NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS
PREPARED BY THE COURT

ASBURY PARK LAW CENTER, LLC,

Plaintiff,

vs.

ASBURY GRAND CONDOMINIUM ASSOCIATION, INC., KEVIN O'HARE, TROY PEROTTA, JAMES MORAN, WENTWORTH PROPERTY MANAGEMENT CORP., and ASSOCIATION ADVISORS, LLC,

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
MONMOUTH COUNTY

DOCKET NO. MON-L-4679-14

CIVIL ACTION

OPINION

BRIDGEMEN HOLDINGS, LLC and KEITH ZYLA,

Plaintiffs,

vs.

ASBURY GRAND CONDOMINIUM ASSOCIATION, INC., KEVIN O'HARE, TROY PEROTTA, JAMES MORAN, ASSOCIATION ADVISORS, LLC, SHREEDEVI THACKER, ANDREW MACDONALD, DANIEL BARROS, ESQ., HUBERT CUTOLO, ESQ., CUTOLO MANDEL, LLC, and BONNIE BERTAN,

Defendants,

BONNIE BERTAN and ASSOCIATION ADVISORS LLC,

Third-Party Plaintiffs,

vs.

TOWNSMEN PROPERTIES, LLC and HERB FEHRENBACK

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
MONMOUTH COUNTY

DOCKET NO. MON-L-50-15

(Consolidated with MON-L-4679-14)

CIVIL ACTION

Argued: July 10, 2015
Decided: November 5, 2015

Katie A. Gummer, J.S.C.

Kevin J. Conyngham, Esq., appearing for defendants Asbury Grand Condominium Association, Inc., Kevin O'Hare, Troy Perotta, James Moran, Association Advisors, LLC, Shreedevi Thacker, Andrew MacDonald, and Bonnie Bertan. (Zimmerer, Murray, Conyngham & Kunzier; Kevin J. Conyngham, Esq., on the brief).

Gary E. Fox, Esq., appearing for plaintiffs Bridgemen Holdings, LLC and Keith Zyla. (Fox & Melofchik, LLC; Gary E. Fox, Esq., on the brief).

This matter comes before the Court pursuant to a motion for partial summary judgment brought by defendants Asbury Grand Condominium Association, Inc. ("AGCA"), Kevin O'Hare, Troy Perotta, James Moran, Association Advisors, LLC, Shreedevi Thacker, Andrew MacDonald, and Bonnie Bertan (collectively, "movants" or "defendants") under Docket No. MON-L-50-15. Defendants seek dismissal of Count Four of the Complaint. In Count Four plaintiffs Bridgemen Holdings, LLC ("Bridgemen") and Keith Zyla (collectively, "plaintiffs" or "cross-movants") assert a claim for willful violation of N.J.S.A. 46:8B-1 to -38 (the "Condominium Act" or the "Act"). Plaintiffs' claim is based on an amendment to AGCA's Master Deed. Plaintiffs contend that that amendment resulted in a change to units in violation of N.J.S.A. 46:8B-11. Plaintiffs cross-move for summary judgment as to Count Four of their Complaint. Plaintiffs also had cross-moved for summary judgment with respect to Counts One, Two, and Ten of their Complaint. However, they withdrew that portion of their cross-motion at oral argument.[1] This Court heard oral argument on July 10, 2015.

[1] The defendants in the consolidated matter Asbury Park Law Center, LLC v. Asbury Grand Condominium Association, Inc., Docket No. MON-L-4679-14, filed a submission "in support of" movant's motion for partial summary judgment and submitted a proposed form of order dismissing Count V of the Complaint in Asbury Park Law Center. The plaintiff in that case filed a submission "joining with, and in support of" plaintiff's cross-motion. For the reasons set forth on the record on July 10, 2015, the applications submitted in Asbury Park Law Center, LLC were denied without prejudice as procedurally improper.

FINDINGS OF FACT

The Asbury Grand Condominium Complex is a mixed-use condominium, consisting of twenty-five residential apartment-style units and three commercial-retail units. See Certification of Kevin J. Conyngham ("Conyngham Cert."), Ex. A at ¶10. Asbury Grand Associates, LLC, the developer of the complex, executed and recorded a Master Deed, Certificate of Incorporation, and by-laws for defendant AGCA. Id. at ¶14. Those documents were incorporated into a Public Offering Statement ("POS") that was published and issued to prospective buyers on July 16, 2004. Id. at ¶17. A budget forecast that was attached to the POS provided that commercial units one through four would have a zero percent responsibility toward the assessments for "limited common expenses." Id. at ¶¶17-19. An amendment to the POS, effective October 21, 2004, reduced the number of commercial units from four to three in order to provide space for a common exercise room. Id. at ¶¶20-21. On October 17, 2011, plaintiff Bridgemen purchased commercial condominium units C-1 and C-2, together with an undivided interest in, and to, the general common elements in the condominium. Id. at ¶30.

Article II, section 2.30 of the Master Deed states that "Owner" or "Unit Owner" means "those persons or entities in whom record fee simple title to any Unit is vested as shown in the records of the Monmouth County Clerk . . . ." Id., Ex. C (Master Deed). Article II, section 2.36 defines a "Unit" as:

> a part of the Condominium designated and intended for independent ownership and use, regardless of type; all as more specifically described in Article IV hereof, and shall not be deemed to include any part of the General Common Elements or Limited Common Elements situated within or appurtenant to a Unit. The Unit also includes the proportionate undivided interest in the Common Elements assigned thereto in this Master Deed or any future amendments thereof.

Id. Article IV, section 4.01 of the Master Deed provides that "[e]ach Unit is intended to contain all the space within the area bounded by the interior surface of its perimeter walls and its lowermost floor and its uppermost ceiling." Id. Article IV, section 4.02 of the Master Deed explains that although improvements "which are exclusively appurtenant to a Unit" are included in what is considered the "Unit," those appurtenant improvements include only the improvements that serve an individual Unit "and not any other Unit or portion of the Common Elements . . . ." Id. Article V, section 5.01 identifies "General Common Elements" as "[a]ll appurtenances and facilities and other items which are not part of the Units hereinafter described in Article IV or part of the Limited Common Elements hereinafter described in Section 5.02 . . ." Id. Article V, section 5.02 defined "Limited Common Elements" as the "interior lobby, elevators and stairwells and hallways, to which there is direct access from the interior of the appurtenant Units . . . and shall be for the exclusive use of Owners of such Units." Id. Article XVI, section 16.02 of the Master Deed provides that the "Master Deed may be amended at any time after the date thereof by a vote of at least sixty-seven percent (67%) in interest of all Unit Owners . . . ." Id.

On January 10, 2014, AGCA forwarded correspondence to all unit owners advising them of a proposed amendment (the "Amendment") to the Master Deed. Id., Ex. A at ¶82. The correspondence stated that the amendment was designed to "correct an internal inconsistency within the Master Deed." Id., Ex. D (letter). Specifically, AGCA sought to amend the language of the Master Deed that prohibited the commercial unit owners from having access to, or use of, the Limited Common Elements in the condominium building. Id. In its correspondence to the unit owners, AGCA wrote that "a strict interpretation of Article V, Section 5.02(a)" could be construed as permitting "only the residential units . . . access to the lobby, elevators, stairwells and hallways." Id. AGCA concluded that Section 5.02(a) "implicitly permits the Association to preclude the commercial units from gaining access to the interior of the building . . . , including the roof, gym and trash room." Id. AGCA wrote that the Amendment

was necessary to "permit access to the interior of the building, as the Sponsor intended . . . ." Id. To effect that change, the Amendment would alter the Master Deed's definition of "Limited Common Elements" to include only "[t]he hallways of the second, third, fourth and fifth floors, to which there is a direct access from the interior of the appurtenant residential units." Id.

On January 24, 2014, the Unit owners voted on the Amendment. AGCA reached a quorum by attaining approval of 82.751% of the Unit owners who had voted. Id., Ex. A at ¶92 and Ex. F (Tyree Coachman Cert.). A subsequent tally of votes that included absentee ballots and proxy ballots indicated that 77.486% of the ownership interest had voted in favor of the amendment. Id., Ex. G (Second Tyree Coachman Cert.). Ultimately, 5.265% of interested Unit owners voted against the amendment. Id. The Amendment went into effect on February 7, 2014. Id., Ex. A at ¶92 and Ex. E (Master Deed Amendment).

THE PARTIES' ARGUMENTS

N.J.S.A. 46:8B-11 states that no amendment to a master deed "shall change a unit unless the owner of record thereof . . . shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed."

I. Defendants' Argument in Support of Their Motion

Defendants argue that AGCA properly adopted the Amendment to the Master Deed pursuant to the rules set forth in the Master Deed and by-laws. Defendants contend that the Amendment did not alter plaintiff's units or plaintiff's percentage of ownership interest in the Limited Common Elements. With respect to the amendment process, defendants argue that the amendment was placed before the Membership for approval; the necessary quorum of members were present; and at least sixty-seven percent of all members voted in favor of amending the Master Deed.

Defendants argue that they did not violate N.J.S.A. 46:8B-11 because plaintiff's units were not changed as a result of the Amendment. Defendants note that as defined by the Master Deed, a unit "shall not be deemed to include any part of the General Common Elements or Limited Common Elements situated within or appurtenant to a Unit." Defendants further note that Section 4.02 of the Master Deed states that although improvements "which are exclusively appurtenant to a Unit" are included in what is considered a "Unit," those improvements include only the improvements that serve an individual Unit "and not any other Unit or portion of the Common Elements . . . ." Defendants assert that those provisions unequivocally state that neither the General Common Elements nor the Limited Common Elements are considered part of the "Unit." Defendants argue that the Amendment merely narrowed the scope of what was considered a "Limited Common Element" and had no effect on the Master Deed's definition of "Unit." Defendants conclude that the Amendment did not change plaintiff's "proportionate undivided interest in the Common Elements" because plaintiff's percentage interest remained the same even after the Amendment.

II. Plaintiffs' Argument in Opposition to Defendants' Motion and in Support of Plaintiffs' Cross-Motion

Plaintiffs argue that defendants clearly violated the Condominium Act by adopting the Amendment. Plaintiffs contend that N.J.S.A. 46:8B-11 prohibits an amendment to a master deed that would "change a unit" unless that unit owner consents to the change. Plaintiffs assert that a proportionate share of the Common Elements was included in the two commercial units purchased by Bridgemen. However, plaintiffs argue that Bridgemen did not purchase any share in the Limited Common Elements and, thus, had no legal interest in the Limited Common Elements and had no obligation to pay any of the expenses attributable to the Limited Common Elements. Plaintiffs argue that as a result of the Amendment to the Master Deed, Bridgemen was forced to purchase additional common elements. Plaintiffs contend that the addition or subtraction of common elements constitute a

"change in unit" that could not be effectuated absent affirmative consent as set forth in N.J.S.A. 46:8B-11, citing Thanasoulis v. Winston Towers 200 Association, 110 N.J. 650 (1988).

III. Defendants' Argument in Reply to Plaintiffs' Opposition and in Opposition to Plaintiffs' Cross-Motion

Defendants argue that plaintiffs' reliance on Thanasoulis is not persuasive. According to defendants, Thanasoulis involved an association that had increased the plaintiff's proportionate share in the common expenses by increasing the cost of parking spots to the class of nonresidential tenants, thereby denying the plaintiff the economic value of a portion of his unit by forcing the plaintiff's tenants to rent a parking spot through the association directly. See id. at 652-54. Defendants assert that in contrast the Amendment did not change plaintiff's proportionate undivided interest in the Common Elements. Defendants argue that the Amendment merely converted items that used to be considered "Limited Common Elements" into "General Common Elements." Defendants assert that although the items considered to be "General Common Elements" may have changed, plaintiff's proportionate undivided interest in those elements did not change. According to defendants, Bridgemen has to continue to pay its same proportionate share of the general common element expenses.

Defendants also argue that plaintiffs' interpretation of the meaning of "proportionate undivided interest" does not make practical sense. Defendants assert that according to plaintiffs, adding an item to the list of "General Common Elements" constitutes a "change [in] a unit" under N.J.S.A. 46:8B-11, thus requiring unanimous approval. Defendants argue that foreclosing an association's ability to add common elements, such as elevators, by requiring the express consent of every unit owner is not practical and was not intended by the Legislature when it enacted the Condominium Act.

CONCLUSIONS OF LAW

The Supreme Court of New Jersey revisited the standard to be applied by the trial judge when determining a motion for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520

(1995). The Court focused on whether an existing issue of fact is to be considered "genuine" under Rule 4:46-2 or, in the alternative, merely "of an insubstantial nature" thereby allowing the granting of summary judgment. Id. at 530. The Supreme Court stated that the essence of the inquiry by the trial judge should be the same as is applied in motions for directed verdicts: '"whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."' Id. at 536 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986)).

Thus, the standard for determining whether a "genuine issue" of material fact exists in a summary judgment motion requires the trial court to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." Id. at 540. However, where there "exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for the purposes of Rule 4:46-2." Id. The Court concluded by stating, "[t]he thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

Plaintiffs do not appear to contest the procedures by which defendants ultimately amended the Master Deed, and none of the parties assert the existence of a genuine issue of material fact. Thus, the threshold issue before the Court is whether the Amendment to the Master Deed that re-designated certain Limited Common Elements as General Common Elements was a "change [of] a unit," requiring the consent of the owners of record pursuant to Condominium Act. N.J.S.A. 46:8B-11. If the Amendment was a "change [in] a unit" of plaintiff's units without its consent in violation of the Act, the

Court then must consider whether that violation was willful, as alleged by plaintiffs in Count Four of their Complaint.

The New Jersey Condominium Act governs the creation and operation of condominiums within the State. See Siddons v. Cook, 382 N.J. Super. 1, 6 (App. Div. 2005) (citing N.J.S.A. 46:8B-1 to -38). A condominium is created under the Act by the recording of a master deed. See N.J.S.A. 46:8B-8. Thereafter, a condominium association is "'responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners.'" Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 288 (App. Div. 2014) (quoting N.J.S.A. 46:8B-12). An association must act in accordance with its master deed, by-laws, and the Condominium Act. See Thanasoulis, 110 N.J. at 656. Pursuant to the power granted to an association by its governing documents and the Act, an association may adopt, distribute, amend, and enforce rules governing the use and operation of common elements. See Brandon Farms Prop. Owners Ass'n v. Brandon Farms Condo Ass'n, 180 N.J. 361, 368-69 (2004) (citing N.J.S.A. 46:8B-14(c)).

Section 11 of the Act governs the process for amending a Master Deed. See N.J.S.A. 46:8B-11. The Act provides that a "master deed may be amended or supplemented in the manner set forth therein." Id. However, "no amendment shall change a unit unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed." Id.

The Act defines a "Unit" as "a part of the condominium property designed or intended for any type of independent use . . . includ[ing] the proportionate undivided interest in the common elements and in any limited common elements assigned thereto in the master deed or any amendment thereof." See N.J.S.A. 46:8B-3(o). Article II, Section 2.36 of the Master Deed defines "Unit":

> "Unit" shall mean a part of the Condominium designated and intended for independent ownership and use, regardless of type . . . and shall not be deemed to include any part of

> the General Common Elements or Limited Common Elements situated within or appurtenant to a Unit. The Unit also includes the proportionate undivided interest in the Common Elements assigned thereto in this Master Deed or any future amendments thereof.

See Conyngham Cert., Ex. C (Master Deed). Article IV of the Master Deed also describes what constitutes the boundary of a unit, stating that "[e]ach Unit is intended to contain all the space within the area bounded by the interior surface of its perimeter walls and its lowermost floor and its uppermost ceiling . . . ." Id. at Art. IV, §4.01. Limited Common Elements are "those common elements which are for the use of one or more specified units to the exclusion of other units." See N.J.S.A. 46:8B-3(k). The process for amending the Master Deed is set forth in Article XVI, §16.02 of the Master Deed. The Master Deed provides that it "may be amended at any time after the date thereof by a vote of at least sixty-seven percent . . . in interest of all Unit Owners, at any meeting of the Association duly held in accordance with the provisions of the By-Laws . . . ." Id. at Art. XVI, §16.02. As noted, plaintiffs do not contest the procedure by which the Amendment at issue was adopted.

A court's role in interpreting a statute is "'to determine and effectuate the Legislature's intent.'" See State v. Revie, 220 N.J. 126, 132 (2014) (quoting State v. Friedman, 209 N.J. 102, 117 (2012)). A court is instructed to "'look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.'" Friedman, 209 N.J. at 117 (quoting Pizzullo v. New Jersey Mfrs. Ins. Co., 196 N.J. 251, 264 (2008)). A court must read a statute as a whole and avoid "seiz[ing] upon one or two words as a fixed guide to the meaning of the entirety." Id. (citing Singh v. Sidana, 387 N.J. Super. 380, 386 n.2 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007)). A statute is "'to be read sensibly rather than literally . . . .'" Id. (quoting Mayfield v. Comty Med. Assocs., P.A., 335 N.J. Super. 198, 205 (App. Div. 2000)). The Legislature did not define "change" as it relates to the prohibition against amendments that "change a unit" without consent. See N.J.S.A.

46:8B-11. The Court in Thanasoulis wrote, "we assume that the legislative intent was that a unit owner should retain essentially the same property rights originally deeded to him for as long as he owns his unit, unless he affirmatively consents to their being altered." See 110 N.J. at 663.

Having reviewed AGCA's governing documents, the Condominium Act, and the relevant case law, the Court concludes that the Amendment did not "change" plaintiff's units in violation of N.J.S.A. 46:8B-11. Under the terms of the Master Deed, a Unit owner owns its Unit. See Conynghim Cert., Ex. C., Art. II, § 2.30. The Master Deed unambiguously defines the term "Unit" as not "includ[ing] any part of the General Common Elements or Limited Common Elements situated within or appurtenant to a Unit," but as "includ[ing] the proportionate undivided interest in the Common Elements assigned thereto in this Master Deed or any future amendments thereof." Id., Art. II, § 2.36. Thus, the property right given to the Unit Owner by the Master Deed is not a right to a specific common element, but rather to a "proportionate undivided interest" in the Common Elements. Here, the Amendment to the Master Deed did not alter plaintiff's proportionate undivided interest in the Common Elements. Although the number of Common Elements may have changed, plaintiff's proportionate undivided interest in those elements remained the same. Thus, as defined in the Master Deed, plaintiff did not experience a change in its units or a change in its property rights. Therefore, the Amendment to the Master Deed did not "change a unit," and its adoption was not a violation of N.J.S.A. 46:8B-11. See Conyngham Cert., Ex. C at Art. II, §2.36.

In reaching that decision, the Court notes that the facts of this case differ substantively from the facts of Thanasoulis. See 110 N.J. 650. In Thanasoulis, the defendant association adopted a resolution that required a unit owner's tenant to lease a parking space directly from the association at an increased price. See id. at 663. The Court held that the resolution had the

"effect of confiscating a portion of the property interest [the unit owner] acquired when he purchased his unit, thereby denying plaintiff the economic value of a portion of his unit." Id. The Court focused on the confiscatory effect of the amendment at issue because the Court previously had observed that "'[t]he individual condominium purchaser owns his unit together with an undivided interest in common elements.'" See id. at 657 (quoting Siller v. Hartz Mountain Ass'n, 93 N.J. 370, 375 (1983)). Ultimately, the Court found that that amendment had the effect of reducing the plaintiff's property interest, which therefore constituted a "'change' in the plaintiff's unit in contravention of the Act." Id.

In contrast, the Amendment to the Master Deed had no confiscatory effect on plaintiff's property interest. Instead, the Amendment redesignated certain Limited Common Elements as General Common Elements. Specifically, the lobby, elevators, stairwells, and hallways on the first and sixth floors had existed as Limited Common Elements that were not assigned to plaintiffs. The redesignation of those Limited Common Elements to General Common Elements caused an increase in the number of General Common Elements assigned to plaintiff's units. However, unlike the amendment in Thanasoulis, the adoption of the Amendment did not affect a change in the property owners undivided interest in the Common Elements. AGCA has not acted to confiscate or otherwise alter plaintiff's undivided interest in the Common Elements. Likewise, the Amendment has not changed plaintiff's units based on the definitions of "Unit" set forth in both the Condominium Act and the Master Deed. Plaintiff's units and the undivided interests in the Common Elements assigned to those units after the Amendment are identical to plaintiff's units and undivided interests in the Common Elements assigned to those units before the Amendment.

For all of the foregoing reasons, defendants' motion for partial summary judgment as to Count Four of plaintiffs' Complaint is hereby GRANTED and plaintiffs' cross-motion for partial summary judgment is hereby DENIED. Accordingly, Count Four of plaintiffs' Complaint is dismissed with prejudice.