SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2561-20

LYNDA THOMSON,

Plaintiff-Appellant,

v.

ATLANTIS CONDOMINIUM ASSOCIATION, GREGORY WIND, GAIL WIND, DEBORAH STRANO, DAVID SHUM, JUSTINE CHAMBERLAIN, and DARLENE RIVERA,

Defendants-Respondents

and

RADAMES RIVERA, KAREN MESISCA, ANDRES FERNANDEZ, DANA FERNANDEZ, THE MALMAN TRUST, SUSAN WETHERELL, JAMES COCCARO, JEAN COCCARO, ROBERT GERONEMO, GINA STELLUTI, MARIA MIGLIORE, ROBERT MANCUSO, BETH ANN MANCUSO and PETER COMPETIELLO,

Defendants.

Submitted March 28, 2023 – Decided August 7, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1488-18.

Steven D. Janel, attorney for appellant.

Goldberg Segalla LLP, attorneys for respondents Atlantis Condominium Association, Gregory Wind, Gail Wind, Deborah Strano, David Shum, Justine Chamberlain, and Darlene Rivera (Michael P. Luongo, on the brief).

PER CURIAM

In this condominium-repair dispute, plaintiff Linda Thomson appeals an order granting defendants' summary-judgment motion. Perceiving no genuine issue of material fact, we affirm.

I.

We discern the material facts from the summary-judgment record, viewing them in a light most favorable to plaintiff, the non-moving party. See Rivera v. Cherry Hill Towers, LLC, 474 N.J. Super. 234, 238 (App. Div. 2022).

The Atlantis Condominium Association is a New Jersey non-profit corporation that operates the Atlantis Condominium in Seaside Heights. The

Association is managed by a board of officers, consisting of a president, vice president, treasurer, and secretary, who are unit owners (the Board). The property consists of fifteen units located on four levels.

In 2005, plaintiff purchased Unit A3, which is located on the ground level. She purchased it as a second home and has never resided there.

Defendants Gregory Wind and Gail Wind were president and secretary of the Association, respectively, in 2012 and own Unit C4. Defendant Deborah Strano was vice president of the Association in 2012 and owns Unit B2. Defendant David Shum was treasurer of the Association in 2012 and owned Unit B4, which he sold in May 2017. Defendant Justine Chamberlain purchased Unit D2 in March 2016 and became vice president on April 1, 2017. Defendant Darlene Rivera purchased Unit A1 in April 2017 and became treasurer in or about May 2017. We refer to these defendants as "the Board defendants" and refer to the Association and the Board defendants collectively as "defendants."

In April 2012, plaintiff's unit sustained damages. According to defendants, a sewer back-up caused the damages. According to plaintiff, the damage was caused by "effluence entering into her unit from damaged pipes in the unit directly above," which was Unit B4, and resulted in plaintiff being "displaced" from her unit. That same month, the Association contacted

contractors to remediate the damages. According to plaintiff, her unit was not "ever properly repaired."

While plaintiff still was "displaced" from her unit, the three ground-level units sustained extensive damage from Hurricane Sandy in October 2012. An insurance adjuster determined those units, including plaintiff's unit, to be a total loss, requiring walls and wiring to be stripped and rebuilt. The units located above the ground level were not directly damaged by Hurricane Sandy.

Following Hurricane Sandy, the Association took action to assist unit owners, including meeting with contractors regarding damage repair and remediation and obtaining insurance proceeds from the Association's insurers. Mold remediation was performed on the ground-floor units, including plaintiff's unit, in January 2013, and additional plumbing and electrical work was performed in 2013.

According to defendants, the Association had to prioritize the order in which the ground-floor units were repaired; it gave first priority to Unit A2 because its elderly and disabled owner resided there and second priority to Unit A1 because full-time tenants resided there; and it gave last priority to plaintiff's unit because it was not her primary residence and no tenants had been displaced. According to plaintiff, the Board targeted her, infringed on her rights as a unit

owner, and acted offensively and aggressively towards her. Plaintiff specifically cites the behavior of defendant Gail Wind, who left her a voice-mail message in 2013 calling her a "cunt" and sent her emails in 2012 and 2013 calling her "ungrateful," "self-centered," "classless," "miserable," and "a nasty POS."

In September 2016, the Federal Emergency Management Agency offered the Association approximately $41,000 to be used to repair the remaining damages from Hurricane Sandy. The Association voted to give those funds directly to plaintiff so that she could use them to complete the repairs to her unit. Plaintiff declined to accept those funds. In March 2017, the remediation and repair of damages in Unit A1 were completed, leaving plaintiff's unit as the only unit still needing repair from the damage caused by Hurricane Sandy. According to plaintiff, the repairs to her unit are still "unfinished" and she "remain[s] out of" her unit.

On April 9, 2018, plaintiff filed a complaint against the Association, the Board defendants, and other individuals she identified as current unit owners whose "rights as such may be affected."[1] Plaintiff asserted the following causes

[1] The trial court subsequently granted an unopposed summary-judgment motion filed by the defendants whom plaintiff had identified as current unit owners, thereby dismissing them from the case. Those defendants did not take part in this appeal.

of action against defendants: breach of contract, based on an alleged failure to perform "a duty" under the Condominium's master deed and the Association's bylaws "to make timely, necessary and appropriate remediation and repairs to her [unit] and the common areas"; breach of fiduciary duty, specifically a duty "to act reasonably and in good faith, as well as to refrain from engaging in self-dealing, fraudulent conduct, or unconscionable behavior"; conspiracy, asserting defendants "acted in concert to commit unlawful acts against [p]laintiff . . . in an effort to keep [her] displaced from her [u]nit . . . for as long as possible"; and negligence, based on defendant Shum's alleged "dispos[al] of building materials through his unit's plumbing system" and defendants' alleged failures "to properly investigate and vet the contractors which were hired to conduct repairs and remediation," "to properly manage the repair and remediation process," and "to properly ensure that the condominium structure was properly secured with emergency repairs." Plaintiff also sought the appointment of a receiver and an accounting.

After multiple adjournments of the discovery end date and after an approximate three-month period following plaintiff's voluntary dismissal of the case without prejudice, defendants moved for summary judgment on January 22, 2021. In opposition to the motion, plaintiff submitted her and her attorney's

certifications. In reply, defendants submitted, among other things, the certification of Gail Wind, who testified that "[t]he common elements to the Atlantis Condominium, including areas around [plaintiff's] unit, were fully restored following Hurricane Sandy" and "[a]ll of the common elements were repaired by July of 2013."

The motion judge heard argument and, on March 30, 2021, issued an order with an attached statement of reasons granting defendants' motion.[2] The judge found the master deed was "clear and unambiguous that unit owners are responsible for all maintenance, repairs and replacements within their units and the cost and expenses of same." He held defendants had demonstrated that no genuine issue of material fact existed to defeat summary judgment and that a rational factfinder could not find in plaintiff's favor on any of the counts in the complaint given the lack of competent evidence supporting her claims.

On appeal, plaintiff argues the motion judge erred in granting the summary-judgment motion because the additional facts she submitted in opposition to the motion required a denial of the motion, the record was "insufficient" to support summary judgment, and genuine issues of material fact

[2] In the order, the judge also denied plaintiff's cross-motion to extend discovery. Plaintiff did not appeal that aspect of the order.

existed as to her breach-of-contract, breach-of-fiduciary duty, and negligence claims.[3] Perceiving no genuine issue of material fact or misapplication of the law, we affirm.

II.

We review a trial court's summary-judgment decision de novo, applying the same standard used by trial courts. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Under that standard, we "must '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 factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Meade v. Township of Livingston, 249 N.J. 310, 327 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

[3] Plaintiff did not brief the grant of summary judgment on her causes of action regarding the appointment of a receiver and an accounting and thereby waived those issues. N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived upon appeal").

burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

"The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540). "A dispute of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Gayles by Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021) (quoting Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017)). If there is no genuine issue of material fact, "we must then decide whether the trial court correctly interpreted the law." Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 530 (App. Div. 2019). We accord no deference to a trial judge's conclusions of law. Platkin v. Smith & Wesson Sales Co., 474 N.J. Super. 476, 489 (App. Div. 2023).

A plaintiff asserting a breach-of-contract must prove: "the parties entered into a contract containing certain terms"; the "plaintiff[] did what the contract required [him or her] to do"; the "defendants did not do what the contract required them to do"; and the "defendants' breach, or failure to do what the

contract required, caused a loss to the plaintiff[]." Goldfarb v. Solimine, 245 N.J. 326, 338-39 (2021) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). Plaintiff premised her breach-of-contract claim generally on the Condominium's master deed and the Association's bylaws.

The rights and responsibilities of a condominium-unit owner and a governing association are controlled by the master deed, the bylaws, and the New Jersey Condominium Act (the Act), N.J.S.A. 46:8B-1 to -38. Cape May Harbor Vill. & Yacht Club Ass'n, v. Sbraga, 421 N.J. Super. 56, 70 (App. Div. 2011). The Act requires the master deed to include certain provisions, including "[a] description of the common elements and limited common elements," and allows the master deed to contain other provisions related to "the use, occupancy, . . . or other disposition" of units as long as the provisions are not inconsistent with the Act. N.J.S.A. 46:8B-9(f), (m).

Pursuant to the Act, a condominium association is responsible for "[t]he maintenance, repair, replacement, cleaning and sanitation of the common elements." N.J.S.A. 46:8B-14(a); see also Lechler v. 303 Sunset Ave. Condo. Ass'n, 452 N.J. Super. 574, 585 (App. Div. 2017); Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 171 (App. Div. 2002). The Act defines common elements to include "the foundations, structural and bearing parts,

supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units," "all apparatus and installations existing or intended for common use," and "such other elements and facilities as are designated in the master deed as common elements." N.J.S.A. 46:8B-3(d)(ii), (vi), (viii). "The inclusion within common elements in subparagraph '(ii)' of the 'main walls' and 'roofs' implies that material further to the interior of a unit would be part of the unit." Soc'y Hill Condo. Ass'n, 347 N.J. Super. at 170. "[T]he thrust of this section of the Act is to define common elements in general as those elements existing or intended for common use." Ibid. The Act defines "'[l]imited common elements'" as "those common elements which are for the use of one or more specified units to the exclusion of other units." N.J.S.A. 46:8B-3(k).

The Condominium's master deed provides that "[e]ach [u]nit [o]wner shall . . . be responsible for, at his own expense, all of the maintenance, repairs and replacements within his own [u]nit." The master deed defines "[u]nit" as "any apartment unit designated and intended for independent ownership and use as a residential dwelling . . . and shall not be deemed to include any part of the [g]eneral [c]ommon [e]lements or [l]imited [c]ommon [e]lements situated

within or appurtenant to a [u]nit." According to the master deed, "[u]nit" includes, among other things, "[s]o much of the common heating, plumbing and ventilating system as extends from the interior surface of the walls, floors or ceilings into the [u]nit," "[a]ll electrical wires which extend from the interior surface of walls, floors or ceilings into the [u]nits and all fixtures, switches, outlets and circuit breakers," and "[a]ll equipment, appliances, machinery, mechanical or other systems which serve the [u]nit exclusively whether or not same are located within or without the Unit."

The master deed defines "[g]eneral [c]ommon [e]lements" as "[a]ll appurtenances and facilities and other items which are not part of the [u]nits hereinbefore described . . . or part of the [l]imited [c]ommon [e]lements hereinafter described." The definition specifically includes "[t]he roof, the foundations, footings, columns, girders, beams, supports exterior or interior bearing or main walls and floors between [u]nits." The master deed defines "[l]imited [c]ommon [e]lements" as including specifically "any balcony, terrace or patio, or stoop to which there is direct access from the interior of an appurtenant [u]nit."

In her complaint, plaintiff accused defendants of failing to make "appropriate remediation and repairs to her [u]nit . . . and the common areas" as

required by the master deed and bylaws. She did not cite any particular provision of the master deed or bylaws and did not identify any particular common area that was not repaired. Instead, she complained repeatedly about the lack or delay of efforts to repair "her unit."

Likewise, in the certification she submitted in opposition to the summary-judgment motion, plaintiff again asserted that damage had been done to her unit but did not identify what common or limited common elements remained unrepaired. Nor did she provide proof, such as photographs or statements from contractors, to support her claim that defendants had failed to repair common elements. And the correspondence plaintiff submitted in opposition to the motion addresses issues concerning the repairs to her unit, not repairs to common elements. Plaintiff faults defendants for not responding to the "Additional Material Facts" she submitted. But even in that document she made repeated assertions about unrepaired damage to her unit and did not identify what common elements had not been repaired.

In her appellate brief, plaintiff concedes she was responsible for making a claim through her homeowners insurance for damages to her unit. She complains for the first time about damages to "Limited Common Elements." She defines "Limited Common Elements" as "consisting of insulation, framing,

electrical systems and wiring, plumbing systems, sprinkler systems, and duct-work" but fails to point to anything in the record that demonstrates which, if any, of those purported limited common elements were not repaired.

A review of her pleadings and submissions show that plaintiff's focus was on alleged unfinished repairs to her unit, which she now concedes, and the judge correctly found, were her responsibility. Her generic claims and unsupported and vague assertions regarding common elements are not enough to enable a reasonable factfinder to identity what common or limited common element defendants allegedly failed to repair. Nor are they enough to establish the existence of a genuine issue of material fact warranting submission of the case to a trier of fact.

A party opposing summary judgment does not create a genuine issue of fact simply by offering a sworn statement. Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). "'[C]onclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (quoting Puder v. Buechel, 183 N.J. 428, 440 (2005)). Summary judgment will not be precluded by "[b]are conclusory assertions" lacking factual support, Horizon Blue Cross Blue Shield

of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 413-14 (App. Div. 2013), or disputed facts "of an insubstantial nature," Miller v. Bank of Am. Home Loan Servicing, LP, 439 N.J. Super. 540, 547 (App. Div. 2015) (quoting Brill, 142 N.J. at 523). "The [summary-judgment] opponent must 'come forward with evidence' that creates a genuine issue of material fact." Horizon, 425 N.J. Super. at 32 (quoting Brill, 142 N.J. at 529). Because plaintiff failed to do that, the judge correctly granted summary judgment on plaintiff's breach-of-contract claim.

"The governing body of a condominium association has a fiduciary obligation to the unit owners 'similar to that of a corporate board to its shareholders.'" Jennings v. Borough of Highlands, 418 N.J. Super. 405, 420 (App. Div. 2011) (quoting Kim v. Flagship Condo. Owners Ass'n, 327 N.J. Super. 544, 550 (App. Div. 2000)). "A condominium association's governing body has 'the duty to preserve and protect the common elements and areas for the benefit of all its members.'" Id. at 420-21 (quoting Siddons v. Cook, 382 N.J. Super. 1, 7 (App. Div. 2005)). "Condominium association board members are required to 'act reasonably and in good faith in carrying out their duties.'" Id. at 421 (quoting Papalexiou v. Tower W. Condo., 167 N.J. Super. 516, 527 (Ch. Div. 1979)).

It is well-established that "decisions made by a condominium association board should be reviewed by a court using the . . . business judgment rule." Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 134-35 (App. Div. 2018) (quoting Walker v. Briarwood Condo. Ass'n, 274 N.J. Super. 422, 426 (App. Div. 1994)). Courts have adopted a "two-prong test" under the business judgment rule: "(1) whether the [a]ssociations' actions were authorized by statute or by its own bylaws or master deed, and if so, (2) whether the action is fraudulent, self-dealing or unconscionable." Owners of the Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, 367 N.J. Super. 314, 322 (App. Div. 2004).

In her breach-of-fiduciary-duty claim, plaintiff alleges defendants breached their fiduciary duty to her "through their unreasonable, self-serving, vindictive, unconscionable and/or retaliatory acts and/or failures to act as set averred herein." She faults defendants for giving priority to the repair of the other ground-floor units damaged by Hurricane Sandy. Given that people resided in those units and no one used plaintiff's unit as a primary residence, we find no fault in defendants' decision to prioritize the repair of the other ground-floor units, neither of which were then owned by defendants.

She accuses defendants of self-dealing but provides no evidence of it. Plaintiff faults defendants for the language Gail Wind used in her communications with plaintiff. However despicable that language and name-calling may have been, plaintiff failed to demonstrate that Gail Wind's language or actions had caused her any damages – an essential element of a breach-of-fiduciary-duty claim. See F.G. v. MacDonell, 150 N.J. 550, 564 (1997) (holding a "fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of [the fiduciary] relationship"); Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 146 (Ch. Div. 2018) (holding a plaintiff must show "injury to the plaintiff occurred as a result of the breach" of duty in order to prove a breach-of-fiduciary-duty claim). She faults defendants for not timely filing the Association's tax returns or annual reports but again fails to demonstrate how those alleged failings caused her any damages. And as we hold today, plaintiff failed to establish a genuine issue of material fact regarding defendants' alleged failure to repair common or limited common elements. The judge correctly granted summary judgment on plaintiff's breach-of-fiduciary-duty claim.

"To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and

(4) actual damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. County of Essex, 196 N.J. 569, 584 (2008)). Plaintiff "bears the burden of establishing those elements by some competent proof." Ibid. (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014)). "It is well-settled law that a recovery for damages cannot be had merely upon proof of the happening of an accident." Universal Underwriters Grp. v. Heibel, 386 N.J. Super. 307, 321 (App. Div. 2006). "Negligence is never presumed; it, or the circumstantial basis for the inference of it, must be established by competent proof presented by plaintiff." Ibid.; see also Franco v. Farleigh Dickinson Univ., 467 N.J. Super. 8, 25 (App. Div. 2021) ("The mere showing of an incident . . . is not alone sufficient to authorize the finding of an incident of negligence." (quoting Long v. Landy. 35 N.J. 44, 54 (1961))).

On appeal, plaintiff did not brief and consequently waived her allegations that defendants were negligent in failing "to properly investigate and vet the contractors," "to properly manage the repair and remediation process," and "to properly ensure that the condominium structure was properly secured with emergent repairs." N.J. Dep't of Env't Prot., 438 N.J. Super. at 505 n.2. Instead, plaintiff briefed only her allegations regarding the April 2012 incident. The only evidence she submitted in support of those allegations was her certification,

in which she described the incident as follows: "a pipe burst in the unit directly above, which resulted in my unit being flooded with effuse from the condo units on the upper floors and sewage back-up, rendering [it] [un]inhabitable." She did not submit any evidence as to the cause of the burst pipes. Nor did she submit evidence as to how she incurred damages as a result of the incident, such as proof of any costs she incurred in repairing her unit or lost rent. Her statement describing the incident may be "proof of the happening of an accident," Universal Underwriters Grp., 386 N.J. Super. at 321, but it is not proof of negligence and is not sufficient to create a genuine issue of material fact as to negligence. The judge correctly granted summary judgment as to plaintiff's negligence claim.

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, . . . the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005). Because plaintiff failed to demonstrate any genuine issue of material fact that defendants had committed any "unlawful acts" against plaintiff, her conspiracy claim also fails and the judge correctly granted summary judgment on that claim.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION