

Circuit Court of Alexandria Virginia

Judges

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LISA BONDAREFF KEMLER
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February 23, 2009

Sent via facsimile and U.S. Mail

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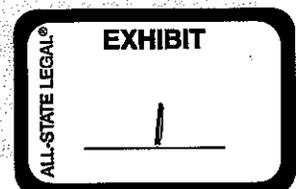
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Re: *Gordon Properties, LLC v. First Owners' Association of Forty Six Hundred
Condominium, Inc., et al.*, Civil Case No. CL08-001432

Counsel:

Before the Court is Gordon Properties, LLC's ("Gordon Properties") request, as set forth in Count I of the First Amended Complaint, for a permanent injunction requiring the First Owners' Association of Forty Six Hundred Condominium (the "FOA") and the Board of Directors of the FOA (the "Board") "to perform their obligations under the Condominium Declaration and By-Laws of the FOA and specifically prohibiting the FOA and the Board from (i) assessing Gordon Properties based upon Assessment values calculated using ... any method other than the method set forth in the Condominium instruments, (ii) using reserve funds appurtenant to Gordon Properties' Units for replacement of General or Limited Common Elements other than those to which Gordon Properties' Units are appurtenant; (iii) charging Gordon Properties a rental fee for the Residential/Commercial Limited Common Elements (single-user) that it owns; (iv) collecting maintenance Assessments from Gordon Properties as owner of a Street-Front Commercial Unit; and (v) requiring the FOA to reimburse Gordon Properties for all improper and unauthorized assessments paid by it." (First Amended Complaint at pps. 20-21, paragraphs (a)(i)-(v)).¹

¹ Regarding subparagraph (iv) above, in an Order dated January 30, 2009, the Court granted the FOA's Motion for Partial Summary Judgment and construed the Declaration and By-laws, together with Virginia Code Ann. § 55-79.83(D), as granting the FOA the authority to assess the Street-Front



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Having heard the evidence presented at trial, reviewed the pertinent portions of the Condominium Declaration, the By-Laws of the FOA and the Condominium Act (Virginia Code Ann. §§ 55-79.39 through 55-79.103), and considered the arguments of counsel, the Court makes the following findings:

I. Construction and Interpretation of Declaration and By-Laws

A. Declaration

1. 4600 Condominium is a mixed-use condominium consisting of three types of condominium units: "Residential Units," Commercial Units," and "Street-Front Commercial Units." The "Residential Units" are units located on the fifth through sixteenth floors of the building. See Declaration at Deed Book 811, p. 318. The "Commercial Units" are units located on either the third or fourth floors of the building and the "Street-Front Commercial Units" are those units fronting on Duke Street. See Declaration at Deed Book 811, pp. 317-18.

2. The Declaration identifies six categories of Common Elements divided into two types of single-user Limited Common Elements, three types of multiple-user Limited Common Elements and General Common Elements. They are identified in the Declaration as follows: (i) Parking Garage Limited Common Element (single user)², Storage Area Limited Common Element (single user)³, Residential Limited Common Element (multiple user)⁴, Commercial Limited Common Element (multiple user)⁵, Residential/Commercial Limited Common Element

Commercial Unit owned by Gordon Properties for common expenses relating to the operation and management of the FOA as described in Article VIII of the By-Laws and that the Street-Front Commercial unit owned by Gordon Properties is responsible for 11.32% of those expenses, and, therefore, dismissed with prejudice Gordon Properties' claim in subparagraph (iv) for an injunction against collecting maintenance Assessments from Gordon Properties as owner of a Street-Front Commercial unit.

Regarding subparagraph (v), at trial, the Court granted Defendants' motion to strike finding that Gordon Properties had failed prove damages.

² Declaration, Section III(A)(1).

³ Declaration, Section III(A)(2).

⁴ Declaration, Section III(B)(1).

⁵ Declaration, Section III(B)(2).

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(multiple user)⁶, and General Common Elements. See Declaration, Section IV.

3. In identifying the six categories of Common Elements, the Declaration expressly defines what constitutes each category and provides that the owners of Condominium Units assigned parking spaces or storage areas shall share in the cost of maintenance and operation of said limited common elements "as set forth in Section V of [the] Declaration."

4. Regarding Residential Limited Common Elements (multiple users), Section III(B)(1) of the Declaration identifies those Limited Common Elements that the owners of Residential Units have the exclusive use of, including, but not limited to, the "elevators, elevator shafts and all equipment comprising the operation of the elevators, not including the freight elevator." In addition, all such Limited Common Elements described in Section III(B)(1) of the Declaration are "deemed appurtenant to the Residential Units." Finally, Residential Unit owners to which such Limited Common Elements are appurtenant bear the responsibility under Section V of the Declaration for the costs of maintenance and operation of the Limited Common Elements based on the allocations set forth in Table C of Exhibit D to the Declaration.

5. Regarding the Commercial Limited Common Elements, the passenger elevators are not included within the description of Commercial Limited Common Elements. See Declaration, Section III(B)(2).⁷ The Commercial Unit owners bear the responsibility under Section V of the Declaration for the costs of maintenance and operation of the described Commercial Limited Common Elements based on the allocations set forth in Table D of Exhibit D to the Declaration.

6. The freight elevator is specifically identified within the description of Residential/Commercial Limited Common Elements. See Declaration, Section III(B)(3). The Residential/Commercial Unit owners bear the responsibility under Section V of the Declaration for the costs of maintenance and operation of the described Residential/Commercial Limited Common Elements based on the allocations set forth in Table B of Exhibit D to the Declaration.

⁶ Declaration, Section III(B)(3).

⁷ The Defendants argued that the passenger elevators are "Residential/Commercial Limited Common Elements" based on the "General Notes" on each of the plats included in Exhibit B to the Declaration. The "General Notes," contrary to Section III(B)(1) of the Declaration, state that the "stairwells and passenger elevators are R/C through the fourth floor and R from the fifth through sixteenth floors...." The "R/C" stands for Residential/Commercial and the "R" stands for Residential. The Court rejected this argument finding that the detailed description of "Residential Limited Common Elements" in Section III(B)(1) is controlling.

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7. The General Common Elements consist of all other portions of the Condominium Project that are not a limited common element as described in Sections III(A)(1) and (2) or Sections III(B)(1) through (3) of the Declaration and are not Condominium Units. Section IV of the Declaration provides that the all Condominium Unit owners bear the responsibility for the costs of maintenance and operation of the General Common Elements as set forth in Table A of Exhibit D to the Declaration.

8. Section V of the Declaration contains the obligations of the owners of Limited Common Elements.

9. With respect to ownership interest, Section V(A) of the Declaration provides that each Condominium Unit owner "shall own an undivided interest in the Limited Common Elements in the same proportion that the square foot area of the Unit bears to the total square foot area of all units.

10. Section V(B) of the Declaration lays out a specific methodology for establishing assessments for the cost of maintenance and operation of the Limited Common Elements, including "a reserve for their replacement, renovations, [and] restoration" in that it specifically provides that those costs "shall be borne among the Unit owners having Limited Common Elements appurtenant to their Units *in proportion to the percentage assigned to each Unit by Exhibit D and as set forth below:*" (emphasis added). Thereafter, in Sections V(B)(1) and (B)(2) the Declaration provides that Unit owners whose Units are assigned single user and/or multiple user Limited Common Elements shall share in the cost and maintenance of the Limited Common Element, including a reserve for replacement, in accordance with the percentages set forth in Exhibit D to the Declaration.

11. As to paragraph (B)(1) of Section V of the Declaration, it provides that "[a] unit owner whose Unit has assigned to it a Limited Common Element (single user) shall share in the expense and maintenance of the Limited Common Element of which his assigned space is a part including a reserve for a replacement thereof in accordance with the percentage set forth in Exhibit D." However, there is nothing in Exhibit D that addresses Limited Common Elements (single user). Therefore, Virginia Code Ann. § 55-79.83(A) applies to determine the Unit owner's liability for the expenses relating to such Limited Common Elements (single users) assigned to the owner's Unit. Section 55-79.83(A) provides, in pertinent part:

Except to the extent that the condominium instruments provide otherwise, any common expense associated with the maintenance, repair, renovation, restoration, or replacement of any limited

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common element shall be specially assessed against the
condominium unit to which that limited common element was
assigned at the time such expenses were made or incurred.

B. By-Laws

12. Article V, Section 3 of the By-Laws sets forth the powers and duties of the Board. Among the duties is the duty to establish and collect Assessments and to establish a general operating reserve and/or reserve for replacement or depreciation of Common Elements and to provide for the collection of such amounts.

13. Article IX of the By-Laws provides for the establishment of Assessments, as well as the establishment and maintenance of a reserve fund. The Board is required to determine the amount of Assessments at least annually and the Assessments are required to be based on the percentages of responsibility as set out in Exhibit D to the Declaration. See By-Laws, Article IX, Section 1.

14. With respect to the reserve fund, under Article IX, Section 3 of the By-Laws, the Board must designate what portion of the reserve fund relates to the General or Limited Common Elements as set out in Section III of the Declaration and can only draw from the Assessments on the Units to which a particular Common Elements is appurtenant. The By-Laws further provide that "the amounts required to be allocated to the reserve for replacements shall be considered an appurtenance of the Unit from which the Assessment was drawn and shall not be separately withdrawn, assigned or transferred, or otherwise separated from the Unit to which it appertains..." See By-Laws, Article IX, Section 3.

III. Application of Declaration and By-Laws

In light of the aforesaid construction of the Declaration and By-Laws, the Court makes the following additional findings:

1. In preparing the proposed and approved annual budget, the By-Laws require, pursuant to Article IX, Section 3, that the Board designate the portion of the total amount required to fund replacement reserves that is applicable to each of the six categories of Common Elements as identified in Sections III and IV of the Declaration.

2. The By-Laws require that the Board specifically designate separate reserve assessments for each of the six categories of Common Elements and assess the amounts designated as applicable to each of the six categories of Common Elements only against the Unit

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or Units to which the particular Common Element is appurtenant. Thus, the reserve assessment of a Parking Garage Limited Common Element (single user) or a Storage Area Limited Common Element (single user) is assessed 100% against the Condominium Unit to which that Limited Common Element (single user) is appurtenant. The reserve Assessment for Residential, Commercial or Residential/Commercial Limited Common Elements (multiple users) is assessed by multiplying the total amount for that category by the applicable percentage of responsibility for that Limited Common Element (multiple user) for each Unit as listed in the tables in Exhibit D to the Declaration. The reserve assessment for the General Common Elements is assessed against the Condominium Units in proportion to the number of votes in the FOA appertaining to each such Unit.

3. Pursuant to Article IX, Section 3 of the By-Laws, any amounts specifically designated as separate reserve assessments (as set forth in paragraph B(2) above), can only be used to pay the costs of repairing, replacing or restoring the Common Elements comprising the category to which those amounts were designated.

4. The Declaration and By-Laws require the Board to determine separate maintenance and operating expenses to maintain, repair and operate each of the six categories of Common Elements and to establish Assessments for such expenses only against the Unit or Units to which the particular Common Element is appurtenant. Thus, the maintenance and operating assessment for a Parking Garage Limited Common Element (single user) or a Storage Area Limited Common Element (single user) is assessed 100% against the Condominium Unit to which that Limited Common Element (single user) is appurtenant. The maintenance and operating assessment for Residential, Commercial or Residential/Commercial Limited Common Elements (multiple users) is assessed by multiplying the total amount for that category by the applicable percentage of responsibility for that Limited Common Element (multiple user) for each Unit as listed in the tables in Exhibit D to the Declaration. The maintenance and operating assessment for the General Common Elements is assessed against the Condominium Units in proportion to the number of votes in the FOA appertaining to each such Unit.

5. Unit 331 is owned by Gordon Properties. Storage Area Limited Common Elements (single user) appurtenant to Unit 331 are: 1B1, 1B2, 1C1, 1C2, 2B1, 2B2 and 2C1. In accordance with Virginia Code Ann. §55-79.83(A), annual assessments for these Limited Common Elements (single user), as well as any other Limited Common Elements (single user) are limited to the actual expenses associated with the maintenance, repair, renovation, restoration or replacement of those Limited Common Elements (single user) at the time such expenses were made or incurred.

6. In order to comply with the Declaration and By-Laws, the FOA, whether through its

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financial manager or otherwise, must utilize an accounting system which will accurately record and report all maintenance and operating expenses and reserve expenses and assign each expense, as and when incurred, to whichever of the six categories of Common Elements, as described in Sections III and IV of the Declaration, for which those expenses were incurred.

III. Conclusion

The Court has determined that the Declaration, By-Laws and Condominium Act set forth an appropriate methodology and scheme for establishing Assessments and for establishing and maintaining a reserve fund for the 4600 Condominium. As testified to by the current and prior financial managers of the FOA, as well as the parties' expert witnesses, the governing documents at issue are extremely complicated, convoluted and difficult to apply. In addition, based on the evidence adduced at trial, the FOA and the Board did not always adhere to the required methodology. Because the Court assumes that the current Board of Directors and all future boards will follow the dictates of the Declaration, By-Laws and Condominium Act as interpreted by the Court in this Letter Opinion, the Court declines to issue a permanent injunction as requested by Gordon Properties.

Counsel are directed to prepare an Order which incorporates this Letter Opinion without restating its contents and, in addition, sets forth the jury's verdict and the Court's rulings on any post-trial motions following the hearing on such motions.

Very truly yours,


Lisa B. Kemler