21256.01511

FILED

OCT 07 2019

HON. STUART A. MINKOWITZ, A.J.S.C.
SUPERIOR COURT OF NEW JERSEY
JUDGE'S CHAMBERS

PREPARED BY THE COURT:

MARY PURZYCKI, ET AL., *Plaintiffs,*	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CIVIL PART MORRIS COUNTY**
v.	**Docket No. MRS-C-2-17**
	Civil Action
LAKE PARSIPPANY PROPERTY OWNERS ASSN., INC., AND BOARD OF DIRECTORS, *Defendant.*	**JUDGMENT**

THIS MATTER, having been opened to the Court upon Plaintiffs', Mary Purzycki, et al., Motion for Summary Judgment, through their attorneys, Rader Law, LLC (Brian M. Rader, Esq., appearing and on the brief); and upon Defendants', Lake Parsippany Property Owners Association, Inc. and Board of Directors, Cross-Motion for Summary Judgment, through their attorneys, Marshall Dennehey Warner Coleman & Goggin, P.C. (Howard B. Mankoff, Esq., appearing and on the brief); and the Court having considered all submissions, and for good cause having been shown, and for the reasons set forth in the accompanying Statement of Reasons;

IT IS, on this 7th day of Oct, 2019;

ORDERED, that Plaintiff's Motion for Summary Judgment is **DENIED**; and it is further

ORDERED, that Defendants' Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED, that Plaintiffs' and Defendants' applications for attorney's fees and costs are both **DENIED**.

HON. STUART A. MINKOWITZ, A.J.S.C.

( ) Unopposed
(x) Opposed

A copy of this Order and the accompanying Statement of Reasons shall be served on all parties within seven (7) days of the signing of this Order.

Mary Purzycki, et al. v. Lake Parsippany Property Owners Association, Inc. and Board of Directors
Docket No. MRS-C-2-17
STATEMENT OF REASONS

I. BACKGROUND AND PROCEDURAL HISTORY

This matter comes before the Court by way of Plaintiffs' ("Plaintiffs") Motion for Summary Judgment, and Defendants', Lake Parsippany Property Owners Association, Inc. and Board of Directors ("Defendants"), Cross-Motion for Summary Judgment.

Lake Parsippany (the "Lake") is an area consisting of 2,204 homes that is located in Parsippany-Troy Hills, New Jersey. Amended Complaint ¶ 7. The community was developed by The New York Daily Mirror, which was part of the Mirror Holding Corporation ("Mirror"), in the 1930's. Id. ¶ 4. During this time, Mirror excavated 159 acres (the "Tract") and erected a dam to create the Lake. Id. The parties dispute whether the Tract was intended to be a common interest community when it was developed.

The following facts are not in dispute. The Lake Parsippany Property Owners Association, Inc. ("LPPOA") was incorporated on or about October 24, 1933 to manage the Lake and certain Lake facilities. Id. ¶ 5. Membership in the LPPOA has always been voluntary. Id. ¶ 8. Since 1933, LPPOA has funded the management of the Lake and other property it owns based on voluntary membership dues. Mankoff Certification Exh. C. However, owning property in the Tract does not bestow Lake access rights; only members of the LPPOA can use the Lake. Rader Cert. Exh. D. Any individual or entity, regardless of whether or not they live within the Tract, may purchase membership in LPPOA and gain access to the Lake. Rader Cert. ¶ 5.

In a deed dated June 7, 1935, Mirror conveyed "[all] those certain places or parcels of land situate and being at Lake Parsippany" to LPPOA. Mankoff Cert. Exh. B. This transaction was done with the understanding that the "said Association will at all times pay all taxes and assessments which may hereafter be assessed, levied or imposed upon the lands and buildings in this deed," and "upon the express covenant and condition which shall run with the land." Id. Today, LPPOA's duties include "paying township property taxes, dam and dike maintenance, lawn and tree care, property and liability insurance, water quality management, property maintenance, staffing of the beaches, and management of activities." Id., Exh. C. The 1935 deed further states that the LPPOA would maintain a club house and other recreational properties for "boating, bathing and fishing," and that, "Lake Parisppany shall be held for the use of property owners at Lake Parsippany for boating, bathing and fishing, subject to the rights of the adjoining owners, to use the said waters for like purposes . . . ." Id., Exh. B.

Over time, LPPOA relinquished some of these recreational facilities, such when it conveyed the club house to the local fire department, and when it sold the tennis courts to a residential developer. Am. Compl. ¶ 9-12. In addition, the 1935 deed provided that LPPOA would "at all times keep, maintain and improve the streets, roads, avenues and drives" around the Lake for the benefit of residents and the general public. Id. ¶ 13. However, the Township of Parsippany-Troy Hills, and not the LPPOA, has maintained the roads around the Lake since 1948. Id. ¶ 14.

On August 3, 2015, the LPPOA Board of Directors sent a letter to LPPOA members, stating that, "[o]ver the last 5 years we have experienced a decline in membership." Rader Cert. Exh. B. The letter stated that, "of the 2000 plus homes within the borders of Lake Parsippany" as of June 15, 2015, there were 443 memberships, with 143 of these memberships representing properties "out from the borders of the lake." Id. The letter further informed LPPOA members that "[i]n

reviewing our annual finances, the Board has projected that the possibility exists that we may be unable to support the lake from our operating budget within the next 6-10 years." Id. The letter detailed a new "fair share" fee assessment structure for the easement found in Tract residents' deeds (the "Easement"), under which LPPOA claimed authority to collect a fee that would "go to what would be required to maintain the lake property." Id. The Easement assessment would be used for "items such as water quality, land improvement and maintenance, tree maintenance, insurance costs and security[,]" while an additional fee for those residents who wished to become full LPPOA members would provide for "full access to all lake activities." Id.

LPPOA held a vote on the issue at its October 19, 2016 membership meeting. Mankoff Cert. Exh. F. The motion carried, with 101 votes in favor of imposing an easement assessment fee and 16 votes against out of a total of 117 votes cast. Id. That same day, LPPOA's Board of Trustees passed a resolution providing that, pursuant to restrictive covenants contained in the original Lake deeds, the By-Laws of LPPOA, and New Jersey case law, "[a]ll property owners in the community will be required to pay an assessment which represents an equitable pro rata sharing of a common expenses of the lake and recreational facilities." Id., Exh. G.

In an undated letter, LPPOA Vice President Bill Sempler ("Sempler") wrote to LPPOA members to inform them that LLPOA members had voted in favor of assessing the Easement fee "on all properties within the original purchase tract of Lake Parsippany." Rader Cert. Exh. D. As justification for imposing the fee, Sempler's letter contended that certain language contained in title searches dating to 1933 – specifically the language, "together with the right to use, in common with others, the waters of Lake Parsippany for bathing, boating and fishing" – gives all property owners within the Tract an Easement in the Lake. Id. The letter mentioned that two public meetings would be held to give locals the opportunity to ask questions regarding the imposition of the fee.

Id. The letter also detailed new Lake access privileges for these Easement holders, identified as "the 2,204 property owners of the original purchase tract of Lake Parsippany whose deeds provide for such access." Id. Exh. C. These new privileges "include[] boating and fishing, and use of all the common areas around the lake among other privileges." Id. The letter further informed these property owners that they might want to consider a full recreational membership in order to receive access to "all lake offerings," and outlined the distinctions between the two membership types. Mankoff Cert. Exh. C.

Plaintiffs allege that, on or about January 7, 2017, the LPPOA, through its management company, Cedarcrest Property Management, sent property owners located within the Tract an "invoice of 12/31/16" for $115.00, with payment to be due on January 1, 2017. Am. Compl. ¶ 40. Plaintiffs also contend that the invoice stated that, if this payment was not received by March 15, 2017, there would be a late notice and a $25.00 late fee requesting immediate payment. Id. ¶ 41. Plaintiffs argue that proposed amendments to the Planned Real Estate Development Full Disclosure Act ("PREDFDA") that are currently pending in the State legislature would prevent LPPOA from issuing this invoice and late fee.[1]

Plaintiffs chose not to pay the Easement assessment and instead initiated this action on January 9, 2017. Plaintiffs filed an Amended Complaint on May 4, 2017 and moved for Summary Judgment on June 29, 2017. This Motion for Summary Judgment was denied pending class certification for a declaratory judgment action. Plaintiffs' Memorandum of Law in Support, n. 1.

[1] Plaintiffs contend that the Court should consider Bill 5043, which is currently awaiting signature by Governor Murphy. Bill 5043 states that PREDFDA "did not impose new responsibilities on property owners to pay compulsory charges[,]" and ensures that property owners are protected "from the issuance of sudden, unanticipated compulsory charges in planned real estate developments where assessments have historically been voluntary." Rader Cert. Exh. E. However, this legislation was not even introduced to the legislature until February 14, 2019, a full two years after this action was commenced, on January 9, 2017. Id. The Court declines to speculate as to the ultimate outcome of Bill 5043. Thus, the Court will not entertain Plaintiffs' argument that the Court should consider the Bill's pending status.

On October 29, 2018, this matter was certified as a class action. Defendants filed another Motion for Summary Judgment on July 25, 2019. Plaintiffs filed an Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Further Support of Plaintiffs' Motion for Summary Judgment on July 29, 2019. The Court heard arguments in this matter on September 9, 2019.

II. ANALYSIS

a. Summary Judgment Standard

Under Rule 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." In Brill v. The Guardian Life Insurance Co., 142 N.J. 520 (1995), the Court explained, the "essence" of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). Moreover, "on a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Id. at 536.

Although non-movants obtain the benefit of all favorable inferences, bare conclusions without factual support in affidavits or the mere suggestion of some metaphysical doubt as to the material facts will not overcome motions for summary judgment. Rule 4:46-5; see also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (requiring submission of factual support in affidavits to oppose summary judgment motion); Fargas v. Gorham, 276 N.J. Super. 135 (Law Div. 1994) (self-serving assertions alone will not create a question of material fact sufficient to defeat summary judgment motion); Heljon Management Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959) ("It is not sufficient for the party opposing the motion merely to

deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact."). A non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Therefore, if the opposing party only points to "disputed issues of fact that are 'of an insubstantial nature' the proper disposition is summary judgment." Id.

Rule 4:46-2 describes the requirements of a motion for summary judgment and any opposition thereto. Under Paragraph (a) of the Rule, a moving party must include a statement setting forth the undisputed material facts with precise citation to the record. Paragraph (b) then requires a party opposing a motion for summary judgment to file a responding statement admitting or denying each fact, with precise citation to the record.

A court should not grant summary judgment when the matter is not ripe for summary judgment consideration. Driscoll Const. Co., Inc. v. State, Dept. of Transportation, 371 N.J. Super. 304, 317 (App. Div. 2004). For example, a matter may not be ripe when discovery is not completed. Id. The court should afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." Id. However, a plaintiff "has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003).

b. Common Interest Community Standard

A common interest community "has the powers reasonably necessary to manage the common property, administer the servitude regime, and carry out other functions set forth in [a] declaration." Restatement (Third) of Property (Servitudes) § 6.4 (2000). In these communities, "there is a commonality of interest, an interdependence directly tied to the use, enjoyment, and

ownership of property." Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 365 (2007) (quoting Fox v. Kings Grant Maintenance Ass'n, 167 N.J. 208, 222 (2001)). Properties in common interest communities are "burdened by servitudes requiring property owners to contribute to maintenance of commonly held property or to pay dues or assessments to an owners association that provides services or facilities to the community." Fox, 167 N.J. at 222 (quoting Restatement (Third) of Property (Servitudes) § 6, intro.). These communities have implicit powers to do all that is reasonably necessary to manage common property and administer any other needs of the community. See id. Any "limitations on these powers should be narrowly construed," so that the common interest community does not fall into disrepair. Restatement (Third) of Property (Servitudes) § 6.4, cmt. a. A common interest community has the power to bind property owners to contribute to facilities or activities that an association supports, even if those property owners do not take advantage of these offerings, or do not even agree to voluntarily join the association. Id., cmt. c. This authority can be implied as well as expressed, such as when an association manages common property, but lacks any means for collecting funds for necessary functions. Id., cmt. A. There can be serious public policy implications if a community is not maintained, which could result in municipalities getting involved in the provision of services. See id.

i. The Tract is a common interest community

Defendants' counsel stated at oral argument that, prior to the start of the assessment process, they had researched the chains of title for approximately twenty-five (25) properties in various locations throughout the Tract. See also Mankoff Cert. Exh. A. In all cases, the title search revealed the Easement, granting the privilege, "together with the right to use, in common with others, the waters of Lake Parsippany for bathing, boating and fishing." Id. Property owners could

have discovered the Easement through a title search, thus putting them on notice that they are members of a common interest community, and could be subject to later assessments. The deed also provides that the Easement and other conditions "shall be covenants running with the land," providing further indicia of a common scheme.[2] Id., Exh. B.

Plaintiffs argue that there was never any intent for the Lake to be a common interest community because LPPOA does not limit its membership to Tract owners. However, this lack of exclusivity does not necessarily indicate that there was no common plan or scheme when Mirror developed the Lake. LPPOA may have maintained an open and voluntary membership structure until recent years, but the deed conveying the Tract from Mirror to LPPOA specifically referred to LPPOA's obligations as "covenants running with the land," indicating that LPPOA was expected to play a central role in maintaining common Lake facilities. Id. Exh. B. Additionally, Plaintiffs contend that any common neighborhood scheme that might have once existed was abolished when LPPOA relieved itself of certain properties, such as when it sold the club house to the local fire department and when it conveyed tennis courts to a residential developer. Am. Compl. ¶ 9-12. Defendants sold these properties – which notably lacked the same Easement language – in spite of deed restrictions that stipulated that LPPOA would "at all times" continue to keep and maintain these facilities. Id. ¶ 11; Mankoff Cert. Exh. B. As Plaintiffs see it, these transfers essentially terminated whatever common interest community could have been implied in the original deeds. Yet, the fact remains that property owners in the Tract still had notice of the Easement based on their chains of title. There is no indication that LPPOA intended these sales to terminate the common interest community that these recorded documents established. The

[2] In addition, at oral argument, counsel for Defendants represented that there is a tax map dating to the time that the Lake was developed, which identifies properties that are located inside the Tract. It was not introduced as evidence, but its existence was not refuted. Even in the unlikely event that a title search for the Easement proved unsuccessful, this filed map, if it exists, would also have provided Plaintiffs with notice that they reside in a common development.

Easement makes it clear that, within the Tract, "there is a commonality of interest, an interdependence directly tied to the use, enjoyment, and ownership of property." Committee for a Better Twin Rivers, 192 N.J at 365 (quoting Fox, 167 N.J. at 222).

ii. Tract residents benefit from living on or near the Lake

Easements in a chain of title confer a benefit on easement holders, such as entitling easement holders to use a lake. See Lake Lookover Property Owners' Ass'n v. Olsen, 348 N.J. Super. 53, n. 1 (App. Div. 2002). Here, Tract residents benefit from the Easement language in their chains of title, which reads, "together with the right to use, in common with others, the waters of Lake Parsippany for bathing, boating and fishing." Mankoff Cert. Exh. A. According to the Sempler letter, although LPPOA recently interpreted this language to mean that LPPOA can compel property owners to pay an Easement assessment, residents also gained something in return: "new access to the lake includ[ing] boating and fishing, and use of all the common areas around the lake among other privileges." Id., Exh. C.

Property owners in the Tract derive several other benefits from owning property on or near the Lake that are not strictly limited to the Easement language. As Defendants' counsel asserted at trial, residents can become full members of LPPOA, and through this expanded membership they can gain additional perks, such as the ability to vote in association meetings. Residents can decide whether they want to take advantage of these benefits of full membership, which requires paying an additional fee on top of the $115.00 annual charge. See id. Non-residents do not even have the option of voting or engaging in other activities as full, resident LPPOA members do; non-resident privileges are limited to recreational use of the Lake. In addition, although it is unclear if properties

in the Tract are worth more as compared to properties located just outside the Tract,[3] at a minimum, LPPOA's role in maintaining the Lake and recreational facilities enhances or at the very least sustains the value of nearby properties, since a poorly-maintained lake would certainly be unattractive to potential buyers, and could also implicate public health or safety. See id., Exh. G. Property valuation issues aside, Tract residents also derive less tangible benefits from living in proximity to the Lake, such as scenic views and easy access to LPPOA facilities. See Lake Lookover, 348 N.J. Super. at 68 (acknowledging that benefit of an easement can be coupled with property owners' ability to "enjoy the lake itself" when considering the need to impose an assessment).

iii. Since Tract residents benefit from the Lake, LPPOA can compel residents to pay for the accompanying burden

"With the benefit [of an easement] ought to come the burden." Lake Lookover, 348 N.J. Super. at 65 (alteration in original) (quoting Island Improvement Ass'n v. Ford, 155 N.J. Super. 571, 574 (App. Div. 1978)). The burden of an easement should be fairly allocated between all who benefit from the easement; there is an "obligation of . . . individual owners to contribute to the repair and maintenance of [an] easement" that property owners benefit from. Island Improvement, 155 N.J. Super. at 575. Common interest associations generally have authority to require payment to support this burden. Unless it is expressly limited otherwise, "a common-interest community has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community and by charging fees for services or for the use of common property." Restatement (Third) of Property (Servitudes) §

[3] Neither party proffered evidence in the record regarding the average appraisal values of properties inside and outside the Tract.

6.5(1)(a). Since these communities benefit from shared easements and other common servitudes, it is appropriate for an association to impose a "fair and reasonable sharing of financial obligation among such property owners" who live near and benefit from common community elements, such as dams and lakes. Lake Lookover, 348 N.J. Super. at 60. "It is well established that membership obligations requiring homeowners in a community to join an association and to pay a fair share toward community maintenance are enforceable as contractual obligations." Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 111 (2006). Courts have found that common interest communities, particularly those located in proximity to lakes, can compel homeowners to pay dues to manage shared amenities. See id.; Lake Lookover, 348 N.J. Super. at 65-67; Paulinskill Lake Ass'n v. Emmich, 165 N.J. Super. 43, 45-46 (App. Div. 1978); Island Improvement, 155 N.J. Super. at 574-75.

Since residents benefit from living in the Tract, and residents had notice in the form of the Easement language in their deeds, LPPOA can burden property owners with the Easement assessment in order to maintain the benefits that residents derive from living on or near the Lake. In Lake Lookover, the Appellate Division affirmed the Chancery Division's finding that the lake association, "as the owners of [the lake,] has the power to make assessments against property owners who hold an easement for use of the lake, for the upkeep of the lake including repair of the dam." 348 N.J. Super. at 64 (alteration in original). Here, LPPOA has the authority to impose similar assessments on all property owners by passing resolutions pursuant to its By-Laws, which vest the LPPOA Board of Trustees "with the management and control of all property of LPPOA." Mankoff Cert. Exh. G.

Not only does LPPOA have the authority to impose an Easement assessment, but the LPPOA also administered the Easement assessment fairly. LPPOA equally distributed the same

annual $115.00 burden to each property owner in the Tract. Am. Compl. ¶ 40. This fee allegedly "represents an equitable pro rata sharing of the common expenses of the lake and recreational facilities," similar to the pro rata assessment structure the Court approved of in Lake Lookover. Mankoff Cert. Exh. G; Lake Lookover, 348 N.J. Super. at 60. Sempler's letter stated that LPPOA planned to direct the $115.00 toward "specific expenses related to maintenance of the common areas of Lake Parsippany," such as taxes and water quality management. Mankoff Cert. Exh. C. Sempler also addressed how Lake residents were given the option of becoming "full recreational member[s]," entitling them to additional privileges beyond the bare minimum Lake maintenance requirements, if they so wished to take advantage of these privileges. Id. LPPOA's two-tiered approach indicates that it carefully considered what qualifies as basic Lake upkeep, and that it did not attempt to unfairly charge Tract residents more than what was necessary. Thus, LPPOA has authority to require Tract property owners to contribute to the reasonable maintenance of the Lake, and it adopted a rational approach when calculating the Easement assessment and additional membership fees.

In this case, summary judgment in favor of Defendants is appropriate because there is no genuine dispute of material facts. Plaintiffs take issue with Defendants' characterization of the Tract as a common interest community, in support of their argument that Defendants have no authority to impose an Easement assessment. However, the Tract fits squarely within the definition of a common interest community: it is a community that is "burdened by servitudes" – here, the Easement language – "requiring property owners to contribute to maintenance of commonly held property or to pay dues or assessments to an owners association that provides services or facilities to the community." Fox, 167 N.J. at 222 (quoting Restatement (Third) of Property (Servitudes) § 6, intro.). At no point at oral argument or in their briefs did Plaintiffs deny that, other than the few

communal properties that LPPOA sold, property owners in the Tract had no notice of the Easement in their chains of title. It is similarly clear that Tract residents derive multiple benefits from the Easement language, such as the ability to vote in LPPOA elections, that non-residents do not have. Relevant and binding case law states that Tract residents can be compelled to pay for the burden that accompanies this benefit. See Lake Lookover, 348 N.J. Super. at 65. Therefore, Defendants can impose an Easement assessment on all property owners located in the Tract, and summary judgment is entered in Defendants' favor.

c. Attorney's Fees

R. 4:42-9(a) provides that, "[n]o fee for legal services shall be allowed in the taxed costs or otherwise," unless one of eight specific fee-shifting exceptions listed under subsections (1) through (8) applies. Additionally, "[e]xcept in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered." R. 4:42-9(b).

Plaintiffs and Defendants both requested reasonable attorney's fees in their Amended Complaint and Answer, respectively. However, the instant action does not fall under one of the fee-shifting exceptions listed under R. 4:42-9, and neither side submitted affidavits or certifications attesting to the amount of attorney's fees and costs they incurred during the course of this litigation. Thus, their respective motions are denied.

III. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment is **DENIED**. Defendants' Cross-Motion for Summary Judgment is **GRANTED**. Plaintiffs' and Defendants'

applications for attorney's fees and costs are both **DENIED**. A conforming Order accompanies this Statement of Reasons.