Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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GAVIN W. SCOTTI AS PRESIDENT OF BOARD OF MANAGERS OF HARBOR VIEW AT PORT WASHINGTON CONDOMINIUM,

Plaintiff,

-against-

RICHARD J. GREENE, ROBERT M. CALICA, JAMES NACOS, TOBIAS PIENIEK, SANDRA JACOBY, PETER MATRANGA and HARBOR VIEW AT PORT WASHINGTON HOME OWNERS ASSOCIATION, INC.,

Defendants.

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Index No. 17163/06

Motion Dated: 8/28/07
Motion Submitted: 9/07/07
Motion Sequence: 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

This Court's decision with respect to Motion Sequence 003, dated December 19, 2007 and entered by the County Clerk's Office on December 27, 2007, is hereby vacated.

This motion for an Order pursuant to CPLR § 2221 granting reargument or renewal of this Court's Order dated June 29, 2007, which granted defendants' motion for summary judgment on account of plaintiff Gavin Scotti's (hereinafter "Scotti") lack of standing is granted without opposition and upon reargument/renewal, this Court adheres to its original determination insofar as the defendants were granted summary judgment.

The facts of this action were set forth in this Court's June 29, 2007 Order.

The relationship between a HOA and its members is governed by the Association's Declaration and its By-Laws. (Cf., ***Murphy v. State of New York***, 14 A.D.3d 127, 787 N.Y.S.2d 120 (2d Dept., 2004); ***Schoninger v Yardarm Beach Homeowners' Assn.***, 134 A.D.2d 1, 523 N.Y.S.2d 523 (2d Dept., 1987); ***Royal York Owners Corp. v. Royal York Assoc., L.P.,*** 8 Misc.3d 1002(A), 2005 N.Y. Slip Op. 50889(U) [Sup.Ct., N.Y.Co., 2005]). Accordingly, the Sponsor's dissemination of an Estimated Budget within the Offering Plan did not confer any rights upon HOA's members *vis a vis* the HOA with regard to their obligation to pay Shared Expenses under the Declaration and By-Laws. At best, an offering plan may create obligations between the Sponsor and the purchasers. (See, ***511 W. 232nd Owners Corp. v. Jennifer Realty Co.,*** 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 (2002); but see, ***Hamlet On Olde Oyster Bay Home Owners Assn., Inc. v. Holiday Org., Inc.***, 12 Misc.3d 1182(A), 824 N.Y.S.2d 763 [Sup.Ct., Nassau Co., 2006]).

In any event, an ambiguity cannot be created by reference to extrinsic evidence. Reliance on parol evidence is only permitted if an ambiguity exists in the governing documents themselves. (***Matter of Schapira v. Grunberg***, 11 Misc.3d 1063(A), 816 N.Y.S.2d 701 (Sup.Ct., Bronx Co., 2005), aff'd. 30 A.D.3d 345, 819 N.Y.S.2d 8 (1st Dept., 2006); see also, ***Caprer v. Nussbaum***, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2d Dept., 2006); ***Geothermal Energy Corp. v Caithness Corp.,*** 34 A.D.3d 420, 825 N.Y.S.2d 485 (2d Dept., 2006); ***Yonkers Racing Corp. v. Catskill Regional Off-Track Betting Corp.***, 159 A.D.2d 615, 552 N.Y.S.2d 670 [2d Dept., 1990]). To determine whether an ambiguity exists, the Court must examine the Declaration and By-Laws in their entirety. (***Kass v. Kass***, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 [1998]). Even if not specifically defined, if the term's meaning can be clearly discerned from the governing documents themselves, no ambiguity exists. ***Altebrando v. Gozdziewski,*** 13 Misc.3d 1241(A), 831 N.Y.S.2d 351 (Sup.Ct., N.Y.Co., 2006); see also, ***Brazzale v. County of Dutchess***, 188 Misc.2d 520, 729 N.Y.S.2d 238 [2d Dept., 2001]). Certain facts recited in this Court's June 29, 2007 decision bear repeating here as they are the basis for the resolution of this case.

Article I(h) of the HOA' s Declaration defines "Common Properties" or "Common Areas" as "certain areas of land other than individual lots, condominium common elements as shown on the field subdivision map and intended to be devoted to the common use and enjoyment of the owners of the Properties." An adjacent parcel, which is owned by an unrelated entity and being developed as a Congregate Care Retirement Community (hereinafter "CCRC") to be known as the "Amsterdam" is subject to a Reciprocal Easement Agreement with the Harbor View Community. Under the Reciprocal Easement Agreement, the CCRC parcel, which shares the Harbor View Gatehouse, possesses a limited easement over only a small portion of the HOA' s common roads, more specifically, portions of five roads that lead from the Harbor View gatehouse up to the entrance of the adjacent CCRC parcel. In return for access and parking easement, the Amsterdam CCRC pays 60% of the

Gatehouse/security guard fees and 60% of the cost of snow removal and lighting costs of the "HOA common roads", which are not defined.

The By-Laws of the BOA provide that the basis of assessments is as specified in Section 3 of Article VI of the Declaration. Section 3, Article VI of the HOA' s Declaration limits Class B owners Shared Expenses as follows:

> The Association Assessments payable by the Class B Members is limited to their *pro rata* portion of the "Shared Expenses which includes the costs and expenses associated with maintenance and cleaning of guard booth; *electric/gas for outdoor lighting (Association common roads only)*; electric/gas for guard booth, exterminating of guard booth; health club/fitness center and recreational facilities; *landscape maintenance (Association common roads only)*; management fees; management office expenses; *repair, maintenance and irrigation (Association common road only)*; shuttle service to shops; security (guard booth and roving); *snow removal(Association common roads only); water & sewer (Association common roads only)*. The categories of shared expenses may be expanded if the Association provides additional services to the Class B Members. The Class A Members will only pay 10% of the Concierge costs because the concierge will be located in the lobby of the Condominium building which may be constructed on the Phase II Property and it is anticipated that as a result the concierge services will be used predominantly by the Class B Members. (Emphases added).

Only the Class A homeowners pay for the cost of landscaping of the individual lots(owned in fee), snow plowing of walkways and driveways on the individual lots, roof repairs of attached homes (approximately 70 of the 125 fee-owned homes), and certain other expenses.

Article IV, Section 2 of the HOA' s Declaration states that the HOA covenants to maintain the Common Properties in good repair, and that such maintenance shall include "maintenance and repair to roadways." Article V, Section 2 of the HOA's Declaration affords

all of the HOA's members (including the Class B Members) "easements, licenses, rights and privilege for: Right of way for ingress and egress by vehicles or on foot, in, through, over under, upon and across the streets, roads, walks and Common Areas in the Properties (as shown on the field map as they may be built or relocated in the future) for all purposes. " The same definition for "Common Properties" and "Common Areas" is found within Article II(i) of the By-Laws. The map of the development indicates that the roadway, including alleyways, are "Common Properties" or "Common Areas".

"Common roads" are not defined in the Declaration or By-Laws. However, it is clear that "Common Roads" means all of the Association's roads. Indeed, nothing in the Declaration or By-Laws indicates any limitation on the Association's common roads. Plaintiff's attempt to minimize Class B members' responsibility for maintaining the Association's Common Roads to only two roads because they only derive a substantial benefit from two of the roads conflicts with the Declaration and By-Laws' use of the term Common Roads, as well as the Declaration, which specifically provides that "no member may except himself from contributing toward the expense of the Association by waiver of the use of the improvements maintained by the Association."

As for plaintiff's fifth cause of action whereby it seeks reimbursement for overpayments it made before the defendant Board members corrected the errors of the Estimated Budget, an auditor's report prepared for the Board establishes that Class A and Class B members overpayed virtually the same amount. In fact, the net sum due Class A members is $4,574.

As for plaintiff's claim that its members were improperly charged accounting and legal fees, in the 2006 Budget in direct contravention to the Offering Plan's Estimated Budget, which allocated all such costs to Class A members, that claim, too, fails. Again, not only is the Offering Plan irrelevant here, the Class B members' obligation to bear the costs of maintaining the common elements of the development must deem a concomitant obligation to bear their *pro rata* share of accounting and legal fees.

The Court further notes that even if plaintiff's claims were viable, the complaint against the individual Board members would be dismissed. None of the individual defendants are alleged to have acted individually; they all acted in concert with one another as members of the Board and accordingly cannot be held liable in their individual capacities. (See, ***Walker v. Windsor Ct. Homeowners' Assn.***, 35 A.D.3d 725, 827 N.Y.S.2d 214 (2d Dept., 2006); see also, ***Myers v. BMR Bldg. Inspections, Inc.***, 29 A.D.3d 546, 814 N.Y.S.2d 686 (2d Dept., 2006); ***Bernstein v. Starrett City***, 303 A.D.2d 530, 758 N.Y.S.2d 658 [2d Dept., 2003]). In any event, individual board members cannot be held liable absent evidence of independent tortious conduct, which is lacking here. (***Murtha v. Yonkers Child Care Assn.***,

45 N.Y.2d 913, 383 N.E.2d 865, 411 N.Y.S.2d 219 (1978); see also, ***Pelton v. 77 Park Avenue Condominium***, 38 A.D.3d 1, 825 N.Y.S.2d 28 (1st Dept., 2006); ***Brasseur v. Speranza***, 21 A.D.3d 297, 800 N.Y.S.2d 669 [1st Dept., 2005]). Moreover, since the individual defendant board members relied upon the legal opinion of counsel, they are also protected by Section 717(b) of the Not for Profit Law. (See, ***Gordon v. Nationwide Mut. Ins. Co.***, 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972), cert den., 410 U.S. 931, 93 S.Ct. 1374 (1973); ***Spinale v. 10 W.66th St. Corp.***, 291 A.D.2d 234, 736 N.Y.S.2d 879 [1st Dept., 2002]).

Furthermore, the individual defendant board members are also protected by the business judgment rule. (See, ***Matter of Levandusky v. One Fifth Ave. Apt. Corp.***, 75 N.Y.2d 530, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990); see also, ***Matter of Renauto v. Board of Directors of Valimar Homeowners Assn., Inc.***, 23 A.D.3d 564, 806 N.Y.S.2d 656 (2d Dept., 2005); ***LoRusso v. Brookside Homeowner's Assn., Inc.***, 17 A.D.3d 323, 793 N.Y.S.2d 96 [2d Dept., 2005]). This rule "prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' " (***Matter of Levandusky v One Fifth Ave. Apt. Corp., supra***, at p. 537-538, quoting ***Auerbach v. Bennett***, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). So long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.' " (***Matter of Levandusky v. One Fifth Ave. Apt. Corp., supra***, at p. 538, quoting ***Pollitz v. Wabash R.R. Co.***, 207 N.Y. 113, 124, 100 N.E. 721 [1912]). Judicial scrutiny only lies when "the Board has acted (1) outside the scope of its authority, (2) in a way that did not legitimately further corporate purposes or (3) in bad faith." (***40 W. 67th St. v. Pullman***, 100 N.Y.2d 147, 155, 790 N.E.2d 1174, 760 N.Y.S.2d 745 (2003). None of those circumstances have been shown to exist here. Indeed, the HOA's Declaration and By-Laws make clear that the HOA's Board of Directors clearly has the authority to determine the budget and fix assessments. And, even where some Board members have an inherent conflict of interest in assessing expenses, the business judgment rule still applies where, like here, there is no evidence that only those who stood to benefit approved the allocation. (***Board of Mgrs. of 229 Condominium v. J.P.S. Realty Co.***, 308 A.D.2d 314, 764 N.Y.S.2d 405 (1st Dept., 2003); see also, ***Croton River Club, Inc. v. Half Moon Bay Homeowners Association, Inc.***, 52 F.3d 41, 27 Bankr.Ct.Dec. 113 (2d Cir., 1995). Here, not only did some Class B members approve the 2006 Budget, Class A Board members voted to reallocate expenses to their own financial detriment in some instances, also.

In sum, the first, second, third and fourth causes of action are dismissed. Defendants have established and it is hereby declared that the individual defendants are immune from

liability; that all of the HOA's common roads are "Common Roads" for purposes of computing the members' obligation to share expenses related thereto; and, that the 2006 HOA's budget was properly enacted and is legal. Moreover, the defendants have also established and it is further declared that the HOA's Board has the power to correct errors in the Sponsor's Estimated Budget so long as said corrections are in accordance with the HOA's Declaration and By-Laws and that said corrections may be made retroactively.

Pursuant to CPLR § 3212(e), the defendants are granted summary judgment on their fifth cause of action.

The foregoing constitutes the Order of this Court.

Dated: February 19, 2008
Mineola, NY

Karen V. Murphy
J.S.C.
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