STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: June 19, 2013)

THE BALCO TRUST, LLC, a Connecticut limited liability company, JOHN J. BALDELLI, NANCY J. BALDELLI RONALD P. GALE, as Trustee of the RONALD P. GALE TRUST, RONALD P. GALE, CARRIE G. GALE, WILLIAM J. MARARBELLA[1] and CLAIRE A. MARABELLA	:	
V.	:	**C.A. No. WC-2010-0857**
STEVEN GLAZER, JOSEPH CAVALLARO, WALTER WILKS, ANDREW PORT, ALEX BILOURIS, RAPLH COLLESIAN, and KAREN EAKER, in their capacity as Members of The Board of Directors of the Oceanside Condominium Association, and the OCEANSIDE CONDOMINIUM ASSOCIATION	:	

DECISION

SILVERSTEIN, J. This is a dispute over the allocation of common expenses among condominium unit owners at the Oceanside Condominium complex (the Condominium complex) in Narragansett. The Condominium complex was built in a multi-phase project from 1984 to 1986. The Developer made the Declaration of Plan (the Declaration) in 1984 as required by the Rhode Island Condominium Ownership Act (the Condominium Ownership Act) and amended the Declaration five times to account for the new units as they were completed. Although the parties dispute the proper computation of the Allocated Interests for purposes of the Common

[1] The Court adopts the spelling used in the Complaint for the case caption; some parties' names were spelled inconsistently across the pleadings and motions.

Expenses, they do not dispute that for twenty-six years (1984 to 2009) the Common Expenses were allocated equally among the unit owners—an allocation clearly not provided for under any reasonable interpretation of the Declaration. Since the parties recognized this discrepancy (in 2007) and decided to do something about it (in 2009), they have been unable to come to an agreement about what to do going forward. Thus, the Court must now intervene and rule on the multiple dispositive motions that are pending.

I

Facts and Travel

A

The Parties

The Plaintiffs own three condominium units (Units 17, 19, and 20) in the Condominium complex. (Compl. ¶¶ 1-5.) The Defendants are the Oceanside Condominium Association (the Association)—an unincorporated condominium association organized under the Rhode Island Condominium Act—and seven members of its Board of Directors (the Board). Id. ¶¶ 6-13. The rest of the forty-two total unit owners are not parties in this lawsuit.

B

The Declaration and Amendments

Under the Condominium Ownership Act, prior to the conveyance of any unit, the Developer must "record a declaration containing covenants, conditions, and restrictions relating to the project . . . ." G.L. 1956 § 34-36-10. Additionally, the Condominium Ownership Act permits a declaration to contain "[t]he method by which the declaration may be amended consistent with the provisions of this chapter." Id. § 34-36-10(10). Here, the Declaration was made by the Developer in 1984 when the development contained ten completed units. As the

Condominium complex grew to forty-two units over the multi-phase project, the Declaration was amended five times by the Developer between 1984 and 1986.[2] Neither party contests the validity of the amendments as such, i.e., that the Developer had the authority to amend the Declaration.

Section 2.5 of the Declaration provides that each unit owner is responsible for the Common Expense Liability "based upon his Allocated Interests in the Common Elements within the Property as specified in Exhibit C hereto." (Original Declaration § 2.5.) "Allocated Interests" is explained in § 6.12, which provides that "the Allocated Interest appurtenant to each Unit which shall be determined by a fraction, the numerator of which shall be the floor space area of each Unit and the denominator of which shall be the total floor space of all Units subject to this Declaration as of the same date" (the Allocated Interest Formula). Id. § 6.12. Although § 2.5 states that Exhibit C "specifie[s]" the Allocated Interests, Exhibit C is titled "Square Footage of Living Space of Each Unit and Percentage of Allocated Interest in the Common Elements"; thus it refers to "living space" rather than "floor space" area as defined in § 6.12. Id. at Ex. C.

Another relevant term is "Common Elements," which is defined as "all portions of the Property other than the Units as further defined in Section 3.1." Id. § 1.7. The further definition provides that the Common Elements:

> "consist of all of the Property except the Units, including without limitation, all the elements of the Buildings not included in any Unit; the land on which the Buildings are located; roadways, parking areas, walkways, lawns and gardens; all installations of

[2] The Court will use the following nomenclature. The "Original Declaration" refers to the Declaration that was adopted by the Developer prior to any amendments. When meaning to refer to information contained in a specific amendment, the Court will refer to it by number, e.g., the "Third Amendment." Finally, the "Declaration" means the entire Declaration including its amendments.

> power, lights, gas, water, storm and sanitary plumbing not included in any Unit; and all other parts of the Property necessary or convenient to its existence, maintenance and safety or normally in common use." Id. § 3.1.

A "Unit" is "a physical portion of the Property designated for separate ownership or occupancy, the boundaries of which are described in Section 2.3." Id. § 1.25. Section 2.3 adds that "[t]he designation of each Unit, a designation of the Building in which it is or will be located and its percentage of undivided interest in the Common Elements within the Property are set forth in Exhibit C, attached hereto and made a part hereof." Id. § 2.3. As noted above, Exhibit C is a chart titled "Square Footage of Living Space of Each Unit and Percentage of Allocated Interest in the Common Elements," which purports to contain the actual square footage of living space for Units 1-10 and the projected amount of living space for the rest of the units. Id. at Ex. C.

Over the next two years, the Developer amended the Declaration five times. The First Amendment does not seem to be of consequence here. The Second Amendment and the subsequent amendments, however, include an "Exhibit B" containing the same title as Exhibit C to the Original Declaration—"Square Footage of Living Space of Each Unit and Percentage of Allocated Interest in the Common Elements"—and the same chart, each accounting for the newly completed units. The calculation of the numbers in these charts are at the core of this controversy.

The other relevant provisions of the Declaration and the Amendments relate to garages. The Original Declaration includes "garages" as "Limited Common Elements" in § 3.2. A Limited Common Element is "a portion of the Common Elements allocated by the Declaration in Section 3.2 for the exclusive use of one or more but fewer than all of the units." (Original Declaration § 1.16.) The Developer next added information regarding garages in the Third Amendment. Exhibit D to the Third Amendment states that "Garages on the Plan Basement

Garage Level on Sheet 2 of the Record Survey Map of the Phase 1-B Property by number shall be for the sole use of the Unit bearing that same number." (Third Amendment, Ex. D.) The Fourth and Fifth Amendments contain the same sentence, but accounting for Phase 2-B and Phase 3, respectively. The units that came into the Condominium complex during the Third and Fourth Amendments did not have their garages counted in the chart on living space, while units assimilated in the Fifth Amendment did have their garages counted. See Lombardi Aff. ¶ 20. The Plaintiffs' units were added to the Condominium complex on the Fourth Amendment.

C

The Actual Payments and the "Clarification"

From 1984 to 2009, all unit owners paid an equal amount of Common Expenses. (Baldelli Aff. ¶ 6; Cavallaro Aff. ¶¶ 17-20.) The Allocated Interests issue was first raised at the 2007 Annual Meeting of Unit Owners. (Cavallaro Aff. ¶ 22.) However, the budget passed without objection at that meeting retained the equal assessment. Id. ¶ 30. The issue was next raised at the 2009 Annual Meeting. Id. ¶ 32. Although the assessment of Common Expense Liability approved at the 2009 Annual Meeting (for the following year) again contained the equal allocation, a group of "certain unit owners" met and determined that the Board should engage expert counsel to review the inconsistencies. Id. ¶¶ 33-35. The Board then engaged Frank Lombardi, Esq. as expert counsel. Id. ¶ 36.

Mr. Lombardi informed the Board that the Developer "used inconsistent mathematical figures for the numerator in the allocation formula, and also that the allocations set forth in the Fifth Amendment, as founded upon the flawed original Declaration, were clearly incorrect." (Cavallaro Aff. ¶ 42.) More specifically, Mr. Lombardi determined that "the square footages of floor space in certain units with garages as well as some units with storefronts were not included

when computing the numerators in the [Allocated Interest Formula]." (Cavallaro Aff., Ex. 1, Letter of Frank Lombardi.)

Mr. Lombardi proposed three options to address the issue. Id. The Board unanimously chose to follow the "Third Option," which was "to simply clarify and revise the mathematical computation errors that exist in the current allocation interest schedule last set forth in the Fifth Amendment to your Declaration, much like an attorney or draftsman would do if the legal description is incorrect due to a typographical or engineering computation error." Id.; Cavallaro Aff. ¶ 66. In the spring of 2010, the Board approved the Clarification of Fifth Amendment to Declaration of Plan (the Clarification), and recorded it in the Narragansett Land Evidence Records. (Cavallaro Aff. ¶ 67; Baldelli Aff. ¶ 9.) The Board assessed the Common Expenses for the Condominium complex according to the Clarification's calculations for the 2009, 2010, and 2011 fiscal years. (Baldelli Aff. ¶ 13.)

D

The Complaint and Motions

The Plaintiffs filed their four-count Verified Complaint for Declaratory Judgment (the Complaint) on November 30, 2010. Counts I-III seek a declaration voiding the Clarification, an injunction preventing the Defendants from recording the Clarification or any amendment purporting to change the Allocated Interests and from assessing Common Expense Liability on a basis other than the Allocated Interests in the Declaration. Count IV seeks compensatory damages. The Plaintiffs filed a Motion for Partial Summary Judgment, seeking summary judgment on Counts I-III of the Complaint. The Defendants responded on three fronts: (1) a Motion to Dismiss for Failure to Add Indispensible Parties (the other affected unit owners);

(2) an Objection to Plaintiffs' Motion for Partial Summary Judgment; and (3) a Cross-Motion for Summary Judgment.

II

Standard of Review

When considering a motion for summary judgment, the Court "does not pass upon the weight and credibility of the evidence, but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Weaver v. American Power Conversion Corp., 863 A.2d 193, 200 (R.I. 2004). Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "'Summary judgment is an extreme remedy that should be applied cautiously.'" Hill v. National Grid, 11 A.3d 110, 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)). "Nevertheless, Rule 56 of the Superior Court Rules of Civil Procedure constitutes a procedural device that, in the proper circumstances, plays an appropriate role in separating the wheat from the chaff in the litigation process." Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 557 (R.I. 2009).

The Uniform Declaratory Judgments Act (UDJA) grants the Superior Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." G.L. 1956 § 9-30-1. "This power is broadly construed, to allow the trial justice to

'facilitate the termination of controversies.'" Bradford Associates v. Rhode Island Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) (quoting Capital Properties, Inc. v. State, 749 A.2d 1069, 1080 (R.I. 1999)). However, "[t]he court may refuse to render or enter a declaratory judgment or decree where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Id. § 9-30-6. "The decision to grant or to deny declaratory relief under the Uniform Declaratory Judgments Act is purely discretionary." Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997).

III

Discussion

A

Declaratory Relief

1

Proper Interpretation of the Declaration

The heart of this problem is the inconsistency within the Declaration and its Amendments. This is clear even from the terminology. The Declaration provides the "the Allocated Interest appurtenant to each Unit which shall be determined by a fraction, the numerator of which shall be the floor space area of each Unit and the denominator of which shall be the total floor space of all Units subject to this Declaration as of the same date." Declaration § 6.12 (emphasis added). However, Exhibit C—purporting to specify Allocated Interests in the Common Elements—is titled "Square Footage of Living Space of Each Unit and Percentage of Allocated Interest in the Common Elements." Original Declaration, Ex. C (emphasis added); Second-Fifth Amendments, Ex. B (emphasis added). Neither "floor space area" nor "living space" is defined. See Declaration Art. 1. Furthermore, over the five Amendments to the

Declaration, some garages were counted for the "Square Footage of Living Space of Each Unit and Percentage of Allocated Interest in the Common Elements" chart while others were not, and some storefronts were counted while others were not. (The Association, Clarification to Fifth Amendment to Decl. of Plan ¶ 4; Cavallaro Aff. ¶ 42; Lombardi Aff. ¶ 20.)

When there is a discrepancy between a clearly expressed formula and a numerical chart purporting to apply the formula, the formula itself must prevail. Cf. U.C.C. § 3-114 ("If an instrument contains contradictory terms . . . words prevail over numbers.").[3] The numbers in Exhibit C are merely intended to be a derivation of the worded content in the Allocated Interest Formula. See Original Declaration § 2.5 (Common Expense Liability based upon Allocated Interests "as specified in Exhibit C"). Thus, the operative device here is the Allocated Interest Formula, not the percentages assigned in Exhibit C to the Fifth Amendment.

There was a purported inconsistency regarding whether the storefront units were and/or should be included in the numerators to the formula. The floor space area of the storefront space should be included. The Allocated Interest Formula provides that "the numerator . . . shall be the floor space area of each Unit." (Declaration § 6.12 (emphasis added)). The definition of Unit—"a physical portion of the Property designated for separate ownership or occupancy"—does not discriminate between residential and commercial space; if anything, the use of both "ownership" and "occupancy" signals that it should include commercial space. Id. § 1.25.

The more contentious issue involves whether to include garages. One could argue that garages are Limited Common Elements, which are a "portion of the Common Elements," which are "all portions of the Property other than the Units . . . ." Id. §§ 1.7, 1.16. Accordingly,

[3] "An instrument" refers to a negotiable instrument, which is defined at G.L. 1956 § 6A-3-104(a), (b). Although this case does not involve a negotiable instrument, this citation provides a point of comparison.

garages would not be considered part of the individual Units for the Allocated Interest Formula. However, the Units consist of the "physical portion of the Property designated for separate ownership or occupancy," and the garages are "for the sole use of the Unit bearing that same number." Id. § 1.25; Fifth Amendment, Ex. D. Because these provisions fit garages into the definition of a Unit, the garages are not "Property other than the Units." Thus, the floor space area of the garages should be included in the numerator because garages are "designated for separate ownership or occupancy."

2

The Result

In essence, the analysis above is consistent with the Clarification because the Clarification purports to include the floor space of all garages and storefronts. The Plaintiffs contend that the adoption of the Clarification violates G.L. 1956 § 34-36.1-2.17(d) and that the assessment in turn violates § 34-36.1-3.15. This is not correct. Section 34-36.1-2.17(d) provides: "Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may . . . change . . . the allocated interests of a unit . . . in the absence of unanimous consent of the unit owners." While it is undisputed that the Unit owners at the Condominium complex did not unanimously consent to the Clarification, the Allocated Interests were not actually changed. The Allocated Interest Formula has remained static since the Original Declaration in 1984: "the Allocated Interest appurtenant to each Unit which shall be determined by a fraction, the numerator of which shall be the floor space area of each Unit and the denominator of which shall be the total floor space of all Units subject to this Declaration as of the same date." (Original Declaration § 6.12.) There is evidence supporting that Exhibit B to the Fifth Amendment is clearly inconsistent with the formula. The Plaintiffs point to no

evidence that the calculations contained in Exhibit C to the Fifth Amendment were intended to take precedence over the Allocated Interest Formula in § 6.12.

Although the Court has found that the Clarification is consistent with the Court's analysis above regarding the garages and storefront space, the Court cannot accept the Board's bare assertion that "the Executive Board has secured the proper floor space measurements for the subject garage and storefront spaces . . . ." (The Association, Clarification to Fifth Amendment to Decl. of Plan ¶ 4.) This is particularly true in light of Mr. Baldelli's attested assertion that the Association "has not measured the square footage of all the units and garages at the Condominium." (Baldelli Supp. Aff. ¶ 4.)[4] Additionally, the Court notes that while the language of the Clarification seems consistent with this Court's finding above in that the Board "derived an intent to include all storefront unit space," the Court's confidence in the Clarification's precise measurements is lessened by the lack of clarity in the representations to the Court regarding the treatment of storefront space.[5] Therefore, the Court orders the

[4] Mr. Baldelli's Supplemental Affidavit, subscribed and sworn to on May 21, 2012, contains two paragraphs numbered "2" and two paragraphs numbered "4"; this citation refers to the second "4" paragraph.

[5] This may be caused by inconsistent nomenclature in the Declaration (i.e., floor space area and living space) or by the parties or some combination of the two. However, the Cavallaro Affidavit contends that a letter from Mr. Lombardi to the Board states that Unit nos. 1-10, the first storefront units, "included the storefront 'commercial' space as an allocated interest, which is clear error and a violation of the Declaration and Zoning." (Cavallaro Aff. ¶ 45.) Notably, Cavallaro cites to an attached letter from Mr. Lombardi, but the letter says nothing of the sort. Nevertheless, Cavallaro goes on to say that some retail units were "incorrectly omitted in previous formulas" and that the Board's Clarification includes "all garages and the stores." Id. ¶¶ 51, 53 (emphasis in original). The Court's concern about the actual measurements is also founded upon the fact that much of Mr. Lombardi's conclusions about what was or was not included in the calculation of floor space area seems to depend upon a comparison with projections contained in earlier documents. See Lombardi Aff. ¶¶ 4-20. The Court is not particularly persuaded by comparisons to projections because the projections may have changed as the units were actually built; the Court cares that all storefront floor space area is included in the floor space area calculated for the Allocated Interests.

Defendants to hire an expert to compute the proper floor space area of each Unit[6] consistent with this Decision, i.e. the numerators are to include all garages and all storefront space. While Mr. Lombardi may be an expert in condominium law, there is no evidence that he or any Board Member is a surveyor or even conducted the complete measurements in fact. Under its broad powers in Declaratory Judgment claims, the Court believes that this course of action will facilitate the termination of the controversy. See Bradford Associates, 772 A.2d at 489.

B

Compensatory Damages

Although the Complaint is styled "Verified Complaint for Declaratory Judgment," Count IV requests "compensatory damages equal to the amount of all payments made by Plaintiffs for common expenses in excess of their allocated interest in the Condominium." (Compl. ¶ 42.) While the Plaintiffs did not move for summary judgment on Count IV, the Defendants' Cross-Motion for Summary Judgment is not so limited. For twenty-six years, the Board assessed the Common Expenses equally. Although the Plaintiffs did not own their units for that entire period, all owned their units since at least 2006 (including one since 1993). The issue was first raised at the 2007 Annual Meeting, but the equal assessments continued for two more years. The record contains no evidence that any Plaintiff objected to the equal assessment. Therefore, the Plaintiffs are estopped from claiming compensatory damages because of their acquiescence to prior equal assessment.

[6] That is, the entirety of each Unit, not just the previously un-included storefronts and garages.

IV

Conclusion

For the reasons stated above, the Court finds that the Allocated Interest Formula is the proper method for the calculation of the Allocated Interests for assessing Common Expenses. All storefronts and garages are to be included in the computation of the floor space area of each Unit. The Court directs the Defendants to hire an expert to compute the proper floor space area of each Unit. The Court denies the Plaintiffs' Motion for Summary Judgment and grants the Defendants' Cross-Motion for Summary Judgment to the extent that it is consistent with this Decision. Given that the Court's analysis essentially favors the Defendants, and that the Defendants had pressed the Motion to Dismiss, the Court does not rule on the Motion to Dismiss. Prevailing counsel may present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: The Balco Trust, LLC v. Steven Glazer, et al.

CASE NO: WC-2010-0857

COURT: Washington County Superior Court

DATE DECISION FILED: June 19, 2013

JUSTICE/MAGISTRATE: Silverstein, J.

ATTORNEYS:

For Plaintiff: Peter Brent Regan, Esq.

For Defendant: Todd D. White, Esq.; James A. Hall, Esq.