STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 10-1-11 Wrcv

ARAPAHO OWNERS ASSOCIATION, INC. and MARK KATTALIA,

Plaintiffs,

v.

LINNA ALBERT, et al.,

Defendants.

DECISION RE: DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS

This decision will address Defendants' Motion for Attorney's Fees and Costs, filed August 19, 2013. The Court held a hearing on this motion on Tuesday, March 11, 2014 with Attorney Gillies representing Plaintiffs and Attorney Readnour representing Defendants.

FINDINGS OF FACT

This case involves protracted litigation over issues between the Board of Directors of Arapaho Village, a condominium complex in Ludlow and certain of the Arapaho condominium owners. Initially, this action was brought for declaratory relief by the Arapaho Owners Association. This filing was met by a counterclaim on behalf of some, but not all, of the condominium owners. For ease of reference the Arapaho Owners Association will be referred to as the "Association," its directors as the "BOD," and the Defendants as the "Owners."

Arapaho was built in the late 1970s. Sometime around 2008, issues were raised to the BOD about payment for common expenses, as owners of similar units were not paying a similar share of common expenses. Expenses had not been allocated by percentage of ownership interest for some time, if ever, following the construction of the units. In addition, potential questions concerning marketability of title were brought to the attention of the BOD due to the subdivision of certain units, so-called "split units," which was not reflected in the original declaration schedule of units in 1979 ("1979 Schedule D"). In addition, concerns were raised about the failure to construct unit 23F, which was listed in the 1979 Schedule D, but never built.

In an effort to address these concerns, the BOD created a committee of owners to investigate the issues and propose solutions. The committee recommended that the BOD place for a vote two amendments to the declaration, one to address the "split-unit" issue and one to address the division of common expenses, using a formula which allocated

62.5% of common expenses equally among unit owners and split the remaining 37.5% based upon the size of the unit, an "allocation formula." The vote was held on October 9, 2010.

The results of the vote became the subject of controversy. The amendment to reflect the actual number of units constructed required 100% of the vote of unit owners. Even without the issue of how the ownership interest of the un-built 23F was to be handled, the amendment failed, as the BOD recognized that this would require a 100% affirmative vote, which the amendment did not receive.

The BOD felt that only a 75% affirmative ownership interest vote was required for the adoption of the allocation formula. Based upon their tally of the vote, the BOD believed they had received it, as they received over 75% of the ownership interest of units actually constructed, but less than 75% of the scheduled ownership interest, due to the absence of anyone voting the allocated interest of unit 23F.

Because the results of the voting on the amendments did not satisfactorily solve the issues facing the Association, the BOD on behalf of the Association brought a declaratory action, which was filed on January 10, 2011. The declaratory action, undertaken to provide judicial imprimatur to the actions taken by the BOD quickly became adversarial. A counterclaim was filed February 4, 2011 by the Owners seeking to nullify the amendments undertaken by the BOD. The litigation has been fervent since that time.

The Court will not review the entire procedural history of this case. Two decisions were of major importance, a summary judgment ruling by Judge DiMauro on February 21, 2012 and one by the undersigned on May 9, 2013. Judge DiMauro's ruling held that unanimous consent for an amendment regarding common expenses was not required and that a 75% affirmative vote would be sufficient, but that an issue existed over whether the 75% vote had been achieved. In the May 2013 decision, the undersigned ruled that a 100% affirmative vote was required under the language of the applicable statute of the Uniform Common Interest Ownership Act ("UCIOA"), which had clearly not been achieved. By any standard, the ruling of May 2013 was a reversal of a portion of an opinion reached earlier in the case by a different judge.

The Owners have posited that the actions of the BOD were a concerted effort by the large unit owners to foist upon the owners of the smaller units an "unfair" share of the common expenses. Common expenses may be shared in any way the unit owners decide, including as proposed by the BOD, so long as properly adopted. Where there was disagreement here was not in the possibility of dividing the common expenses as per the proposed formula recommended by the BOD, but in the requirements for valid adoption.

The Owners claimed that the BOD disregarded the legal advice provided by its counsel in an effort to ram through a proposal favoring the large unit owners at the expense of the small unit owners. This argument fails for two reasons. First, the evidence was uncontroverted at the hearing on attorney's fess that the expense allocation formula was recommended by a committee which included at least some small unit owners. That evidence also showed that the BOD had attempted to populate the

committee with a cross-section of unit owners. No evidence supports a conclusion that the committee was stacked to obtain a particular recommendation.

Second, one of the attorneys representing the Association, Martin Nitka, testified at the hearing on attorney's fees that he had given the BOD his opinion that a 75% affirmative vote was all that was required to successfully amend the common expense formula. This opinion was one which Judge DiMauro had shared, and while the undersigned does not agree with it, is certainly one upon which reasonable minds could, and did, differ. Most importantly, the legal advice provided by Attorney Nitka was not, as the Owners have repeatedly suggested both orally and in writing, in support of the position advocated by the Owners and contrary to the path undertaken by the BOD.

Following the vote, and pending resolution of the declaratory action, Attorney Nitka recommended to the BOD that they return to using the 1979 Schedule D for common expenses. The BOD did not follow that advice. Accordingly, the BOD is now engaged in a "true-up" of expense assessments as ordered by the Court.

The BOD was confronted by a myriad of problems which were co-occurring. These problems had been brewing, to a greater or lesser extent, since 1979. The response to these problems by the BOD was a reasonable one, specifically to appoint a committee to make recommendations, propose amendments to the Declaration, to seek a vote of the unit owners, and to obtain legal advice when the results of the vote cast doubt upon whether the allocation formula for common expenses, at least, were sufficient to adopt it. Thereafter, the BOD brought a declaratory action, which was an appropriate legal recourse, seeking a judicial declaration regarding the actions of the BOD.

The Owners argue that the actions of the BOD did not seek to address the title problems resulting from the split unit issue or the failure to construct unit 23F. On the contrary, the declaratory action did seek that relief, but in a manner that the Court found was outside of its powers to declare. The efforts of the BOD in resolving the title problems created by the construction of the split units and particularly the failure to construct unit 23F, might have been comparatively easy to resolve, although resort to judicial process would have been ultimately necessary given the results of the vote and the inability to achieve the 100% necessary with the inability to vote the ownership share of the un-built unit. The BOD's attempt to tackle the common expense formula at the same time as addressing the potential title issues, while not improper, made resolution of this litigation infinitely more complex, especially given the overlap between two condominium acts, the one in effect when the complex was constructed (the Vermont Condominium Ownership Act) and the one currently in effect (UCIOA).

A great deal of time and argument was spent over whether the Association had achieved a 75% share of the vote in connection with the common expense formula. The argument that 100% was necessary was not the focal point of earlier pleadings, although it could have been.

Despite repeated assaults upon the motivation of the BOD by the Owners, the Court does not find support for any nefarious intent by the BOD to specifically benefit the large unit owners at the expense of the small unit owners. Any common expense

formula results in some inequities. There are perceived "winners" and perceived "losers" regardless of the formula employed. This is amply evidenced by the various adjustments made by management companies to the common expense formula throughout the life of Arapaho. Whether the formula used is an equal division among units, a value formula, one which incorporates some consideration of unit location, a hybrid formula, or some other basis, someone will be unhappy. The legislative requirement of 100% agreement to amend common expense allocation is a clear expression that the predictability of whatever formula is initially adopted is far more preferable than continuous amendments to the expense formula depending upon who can muster some lesser majority. Equity exists because of predictability, not because some other formula would be unfair.

The claim for attorney's fees is supported here by an affidavit which does not break down the tasks performed with respect to any particular billing. It has not been contested that Attorney Readnour is an experienced attorney with a practice that includes work for and on behalf of condominium owners and associations. No expert was called in support of the claimed fees. No objection was made as to the reasonableness or the amount of the fees by the Association or to the manner of proof of the fees as submitted.

CONCLUSIONS OF LAW

27A V.S.A. § 4-117(a) allows for an award of attorney's fees, in the discretion of the Court, when a unit owner has brought an action to enforce a right granted under the UCIOA, the condominium declaration, or the by-laws. This Court had initially felt a showing of bad faith or deliberate misconduct would be required to justify an award of attorney's fees. However, the Court believes that where, as here, the award of attorney's fees is discretionary under the statute providing for them, that such a showing is unduly restrictive.

The recent decision in *Montgomery v. 232511 Investments, Ltd.*, 2012 VT 31, 191 Vt. 624, decided under the same statute, affirmed an award of attorney's fees without such a showing. Even where the award is discretionary, some standard for the award of fees must apply. *Montgomery* suggests two standards, without guidance as to which is appropriate. The first standard is whether the plaintiff's suit (here the counterclaim by the defendants) was a catalyst for the relief, requiring the movant to show that their suit was causally related to the defendant's actions and that plaintiff's claims had a colorable or reasonable likelihood of success on the merits. *See Montgomery v. 232511 Investments, Ltd.*, 2012 VT 31, ¶ 9, 191 Vt. 624. The second standard is whether a defendant's (here plaintiffs') voluntary change in conduct was accomplished with sufficient judicial imprimatur to make the movant the prevailing party. *See id.*, ¶ 10.

Applying either standard, the Owners are entitled to attorney's fees. Their actions in pursuing relief have been relentless, and have resulted in a judicial determination contrary to that sought by the BOD. The Owners have prevailed on their claim rejecting the hybrid formula for common expense assessment and in obtaining a "true-up" of assessments. The common expense formula issue was a focal point of the litigation.

The Owners seek to exclude those who participated in challenging the actions of the BOD from sharing in any liability for payment of those fees. There is an irony here. The Owners fought long and hard to obtain a result which they felt represented the correct formula for the sharing of common expenses and then seek to be excluded from the operation of that formula upon these expenses, which are common to the owners as a whole. No precedent has been provided to exclude the Owners from the common expenses of this litigation. The attorney's fees awarded to the Owners is a common expense of Arapaho and is to be shared just like any other; according to the formula validly adopted.

There remains the question of how much should be awarded in fees. "For purposes of an award of attorney's fees under Vermont law, the touchstone is reasonableness." *Perez v. Travelers Ins.*, 2006 VT 123, ¶ 13, 181 Vt. 45. The Owners claim that they have spent $99,650 in fees in this litigation. No expert has been provided to support the reasonableness of the fees. The Association has not objected to the lack of an expert supporting the reasonableness of the fees and objected instead to the appropriateness of any award of attorney's fees.

The pleadings in this case have been exhaustive in their briefing of the issues. It is clear that the Owners obtained the result they did concerning the common fee assessment because of their efforts. While this issue occupied the majority of the discussion in the pleadings, it need not have. The title issues presented by the un-built unit and the split units were equally, if not more pressing, given their impact upon the marketability of the units' title and the ability of unit owners to sell their units. Most importantly considerable effort was made arguing whether the Association had received a 75% affirmative vote on the common expense formula, an issue which proved to be of little consequence. The briefing on the 100% affirmative requirement was scarce at first and comparatively late in coming.

"In calculating the award of attorney's fees, the court looks to the 'most useful starting point,' the 'lodestar figure,' by determining the number of hours reasonably expended on the case multiplied by a reasonable hourly rate, and then adjusting that fee upward or downward based on various factors." *L'Esperance v. Benware*, 2003 VT 43, ¶ 22, 175 Vt. 292. "These factors include, among others, the novelty of the legal issue, the experience of the attorney, and the results obtained in the litigation." *Id.* In this case, Attorney Readnour submitted an affidavit defending the Owners' $99,650 in attorney's fees as reasonable. Aff. of Attn'ys' Fees, Jon S. Readnour, Esq. ("Readnour Aff."), ¶ 11. Attorney Readnour also attached a bill journal summarizing his fees and expenses. Attach. A to Readnour Aff. At the hearing, the Association did not challenge Attorney Readnour's calculation of his fees or his hourly rate of $210 to $220 per hour.

The issues in this case were also made more complex by the overlap of two sets of statutes concerning condominiums, the VCOA and the UCIOA. This overlap made the issues in this case somewhat novel.

The Court has determined that a recovery of $40,000 of the claimed attorney's fees by the Owners is appropriate here. The Court has declined to award more of the claimed fees based upon the amount of time spent on issues which were collateral to the seminal issues, such as whether a 75% vote had been achieved, and in recognition that the BOD had taken actions which were objectively proper in an attempt to resolve several issues facing the BOD at one time. While a bad faith standard is not applicable in order for an aggrieved owner to receive attorney's fees, at the same time it must be recognized that the BOD here promptly sought judicial resolution of the issues facing the Association through a declaratory action once their attempts to do so through votes of the homeowners did not provide clarity. This is not a case where an association board took no action to address concerns and owners were forced to bring a claim to get relief.

The awarded figure is roughly 40% of the claimed fees, and represents in the Court's view a fair award primarily based on what the Court has determined, based upon the pleadings, to be a reasonable amount of fees on the common expense and true-up issues with due consideration to the arguments on the other issues made by the Owners. *See Bonanno v. Verizon Bus. Network Sys.*, 2014 VT 24, ¶ 23 (emphasizing that "[t]rial courts have ample discretion in determining the amount of attorneys' fees to award."). All unit owners are to share in the expenses for the attorney's fees according to the common expense formula.

ORDER

The Owners' Motion for Attorney's Fees and Costs is hereby GRANTED in part. The Owners shall recover $40,000.00 from the Association. The Association shall make payment of these fees to the Owners' attorneys consistent with the manner in which other financial obligations of the Association are met.

Dated at White River Junction, Vermont, this 25 day of March, 2014.

Honorable Harold E. Eaton, Jr.
Superior Court Judge

FILED

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