulcan was offering non-specified pipe under the 'or equal' clause, would have conditioned their bid in like manner if they still wanted to use Vulcan's non-specified pipe.

Janke did not supply Vulcan with the project plans and specifications. Therefore it is reasonable to infer that Vulcan obtained them either from the project engineers or through one of the Dodge Reports plan rooms prior to submitting, two weeks after the bidding, shop drawings and design specifications. The record does not indicate the date when Janke discovered that Vulcan was offering to supply non-specified pipe; however, between March 10 and March 23, 1970, Vulcan's representatives

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participated in a series of meetings with James Janke and the project engineers in an unsuccessful effort to persuade the engineers to accept Vulcan's non-specified C302 pipe. Finally, almost 7 weeks after the bidding, the project engineers requested Janke to submit shop drawings using material 'as specified', and advised Janke that 'Time is very critical to the completion of this project'. Vulcan then realized that its pipe would not be accepted and, after two weeks of consideration as to whether Vulcan should go into the manufacture of steel-cylinder pipe to meet the specifications, decided not to try to furnish the pipe specified by the project engineers. It was then that Vulcan abandoned its efforts to supply Janke with pipe that would 'do the job', although Vulcan's people had repeatedly assured Janke that its pipe would 'do the job'. Art Littva of Vulcan's engineering department then told James Janke to 'go ahead and buy the pipe from Interpace'.

We conclude that the record furnishes substantial and credible evidence that Vulcan promised to supply Janke with pipe which would be acceptable to the project engineers, and that Janke acted in justifiable reliance upon such promise.

As for Vulcan's argument that Janke failed to establish any reliance damages, we agree with the District Court that Janke suffered substantial detriment by acting in reliance upon Vulcan's bid; that upon Vulcan's finally telling Janke that Vulcan had decided not to go into manufacturing the specified pipe and that Janke should therefore go ahead and purchase the specified pipe from Interpace, Janke was compelled to pay Interpace $39,992.40 more than Vulcan had quoted. Janke was entitled to recover said amount in damages from Vulcan.

Vulcan argues, however, that when Janke received Vulcan's written confirmation on or about March 11th, Janke was put on written notice that Vulcan's quoted prices were on C302 Class III pipe and that Janke could then have notified the State of its error,—if an error was made,—and could have rescinded its bid within 72 hours of the bid opening. *781 The weakness of this argument is that Janke was relying on Vulcan to produce proper pipe for the project—pipe that assuredly would 'do the job'—and that it was not until March 27th, long past the time when Janke could have rescinded its bid, that Janke was advised that Vulcan's C302 pipe was not acceptable.

In view of all of the foregoing, the judgment of the District Court is Affirmed.

All Citations

527 F.2d 772

Footnotes

* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

1 See also cases cited in Dotschay, supra, 246 F.2d at 223, n.5.

2 The doctrine of promissory estoppel is expressed in Section 90 of the Restatement of the Law of Contracts as follows: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

3 Debron Corporation v. National Homes Construction Corporation, 493 F.2d 352 (8th Cir. 1974); Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc., 291 Minn. 113, 190 N.W.2d 71 (1971); Saliba-Kringlen Corp. v. Allen Engineering Co., 15 Cal.App.3d 95, 92 Cal.Rptr. 799 (1971); E. A. Coronis Associates v. M. Gordon Construction Co., 90 N.J.Super. 69, 216 A.2d 246 (1966); Reynolds v. Texarkana Construction Co., 237 Ark. 583, 374 S.W.2d 818 (1964); Norcross v. Winters, 209 Cal.App.2d 207, 25 Cal.Rptr. 821 (1962); Air Conditioning Co. of Hawaii v. Richards Construction Company, 200 F.Supp. 167 (D.Hawaii, 1961), affirmed on other grounds, 318 F.2d 410 (9th Cir. 1963).

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2009 Mass.App.Div. 132
Massachusetts Appellate Division,
District Court Department, Southern District.

BOARD OF TRUSTEES OF the SEA
GRASS VILLAGE CONDOMINIUM [1]
v.
James S. BERGQUIST and others [2].

No. 08-ADMS-40029.
|
Heard Nov. 7, 2008.
|
Opinion Certified June 25, 2009.

Synopsis
Background: Board of trustees of condominium community filed suit against unit owner, seeking unpaid common expenses, fines, interest, and attorney fees, as well as establishment of condominium lien. Unit owner filed counterclaims, alleging abuse of process and discrimination, The District Court Department, Orleans Division, Merrick, J., entered judgment on jury verdict awarding board damages of $2,405.61 and finding in favor of board on unit owner's counterclaims, awarded board attorney fees and collection costs of $33,026.93, found unit owner personally liable on judgment, and imposed condominium lien upon owner's unit. Board appealed. Unit owner cross-appealed.

Holdings: The District Court Department, Appellate Division, Williams, P.J., held that:

[1] condominium lien was subordinate to comprehensive permit and regulatory agreement;

[2] reasonableness standard applied with respect to determination of appropriate amount of award of attorney fees and costs to board;

[3] trial court's analysis of board's attorney fee request was insufficient to support attorney fee award;

[4] board was not entitled to attorney fees and costs it incurred in defending against unit owner's discrimination complaints filed with state and federal agencies;

[5] board was entitled to prejudgment interest of 18 percent on jury award of $2,405.61 in damages; and

[6] board was entitled to interest on award of attorney fees.

Affirmed in part; returned in part.

West Headnotes (7)

[1] **Common Interest Communities**
⇐ Perfection and priority

Condominium lien of board of trustees of condominium community against unit owner, who became owner due to his success in affordable housing lottery, was subordinate to comprehensive permit issued by zoning board of appeals and regulatory agreement between developer and his bank, pursuant to statute providing that condominium lien is prior to all other liens and encumbrances on a unit except liens and encumbrances recorded before recordation of master deed, as both permit and agreement were recorded prior to master deed and declaration of trust establishing condominium community, and they predated condominium lien, and both permit and agreement constituted "encumbrances" on unit, in that they contained conditions and restrictions governing sale of affordable units. M.G.L.A. c. 40B, § 21; M.G.L.A. c. 183A, § 6(c).

1 Cases that cite this headnote

[2] **Common Interest Communities**
⇐ Lien foreclosure; other remedies and proceedings for nonpayment

Common Interest Communities
⇐ Costs and attorney fees

Reasonableness standard applied with respect to determination of appropriate amount of award of attorney fees and costs to board of trustees of condominium community, in its action against unit owner to establish condominium lien for unpaid common area

G1

expenses, in which board prevailed, as statute governing priority of a condominium lien referred to reasonable attorney fees, and attorney fee provision in declaration of trust that established condominium community lacked either the qualifier "reasonable" or any such qualifier as "any" or "all," such that it would be inferred, given that attorney fee provision appeared on page 41 of a 64-page trust document, that a reasonableness standard applied. M.G.L.A. c. 183A, § 6.

1 Cases that cite this headnote

[3] Common Interest Communities
⇐ Lien foreclosure;other remedies and proceedings for nonpayment

Common Interest Communities
⇐ Costs and attorney fees

Trial court's analysis of request of board of trustees of condominium community for attorney fees insufficiently considered whether amount of time spent in board's suit against unit owner to establish condominium lien against owner for unpaid common area expenses was reasonable in light of result, which was jury award to board of $2,405.61, and, thus, analysis was insufficient to support award to board of $33,026.93 in attorney fees and costs; it could not be discerned whether trial court was punishing owner for his perceived obduracy, or was simply alluding generally to the time and effort the board had been compelled to expend in response to owner's tactics. M.G.L.A. c. 183A, § 6.

2 Cases that cite this headnote

[4] Civil Rights
⇐ Proceedings, grounds, and objections in general

Civil Rights
⇐ Hearing, determination, and relief;costs and fees

Common Interest Communities
⇐ Costs and attorney fees

Board of trustees of condominium community was not entitled to attorney fees and costs it incurred in defending against unit owner's discrimination complaints filed with the state's Commission Against Discrimination and the United States Department of Housing and Urban Development (HUD), pursuant to attorney fee provision in declaration of trust that established condominium community, though complaints were dismissed, as effect of provision was to indemnify board for defense costs in any claim whatsoever brought by a unit owner for any behavior whatsoever on board's part, including intentional conduct or misfeasance, whether board prevailed on that claim or not, which rendered provision unfair.

Cases that cite this headnote

[5] Interest
⇐ Construction and Operation

Board of trustees of condominium community was entitled to prejudgment interest of 18 percent on jury award of $2,405.61 in damages, in board's suit against unit owner seeking condominium lien against owner for unpaid common area expenses, as declaration of trust that established condominium community provided for such interest, and statute provided that unit owner shall be personally liable for all sums assessed for his share of the common expenses including interest assessed by the organization of unit owners. M.G.L.A. c. 183A, § 6; M.G.L.A. c. 231, § 6C.

Cases that cite this headnote

[6] Interest
⇐ Particular provisions

Board of trustees of condominium community was entitled to interest on award of attorney fees to board, which prevailed in its suit against unit owner to establish condominium lien against owner for unpaid common area expenses, to be calculated based on date on which expenses were paid, as fair reading of declaration of trust that established condominium community provided for interest on attorney fee award,

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and this contractual provision did not violate public policy.

Cases that cite this headnote

[7] Interest
⇐ Particular cases and issues

Prejudgment interest on attorney fees is calculated based on the date on which the expenses were incurred; the term "incurred" means "paid."

Cases that cite this headnote

In the Orleans Division, Docket No. 0726-CV-0035, Merrick, J.[3]

Attorneys and Law Firms

Brian J. Wall, Esq., Troy Wall Associates, Sandwich, MA, for plaintiff.

James S. Bergquist, South Dennis, MA, pro se.

Before WILLIAMS, P.J., McCALLUM & SINGH, JJ.

OPINION

WILLIAMS, P.J.

*1 Sea Grass Village is a condominium community in South Dennis consisting of 14 freestanding units and common areas. Following its determination that a unit owner, James S. Bergquist ("Bergquist"), had breached several condominium rules, the Board of Trustees of the Sea Grass Condominium ("Trustees") filed this action to collect various expenses and fines and to establish and enforce their lien pursuant to G.L. c. 183A. After a jury had awarded the Trustees money damages, the trial judge decided the issues of the Trustees' lien priority and their claim for attorney's fees. The Trustees appeal the trial judge's decision that their lien, which arises pursuant to G.L. c. 183A, § 6(a) and the Master Deed, is subordinate to a comprehensive permit requiring that several units be affordable and to a regulatory agreement, both of which were recorded before the Master Deed, and to a deed rider recorded thereafter. The Trustees appeal three claimed errors: the trial judge's failure to assign their lien priority over other perceived encumbrances, his failure to award them attorney's fees arising from their defense of Bergquist's administrative discrimination claims, and his failure to order interest on any part of the award. Finally, the Trustees submit that Bergquist's cross appeal assailing the reasonableness of the attorney's fees the trial court did award must fail because that award was reasonable and not clearly erroneous. We affirm the trial court's decision regarding the lien priorities, but return the action to the Orleans District Court for further consideration of the attorney's fee award and for the assessment of certain prejudgment and postjudgment interest.

Sea Grass Village was established by a Master Deed and a Declaration of Trust recorded on October 7, 2002. The Rules and Regulations that govern aspects of the operation, use, and appearance of the condominiums were recorded with the Trust. Bergquist became the owner of Unit No. 14 on October 11, 2002 as the result of his success in a G.L. c. 40B affordable housing lottery. His deed expressly rendered his ownership subject to the rights and obligations set out in G.L. c. 183A and in the Master Deed and the bylaws filed with it.

In January and February, 2006, two unit owners complained to the Trustees that Bergquist's yard was unkempt, that he had more pets than permitted, and that his cat was roaming unrestrained. The Trustees asked Bergquist in writing to abide by rules pertaining to those matters, among others. There followed a duel of correspondence. Bergquist warned the Trustees that he would file discrimination claims against them with, among other bodies, the Massachusetts Commission Against Discrimination ("MCAD").[4] The Trustees' theme was that Bergquist's persistence in violating the rules would render him liable for various fines and costs, including attorney's fees.

Since Bergquist failed to comply as requested, the Trustees finally, in August of 2006, launched a lien-enforcement action against him pursuant to G.L. c. 183A, § 6(c) and Article V, § 5.5 of the Trust. They also notified the mortgagee on Bergquist's unit, Cape Cod Five Cent Savings Bank ("Cape Cod Five"), of their intent to foreclose on the condominium. In order to protect the priority of its mortgage from the condominium's statutory lien, Cape Cod Five paid the unpaid common area charges

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along with the attorney's fees generated by the notice letter.

*2 His attention finally captured, Bergquist began exploring resolution of the dispute. Several months of negotiation followed. It is apparent that Bergquist at times ignored the substance of those negotiations in favor of concentrating on such minutiae as an obvious mistyped date in one of the proposed agreements. Finally, in January, 2007, after Bergquist had neither agreed to settlement terms, nor cured the violations, the Trustees brought this action, seeking unpaid common expenses, fines, interest, and attorney's fees as well as the establishment of their lien pursuant to G.L. c. 183A, § 6. Bergquist counterclaimed, alleging what were eventually framed for the jury as claims for abuse of process and discrimination. He further riposted by filing discrimination complaints with the MCAD and the United States Department of Housing and Urban Development ("HUD"). Both those complaints were dismissed in April, 2007.

The Trustees' claims for unpaid common area fees and fines, and Bergquist's counterclaims, were tried to a jury in December, 2007. The jury awarded the Trustees $2,405.61 and found in favor of the Trustees on Bergquist's counterclaims. After trial, the judge addressed the Trustees' claims for attorney's fees and for the establishment of the priority of their lien. In March, and in further orders in April, 2008, the trial judge awarded the Trustees attorney's fees and collection costs totaling $33,026.93. The total judgment entered was $35,426.93. The court found that Bergquist was personally liable on that judgment under G.L. c. 183A, § 6(b), and that that amount constituted a lien upon his unit. The court awarded the Trustees neither legal fees for defending the MCAD and HUD claims, nor interest on any part of the award. Further, the court did not grant the Trustees' lien the priority they had sought. Pursuant to G.L. c. 183A, § 6, the Trustees had asserted that their lien trumped all other "liens and encumbrances" save for Cape Cod Five's mortgage and such liens as those for real estate taxes and municipal assessments.[5] The court, instead, found that the Trustees's lien was subject to a Comprehensive Permit (issued under G.L. c. 40B) and a Regulatory Agreement that had been recorded before the Master Deed. The trial judge also made the Trustees' lien further subject to the "Deed Rider" recorded after Bergquist's deed. Additionally, he ordered that proceeds of the sale of the unit would be applied to each lien according to the priority established in the judgment, and that any remaining proceeds would be paid to the Trustees, with any excess payable to Bergquist.

[1] 1. *Lien Priority.* The Trustees argue that the trial judge erred when he found that the Comprehensive Permit (issued by the Dennis Zoning Board of Appeals), the Regulatory Agreement between the developer and his bank,[6] and the Deed Rider attached to Bergquist's deed took priority over the Trustees' condominium lien. There was no error.

*3 Specifically, the Trustees submit that the trial judge erred as a matter of law because, pursuant to the plain language of G.L. c. 183A, § 6(c), which governs the priority of liens (see note 5, *supra*), it is obvious that their Hen takes primacy. There is scant useful authority interpreting § 6(c) on this point. Clearly, the Trustees bear the burden of demonstrating on appeal that the trial judge was in error. E.g., *Upshaw v. Katharine Gibbs Sch. of Boston, Inc.*, 63 Mass.App.Ct. 92, 93, 823 N.E.2d 414 (2005). The Trustees' argument turns on the scope of the meaning of "liens" or "encumbrances" in the section. Nothing contained in the Comprehensive Permit, the Regulatory Agreement, or the Deed Rider constitutes an encumbrance, the Trustees argue, and thus their lien is first in time, except for the mortgage held by Bergquist's mortgagee, Cape Cod Five. They rely on the general measure of lien priority: "first in time is first in right." *Yung v. Reymonde,* 1999 Mass.App. Div. 194, 195. Although the Trustees acknowledge that the Comprehensive Permit (recorded on April 12, 2002) and the Regulatory Agreement (recorded on August 1, 2002) predate their lien, they argue that because neither of those documents constitutes a "lien" or "encumbrance," neither can tarnish the primacy of their lien, created when the Master Deed was recorded on October 7, 2002. Bergquist's deed with its rider was recorded four days later, on October 11, 2002.

As to the Comprehensive Permit, the Trustees argue that such a permit is neither a lien, nor an encumbrance, but merely a permit issued by a board of appeals authorizing a developer to construct housing. G.L. c. 40B, § 21.[7] As the Trustees recognize, an encumbrance is "[a] claim or liability ... attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership."

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Black's Law Dictionary 568 (8th ed.2004). It must exist in favor of another person, rendering the land of less value to its owner. See *Kellogg v. Ingersoll,* 2 Mass. 97, 101 (1806). As the Trustees further acknowledge, though, the Comprehensive Permit contained numerous conditions, including the restriction that four units of the condominium, including No. 14, Bergquist's unit, remain "affordable in perpetuity." See generally *Zoning Bd. of Appeals of Wellesley, supra* at 814-816, 767 N.E.2d 584. Such conditions, the Trustees submit, cannot constitute encumbrances because they are not interests in land. That view, though, ignores the breadth of the very definition the Trustees offer, which describes "encumbrance" as a "liability ... attached to property *or some other right* " that renders the property-or the right-less valuable. It is difficult to conceive how the restrictions set out in the Comprehensive Permit cannot be considered as a liability reducing the value of the subject unit-"or some other right," such as the right to sell the unit at market value. Not only is that restriction a "liability," but it is also one that represents a patently established public policy of the Commonwealth: fostering the availability of housing to low- and moderate-income homebuyers. Indeed, the Trustees carp that because Unit 14 must remain "affordable in perpetuity," they are prevented from selling it at market value (which they represent to be about $350,000.00) and thus recouping the bulk of the judgment they secured here. Even more pointedly, the Trustees seem to argue, inconsistently, that the affordability provision in Bergquist's Deed Rider does constitute "a lien and/or encumbrance" on the unit while the affordability condition in the Comprehensive Permit does not.

*4 Again, we are provided no authority supporting the notion that such conditions do not properly fall under the statutory rubric of "liens or encumbrances." If the Legislature had wished to limit the scope of that phrase in either the comprehensive permit act or in the even more expansive and detailed condominium statute so as to exclude such situations as this, it could have done so. "We will not add words to a specific statute that the Legislature did not put there, either by inadvertent omission or by design." *Herman v. Admit One,* 2008 Mass.App. Div. 125, 127, quoting *Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't,* 448 Mass. 57, 64, 858 N.E.2d 727 (2006). See also *Bulger v. Contributory Retirement Appeal Bd.,* 447 Mass. 651, 661, 856 N.E.2d 799 (2006), quoting *Commissioner of Revenue v. Cargill, Inc.,* 429 Mass. 79, 82, 706 N.E.2d 625 (1999) ("Where, as here, the language of the statute is clear, it is the function of the judiciary to apply it, not amend it."). To assume that the term "encumbrance" would not encompass the liability, the conditions, here that lessen the value of the unit-but that also advance a key public policy of the Commonwealth established by the Legislature in G.L. c. 40B-would be to constrict the term the Legislature chose to use. *Alves's Case,* 451 Mass. 171, 176, 884 N.E.2d 468 (2008), quoting *Walsh v. Bertolino Beef Co.,* 16 Mass. Workers' Comp. Rep. 151, 154 (2002) ("Where there is such a plain and rational meaning to be applied, we are obliged to apply it, rather than set off on an interpretative quest.... '[A] basic tenet of statutory construction is to give the words their plain meaning in light of the aim of the Legislature, and when the statute appears not to provide for an eventuality, there is no justification for judicial legislation' " [citation omitted]). In short, the available authority construing the definition of "encumbrance" does not convince us that the trial judge was wrong in concluding that the Comprehensive Permit trumped the Trustees' lien.

The core of the Trustees' argument as to the Regulatory Agreement, which sets out certain conditions governing the sale of the affordable units, seems to be that it did not explicitly subordinate the interests of the Trust to any lien or encumbrance, and did not convey anything to the town of Dennis or any charitable organization. We are not persuaded that the trial judge erred in his findings as to the Regulatory Agreement for the reasons set out above as to the Comprehensive Permit, especially in light of our recognition of the policy of the Commonwealth in providing affordable housing opportunities to its citizens.

[2] 2. *Attorney's Fees.* In his cross appeal, Bergquist, relying broadly on *Linthicum v. Archambault,* 379 Mass. 381, 398 N.E.2d 482 (1979),[8] attacks the amount of attorney's fees awarded the Trustees as "grossly excessive."[9] He highlights both his own efforts to resolve the dispute and, especially, the fact that that fee award came to more than 15 times the jury's damage award, and thus did not comport with the results the Trustees had obtained. The Trustees' position is that they are entitled to the recovery of all their incurred attorney's fees without judicial analysis of whether the claimed fees are reasonable.

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*5 At the outset, we reject the notion that a reasonableness standard does not, or should not, apply to the attorney's fee determination in this action. See G.L. c. 183A, § 6 (referring to "reasonable attorneys' fees"). The Appeals Court recently observed in an unpublished decision, without analysis, that a trial judge had properly rebuffed the same suggestion from a condominium board: that "it was entitled to recover all attorney's fees related to the collection effort, without a determination as to whether such fees were reasonable." *Board of Trustees of 447 Marlborough St. Condominium Trust v. Corben,* No. 08-P-216, at 2 n. 2 (Mass.App.Ct. Feb.2, 2009) (unpublished 1:28 decision). Cf. *Robbins v. Krock,* 73 Mass.App.Ct. 134, 140, 896 N.E.2d 633 (2008) (provision in promissory note providing for debtor's liability for "any" attorney's fees means liability for "all" attorney's fees incurred). The attorney's fee provision here lacks the qualifier "reasonable" and any such qualifier as "any" or "all." We choose to infer, in the context of this condominium case, in which the attorney's fee provision appears on page 41 of a 64-page trust document, that a reasonableness standard should apply here, regardless of the absence of the term "reasonable" in the trust document. It might develop, of course, that the trial judge decides that all the fees proffered by the Trustees are reasonable and thus due.

[3] A trial judge enjoys broad discretion in awarding attorney's fees, and we will reverse such an award for abuse of discretion only if we find it clearly erroneous. E.g., *GreatAmerica Leasing Corp. v. Law Office of Donald H. Jackson, Jr., P.C.,* 2008 Mass.App. Div. 165, 168, citing, inter alia, *Cargill, Inc. v. Beaver Coal & Oil Co.,* 424 Mass. 356, 363, 676 N.E.2d 815 (1997). See also *WHTR Real Estate Ltd. Partnership v. Venture Distrib., Inc.,* 63 Mass.App.Ct. 229, 235, 825 N.E.2d 105 (2005). We do not substitute our judgment for that of the trial judge, to whose firsthand knowledge of the services performed before him we accord due deference. *GreatAmerica Leasing Corp., supra,* citing, inter alia, *Bollen v. Camp Kingsmont,* 2000 Mass.App. Div. 56, 57. We note, however, that "[t]he amount of a reasonable attorney's fee is a fact that should be supported by some statement of reasons illuminating the judge's fact-finding process." *Ross v. Continental Resources, Inc.,* 73 Mass.App.Ct. 497, 516, 899 N.E.2d 847 (2009).

Acknowledging that the fees charged by the Trustees' counsel in this action "seem quite high for the issues and amounts involved," the trial judge noted that that resulted partially because Bergquist, "trained in the law, [had] put the [Trustees] 'through hoops' in an effort to pressure them to cease their legitimate efforts to enforce the condominium rules and regulations." Indeed, the trial judge found that Bergquist had "deliberately and as a matter of strategy, put the [Trustees] through an unnecessarily extensive effort to pursue this claim." We cannot determine from those observations, which stand alone without discussion of, say, the factors involved in the familiar "lodestar" analysis, see, e.g ., *Killeen v. Westban Hotel Venture, LP.,* 69 Mass.App.Ct. 784, 790-796, 872 N.E.2d 731 (2007) and cases cited, whether the trial judge was punishing Bergquist for his perceived obduracy, or was simply alluding generally to the time and effort the Trustees had been compelled to expend in response to Bergquist's tactics. See, e.g., *GreatAmerica Leasing Corp., supra.*

*6 In any event, following the lead of *Killeen,* we are constrained to note that "when a fee request [or, as here, award] appears on its face dramatically disproportionate to the results the litigation produced, as it does here, the judge must focus with precision on the relationship between the time invested and the results achieved in order to insure that the 'time spent was [not] wholly disproportionate to the interests at stake.' " *Id.* at 796, 872 N.E.2d 731, quoting *Stratos v. Department of Pub. Welfare,* 387 Mass. 312, 323, 439 N.E.2d 778 (1982). Indeed, although we acknowledge that "neither the amount of the fee, standing alone, nor the relationship between the fee and damages awarded, by itself, is a basis for vacating the fee award," *id.,* we are unable in this case to discern whether "the judge's analysis of the [Trustees'] request for attorney's fees considered with insufficient precision the relationship between the fee requested and the results the litigation achieved, that is, whether the amount of time spent on the case was reasonable in light of those results." *Id.* at 795, 439 N.E.2d 778. We must return this aspect of the case to the trial judge for further orders consistent with this opinion.

[4] In regard to the trial judge's refusal to award the Trustees attorney's fees for their defense of Bergquist's MCAD/HUD discrimination claim, we find no error. The effect of the Trust clause upon which the Trustees rely, § 5.13,[10] is to indemnify the Trustees for defense costs in any claim whatsoever brought by a unit owner (or "tenant, occupant or other such person") for any

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behavior whatsoever on the part of the Trustees, including intentional conduct or misfeasance, whether the Trustees prevail in that claim or not. In other words, even if a plaintiff filed, say, a federal civil rights action against the Trustees on egregious facts, and prevailed at trial, that successful plaintiff (who might be awarded attorney's fees, see 42 U.S.C. § 1988(b)) would nevertheless have to reimburse the Trustees for all their defense costs. Such a result is anomalous.

The fact that Bergquist's particular claims here fell short-indeed, far short-of victory [11] cannot alter the potentially jarring and unfair effect of the clause the Trustees invoke. We are unpersuaded that the trial judge erred in not awarding the Trustees their defense costs on the agency discrimination claims.

[5] 3. *Interest.* The Trustees claim annual interest in the amount of 18% by the terms of § 5.5(C) of the Trust. That subsection addresses the collection of common expenses, and specifically provides that interest at that rate apply to the assessment of common expenses. Through the application of § 5.12 of the Declaration of Trust, "any charge, fine, attorney's fees or other financial obligation" of any unit owner constitutes a lien on the unit and is made "enforceable to the same manner and extent as for Common Expenses provided for in this Declaration [§ 5.5(C)] and [G.L. c. 183A, § 6]."

*7 The matter of awarding prejudgment interest is one of balancing equities, *Siegel v. Berkshire Life Ins. Co.,* 70 Mass.App.Ct. 318, 322, 873 N.E.2d 1202 (2007), citing *USM Corp. v. Marson Fastener Corp.,* 392 Mass. 334, 350, 467 N.E.2d 1271 (1984). The mandatory language of G.L. c. 183A compels us to find that the Trustees were entitled to their contractual rate of interest on the jury award, comprising common area fees and fines. G.L. c. 231, § 6C; *Berish v. Bornstein,* 437 Mass. 252, 274, 770 N.E.2d 961 (2002). Prejudgment interest is to be added to awards as of the date of breach or demand, which date is a question of fact for the jury, and neither the trial judge, nor this Division, may make that determination. *Berish, supra,* citing *Deerskin Trading Post, Inc. v. Spencer Press, Inc.,* 398 Mass. 118, 125, 495 N.E.2d 303 (1986). When the jury does not establish the date of breach or demand, as was the case here, interest is assessed from the date of commencement of the action. G.L. c. 231, § 6C. We thus order that interest of 18% be applied to the jury award damages from the date this action commenced, which was January 24, 2007.

[6] [7] The Trustees, though, claim that they are entitled to interest on all aspects of the award, including attorney's fees. If awarding prejudgment interest is an exercise in balancing equities, *Siegel, supra* at 322, 873 N.E.2d 1202, our sensitivity to that approach is heightened when considering interest on attorney's fees. A fair reading of the Trust demonstrates that it does provide for interest on an attorney's fee award. Given the propriety of assessing interest on attorney's fees in various contexts, see *id.,* citing *Patry v. Liberty Mobilehome Sales, Inc.,* 394 Mass. 270, 272-273, 475 N.E.2d 392 (1985), we do not find that such a contractual provision offends public policy. See, e.g., *McLaughlin v. Amirsaleh,* 65 Mass.App.Ct. 873, 880-881, 844 N.E.2d 1105 (2006) and cases cited. We do, however, adopt the view that "[p]rejudgment interest on attorney's fees is calculated based on the date on which the expenses were incurred." *Liquor Liability Joint Underwriting Ass'n of Mass. v. Hermitage Ins. Co.,* 419 Mass. 316, 324-325, 644 N.E.2d 964 (1995), citing *Liberty Mut. Ins. Co. v. Continental Cas. Co.,* 771 F.2d 579, 583-584 (1st Cir.1985). Cf. *University of Mass. Boston v. Massachusetts Comm'n Against Discrimination,* No. 07-P-1439, at 5 (Mass.App.Ct. Dec.26, 2008) (unpublished Rule 1:28 decision) (MCAD awards interest on attorney's fees and costs from date of filing of petition). We take "incurred" to mean "paid." *Liquor Liability Joint Underwriting Ass'n of Mass., supra* at 325, 644 N.E.2d 964. Thus, when the case is returned to the trial judge, he will determine what attorney's fees are due the Trustees, affording the Trustees the opportunity of offering evidence, presumably by affidavit, as to when those fees were paid so that interest on them can be assessed.

The trial court's decision on the issue of the lien priorities is affirmed. The case is returned to the Orleans Division of the District Court Department for the trial judge's further consideration of the attorney's fee award and for the assessment of interest in accordance with this opinion.

*8 So ordered.

All Citations

Not Reported in N.E.2d, 2009 Mass.App.Div. 132, 2009 WL 1900424

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Footnotes

1 Mary Colantino, Paul Butler, Scott Owens, Judy Herrmann, and Barbara Couch, in their capacities as The Trustees of the Sea Grass Condominium Trust.

2 Cape Cod Five Cent Savings Bank, Barnstable County, Dennis Housing Authority, and Town of Dennis.

3 Justice Brian R. Merrick recused himself from any consideration of this appeal, and took no part in this opinion.

4 Bergquist's discrimination claim was based on his status as the "single dad" of minor children and as the buyer of an affordable home under G.L. c. 40B.

5 General Laws c. 183A, § 6(a)(ii) empowers the Trustees to "assess any fees, attorneys' fees, charges, late charges, fines, costs of collection and enforcement, court costs, and interest charged pursuant to this chapter against the unit owner and such assessment shall constitute a lien against the unit from the time assessment is due, and shall be enforceable as common expense assessments under this chapter." Pursuant to § 6(c):

> "Such lien is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the master deed, (ii) a first mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other municipal assessments or charges against the unit."

6 The developer was DeWitt Davenport, Trustee of 729 Route 134 Realty Trust and affiliates of "The Davenport Companies," and the bank was Cape Cod Bank & Trust.

7 The Trustees' narrow characterization of the Comprehensive Permit is misleading. The Comprehensive Permit allowed the developer to build the project in exchange for a mandate that four condominium units, including the one that became Bergquist's, remain affordable in perpetuity to low- or moderate-income homebuyers, in furtherance of the policy of the Commonwealth of ensuring such housing, as embodied in G.L. c. 40B. Chapter 40B is sometimes referred to as the "anti-snob zoning act." *Wrentham v. Housing Appeals Coram.*, 69 Mass.App.Ct. 449, 452, 868 N.E.2d 1229 (2007), quoting *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 814, 767 N.E.2d 584 (2002). "The primary purpose of the [comprehensive permit] act is 'to provide relief from exclusionary zoning practices which prevent[ ] the construction of badly needed low and moderate income housing.' (Citations omitted.) The act allows a 'limited dividend organization interested in constructing low or moderate income housing to circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, to apply to the local board of appeals for issuance of a single comprehensive permit.' (Citation omitted.) 'In addition to streamlining the permitting process itself, the clear intent of the Legislature was to promote affordable housing by minimizing lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods' " (citation omitted). *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 582-583, 887 N.E.2d 1051 (2008). See also *Hingham v. Department of Hous. & Community Dev.*, 451 Mass. 501, 502-503, 887 N.E.2d 231 (2008).

8 "While the amount of a reasonable attorney's fee is largely discretionary, a judge 'should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.' [*Linthicum, supra* at 388-389, 398 N.E.2d 482.] 'No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required.' *Berman v. Linnane*, 434 Mass. 301, 303, 748 N.E.2d 466 (2001)." *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 429-430, 837 N.E.2d 1121 (2005).

9 Bergquist does not argue that the Trustees are not entitled to any attorney's fees at all, the contractual provision of which is enforceable, even in contracts of adhesion. See, e.g., *David R. Rykbost Corp. v. O'Connor*, 2004 Mass.App. Div. 75, 76. Section 5 .13 of the Trust provides in pertinent part:

> "In such case as it is necessary for the Trustee(s) to engage the services of an attorney, or attorneys, for the purpose of enforcing against a Unit Owner ... any provision of the Master Deed, the Declaration of Trust, the Rules and Regulations, or obligations there under [sic], and/or for the purpose of defending any action brought by such person(s), said Unit Owner ... shall be liable for, in addition to any other liability, the fees and costs of such attorneys in so proceeding thereto...."

10 See note 9, *supra*.

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11 Bergquist filed his MCAD/HUD claim the day after the Trustees filed their action against him in the Orleans District Court (on January 24, 2007), and then recast those claims as a counterclaim against the Trustees when he filed his answer on February 14, 2007. As noted above, the MCAD/HUD claim was soon thereafter dismissed in April, 2007.

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Disagreed With by Saunders v. Taylor, Cal.App. 4 Dist., February 28, 1996

114 Cal.App.3d 783
Court of Appeal, First District, Division 2, California.

RAVEN'S COVE TOWNHOMES, INC. et al., Plaintiff and Appellant,
v.
KNUPPE DEVELOPMENT COMPANY, INC. et al., Defendants and Respondents.

Civ. 45398.
|
Jan. 20, 1981.
|
Rehearing Denied Feb. 19, 1981.
|
Hearing Denied April 16, 1981.

Condominium owners' association brought action on defects in common area landscaping, defects in exterior walls of individual units, and for breach of fiduciary duty against developer and initial directors of association. The Superior Court, Alameda County, William J. Hayes, J., entered judgment of nonsuit, and association appealed. The Court of Appeal, Taylor, P. J., held that: (1) association had standing to sue on its own behalf for damage to common areas and on behalf of all owners for damage to individual units; (2) expert testimony was not necessary for jury to be able to determine whether there were defects; (3) developers and their employees as former directors in control of the association breached their fiduciary duty and were individually liable to the association for said breach; (4) proper measure of damages was cost of remedying the defects, together with value of lost use, if any, during period of injury; and (5) nominal attorney fees on appeal were recoverable by association.

Reversed and remanded.

West Headnotes (10)

[1] Common Interest Communities
⇐ Association and members of its board

Owners' association had standing to sue for damages for landscaping defects in commonly owned areas of condominium project. West's Ann.Code Civ.Proc. § 374.

3 Cases that cite this headnote

[2] Common Interest Communities
⇐ Association and members of its board

Owners' association did not have standing to sue for damages to individual condominium units, which units were not commonly owned. West's Ann.Code Civ.Proc. § 374.

5 Cases that cite this headnote

[3] Parties
⇐ Factors, grounds, objections, and considerations in general

Parties
⇐ Community of interest;commonality

Two requirements that must be satisfied for a representative action are an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented.

3 Cases that cite this headnote

[4] Parties
⇐ Landowners;tenants;condominium interests

Owners' association had standing to sue in a representative capacity on behalf of individual condominium unit owners for damage to exterior of individual units, which were individually owned. West's Ann.Code Civ.Proc. § 382.

12 Cases that cite this headnote

[5] Appeal and Error
⇐ Dismissal or nonsuit

Where trial court has granted motion for nonsuit, reviewing court must confine its consideration to the grounds specified below for nonsuit, notwithstanding the existence of

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other good grounds, in order to allow plaintiff opportunity to correct defects.

1 Cases that cite this headnote

[6] Common Interest Communities
⇐ Evidence

In action on defects in common area landscaping and defects in exterior walls of individual condominium units against developer and developer's employees, no expert testimony was necessary for jury to be able to determine whether there were defects in the real property, as they were of a nature that could be ascertained by lay jury without aid of experts.

6 Cases that cite this headnote

[7] Common Interest Communities
⇐ Sponsor, developer, declarant and successors

Failure of initial owners' association directors to exercise supervision which permitted mismanagement or nonmanagement was independent ground for breach of fiduciary duty by the developer during initial period of the association, when developer and its employees controlled the association.

12 Cases that cite this headnote

[8] Common Interest Communities
⇐ Sponsor, developer, declarant and successors

Where owners' association's original directors, comprised of owners of developer and the developer's employees, failed to exercise their supervisory and managerial responsibilities to assess each condominium unit for an adequate reserve fund, and acted with a conflict of interest, they abdicated their obligation as initial directors of the association to establish such a fund for the purposes of maintenance and repair, and were individually liable to association for breach of basic fiduciary duties of acting in good faith and exercising basic duties of good management.

23 Cases that cite this headnote

[9] Damages
⇐ Defects in performance

Proper measure of damages in action by owners' association against condominium developer for defects was cost of remedying the defects in the landscaping and repairing of individual condominium units, together with value of the lost use, if any, during period of injury. West's Ann.Civ.Code, § 3333.

14 Cases that cite this headnote

[10] Common Interest Communities
⇐ Costs and attorney fees

Nominal attorney fees on appeal were recoverable where they were authorized by contract of the parties in cause for action pertaining to breach of fiduciary duties by initial directors of condominium owners' association.

3 Cases that cite this headnote

Attorneys and Law Firms

*787 **335 James E. Cooke, Julia P. Wald, Cooke & Mack, San Francisco, for plaintiff and appellant.

Watson & Joiner, Joseph D. Joiner, Sedgwick, Detert, Moran & Arnold, Mark W. Hudson, San Francisco, for defendants and respondents.

Opinion

TAYLOR, Presiding Justice.

This is an appeal by Raven's Cove Townhomes, Inc., a homeowners' association (Association), from a judgment of nonsuit in its action against Knuppe Development Company, Inc., the project developer (Developer) for strict liability and breach of warranty as to defects in common area landscaping, as well as in the exterior walls of individual units, and against the Developer and the Developer's employees as former directors in control of the Association, for breach of fiduciary duty

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by failing to properly determine operating costs and fund a maintenance reserve account. The major questions presented are: 1) the Association's standing to sue as representing a common interest subdivision (as defined by Bus. & Prof. Code, s 11000.1) pursuant to Code of Civil Procedure section 374, or in a representative capacity, pursuant to Code of Civil Procedure section 382; 2) the strict liability of the Developer and appropriate measure of damages pursuant to Kriegler v. Eichler Homes, Inc., 269 Cal.App.2d 224, 74 Cal.Rptr. 749; 3) the fiduciary liability of the Developer and its employees as former directors in control of the Association; and 4) attorney fees. For the reasons set forth below, we have concluded that the judgment must be reversed.

Viewing the record in favor of the Association, as we must on appeal from the nonsuit pursuant to Code of Civil Procedure section 581c (cf. Smith v. Roach, 53 Cal.App.3d 893, 897-898, 126 Cal.Rptr. 29), the following pertinent facts appear.

**336 The Association is a nonprofit corporation whose members are the owners of 65 townhomes in the Raven's Cove development in Alameda, California. In November 1972, defendants, James and Barbara *788 Knuppe, the sole owners of the Knuppe Development Company, [1] conveyed the common areas and facilities in fee simple to the Association. The Developer had been in the residential home building business for over 18 years. and had built about 3,000 units, including several townhome developments, before Raven's Cove. The Developer acquired the undeveloped Raven's Cove site in April 1972. The site had been the place of fill activity for many years. The Developer added more fill in the fall of 1972. The overlying compoted fill is not generally characteristic of the native sandy soil.

The Association was incorporated by the Developer in 1972. In August 1973, the Developer recorded its grant deed of the common areas to the Association. By October 1973, construction had been substantially completed and sales commenced. Until May of 1974, when it was turned over to the homeowners, the Association was under the control of the Knuppes, who could not recall any functions that they performed, other than the signing of the Association's bylaws as officers.

The Association holds title to the common areas, including nearly two acres of lawns and shrubbery and landscaped areas. The Association also is responsible for maintenance and repair of the roofs and siding of the individual units, the common areas, and has the responsibility of assessing and collecting dues from the homeowners to establish: 1) an operating fund to pay current costs of upkeep, payment of water bills, and the cost of landscape maintenance personnel; 2) a replacement reserve fund for major costs, such as painting exterior surfaces of the individual units, replacement of roofs and major private street repairs. Replacement reserves have to be accumulated because the Association: 1) cannot assess its members a sufficient amount in a short period of time to pay for the work and materials required for major repairs and improvements; 2) cannot borrow funds for this purpose as the result of the nature of its assets. No reserve or operating funds were ever established or turned over to the Association.

There were serious defects in the landscaping and siding of Raven's Cove in 1974. As to the landscaping, expert testimony established that the problems with the soil, drainage and irrigation systems of the common areas which resulted in yellow lawns, dead olive trees and *789 unhealthy plants, were the result of the Developer's failure to properly prepare the soil. The soil conditions were not appropriate for the desired landscaping; the soil contained a lot of clay, base rock and in most areas was not more than three or four inches deep before hitting hardpan or base rock. In some areas, there was no soil. The Associations' expert, a landscape architect, testified that the soil type was not proper for the growth of plant materials, as the roots of plants could not penetrate the soil. In addition, the progressive land fill resulted in problems of compaction. The differences in soil textures created layering and improper subsurface drainage for the plants. He opined that although 12 inches was the reasonably satisfactory depth for lawn planting material, the problem could be solved by removing the present shallow top soil layer over the hardpan and replacing it with an 8 inch depth of planting material.

Further, the drainage and irrigation system installed at Raven's Cove varied from the plants and specifications of the Developer's landscape architect. The wrong sprinkler heads were installed so that there was inadequate watering in some areas and too much irrigation in others. In a number of areas, the sprinklers watered the buildings, sidewalks and streets. The irrigation system delivered the same quantity of water to shady, sunny and windswept

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areas, **337 and to all kinds of plants without adjustment for the differing requirements of trees, lawns and shrubbery. The Association's experts estimated that the costs of correcting the landscaping defects would range from about $219,000 to $240,000; this estimate included redesigning the irrigation system, replacing the olive trees and correcting the lawns.

As to the siding, a painting contractor reaffirmed the testimony of homeowners and property managers as to the conditions of the siding and trim of the individual units. The unpainted siding was decomposing from water and rusting, blacking and mildew, which in some areas was caused or exacerbated by improper sprinkler placement. Apart from mildew, an unpainted wood surface will eventually break down. The use of ungalvanized nails in the trim caused deterioration in the paint and premature chalking in 1974, shortly after the turnover of the Association, as well as seeping rust from the nails. Galvanized nails are customarily used on all exterior surfaces in well constructed projects. He estimated that it would cost between $8,000 and $9,000 to paint the siding, and $17,640 (at $256 for each of the 65 units) to repaint the trim on the individual units.

*790 The instant action was commenced by the Association in 1976. The amended complaint alleged eight causes of action for declaratory relief, strict liability and for breach of warranty as to the landscaping of the common areas and the defects in the individual units, and breach of fiduciary duties by the initial Association directors for failing to establish an adequate reserve fund.

In granting the Developer's motion for nonsuit, the trial court specified three grounds: as to the causes of action involving the individual units on the ground that the Association lacked standing; involving the common areas on the ground that there had been no proof of out-of-pocket loss; and against the individual directors on grounds of no breach of fiduciary or other duties.

[1] The first major contention on appeal pertains to the standing of the Association to sue for the landscaping defects in the common areas and the defects in the exteriors of the individual units. As a general rule, a homeowners' association has no standing to sue unless it has an ownership interest in the property by the association or an express statutory grant to bring the suit (Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co., 31 Cal.App.3d 220, 107 Cal.Rptr. 123). The Developer erroneously asserts that Friendly Village states the law applicable here. The Developer's argument overlooks the significant distinguishing factor between Raven's Cove and the condominium type of development involved in Friendly Village, namely, here the Association owns the common areas. Thus, there can be no question that here, at least as to the common areas, the Association has standing pursuant to Code of Civil Procedure section 374, [2] which was enacted in 1976 in response to Friendly Village to provide that owners' associations in projects of condominiums, community apartments and undivided interest subdivisions have standing to sue for damages to commonly owned areas.

*791 The Association maintains that Raven's Cove is an undivided interest subdivision project, as defined by Business and Professions Code section 11000.1, set forth, so far **338 as pertinent, below. [3] Business and Professions Code section 11000.1 adds to the definition of "subdivided lands" and "subdivision," for purposes of regulation of offers or sales of such subdivision, the creation of five or more undivided interests in improved or unimproved land. As indicated above, at Raven's Cove, the interests are specifically divided between the Association, which is the sole owner of the common area [4] and facilities, and its homeowner members, who are the sole owners of their individual residential units. Thus, there are no undivided interests to bring the Association within the purview of Code of Civil Procedure section 374, as originally enacted.

The Association, however, argues that it is a planned development, as defined by Business and Professions Code section 11003, set forth below, [5] and purports to rely on the 1979 amendment to Code of Civil Procedure section 374 by which the Legislature specifically gave standing *792 to associations of planned developments. [6] The 1979 amendment, while not applicable here, is but one factor in determining the meaning of the 1974 version (Eu v. Chacon, 16 Cal.3d 465, 470, 128 Cal.Rptr. 1, 546 P.2d 289; Steilberg v. Lackner, 69 Cal.App.3d 780, 787, 138 Cal.Rptr. 378). In any event, the subsequent amendment further undermines the viability of Friendly Village, supra, 31 Cal.App.3d 220, 107 Cal.Rptr. 123, on which the Developer relies.

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The Association argues that subsequent statutory changes have been held to provide a sufficient reason for departing from precedent, particularly where, as here, public policy considerations are involved (People v. Valentine, 28 Cal.2d 121, 144, 169 P.2d 1; Hunt v. Authier, 28 Cal.2d 288, 295, 169 P.2d 913; cf. Henrioulle v. Marin Ventures, Inc., 20 Cal.3d 512, 520-521, 143 Cal.Rptr. 247, 573 P.2d 465). The rationale for allowing homeowners' associations to bring suit is that "if the association does not have standing, the costs of prosecution of the **339 case would not be a common expense, thus greatly increasing the difficulty of individual owners seeking redress against a corporate defendant (see Hyatt and Rhoads, "Concepts of Liability in the Development and Administration of Condominium and Homeowners' Associations, " 12 Wake Forest L.Rev. 915, 975). Here, as indicated above, the Association has the obligation to maintain and repair the common areas and the exteriors of the individual units specifically referred to in the 1979 amendment.

[2] As the Association urges, the 1979 amendment reflects a legislative tendency to enlarge rather than restrict the groups of persons and the causes of action available (cf. Hunt v. Authier, supra, 28 Cal.2d, at p. 291, 169 P.2d 913). We do not think, however, that the public policy considerations here are as compelling as those present in Henrioulle, supra, 20 Cal.3d 512, 143 Cal.Rptr. 247, 573 P.2d 465. Further, the very specific language of the 1979 amendment pertaining to planned development associations and their causes of action for damages to common areas as well as to individually owned lots, [7] and *793 the relative newness of the kind of real property interests involved, present us from reasonably construing the 1979 amendment as one that merely clarifies existing law rather than changing it. We hold, therefore, that the trial court properly concluded that the Association did not have standing as to the cause of action for damage to the individual units pursuant to Code of Civil Procedure section 374 prior to the 1979 amendment.

The next question is whether the Association has standing to sue in a representative capacity pursuant to Code of Civil Procedure section 382, which provides, so far as pertinent: "... when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all." (Emphasis added.)

The Developer grudgingly concedes that the Association has the proper capacity to sue and would be a proper class representative, but argues that it has not satisfied the requirements for standing to maintain a class action. [8] We do not consider apposite the Developer's authorities related to class actions. However, we need not deal with the question of whether the Association's cause of action for the defects in the individual units qualifies as a class action. Pursuant to Code of Civil Procedure section 382 the Association has the requisite standing in a representative capacity. The leading authority is Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal.App.3d 117, 109 Cal.Rptr. 724. In Beverly Glen, a nonprofit corporation composed of families residing in an area that would be adversely affected by a proposed development, was held to have standing to sue in a representative capacity; there, as in the instant case, there were no express allegations that the nonprofit corporation was duly authorized to sue or that it brought the action in its representative capacity. The court reviewed the applicable precedents, at pages 120-126, 109 Cal.Rptr. 724, and noted, at page 122, 109 Cal.Rptr. 724, that there had been a "marked accommodation of formerly strict procedural requirements of standing to sue ... where matters relating to the 'social and economic realities of the present-day organization of society' *794 ... are concerned." **340 Emphasis added.) This observation is particularly apt here since one of the present-day social and economic realities is that today the typical homeowner in California owns a real property interest in a planned development, condominium, cooperative, or other similar interest, rather than the detached single family home of the post-World War II years. [9]

The same is true in other states which have experienced a "phenomenal growth" in condominium-type housing (see P. East Mortgage Corp. v. P East One Cond. Corp. (Fla.1973) 282 So.2d 628, 73 A.L.R.3d 603, at p. 611). As we indicated in Kriegler v. Eichler, supra, 269 Cal.App.2d 224, 227, 74 Cal.Rptr. 749: "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times."

The court in Beverly Glen, supra, 34 Cal.App.3d 117, stated at page 129, 109 Cal.Rptr. 724: "Whether or not a representative plaintiff does and can in fact adequately represent others is a question of fact for the trial court. And if the trial court decides that a named plaintiff

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cannot suitably represent the class, it should afford an opportunity for amendment (La Sala v. American Sav. & Loan Assn., 5 Cal.3d 864, 872 (97 Cal.Rptr. 849, 489 P.2d 1113)...). It may also be true that while all class suits are representative in nature, all representative suits are not necessarily class actions. (Compare the type of class action exemplified by La Sala v. American Sav. & Loan Assn., supra, and by Vasquez v. Superior Court, 4 Cal.3d 800 (94 Cal.Rptr. 796, 484 P.2d 964) ..., with those set forth in Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276 (32 Cal.Rptr. 830, 384 P.2d 158); Diaz v. Quitoriano, supra, 268 Cal.App.2d 807 (74 Cal.Rptr. 358), and Santa Clara County Contractors etc. Assn. v. City of Santa Clara, supra, 232 Cal.App.2d 564 (43 Cal.Rptr. 86). See also Los Angeles Superior Court Class Action Manual, s 404.)" (Emphasis added.)

Arguably, Beverly Glen is limited to the "environmental concerns" there in issue. Even if so, the interests of the Association and its members *795 here affected by the conduct of the Developer are "environmental," although in a sense somewhat narrower than its customary use. Furthermore, a subsequent opinion of the same appellate district that decided Beverly Glen indicates that the case is not to be narrowly confined to its own set of facts and circumstances. In Salton City etc. Owners Assn. v. M. Penn Phillips Co., 75 Cal.App.3d 184, 141 Cal.Rptr. 895, the court discussed Beverly Glen and held at pages 188-189, 141 Cal.Rptr. 895, that an association of persons who had entered into land sale contracts with the defendants had standing not only in a representative capacity but also was in essential nature a proper (although somewhat unorthodoxly defined) class action. The court reiterated at page 187, 141 Cal.Rptr. 895 that a plaintiff's standing to sue as a representative should be considered in the light "of the particular plaintiff's ability to fairly protect the rights of the group he purports to represent." The court also reiterated the distinction between class and representative actions, and continued at page 191, 141 Cal.Rptr. 895: "In either instance, however, justification for the procedural device whereby one may sue for the benefit of many rests on considerations of necessity, convenience and justice." (Emphasis added.) We note that our Supreme Court subsequently denied a hearing in Salton City.

[3] [4] The two requirements that must be satisfied for a representative action are an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented (**341 Daar v. Yellow Cab Co., 67 Cal.2d 695, 704, 63 Cal.Rptr. 724, 433 P.2d 732; Salton City, supra, 75 Cal.App.3d 184, 141 Cal.Rptr. 895). The Association was formed for the purpose of providing "maintenance, preservation and architectural control of the residence Lots and Common Area ... and to promote the health, safety and welfare of the residents...." The Association has filed this action on behalf of its homeowner members who all have a beneficial interest in the result of this case. We think that here, as in Salton City, supra, considerations of necessity, convenience and justice under the circumstances provide ample justification for the use of the representative procedural device.

Even assuming that pursuant to Salton City, the cause of action here in issue qualifies as a class action, we note that the court in Salton City, at page 191, 141 Cal.Rptr. 895, disposed of the notice requirement urged by the Developer and remanded the case to the lower court to determine whether the property owners' association could fairly and adequately represent its members. We also note that in Deal v. 999 Lakeshore Ass'n (Nev.1978) 579 P.2d 775, the court found a sufficient community of interest *796 for a class action among the owners of condominium units who sued the developer for damages for roof leakage, improper drainage and inadequate exterior staining. The Nevada court noted at page 778 that while not every owner had a leaky roof, leaks occurred in every one of the 10 buildings and all units were assessed for repairs to the common roof area.

We conclude that the Association has standing to sue in a representative capacity for the damage to the individual units pursuant to Code of Civil Procedure section 382.

In view of the above conclusion, we need not discuss in greater detail the Developer's contentions concerning the alleged difficulties of ascertainment of the class. We merely note that present and former owners of recorded real property interests, like those held by the Association's members here, present a far more easily and readily ascertainable class than random users of taxicabs (Daar v. Yellow Cab Co., supra, 67 Cal.2d 695, 704, 63 Cal.Rptr. 724, 433 P.2d 732).

[5] Next, we turn briefly to the Developer's contention that the Association failed properly to prove by expert testimony that the Developer had not met the industry

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standard as to the quality of landscaping in the common areas and exterior surfaces. This contention is not properly before us, as it was not among the grounds for the nonsuit stated by the court below. If the court grants the motion (for nonsuit), the appealing plaintiff should be able to insist that the reviewing court confine its consideration to the grounds specified below notwithstanding the existence of other good grounds; otherwise, he is deprived of the opportunity to correct defects" (4 Witkin, Cal. Procedure (2d ed.) Trial, s 362, p. 3159; Lawless v. Calaway, 24 Cal.2d 81, 94, 147 P.2d 604).

[6] In any event, the Developer has misconceived and misstated the law. Here, no testimony was necessary for the jury to be able to determine whether there were defects in the real property that Developer created at Raven's Cove. The defects were of a nature that could be ascertained by a lay jury without the aid of experts.

In Cronin v. J. B. E. Olson Corp., 8 Cal.3d 121, 104 Cal.Rptr. 433, 501 P.2d 1153, a strict liability case, our Supreme Court specifically denied the need to define "defectiveness" for the trier of fact by introduction of evidence of some standard set by knowledgeable individuals *797 for the manufacture and use of a particular part under scrutiny, or to have such an expert testify to something more than "his own unilateral standard" (pp. 125-126, 104 Cal.Rptr. 433, 501 P.2d 1153).

The record indicates that here, following Cronin, the Association adduced testimony by lay and expert witnesses which was sufficient to show that the irrigation system, the landscaping, and the paint and exterior trim failed to fulfill their respective purposes. Miller v. Los Angeles County Flood Control Dist., 8 Cal.3d 689, 106 Cal.Rptr. 1, 505 P.2d 193, cited by the Developer, is **342 readily distinguishable from the instant facts. In Miller, the court held at page 701, 106 Cal.Rptr. 1, 505 P.2d 193 that plaintiff must introduce expert testimony to establish the "practices of builders in the area in order to establish the proper standard of care" applicable to a defendant-builder. The court reasoned that the average layman ordinarily cannot determine defectiveness where it involves not only "the erection of the structure itself but also ... the location of the house on a particular lot, the elevation of the lot, the influence of the surrounding terrain, the possibility of run-offs and floods, and the existence of the debris dam" (p. 703, 106 Cal.Rptr. 1, 505 P.2d 193). Thus, the issues to be determined by the jury in Miller were sufficiently complex to warrant expert testimony. Further, Miller stated at page 702, 106 Cal.Rptr. 1, 505 P.2d 193 that the test for whether experts are required are as follows: " 'the decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' "

Applying this test to the instant facts summarized above, it is clear that the defects complained of by the Association were of a kind which are of such common knowledge that men of ordinary education could easily recognize them.

We turn next to the Association's second cause of action for breach of fiduciary duty as a result of the failure of the Association's initial board of directors to fund an adequate reserve account for contingencies.

The record indicates that the Developer paid the ordinary costs of maintenance until the Association was turned over to the homeowners after the last unit was sold in May of 1974. The uncontroverted evidence established that the Developer and its employees (who were the *798 incorporating directors and initial officers) totally controlled the Association until May 1974. It is uncontroverted that until the turnover, all directors [10] of the Association were either the owners or employees of the Developer. As a result of its prior experience, the Developer had learned that it was unwise to turn an Association over to "inexperienced homebuyers" and "expect them to run a business." Accordingly, the Developer recommended a professional manager who was employed on the night that the homeowners first were elected to the board of the Association. Six months later, the homeowners' board independently selected and employed a new manager. The new manager had to sue to obtain the Association's financial records from the former manager.

As indicated above, in 1974, no reserve or operating funds had been created; thus, none were turned over to the Association. As a result, the homeowners had to vote a dues increase for operating costs only. Thus, no funds were available to be set aside for reserves, although in one instance $35 had been set aside in escrow for this

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purpose. Generally, maintenance reserves are set aside for the purpose of roof replacement, painting and long-term maintenance, and the reserve fund is ordinarily commenced with the conveyance of the common area. At Raven's Cove, the conveyance of the common area occurred in 1973 simultaneously with the sale of the first unit.

The Developer here knew that the bay front exposure of Raven's Cove created particular maintenance problems as to the paint and exterior trim which were the result of severe wind and salt spray exposure of the site. A replacement reserve is a portion of the overall operating budget; in preparing it, the components of the operating budget are used to consider "all those things that will wear out, fall apart, need to be replaced or repaired substantially." Each purchaser at Raven's Cove received **343 copies of the Association's articles and the 1972 estimated operating budget, which set forth a contingency fund comprised of $28-$30 per unit per month. The Association's expert testified that $10 per unit would have been a more reasonable initial replacement reserve budget; by the time of trial, the assessment should have been $15 a month per unit.

The record indicates that pursuant to the declaration of covenants, conditions and restrictions signed by the Developer and each homeowner *799 at the time of purchase, monthly assessments were to start with the conveyance of the common areas to the Association. Necessarily, at the time of purchase, Raven's Cove homeowners bought as yet uncompleted landscaped units. We note that the problems that developed at Raven's Cove have been pervasive as to the common areas of townhouse developments (12 Wake Forest L.Rev., supra, p. 957).

The parties have not cited, and our research has not disclosed, any specific authority in this state. Nevertheless, it is well settled that directors of nonprofit corporations are fiduciaries. The statutory provisions here applicable are former Corporations Code section 9002[11] which provided that the provisions of the general Corporations Law were applicable to nonprofit corporations. The pertinent provision was former general Corporations Code section 820, which required directors and officers to "exercise their powers in good faith, and with a view to the interests of the corporation."

Of particular significance is the conflict of interest presented where, as here, the owner of the Developer and his wife and major co-owner, are also directors of the Association in its infancy, along with the Developer's employees. We note that the duty of undivided loyalty (see Scott, The Fiduciary Principle, 37 Cal.L.Rev. 539) applies when the board of directors of the Association considers maintenance and repair contracts, the operating budget, creation of reserve and operating accounts, etc. Thus, a developer and his agents and employees who also serve as directors of an association, like the instant one, may not make decisions for the Association that benefit their own interests at the expense of the association and its members (cf. Northridge Coop. Sec. No. 1 v. 32nd Ave. C. Corp. (1957) 2 N.Y.2d 514, 161 N.Y.S.2d 404, 141 N.E.2d 802; Shore Terrace Cooperative, Inc. v. Roche, 25 A.D.2d 666, 268 N.Y.S.2d 278; Ireland v. Wynkoop (1975) 36 Colo.App. 205, 539 P.2d 1349, 1357). In most jurisdictions, the developer is a fiduciary acting on behalf of unknown persons who will purchase and become members of the association (Florida Condominiums Developer Abuses and Securities Law Implications, 25 U.Fla.L.Rev. 350, 355).

*800 We also find persuasive the following comment on the specific problem here presented. "(I)ndividuals on the board are held to a high standard of conduct, the breach of which may subject each or all of them to individual liability.... Where a developer or sponsor totally dominates the association, or where the methods of control by the membership are weak or nonexistent, 'closer judicial scrutiny may be felt appropriate,' and the principles of fiduciary duty established with business corporations 'may exist for holding those exercising actual control over the group's affairs to a duty not to use their power in such a way as to harm unnecessarily a substantial interest of a dominated faction.' " (12 Wake Forest L.Rev. 915, 923.) We are indebted for our approach to these problems to the thoughtful and insightful discussion of the specific issues in the Wake Forest Law Review cited above, which aptly continues at page 976: "The subject of fiscal responsibilities, e. g., 'lowballing' failure to pay assessments on unsold units, the failure to enforce the obligation to pay, is one of the areas of great developer exposure." The article also points to the necessity for **344 good management with adequate books, records and minutes (see also Self-Dealing by Developers of Condominium Project As Affecting Contracts or Leases With Condominium Association, 73 A.L.R.3d 613).

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We also find helpful the reasoning of Stern v. Lucy Webb Hayes Nat. Train. Sch. for Deacon. & M. (U.S.D.C., 1974) 381 F.Supp. 1003, at page 1014, in which the less stringent corporate rules were applied to the directors of a charitable corporation to require due diligence in the supervision of the actions of officers, employees and outside experts over whom they had responsibility under a standard of honesty, good faith and a reasonable amount of diligence and care.

[7] We think that here, the failure of the initial Association directors to exercise supervision which permits mismanagement or non-management is an independent ground for the breach of fiduciary duty by the Developer during the initial period of the Association, when the Developer and its employees controlled the Association.

[8] Here, the initial directors and officers of the Association had a fiduciary relationship to the homeowner members analogous to that of a corporate promoter to the shareholders. These duties take on a greater magnitude in view of the mandatory association membership required of the homeowner. We conclude that since the Association's original directors (comprised of the owners of the Developer and the Developer's employees) admittedly failed to exercise their supervisory and managerial *801 responsibilities to assess each unit for an adequate reserve fund and acted with a conflict of interest, they abdicated their obligation as initial directors of the Association to establish such a fund for the purposes of maintenance and repair. Thus, the individual initial directors are liable to the Association for breach of basic fiduciary duties of acting in good faith and exercising basic duties of good management.

As the Developer concedes that if the Association has standing and adduced sufficient evidence, the applicable theory is strict liability, as first delineated by our seminal decision in Kriegler v. Eichler Homes, supra, 269 Cal.App.2d, at pages 227-228, 74 Cal.Rptr. 749, we turn to the question of the appropriate measure of damages in this case. This question also appears to be one not previously faced by an appellate court in this state in a published opinion.

The record indicates that the trial court, believing that the only proper measure of damages was the "out of pocket" rule (Civ.Code, s 3343), refused an instruction allowing damages equal to the cost of repairs. The record also indicates that the court's ruling was based on its misapprehension that the Association had failed to prove fraud, which is the prerequisite for damages pursuant to Civil Code section 3343. [12]

Here, the applicable statute is Civil Code section 3333, set forth below, [13] which sets forth the measure of damages for actions in tort. In Avner v. Longridge Estates, 272 Cal.App.2d 607, 77 Cal.Rptr. 633, the developer of a lot was held strictly liable for damages suffered by the owner when the rear slope of the plaintiffs' lot failed as a result of uncompacted fill and inadequate drainage. The court, relying on Kriegler, supra, 269 Cal.App.2d 224, 74 Cal.Rptr. 749, indicated that the cost of repair pursuant to Civil Code section 3333 was the proper measure of damages. The purpose of tort damages is to make the injured plaintiff whole (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, s 842, p. 3137). *802 While as **345 Witkin also points out, the normal measure of damages for injuries to real property is the difference between the market value of the land before and after the injury, "(a)nother permissible measure is the reasonable cost of repair or restoration of the property to its original condition, together with the value of the lost use during the period of injury" (Witkin, supra, Torts, s 919, p. 3204). This is the correct and practical approach here. Contrary to the Developer's contention, nothing in Kriegler, supra, or Sabella v. Wisler, 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889, suggests that diminution in value is the only measure. We note that Sabella followed Stewart v. Cox, 55 Cal.2d 857, 13 Cal.Rptr. 521, 362 P.2d 345, in which a builder was held liable for damages measured by the cost of repairing the damage proximately caused by his negligence. Other commentators agree that regardless of the theory of liability relied upon by a plaintiff, if judgment is rendered against the contractor for construction defects, the proper measure of damages is the cost of repair to the plaintiff's property (Miller & Starr, Current Law of California Real Estate, s 9:20, p. 475; see also 8 Pac.L.J. 211 (1977).

The Developer's reliance on Overgaard v. Johnson, 68 Cal.App.3d 821, 137 Cal.Rptr. 412, to support the out-of-pocket rule is inapposite, since the reasoning of the case supports the Association's position. Overgaard was an action for negligence brought by the sellers of real property against a real estate salesman and broker for

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damages due to misrepresentation of the acreage involved in the sale. The court held, however, that Civil Code section 3333 provided the proper measure of damages and that plaintiffs were entitled to damages measured by the actual loss suffered (pp. 827-828, 137 Cal.Rptr. 412).

[9] We hold, therefore, that the proper measure of damages here is the cost of remedying the defects in the landscaping and repairing of the homeowners' individual properties, together with the value of the lost use (if any) during the period of injury. Accordingly, we need not discuss the parties' contentions concerning damages based on other theories of liability.

Finally, we turn briefly to the Association's contention that it is also entitled to its attorney fees on this appeal pursuant to the provisions of the Association's declaration of "Covenants, Conditions and Restrictions." The pertinent portions of the declarations stated: 1) all of their covenants ran with the property and were binding on all parties and successors (Preamble); and 2) that for each lot, the Developer covenanted *803 that there would be paid to the Association annual assessments and special assessments for capital improvements, and that if the Association had to take legal action to enforce its rights to assessments, these assessments, along with attorney fees, were to be a charge on the land, a continuing lien against the property and the personal obligation of "the person who was the Owner of such property at the time when the assessment fell due" (Art. IV, s 1, p. 6).

[10] Attorney fees on appeal are recoverable where, as here, they are authorized by the contract of the parties. The above mentioned provisions of the declarations clearly authorize attorney fees on appeal for the cause of action pertaining to the breach of fiduciary duties discussed above (6 Witkin, Cal.Proc. (2d ed. 1971) s 587, p. 4518). Here, the Association filed the breach of duty cause of action to enforce the provisions of the declarations (Heidt v. Miller Heating & Air Conditioning Co., 271 Cal.App.2d 135, 137-138, 74 Cal.Rptr. 695). Since we have jurisdiction to make the award, we note that the issue, while one of law and first impression, was not particularly well briefed or discussed extensively on appeal. Accordingly, we think the Association is entitled only to nominal attorney fees for raising the fiduciary duty issue on this appeal. On remand, the trial court is to determine the appropriate amount.

The judgment of nonsuit is reversed. The trial court is to determine the approximate amount of nominal attorney fees on appeal.

MILLER and SMITH, JJ., concur.

All Citations

114 Cal.App.3d 783, 171 Cal.Rptr. 334

Footnotes

1 The other named defendants, T. A. McKee and J. W. Howard, were employees of Knuppe. Defendant, United Pacific Insurance was the surety on the bonds for the completion of the common areas of Raven's Cove, and is no longer a party.

2 The statute, as originally enacted, became effective on August 27, 1976, and read as follows: "An owners' association established in a project consisting of condominiums, as defined in Section 783 of the Civil Code, or of a community apartment project, as defined in Section 11004 of the Business and Professions Code, or an undivided interest subdivision project, as defined in Section 11000.1 of the Business and Professions Code, shall have standing to sue as the real party in interest for any damages to the commonly owned lots, parcels, or areas occasioned by the acts or omissions of others, without joining with it the individual owners of such project" (Stats.1976, ch. 595, s 2; emphasis added).

Although the instant complaint was filed on May 6, 1976, before the above effective date, the parties here apparently concede that the statute is properly retroactively applicable to the instant case.

3 "(a) 'Subdivided lands' and 'subdivision,' as defined by Sections 11000, 11000.5, and 11004.5, also includes improved or unimproved land or lands, lot or lots, or parcel or parcels, of any size, in which, for the purpose of sale or lease or financing, whether immediate or future, five or more undivided interests are created or are proposed to be created. P (b) This section shall not apply to the creation or proposed creation of undivided interests in land if any one of the following conditions exist: P (1) The undivided interests are held or to be held by persons related one to the other by blood or marriage" (emphasis added).

4 The Association's ownership of the common areas distinguishes the instant form of "undivided" subdivision from: 1) a condominium-type in which owners own the individual unit in fee and also have an undivided interest as tenants in

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common in the facilities used by all of the owners (Civ.Code, ss 783, 1350); 2) a cooperative in which typically each member owns a share in a cooperative association which gives the member the right to occupy one of the units owned in common by the association (15A Am.Jur.2d, Condominiums and Co-operative Apartments, s 2).

5 "A 'planned development' is a real estate development, as defined in Section 11003.1 of this code, other than a community apartment project as defined in Section 11004 of this code, a project consisting of condominiums as defined in Section 783 of the Civil Code, or a stock cooperative, as defined in Section 11003.2 of this code, having either or both of the following features: P (a) Any contiguous or noncontiguous lots, parcels or areas owned in common by the owners of the separately owned lots, parcels or areas consist of areas or facilities the beneficial use and enjoyment of which is reserved to some or all of the owners of separately owned lots, parcels or areas. P (b) Any power exists to enforce any obligation in connection with membership in the owners' association as described in Section 11003.1 of this code, or any obligation pertaining to the beneficial use and enjoyment of any portion of, or any interest in, either the separately or commonly owned lots, parcels or areas by means of a levy or assessment which may become a lien upon the separately owned lots, parcels, or areas of defaulting owners or members, which said lien may be foreclosed in any manner provided by law for the foreclosure of mortgages or deeds of trust, with or without a power of sale." (Emphasis added.)

6 The 1979 amendment (Stats.1979, ch. 168, s 1) became effective on January 1, 1980, after the entry of the judgment in the instant case and, therefore, is not directly before us (People's Home Sav. Bank v. Sadler, 1 Cal.App. 189, 193, 81 P. 1029). We note that the very specific language of the 1979 amendment gives associations of planned developments standing to sue for damages to common areas, as well as individual units.

7 As amended in 1979, Code of Civil Procedure section 374, now reads: "An owners' association established in a project consisting of condominiums, as defined in Section 783 of the Civil Code, or of a community apartment project, as defined in Section 11004 of the Business and Professions Code, an undivided interest subdivision project, as defined in Section 11000.1 of the Business and Professions Code, or a planned development, as defined in Section 11003 of the Business and Professions Code, shall have standing to sue as the real party in interest for any damages to commonly owned lots, parcels, or areas or individually owned lots, parcels, or areas which the owners' association is obligated to maintain, preserve, or repair occasioned by the acts or omissions of others, without joining with it the individual owners of such project or development."

8 "Standing" refers to the requisite interest to support an action or the right to relief and is distinct from "capacity" (Friendly Village, supra, 31 Cal.App.3d, at p. 224, 107 Cal.Rptr. 123).

9 We also may take judicial notice of a letter dated November 22, 1978, from the Department of Real Estate (Department) providing figures from an official study indicating the rapid growth of this form of home ownership. The Department estimated as of that date that there were over 10,000 homeowner associations in existence in this state and they were being created at the approximate rate of 160 per month, producing a projection of at least 19,000 more of these associations in the next 10 years. (Evid.Code, ss 450, 453, 454.)

10 The owner of the Developer could not recall who had served as the president of the Association in this initial period. The record indicates that the owner and his wife were two of the five incorporating directors; she executed the bylaws as secretary for the Association.

11 Former Corporations Code section 9002 was repealed and superseded by Statutes of 1978, chapters 567 and 1305, which enacted a new Nonprofit Corporation Law beginning with section 5000, operative January 1, 1980. The pertinent provision of the new law is section 5231, which sets forth the good faith duties of directors in greater detail than the prior law.

12 For the same reason, Gagne v. Bertron, 43 Cal.2d 481, 275 P.2d 15, cited by the Developer, is inapposite. Gagne held that the out-of-pocket rule applies to determine damages to plaintiffs who had purchased lots in reliance on defendant's representation as to the amount of fill thereon. Here, of course, the Association does not rely primarily on a fraud theory but on strict liability.

13 Civil Code section 3333: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

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18 Mass.L.Rptr. 259
Superior Court of Massachusetts.

Carol WASSERMAN, Plaintiff,
v.
REGISTRAR OF MOTOR VEHICLES, Defendant.

No. 03-03341-C.
Sept. 7, 2004.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

JOHN C. CRATSLEY, Justice of the Superior Court.

*1 The plaintiff, Carol Wasserman ("Wasserman"), filed this appeal in the Superior Court seeking review of a decision of the Chelsea District Court on July 23, 2001, in which she had sought review of an administrative decision to suspend her license to operate a motor vehicle by the defendant Registrar of Motor Vehicles (the "RMV"), pursuant to the Chemical Test Refusal Law and regulations. G.L. c. 90, § 24(1)(f), (g); 540 C.M.R. 11.01 et. seq. Wasserman argues here that the Chemical Test Refusal Law and regulations violated her right to due process and her right to equal protection under Article 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution. She also asserts numerous statutory violations pursuant to the Administrative Procedure Act (the "APA"), the Chemical Test Refusal Law, and various regulations, including 501 C.M.R. 2.52, 501 C.M.R. 9.05(6), 540 C.M.R. 11.01, and 801 C.M.R. 1.03. Finally, Wasserman argues that the decision of the RMV hearing officer was in error and not supported by substantial evidence. On April 26, 2004 the RMV filed a Motion for Judgment on the Pleadings. Upon careful consideration of counsels' oral arguments and memoranda, the RMV's Motion for Judgment on the Pleadings is *ALLOWED.*

FACTUAL BACKGROUND

All of the following facts are taken from the parties' filings, briefs, and affidavits, and the administrative record.

1. *Wasserman's Arrest*

On May 4, 2001, Revere Police Department Officer Leo MacAskill ("Officer MacAskill") was dispatched to investigate a report made to the Boston Police Department (the "BPD") that a Red Mustang was "all over the road" on Route 1A heading into Revere. Officer MacAskill located a car matching that description and confirmed that the registration matched information provided by the BPD. He then observed that the car wove back and forth in the driving lane, and at one point entered the bus stop lane. He activated his blue lights and pulled the vehicle over.

Officer MacAskill approached the vehicle and detected a strong odor of alcohol while speaking to the driver, Carol Wasserman. The officer noted that Wasserman's speech was slurred and her eyes were red. He asked her if she and been drinking and she replied yes, "a couple of martinis." He then asked her if she would be willing to step out of the car and perform several sobriety tests and she agreed. At this point, Officer MacAskill was joined on the scene by Sergeant Picardi, Officer Malatesta, and Officer Chan. Wasserman was asked whether she had any medical problems which would hinder her ability to perform the tests and she stated that she did not. She did state, however, that she suffered from asthma and used an inhaler. When asked, she further stated that she understood the questions the officer was asking her.

Officer MacAskill then asked her to perform several sobriety tests, including the nystagmus eye test, the one-leg stand, and the nine step heel-to-toe test. Wasserman failed each test. Based upon his observations and her failure of the tests, Officer MacAskill placed Wasserman under arrest for operating a motor vehicle under the influence of intoxicating liquor ("OUI"). Wasserman was then taken to the police station for booking. Wasserman disputes the following facts propounded by the

defendant-that she was asked to submit to a chemical breath test ("breath test") and that she refused. [1] Officer MacAskill subsequently prepared and submitted an electronic Report of Refusal to Submit to Check Test ("Report of Refusal") to the RMV. The officers also faxed a typed and signed Report of Refusal to the RMV.

*2 Wasserman was then issued a temporary license that became valid twelve hours after issue and expired at the end of the fifteenth day following her arrest. She was also provided with a notice informing her that the RMV intended to suspend her license for 120 days based upon her refusal to consent to a breath test, which would take effect upon expiration of her temporary license. Finally, Wasserman was notified that she had a right to a hearing on the 120-day suspension pursuant to G.L. c. 90, § 24.

2. *Statutory and Regulatory Framework*

A. *Administrative Procedure Act*

General law chapter 30A, known as the Administrative Procedure Act ("APA"), regulates the adjudicatory proceedings of administrative agencies. The "broad, remedial purpose" of the APA is to "provide comprehensively for procedural due process in administrative proceedings." *Milligan v. Bd. of Registration of Pharmacy*, 348 Mass. 491, 500 (1965). Because the RMV is an agency within the meaning of the statute, the standards contained therein apply to its hearings pursuant to G.L. c. 90, § 24(1)(g), described below. *Okongwu v. Stephens*, 396 Mass. 724, 730 n. 10 (1986); G.L. c. 30A, § 1.

Adjudicatory proceedings of administrative agencies "shall afford all parties an opportunity for full and fair hearing." G.L. c. 30A, § 10. Pursuant to the statute, a full and fair hearing includes, inter alia, the right to notice of the hearing, a reasonable opportunity to prepare and present evidence and argument, the right to call and examine witnesses, introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence. G.L. c. 30A, § 10(1)-(3). All evidence presented "shall be offered and made a part of the record in the proceeding." G.L. c. 30A, § 10(4).

Reasonable notice of the time and place of the hearing shall be afforded to all parties, including sufficient notice of the issues involved "to afford them reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). Although the proceedings are not bound by the rules of evidence, privileges apply, and only evidence of the type on which "reasonable persons are accustomed to rely in the conduct of serious affairs" may be given probative effect. G.L. c. 30A, § 11(2). Every party to an adjudicatory proceeding "shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence." G.L. c. 30A, § 11(3). All such evidence submitted, including any records, reports, or documents, however, must be "made a part of the record in the proceeding." G.L. c. 30A, § 11(4). The agency then must make the record available, whether in written form or otherwise, and may require the parties to pay the reasonable cost of such records. G.L. c. 30A, § 11(6). Finally, "each agency decision shall be in writing or stated in the record ... [and] shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision ..." G.L. c. 30A, § 11 (8).

*3 "[A]ny person ... aggrieved by a final decision of any agency in an adjudicatory proceeding ... shall be entitled to ... judicial review." Upon review of a final agency decision, a court may affirm, remand, set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is-(a) [i]n violation of constitutional provisions; or (b) [i]n excess of the statutory authority or jurisdiction of the agency; or (c) [b]ased upon an error of law; or (d) [m]ade upon unlawful procedure; or (e) [u]nsupported by substantial evidence; or (f) [u] nwarranted by facts found by the court on the record as submitted or as amplified ..., in those instances where the court is constitutionally required to make independent findings of fact; or (g) [a]rbitrary or capricious, and abuse of discretion, or otherwise not in accordance with law." G.L. c. 30A, § 14(7)(a)-(g).

B. *The Chemical Test Refusal Law and Regulations*

General laws chapter 90, section 24(1)(f), the Chemical Test Refusal law, states that "[w]hoever operates a motor vehicle upon any way ... shall be deemed to have consented to submit to a [breath test] in the event that he is arrested for [an OUI] ..." Chapter 90 directs police to inform any person arrested for an OUI (hereinafter "the operator"), that refusal to submit to a breath test will result in the suspension of her license to operate a motor vehicle for at least one hundred and twenty days. *Id.* If the operator nonetheless refuses to submit to a breath test, the police shall "(i) immediately ... take custody of [the operator's] driver license or permit ...; (ii) provide [the operator] ... with a written notice of intent to suspend ...; [and] (iii) issue to [the operator] who refuses such test ... a temporary driving permit ..." *Id.*

Following the confiscation of the operator's license, "[t]he police officer before whom such refusal was made shall immediately prepare a report of such refusal ... under the penalties of perjury." *Id.* "Each such report shall set forth the grounds for the officer's belief that [the operator] had been operating a motor vehicle ... while under the influence of intoxicating liquor, and shall state that [the operator] had refused to submit to such [breath test] when requested by such police officer to do so, such refusal having been witnessed by another person other than [the operator]. Each such report shall identify which police officer requested said [breath test], and the other person witnessing said refusal. Each such report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend ... Said report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding any suspension specified in this section." *Id.*

*4 Chapter 90 provides the operator with a hearing before the RMV within fifteen days of the suspension of her license. G.L. c. 90, § 24(1)(g). Hearings are held on a walk-in basis. *Id.* The hearing officer compiles a record of the proceedings, and the scope of the hearing is limited to the following issues: "(i) did the police officer have reasonable grounds to believe that [the operator] had been operating a motor vehicle while under the influence of intoxicating liquor ..., (ii) was [the operator] placed under arrest, and (iii) did [the operator] refuse to submit to such test or analysis." *Id.* If the hearing officer finds on any one of these issues in the negative, the operator's license shall be restored immediately. *Id.*

The hearing procedure is further governed and outlined in greater detail by 540 C.M.R. 9.01 et. seq. and 540 C.M.R. 11.01 et. seq. The operator has the right to submit both evidence and testimony. 540 C.M.R. 9.05(6); 540 C.M.R. 11.02(4). The operator may call witnesses on her own behalf and may subpoena any other witnesses she believes are necessary to the determination of the issues before the hearing officer. *Id.* She may also cross-examine those witnesses testifying against her. 540 C.M.R. 9.05(6). The record of the hearing must include "any testimony or evidence submitted by the operator," but directs that "[i]t shall be the responsibility of the operator to include any and all relevant testimony in written form for the record."[2] 540 C.M.R. 11.02(4). However, the hearing officer "may rely solely on official documents, reports, court records, transcripts or abstracts, or other documentary evidence" in making his determination. 540 C.M.R. 9.05(6).

If the hearing officer determines, as set forth by the Chemical Test Refusal law, that the refusal report meets the statutory requirements, "the burden is on the operator to show that one of the following factual issues ... was in the negative: 1. did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor ...; 2. was such person placed under arrest, and 3. did such person refuse to submit to such test or analysis." 540 C.M.R. 11.02(5)(b).

Chapter 90 further provides that a person whose license has been suspended may file a petition for judicial review in the district court. G.L. c. 90, § 24(1)(g). "Review by the court shall be on the record established at the hearing before the registrar. If the court finds that the [RMV] exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the registrar's determination." *Id.*

3. *The Hearing and Appeal*
On May 17, 2001, Wasserman requested and received a walk-in hearing before the RMV. Wasserman was represented by counsel at the administrative hearing. The hearing officer, James Poliseno, reviewed the Report of Refusal that was submitted electronically to the RMV, the Report of Refusal that was signed and faxed to the RMV, Officer MacAskill's police report, and five affidavits submitted by Wasserman.[3] The affidavits were authored by Wasserman, her attorney and husband Brian Olmstead, Wasserman's physician Sharon N. Barrett, and Wasserman's friend and dinner companion on the night of her arrest Iris W. Davis.

*5 Wasserman's affidavit, which is supported by facts recited in the other affidavits submitted by her, states that during her drive home on May 4, 2001, she experienced blurred vision, a loss of coordination, disorientation, loss of motor control, an inability to record what was said and done around her, and short term memory loss. At the hearing, Wasserman argued that these symptoms, which were caused by an adverse reaction to her prescription medication neurontin, prevented her from making a voluntary, knowing, and intelligent decision to refuse take the breath test. She also argued that her right to counsel was violated when she was asked to take the breath test prior to the arrival of her attorney.

On May 21, 2001, the hearing officer upheld the suspension of Wasserman's license based upon her refusal to take a breath test. He credited Officer MacAskill's report and found that the officer had reasonable grounds to believe that Wasserman was operating a motor vehicle under the influence of alcohol and that she had been arrested. He further found, relying on the reports submitted by the officers, that Wasserman had refused to submit to a breath test. Finally, citing *Commonwealth v. Brazelton*, 404 Mass. 783 (1989), the hearing officer rejected Wasserman's claim that the police violated her right to counsel by not waiting for her attorney to arrive prior to asking her to take or refuse a breath test.

On May 25, 2001, Wasserman appealed the RMV's decision to the Chelsea District Court pursuant to G.L. 90, § 24. In addition to the record below, the District Court Judge (Brant, J.) allowed Wasserman to enter into evidence a blank Form A Statutory Rights and Consent Form ("Form A") which Wasserman alleges the officers were required to complete, but did not. He also allowed her to put into evidence the electronic and typed Reports of Refusal which were completed by officers.[4] In her District Court brief, Wasserman raises due process claims with respect to her right to an attorney prior to being asked to take a breath test and with respect to the administrative hearing process itself. On July 5, 2001, the District Court Judge upheld the decision of the RMV hearing officer. Judge Brant concluded that there was adequate support in the record to support the hearing officer's decision and found "no violations of due process in the procedures before the [RMV]."

Wasserman filed this Superior Court appeal from the Chelsea District Court on July 23, 2001. Wasserman's license was subsequently reinstated on September 17, 2001. Her criminal case was then resolved on November 30, 2001, when the Chelsea District Court (Darling, J.) held that Officer MacAskill lacked reasonable suspicion to stop Wasserman and suppressed all observations, statements, and other evidence in the case.[5]

DISCUSSION

I. Procedural Posture & Standard of Review
The instant appeal was filed pursuant to G.L. c. 231, § 97 which allows parties "aggrieved by the judgment of a district court in a civil action which could not have been removed to the superior court" to appeal to the superior court thereafter. Section 97 appeals are then "tried and determined as if originally entered [in the superior court]." *Id.* A trial *de novo* in the superior court, however, is not the appropriate vehicle for Wasserman's appeal. See *Godfrey v. Chief of Police of Wellesley*, 35 Mass.App.Ct. 42, 43-45 (1993). Where the substance of the plaintiff's claim involves a decision of an agency that has conducted a proceeding that is quasi-judicial in nature, "but not according to the course of common law," her sole remedy in superior court is an "action in the nature of certiorari" pursuant to G.L. c. 249, § 4. *Id.* See, e.g., *Carney v. City of Springfield*, 403

Mass. 604, 605 (1983). The proper vehicle for resolution of petitions for judicial review brought pursuant to G.L. c. 249, § 4, is motion for judgment on the pleadings. *Drayton v. Comm'r of Corr.*, 52 Mass.App.Ct. 135, 136 n. 4 (2001); Mass. R. Civ. P. 12(c).

*6 An action in the nature of certiorari, however, does not provide "an additional or alternative avenue of appellate review." *Cumberland Farms, Inc. v. Planning Bd. of Bourne*, 56 Mass.App.Ct. 605, 607 (2002). The Court will not exercise its power to remedy "mere technical errors that have not resulted in manifest injustice." *Id.*, citing *Massachusetts Prisoners Assn. Political Action Comm. v. Acting Governor*, 435 Mass. 811, 824 (2002). "The purpose of the certiorari procedure is to provide a remedy, where none would otherwise exist...." *Id.*, citing *Drayton*, 52 Mass.App.Ct. at 140. Therefore, the Court will correct only those substantial errors of law that are apparent on the record and adversely affect the material rights of the plaintiff. See also *Fire Chief of East Bridgewater v. Plymouth County Retirement Bd.*, 47 Mass.App.Ct. 66, 69 (1999).

II. Constitutional Claims

Wasserman makes five constitutional claims under Article 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution, concerning the initial removal and later suspension of her license to operate a motor vehicle pursuant to the Chemical Test Refusal Law and regulations.[7] G.L. c. 90, § 24 (1)(f), (g); 540 C.M.R. 11.01 et. seq. First, Wasserman argues that her refusal to take the breath test can be effective against her only if her refusal was voluntary, knowing, and intelligent. Second, she argues that she was deprived of her right to be confronted by the evidence against her. Third, she argues she was deprived of her right to counsel. Fourth, she argues that procedural errors during the hearing deprived her of her constitutional rights to due process. Fifth, she argues that she was denied the protections of a full and fair hearing as afforded to other citizens facing license suspension before the RMV pursuant to 540 C.M.R. 9.01 et. seq., also promulgated pursuant to G.L. c. 90. Each argument is addressed below.

A. Substantive Due Process

First, Wasserman argues that her rights to substantive due process under Article 12 and the Fourteenth Amendment were violated when the hearing officer failed to inquire whether her refusal to take the breath test was voluntary, knowing, and intelligent.[8] See *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir.1991), cert. denied, 502 U.S. 879 (1991) (where defendant challenges the state's conduct as inadequate, rather than the adequacy of the procedure, due process claims examined under rubric of substantive due process). Substantive due process claims may be proved by two theories.[9] See *Cruz-Erazo v. Rivera-Montanez*, 212 F.3d 617, 622 (1st Cir.2000). A plaintiff may either "demonstrate a deprivation of an identified liberty or property interest protected by" Article 12 or the Fourteenth Amendment, or she may prove that the state conduct in question "shocks the conscience." *Id.*, citing *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 531 (1st Cir.1995). Because Wasserman's claim does not specify any particular constitutionally protected interest in a voluntary, knowing, and intelligent refusal to take the breath test, the Court applies the second test.

*7 Substantive due process prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (internal citations omitted). "In substantive due process analysis, the nature of the individual interest at stake determines the standard of review that courts apply when deciding whether a challenged statute meets the requirements of the due process clause." *Aime v. Commonwealth*, 414 Mass. 667, 673 (1993), citing *Salerno*, 481 U.S. at 748-751. "Where a right deemed to be 'fundamental' is involved, courts 'must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation,' and typically will uphold only those statutes that are narrowly tailored to further a legitimate and compelling governmental interest." *Id.* (internal citations omitted). "If a statute does not infringe on a fundamental right, courts will apply a less exacting standard of review whereby a challenged statute will pass constitutional muster under the due process clause if it 'bears a reasonable relation to a permissible legislative objective.' " *Aime*, 414 Mass. at 673-674, citing *Rushworth v.*

Registrar of Motor Vehicles, 413 Mass. 265, 268 (1992), quoting *Pinnick v. Cleary*, 360 Mass. 1, 14 (1971).

In the present case, however, a substantive due process analysis is a meaningless inquiry. An individual arrested for operating under the influence of intoxicating liquor has no constitutional right to refuse a breath test.[10] See *Commonwealth v. Davidson*, 27 Mass.App.Ct. 846, 848 (1990). "The right of refusal stems from the statute, which requires that a test not be conducted without his consent." *Id.* The voluntary, knowing, and intelligent standard "applies only to [an individual's] 'consent' to the actual relinquishment of [a] constitutional *right*." *Id*. (emphasis in the original), citing *Commonwealth v. Deeran*, 397 Mass. 136, 141 (1986). Given its statutory origin, therefore, the Chemical Test Refusal Law does not require consent or refusal in accordance with the voluntary, knowing, and intelligent standard applicable to waivers of constitutional rights. *Davidson*, 27 Mass.App.Ct. at 849 (defendant who was deemed too intoxicated to voluntarily, knowingly, and intelligently waive his *Miranda* rights could consent to a breath test pursuant to G.L. c. 90, § 24). This Court therefore holds that no police department or officer must initially determine an arrestee's mental competence to rationally comprehend the test and voluntarily decide to take it before proceeding to administer the breath test. Law enforcement would be brought to a standstill and impossible, and/or irrelevant determinations would be required if such were the law for drunken driving.

Second, Wasserman argues that (a) the failure of the RMV to produce the police officers at the hearing, (b) the requirement that all testimony elicited by the operator be submitted to the hearing officer in written form, and (c) the regulatory grant of *prima facie* status to the Refusal Report, all infringe on her constitutional right to be confronted by the evidence against her. Wasserman, however, improperly merges the guarantees of procedural due process in a civil administrative proceeding with the standards employed in a criminal trial.

*8 The confrontation clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with witnesses against him." In a criminal trial, submission of evidence by a non-testifying witness against the defendant violates this right. See *Commonwealth v. Dias*, 405 Mass. 131, 135 (1989). No similar right is afforded parties in a civil proceeding of any kind. *Covell v. Dep't of Social Services*, 439 Mass. 766, 788 (2003); *Town of Reading v. Murray*, 405 Mass.App.Ct. 415, 418 (1989). The RMV, therefore, was under no constitutional obligation to produce the police officers for the purpose of live testimony, to allow her to avoid the requirement of offering testimony without a written record of such testimony, or to place the burden exclusively on the Commonwealth.[11]

The Court finds no substantial errors of law with respect to the plaintiff's substantive due process rights that are apparent on the record and adversely affect the material rights of the plaintiff. Defendant's Motion for Judgment on the Pleadings as to this claim in Count I of the plaintiff's Complaint is allowed.

B. Procedural Due Process

1. Pre-Suspension Right to Counsel

Wasserman's argues that she was deprived of her right to counsel under Article 12 and the Fourteenth Amendment when she was required to decide whether to take or refuse a breath test before her attorney arrived. This argument is without merit. The Supreme Judicial Court held in *Commonwealth v. Brazelton*, unequivocally, that the moment at which a person must decide whether to take or refuse a breath test is not a critical stage in the criminal process. 404 Mass. 783, 785 (1989). The Court concluded that a defendant has no right to counsel under either Article 12 or the Fourteenth Amendment with respect to the decision to take or refuse the breath test.[12] *Id.* Wasserman argues that relief is nonetheless merited "as a matter of fundamental fairness" where, as here, she suggests, police officers "purposefully interfere [d] with a defendant's access to a specific attorney who want[ed] to confer with the defendant and who the police [knew] represent[ed] the defendant." *Commonwealth v. Mencoboni*, 28 Mass.App.Ct. 504, 506 (1990). However, the record contains no evidence that the officers in the instant case delayed or in any way interfered with Wasserman's right to

counsel. The mere fact that officers did not wait for her attorney to arrive prior to inquiring whether she would take a breath test does not offend traditional notions of fundamental fairness for this type of prompt statutorily required law enforcement procedure.

2. Full and Fair Post-Suspension Hearing

Wasserman also argues that procedural errors during the hearing violated her rights under Article 12 and the Fourteenth Amendment.[13] Without question, the "opportunity to be heard at a meaningful time and in a meaningful manner" is fundamental to procedural due process analysis. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Due process is not a rigid concept; procedural protections vary "as the particular situation demands," *Matthews*, 424 U.S. at 334, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), because "there must also be a relationship between the quality of the evidence presented to the tribunal and the kind of decision that the tribunal renders." *Covell v. Dep't of Social Services*, 54 Mass.App.Ct. 805, 813 (2002). "What may be adequate to support findings on certain subjects will not of necessity be adequate to support findings on others." *Covell*, 54 Mass.App.Ct. at 813.

*9 An administrative hearing need not be "elaborate." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985). Something less than a full evidentiary hearing is often sufficient prior to final adverse administrative action. *Id.* With this in mind, the Court looks to the following factors to determine whether sufficient process was afforded in the present case: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews*, 424 U.S. at 335.

a. Private and Governmental Interests

Wasserman's interest is the continued possession and use of her license while her OUI prosecution is pending. Upon determination by the RMV that she refused a breath test following her arrest for an OUI, Wasserman's license was suspended for 120 days.[14] This loss is by no means insignificant given the average individual's daily need for transportation. It is not as significant, however, as the Commonwealth's interest in public safety and preservation of evidence in cases where individuals have been stopped and arrested for operating under the influence. See generally *Mackey*, 443 U.S. at 17-18. See also *Commonwealth v. Luk*, 421 Mass. 415, 425 (1995) (discussing the remedial purpose of the Chemical Test Refusal Law).

b. Risk of Erroneous Deprivation

The thrust of Wasserman's argument properly focuses on the risk of erroneous deprivation. She argues that she was deprived of her right to cross-examine witnesses against her both because the RMV did not produce the police officers at the hearing and because she was required to provide the testimony of witnesses she wished to call in writing. See G.L. c. 90, § 24(1)(f); 540 C.M.R. 11.02(5)(b). She further argues that the regulatory practice of giving the refusal report *prima facie* status if the hearing officer determines that the refusal report meets the statutory requirements, thereby placing the burden on her to prove a negative, deprives her of her right to be confronted by the evidence against her. 540 C.M.R. 11.02(5)(b). The question presented, therefore, is whether something less than a full evidentiary hearing prior to the loss of a license to operate a motor vehicle, as in this case, is sufficient to alleviate the risk of erroneous deprivation.

As described above, the RMV's administrative hearing is an abbreviated procedure designed to resolve only three issues of fact: "(i) did the police officer have reasonable grounds to believe that [the operator] had been operating a motor vehicle while under the influence of intoxicating liquor ..., (ii) was [the operator] placed under arrest, and (iii) did [the operator] refuse to submit to such test or analysis." G.L. c. 90, § 24(1)(g). In order to accomplish this task, G.L. c. 90, § 24(1)(f) and 540 C.M.R. 11.02(5)(b) provide streamlined procedures. Hearings are held on a walk-in basis within fifteen days of suspension and the hearing officer is directed to compile a record of the proceedings.

G.L. c. 90, § 24(1)(g). An operator has the right to submit evidence and testimony, to call any witnesses on her own behalf as well as subpoena any other witnesses she believes are necessary, and may cross examine those testifying against her. 540 C.M.R. 9.05(6); 540 C.M.R. 11.02(4).

*10 First, as stated above, Wasserman had the right to subpoena the arresting officers, but declined to do so. 540 C.M.R. 9.05(6); 540 C.M.R. 11.02(4). There is no indication that requiring Wasserman to request the presence of the police officers at the hearing will increase the risk of erroneous deprivation. Although coordinating the schedule of the officers with that of all other parties to the hearing is a challenge, it is an ever present hurdle in today's courts and does not rise, in my view, to the level risking an erroneous deprivation of rights. Moreover, a constitutional deprivation of process will not be found where the proponent of those rights fails to attempt to exercise them.

Second, although it is no doubt a challenging task to provide written testimony for the administrative record, this Court does not find that it increases the risk of erroneous deprivation. To the contrary, the submission of testimony in written form serves to preserve the sum and substance of what was presented before the hearing officer for any appeal to the District Court. See *New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth*, 368 Mass. 745, 751 (1975) ("summary of evidence contained in the board's 'Findings of Fact and Report' is no substitute for a transcript"). Nor does the burden of providing such written testimony fall too heavily on the plaintiff. The regulations require the RMV to provide forms "for witnesses to transcribe their testimony to submit it for inclusion in the record, and shall provide reasonable assistance to facilitate such transcription, should it be requested by the operator." 540 C.M.R. 11.02(4). "The [RMV] shall also allow the operator to have the proceeding transcribed or recorded by a court reporter, at the operator's own expense, if he or she so chooses." *Id.* See also 540 C.M.R. 9.05(3) ("The applicant may record the hearing at his or her own expense by any means he or she chooses that will not substantially interfere with the proceedings"). The right to procedural process does not include a right to be free from some inconvenience and cost.

Third, Wasserman argues that the Chemical Test Refusal Law and regulations, which shift the burden to the operator during the hearing, deprives her of her right to be confronted with all of the evidence against her. At the hearing, the Report of Refusal prepared by the police officers "shall constitute prima facie evidence of the facts set forth therein." G.L. c. 90, § 24(1)(f). "[T]he burden is on the operator [therefore] to show that one of the ... factual issues ... was in the negative: 1. did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor ...; 2. was such person placed under arrest, and 3. did such person refuse to submit to such test or analysis." 540 C.M.R. 11.02(5)(b). Wasserman argues, that giving the Refusal Report *prima facie* status without requiring the officers to testify violates her constitutional right to procedural due process.

*11 Given the extremely narrow scope of inquiry, and the fact that the proceeding is civil in nature, this Court does not find that the burden shifting scheme laid out in G.L. c. 90, § 24(1)(f) and 540 C.M.R. 11.02(5)(b) increases the risk of erroneous deprivation. Burden shifting is a common practice in civil matters. For example, in employment discrimination claims, once the plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to assert a nondiscriminatory reason for its actions. *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 116-118 (2000); *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 440-441 (1995). If the defendant provides such a reason, the burden shifts back to the plaintiff to demonstrate that the defendant's reason is mere pretext. *Id.*

Similarly, in the present case the burden shifts to the operator to negate one of the three facts presented in the *prima facie* case only if the judge finds that the Report of Refusal meets the statutory requirements of the Chemical Test Refusal Law. 540 C.M.R. 11.02(5)(b). The operator need only disprove one of three facts; (1) that the police officer had reasonable grounds to believe that she had been operating a motor vehicle while under the influence of intoxicating liquor; (2) that she was arrested; and (3) that she

refused a breath test. The final determination of the hearing officer is subject to judicial review in the District Court, upon which review a judge may find that the hearing officer's determination was unsupported by the evidence in the record. G.L. c. 90, § 24 (1)(g); 540 C.M.R. 11.02(5)(b).

Applying the appropriate standard under *Matthews v. Eldridge*, 424 U.S. at 335, this Court finds that the risk of erroneous deprivation is not increased by requiring the operator to subpoena the reporting police officers if he or she wishes, by requiring that the operator provide all testimony offered in writing to the court, and/or by shifting the burden to the operator once the officers have established a *prima facie* case. Nor is there a constitutional or legal problem from requiring all of them together. This Court finds no substantial errors of law with respect to the plaintiff's procedural due process rights that are apparent on the record and adversely affect the material rights of the plaintiff. Defendant's Motion for Judgment on the Pleadings as to this claim in Count I is allowed.

C. Equal Protection

Wasserman's final constitutional claim alleges that she was denied the protections of a full and fair hearing as afforded to other citizens facing license suspension before the RMV, pursuant to 540 C.M.R. 9.01 et. seq., also promulgated pursuant to G.L. c. 90, in violation of her right to equal protection under Article 12 and the Fourteenth Amendment.[15] Wasserman has failed to assert that she is a member of any suspect class or that the provisions of either G.L. c. 90 or 540 C.M.R. 9.01 et. seq. infringe on any of her fundamental personal rights. As such, "the [statute and regulations] will be upheld against an equal protection argument as long as [they are] rationally related to the furtherance of a legitimate State interest." *Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 722 (1999) (rational to exempt liquor stores within 10 miles of Vermont and New Hampshire borders from the state's Sunday closing law).

*12 540 C.M.R. 9.01 et. seq. applies to discretionary hearings involving the "suspension, revocation or reinstatement of any license, registration, certificate, or privilege issued or allowed under G. L c. 90 or G.L. c. 90D." Chapter 90 encompasses the regulation of all motor vehicles and aircraft and chapter 90D regulates motor vehicle certificates of title. Within these chapters, the regulated activity varies widely from serious injury caused by a driver operating a motor vehicle under the influence of intoxicating liquor to the regulation of the location and height of airports. *Id.* It cannot be said, therefore, that it is irrational to provide different types of hearings for different kinds of infractions under these laws, particularly in the case of the G.L. c. 90, § 24(1)(f), (g), the Chemical Test Refusal Law, where the scope of inquiry is narrow (as discussed above) and the penalty modest (license suspension for 120 days).

Therefore this Court finds no substantial errors of law with respect to the plaintiff's right to equal protection under the law that are apparent on the record and adversely affect the material rights of the plaintiff. Defendant's Motion for Judgment on the Pleadings as to this claim in Count I is allowed.

III. Statutory Claims

Wasserman argues that 540 C.M.R. 11.02, which regulates the hearing at issue, is invalid because it violates the provisions of the APA; the Chemical Test Refusal Law, 501 C.M.R. 2.52, 501 C.M.R. 9.05(6); and 801 C.M.R. 1.03. She also argues that the hearing officer's decision was insufficient as a matter of law pursuant to the APA. Both arguments are addressed below.

A. 540 C.M.R. 11.02

Wasserman argues that 540 C.M.R. 11.02, the regulation governing the administrative hearing in question, violates the APA, the Chemical Test Refusal Law, and several regulations promulgated thereunder, 501 C.M.R. 2.52, 501 C.M.R. 9.05(6), and 801 C.M.R. 1.03. Where a facial challenge to regulations promulgated by a governmental agency is made, the standard of judicial review is "highly deferential," because "a regulation 'has the force of law and must be accorded all the deference due a statute.' " *Cacicio v. Sec'y of Pub. Safety*, 422 Mass. 764, 769 (1996), citing *Borden, Inc. v. Comm'r of Pub. Health*, 388 Mass. 707, 723, cert. denied, 464 U.S. 936 (1983). A court may not "substitute [its] judgment as to the need for a regulation or the propriety of the

means chosen to implement the statutory goals, so long as the regulation is rationally related to those goals." *Id.*, citing *American Family Life Assurance Co. v. Comm'r of Ins.*, 388 Mass. 468, 477, cert. denied, 464 U.S. 850 (1983). Each argument is addressed below.

1. The Administrative Procedure Act (G.L. c. 30 A, §§ 10, 11)
Pursuant to G.L. 30A, § 10, adjudicatory proceedings of administrative agencies "shall afford all parties an opportunity for full and fair hearing." G.L. c. 30A, § 10. A full and fair hearing includes, inter alia, the right to notice of the hearing, a reasonable opportunity to prepare and present evidence and argument, the right to call and examine witnesses, introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence. G.L. c. 30A, § 11(1)-(3). At the conclusion of the hearing, "each agency decision shall be in writing or stated in the record ... [and] shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision ..." G.L. c. 30A, § 11(8). Wasserman argues that 540 C.M.R. 11.02 violates the provisions of the APA.[16] Each of Wasserman's contentions fails.

*13 First, Wasserman's right to sufficient notice was not infringed by the immediacy of the hearing. The Chemical Test Refusal Law provides an operator with a hearing within fifteen days of her suspension in order to prevent any unnecessary loss of use of her license. G.L. c. 90, § 24(1)(g). Hearings are held on a walk-in basis for the convenience of the operator who is thus able to determine when the hearing will be held. *Id.* Moreover, 540 C.M.R. 11.02(5)(c) permits the hearing officer to adjourn the hearing and thereafter obtain further evidence on the narrow issues presented for review in the hearing. Wasserman neither suggests what kind of notice would be proper nor states what evidence or argument she was not permitted to present because of the lack of notice. At her hearing, in fact, Wasserman was able to present five separate affidavits in support of her arguments and did not request an adjournment in order to gather and present additional evidence or argument. This Court finds, therefore, that immediacy of the hearing offered in 540 C.M.R. 11.02 is rationally related to the goals of sections G.L. c. 30A, §§ 10, 11.

Second, Wasserman's right to call and cross examine witnesses was not infringed by the requirement that all testimony be submitted in writing. See 540 C.M.R. 11.02(4). The APA requires that all evidence submitted be "made a part of the record in the proceeding." G.L. c. 30A, § 11(4). Although the agency must make the record available to the parties, whether in written form or otherwise, the agency may require the parties to pay the reasonable cost of such records. G.L. c. 30A, § 11(6). Accordingly, 540 C.M.R. 11.02(4) states that "[i]t shall be the responsibility of the operator to include any and all relevant testimony in written form for the record." The RMV provides forms which the witnesses may use to transcribe their testimony, reasonable assistance to facilitate such transcription if it is requested by the operator, and allows the operator to have the proceeding transcribed or recorded at her own expense. *Id.*

The requirement that any testimony be submitted in writing to the agency to be made a part of the record does not infringe on an operator's ability to call and cross examine witnesses. Indeed, Wasserman had the right to subpoena any witnesses, including the police officers, that she believed necessary to the determination fo the issues presented, but chose not to do so. 540 C.M.R. 9.05(6). In this Court's view, the fact that providing witness testimony in writing is more difficult does not materially affect her right to call and cross examine witnesses. As previously stated, at the hearing the scope of the inquiry is narrow. The requirement that all evidence be made a part of the record in written form serves the important goal of preserving all issues presented to the hearing officer for appeal. This Court finds, therefore, that 540 C.M.R. 11 .02 is rationally related to the goals of sections G.L. c. 30A, §§ 10, 11.

2. The Chemical Test Refusal Law and 501 C.M.R. 2.52
*14 The Chemical Test Refusal Law, G.L. c. 90, § 24(1)(f), states that "[w]hoever operates a motor vehicle upon any way ... shall be deemed to have consented to submit to a [breath test] in the event that [she] is arrested for [an OUI] ..." The law states that "if the [operator] refuses to submit to a [breath test], *after having been*

informed that [her] license ... shall be suspended for at least a period of one hundred and twenty days ..., no such test ... shall be made and [she] shall have [her] license ... suspended." *Id.* (emphasis added). 501 C.M.R. 2.52 also instructs that the operator be informed of the consequences of refusal. "If *after being advised of ... her rights and the consequences or refusing to take a breath test,* a defendant refuses to submit to a breath test, none shall be given and the officer before whom the refusal was made shall immediately notify the [RMV] of the refusal." *Id.* (emphasis added). Wasserman argues that 540 C.M.R. 11.02 violates the Chemical Test Refusal Law and 501 C.M.R. 2.52 because it does not require the hearing officer to specifically find that Wasserman was first advised of her rights and the consequences of refusal prior to refusing to take a breath test.

Pursuant to 540 C.M.R. 11.02, if a hearing officer finds that the Report of Refusal meets the statutory requirements, the burden shifts to the operator to disprove one of the following three facts; (1) the police had "reasonable grounds to believe that [she] had been operating a motor vehicle while under the influence of intoxicating liquor ...", (2) she was placed under arrested, and (3) she refused to submit to a breath test. Whether or not the operator was first informed of her rights and the consequences of refusal is not considered. Nor does the explicit language of the Chemical Test Refusal Law require the Report of Refusal to include this information. It states that the Report of Refusal "shall set forth the grounds for the officer's belief that the [operator] had been operating a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that [she] refused to submit to a [breath test] when requested by such police officer to do so, such refusal having been witnessed by another person other than the [operator]. Each report shall identify which police officer requested said chemical test or analysis, and the other person witnessing said refusal." G.L. c. 90, § 24 (1)(f).

"A regulation is invalid if it conflicts with the authorizing statute." *Morris v. Commonwealth,* 412 Mass. 861, 864 (1992). Insofar as 501 C.M.R. 2.52 requires the hearing officer to specifically find that the operator was first informed of her rights and the consequences of refusal, it conflicts with G.L. c. 90, § 24(1)(f).

The Chemical Test Refusal Law, however, is an implied consent law. See *Mackey,* 443 U.S. at 3; G.L. c. 90, § 24(1)(f). An operator's voluntary, knowing, and intelligent consent is not sought, it is presumed. *Id.* Its purpose is non-retributive; it merely seeks to protect public safety through prompt removal of drunk drivers from the public roads. See *Leduc v. Commonwealth,* 421 Mass. 433, 435-436 (1995), certiorari denied, 519 U.S. 827 (1995). Requiring the hearing officer to specifically find that the operator was first informed of both her rights and the consequences of refusal would contradict the plain language of the statute which contains no such requirement. Further, it would read into the statute a voluntary, knowing, and intelligent refusal standard that does not exist. The Court finds, therefore, that 540 C.M.R. 11.02 is rationally related to the goals of the Chemical Test Refusal Law.

3. 501 C.M.R. 9.05(6)

*15 Wasserman argues that 540 C.M.R. 11.02 violates 540 C.M.R. 9.05(6). 540 C.M.R. 9.05(6), which is applicable to discretionary hearings involving the suspension, revocation or reinstatement of any license to operate a motor vehicle, governs testimonial evidence for these types of hearings. 540 C.M.R. 9.01. It states that "[t]he applicant shall have the right to present his or her own evidence and witnesses and to cross-examine those testifying against him or her. The applicant may, at least two business days prior to the hearing, contact the appropriate Registry official to ascertain the identities of any witnesses the Registry plans to call to testify. Subpoenas may be issued pursuant to the provisions of the [APA]." 540 C.M.R. 9.05(6).

Wasserman argues that 540 C.M.R. 11.02 is inconsistent with, or outright contradictory to 540 C.M.R. 9.05(6) because the former confines the RMV hearing to RMV forms obtained at the hearing and thereafter confines appeals to the forms submitted at the hearing. The plain language of 540 C.M.R. 11.02, however, in no way limits the evidence to RMV forms, it only requires that any testimony or evidence submitted by the operator be in writing to become part of the record of the proceedings.

540 C.M.R. 11.02(4). The RMV will either provide forms for the operator to use in submitting this written testimony or the operator may, at her own expense, have the proceeding transcribed or recorded by a court reporter. *Id.* 540 C.M.R.11.02 then describes how it will address the Report of Refusal Form submitted by the police officers, it does not confine review to those forms: 540 C.M.R. 11.02(5)(a)-(b). Finally, 540 C.M.R. 11.02 does not limit appeal to the Refusal Form. In fact, it makes no mention of appeals at all. The Court finds, therefore, that 540 C.M .R. 11.02 is not inconsistent with or contradictory to the goals of 501 C.M.R. 9.05(6).

4. 801 C.M.R. 1.03

Wasserman next argues that the hearing officer violated 801 C.M.R. 1.03(6)(a)(1)(a) by receiving documents from the police, ex parte, following the hearing and by thereafter relying on those documents in making his decision. This argument was not presented in Wasserman's complaint and is therefore not properly before the court. Nonetheless, the statutory scheme clearly permits the hearing officer's receipt of these documents. 801 C.M.R. 1.03(6)(a)(2) permits the hearing officer, upon his own motion, to "accept or require the submission of additional evidence of the substance of a communication prohibited by 801 C.M.R. 1.03(6)." Moreover, 540 C.M .R. 11.02(5)(c) states that the hearing officer "shall have leave to adjourn the hearing at any point to obtain further evidence." The operator is thereafter allowed to "review such additional evidence and submit such counter affidavits or other rebuttal evidence as he or she desires, before the hearings officer concludes the hearing." *Id.* The hearing officer's receipt of materials from the Revere Police Department after the hearing was adjourned was proper. Therefore, the Court finds that 540 C.M.R. 11.02 is not inconsistent with or contradictory to the goals of 801 C.M.R. 1.03.

**16* As a result of the previous careful review, the Court finds no substantial errors of law with respect to the relationship between 540 C.M.R. 11.02 and the APA, the Chemical Test Refusal Law, 501 C.M .R. 2.52, 501 C.M.R. 9.05(6), and 801 C.M.R. 1.03. None are apparent on the record and none that are argued by the plaintiff can be said to adversely affect her material rights. Defendant's Motion for Judgment on the Pleadings on Count II and III as to these claims of the plaintiff's Complaint is, therefore, allowed.

B. The Administrative Procedure Act (G.L. c. 30A, § 11(8))

Wasserman challenges the validity of the hearing officer's decision under G.L. c. 30A, § 11(8). The APA states that at the conclusion of the hearing "each agency decision shall be in writing or stated in the record ... [and] shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision ..." *Id.* Wasserman argues that the hearing officer failed to accompany its decision with a statement of reasons for the decision, including each issue of fact and law.

In this Court's opinion, the hearing officer's decision did include a determination of each issue of fact and law necessary to the decision. The hearing officer concluded, citing the evidence upon which he relied, that the police officers had reasonable grounds to believe that Wasserman was operating a motor vehicle under the influence of intoxicating liquor, that she was placed under arrest, and that she refused to submit to a breath test. Pursuant to the Chemical Test Refusal Law, these are the only factual determinations that the hearing officer is required to make. G.L. c. 90, § 24(1)(f).

Moreover, contrary to Wasserman's assertions, the hearing officer further addressed each of her arguments presented at the hearing, (1) that she did not knowingly refuse the test, (2) that the police interfered with her right to counsel by not waiting until her attorney arrived before asking her to take the breath test, and (3) that the signatures on the Report of Refusal Form B had been placed incorrectly according to which officer witnessed the refusal and to which officer the refusal was made. Therefore, the Court finds no substantial errors of law with respect to the statutorily required elements of the hearing officer's decision that are apparent on the record and adversely affect the material rights of the plaintiff.

Defendant's Motion for Judgment on the Pleadings on plaintiff's Count II as to this claim of plaintiff's Complaint is therefore allowed.

IV. The Evidence Supporting the Hearing Officer's Decision

Finally, Wasserman directly challenges the hearing officer's decision. The appropriate standard of review for a decision of an agency in an administrative proceeding that is quasi-judicial in nature is determined according to "the nature of the action sought to be reviewed." *Cepulonis v. Comm'r of Corr.*, 15 Mass.App.Ct. 292, 293 (1983). See also *Fire Chief of East Bridgewater*, 47 Mass.App.Ct. at 69. In this case, G.L. c. 90, § 24(1)(g) directs that the findings made pursuant to the RMV's administrative hearing shall be reversed if the reviewing court finds that the RMV "exceeded its constitutional or statutory authority, made an erroneous interpretation of law, acted in an arbitrary or capricious manner, or made a determination which is unsupported by the evidence in the record."

*17 As the District Court Judge (Brant, J.) noted, this standard is analogous to that performed under a "substantial evidence" test pursuant to the APA, which also governs adjudicatory hearings by administrative agencies. G.L. 30A, § 14(7)(e). See generally *Khodaverdian v. Dept. of Employment & Training*, 39 Mass.App.Ct. 414, 414-415 (1995). This Court will therefore review the findings below to determine whether they were supported by "substantial evidence on the record as a whole." See *Fire Chief of East Bridgewater*, 47 Mass.App.Ct. at 69-70, citing *Georgetown v. Essex County Retirement Bd.*, 29 Mass.App.Ct. 272, 274 (1990). It will not disturb the findings below unless substantial errors of law, which are apparent on the record, have adversely affected the material rights of the plaintiff. *Fire Chief of East Bridgewater*, 47 Mass.App.Ct. at 70.

Wasserman argues that the hearing officer's decision is not supported by substantial evidence on the record as a whole because (1) she did not give a voluntary, knowing, and intelligent refusal to take the breath test, (2) that her right to counsel was infringed when the police did not wait for her attorney to arrive prior to asking her to take the breath test, (3) the Report of Refusal Form A was not used by the police officers as it should have been, (4) the Report of Refusal Form B was completed incorrectly, and (5) the hearing officer failed to make explicit findings with respect to each of the aforementioned issues. As previously discussed, no voluntary, knowing, and intelligent waiver standard applies in the present case and Wasserman did not have a right to counsel prior to deciding whether to take or refuse a breath test. See II(A) and II(B)(1) of the discussion section *supra*. Wasserman's other arguments are addressed below.

A. Report of Refusal Form A & B

In essence, Wasserman states that there exists a Report of Refusal Form A which the police officers were required to complete.[17] She also states that the signatures on the Report of Refusal Form B were placed incorrectly as to which officer witnessed the refusal and as to which officer the refusal was made. Together, Wasserman argues that the evidence precludes the hearing officer from upholding the suspension of her license. This Court disagrees. The absence of the Report of Refusal Form A and the minor error on the Report of Refusal Form B does not diminish the substantial evidence upon which the hearing officer's decision was made.

" 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion," not proof beyond a reasonable doubt. G.L. c. 30A, § 1 (6). This Court finds that it was reasonable for the hearing officer to rely on the following evidence to support the conclusion that the arresting officers had reason to believe she was driving while under the influence of intoxicating liquor and that she refused a breath test. First, the hearing officer received the information contained in Form B that indicated Wasserman had been pulled over for weaving while driving, that she was unsteady on her feet, slurred her speech, smelled of alcohol, and was unable to perform the field sobriety tests as directed. Second, the hearing officer received the information contained in Form B that she was informed of her rights and the consequences of refusal, asked to perform a breath test, and refused. Third, the hearing officer received the affidavit from Wasserman's physician which confirmed that her medication could cause her to experience disorientation and loss of voluntary muscular control, involuntary muscular movement in the eyes, short term memory loss, the inability to properly record and recall events.[18]

B. Explicit Findings in the Hearing Officer's Decision

*18 Wasserman's argument that the hearing officer's decision is unsupported by substantial evidence because of his failure to make explicit findings with respect to the aforementioned claims-(1) the absence of a voluntary, knowing, and intelligent refusal to take the breath test, (2) the infringement of her right to counsel, (3) the failure of the police officers to use Report of Refusal Form A, and (4) the inaccuracies in Report of Refusal Form B-is without merit. The hearing officer's decision begins by summarizing each of Wasserman's arguments and addresses each in turn.

First, the hearing officer specifically finds that it would be "foolish and not in the interest of public safety to overturn a suspension if one was so intoxicated at the time of his/her arrest that he/she could not recall being offered the breathalyzer test or whether he/she refused such test." Second, the hearing officer held, citing to and relying upon *Commonwealth v. Brazelton*, 404 Mass. 783 (1989), that "police officers did not have to wait for [Wasserman's] attorney to appear before asking [her] to take a breathalyzer test." Third, the hearing officer specifically discusses the alleged inaccuracies in the Report of Refusal Form B. Citing primarily to *Commonwealth v. Kelley*, 39 Mass.App.Ct. 448 (1995), the hearing officer concludes that while Wasserman is free to argue that "deviation from meticulous compliance" should result in a ruling in her favor, such minor inaccuracies which do not seriously jeopardize the integrity of the procedure do not so require. Wasserman is correct in stating that the hearing officer's decision does not mention the arresting officers' failure to use Report of Refusal Form A. There is no evidence in the record, however, that this argument was presented before the hearing officer.

This Court therefore finds after a review of the record that there are no substantial errors of law with respect to the hearing officer's decision which adversely affect the material rights of the plaintiff. This Court further finds that the hearing officer's decision was supported by substantial evidence, as confirmed by Judge Brant of the District Court. Defendant's Motion for Judgment on the Pleadings on plaintiff's Count II G and H and Count III B and C of her Complaint is allowed.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendant's Motion for Judgment on the Pleadings on all of plaintiff's Counts is *ALLOWED*.

All Citations

Not Reported in N.E.2d, 18 Mass.L.Rptr. 259, 2004 WL 2049771

Footnotes

1 It is unclear from her pleadings and oral presentation whether (1) it is Wasserman's position that she was simply never asked to take a breath test or (2) it is her position that it should be found, as a matter of fact, that she was not aware if she was asked because she was under the influence of prescription medication, discussed below, that prevented her from voluntarily, knowingly, and intelligently understanding her options and rationally choosing to refuse to take the breath test.

2 "The [RMV] shall provide forms for witnesses to transcribe their testimony to submit it for inclusion in the record, and shall provide reasonable assistance to facilitate such transcription, should it be requested by the operator." 540 C.M.R. 11.02(4). "The [RMV] shall also allow the operator to have the proceeding transcribed or recorded by a court reporter, at the operator's own expense, if ... she so chooses." *Id.* See also 540 C.M.R. 9.05 (3) ("The applicant may record the hearing at ... her own expense by any means ... she chooses that will not substantially interfere with the proceedings").

3 Wasserman argues, for the first time in her reply to the defendant's Motion for Judgment on the Pleadings, that the hearing officer violated 801 C.M.R. 1.03(6)(a)(1)(a) by receiving ex parte documents from the

police after the hearing and relying upon those documents in making his decision. For the resolution of this issue, please see III(A)(4) of the discussion section *infra*.

4 Wasserman argues that G.L. c. 90, § 24(1)(f)(1) requires that all forms promulgated by the RMV be used by the police during a suspension for refusal to take a breath test. The relevant language states: "The police officer before whom such refusal was made shall immediately prepare a report of such refusal. Each such report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such report was made." Wasserman argues that because the RMV has promulgated Form A for use prior to the request of the operator to take a breath test and prior to the suspension of the operator's license, failure to do so results in a violation of the statute. It is not clear, however, whether G.L. c. 90, § 24(1)(f)(1) requires the use of Form A. The plain language of the statute requires an officer to make a report of the refusal after the operator is asked to take a breath test. The statute discusses the use of a single refusal report, not multiple reports.

5 Contrary to Wasserman's assertions, it is my view that the resolution of her criminal case in her favor is entirely irrelevant to the review of the civil administrative proceedings before this Court.

6 The RMV argues that Wasserman's claims are moot because her license was reinstated on September 17, 2001. The Court disagrees. A plaintiff's claims are mooted only if she ceases to have a personal stake in the outcome. See *Blake v. Massachusetts Parole Bd.*, 369 Mass. 701, 703 (1976). Here, Wasserman seeks equitable relief against the RMV in the form of alteration of her records at the RMV. Insofar as the RMV refuses to provide the relief requested, an actual controversy exists between the parties.

7 Wasserman presents constitutional claims in her brief which were argued below, but are not included in her Complaint. In exercise of extreme caution, the Court reviews those claims herein.

8 This argument is made in the alternative. Wasserman maintains, in the first instance, that she was never asked to take a breath test. See n. 1, *supra*.

9 In general, Massachusetts courts have held that "the due process provisions of the Massachusetts Constitution ... afford protection comparable to that supplied by the Fourteenth Amendment [to the United States Constitution]." *Rushworth v. Registrar of Motor Vehicles*, 413 Mass. 265, 270 (1992), quoting *Boston v. Keene Corp.*, 406 Mass. 301, 308 n. 8 (1989). Because the plaintiff has not made a claim that Article 12 provides any greater protection than the Fourteenth Amendment under the circumstances presented, this Court treats the two provisions as equivalent.

10 Indeed, in her briefs Wasserman fails to articulate what fundamental constitutional right is impeded by the statutory scheme set out in the Chemical Test Refusal Law.

11 Although Wasserman has no constitutional right to be confronted with evidence against her, the Chemical Test Refusal Law, and parallel regulation, provides her with some statutory rights with respect to the hearing, as discussed *infra*. G.L. c. 90, § 24(f)(1).

12 Wasserman argues that *Brazelton* stands for the proposition that police interference with a defendant's constitutional right to consult his attorney prior to deciding whether to take a breath test merits sanction. See plaintiff's Memo on Merits of Claims of Unlawful License Suspension, pp. 5-6 (July 23, 2001). Wasserman, however, mis-characterizes the Court's

findings. The Court explicitly held that no right existed, constitutional or otherwise, to consult your attorney prior to deciding whether to take a breath test. *Brazelton*, 404 Mass. at 785.

13 In 1979, the United States Supreme Court upheld the constitutionality of the Massachusetts Implied Consent Law, now referred to as the Chemical Test Refusal Law, in *Mackey v. Montrym*, 433 U.S. 1 (1979). In *Mackey*, a Massachusetts driver sought a declaration that the automatic suspension of his license for his refusal to submit to a breath test following his arrest for an OUI pursuant to G.L. c. 90, § 24, without a pre-suspension evidentiary hearing, violated his right to procedural due process under the Fourteenth Amendment. *Mackey*, 433 U.S. at 3-4. Applying the balancing test set out in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court found that no such pre-suspension process was due, particularly in light of the availability of an evidentiary hearing post-suspension. *Mackey*, 433 U.S. at 11, 15-16. Today, this Court examines the adequacy of the process afforded in the post-suspension hearing under the current version of that law.

14 Wasserman disputes these facts. See n. 1, *supra*.

15 In general, Massachusetts courts treat equal protection claims under the Massachusetts Declaration of Rights identically to claims under the Fourteenth Amendment. See *Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 723 (1999); *Dickerson v. Attorney General*, 396 Mass. 740, 743 (1986); *Doyle v. Dep't of Indus. Accidents*, 50 Mass.App.Ct. 42, 45 (2000).

16 In Count II E of Wasserman's Complaint, she also argues that 540 C.M.R. 11.02 violates G.L. c. 30A, § 8 because it does not require the police officers to provide both Report of Refusal Form A and B for the hearing officer to uphold the suspension. Wasserman argues that the RMV "is bound by the forms it promulgated, including Form A, pursuant to [G.L. c. 30A, § 8]." Section 8 of c. 30A, however, deals with the availability of advisory rulings by an administrative agency. Count II E is therefore not cognizable. Defendant's Motion for Judgment on the Pleadings on plaintiff's Count II E is allowed.

17 See n. 4 *supra*.

18 There is no allegation or indication in the pleadings, the record, or elsewhere that the hearing officer improperly afforded Form B alone *prima facie* status pursuant to 540 C.M.R. 11.02.

19 Contrary to Wasserman's contention, consideration of Dr. Barrett's affidavit makes it more reasonable, rather than less, that she had been driving under the influence and refused the breath test given that the symptoms produced by the medication are also present in one who is very intoxicated.

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441 A.2d 956
District of Columbia Court of Appeals.

WISCONSIN AVENUE ASSOCIATES, INC., et al., Appellants,
v.
2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., et al., Appellees.
GOLD DEPOSITORY AND LOAN COMPANY, INC., Appellant,
v.
2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., et al., Appellees.

Nos. 79-631, 72-1102 and 79-1103.
|
Argued June 17, 1981.
|
Decided Feb. 2, 1982.

Cooperative housing association and individual members brought suit to recover against former officers and/or directors of cooperative and related corporate entities for breach of fiduciary duty and breach of contract. The Superior Court, District of Columbia, William E. Stewart, Jr., Trial Judge, cancelled an indebtedness, transferred title to several apartment units to cooperative, invalidated several provisions of deed of trust and awarded nominal and punitive damages and attorney fees, and, subsequently, enjoined subsidiary of a continuation of a named corporate defendant from selling certain apartment units and found promoter in civil contempt, and appeal was taken. The Court of Appeals, Harris, J., held that: (1) evidence supported finding that corporation had failed to discharge its fiduciary duty to cooperative; (2) evidence supported findings that existence of two notes was not adequately disclosed to prospective apartment purchasers and that terms of notes had been significantly altered from those outlined in assignment of purchase agreement to the detriment of cooperative; (3) evidence supported conclusion that defendants breached their fiduciary duty to cooperative by failing to adequately inform cooperative members of extent of their maintenance obligations; (4) deed of trust provision, under which cooperative was to hold corporation harmless from attorney fees, was illegal and void; (5) deed of trust provision, which permitted corporation to accelerate cooperative's debt on sale or transfer of apartment unit, was void; (6) evidence supported conclusion that corporation had maintained unsold apartment units for purposes other than that specified by assignment agreement; and (7) evidence supported conclusion that the subsidiary was in privity with promoter and was bound by order enjoining selling or leasing of apartments.

Affirmed.

West Headnotes (23)

[1] Corporations and Business Organizations
⇐ Fiduciary nature of relation

Corporations and Business Organizations
⇐ Good faith

Officers and directors of corporation owe fiduciary duty to corporation and its shareholders; such duty requires them to act in good faith in managing affairs of the corporation.

4 Cases that cite this headnote

[2] Corporations and Business Organizations
⇐ Director, officer, or agent of different corporations

Transactions resulting from actions of common directors taken on behalf of both corporations must be deemed presumptively fraudulent.

Cases that cite this headnote

[3] Corporations and Business Organizations
⇐ Fiduciary nature of relation

Promoters of corporation stand in fiduciary relation to both corporation and its stockholders; such duty requires promoters to act with utmost good faith and to disclose fully all material facts to both corporation and its stockholders.

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1 Cases that cite this headnote

[4] Associations
⇐ Officers, committees, and agents
Fiduciary concept is not limited to stock corporations, but applies to membership organizations as well.

1 Cases that cite this headnote

[5] Common Interest Communities
⇐ Declarant, developer, or sponsor in general
Common Interest Communities
⇐ Relationship with unit owners in general
Developers of housing cooperative occupy fiduciary position with respect to individual members of the cooperative.

1 Cases that cite this headnote

[6] Common Interest Communities
⇐ Disclosures, Public Offering Statement, Promotional Materials and Other Requirements
Promoter of cooperative apartment building must disclose completely the terms of the apartment sales and the extent of the financial obligation to be undertaken by the prospective apartment purchasers.

Cases that cite this headnote

[7] Common Interest Communities
⇐ Governing board;members, directors, and officers;committees
In suit in which cooperative housing authority and individual members sought recovery against former officers and/or directors of cooperative and related corporate entities for breach of fiduciary duty and breach of contract and in which it was determined that promoter dominated boards of directors and that the other board members viewed themselves as employees of promoter and had no concept of their roles as officers and directors, evidence supported finding that corporation, which had entered into various agreements with cooperative, had failed to discharge its fiduciary duty to cooperative.

1 Cases that cite this headnote

[8] Common Interest Communities
⇐ Governing board;members, directors, and officers;committees
As fiduciaries, former officers and directors of cooperative housing association and related corporate entities were required to disclose extent of the financial undertakings to members of the cooperative.

Cases that cite this headnote

[9] Common Interest Communities
⇐ Governing board;members, directors, and officers;committees
In suit in which recovery was sought against former officers and/or directors of cooperative housing association and related corporate entities for breach of fiduciary duty and breach of contract, evidence supported findings that existence of two notes, which cooperative executed in favor of corporation, was not adequately disclosed to prospective apartment purchasers and that terms of notes had been significantly altered from those outlined in assignment of purchase agreement to the detriment of cooperative, and conclusion that the treatment of notes constituted an overreaching was not clearly erroneous; limiting defendants' recovery on notes to amounts expended for closing and renovation expenses was proper.

1 Cases that cite this headnote

[10] Common Interest Communities
⇐ Governing board;members, directors, and officers;committees
In suit in which recovery was sought against former officers and/or directors of cooperative housing association and related corporate entities for breach of fiduciary duty

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and breach of contract, evidence supported conclusion that defendants breached their fiduciary duty to cooperative by failing to adequately inform cooperative members of extent of their maintenance obligations.

2 Cases that cite this headnote

[11] Contracts
Public Policy in General
Though courts properly are reluctant to interfere with freedom to contract, it may be necessary to refuse to enforce contractual provisions which operate contrary to public policy.

5 Cases that cite this headnote

[12] Contracts
Contravention of law in general
Contracts which tend to encourage promoters to disregard best interests of corporation must be invalidated.

Cases that cite this headnote

[13] Indemnity
Requisites and Validity of Contracts
Generally, a deed of trust provision purporting to hold a party harmless from attorney fees is enforceable, but courts have discretion to refuse to enforce such provisions in cases in which it would be inequitable to do so.

3 Cases that cite this headnote

[14] Costs
Contracts
Generally, contracting parties are free to agree that attorney fees will be borne by a particular party.

1 Cases that cite this headnote

[15] Contracts
Breach of trust
Deed of trust provision, which was negotiated by promoter on behalf of both cooperative housing association and corporation and under which cooperative was to hold corporation harmless from attorney fees incurred in any action that corporation would become a party to by reason of the deed of trust, was illegal and void, in view of fact that such provision served to foster and insulate breaches of fiduciary duty by corporation.

1 Cases that cite this headnote

[16] Perpetuities
Mortgages and leases
In determining whether restraint imposed on a mortgagor by a due-on-sale clause is reasonable, the quantum of the restraint must be weighed against mortgagee's legitimate interest in protecting his loan.

Cases that cite this headnote

[17] Perpetuities
Mortgages and leases
In light of fiduciary duty owed by corporation to cooperative housing association, deed of trust provision, which permitted corporation to accelerate cooperative's debt on the sale or transfer of an apartment unit, constituted an overreaching by corporation and was void as an unreasonable restraint on alienation of apartment units; such provision was not a necessary control device to prevent "undesirables" from entering the cooperative, and corporation's desire to maintain its loan at current interest rates was not sufficient justification for enforcement of the provision.

1 Cases that cite this headnote

[18] Perpetuities
Mortgages and leases
Deed of trust provision, which provided that cooperative housing association could not prepay the participating financing without corporation's written consent, was unenforceable because it unreasonably

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impaired marketability of the apartment units.

Cases that cite this headnote

[19] Contracts
⇐ Ousting Jurisdiction or Limiting Powers of Court

Deed of trust provision, which gave corporation power to declare cooperative housing association's $945,000 note to be due in full in ten days if deed of trust were declared unenforceable by a court, was unenforceable, in light of fact that it deprived cooperative of its right to redress in court for violations of corporation's fiduciary duty to cooperative.

Cases that cite this headnote

[20] Common Interest Communities
⇐ Governing board;members, directors, and officers;committees

Common Interest Communities
⇐ Damages and other relief

In suit to recover against former officers and/or directors of cooperative housing association and related corporate entities for breach of fiduciary duty and breach of contract, evidence supported conclusion that defendant corporation, to which apartment units were assigned for sole purpose of selling the units, had maintained unsold units for purposes other than that which was specified by assignment agreement; partially rescinding agreement and ordering corporation to reconvey title to unsold units to cooperative, rather than rescinding agreement completely by returning building to corporation and cancelling cooperative's indebtedness, was not abuse of discretion, in light of defendants' oppressive actions.

Cases that cite this headnote

[21] Costs
⇐ Bad faith or meritless litigation

Generally, attorney fees are not to be awarded to either party, but award of attorney fees is appropriate if a party brings or maintains an unfounded suit or withholds action to which opposing party is patently entitled, as by virtue of a judgment or because of a fiduciary relationship, and does so in bad faith, vexatiously, wantonly, or for oppressive reasons.

5 Cases that cite this headnote

[22] Costs
⇐ Particular Actions or Proceedings

In overlitigated suit in which cooperative housing association and individual members sought to recover against former officers and/or directors of cooperative and related corporate entities for breach of fiduciary duty and breach of contract and in which trial court cancelled indebtedness, transferred title to several apartment units to cooperative, invalidated several provisions of deed of trust and awarded nominal and punitive damages, awarding attorney fees to cooperative was not abuse of discretion.

4 Cases that cite this headnote

[23] Injunction
⇐ Successors, assigns, and persons in privity

In suit by cooperative housing association and individual members to recover against former officers and/or directors of cooperative and related corporate entities for breach of fiduciary duty and breach of contract, evidence supported conclusion that wholly-owned subsidiary of a continuation of a named corporate defendant was in privity with promoter and was bound by court's order enjoining defendants and all parties in active concert from selling or leasing certain apartment units, and, thus, court did not err in prohibiting public sale of such units by subsidiary.

3 Cases that cite this headnote

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Attorneys and Law Firms

*959 E. Leo Backus, Washington, D. C., for appellants in Nos. 79-631 and 79-1103.

John H. MacVey, Washington, D. C., for appellant in No. 79-1102.

Richard A. Hibey, Washington, D. C., with whom Robert B. Wallace, Washington, D. C., was on briefs, for appellees.

Before HARRIS, MACK and PRYOR, Associate Judges.

Opinion

HARRIS, Associate Judge:

Appellees, a District of Columbia cooperative housing association and individual members of the cooperative, brought suit in Superior Court charging appellants, former officers and/or directors of the cooperative and various related corporate entities, with breach of fiduciary duty and breach of contract. [1] Appellants challenge the trial court's findings-made after a nonjury trial-of breach of contract and breach of fiduciary duty and the resulting cancellation of indebtedness, transfer of title to several apartment units to the cooperative, invalidation of several provisions of the deed of trust, and award of nominal and punitive damages and attorneys' fees. Appellant Gold Depository and Loan Company (GDLC) seeks reversal of the post-judgment issuance of an injunction on August 10, 1979, preventing it from selling certain cooperative apartments in violation of the final judgments and injunctive order of April 27, 1979. In addition, appellant Laurins disputes the August 10, 1979, finding that he was in civil contempt for noncompliance with the April 27, 1979, final judgment. We affirm the trial court's final judgments and order and its issuance of the injunction prohibiting the sale of apartment units by GDLC. That portion of the appeal which is directed to the civil contempt citation is moot.

I

In November of 1974, A. V. Laurins & Company, Inc., entered into a sales contract with Marjory J. Jawish and Henry Jawish for the purchase of the building at 2720 Wisconsin Avenue, N.W. The parties agreed upon a purchase price of $750,000, consisting of a cash down payment of $75,000, the assumption of two existing mortgages, and the issuance of a third mortgage.

On December 1, 1974, 2720 Limited Partnership (an entity controlled by defendant Laurins) agreed to purchase a $945,000 note to be executed by the yet-to-be-formed 2720 Wisconsin Avenue Cooperative Association, Inc. (Cooperative), in favor of the yet-to-be-formed Wisconsin Avenue Associates, Inc. (Associates). [2]

On December 6, Cooperative and Associates signed an assignment of purchase agreement under which Associates assigned to Cooperative its right to purchase the Jawish property in exchange for a "wrap-around" mortgage in the amount of $945,000 executed by Cooperative in favor of *960 Associates. The sales agreement prepared by defendants stated that the entire corporate indebtedness was $945,000. The settlement sheets also reflected a purchase price of $945,000. The assignment of purchase agreement further provided that Associates would advance all cash required to acquire title to the property.

On the same date, Cooperative and Associates entered into two additional written agreements. First, Cooperative agreed to assign to Associates 100 percent of the membership interests in the cooperative for the sole purpose of selling membership interests to individual apartment purchasers. Secondly, Cooperative and Associates executed 49 mutual ownership contracts which gave Associates the power to transfer the individual apartments to the public.

On the date on which those agreements were signed, Cooperative's board of directors consisted of defendants Laurins, Norman, Baden, Chasen, and Tompkins. The members of the board of directors of Associates then were Laurins, Norman, and Baden. The assignment of purchase agreement was signed on behalf of Cooperative by Laurins and attested to by Baden. Laurins recognized that he owed a fiduciary duty to Cooperative as of that date.

On December 16, 1974, Cooperative executed another note in favor of Associates in the amount of $100,000. An additional note was executed in favor of Associates on September 1, 1975, in the amount of $5,700. The amounts advanced to Associates, totaling $105,700, were broken

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down as $75,000 for the down payment to the Jawishes, $9,365.90 in closing costs, and $21,334.10 in renovation expenses. The assignment of purchase agreement provided that Associates would advance all cash necessary for acquiring title and delineated the terms of such loans. The terms of the December 16, 1974, note, however, differed somewhat from those set forth in the assignment of purchase agreement. [3] The $100,000 note was alluded to in a footnote to the 1974-75 budget; however, there the loan was listed as being in the amount of $84,366 and no interest rate was stated.

Two items of non-recurring income were included in the 1975 maintenance budget as "Estimated Income Items": $9,200 in membership fees and $6,900 in first-year principal payments. [4] These items were used to defray the maintenance expenses for the first year. Largely as a result of the non-recurring nature of these income items, the maintenance budget for the following year increased by 37 percent. Additionally, VAL Management Company, the Laurins-controlled property management organization, was late in preparing the 1976 budget and released the budget in the form of a notice of increase in fees.

On March 18, 1976, Cooperative brought suit in Superior Court charging defendants with breach of fiduciary duty and breach of contract. The trial court ordered that the nonjury trial be bifurcated on the issues of liability and damages.

On October 6, 1976, Associates executed 12 promissory notes in favor of 2720 Limited Partnership. Those notes were secured by the pledge of 11 mutual ownership contracts. Later, the notes were assigned to Co-op Mortgage Investors Limited Partnership (CMI), a Laurins-controlled partnership. [5] On January 5, 1978, Associates executed another promissory note in favor of Management Services Group, Inc., another Laurins-controlled corporation. That note was secured by the pledge of nine mutual ownership contracts.

On June 27, 1978, the trial judge issued his memorandum opinion on the liability issue. The court found that the promoters *961 had breached their fiduciary duty by failing to advise cooperative members of the extent of the financial obligation they were undertaking. Although the court found the disclosure of the $945,000 note to be sufficient, it found that defendants failed to disclose adequately the existence of the $100,000 and $5,700 notes and to sustain their burden of showing the fairness of those transactions to Cooperative. Additionally, the court found that the terms of the $100,000 note were altered significantly to the detriment of Cooperative, and, consequently, that their inclusion constituted an overreaching. See note 3, supra. The court held that Cooperative would be obligated on those notes only to the extent that it received value. A further breach of fiduciary duty was found in Laurins' failure to disclose the anticipated increase in the 1976 maintenance budget. The court, however, found that the breach of fiduciary duty did not rise to the level of fraud.

The court invalidated four provisions of the deed of trust as oppressive and contrary to public policy. First, the court found that the provision which held Associates harmless from attorneys' fees or costs incurred regardless of the outcome of litigation violated the general rule that each party must bear its own costs of litigation. Second, the court struck down the paragraph which provided that the entire debt would be accelerated if a purchaser attempted to resell his unit as an unreasonable restraint on alienation. Next, the court found that the paragraph which provided that Cooperative's members could not prepay the participating financing without defendants consent was unenforceable as a severe impairment of the marketability of the units. Finally, the court declared void the provision that the $945,000 note would become due in full if the deed of trust were adjudicated null and void by a court.

The trial court also concluded that Associates breached its contractual duty to convey the units to purchasers and to prepare the apartments. The court enjoined defendants and all parties in active concert with them from selling or leasing any of the remaining unsold units. Because of Associates' breach of fiduciary duty, the court awarded attorneys' fees to Cooperative.

In addition to the individual defendants, the court held liable a number of corporate entities controlled by Laurins that had served as conduits for the various notes executed by Cooperative. The court dismissed defendants' counterclaims for tortious interference with defendants' contractual relations with tenants, damage to reputation, breach of contract, and negligent performance of contract.

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On August 8, 1978, between the issuance of the trial court's liability and damage opinions, Co-op Investment Bankers (CIB) was formed. During August of 1978, the $945,000 note was transferred to CIB. At that time, the October 6, 1976, promissory notes also were endorsed over to CIB by CMI. On August 23, 1978, the October 6, 1976, notes were transferred to Gold Depository and Loan Company, Inc. (GDLC), a wholly-owned subsidiary of CIB. The January 1978 promissory note also was transferred to GDLC.

On December 18, 1978, the trial court issued its memorandum opinion on the damages issue. On the maintenance fee issue, the court concluded that although plaintiffs had established defendants' liability, they had failed to meet their burden of proof on damages. Accordingly, the court awarded nominal damages in the amount of $1 per plaintiff.

The court rescinded the contractual rights and obligations which the mutual ownership contracts for the 11 unsold apartment units sought to confer on defendants and ordered the defendants to turn over to plaintiffs all rents collected on those units plus the reasonable rental value of the units occupied by defendants. [6]

Because of the breach of fiduciary duty relating to the $100,000 note, the court awarded $30,700 in punitive damages to plaintiffs. For the misrepresentation of the maintenance budget, punitive damages of *962 $500 per purchaser were awarded. Punitive damages for the four unconscionable provisions of the deed of trust were denied.

The court awarded plaintiffs $124,245.16 in attorneys' fees and $9,974.48 in general costs. Finally, defendants were allowed $21,334.10 in renovation costs and $9,365.90 in closing costs relating to the cancellation of $105,700 of indebtedness.

On January 23, 1979, Associates filed a Chapter XI petition in Bankruptcy Court. On March 27, 1979, that petition was dismissed on the basis that it had been filed "in bad faith and for the sole purpose of thwarting plaintiffs' rights within the pending lawsuit in D.C. Superior Court." Three days later, appellants filed a Chapter VII petition with the Bankruptcy Court. On April 27, 1979, the Superior Court entered its order and final judgments. Appellants invoked the automatic stay provision of the bankruptcy laws. The stay, however, was lifted on June 14, 1979, by Judge Whelan of the Bankruptcy Court, who noted that the petition had been filed "for the purpose of delaying and otherwise thwarting the Plaintiffs in the Superior Court proceeding and not with any eye toward any legitimate relief under the Bankruptcy Act."

On July 10, 1979, GDLC demanded payment from Associates on the January 1978 promissory note. On that date, GDLC also sent default letters to Associates concerning the October 6, 1976, promissory notes. The letters stated that failure to make payment by July 16, 1979, would result in the public sale of the 11 apartment units. On July 12, 1979, Cooperative received copies of the default letters issued by GDLC. On July 13, the court issued an order to show cause why GDLC and defendants should not be found in contempt of that portion of the court's final judgment which expressly prohibited the further sale or leasing of the apartment units in question. On August 10, 1979, the court found Laurins in civil contempt of court and enjoined GDLC from selling the apartment units. On October 30, 1979, following the delivery of the mutual ownership contracts to Cooperative in compliance with the August 10, 1979, order, Laurins was purged of contempt.

II

The trial court issued four comprehensive memorandum opinions in this case. When a case is tried without a jury, we may review both as to the facts and the law, but we may not set aside a judgment except for errors of law unless the judgment is plainly wrong or unsupported by the evidence. See D.C.Code 1981, s 17-305(a). That presumption as to the validity of the trial court's findings properly exists, inasmuch as the trial court heard the witnesses' testimony and evaluated their credibility. See, e.g., Edmund J. Flynn Co. v. LaVay, D.C.App., 431 A.2d 543, 546 (1981); In re A.B.H., D.C.App., 343 A.2d 573, 575 (1975); Johnson & Jenkins Funeral Home, Inc. v. District of Columbia, D.C.App., 318 A.2d 596, 597 (1974); Lee Washington, Inc. v. Washington Motor Truck Transportation Employees Health and Welfare Trust, D.C.App., 310 A.2d 604, 606 (1973). Recognizing that limitation on our review function, we proceed to a consideration of the merits.

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III

[1] [2] Officers and directors of a corporation owe a fiduciary duty to the corporation and to its shareholders, which requires them to act in good faith in managing the affairs of the corporation. See, e.g., United States v. Byrum, 408 U.S. 125, 142, 92 S.Ct. 2382, 2393, 33 L.Ed.2d 283 (1972); SEC v. Chenery Corp., 318 U.S. 80, 85, 63 S.Ct. 454, 458, 87 L.Ed. 626 (1943); McKay v. Wahlenmaier, 96 U.S.App.D.C. 313, 322, 226 F.2d 35, 44 (1955); Johnson v. American General Insurance Co., 296 F.Supp. 802, 809 (D.D.C.1969). Courts particularly scrutinize transactions between corporations with interlocking directorates, a situation in which two corporations have a majority of their boards of directors in common. Transactions resulting from actions of the common directors taken on behalf of both corporations must be deemed presumptively fraudulent. *963 Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599, 41 S.Ct. 209, 212, 65 L.Ed. 425 (1921); Corsicana National Bank v. Johnson, 251 U.S. 68, 90, 40 S.Ct. 82, 91, 64 L.Ed. 141 (1919); Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp., 84 U.S.App.D.C. 275, 277-282, 173 F.2d 416, 418-423 (1949).

[3] [4] Similarly, promoters of a corporation stand in a fiduciary relation to both the corporation and its stockholders, which requires them to act with the utmost good faith and to disclose fully all material facts to both the corporation and its stockholders. McCandless, Receiver v. Furlaud, 296 U.S. 140, 156-57, 56 S.Ct. 41, 45-46, 80 L.Ed. 121 (1935); Dickerman v. Northern Trust Co., 176 U.S. 181, 203-04, 20 S.Ct. 311, 319, 44 L.Ed. 423 (1900); Post v. United States, 132 U.S.App.D.C. 189, 198, 407 F.2d 319, 328 (1968), cert. denied, 393 U.S. 1092, 89 S.Ct. 863, 21 L.Ed.2d 784 (1969); Bailes v. Colonial Press, Inc., 444 F.2d 1241, 1244 (5th Cir. 1971); Earle R. Hanson & Associates v. Farmers Cooperative Creamery Co., 403 F.2d 65, 70 (8th Cir. 1968). The fiduciary concept is not limited to stock corporations but applies to membership organizations as well. Post v. United States, supra, 132 U.S.App.D.C. at 199, 407 F.2d at 329.

[5] [6] Like promoters or directors of a corporation, developers of a housing cooperative occupy a fiduciary position with respect to the individual members of the cooperative. The promoter of a cooperative apartment building must disclose completely the terms of the apartment sales and the extent of the financial obligation to be undertaken by the prospective apartment purchasers. Northridge Cooperative Section No. I v. 32nd Avenue Construction Corporation, 2 N.Y.2d 514, 527, 141 N.E.2d 802, 808, 161 N.Y.S.2d 404, 412, (1957) (Northridge).

[7] On December 6, 1974, when the various agreements between Associates and Cooperative were executed, the corporations shared a common majority of their boards of directors-defendants Laurins, Norman, and Baden. The trial court found that the promoter, defendant Laurins, dominated the boards of directors and that the other board members viewed themselves as employees of Laurin and had no concept of their roles as officers and directors of the respective corporate entities. Laurins prepared and executed the documents relating to the sale of the apartment building on behalf of both Cooperative and Associates. Defendants, as developers and directors of the cooperative, clearly owed fiduciary duties to its members.

The trial court found that those fiduciary duties commenced on December 1, 1974, the date on which it became clear that Laurins intended to sell his rights in the apartment building to Cooperative. Laurins testified that he recognized his fiduciary obligation as of December 6, 1974, the date on which Cooperative was incorporated and on which the various agreements between Associates and Cooperative were executed. Laurins and his codefendant Norman testified that they discharged their fiduciary obligations to Cooperative by "play-acting," a role-playing technique in which one defendant played the part of Cooperative and the other purported to represent the interests of Associates. The trial court, however, found that the play-acting "fail(ed) to rise to any acceptable level of performance of a fiduciary in behalf of his corporation" and characterized the play-acting as a means of determining just how far the developers could go. The trial court did not err in concluding that Associates failed to discharge its fiduciary duty to Cooperative.

IV

[8] [9] Appellants challenge the trial court's finding that defendants had not disclosed adequately the existence of two notes in favor of Associates totaling $105,700 and

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had not sustained the burden of showing the fairness of those transactions to Cooperative. As fiduciaries, defendants were required to disclose the extent of the financial undertakings to the members of Cooperative. See Northridge, supra, 2 N.Y.2d at 527, 141 N.E.2d at 808, 161 N.Y.S.2d at 412. The sales agreement signed by the members indicated that the total corporate indebtedness was limited to $945,000. Under the terms of the assignment of purchase *964 agreement, Associates agreed to advance any additional cash required by Cooperative to obtain title to the apartment building. The trial court found, however, that the existence of those two notes, which were signed by Laurins and attested to by Baden, was not disclosed adequately to prospective apartment purchasers. Therefore, it was not error to limit defendants' recovery on those notes to the amounts expended for closing and renovation expenses. [7]

Not only did the trial court find that defendants failed to disclose the existence of the two notes, but it also found that the terms of the notes had been significantly altered from those outlined in the assignment of purchase agreement to the detriment of Cooperative. The record amply supports those findings. The trial court's conclusion that the treatment of the notes constituted an overreaching was not erroneous.

V

[10] Defendants also failed to disclose the substantial increase in Cooperative's maintenance fees anticipated after its first year of operation. Defendant Laurins testified that by March 1975, he was aware of the expected increase in fees for the following years, but he failed to notify prospective purchasers of the increase. Consequently, Cooperative members were misled by the maintenance figure appearing in the 1975 budget. Two items of non-recurring income improperly were included in the 1975 maintenance budget: membership fees and first-year principal payments. [8] The trial court heard uncontradicted expert testimony that the inclusion of these items in income violated sound accounting principles. Additionally, the trial court found that the maintenance fee disclosure problem was exacerbated by the failure of defendant VAL Management Company to prepare the 1976 maintenance budget on time. The trial court concluded that in failing adequately to inform the cooperative members of the extent of their maintenance obligations, defendants breached their fiduciary duties to Cooperative. We find no error in that conclusion.

VI

[11] [12] Although courts properly are reluctant to interfere with the freedom to contract, it may become necessary to refuse to enforce contractual provisions which operate contrary to public policy. In particular, careful scrutiny must be given to contractual provisions in situations in which one of the contracting parties acts as a fiduciary to the other party. Contracts which tend to encourage promoters to disregard the best interests of the corporation must be invalidated.

[13] The trial court invalidated four provisions of the deed of trust which it found to be unconscionable and violative of public policy. First, the court held that the paragraph of the deed of trust which held Associates harmless from attorneys' fees was unenforceable. [9] Such provisions are *965 common in deeds of trust in the District of Columbia. See In re Wolman, 314 F.Supp. 703, 705 (D.Md.1970). These provisions generally are enforced in most jurisdictions, including this one. Manchester Gardens, Inc. v. Great West Life Assurance Co., 92 U.S.App.D.C. 320, 325, 205 F.2d 872, 877 (1953). Courts do, however, have discretion to refuse to enforce such provisions in cases in which it would be inequitable to do so. In Manchester Gardens, the court stated:

> (W)here the merit or necessity of the creditor's claim or defense is successfully challenged, courts may decline to enforce attorney's fee provisions. * * * In no event should the sum allowed be so large as to amount to an undue penalty for taking one's grievance to the courts. (Id., at 326, 205 F.2d at 878 (footnote omitted).)

[14] [15] The trial court found that the challenged provision violated the general rule that each party is to bear its own costs of litigation. Although contracting parties generally are free to agree that attorneys' fees will be borne by a particular party, this provision must be evaluated in light of the fiduciary duty which Associates owed to Cooperative. Normally, attorneys' fees provisions which are enforced by courts are those which indemnify the creditor for attorneys' fees and collection costs if the creditor must institute suit when the debtor defaults on his obligation. In this case, the debtor (Cooperative) sued

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the creditor (Associates) for breach of fiduciary duty. This particular attorneys' fees provision, negotiated by Laurins on behalf of both Cooperative and Associates, served to insulate Associates from suit by Cooperative based upon a breach of fiduciary duty. Not only did this provision have the potential to function as a weapon used by the fiduciary to discourage litigation, but in this case defendants actually invoked the provision and offset its attorneys' fees against rental payments which it owed to Cooperative.

Furthermore, the trial court concluded that the attorneys' fees provision was too broad because it required Cooperative to pay Associates' legal fees regardless of the outcome of any litigation. Such a provision is impermissibly broad in that it permits "a party who breaches a contract to rely on the same contract to reimburse it for expenses, such as attorney's fees, which arose out of the breach." First Atlantic Building Corp. v. Neubauer Construction Co., 352 So.2d 103, 106 (Fla.Dist.Ct.App.1977). Thus, we see no error in the trial court's conclusion that this contract clause, which served to foster and to insulate breaches of fiduciary duty by Associates, is illegal and void.

The trial court also voided the provision of the deed of trust which permitted Associates to accelerate the entire debt upon the sale or transfer of an apartment unit.[10] This clause, commonly referred to as a "due-on-sale" clause, provided that any refinancing by the new purchaser with Associates be made at the highest prevailing legal rate of interest. The trial court found no legitimate justification for the overreaching provisions of the clause and concluded that it constituted an unreasonable restraint on alienation.

*966 Although a due-on-sale clause may appear unexceptionable, it can severely restrict the mortgagor's ability to alienate his property freely. During inflationary periods, a purchaser's ability to assume the existing mortgage on a piece of property may determine whether he is willing and financially able to make the purchase. If he is forced to refinance the mortgage at a higher interest rate, the price that he is willing to pay for the property will decrease correspondingly. See Note, Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability, 27 Stan.L.Rev. 1109, 1113 (1975). This due-on-sale clause not only permitted the mortgagee to accelerate the debt upon transfer or sale of the property, but also mandated that the refinancing-available at the sole option of the mortgagee-be at the highest legal interest rate. Thus, the due-on-sale clause substantially impaired the mortgagor's ability to resell his property.

[16] [17] The quantum of restraint imposed on a mortgagor by a due-on-sale clause must be weighed against the mortgagee's legitimate interests in protecting his loan to determine whether the restraint is reasonable. See generally, Annot., 69 A.L.R.3d 713, 734 (1976). The mortgagee has a legitimate interest in protecting against the impairment of his security and the risk of default. When these interests are jeopardized by a change in ownership of the property, enforcement of a due-on-sale clause may be reasonable. Wellenkamp v. Bank of America, 21 Cal.3d 943, 950-51, 582 P.2d 970, 975, 148 Cal.Rptr. 379, 384 (1978); Tucker v. Lassen Savings and Loan Association, 12 Cal.3d 629, 638-39, 526 P.2d 1169, 1175, 116 Cal.Rptr. 633, 639 (1974); Nichols v. Ann Arbor Federal Savings & Loan Association, 73 Mich.App. 163, 169, 250 N.W.2d 804, 807 (1977). At trial, Associates claimed that the due-on-sale clause was a necessary control device to prevent "undesirables" from entering the cooperative. The trial court did not err in concluding that this interest was protected adequately by admission procedures established by the by-laws and the rules and regulations of Cooperative.

Associates argues that the due-on-sale clause was necessary to protect its interest in maintaining its loan at current interest rates. A lender's desire to maintain its loan at current interest rates is not sufficient justification for enforcement of a due-on-sale clause. Wellenkamp v. Bank of America, supra, 21 Cal.3d at 952, 582 P.2d at 976, 148 Cal.Rptr. at 385; Tucker v. Lassen Savings and Loan Association, supra, 12 Cal.3d at 639 n.10, 526 P.2d at 1175 n.10, 116 Cal.Rptr. at 639 n.10; Nichols v. Ann Arbor Federal Savings & Loan Association, supra, 73 Mich.App. at 174, 250 N.W.2d at 809. We find no legitimate interests of Associates which justify the restraint on alienation of the apartment units resulting from the inclusion of the due-on-sale clause in the deed of trust.

Defendant Laurins structured the clause in his best interests as the lender rather than in the best interests of Cooperative, with respect to which he was a fiduciary. The due-on-sale clause protected his interest as a lender in maximizing his income from the loan and ignored

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Cooperative's interest in preserving the marketability of apartment units. Although we do not reach the general validity of due-on-sale clauses in deeds of trust in the District of Columbia, we agree with the trial court that in light of the fiduciary duty owed by Associates to Cooperative, this particular clause constituted an overreaching by Associates and is void as an unreasonable restraint on the alienation of the apartment units.

[18] The trial court also invalidated the paragraph of the deed of trust which provided that Cooperative could not prepay the participating financing without Associates' written consent.[11] Any attempt to prepay the underlying financing would accelerate *967 the entire indebtedness. Associates argues that the clause was necessary to prevent Cooperative from refinancing the debt when interest rates fell and denying defendants the benefit of their bargain. This argument must be considered in conjunction with defendants' position on the due-on-sale clause.

On the one hand, the due-on-sale clause permitted Associates to take advantage of higher interest rates during times of inflation, while on the other hand, the prohibition against prepayment prevented Cooperative from refinancing its mortgage during times of lower interest rates. We conclude that this clause, like the due-on-sale clause, was included in the deed of trust without consideration of the best interests of Cooperative. The trial court did not err in finding that the prepayment clause was unenforceable because it unreasonably impaired the marketability of the apartment units.

[19] Finally, the trial court refused to uphold that portion of the deed of trust which gave Associates the power to declare the $945,000 note due in full in ten days if the deed of trust were declared unenforceable by a court.[12] The court concluded that the provision "operated wholly to the benefit of the defendants at the time that they owed plaintiffs a duty of loyalty which included a prohibition against overreaching." Like the attorneys' fees clause, this paragraph deprived Cooperative of its right of redress in court for violations of the fiduciary duty owed by Associates to Cooperative. The court did not err in concluding that the provision was unenforceable.

VII

[20] The trial court found that Associates failed to perform two of its contractual duties: to convey the units to purchasers and to perform its apartment preparation duties. Title to the apartment units was assigned to Associates for the sole purpose of selling those units to the public. Associates pledged 11 mutual ownership contracts as collateral for the October 6, 1976, and January 1978 promissory notes in clear violation of the assignment agreement. We are unpersuaded by defendants' argument that their actions in pledging the mutual ownership contracts were necessitated by mounting legal fees in the suit brought by Cooperative. The record amply supports the trial court's conclusion that "since the instigation of this litigation, Associates has maintained the unsold units for every purpose *968 but that which is specified by the agreement."

The trial court partially rescinded the assignment agreement between the two parties and ordered defendants to reconvey title to the 11 unsold units to Cooperative. Appellants claim that the proper remedy would have been to rescind the agreement completely by returning the building to Associates and by cancelling Cooperative's indebtedness. We conclude, however, that in light of the oppressive actions by defendants, the court did not abuse its discretion in fashioning an equitable remedy.

VIII

[21] [22] Appellants also challenge the award of attorneys' fees to Cooperative. Attorneys' fees generally are not awarded to either party in a lawsuit. The award of attorneys' fees is appropriate, however, "where a party brings or maintains an unfounded suit or withholds action to which the opposing party is patently entitled, as by virtue of a judgment or because of a fiduciary relationship, and does so in bad faith, vexatiously, wantonly, or for oppressive reasons." 1901 Wyoming Avenue Cooperative Association v. Lee, D.C.App., 345 A.2d 456, 464-65 (1975); accord, AFSCME v. Ball, D.C.App., 439 A.2d 514 (1981); Biggs v. Stewart, D.C.App., 418 A.2d 1069, 1071 n.7 (1980); Bay General Industries, Inc. v. Johnson, D.C.App., 418 A.2d 1050, 1057 n.20 (1980); Trilon Plaza Co. v. Allstate Leasing Corp., D.C.App., 399 A.2d 34, 37 (1979); Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Association, Inc., D.C.App., 385 A.2d 20, 24 (1978); F. W. Berens

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Sales Co. v. McKinney, D.C.App., 310 A.2d 601, 602 (1973); Continental Insurance Co. v. Lynham, D.C.App., 293 A.2d 481, 483-84 (1972). After an examination of the voluminous record (nearly 5,000 pages) in this overlitigated case (the full history of which could not feasibly be set forth in this opinion), we conclude that the trial court did not abuse its discretion in awarding attorneys' fees to Cooperative.

IX

[23] Appellant Gold Depository and Loan Company challenges the post-judgment issuance of an injunction barring the public sale of the 11 apartment units which it held as security for the October 6, 1976, and January 5, 1978, promissory notes which had been issued by Associates. GDLC claims that the prohibition on the sale of the remaining unsold apartment units did not apply to the lien which it held on the units. It argues that in foreclosing on the promissory notes (which were in default), it was not acting in concert with the defendants named in the injunction, but merely was protecting its own security interest. [13]

The pledge of the 11 mutual ownership contracts as collateral for the promissory notes by Associates clearly contravened the purpose of the assignment agreement. See Part VII, supra. The promissory notes then were transferred to a series of Laurins-controlled entities. See Part I, supra. The trial court found that CIB (one of the last holders) was a continuation of CMI, a named defendant in the Superior Court litigation, through its sole general partner, Real Estate Equity Management. See notes 1 and 2, supra. CIB then transferred the promissory notes to GDLC, its wholly-owned subsidiary and another Laurins-controlled entity. Thus, the record supports the trial court's conclusion that GDLC, a wholly-owned subsidiary of a continuation of a named defendant, was in privity with defendant Laurins and, therefore, was bound by the court's order. The attempted foreclosure by GDLC was an effort by defendants to circumvent the court's order enjoining defendants and all parties in active concert from selling or leasing the apartments in question. The trial court did not err in prohibiting the public sale of the 11 units by GDLC.

X

Also challenged is the trial court's finding that defendant Laurins was in civil contempt *969 of the court's final order for his refusal to turn over title to the 11 apartment units to Cooperative. However, Laurins purged himself of contempt by returning the mutual ownership contracts to Cooperative. On October 13, 1979, the trial court set aside the contempt order. The appeal of the contempt citation accordingly is moot. Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co., 610 F.2d 1141, 1145 (3d Cir. 1979); 15A Cyclopedia of Federal Procedure s 87.104 (3d ed. Supp. 1981).

XI

In summary, the trial court did not err in concluding that defendants breached their contractual and fiduciary duties. Accordingly, we affirm the trial court's rulings on liability and damages. We also affirm the issuance of an injunction barring the sale of apartment units by GDLC. The appeal of defendant Laurins' civil contempt citation is moot.

All Citations

441 A.2d 956

Footnotes

1 The action in the trial court was brought by 2720 Wisconsin Avenue Cooperative Association, Inc., and 25 members of the cooperative. For purposes of these appeals, we refer to the plaintiffs collectively as "Cooperative." We refer to Wisconsin Avenue Associates, Inc. (Associates), Aleksandrs V. Laurins, and the following individuals and corporations collectively as "defendants": VAL Management Company, Inc., Metropolitan Mortgage Bankers, Inc., James G. Norman, Charlene Baden, Carol A. Tompkins, Wayne A. Chasen, Real Estate Equity Management, Inc., Scenic Travel, Inc., Real Development Management, Inc., Conference Management Group, Inc., and Security National Bank.

2 The $945,000 note in favor of Associates was negotiated to 2720 Limited Partnership on December 13, 1974, to Real Development Management, Inc., on December 17, 1974, and to Co-op Mortgage Investors Limited Partnership (CMI)

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on December 20, 1974. All of these entities were owned or controlled by defendant Laurins. In August of 1978, the note was transferred without consideration to Co-op Investment Bankers (CIB). The trial court found that CIB was a mere continuation of CMI.

3 The interest rate provided in the December 6, 1974, assignment of purchase agreement was 8.5%, while the $100,000 note actually carried an interest rate of only 8.0%. The payout period was reduced from 23 to 13 years, with a large ("balloon") payment to be made at the end.

4 Principal payments began November 1, 1975. No principal payments were required in the first year.

5 Real Estate Equity Management, a named defendant in the Superior Court litigation, was the sole general partner of CMI.

6 Associates received credit for the maintenance fees that it had paid on those 11 units.

7 The trial court permitted a recovery in the amount of $30,700-$9,365.90 in closing costs and $21,334.10 in renovation expenses. The court did not err in refusing to reimburse Associates for the $75,000 down payment made to the Jawishes for the property. Although Associates agreed to make a cash down payment of $75,000 as part of the purchase price of $750,000 from the Jawishes, the total purchase price agreed upon for the sale from Associates to Cooperative was $945,000, not $945,000 plus the $75,000 cash down payment.

8 See note 4 and accompanying text, supra.

9 That paragraph provided:

Grantor shall save Beneficiary and Trustees harmless from all costs and expenses, including reasonable attorneys' fees, and costs of a title search, continuation of abstract and preparation of survey, incurred by reason of any action, suit, proceeding, hearing, motion or application before any Court or administrative body in and to which Beneficiary or Trustees may be or become a party by reason of this Deed of Trust, including but not limited to condemnation, bankruptcy, and administration proceedings, as well as any other of the foregoing wherein proof of claims is by law required to be filed or in which it becomes necessary to defend or uphold the terms of this Deed of Trust, and all money paid or expended by Beneficiary or Trustees in that regard, together with interest thereon from day of such payment at the rate provided in the note, shall be secured hereby and, shall be payable by Grantor to Beneficiary or Trustees, as the case may be, within five (5) days after demand.

10 That clause, in its entirety, stated:

In the event of the sale, conveyance, or transfer of all or any part of the Premises by the Grantor, Beneficiary may accelerate the entire principal due on the Note. In the event of a sale, conveyance, or transfer of an interest in the Grantor which includes the right of possession to a part of the Premises, Beneficiary may accelerate that portion of the total indebtedness secured hereby which said owner of an interest in Grantor has secured by executing his promissory note to Grantor pursuant to the provisions of paragraph 27 herein. Beneficiary may at his sole option elect to refinance said portion of this indebtedness for the Grantor if the sale of said interest is made to a person whom the Beneficiary, in its sole judgment, believes to be financially capable of supporting the portion of the indebtedness he will be responsible for. Said refinancing may be made at the highest prevailing legal rate of interest. The primary responsibility of repaying the refinanced portion or portions of the total indebtedness secured by this Deed of Trust shall remain with Grantor.

11 That paragraph provided:

Grantor covenants and agrees not to exercise any right or privilege of prepayment of the Participating Financing and further covenants and agrees not to enter into any agreement with the holder of the Participating Financing modifying or amending any of the provisions dealing with payment of principal or interest thereunder without the prior written consent of the Beneficiary. In consideration of the financing provided by Beneficiary under the provisions of this Deed of Trust, Beneficiary is irrevocably constituted sole and exclusive agent and attorney in fact for Grantor to arrange, at Beneficiary's sole discretion to refinance any or all of the Participating Financing or debt due under the terms of this Deed of Trust if such action is desired by Beneficiary. Such agency shall include the authorization of Grantor for Beneficiary to execute on Grantor's behalf all documents required by any lender to accomplish said refinancing. In the event the Grantor shall not have the power to delegate to Beneficiary the performance of any act required to effect said refinancing, Grantor agrees to execute any documents and provide any such affidavits or representations required of a lender to effect said refinancing. Failure of Grantor to cooperate in all respects with the refinancing of the Participating Interests or debt due hereunder shall be deemed a default under the terms and provisions of this Deed of Trust.

12 That paragraph provided:

Nothing herein contained nor any transaction related hereto shall be construed or shall so operate either presently or prospectively, (a) to require Grantor to pay interest at a rate greater than is now lawful in such case to contract

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for, but shall require payment of interest only to the extent of such lawful rate, or (b) to require Grantor to make any payment or do any act contrary to law; but if any clause and provision herein contained shall otherwise so operate to invalidate this Deed of Trust in whole or in part, then such clauses and provisions only shall be held for naught as though not herein contained and the remainder of this Deed of Trust shall remain operative and in full force and effect. If at any time any law or court decree prohibits the performance of any obligation undertaken herein by the Grantor, or provides that any amount to be paid by the Grantor must be credited against the Grantor's obligations under the Note, the Beneficiary will have the right, on ten (10) days prior notice to the Grantor, to require payment in full of the entire indebtedness secured hereby.

13 Appellant GDLC asserts several other grounds of error which we find to be without merit.

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CERTIFICATE OF SERVICE

I, Henry A. Goodman, attorney for the Plaintiff Appellant, certify that on this, the 13th day of April, 2017, I served a copy of Amicus Motion for Leave to File Brief and Brief, to the following attorneys of record:

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