VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-02770

Monika Andrzejkiewicz v. Old High School Condominium Association, Inc.

Opinion and Order on Defendant's Motion for Summary Judgment

Plaintiff Ms. Monika Andrzejkiewicz purchased Unit 1 in the Old High School Condominium complex in Waterbury in 2021. She asserts generally in the complaint that Defendant the Old High School Condominium Association ("Association") has violated covenants and bylaws, all unspecified, to her detriment. She seeks injunctive relief requiring compliance with those covenants and bylaws, the refund of all assessments, damages for the loss of use and enjoyment of her unit, damages for certain expenses for repairs that the Association should have undertaken, and attorney's fees. The Association has filed a motion for summary judgment addressing many items of harm alleged in the complaint.[1]

Specifically, Ms. Andrzejkiewicz claims that the Association: (1) has failed to identify and assign two parking spaces for exclusive use by her and her guests; (2) has failed to reimburse her for a plumbing repair for which the Association was responsible; (3) has failed to keep the parking lot and sidewalks clear of snow, ice, and debris; (4) has

[1] The Court twice requested that Ms. Andrzejkiewicz submit an index allowing it to understand to which exhibits she was referring in her opposition filings. Twice, Ms. Andrzejkiewicz filed no such index and blamed counsel for the Association for the Court's inability to see the correct labels for the exhibits. After the Court's second request, she did refile all her exhibits with labels achieving the same end as the requested index. Accordingly, the Court refers in this decision exclusively to the second set of exhibits.

failed to reimburse her for a $1,510.20 special assessment; and (5) has failed to repair the "drafts and air infiltration" in the bedrooms of her unit.[2]

Summary judgment procedure is "an integral part of the . . . Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Morrisseau v. Fayette*, 164 Vt. 358, 363 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621,

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[2] In the complaint, Ms. Andrzejkiewicz also sought the removal of "any and all liens" on her property. The Association represents, and Ms. Andrzejkiewicz does not dispute, that, at the time the complaint was filed, Ms. Andrzejkiewicz's account was in arrears, and the Association had filed a lien against her unit. She subsequently eliminated the arrearage, and the lien was lifted. While she maintains that there never should have been any lien, the relief she seeks is removal. Because that has happened, there remains no controversy as to any lien within the scope of the complaint. In briefing, Ms. Andrzejkiewicz also asserts numerous objections as to the current condition of the condominium building, how it has been maintained over the years, and as to how the Association's governing board has undertaken its responsibilities. These grievances are well outside the scope of the claims asserted in the complaint. The Court disregards all such grievances as outside the scope of the pleaded claims.

628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375, 380.

The Court evaluates the Association's motion under those standards.

(1) Parking Spaces

Ms. Andrzejkiewicz claims a right to the identification and assignment of two parking spaces for exclusive use by her and her guests. The Association argues that there is no provision giving Ms. Andrzejkiewicz any such right in the Declaration, Bylaws, or Rules, or the deed to her unit. In response, Ms. Andrzejkiewicz argues that there was such a provision in "previous bylaws" and that "Vermont State law" prohibited the Association from "removing" that provision in, presumably, the amended bylaws. Ms. Andrzejkiewicz cites her own Exhibit 2 in support of her representation as to the content of the previous bylaws; she did not submit those bylaws into the record or cite any specific provision of them. Exhibit 2 is a couple of private e-mails among Ms. Andrzejkiewicz and others discussing the general topic of parking. There are no representations in the e-mails as to any bylaws requiring the specific assignment of parking spaces to unit owners, and, even if there were, any such statements would have been inadmissible hearsay on that issue. Evidence offered in support of or in opposition to summary judgment must be admissible in evidence. *See* Vt. R. Civ. P. 56(c). Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Vt. R. Evid. 801(c). Unless subject to exception, hearsay is inadmissible. Vt. R. Evid. 802.

The Association has submitted the original bylaws into the record. Neither they nor the amended ones contain any provision requiring the Association to assign specific

parking spaces to unit owners. It is unclear what law Ms. Andrzejkiewicz believes would have prevented the Association from amending any such parking provision in the original bylaws, but because no such provision ever existed, the matter is moot.

The Association is entitled to summary judgment on this claim.

(2) The Plumbing Repair

Ms. Andrzejkiewicz claims that she was wrongly forced to undertake the expense of a plumbing repair for which the Association was responsible. This dispute arose when the pipe that drained Ms. Andrzejkiewicz's kitchen sink became clogged. The Association took the position that it was Ms. Andrzejkiewicz's responsibility to deal with it because the pipe served her unit only and so was a limited common element for which the unit owner was responsible rather than a common element for which it would have been responsible. Ms. Andrzejkiewicz argues that "the issue was outside the unit," it affected everyone, and plumbers have verified that the clog was not her fault.

The record shows that the pipe is a limited common element to the point where it became plugged. Under 27A V.S.A. § 2-102(c):

> Except as provided by the declaration in a common interest community:
>
> . . .
>
> (2) if any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion of it serving only that unit is a limited common element allocated solely to that unit, and any portion serving more than one unit or any portion of the common elements is a part of the common elements.

The declaration reiterates but does not alter § 2-102(c); *see* Amended Declaration § 5(c). According to the statement of Association President Sara Morin, the clog blocked the pipe for days and affected no one other than Ms. Andrzejkiewicz; no one else complained

about it. Absent evidence to the contrary, this suggests that the pipe, at least at the location of the clog, served Ms. Andrzejkiewicz's unit only.

Ms. Andrzejkiewicz contests that fact. She asserts that the pipe is the "main pipe" and serves the whole building. In support of this allegation, she cited her Exhibits 3 and 4. Exhibit 4 is an invoice from T-Bar Building and Construction on which is handwritten: "snake drain pipe to building main pipe"; "clog is in main drain connecting 2nd floor apartment to 1st floor to basement"; and "need to call Roto Rooter." Exhibit 3 is the invoice from Roto-Rooter on which is handwritten a note from one purporting to be an office manager: "This issue was caused by building draining system—old pipes were not taken care of by condo association. This tenant/unit is not at fault." Leaving aside the same hearsay problem noted above, none of the statements on these invoices addresses whether the pipe at the location of the clog is a limited common element insofar as in that location the pipe served Ms. Andrzejkiewicz's unit only. That the pipe clogged somewhere outside Ms. Andrzejkiewicz's unit does not make it a common element.

Accordingly, the Association has come forward with evidence to the effect that the pipe in that location was a limited common element, and Ms. Andrzejkiewicz has failed to contest that fact with admissible evidence. That does not end the inquiry, however.

The general rule is that the Association—not the unit owner—is responsible for the maintenance and repair of limited common elements. "Except to the extent provided by the declaration . . . the association shall be responsible for maintenance, repair and replacement of the common elements, and each unit owner shall be responsible for the maintenance, repair and replacement of his or her unit." 27A V.S.A. § 3-107(a). The

official comments clarify: "Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. As a result, under subsection (a), unless the declaration provides that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance." *Id.*, Uniform Law Comments ¶ 1; *see also* 27A V.S.A. § 3-115(c)(1) (expense associated with limited common element may be charged to relevant unit "[t]o the extent required by the declaration").

The Association points to Amended Declaration § 5(c) to show that the Declaration does allocate maintenance expenses for limited common elements to unit owners. That provision defines, in part, which elements are limited common elements, but it does not—at least on its face—address maintenance or repair costs at all. Nor does the Association point to any other provision of the Declaration allocating maintenance and repair costs related to limited common elements to respective units. To be sure, the *Amended Bylaws* clearly make that allocation. *See* Amended Bylaws § 3.2(a). But the statutes require that allocation to be made in the Declaration. 27A V.S.A. § 3-107(a), Uniform Law Comments ¶ 1; 27A V.S.A. § 3-115(c)(1); *see also* 27A V.S.A. § 2-103(c) ("If a conflict exists between the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this title.").

With no further briefing from either party as to whether other portions of the Declaration may allocate expenses related to limited common elements to unit owners, the Court declines to rule as a matter of law on this issue at this time. The Association's motion for summary judgment on the issue, though, must be denied.

(3) The Parking Lot and Sidewalks

Ms. Andrzejkiewicz claims that the Association has failed to keep the parking lot and sidewalks clear of snow, ice, and debris. This claim has no merit. The Association has hired a snowplow operator that, in its view, is reputable and does reasonable work.

In general, decisions made by the Association's executive board are protected by the business judgment rule. *See* 27A V.S.A. § 3-103, Uniform Law Comments ¶ 6. "So long as the board acts for the purposes of the [association], within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available." *Levandusky v. One Fifth Ave. Apartment Corp*., 553 N.E.2d 1317, 1322 (N.Y. 1990), cited generally in 27A V.S.A. § 3-103, Uniform Law Comments ¶ 6. As stated in the *Application of Business Judgment Rule to Decisions by Real Estate Condominium or Cooperative Corporations*, 9 A.L.R.7th Art. 5:

> The business judgment rule limits the judicial review of decisions made by a condominium's board of managers to whether the board's actions are authorized and whether the actions were taken in good faith and in furtherance of the legitimate interests of the condominium. It can be gleaned from the case law that so long as a condominium board acts for the purposes of the condominium, within the scope of its authority and in good faith, the courts will not substitute their judgment for that of the board's.

Ms. Andrzejkiewicz wishes that the Association would hire someone that would, in her view, do a better job of clearing the parking area in the winter than the current provider. She has not even attempted to come forward with any showing that the Association has violated any provision of the declaration or bylaws, done anything

without authority, or acted in bad faith. The Association is entitled to summary judgment on this claim.

(4) Special Assessment Relating to Floor Joist Repair

Ms. Andrzejkiewicz claims that she is entitled to reimbursement for her share of a repair to a common element, a severed floor joist, which resulted in a special assessment of $1,510.20.[3] The legal basis for this claim is unclear. Ms. Andrzejkiewicz appears to claim that the Association knew of the problem before she bought her unit and, even if it incurred the expense after she became an owner, the timing of things somehow immunizes her from any responsibility for contributing her proportionate share of the common expense. She also may be claiming that the Association should have had retained funds on hand to make the repair without any special assessments. Ms. Andrzejkiewicz does not explain how any of these allegations would give her any right to a refund of the special assessment.

According to the Association, it learned about the joist problem after Ms. Andrzejkiewicz purchased her unit, it was unable to obtain insurance coverage for the repair, and as a result it specially assessed the unit owners.

[3] In the complaint, Ms. Andrzejkiewicz refers to special assessments totaling $1,510.20 and "all other amounts paid for assessments." She does not specify what any of the disputed assessments were for. In the course of summary judgment briefing, it became clear that the principal dispute is as to a special assessment for the repair of a floor joist for which Ms. Andrzejkiewicz believes the Association should be responsible. To the extent that any other assessments are at issue, the controversy appears to be that the annual assessments are not reasonable because, in Ms. Andrzejkiewicz's view, the Association does not use them to reasonably maintain the building. There is no claim that the Association somehow lacks authority to make the annual assessments or is acting in bad faith, however. The Court perceives no viable legal claim as to annual assessments and certainly none that could survive the business judgment rule.

Although the relevance is unclear, Ms. Andrzejkiewicz cites to her own Exhibits 1a and 1b in support of her allegation that the Association knew about the problem before she purchased her unit. Exhibit 1b consists of two e-mails from unit owners. Neither addresses the joist issue in any way. Exhibit 1a consists of several e-mails, one from unit owner June Cook to the Board on November 9, 2021, apparently reporting the joist problem to the Board for the first time. Ms. Andrzejkiewicz purchased her unit on October 14, 2021. Nothing in Exhibits 1a or 1b indicates that Board had any awareness of the joist problem before Ms. Andrzejkiewicz purchased her unit.

The Association is entitled to summary judgment on this claim.

(5) Drafts and Air Infiltration

Ms. Andrzejkiewicz claims that the Association has failed to repair the "drafts and air infiltration" in the bedrooms of her unit. In its summary judgment motion, the Association characterizes this claim quite differently. It asserts that Ms. Andrzejkiewicz is claiming, instead, that the Association had a legal duty to disclose the "drafts and air infiltration" to her prior to her purchase of the unit but failed to do so. The Court discerns no such claim in the complaint. Ms. Andrzejkiewicz alleged: "Despite plaintiff's requests, defendant has . . . [allowed] air infiltration into the plaintiff's unit." Complaint ¶ 6 (filed June 27, 2023). For relief, she seeks: "Defendant should be ordered to repair the building to prevent drafts and air infiltration into plaintiffs' bedrooms." Complaint ¶ 12(E).

Legally, Ms. Andrzejkiewicz's claim is that there is a problem with a common element causing drafts and air infiltration, the Association has a duty to undertake repairs, and the Association's failure to do so is not protected by the business judgment

rule. Because the Association's motion is not calculated to address this claim, the Court does not rule on its merits at this time. The Association's motion for summary judgment is denied as to this claim.

Conclusion

For the foregoing reasons, the Association's motion for summary judgment is denied in part and granted in part. It is denied as to Ms. Andrzejkiewicz's claims regarding the drainpipe repair and the draft and air infiltration issue. It is granted as to all other claims.

Electronically signed on July 19, 2024, per V.R.E.F. 9(d).

Timothy B. Tomasi
Superior Court Judge