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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2003-15T2

JAMES MARK EPSTEIN,

Plaintiff-Appellant,

v.

CHERRY PARKE CONDOMINIUM  
ASSOCIATION, INC. AND 1ST  
SERVICE RESIDENTIAL.<sup>1</sup>

Defendants-Respondents.

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Submitted February 13, 2017 – Decided March 3, 2017

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,  
Law Division, Special Civil Part, Camden  
County, Docket No. DC-8515-15.

James Mark Epstein, appellant pro se.

Archer & Greiner, P.C., attorneys for  
respondents (Kimberly A. Capadona, Brett L.  
Carrick and Ashley M. LeBrun, on the brief).

PER CURIAM

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<sup>1</sup> Plaintiff misspelled or misnamed defendants in his pleadings. Defendants' correct names are Cherry-Parke Condominium Association, Inc., and FirstService Residential Midatlantic, LLC.

Plaintiff James M. Epstein, the owner of a unit in Cherry-Parke Condominiums, appeals from a December 7, 2015 Special Civil Part order dismissing with prejudice his complaint against defendants Cherry-Parke Condominium Association, Inc. (the Association), and FirstService Residential Midatlantic, LLC (First Residential). For the reasons that follow, we affirm the dismissal of plaintiff's claims for monetary damages and reverse the dismissal of plaintiff's claims for declaratory relief. We remand the latter claims for the trial court to address under Rule 4:6-2(e).

This action's procedural history is short and uncomplicated. On September 1, 2015, plaintiff filed a Special Civil Part complaint, which he amended and refiled on October 8, 2015. On the face of the form complaint, plaintiff demanded \$15,000. In the body of the complaint, plaintiff sought money damages and declaratory relief.

On October 13, 2015, five days after plaintiff filed his amended complaint, defendants filed a motion seeking an order dismissing the complaint with prejudice. Plaintiff filed opposing papers, defendants replied, and the court conducted oral argument on December 7, 2015. Thereafter, the judge delivered an oral opinion from the bench, granting defendants' motion and dismissing

the complaint with prejudice. The judge filed an implementing order on December 7, 2015, and plaintiff appealed.

Defendants based their motion on the complaint and a certification signed by a portfolio manager for First Residential. The complaint alleged two causes of action. In the first cause of action, subtitled "Declaratory relief," plaintiff alleged the Association's board of directors "had a duty, to act in a reasonable manner in managing the common areas of the [condominium] and in enforcing the [Declaration of Covenants, Conditions and Restrictions] and to be in compliance with all applicable laws." Plaintiff further alleged the Association delegated First Residential "as its authorized agent to implement the management of the [condominium] with the [Declaration of Covenants, Conditions and Restrictions] and to be in compliance with all applicable laws." Plaintiff sought "a judicial determination of his rights and [d]efendants' duties, and a declaration as to the validity of the actions and inactions of [d]efendants who have failed to properly maintain [the condominium] in breach of their contract and fiduciary duty to [p]laintiff."

In the second cause of action, subtitled "Breach of Contract," plaintiff alleged he "paid a monthly fee in consideration for the proper maintenance of common areas" and the Association "owed a contractual and fiduciary duty to [him] not to exercise their

powers to gain pecuniary benefit for themselves or cause plaintiff harm by failing to properly maintain the [condominium's] common areas." Plaintiff also alleged the directors breached their duty by directing that the common exterior areas and the building housing plaintiff's unit not be properly maintained, knowing their action and inaction would harm plaintiff, as plaintiff had "continually and regularly notified [d]efendants of common areas not properly maintained."

Specifically, plaintiff asserted that, as a "direct and proximate result" of the directors' breach of their contractual duty, plaintiff was harmed by defendants' failure to maintain: the cleanliness of the buildings' exterior areas; the pool facility; and the cleanliness of the common areas of the building housing plaintiff's unit. Plaintiff also alleged defendant failed to remedy damage to the condominium buildings' exterior areas, as well as standing water and consequent moisture, mildew, and mold that developed in the building that housed his unit. Plaintiff claimed he had been harmed "in an amount to be proven at trial." He demanded, among other remedies, an order "compelling specific performance by [d]efendants to regularly and properly maintain the [condominium's] common areas" and "general and special damages according to proof."

First Residential's portfolio manager averred in his certification that the Association had been undercapitalized for years and the Association's "account receivables were approximately \$400,000 out of an annual budget of approximately \$570,000." The portfolio manager further averred, among other things, that as a result of the Association's financial condition, the board of trustees . . . was forced to defer certain maintenance projects and make judgments about what repairs needed to be performed and which could be delayed."

Relying upon the complaint and certification, defendants argued the complaint should be dismissed for two reasons. First, settled law precludes a condominium unit owner from pursuing a personal claim against a condominium association for damages resulting from a failure to maintain common elements. Second, defendants argued the "business judgment rule" shields from judicial review decisions of the board concerning budget priorities and maintenance of common elements.

Plaintiff argued in opposition that defendants had not addressed his claims for declaratory relief and specific performance "and thus . . . ha[d] failed to sustain [their] burden on those claims." Plaintiff also explained why he was seeking general and special damages. Lastly, plaintiff argued it was premature to dismiss the complaint based on the business judgment

rule. Defendants filed a reply essentially reiterating their initial arguments.

During oral argument, the judge questioned why the case was not filed in the Chancery Division and on what authority plaintiff was seeking damages. The judge also suggested defendants file a claim for frivolous pleading sanctions. The judge ultimately determined plaintiff had no right to bring this cause of action as an individual unit owner.

On appeal, the parties largely submit the same arguments they raised before the trial court.<sup>2</sup> Our review of the judge's decision is somewhat hampered, however, by some fundamental omissions. Defendants did not mention in their motion papers, moving brief, or reply brief, the rule under which they sought to dismiss the complaint, nor did they provide any analysis of the applicable standard of review. When the trial judge rendered his oral decision, he alluded to neither a rule nor an applicable standard of review. For the first time in their appellate brief,

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<sup>2</sup> The parties raise some arguments they did not present to the trial court however. We decline to address them. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

defendants cite Rule 4:6-2(e) as the applicable rule. Proceeding as if the trial court decided the case under Rule 4:6-2(e),<sup>3</sup> we conclude the judge omitted to analyze, or inadequately analyzed, plaintiff's claim for declaratory and injunctive relief.

Rule 4:6-2(e) authorizes a party to assert by motion, rather than in an answer, the defense of "failure to state a claim upon which relief can be granted." The rule explains what a court shall consider when deciding such a motion:

If, on motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

[R. 4:6-2.]

Thus, a motion to dismiss under Rule 4:6-2(e) "must be based on the pleadings themselves." Roa v. Roa, 200 N.J. 555, 562 (2010). For purposes of such a motion, the "complaint" includes the "'exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir.), cert. denied, 543 U.S. 918,

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<sup>3</sup> Rules 4:5 to 4:9, inclusive (pleadings and motions), apply to the Special Civil Part. R. 6:3-1.

125 S. Ct. 271, 160 L. Ed. 2d 203 (2004)). If "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." R. 4:6-2.

A motion to dismiss "should be granted only in rare instances and ordinarily without prejudice." Smith v. SBC Communs., Inc., 178 N.J. 265, 282 (2004). That standard "is a generous one." Green v. Morgan Props., 215 N.J. 431, 451 (2013). The court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Nevertheless, "the motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

Our review of a trial court's order dismissing a complaint for failure to state a claim is plenary. Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 349 (App. Div. 2012), certif. denied, 213 N.J. 45 (2013). We apply the same standard



as the trial judge. Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008).

Here, plaintiff pled two causes of action based on the Association and its board's failure to maintain common elements: one for breach of contract, the other for declaratory relief. Plaintiff was seeking monetary damages for his breach of contract claim. He noted on the form cover page of his complaint he was seeking \$15,000, and pled defendants' failure to maintain common elements proximately caused harms in an amount to be proved at trial. His attorney stated explicitly during oral argument he was seeking money damages. His damage claim was properly dismissed.

Under the Condominium Act, N.J.S.A. 46:8B-1 to -38, a condominium association may sue a developer for construction defects related to the common elements. Siller v. Hartz Mountain Assoc., 93 N.J. 370, 377, cert. denied, 464 U.S. 961, 104 S. Ct. 395, 78 L. Ed. 2d 337 (1983). In Siller, our Supreme Court noted that "[i]f the individual owner were permitted to prosecute claims regarding common elements, any recovery equitably would have to be transmitted to the association to pay for repairs and replacements." Id. at 381. The Court explained that "[a] sensible reading of the statute leads to the conclusion that such causes of action belong exclusively to the association, which, unlike the individual unit owner, may apply the funds recovered on behalf of

all the owners of the common elements." Ibid. (citing W. Hyatt, Condominium and Homeowner Association Practice: Community Association Law 105 (1981)).

Although Siller involved a claim against a developer, its rationale applies to a unit owner's suit against a condominium association for damages to common elements as well. Here, plaintiff has not asserted a claim for damage to his unit caused by the Association's alleged failure to maintain common elements. Rather, he has asserted he paid condominium fees in consideration of proper maintenance of the common elements, which he has not received. Plaintiff has not asserted a claim for funds that should be distributed to him individually rather than to all the owners of the common elements that have allegedly been neglected. In view of the Court's rationale in Siller, such a claim is not cognizable. The trial court properly dismissed the claim. Plaintiff's breach of contract claim failed to state a cause of action upon which relief could be granted. R. 4:6-2(e).

We now turn to plaintiff's claim for declaratory relief. In Siller, the Court recognized derivative claims:

This is not to say that a unit owner may not act on a common element claim upon the association's failure to do so. In that event the unit owner's claim should be considered derivative in nature and the association must be named as a party. Rule 4:32-5 would be applicable. That Rule governs actions

"brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it."

[Siller, supra, 93 N.J. at 381.]

The Supreme Court also noted that "the association's primary right to sue does not diminish any claim that the unit owner may have against the association." Id. at 382. The Court explained that an "association's board of directors, trustees or other governing body have a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders." Ibid. Thus, "[a]cts of the governing body should be properly authorized. Fraud, self-dealing or unconscionable conduct at the very least should be subject to exposure and relief." Ibid.

The trial court did not address whether the complaint's count for declaratory relief and specific performance, construed under the liberal Rule 4:6-2(e) standard of review, states either a derivative cause of action or a cause of action based on unconscionable or other conduct. For that reason, we remand the matter to the trial court for disposition under the appropriate standard of review.

In remanding this matter, we recognize the complaint is not a model of clarity. But the complaint asserts, among other

allegations, the Association and its directors breached their fiduciary duties, including their duty not to exercise their powers to gain pecuniary benefit for themselves or cause plaintiff harm by failing to maintain common areas. The complaint also alleges the directors breached these duties "by directing the common exterior areas and [building housing plaintiff's unit] not be properly maintained." The trial court was required by Rule 4:6-2(e) to search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action could be gleaned even from these and other arguably obscure statements. See Printing Mart-Morristown, supra, 116 N.J. at 746.

The trial court must also decide whether to consider the certification upon which defendants base their assertion of the business judgment rule. He should state, explicitly, whether he is considering the document. The certification is outside the pleadings, as defendants appear to concede implicitly in their appellate brief. If the judge decides to consider the certification, he must treat the motion as one for summary judgment and afford the parties discovery. See R. 1:6-2.

The parties' remaining arguments were either not made to the trial court or lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only these comments. Plaintiff takes exception to the trial court, sua sponte, alluding

to frivolous pleading sanctions. We are confident defendants are capable, without assistance, of preserving such claims if circumstances warrant. We also note the trial court's concern about whether plaintiff properly brought the action in the Special Civil Part. If warranted, the case should be transferred to the appropriate part, not dismissed with prejudice.

For all the reasons previously expressed, we reverse and remand the matter to the trial court for an appropriate analysis of plaintiff's complaint – except his claim for monetary damages, which was properly dismissed. The court may, in its discretion, permit or require the parties to supplement their pleadings prior to oral argument. The court shall make appropriate findings and conclusions. If the court dismisses the case with prejudice, it shall explain why it is doing so rather than permitting plaintiff to amend his pleading in accordance with Rule 4:6-2(e).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION