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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:)	Chapter 11
)	
GORDON PROPERTIES, LLC,)	
CONDOMINIUM SERVICES, INC.,)	Case No. 09-18086-RGM
)	
Debtors.)	
<hr/>		
GORDON PROPERTIES, LLC,)	
)	
Plaintiff,)	
)	
v.)	Adv. Proc. No. 11-01020-RGM
)	
FIRST OWNERS' ASSOCIATION OF FORTY)	
SIX HUNDRED CONDOMINIUM, INC.,)	
)	
Defendant.)	

**FIRST OWNERS' ASSOCIATION OF FORTY SIX HUNDRED
CONDOMINIUM, INC.'S POSITION STATEMENT**

Defendant, First Owners' Association of Forty Six Hundred Condominium, Inc.
("FOA"), by counsel, hereby submits its position statement regarding whether Gordon
Properties, LLC ("Gordon Properties") may have more than one seat on FOA's Board of
Directors (the "Board"), and states as follows:

FACTS

Forty Six Hundred Condominium (the “Condominium”) is a mixed-use condominium located at 4600 Duke Street in Alexandria, Virginia. The Condominium was converted from an apartment building into a condominium in 1975 by the recordation of the Declaration of Forty Six Hundred Condominium and the Bylaws by Forty Six Hundred Corporation, the Declarant (together with the Articles of Incorporation created at the same time, the “Condominium Instruments”). *See* Exhibit 1. Comprised of a combination of 396 residential and approximately 42 commercial units, Gordon Properties, a single purpose real estate holding company, owns one of two street-front units, four residential units and 34 commercial units within the Condominium.

FOA is a Virginia nonstock corporation formed under the Virginia Nonstock Corporation Act to oversee the management of the Condominium as the unit owners’ association in accordance with § 55-79.73 of the Virginia Condominium Act (Va. Code § 55-79.39, *et seq.* (the “Condominium Act”)).

Article IV, Section 2 of FOA’s Bylaws requires FOA to hold its annual meeting on the first Wednesday of each October. One of the purposes of the annual meeting is the election of members of Association to FOA’s Board. The Board is the “executive organ” of the Association as described in the Condominium Act and under the Article V, Section 3 of FOA’s Bylaws, possesses “all of the powers and duties necessary for the administration of the affairs of the Owner’s Association and the Condominium Project and may do all such acts and things as are not by these By-laws directed to be exercised and done by the members.”

In August 2011, Gordon Properties identified only one candidate for the Board, Lindsay Wilson. Gordon Residential, LLC (“Gordon Residential”), a related real estate holding entity and owner of one studio unit, put forth five candidates – Deneta Sells (Bryan Sells’ wife), Moneta Howard (Bryan Sells’ mother-in-law), Eliza Langdon (Bryan Sells’ cousin), Brandy

Greenwell (Bryan Sells' sister) and Nick Greenwell (Bryan Sells' brother-in-law). *See* e-mail from Bryan Sells to James Claggett, Exhibit 2. On September 15, 2011, FOA brought a declaratory judgment action in the Circuit Court for the City of Alexandria ("Circuit Court") seeking a determination as to whether a single member of FOA could have multiple representatives on the Board at one time.

On October 3, 2011, two days prior to the annual meeting, the Circuit Court granted FOA a preliminary injunction enjoining the seating of more than one Gordon Residential candidate (if elected) and authorizing the remaining top vote-getters to serve as directors on the FOA Board.¹ *See* Exhibit 3. In issuing the preliminary injunction, the Court found that FOA had a substantial likelihood of success on the merits of its claims.

The day before the annual meeting, Mr. Sells, on behalf of Gordon Properties, asked Dennis Howland if he would agree to serve on the FOA Board as a Gordon Properties candidate, if he were elected. *See* Exhibit 4. Dennis Howland is Bryan Sells' father-in-law, but was not at the time of the election, nor upon information and belief is he today, an officer or director of Gordon Properties. *See* Exhibit 5. On the night of the October 5, 2011 annual meeting, Gordon Properties submitted Mr. Howland as a write-in candidate. At the annual meeting, an election was held and pursuant to an order of this Court dated June 15, 2012, an FOA Board has been declared and seated. Both Ms. Wilson and Mr. Howland have been seated to the Board under this Order.

At issue in this matter is the question of whether a corporate member such as Gordon Properties may do what a natural person cannot – namely, hold more than one seat on the FOA Board at the same time. Under the both the Condominium Act and the Condominium

¹ Gordon Properties was not originally named as a defendant in that lawsuit because it had only nominated one candidate to the Board.

Instruments, a “member” of the Association, whether a natural or non-natural person, is entitled to only one seat on FOA’s Board at any given time.

ARGUMENT

A close reading of the Virginia Limited Liability Act (Va. Code § 13.1-1000, et seq. (the “LLC Act”)), the Condominium Act, and the Condominium Instruments make clear that a non-natural ‘person’, such as Gordon Properties, may have, at any given time, one seat on the Board just as any natural person member of FOA may have a seat on the Board. There is absolutely no provision of the FOA Bylaws that expressly states that Gordon Properties—or any member—may hold more than one seat on the Board at any given time. Despite this fact, Gordon Properties maintains that it may have as many persons seated to the Board because it has as many Members as it has officers or representatives of the company. Currently, as nominated under Gordon Properties’ unit, seated to the Board are Lindsay Wilson, one of the four owners of Gordon Properties, and Dennis Howland, who is not now nor was he as of October 5, 2011 an officer, director or member of Gordon Properties (but is a family member of the Managing Member of Gordon Properties). This Court should find that Gordon Properties may have only one representative seated to the Board as a result of the 2011 annual meeting and election, and modify its prior order of June 15, 2012 seating the FOA Board accordingly.

I. UNDER THE VIRGINIA LIMITED LIABILITY COMPANY ACT, GORDON PROPERTIES IS A SINGLE ENTITY SEPARATE FROM ITS MEMBERS OR OFFICERS

Gordon Properties was organized under the LLC Act. The LLC Act treats an LLC as a person, but does not grant it more powers than an individual would have. Specifically, Section 13.1-1009 of the LLC Act states that “every limited liability company has the same powers as an individual.”

It is a fundamental concept of corporate governance that an organization acts through its representatives. The LLC Act recognizes that a company's officers and representatives are distinct from the company. Paragraph 8 of § 13.1-1009 states that a limited liability company may "appoint managers, employees, and agents of the limited liability company." Such officers and agents are separate and distinct from the limited liability company itself. Section 13.1-1019 of the LLC Act expressly provides that the officers are not liable for claims against the limited liability company, distinguishing between the company, and its officer.²

These concepts are not unique or surprising. A corporate entity has always been treated as a single person who acts through its representatives. Yet here, Gordon Properties asks that its officers be treated as the equivalent of the entity for the purpose of obtaining multiple seats on FOA's Board. This position is flawed and improper. Moreover, the LLC Act provides that a limited liability company has the same powers as an individual. It is axiomatic that an individual person, even one who owns multiple units, cannot divide herself or himself into multiple persons to attempt to gain multiple seats on FOA's Board; neither can Gordon Properties.

II. UNDER THE VIRGINIA CONDOMINIUM ACT, GORDON PROPERTIES IS ALSO A SINGLE ENTITY SEPARATE FROM ITS MEMBERS

The Condominium Act also defines a "person" so that it is clear that the owner of a condominium unit, or multiple units, is deemed a single unit owner and, thus, a single Member of the condominium association. Section 55-79.41 of the Condominium Act defines "Person" as "a natural person, corporation, partnership, association, trust, or other entity capable of holding title to real property, or any combination thereof." The Condominium Act does not distinguish

² The basic principle is set forth in *Barnett v. Kite*, 271 Va. 65; 624 S.E.2d 52 (2006): "the proposition is elementary that a corporation is a legal entity entirely separate and distinct from the shareholders or members who compose it." *Id.* at 70, 55.

between natural and non-natural entities; they are all “persons.” Again, all of those persons have the same rights and privileges within the association. See Va. Code § 13.1-1009.

The Condominium Act defines “Unit Owner” as “one or more persons who own a condominium unit.” Based on these definitions, a corporate entity that owns a condominium unit is deemed a person and a single unit owner. The definitions do not provide that the owner of multiple condominium units is a “multiple” unit owner. Rather, an entity which owns a unit or units is simply one unit owner and one member of the Association. Thus, while under FOA’s documents Gordon Properties is a Member, its officers and directors are not.

The Condominium Act goes on to specifically define those individuals who may act as the “person” on behalf of the corporate entity. Section 55-79.77C of the Condominium Act states “a unit owner may be more than one person” and “[s]ince a person need not be a natural person, the word ‘person’ shall be deemed for the purposes of this subsection to include, without limitation, any natural person having authority to execute deeds on behalf of any person, excluding natural persons, which is, either alone or in conjunction with another person or persons, a unit owner.” Thus, even when there are multiple persons who own a unit—such as a husband and wife—they are only a **single unit owner**. The same is true for Gordon Properties.

Similar to the LLC Act, § 55-79.78B of the Condominium Act recognizes that a corporate entity and its officers and representatives are distinct from each other. This section provides that: “[i]f the condominium instruments provide that any officer or officers must be unit owners, then notwithstanding the provisions of subsection (a) of § 55-79.50, the term ‘unit owner’ in such context shall, unless the condominium instruments otherwise provide, be deemed to include, without limitation, any director, officer, partner in, or trustee of any person which is, either alone or in conjunction with another person or persons, a unit owner.” Thus, an officer

may serve as the corporate entity's representative. Importantly, this section does not mean that every officer of a corporate entity may serve simultaneously. Gordon Properties argues that "without limitation" means that all of the company's agents may act at the same time. However, this is an illogical reading of the statute. Certainly, it cannot be contemplated that the Legislature intended that the unit owner entity act by committee. The language is clear and unambiguous – any of those persons may act, but not all of them. Section 55-79.78B does not say: "each" or "every" or "any and all" director(s), officer(s), partner(s) and/or trustee(s) of any unit owner is a "unit owner," but instead specifies that such persons are "either alone or in conjunction with another person or persons, a unit owner." The statute uses the singular; all of the owners of a unit—whether several natural persons or the officers of a non-natural person—constitute a single unit owner.

The Condominium Act makes it clear that any number of natural persons or entities owning a condominium unit shall be treated as a single unit owner. It naturally follows Gordon Properties is only entitled to have one representative occupy one seat on the Board at any given time.

III. FOA'S BYLAWS PROVIDE THAT ALL PERSONS OWNING A UNIT CONSTITUTE ONE MEMBER OF THE ASSOCIATION

FOA's Bylaws are decisive in providing that all persons—natural and non-natural—owning a unit or multiple units, constitute one "Member" of the Association. Article III, Section 1, defines who the "Members" of FOA are: "[e]very person, group of persons, corporation, trust or other legal entity, or any combination thereof, which owns a condominium unit within the condominium project shall be a member of the owners association" Individually, a person is a Member. A group of people is a Member, and a legal entity is a Member. Again, as in the relevant statutory provisions, the singular is used; any combination of persons—natural or non-

natural—owning a unit constitutes only one member of the Association. This provision makes clear that a non-natural person (such as a limited liability company) or group of persons is deemed a single unit owner or member.

Further, the Declaration specifically provides that “a Unit Owner shall automatically become a member of the Owners’ Association upon acquiring title to his Unit and shall remain a member thereof until such time as his ownership of the Unit is conveyed to another person or is otherwise divested at which time his membership shall automatically cease.” Art. XV, Declaration, recorded at Book 811, page 331. Thus, membership is derived from title.

Under the Condominium Instruments, each unit is allocated a specific voting percentage. Declaration, Exhibit D recorded at Book 811, page 414. The voting percentages established in the Condominium Instruments are based on the number of square feet of each Unit. These “par values” give owners of larger units (who also pay proportionately higher assessments) an overall percentage of the vote within the condominium that is proportionate to their interest in the common elements. This ensures that owners of substantial interests in the Association are fairly represented in proportion to their ownership interests when voting on Association issues. This is the purpose of the par value system. Each voting percentage may be exercised by one or more owners under certain circumstances. Article IV, Section 7 of the Bylaws provision governing voting provides that:

The vote of any member which is possessed by more than one person may be exercised by any one of them present at any meeting. If more than one owner of a unit is present, the vote may be cast by unanimous consent of said owners or by any one of them, provided no objections or protest by any other owner of such membership is noted at such meeting.

Thus, while Gordon Properties (or any other owner of multiple units) may exercise multiple votes based on ownership, that does not mean that a multiple unit owner may obtain more than

one seat on the Board at any given time. It would be wholly unfair and undermine the purpose of the par value system to permit Gordon Properties to obtain more than one and possibly even all of the seats on the FOA Board.

It is also important to consider this issue in light of the clear directive of the Bylaws.

Article V “Directors,” Section 1 of FOA’s Bylaws, “Numbers and Qualification” states:

The affairs of the Owners’ Association shall be governed by the Board of Directors (hereinafter sometimes referred to as “Board of Directors”) composed of at least seven (7) natural persons who shall (after the first annual meeting of members) be members of the Owners’ Association. At least one of the Directors, but not more than two, shall be owners of Commercial Condominium Units . . .

This Section establishes that the unit owners will be represented by seven natural persons constituting seven different members—not seven natural persons constituting only one member. If Gordon Properties’ position were correct, it could seat seven persons to all seven seats on the Board, even though they are **not** Members in their own right, and are merely the representatives of one Member.³ Such a result would defeat the express terms of the Bylaws which require seven different members on the Board.

Nowhere in either the Condominium Act or FOA’s Condominium Instruments does it state that each person having an ownership interest or responsibility in an entity which owns a unit is, for himself or herself, a unit owner or Member.

By expressly limiting the Board to only two owners of Commercial Condominium Units, the drafters clearly intended to protect all members of FOA from a dictatorship controlled by one owner or group of similarly interested persons. Allowing a non-natural person to have multiple seats on the Board defeats the clear purpose of these Bylaws provisions.

³ Even though Mr. Sells acquired a unit in his own name, neither Ms. Wilson, nor Mr. Howland owns a unit individually. Thus, Ms. Wilson and Mr. Howland are not, themselves, members of FOA.

Finally, it is important to note that the Bylaws *do* permit more than one representative of the owners of the commercial portion of the property to serve on the board simultaneously—but only in **one limited situation**. Article V, Section 1 of the Bylaws states that “[a]t least one of the Directors, but not more than two, shall be owners of Commercial Condominium Units *or if no Commercial Units have been conveyed, owners of the convertible space*.” Forty Six Hundred Corporation, the Condominium Declarant, was the owner of the convertible space prior to the sale of the first Commercial Unit. This provision was clearly meant to be an exception to the general rule barring one owner to have multiple seats on the board. This provision permits the Declarant to occupy two seats on the Board at any given time **prior** to the conveyance of the first Commercial Unit. By this exception, the Bylaws further elucidate that the general rule is that only one representative of a commercial owner may serve at any one time. Under the statutory interpretation principle of *expressio unius est exclusio alterius*, the mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute. *See Marbled Design Intern, Inc. v. Stevens*, 678 S.E.2d 276, 279 (Va. App. 2009). This principle can be applied to the Bylaws by analogy.

IV. IT WOULD BE INEQUITABLE TO TREAT ENTITIES DIFFERENTLY THAN NATURAL PERSONS

As a matter of fairness, § 55-79.78B of the Condominium Act ensures that non-natural persons such as corporations, partnerships and limited liability companies are protected and treated as unit owners just like natural persons. To treat these non-natural persons differently to the detriment of natural persons would be equally unfair. If a natural person owns a unit, that person can only serve on the Board as an individual. Gordon Properties argues, however, that each of its officers or owners can serve as directors at the same time. If this argument were correct, then a non-natural person would have an unfair advantage over an owner who is a

natural person. Clearly that was not the intent of the drafters of the Condominium Act. Nor was it the intent of the Declarant when it created the Condominium Project and required that the Board be comprised of both commercial and residential unit owners to ensure there was not one group controlling the Association. Article V Section 1.

V. GORDON PROPERTIES HAS NOT SHOWN THAT ITS NOMINEES TO THE BOARD MEET THE REQUIREMENTS OF 55-79.77C OF THE VIRGINIA CONDOMINIUM ACT

As discussed at length above, Section 55-79.77C of the Condominium Act states that “[s]ince a person need not be a natural person, the word ‘person’ shall be deemed for the purposes of this subsection to include, without limitation, any natural person having authority to execute deeds on behalf of any person, excluding natural persons, which is, either alone or in conjunction with another person or persons, a unit owner.” Under this section, any person nominated to the Board by Gordon Properties must have the authority to execute deeds on behalf of Gordon Properties. Despite FOA’s discovery requests in arbitration seeking verification that Gordon Properties’ nominees are qualified to execute deeds on behalf of Gordon Properties, no such verification has been produced. Gordon Properties has not provided a single corporate formation document that shows that Dennis Howland is an officer or director of the company or is otherwise authorized to sign deeds on behalf of the company.⁴

Further, even if corporate documents were to exist that showed Mr. Howland as having express authority to sign deeds on behalf of Gordon Properties, this recited delegation of authority would be merely pretext. In order to properly serve as an officer of a limited liability company, the company’s manager must delegate actual operational powers to that person. Upon information and belief, Gordon Properties is a single purpose LLC the sole purpose of which is

⁴ Further, while Ms. Wilson has been held out as a corporate officer, there were no documents produced that stated she had authority to execute deeds on behalf of Gordon Properties.

to hold title to real estate. The company does not need multiple officers to carry out its day-to-day functions.

CONCLUSION

The above-referenced provisions of the LLC Act, the Condominium Act and the Bylaws make clear any number of natural persons or entities owning a condominium unit shall be treated as a single unit owner and accordingly, are entitled to occupy only one seat on the Board. The Bylaws are clear that “every person, group of persons, corporation, trust or other legal entity, or any combination thereof, which owns a condominium unit within the condominium project shall be **a member** of the owners association. Neither the Condominium Act, nor the Bylaws provides an advantage to a non-natural unit owner to allow such an entity to have multiple representatives simultaneously serve on the FOA board. As a limited liability company, Gordon Properties is not entitled to any special advantage over natural person unit owners. To the contrary, they must be treated the same and Gordon Properties permitted to occupy only one seat on the Board. FOA requests that this Court: declare that a “Member” of FOA is limited to one seat on FOA’s Board at any given time; declare that Gordon Properties is limited to one representative on FOA’s Board at any given time, including without limitation for purposes of the 2011 election; modify the Court’s June 15, 2012 Order seating the Board accordingly; and grant any further and additional declarations, remedies and relief as are just and necessary.

Dated: July 13, 2012

Respectfully submitted,

FIRST OWNERS' ASSOCIATION OF FORTY SIX
HUNDRED CONDOMINIUM, INC.

By Counsel,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2012, I electronically filed the foregoing with the Clerk of Court using the Case Management/ Electronic Case Filing system (CM/ECF), which will send notification of such filing to the following counsel of record:

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