STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 10-1-11 Wrcv

Arapaho Owners Association, Inc.
Plaintiff

v.

Linna Alpert, Bruce Fitzgerald, Andrea Fitzgerald,
Chester Bond, Gina Bond, Thomas Berry,
Barbara Weber Barry, AST Property, LLC,
and Mary Otero-Zyman Revocable Trust
Defendants

Decision on Pending Motions

Arapaho Village was created in 1978. It is a condominium village that was meant to consist of 50 units, each of which share ownership of the common areas. An attachment to the original declaration, known as Schedule D, set forth each unit's share of the common areas according to a formula that compared each unit's value at the time of the initial sale to the total value of all units. The declaration further provided that common expenses would be allocated according to the same value-based formula.

All parties agree that Schedule D has never been used to allocate common expenses because it does not reflect the number of units actually built (five of the planned units were subdivided into two units each, and one of the units was never built, for a total of 54 units). All parties further agree that it was a mistake for the developer not to amend the declaration to reflect the actual configuration of the units. But the parties do not agree on the solution to the problem.

One solution might have been to use the value-based formula to recalculate the ownership interests of the units that were actually built, and to allocate common expenses according to the revised statement of each unit's share of the common areas. Doing so would presumably have effectuated the original intent of the developer. But the association board did not follow that path. Instead, the board proposed a new formula that was meant to address not only the problem identified above but also a second problem—a perception by the board that there were longstanding problems of a lack of equity in the allocation of the common expenses. The board therefore proposed a new formula for the calculation of ownership interests and the allocation of common expenses: a hybrid formula that allocated 62.5% of the common interests to each unit equally (per capita) and 37.5% of the common interests to each unit in proportion to the unit's square footage (size).

The board first held a vote to amend Schedule D to reflect the number of units that were actually built, and to allocate ownership interests in the common areas according to the new hybrid formula. All parties agree that this vote failed because it did not receive unanimous consent as required by § 1306(b) of the Vermont Condominium Association Act (VCOA), which was the law

in effect at the time Arapaho Village was created. In a prior motion, the board nevertheless effectively asked Judge DiMauro to ratify this vote under the equitable theory of reformation, on the ground that ratification of this vote was the most expeditious way of resolving the present dispute. Judge DiMauro denied the request, explaining that reformation is usually utilized as a means of effectuating the original intent of the parties in the face of a mutual mistake. She ruled that use of the equitable remedy here would be inappropriate because it would result in the adoption of a new bargain (use of the hybrid formula to allocate common expenses) rather than give effect to the original intent of the parties (use of the value formula to calculate common expenses).

The board next held a vote to allocate common expenses according to the new hybrid formula. All parties agree that this vote was impermissible under the VCOA, because § 1310 of the VCOA prohibited condominium associations from allocating common expenses by anything other than the value formula. The association board nevertheless argued that the vote was permissible under the new Uniform Common Interest Ownership Act (UCIOA), 27A V.S.A. § 1-101 *et seq.*, which became effective in 1999, and this argument became the focal point of the summary-judgment motions that were presented to Judge DiMauro.

As Judge DiMauro explained, one of the possibilities afforded by UCIOA is that condominium developers are now free to allocate ownership interests and common expenses according to a formula other than the "value" formula. Associations are now permitted to allocate common expenses "equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the value of those units," and associations may also choose different formulas for different allocations. 27A V.S.A. § 2-107, Official Comment [2]. Hence, the association argued that it would be permissible to retain the old value formula for the statement of ownership interests in the declaration, but to use the new hybrid formula for allocation of common expenses.

Judge DiMauro agreed with the association's reasoning. She ruled that UCIOA had made "a major adjustment to association management by permitting associations to choose different formulas for allocating common expenses." She further ruled that the association was permitted to amend its declaration to achieve the result permitted by the UCIOA because another feature of UCIOA is that any condominium association may amend its declaration to achieve "any result permitted" by the UCIOA so long as the amendment is approved in accordance with any procedural requirements established by the old law or by the existing declaration. 27A V.S.A. § 1-206(a)–(b) & Official Comment [2]. Judge DiMauro finally ruled that there were no particular voting requirements set forth in VCOA § 1310, and thus a vote to amend the formula for allocating common expenses would be successful so long as it received approval from 75% of all unit owners as specified in the declaration. Noting the presence of a factual dispute about whether the vote actually received 75% approval from the unit owners, Judge DiMauro invited another round of summary-judgment practice directed towards that factual question.

Defendants instead filed a motion for reconsideration. For the first time in the case, defendants argued with clarity that the UCIOA does *not* permit amendments to the allocation of common expenses by anything less than unanimous consent. See 27A V.S.A. § 2-117(d) (explaining that declaration amendments may not change the allocated interests of a unit, including the unit's share of the common expenses, "in the absence of unanimous consent of the unit owners"). Defendants thus argued that the second vote (to amend the formula for allocating

common interests) was *not* a "result permitted" under the UCIOA, because the second vote did not receive unanimous consent.

Judge DiMauro denied the motion for reconsideration. Although she did not explain her decision, it can reasonably be inferred that the basis for the denial was that defendants had not raised the issue (of whether § 2-117(d) required unanimous consent for amendments to the allocation of common expenses) during the extensive summary-judgment motion practice except by way of two opaque references buried amidst forty pages of briefing. See *Campbell v. Stafford*, 2011 VT 11, ¶ 17, 189 Vt. 567 (mem.) (new legal arguments cannot be raised for the first time in motions for reconsideration).

After judicial rotation, defendants filed another motion for "revision" of the decision, along with an affidavit from an attorney with experience in condominium law containing a critique of Judge DiMauro's decision. Influenced by the policy against post-rotation horizontal appeals of prior trial-court decisions and the propriety of using expert affidavits to critique judicial rulings made by another superior-court judge, the undersigned denied the motion for revision.

The parties then sought summary judgment on the question of whether the second vote (the proposal to allocate common expenses according to the hybrid formula) received the number of votes necessary for approval of the amendment. Defendants again raised the issue that UCIOA § 2-117(d) requires unanimous consent for approval of any amendments to the allocation of common expenses, and the issue became the focal point of the oral argument. After reviewing the issue and the history of the case, the court is now persuaded that defendants are advancing the correct interpretation of the law, and that the declaratory judgment in this case cannot be crafted without confronting the issue squarely. See *Myers v. Lacasse*, 2003 VT 86A, ¶ 11, 176 Vt. 29 (approving reconsideration of a prior summary-judgment order where, "[o]nce the [trial] court began to confront the ramifications of the summary judgment order on its ability to craft [the judgment], it concluded that the implementation difficulties demonstrated flaws in the summary judgment decision").

Here, it is true that UCIOA permits condominium associations to amend their declarations to achieve any result permitted by the new law, and it is true that UCIOA also permits condominium associations to amend their declarations to use a formula other than the value formula for allocation of common expenses. However, UCIOA also requires any such amendment to be unanimous. 27A V.S.A. § 2-117(d). It is thus inescapable that the second vote in this case (to allocate common expenses by the new hybrid formula) needed to receive unanimous approval. It did not, and so it failed.

In reaching this decision, the court has reflected upon the question of whether equity permits a different result. In particular, the court has considered the decision of the Connecticut Superior Court in *Strathmore Farms Association, Inc. v. Perrelli*, 2004 WL 2595353 (Conn. Super. Oct. 12, 2004), a case that was not cited by either party. *Strathmore Farms* presents virtually the same situation as present: the declaration allocated ownership interests to 25 units, but the developer only built 23 units, and when it came time to amend the declaration to fix the longstanding problem, there were two holdout unit owners. An application was made to approve a restated allocation of ownership interests by supermajority vote, notwithstanding the unanimous-consent requirement contained in the Connecticut equivalent of § 2-117(d).

The solution in *Strathmore Farms* was to use the inherent equitable powers of the court to approve the declaration amendment over the objections of the holdout unit owners. But there is a material distinction between *Strathmore Farms* and the present case: unlike here, there was no suggestion in *Strathmore Farms* that the association board was trying to adopt a *new formula* for the calculation of ownership interests and common-expense allocations. It is this distinction that makes all the difference.

Use of the equitable powers of the court to reform an erroneous condominium declaration makes sense when the court is able to find that the effect of the reformation would be to give effect to the original bargain that was struck between the developer and the unit owners. But neither the UCIOA nor equity can be used to change the terms of that bargain thirty years after the fact. For these reasons, the court's decision is that the second amendment (to change the formula for allocating common expenses) did not receive the necessary number of votes for approval, and cannot be ratified by resort to equitable principles. See *Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1371 (Fla. 1987) (approving reformation of erroneous condominium declarations where the reformation seeks to give effect to the original bargain between the developer and the unit owners, but not where the reformation seeks to change the terms of that bargain).

Defendants Motion for Partial Summary Judgment, filed Dec. 21, 2012, is thus granted as to the request for a declaration that the second vote did not receive the number of votes necessary for approval, and that the certification of amendment is void. As best as the court can recall, the parties have represented to the court that in the event of such a ruling they would be able to resolve the remaining issues in the case amongst themselves. The parties are so encouraged, and if they reach resolution, the parties shall submit a form of final judgment for the court's approval. Defendants may notify the court within 30 days if there is a need for further judicial involvement in the matter.

ORDER

Defendants Motion for Partial Summary Judgment (MPR #10), filed Dec. 21, 2012, is ***granted*** as to the Request for Relief #1. Plaintiff's Motion for Partial Summary Judgment (MPR #11), filed Dec. 26, 2012, is ***denied***. The parties shall submit a form of final judgment for the court's approval, or Defendants may notify the court within 30 days if there is a need for further judicial involvement.

Dated at Woodstock, Vermont this 8 day of May, 2013.

Harold E. Eaton, Jr.
Superior Court Judge

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