

**Zoeller v Crescent Beach Condominium**

2009 NY Slip Op 31426(U)

June 23, 2009

Supreme Court, Suffolk County

Docket Number: 9238-2008

Judge: Emily Pines

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Zoeller v Crescent Beach Condominiums  
Index Number 9238-2008

Motion Sequence number 002 Decision

SHORT FORM ORDER

INDEX NUMBER: 9238-2008

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 04-03-2009  
Motion Submit Date: 04-29-2009  
Motion Sequence No's.: 002 MG  
CASEDISP

\_\_\_\_\_  
**FRED J. ZOELLER AND KATHLEEN  
ZOELLER,**

**Plaintiff,**

**-against-**

**CRESCENT BEACH CONDOMINIUM,  
ROBERT D'EUSTACHIO, GARY  
COURTIER, JANICE ANGELI, EMIL  
NATALE and LINDA FITZMAURICE,**

**Defendants.**

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**ORDERED**, that the motion (motion sequence number 002) by defendants pursuant to CPLR §3212, granting summary and dismissing the Complaint is granted in its entirety and the action is dismissed.

This action arises out of a dispute between plaintiffs and defendants regarding the removal and restoration of beach grass in certain portions of the common areas located in the Crescent Beach Condominium. Plaintiffs commenced this action by the filing of a Summons and Verified Complaint on or about March 11, 2008 and issue was joined by defendants' service of a Verified Answer dated April 15, 2008. Plaintiffs are the owners of a condominium unit, specifically, unit 16, in the Crescent Beach Condominium, located in Greenport, Suffolk County, New York. The individual defendants are past or current members of the Board of Managers (the "Board") of Crescent Beach Condominium and/or relatives of such members. The submissions reflect that in 1988, a "French drain" was installed to address flooding problems in the condominium, specifically in front of units 15 through 20, and that in 1989, beach grass was planted over the French drain. It is undisputed that the approximate cost of installation, \$35,000.00, was approved by the members of the condominium. In 2005, the

beach grass was subsequently trimmed as it became overgrown with weeds and plaintiffs sought to have the beach grass replaced along the entire French drain. Subsequently, the Board voted to replant the beach grass in certain areas to experiment with whether a denser planting would reduce the weeds. Although plaintiffs attempted to have the beach grass restored, the owners instead voted to keep the beach grass in its current trimmed state. It appears that although the owners did not vote to restore the beach grass, plaintiffs hired their own landscaper in an attempt to independently replace the beach grass on that portion of the French drain in front of their unit. The landscaper was advised by a member of the Board to cease such activity as it was not authorized by the Board and he left the premises.

Plaintiffs then commenced the instant action and set forth eight causes of action sounding in breach of contract, breach of fiduciary duty, intentional infliction of emotional distress, harassment, ejectment, and breach of covenant of quiet enjoyment. The first cause of action is against defendant Crescent Beach Condominium ("Crescent") for breach of contract on the ground that Crescent is obligated by the by-laws to maintain the common areas of the condominium, that the failure to restore the beach grass in front of unit 16 has caused flooding and an unsightly condition in that area and that such failure to restore the beach grass is a breach of contract. On the first cause of action plaintiffs seek an Order directing Crescent to restore the beach grass. The second cause of action against Crescent seeks damages for deprivation of plaintiffs' quiet use and enjoyment of their property. The third cause of action against Crescent alleges ejectment of plaintiffs' landscaper from the property and seeks damages in the amount of \$1,437.10. The fourth cause of action alleges that the Board agreed to restore beach grass in front of certain units that were owned by members of the Board or their family members, and that such actions were in bad faith and for the sole purpose of harassing, annoying or harming plaintiffs and plaintiffs seek punitive damages. The fifth cause of action sounds in intentional infliction of emotional distress and the sixth cause of action alleges misappropriation of funds. In the seventh cause of action plaintiffs seek an accounting for all monies spent on the operation, maintenance and repair of the condominium. Finally, in the eighth cause of action, plaintiffs seek a money judgment for the reimbursement of allegedly misappropriated funds and punitive damages.

Defendants now move for summary judgment seeking an Order dismissing the action in its entirety. Defendants have annexed a copy of the pleadings, the by-laws of Crescent, the transcript of the examination before trial of Kathleen Zoeller taken on October 16, 2008, the transcripts of the examinations before trial of each of the individual defendants held on October 17, 2008, minutes of the Board meetings and the Verified Bill of Particulars dated August 19, 2008.

First, with regard to the breach of contract action, defendants argue that the Board fully complied with the terms of its by-laws in determining to keep the beach grass in its present state (after it was trimmed) and its actions are thus protected by the business judgment rule. Specifically, a meeting was held on May 19, 2007 and

the owners present voted to maintain the beach grass as trimmed. Although plaintiff, Kathleen Zoeller, attempted to bring forth a motion to restore the beach grass, her motion failed to obtain the votes needed. Thus, because the Board acted pursuant to its by-laws, defendants assert that there is no question of fact and the breach of contract claim must fail. Next, turning to the breach of the covenant of quiet enjoyment, defendants argue that this must also be dismissed as plaintiffs have failed to demonstrate either actual or constructive eviction as required to succeed on this claim. Defendants assert that there is no testimony or other evidence that the defendants barred plaintiffs from the premises or prevented plaintiffs from using their unit for its intended purpose. Moreover, defendants note that despite plaintiffs claims that they feared flooding of the premises, Kathleen Zoeller testified at her examination before trial (“EBT”) that the last time flooding occurred was about ten (10) years ago. Therefore, defendants urge the Court to grant summary judgment and dismiss this cause of action.

Similarly, defendants argue that the third cause of action arising out of the damages for services of plaintiffs’ private landscaper, is without merit. Here, as in the first cause of action, defendants argue that the by-laws of Crescent, specifically, Article 5, Section 13, prohibited plaintiffs from hiring their own landscaper to restore the beach grass without the written consent of the Board. It is undisputed that plaintiffs did not obtain such written consent, and thus, failed to comply with the by-laws, in violation of RPL §339-j, and defendants urge the Court to grant summary judgment and dismiss the third cause of action. On the fourth cause of action for punitive damages for harassment and annoyance, defendants argue that no such causes of action exist, but rather, plaintiffs must satisfy the criteria to establish a prima facie tort cause of action. Defendants argue that plaintiffs cannot meet these criteria, to wit, intentional infliction of harm, causing special damages, without excuse or justification, by an act or series of acts that would otherwise be unlawful. Here, defendants assert that plaintiffs cannot show they suffered a specific and immeasurable loss to prove the required special damages and moreover that Crescent engaged in unlawful acts by the replacement of certain portions of the beach grass. Instead, defendants note that defendant D’Eustachio testified that only some of the beach grass was replanted to determine the economic and maintenance feasibility of the beach grass and that such determination was within the scope of the powers of the Board and this claim must also be dismissed.

According to defendants, the fifth cause of action sounding in intentional infliction of emotional distress must suffer the same fate as defendants claim plaintiffs have failed to establish the required elements of this claim. Here, defendants note that plaintiffs cannot even meet the first criteria of extreme and outrageous conduct as the cutting down of beach grass is not so outrageous as to “go beyond all possible bounds of decency.” Additionally, plaintiffs have failed to demonstrate that they suffered mental anguish of a severe nature, as their own admissions in the Verified Bill of Particulars and depositions reflect that they did not seek medical intervention, nor suffered sleeplessness, nervousness or any fears as a result of defendants’ alleged conduct. Thus, defendants argue this cause of action must be dismissed.

Defendants' arguments regarding the misappropriation of funds, bad faith and claims for punitive damages, parallel the breach of contract claim in that they argue that the Board acted within its authority when it replanted the beach grass in front of certain units and thus these causes of action must be dismissed. On the cause of action for breach of fiduciary duty, defendants argue that plaintiffs have not pled such with sufficient specificity nor given notice of the exact occurrence which plaintiffs claim amount to a breach of fiduciary duty and must be dismissed.

Finally, defendants seek the imposition of sanctions against the plaintiffs for commencing a frivolous action pursuant to CPLR §8303-a(c).

Plaintiffs oppose the motion by affidavit of Kathleen Zoeller and submit copies of discovery demands and responses, minutes of Board meetings, photographs, correspondence, account statements and the by-laws. In sum, plaintiffs argue that questions of fact exist as to whether the actions by the Board with regard to the landscaping of the beach grass over the French drain were made solely to benefit members of the Board and/or their family members, to the exclusion of plaintiffs. Specifically, plaintiffs assert that the beach grass was restored in front of units 18, 19 and 20 but not in front of their unit (16) or units 15 and 17. Plaintiffs also allege that the minutes of the Board meetings, specifically of May 19, 2007, do not accurately reflect what transpired at the meeting and moreover, that the vote at that meeting occurred a year after the Board acted with regard to the beach grass. Kathleen Zoeller states in her affidavit that she doesn't believe she made any motion with regard to the beach grass at that meeting. Plaintiffs state the improvements made by the Board cost in excess of \$1,000.00 and thus required approval of the members of the community. Finally, plaintiffs allege that certain improper reimbursements were made to members of the Board and/or their family members.

Plaintiffs argue that the lack of beach grass has caused an unpleasant and unhealthy environment and had caused them to cease entertaining in their home. Additionally, plaintiffs argue that the motion should be denied as premature as discovery has not been completed. They assert that there are issues of fact regarding whether defendants acted in bad faith and whether beach grass existed in front of plaintiffs' unit. Plaintiffs claim that there is an issue of the Board's motives in failing to replant the beach grass in front of plaintiffs' unit when it agreed to replant in front of units 19 and 20. They assert that the Board acted outside the scope of its authority and singled out plaintiffs for harmful treatment.

Plaintiffs oppose the request for sanctions and argue that commencement of the within action was necessary to restore the common areas and moreover, that their review of the books and records has demonstrated misappropriation of funds which must be redressed. Based on the foregoing, plaintiffs urge the Court to deny the motion in its entirety.

Defendants submit a reply and argue that the motion for summary judgment is not premature in that plaintiffs have failed to demonstrate that there are any facts within the exclusive knowledge of defendants. Defendants annex to their reply papers minutes of Board meetings, invoices, transcript of EBT of defendant Fred Zoeller taken October 23, 2008 and affidavits from defendants D'Eustachio, Courtier and Natale. Moreover, defendants state that they have provided documents requested during the EBT's and that the minutes of the Board meetings have been previously provided to plaintiffs. Essentially, defendants reiterate their arguments that they acted within the scope of their authority as delineated by the by-laws in determining where to restore the beach grass. Additionally, defendants note that the Board's authority with regard to spending was actually increased to \$2,000.00 in 1999, as evidenced by minutes annexed to the reply papers. D'Eustachio (a Board member from September 2006 through September 2008) states in his affidavit that during the May 2007 meeting there was a discussion of the beach grass and a motion was made to maintain in its then current state (none in front of units 15, 16 and 17). This motion received the necessary votes to pass. He states that Kathleen Zoeller did move to have the beach grass restored in front of those units but such motion failed.

With regard to improper expenditures, Natale, the treasurer of the Board (and the owner of unit 20), states that he reviews the monthly expenditures and prepares a budget. He states he does not have voting authority on the Board but advises that the planting of beach grass in front of units 18, 19 and 20 was done in October 2006, as approved by the Board, to determine if planting in dense amounts would reduce the weeds and this area had the largest area of the French drain. He states that no consideration was given to who the owners of the units were when this determination was made by the Board.

Based on the foregoing, defendants request that the Court grant their motion in its entirety.

The law is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v. Brick & Ballerstein, Inc.**, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. **Zayas v. Half Hollow Hills Cent. School Dist.**, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). Bald conclusory assertions are insufficient to defeat a motion for summary judgment. **Orange County-Poughkeepsie Ltd Partnership v. Bonte**, 37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept. 2007). "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." **Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.**, 172 A.D.2d 658, 570 N.Y.S.2d 960 (2d Dept. 1991). Issue finding and not issue determination is the key on a motion for summary judgment. **Francis v. Basic Metal Inc.**, 144 A.D.2d 634, 534

N.Y.S.2d 697 (2d Dept. 1988). Finally, while CPLR §3212(f) permits a party a motion for summary judgment to obtain further discovery under certain circumstances, such is not available where the party fails to demonstrate that the discovery being sought is “anything more than a fishing expedition.” Greenberg v. McLaughlin, 242 A.D.2d 603, 662 N.Y.S.2d 100 (2d Dept. 1997). This section generally applies where the party opposing the motion has not had a reasonable time to obtain disclosure prior to the submission of the motion for summary judgment. Aurora Loan Services, LLC v. LaMattina & Assoc., 59 A.D.3d 578, 872 N.Y.S.2d 724 (2d Dept. 2009). See also, Canarick v. Cicarelli, 46 A.D.3d 587, 847 N.Y.S.2d 641 (2d Dept. 2007) (motion for summary judgment was not premature where plaintiff failed to demonstrate that additional discovery might lead to relevant evidence or that the facts necessary to oppose the motion were exclusively within the knowledge and/or control of defendants).

It has been repeatedly recognized that when a condominium unit owner challenges an action by a condominium board of managers, the court must apply the business judgment rule. Helmer v. Comito, \_\_\_ A.D.3d \_\_\_, 877 N.Y.S.2d 370 (2d Dept. 2009); Walden Woods Homeowners’ Assoc., v. Friedman, 36 A.D.3d 691, 828 N.Y.S.2d 188 (2d Dept. 2007). The determination of the board of managers should be upheld if it was authorized, taken in good faith and in furtherance of the legitimate interests of the homeowners’ association. Meadow Lane Equities Corp., v. Hill, \_\_\_ A.D.3d \_\_\_, N.Y.S.2d \_\_\_, 2009 WL 1563591 (2d Dept. 2009); Renauto v. Board of Directors of Valimar Homeowners’ Assoc., 23 A.D.3d 564, 806 N.Y.S.2d 656 (2d Dept. 2005). Conclusory allegations that the by-laws were selectively enforced are insufficient to oppose a motion for summary judgment. See, e.g., Captain’s Walk Homeowners’ Assoc., v. Penney, 17 A.D.3d 617, 794 N.Y.S.2d 82 (2d Dept. 2005).

In the case at bar, defendants have met their prima facie burden of demonstrating entitlement to summary judgment on the first cause of action against Crescent for breach of contract and the sixth cause of action against the individual defendants for misappropriation of funds. The Board has established that their actions with regard to the beach grass were in accordance with Crescent’s by-laws and are protected by the business judgment rule. The minutes of the Board meeting reflect that a majority vote of the members present (in person or by proxy) resulted in the agreement to maintain the beach grass in the condition it was in at the time. Further, the submissions reflect that the Board acted within its authority with regard to the expenditure of funds on beach grass (less than the \$2,000 permitted) and that its determination to only restore beach grass in certain locations to determine the economic and environmental viability was in furtherance of the legitimate interests of the community members. The determination to trim the beach grass was made as a result of excessive weeds growing within the beach grass. Although plaintiff Kathleen Zoeller moved to have the beach grass restored on that portion of the French drain in front of her unit, that motion did not receive the votes necessary to succeed. Moreover, although plaintiffs allege in their complaint that the Board’s failure to maintain the beach grass in front of their unit has resulted in flooding, Kathleen Zoeller’s own testimony at her EBT contradicts said

allegation. Kathleen Zoeller admitted in her EBT that there has not been any flooding in front of her unit in ten (10) years. Additionally, both she and plaintiff Fred Zoeller testified that the Board was responsible to make repairs and approve alterations to common areas. In opposition, plaintiffs have failed to raise a triable issue of fact. Their conclusory assertions that the replanting of beach grass in front of units 18, 19 and 20 was as a result of favoritism toward members of the Board and/or their families, is insufficient to defeat the business judgment rule and the motion for summary judgment. Since the Court finds that the Board acted properly, the sixth cause of action against the individuals which alleges misappropriation of funds arising out of the limited restoration of the beach grass must also be dismissed.

Based on the foregoing, the first cause of action for breach of contract, as well as the sixth, are denied.

Turning to the second cause of action, to establish a cause of action for breach of the covenant of quiet enjoyment, the moving party must show actual or constructive eviction.

34-35th Corp. v. 1-10 Industry Associates, LLC, 16 A.D.3d 579, 792 N.Y.S.2d 173 (2d Dept. 2005). Actual eviction occurs when a party is physically ousted from possession of property. Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc., 17 A.D.3d 453, 793 N.Y.S.2d 124 (2d Dept. 2005). Constructive eviction occurs when a party is deprived of the beneficial use and enjoyment of the subject premises. Johnson v. Cabrera, 246 A.D.2d 578, 668 N.Y.S.2d 45 (2d Dept. 1998). Here, defendants have also met their prima facie burden that plaintiffs have not been either actually or constructively evicted from their property. There is no evidence or testimony that plaintiffs have been physically ousted from the premises and the only testimony regarding deprivation of the enjoyment is plaintiff Kathleen Zoeller's testimony that she has not entertained family or friends at the premises and she fears flooding. As stated earlier, Kathleen Zoeller testified that the last flood was about ten (10) years ago. Plaintiffs admitted that their son and a friend has been to the property since the mowing of the beach grass. Again, in opposition, plaintiffs have failed to raise a triable issue of fact regarding their actual or constructive eviction from the property and the second cause of action is dismissed.

The third cause of action for the ejection of the plaintiffs' landscaper from the premises must be dismissed. Crescent's by-laws (Article 5, Section 13) explicitly state that unit owners are prohibited from making any changes to the common areas without the prior written consent of the Board. Defendants have demonstrated, and plaintiffs have not refuted, that they hired a private landscaper to restore the beach grass, without the prior written consent of the Board. Pursuant to RPL §339-j, plaintiffs are required to comply with the provisions of the by-laws. Therefore, summary judgment is appropriate dismissing the third cause of action.

Plaintiffs' fourth cause of action against the individual defendants alleges harassment in their actions in only restoring beach grass in front of units 19 and 20, which are owned by either members of the Board, former members of the Board or their family members and the fifth cause of action seeks punitive damages for such conduct. Here, the Court agrees with defendants that New York does not recognize a civil cause of action for

harassment. Ralin v. City of New York, 44 A.D.3d 838, 844 N.Y.S.2d 83 (2d Dept. 2007). While a cause of action sounding in prima facie tort may be actionable, plaintiffs would have to demonstrate “(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful”. Curiano v. Suozzi, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1984). Likewise, the fifth cause of action alleging that the conduct by the defendants was so extreme and outrageous as to be an intentional infliction of emotional distress requires that plaintiffs demonstrate, “(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress”. Andrews v. Bruk, 220 A.D.2d 376, 631 N.Y.S.2d 771 (2d Dept. 1995). Here, defendants have met their prima facie burden of demonstrating that plaintiffs are not entitled to recover for either prima facie tort or intentional infliction of emotional distress, as they have not demonstrated the requisite intentional infliction of harm or special damages, or extreme and outrageous conduct and severe emotional distress. Again, the Court has found that the Board acted within the scope of the by-laws in determining only to restore the beach grass in front of certain units. Plaintiffs testified in their EBTs that they did not require any medical attention nor did they experience any sleeplessness, nervousness or fears as a result of the alleged conduct. In opposition, plaintiffs have failed to raise a triable issue of fact. Therefore, the fourth and fifth causes of action must be dismissed.

Finally, the seventh cause of action for breach of fiduciary duty and the eighth cause of action for bad faith must also be dismissed. Defendants have demonstrated that the Board acted within its authority when it contracted with either unit owners or members of their family to perform certain services for the benefit of the entire condominium complex. Such expenditures, within the limit authorized by the Board does not demonstrate a breach of fiduciary duty. Since defendants did not breach their fiduciary duty, they did not act in bad faith. Therefore the seventh and eighth causes of action are also dismissed.

Based on the foregoing, the Complaint is dismissed in its entirety. Defendants’ request for the imposition of sanctions is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: June 23, 2009  
Riverhead, New York

  
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EMILY PINES  
J. S. C.