

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 26-1-18 Wmcv

Rogers et al vs. A&A Mountain Enterprises, LLC et

NOTICE OF DECISION ON MOTIONS
FOR SUMMARY JUDGMENT

Vermont Superior Court
Filed 08/07/20
Windham Unit

This action is based on the plaintiffs Charles and Evelyn Rogers' claims for damages to the loss of use and enjoyment of and income from their second story residential condominium in the Village Square Condominiums in Stratton, caused, they allege, by a nuisance emanating from the downstairs commercial condominium, operated as the Stratton Mountain Market and Deli. The plaintiffs complain that noxious odors produced by cooking or processing meat in the Deli amount to a nuisance, and have caused them damage and financial losses. The commercial downstairs unit is owned by Village Holdings, an LLC, and A & A Mountain Enterprises (A & A) is an LLC that operates the Market and Deli, leasing the unit from Village Holdings. The plaintiffs allege that the continued production of these noxious odors is a violation of various terms of the condominium association's declarations and by-laws. For purposes of this decision, the court is assuming but not deciding that the claims that A & A's production of noxious meat-cooking/processing related odors was a violation of the COA's declaration, rules, or by-laws.

As condominium owners, both the plaintiffs and Village Holdings are members of the Stratton Mountain Village Square Condominium Owners' Association (COA). The COA is managed by the Stratton Corporation (Stratton). In their amended complaint, filed on May 11, 2018, the plaintiffs also allege that the COA and Stratton as its manager have breached their contract with the plaintiffs, by "failing to bring an action against Village Holdings despite the plaintiffs'" request that they do so based on Village Holding's breach of the declarations and by-laws of the condominium association. The plaintiffs assert that the COA's and Stratton's "failure to bring a legal action against Village Holdings following Plaintiffs' request that such an action be brought.... constitute[s] a breach of contract." (Amended Complaint, ¶ 64). They assert that due to this alleged breach of contract, they have been forced to hire attorneys to assist them in trying to end the noxious odors and to force the COA and Stratton, as manager of the COA, to bring an action against Village Holdings for violating the declaration. (Amended Complaint, ¶ 65).

The COA and Stratton have moved for summary judgment against the plaintiffs, arguing that their decisions not to bring a legal action against a third party is not a breach of contract. Stratton also argues that it had no duty to the plaintiffs. The plaintiffs oppose these motions, and assert that based on the terms of the declaration, these defendants' failure to enforce the terms of the declaration strictly by bringing suit against the other defendants, is a breach of contract.

UNDISPUTED FACTS

All parties agree to some of the relevant facts. These material undisputed facts are as follows:

Both the condominiums in question, that owned by the plaintiffs, and that owned by Village Holdings LLC, and leased by A & A, are in fact part of the Village Square Condominiums, and are governed, therefore, by the declaration applicable to all members of the condominium association.

Section 10 of the declaration states:

Failure of the Board of Directors to Insist on Strict Performance. The failure of the Board of Directors or manager to insist, in any one or more instances, upon strict performance of any of the terms, covenants, conditions or restrictions of this Declaration, or to exercise any right or option herein contained, or to serve any notice or to institute any action, shall not be construed as a waiver or relinquishment with respect to the future enforcement of such term, covenant, condition or restriction, but such term, covenant or restriction shall remain in full force and effect.

Section 16 of the declaration states:

Enforcement. Each unit owner shall comply strictly with the provisions of this Declaration and with the Bylaws of the COA... and rules and regulations promulgated pursuant thereto, as the same shall be lawfully amended from time to time. Failure so to comply shall be grounds for an action to recover sums due for the damages, or for injunctive relief, or both, maintainable by the Board of Directors or manager on behalf of the owners.

Section 22 of the declaration states:

Interpretation. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development and operation of a condominium project. Failure to enforce any provision hereof shall not constitute a waiver of the right thereafter to enforce that provision or any other provision hereof.

The parties also agree to the following facts related to the plaintiffs' specific claims that the COA and Stratton breached contractual duties to them:

The offensive odor was first noticed by the plaintiffs in 2014. The Deli installed a ventilation system to address the issue. In June 2017, the plaintiffs wrote to the COA saying that they had been working with Stratton to address this issue with no success, and asking for the COA's "thoughts about the problem." The deli installed additional insulation in the ceiling between their unit and the plaintiff's in June 2017, in hopes that would be the solution.

In August 2017, the plaintiffs asked the COA for help in getting information about whether the insulation had in fact solved the odor problem. Plaintiffs also asked the COA to send A & A a cease and desist letter. The COA did so on August 17. The letter required that A & A stop using the condominium to cook unless A & A identified additional mediation (sic) measures that had a reasonable chance of addressing the odor problem, and promptly undertook such measures, or unless A & A reached an agreement with plaintiffs.

In late October 2017, plaintiffs' attorney told the COA that he was continuing to work on a solution, and did not request that the COA file suit. There were discussions about conference calls to discuss the issue in early November 2017. The plaintiffs continued to negotiate with A & A through December 2017. The initial complaint was filed in this action on January 23, 2018. The plaintiffs did not inform the COA that the negotiations with A & A had failed until the complaint was filed. The parties also agree that the plaintiffs did not ask Stratton to bring a lawsuit on their behalf before the filing of their complaint against A & A.

LEGAL CONCLUSIONS

“Summary judgment is appropriate when, construing the facts as alleged by the nonmoving party and resolving reasonable doubts and inferences in favor of the nonmoving party, there are no genuine issues of material fact and judgment is appropriate as a matter of law.” *Newton v. Preseau*, 2020 VT 50, ¶ 4 (quoting *Sheldon v. Ruggerio*, 2018 VT 125, ¶ 14); V.R.C.P. 56.

The COA argues that it is entitled to summary judgment in its favor because it is not required by the condominium declaration to file suit against A & A, and the plaintiffs never asked it to do so before filing this action. The COA asserts that the decision whether to bring suit against an owner for violations of the declaration or rules is within its discretion, and subject to the “business judgment rule.” The court has been unable to find Vermont case law that relies explicitly on this rule, designed to protect corporate decision makers from actions seeking to force them to bring lawsuits. The “rule” assumes that a corporate board of directors or other governing entity has acted properly and in the best interests of the organization as a whole in declining to bring suit. See *In re Resource Capital Corp., Shareholder Derivative Litigation*, 286 F. Supp. 3d 619, 627 (S.D.N.Y. 2018) (a presumption of reasonableness is applied to board decisions not to accede to a shareholder’s demand); *Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 234 (2d Cir. 2015) (there is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company,” and a requirement that the shareholder prove that the refusal was “wrongful”) (citation omitted); *Joy v. North*, 692 F.2d 880, 887 (2d Cir. 1982) (“In the normal course of events a decision whether to bring a lawsuit is a corporate economic decision subject to the business judgment rule” unless bad faith is proven), superseded by statute on other grounds.

Stratton argues that it was not a party to any relevant contract with the plaintiffs and therefore cannot have breached any contractual duty to them. As the COA’s manager, its contract and contract duties were with the COA, not with the individual owners. Stratton also argues that it is not a party to the declaration because although it was one of the founders of the development, the declarations are a contract between the COA and the owners. Stratton argues that, even if it was a party to the declarations, the plain language of the declaration does not require the COA or the manager to bring suit against A & A. Stratton asserts, moreover, that only the board of the COA had the authority to direct the manager to file suit against an owner for violation of the declaration. Stratton also asserts that even if it was obligated to sue A & A, the plaintiffs never asked it to do so, so there was no breach of any such duty.

Both the COA and Stratton also rely on 27 V.S.A. § 1327 of the Condominium Ownership Act, which states that “actions may be brought by the manager or board of directors (in either case in the discretion of the board of directors) on behalf of two or more of the apartment or site owners . . . with respect to any cause of action relating to the common areas and facilities of more than one apartment or site.” 27 V.S.A. § 1327. They assert that § 1327 applies to the action that the plaintiffs argue should have been filed here, because the ceiling or area between the plaintiffs’ unit and the A & A unit is part of the common areas of the condominium association, both units are affected by it, and the offensive odor traveled through that common area.

The defendants have also noted that 27 V.S.A. § 1307 provides:

Each apartment or site owner shall comply strictly with the bylaws and with the administrative rules adopted under them, as either may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his or her apartment or site. Failure to comply with them shall be grounds for an action to recover sums due, for damages or

injunctive relief or both maintainable by the manager or boards of directors on behalf of the association of owners or, in a proper case, by an aggrieved apartment or site owner.

27 V.S.A. § 1307. See *Watson v. Village at Northshore I Assoc., Inc.*, 2018 Vt. 8, ¶¶ 30–31, 207 Vt. 154. The defendants note that the plaintiffs themselves had the right to bring an action against Village Holding under this section, and that therefore there was no need for the defendants to do so.

The plaintiffs oppose all of these arguments. They argue that the terms of the declaration are mandatory, not discretionary, and that the COA and the manager were required to bring suit against A & A to comply with its terms. They argue that § 1327 is not applicable here because this action is not related to a common area. They argue that Stratton is a party to the declaration, and that it and the COA were equally bound to bring suit against A & A for its violation of the declaration. They also argue that the court is bound by its earlier denial of these defendants' motions to dismiss, which were based on similar arguments.

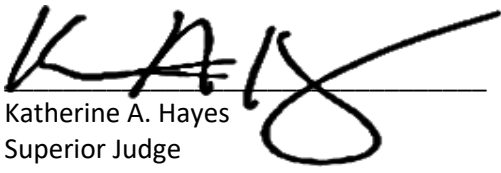
The plaintiffs allege that both the COA and Stratton have breached their contractual duties under the condominiums' declaration. "Because a declaration of condominium is in the nature of a contract, we look to the intent of the contracting parties, which we presume is reflected in the contract's language when that language is clear." *Watson*, 2018 VT 8, ¶ 58 (quotation and citation omitted). In interpreting that language, the court should "consider[] the instrument as a whole and giv[e] effect to every part contained therein to arrive at a consistent, harmonious meaning, if possible." *Higtridge Condominium Owners Assoc. v. Killington/Pico Ski Resort Partners, LLC*, 2014 VT 120, ¶ 14, 198 Vt. 44 (quotation and citation omitted).

The court concludes that this motion must be resolved based on the clear, unambiguous language of the declarations. The declarations are to be enforced by the owners' association for the common benefit of all the owners. *Watson*, 2018 VT 8, ¶ 33. "[A]nyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts the risk that the power may be used in a way that benefits the commonality but harms the individual." *Id.* ¶ 31 (quotation and citation omitted).

The plain language of these declarations does give the COA and its manager (if directed by the board) authority to bring suit against owners who violate them. "Failure so to comply shall be grounds for an action to recover sums due for the damages, or for injunctive relief, or both, maintainable by the Board of Directors or manager on behalf of the owners." Declaration, Section 16. The other terms related to violations of the declarations make it clear that if the COA allows one violation, that does not mean that it is waiving its right to enforce the declarations if there are future violations. "[F]ailure of the Board of Directors or manager to insist, in any one or more instances, upon strict performance of any of the terms, covenants, conditions or restrictions of this Declaration, or to exercise any right or option herein contained, or to serve any notice or to institute any action, shall not be construed as a waiver or relinquishment with respect to the future enforcement of such term, covenant, condition or restriction." Section 10. And "[f]ailure to enforce any provision hereof shall not constitute a waiver of the right thereafter to enforce that provision or any other provision hereof." Section 22.

However, there is nothing in the language of these terms that mandates that the Board of the COA or the manager must bring suit against any owner for any violation. Any such requirement would be inconsistent with their obligations to act on behalf of the owners as a group, not on behalf of any individual owner. Therefore, the court concludes that under the plain language of the declarations, neither the COA nor the manager on its behalf was obligated to bring suit against A & A, even if the plaintiffs had in fact 'demanded' that they do so. They had no contractual obligation to bring such an action. These defendants' motions for summary judgment are therefore GRANTED.

It is so ordered.

A handwritten signature in black ink, appearing to read 'K.A.H.', with a large, stylized flourish extending to the right. The signature is written over a horizontal line.

Katherine A. Hayes
Superior Judge
Signed electronically

August 7, 2020

So Ordered