99 Mass.App.Ct. 1115
Unpublished Disposition

Appeals Court of Massachusetts.
Kevin MCQUILLY & another[1]
v.
Kathy BELFI, individually and as trustee,[2] & others.[3]
20-P-209
|
Entered: March 10, 2021.

By the Court (Green, C.J., Shin & Hand, JJ.[4])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** This action arises from a dispute over the operation of the Vineyard Harbor Condominium (condominium), some features of which more closely resembled a motel than a complex of individually-owned units. Plaintiffs Kevin McQuilly and Spencer Rhoads, each of whom own a unit in the condominium, appeal from judgments (1) dismissing all but one of their claims against the Vineyard Harbor Condominium Trust (trust) and certain of its trustees and (2) on the plaintiffs' remaining claim and one of the trust's counterclaims, declaring the parties' rights regarding McQuilly's unit.[5] For the reasons set forth below, we affirm the judgment entered on March 16, 2018, which dismissed most of the plaintiffs' claims. We vacate the judgment entered on November 1, 2019, which declared the parties' rights regarding McQuilly's unit, and we remand the matter to the Superior Court.

Background.[6] 1. The condominium. The condominium, located on Martha's Vineyard, was established under G. L. c. 183A and is comprised of forty-two units in two buildings. The master deed creating the condominium was recorded in 1976. The defendant trust is the unit owners' association; it was created by a recorded declaration of trust. Defendants Kathy Belfi, Louis Piacentini, Peter Flynn, James MacDonald, and Gerald B. Moore were, at the time suit was filed, the trustees of the trust. Each of the plaintiffs owns a unit in building two -- Rhoads owns unit 36 and McQuilly owns unit 42.

The trust has operated the condominium essentially as a motel since at least the late 1970s. The master deed provided that unit owners could rent their units, including on a short term basis, but did not mention the motel operation. Unit owners who wish to rent their units must participate in the trust's rental program. The trust establishes rates for each room, and guests book and pay through a centralized system, which, at its discretion, assigns guests to available rooms. The trust provides daily cleaning and linen service, and guests have access to the motel's common areas.

The trust treats the costs associated with operating the motel as a common area expense. The expense allocation methodology treats certain expenses as "fixed" and other expenses as "variable." The trust allocates fixed expenses to all unit owners but allocates variable expenses only to those units that are available for rent in a given month. Both categories of expenses are then allocated using a formula that during certain periods took into account each unit's percentage interest in the common areas and during other periods took into account the relationship between the square footage of each unit and the total square footage of the condominium. Unit owners receive periodic statements showing the revenue and expenses allocated to their units. The trust distributes profits to unit owners, or bills them for deficits, yearly.

***2** 2. The action. The plaintiffs took issue with the manner in which common area revenue and expenses were allocated, among other things, and sent a demand letter to the trustees. They did not serve a demand on the other unit owners. When the trustees refused to take action, McQuilly and Rhoads filed suit. Their complaint included nine counts, some styled as derivative claims

and others as direct claims.[7]

The trust counterclaimed, asserting that McQuilly owed common area expenses (count I under G. L. c. 183A, § 6), that the trust had the legal right to charge McQuilly an additional fee because unit 42 had been expanded (count II for declaratory judgment), and that McQuilly had been unjustly enriched by the expansion of unit 42 (count III for unjust enrichment).

After discovery closed, the parties filed cross motions for summary judgment. A Superior Court judge allowed the defendants' motion on all counts of the complaint except one -- count II, McQuilly's declaratory judgment claim -- and a judgment entered on those counts. The parties subsequently filed an agreed statement of facts under Rule 20 (2) (h) of the Rules of the Superior Court (2018) and cross motions for judgment, in which they addressed the status of unit 42. After a jury-waived proceeding, the judge declared that unit 42 would have exclusive use of the 242 square feet of living space that had been added to the unit by enclosing a portion of the limited common area roof deck and authorizing the defendants to charge an additional fee for common area expenses to McQuilly based upon the increased square footage of his unit. Judgment entered on count II of the complaint and count II of the counterclaims. The plaintiffs then appealed, arguing that the judge engaged in improper fact finding and incorrectly applied the law.

Discussion. 1. Summary judgment. a. Standard of review. We review a grant of summary judgment de novo. See Fortenbacher v. Commonwealth, 72 Mass. App. Ct. 82, 85 (2008). Under Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002), to obtain summary judgment, the moving party has "the burden 'to show by credible evidence from [their] affidavits and other supporting materials that there is no genuine issue of material fact and that [they are] entitled, as matter of law, to a judgment.' " Todd v. Commissioner of Correction, 54 Mass. App. Ct. 31, 39 (2002), quoting Smith v. Massimiano, 414 Mass. 81, 85 (1993). Once the moving party meets that burden, the opposing party must respond and show that there is a genuine issue of material fact for trial. Community Nat'l Bank v. Dawes, 369 Mass. 550, 554 (1976). Because summary judgment "focuses on the merits of the controversy," rather than on the "validity of the pleading[s]," Finn v. National Union Fire Ins. Co. of Pittsburgh, Pa., 452 Mass. 690, 692 n.7 (2008), parties opposing summary judgment may not "rest upon the mere allegations or denials of [their] pleading[s]" and, instead, must respond "by affidavits or as otherwise provided in [the] rule," Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974). Moreover, not every dispute of fact is grounds for denying summary judgment; to raise a triable issue, a disputed fact must be "material" in the sense that its existence or nonexistence "might provide a basis for a fact finder to find in favor of the [nonmoving] party." Liss v. Studeny, 450 Mass. 473, 482 (2008).

***3** Here, although the plaintiffs argue at length that there were disputed issues of material fact that foreclosed summary judgment, all of the facts to which the plaintiffs point fall into two categories: (1) facts that, while arguably material, are not disputed[8] and (2) facts that, while arguably disputed, are not material.[9] Because the plaintiffs have not pointed to any disputed issues of material fact, we review the judge's decision to determine only if he correctly applied the law to the undisputed facts.

b. Derivative claims. Because the plaintiffs brought counts I, III, IV, IV*, V, VI, and VII derivatively, these claims are subject to the pleading requirements of Mass. R. Civ. P. 23.1, 365 Mass. 768 (1974). See Cote v. Levine, 52 Mass. App. Ct. 435, 439-440 (2001) ("[rule 23.1] governs how a derivative action is brought"). The judge dismissed the plaintiffs' derivative claims for failure to comply with rule 23.1's requirement that the complaint "allege with particularity the efforts ... made by the plaintiff[s] to obtain the action [they] desire[d] from the directors or comparable authority and ... from the shareholders or members, and the reasons for [their] failure to obtain the action or for not making the effort."

"A condominium, once created, is run by a corporation, trust, or unincorporated association.... The members of the association are the unit owners.... The governing body of the association is the equivalent of the board of directors of a corporation, and the unit owners are the equivalent of shareholders." Cote, 52 Mass. App. Ct. at 439. For that reason, in this context, we have interpreted rule 23.1 to require that the plaintiffs' complaint allege with particularity both (1) "the efforts, if any, made to obtain the action [they] desire[d] from the trustees and why such demand failed or was not made" and (2) that the plaintiffs made a demand "on the remaining unit owners unless they too were interested or their number very large." Id. at 440, 442-443. Here, the plaintiffs concede that they did not make a demand on the other unit owners before filing suit. The plaintiffs argue that this requirement should be excused because of the following circumstances: (1) the other unit owners could not grant the relief requested and (2) the number of other unit owners is large because many of the units were bought and sold over the years. This argument is not supported by the plaintiffs' pleadings or by applicable law.

***4** Rule 23.1 establishes a pleading standard that is "higher ... than ordinary notice pleading." Johnston v. Box, 453 Mass. 569, 578 (2009) (applying Massachusetts rule 23.1 to Delaware shareholder action). If a plaintiff's complaint does not allege that the required demand was made or the reasons why such a demand should be excused, "there [i]s no triable issue of fact before the judge with regard to the plaintiffs' failure to comply with that condition precedent required under Mass. R. Civ. P. 23.1," and the judge must dismiss the derivative counts. Aliberti v. Green, 6 Mass. App. Ct. 41, 45 (1978). Cf. Billings v. GTFM, LLC, 449 Mass. 281, 290 (2007) (complaint alleged futility of demand on other members based on unlikelihood members would agree to sue themselves, thereby satisfying rule 23.1 requirements). Here, although the plaintiffs now argue that the demand on the other unit owners should be excused, there are no factual allegations in the complaint to suggest that the other unit owners lacked the ability to act or that the other unit owners were too numerous.

Moreover, even if the plaintiffs had pleaded facts demonstrating that the other unit owners could not act on the plaintiffs' complaint, such facts would not excuse the plaintiffs' obligation to make a demand on the unit owners. To establish that a demand on the other unit owners would have been futile, the plaintiffs were required to show that the other unit owners were "interested," meaning that the unit owners were involved in the alleged wrongdoing or controlled by the alleged wrongdoers. See Harhen v. Brown, 431 Mass. 838, 842–844 (2000). There is no authority for the proposition that a demand on disinterested unit owners may be excused because the plaintiff believes those unit owners will not or cannot act.[10] Thus, the plaintiffs were obligated to make a demand on the other unit owners. Their failure to do so is fatal to their derivative claims.

c. Direct claims. We also agree that the plaintiffs' following direct claims were properly dismissed: count IV, for an accounting; count IV*, for aiding and abetting; count V, for breach of contract; count VII, for an accounting; and count VIII for lost rent and overcharges.

i. Accounting. Counts IV and VII, to the extent that they were brought directly, were properly dismissed because the plaintiffs did not show that they were entitled to an accounting. An accounting is an equitable remedy available where there is "a fiduciary relation between the parties" or an account "so complicated that it cannot be conveniently taken in an action at law." Ball v. Harrison, 314 Mass. 390, 391-392 (1943), citing Badger v. McNamara, 123 Mass. 117, 119 (1877). See Chamberlain v. James, 294 Mass. 1, 6-7 (1936); C.A. Spencer & Son Co. v. Merrimac Valley Power & Bldgs. Co., 242 Mass. 176, 180 (1922).

Here, the plaintiffs are not entitled to an accounting on the basis of a fiduciary relationship. Fiduciary duties in this case run from the trustees to the trust as a whole, and not to any particular unit owner. See Cigal v. Leader Dev. Corp., 408 Mass. 212, 219 (1990) (breach of fiduciary duty claim based upon failure to collect common charges from certain units, resulting in increased common charges to other units, was based on duty owed to unit owner's association and could only be brought derivatively). See also Office One, Inc. v. Lopez, 437 Mass. 113, 125 (2002) (trustees "owe no fiduciary duty to individual condominium unit owners"). In other words, the only breach of fiduciary duty claim available to the plaintiffs is a derivative claim. Because, however, the plaintiffs have not met the procedural requirements to sue derivatively on behalf of the trust, they cannot pursue an accounting claim based upon the existence of fiduciary duties owed to the trust. Thus, the issue is whether the plaintiffs have established that the condominium accounts are so complicated that they cannot be conveniently taken at law.

***5** Case law addressing the plaintiffs' burden of proof on this issue is admittedly sparse. Nonetheless, we agree with the judge that where, as here, the plaintiffs offered no evidence to support bare allegations of "opaque" and "complicated" accounts, they have not shown a need for an accounting. See Badger, 123 Mass. at 119–120 (at pleading stage, "general allegation" of complicated account insufficient to state claim). Cf. Pierce v. Equitable Life Assur. Soc. of U.S., 145 Mass. 56, 60 (1887) (accounting available where it "appear[s] from the evidence reported" that accounts at issue are "singularly complicated" [emphasis added]). To hold otherwise would render accountings available as a matter of course; such a result is inconsistent with our prior decisions limiting accountings on the basis of a complicated account to those situations where legal remedies are inadequate. See, e.g., Chamberlain, 294 Mass. at 11 (allegations failed to "show any account ... so complicated that it cannot be taken in an action at law"); C.A. Spencer & Son Co., 242 Mass. at 180 (similar); Walker v. Brooks, 125 Mass. 241, 248 (1878) ("complete remedy at law" available). See also Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962) (plaintiff not entitled to accounting where "jury, under proper instructions from the court, could readily determine the recovery, if any, to be had," and thus breach of contract or trademark infringement claims were available to redress plaintiff's concerns).

The plaintiffs' argument that they are entitled to an

accounting because the defendants "inappropriate[ly]" commingled rental income and condominium income fails for the same reason. The question is not whether the plaintiffs can point to accounting improprieties, but rather whether the accounts are so complicated that legal remedies are inadequate to address the alleged improprieties. Because the plaintiffs did not avail themselves of available discovery and inspection rights, see G. L. c. 183A, § 10 (granting condominium unit owners right to inspect certain books and records of condominium association); Mass. R. Civ. P. 34, as amended, 474 Mass. 1402 (2016) (authorizing discovery requests to "inspect, copy, test, or sample" documents), they have no evidence as to the nature or extent of the financial records at issue. Thus, there is no basis to conclude that the condominium accounts are so complicated that an accounting is required.

ii. Breach of contract and lost rent claims. The plaintiffs' position on count V, for breach of contract, and count VIII, for lost rent and overcharges, is not entirely clear. On the one hand, the plaintiffs argue that the judge erred in concluding that there was an implied-in-fact contract to operate the rental program. On the other hand, the plaintiffs seek damages for alleged breaches of a contract for operation of a rental program. We need not resolve this apparent inconsistency because the wrongdoing alleged in counts V and VIII -- that renters were undercharged for the plaintiffs' units and switched to units owned by others, thereby depriving the plaintiffs of income, and that expenses were improperly allocated between units -- is not supported by any record evidence. Accordingly, no matter the characterization of the claims, the plaintiffs cannot prevail.

The plaintiffs' reliance on evidence they argue shows commingling of rental income and condominium fees does not defeat summary judgment because such commingling has no bearing on whether undercharging, rent switching, or improper expense allocation occurred. Accordingly, evidence that rental income and condominium income were commingled does not raise a triable issue of material fact sufficient to overcome summary judgment.

iii. Aiding and abetting claim. Count IV* for aiding and abetting was also properly dismissed. One of the elements of an aiding and abetting claim is commission of the underlying tort. See Go-Best Assets Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012) (elements of aiding and abetting). Because the plaintiffs cannot prevail on their breach of fiduciary duty claims, which are their only tort claims, their aiding and abetting claim also does not survive summary judgment.

2. Unit 42. Count II of the complaint and count II of the counterclaims both concern the status of, and common area expenses charged to, unit 42. Unit 42 was originally 421 square feet and had access to a roof deck that the master deed designated as a "limited common area for the exclusive use of the owner of Unit No. 42." In 1989, unit 42 was expanded to some 622 square feet as part of a roof replacement project that required altering unit 42 to fit the new roof. The owner of unit 42 at that time returned a signed authorization for the work on behalf of unit 42.

***6** At a meeting of the trustees on October 19, 1991, the trustees agreed to assess unit 42 an increased percentage of common area expenses and to reduce other units' percentage interests accordingly. Regardless, no amendments were made to the master deed or declaration of trust, and expenses continued to be charged based on the percentage interests stated in the master deed. In 2000, after identifying what they described as an "error," the trustees adopted a "Corrected Percentage Factor" based upon the square footage of each unit. As a result, the percentage factor for unit 42 increased, while the percentage factors for all other units decreased. The trustees have since reverted to using the percentage interests established in the master deed to calculate the common area expenses assessed to each unit.

In his decision on these claims, the judge concluded as follows: (1) unit 42 shall have exclusive use of the 242 square feet of living space added to the unit by enclosing a portion of the limited common area roof deck and (2) the trustees are authorized to charge McQuilly an additional fee for common area expenses based upon the increased square footage of his unit. The judge described this resolution as "not perfect, [but] as equitable and consistent a result as can be accomplished without wholesale disruption to the status quo."

Because these claims were tried under Rule 20 (2) (h) of the Rules of the Superior Court, we review the judge's decision "according to the standard of review that would apply to a verdict by a jury in a case tried to a jury and to the judgment entered thereon" (citation omitted). Spinosa v. Tufts, 98 Mass. App. Ct. 1, 10 (2020). "A jury verdict will be upheld so long as 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [prevailing party].' " Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 595 (2007), quoting Tufankjian v. Rockland Trust Co., 57 Mass. App. Ct. 173, 178 n.9 (2003).

Applying this standard, we vacate the judgment as to count II of the complaint and count II of the counterclaims because we can identify no authority to support the judge's conclusion that the trustees were authorized to charge an additional fee for common area expenses to unit 42's owner based upon the increased square footage of the unit. We are mindful that the judge's decision was an attempt to achieve an equitable result, but discretion to fashion equitable remedies must be exercised consistent with applicable law. See, e.g., Feinzig v. Ficksman, 42 Mass. App. Ct. 113, 118 (1997) ("the court may not exercise its discretion to violate a legal principle"). Here, neither G. L. c. 183A, § 5, which governs interests in condominium common areas and facilities, nor the master deed or declaration of trust, authorized the trustees to reallocate a unit's percentage liability for common area expenses without the consent of all unit owners.[11]

In Massachusetts, the condominium form of ownership is designed to offer flexibility; while "G. L. c. 183A mandates that certain minimum requirements for establishing condominiums be met, those matters that are not specifically addressed in the statute are to be worked out by the involved parties" (citation omitted). Trustees of the Beechwood Village Condominium Trust v. USAlliance Fed. Credit Union, 95 Mass. App. Ct. 278, 285 (2019). Thus, to determine whether the trustees' actions were authorized, we look both to the minimum statutory requirements and the condominium documents, including the master deed, which "provides 'the rules of the game.' " Id., quoting Flynn v. Parker, 80 Mass. App. Ct. 283, 289 (2011). Here, the declaration of trust established each unit owner's liability for common expenses. It provided that such liability shall be "in proportion to [the unit owners'] respective percentages of beneficial interest" in the condominium's common areas and facilities. The unit owners' respective percentages of beneficial interest in common areas and facilities are, in turn, set out in the master deed. It follows that to reallocate liability for common area expenses, the trustees must first amend the master deed's allocated percentages of beneficial interest in the common areas and facilities. According to the master deed, such an amendment requires consent from all unit owners.

***7** General Laws c. 183A, § 5 (b) (2), which the defendants rely on, does not alter this requirement. It provides in relevant part as follows:

> "The organization of unit owners ... shall have the power and authority ... to ... (ii) [g]rant to or designate for any unit owner the right to use, whether exclusively or in common with other unit owners, any limited common area and facility, whether or not provided for in the master deed, upon such terms as deemed appropriate."

At best, this language is relevant to the trustees' decision to grant exclusive use of the enclosed common area to unit 42. There is nothing in this language to suggest that it is intended to override the requirement of the master deed or G. L. c. 183A, § 5 (b) (1), to obtain the unit owners' consent before altering a unit owner's undivided interest in the common areas and facilities. Indeed, G. L. c. 183A, § 5, would seem to compel the opposite result because it also provides that "the withdrawal of a portion of the common areas and facilities, all as provided for in this subsection, shall not be deemed to affect or alter the undivided interest of any unit owner." Moreover, the defendants have pointed us to no authority to support their position that G. L. c. 183A, § 5 (b) (2) (ii), authorized the trustees to reallocate the unit owners' undivided interests in the common areas without the consent of all unit owners. Accordingly, because the reallocation was done without the consent of the unit owners, the judgment on these counts cannot stand.[12]

Conclusion. The judgment entered on March 16, 2018, is affirmed. The judgment entered on November 1, 2019, is vacated, and the matter is remanded for further proceedings consistent with this memorandum and order.

So ordered.

All Citations

Slip Copy, 99 Mass.App.Ct. 1115, 2021 WL 914034 (Table)

Footnotes

[1] Spencer Rhoads.

[2] Of the Vineyard Harbor Condominium Trust.

[3] Louis Piacentini, Peter Flynn, James MacDonald, Gerald B. Moore, all individually and as trustees of the Vineyard Harbor Condominium Trust, and the Vineyard Harbor Condominium Trust. While, as a general rule, unincorporated associations lack the capacity to sue and be sued, G. L. c. 183A, § 10 (b) (4), creates an exception for condominium associations. Sea Pines Condominium III Ass'n v. Steffens, 61 Mass. App. Ct. 838, 842 (2004).

[4] The panelists are listed in order of seniority.

[5] It appears that two of the trust's counterclaims may still be pending and that no separate judgment entered. Given our resolution of the issues on appeal, and the fact that no party has argued that the appeal is premature because no separate judgment entered, we do not address the issue further. Resolution of the issues on appeal is in the interest of judicial economy. See Creatini v. McHugh, 99 Mass. App. Ct. 126, 128 (2021), quoting Swampscott Educ. Ass'n v. Swampscott, 391 Mass. 864, 865 (1984) ("in the interests of judicial economy, we exercise our discretion to reach the merits" as it is "recognized that a decision on the merits should not be avoided on the technicality that a premature notice of appeal was or may have been filed, where no other party has been prejudiced by that fact").

[6] We take the facts primarily from the summary judgment record, reserving certain of them for later discussion.

[7] Count I was a derivative claim for breach of fiduciary duty that challenged the common area expense allocations; count II was a direct claim by McQuilly for declaratory relief; count III was a derivative claim for breach of fiduciary duty based upon failure to hold meetings; count IV was a derivative and direct claim for an accounting of the condominium's rental operations; a second count IV, which we will refer to as count IV*, was a derivative and direct claim for aiding and abetting; count V was a derivative and direct claim for breach of contract; count VI was a derivative claim for breach of fiduciary duty for failure to maintain condominium property; count VII was a derivative and direct claim for an accounting of the condominium's nonrental operations; and count VIII was a direct claim by Rhoads for allegedly undercharging guests who rented his unit.

[8] Illustrative of this first category is the plaintiffs' contention that there is a dispute regarding which rental expenses should be considered fixed versus which should be considered variable for purposes of allocating those expenses to unit owners. The plaintiffs point to no evidence supporting their contention that expenses were improperly categorized. Indeed, in the parties' consolidated statement of material facts in support of summary judgment, the plaintiffs purport to dispute the defendants' statement on this issue by writing the word "disputed" without any evidentiary citation. Conclusory statements, general denials, and inadmissible factual allegations do not provide a basis for denying a properly supported motion for summary judgment. See Davidson v. General Motors Corp., 57 Mass. App. Ct. 637, 639 (2003).

[9] Examples of this second category include the plaintiffs' contention that there is a dispute regarding the frequency with which billing statements were sent to unit owners. While the testimony on this issue is ambiguous, whether the billing statements were sent monthly or quarterly does not impact the outcome of any of the plaintiffs' claims. Indeed, other than noting the dispute, the plaintiffs provide no explanation as to its significance.

[10] Further, the record provides us with no indication that the other unit owners lacked the ability to act on the plaintiffs' demand by, for example, calling a meeting to address the plaintiffs' concerns.

[11] General Laws c. 183A, § 5, requires the consent of "all unit owners whose percentage of the undivided interest is materially affected" to alter a unit's percentage of the undivided interest in the common areas and facilities. The master deed required the written consent of all unit owners to effect such an amendment.

[12] "To the extent we have not addressed any other points raised, it is not because we have not considered them; rather, '[w]e find nothing in them that requires discussion.' " Northern Sec. Ins. Co. v. R.H. Realty Trust, 78 Mass. App. Ct. 691, 698 n.16 (2011), quoting Department of Rev. v. Ryan R., 62 Mass. App. Ct. 380, 389 (2004).

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