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Honorable Stuart A. Minkowitz, A.J.S.C.
Superior Court of New Jersey, Morris Vicinage
Chancery Division
Washington and Court Streets
Morristown, New Jersey

Re: Purzycki, et als. v. Lake Parsippany Owners Association, Inc. et als.
Docket No: C-2-17
Motion for Reconsideration and/or Clarification

Your Honor:

This office represents the Plaintiffs Mary Purzycki, et als. ("Plaintiffs") in the above matter. We submit this Letter Brief in lieu of more formal papers in support of Plaintiffs' motion for reconsideration and/or clarification of the Court's Judgment/Opinion dated October 7, 2019. The Certification of Brian M. Rader (the "Rader Cert.") shall be incorporated herein by reference.

Preliminary Statement

Plaintiffs believe that the Court overlooked certain critical aspects of the assessment scheme and applicable controlling law in its October 7, 2019 Judgment (the "Judgment") in favor

of the Defendants the Lake Parsippany Property Owners Association, Inc. and the Board of Directors (the "Defendants"). In short, although the Court opined as to the pivotal issue of whether Lake Parsippany is indeed a common-interest community; the opinion fails to address the various aspects of the assessment scheme as set forth in the Defendants resolution dated October 19, 2016 (the "Resolution") of which Plaintiffs sought complete review, and which are equally as critical as the overall right to assess, i.e., attorney's fees, late fees, and liens, and voting and participation rights for all property owners. **See Rader Cert. Para. 1.** In addition, the notion that the Defendants intend to implement a "two-tiered" approach to charging property owners, necessitates clarification as to the voting and participation rights of the parties. Indeed, even the Defendants argued in their moving papers (and again at oral argument) that the law, as it currently stands, means that all property owners who reside in a common-interest community are "members". Surely, the 2017 amendments to N.J.S.A. 45:22A-43, et seq (the "Act") clearly and unequivocally state that property owners in a common-interest community maintain all voting and participation rights contemplated under the Act, so long as they are current with respect to their payment obligations. Id.; **See Rader Cert. Para. 2.** Now that this Court has held that Lake Parsippany is a common-interest community, property owners shall be entitled to unfettered voting and participation so long as they are not delinquent.

Summary of Facts

On October 7, 2019 this Court rendered a fourteen (14) page opinion (the "Opinion") upholding the Defendants right to assess property owners who reside in a geographic location of Parsippany, New Jersey known as Lake Parsippany on the basis that Lake Parsippany is considered a common-interest community. However, the Opinion did not address other aspects of the assessment scheme such as the Defendants right to charge late fees, attorney's fees, record liens

against properties for non-payment of the assessment, and voting/participation rights, all of which were a critical part of the assessment scheme and contained in the Resolution. Currently, the Defendants propose two-tiers: Easement holder privileges, and recreational member privileges. **See Rader Cert., Para. 3.** If it is indeed the Defendants' intent to limit any group's voting and participation rights afforded under the Act as if they are not members of the common-interest community, then that is an issue that needs to be clarified or reconsidered.

It would benefit Plaintiffs and Defendants, as well as the Court for the sake of judicial economy, to consider and address all issues pertaining to the easement assessment scheme under one single declaratory ruling to deter future litigation with respect to these very issues, litigation which will likely transpire if the Court does not address the remaining issues of the assessment scheme at this present time.

Argument

Under Rule 4:49-2, a party may ask a court to reconsider or amend a judgment or order if a party believes (1) the court has overlooked any facts or law, or (2) the court has erred. See R. 4:49-2.

Courts have broad discretion to grant a motion for reconsideration of its prior orders pursuant to R. 4:49-2. See, e.g., *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *Johnson v. Cyklop Strapping Corp*., 220 N.J. Super. 250, 257 (App.Div.1987), *certif. denied,* 110 N.J. 196 (1988). Reconsideration of a prior order should be granted where either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi*, 398 N.J. Super. 299, 310 (App. Div. 2008); *D'Atria v. D'Atria,* 242 N.J. Super. 392, 401 (Ch. Div. 1990). A motion for

reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, *R.* 1:7-4, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record. *Cummings v. Bahr,* 295 *N.J.Super.* 374, 384, 685 *A.*2d 60 (App.Div.1996).

I. A PROPERTY OWNER WHO PAYS THE LOWER-TIER EASEMENT ASSESSMENT MAY BE SUBJECT TO RESTRICTED RECREATIONAL ACCESS BUT SHALL NOT BE DEPRIVED OF VOTING AND PARTICIPATION RIGHTS AS A MATTER OF LAW

The Act explicitly provides that if a property owner resides in a common-interest community, then the property owner is a member. In fact, as noted above, even the Defendants argued this point in support of its cross-motion for summary judgment. **See Rader Cert. Para. 4.** Accordingly, so long as the property owner pays the chargeable easement assessment, then the property owner is considered a member in good standing for purposes of voting and participation rights.

Here, the Court ruled that Lake Parsippany is a common-interest community. Hence, the two-tiered approach the Defendants propose would directly contradict the Act if it were used to deprive those (who elect the lower tier) of rights under the Act. If it is indeed the intent of the Defendants to deprive any paying individual of voting and participation rights, then the two-tiered approach is invalid as a matter of law. In other words, a property owner who elects the lower tier is not a member in "bad standing" under the Act. Of course, the Defendants could limit recreational access to those who elect the lower tier; however, under no circumstance may Defendants limit voting and participation rights of property owners in a common-interest community who are paying a required fee; otherwise, this would serve as a direct violation of the Act.

Accordingly, all property owners shall be entitled to complete voting and participation rights as prescribed under the Act.

II. IF THIS COURT FINDS THAT PROPETY OWNERS ARE MERELY EASEMENT HOLDERS WITH MAINTENANCE OBLIGATIONS (AS OPPOSED TO MEMBERS) THAN THERE IS NO PRIVY OF CONTRACT AND THEREFORE ATTORNEY'S FEES, LATE FEES AND INTEREST MAY NOT BE CHARGED AS PART OF ANY COLLECTION PROCESS

As this Court noted on Page 13 of its opinion (in denying both parties' request for legal fees in the case at hand), R. 4:42-9 governs the ability to collect attorney's fees as part of an action. No fee-shifting exception would apply to collection actions against property owners. In addition, there would be no legal right to charge late fees or interest unless the property owners are "members" and subject to the Governing Documents which govern the corporation and its members in a contractual sense. Late fees and interest are considered stipulated damages and can only be implemented if set forth in a contract.

Because stipulated damages "may constitute an oppressive penalty," "[h]istorically, courts have closely scrutinized contract provisions that provided for the payment of specific damages upon breach." MetLife v. Washington Ave. Assocs., L.P., 159 N.J. 484, 493-95 (1999) citing Wasserman's Inc. v. Middletown, 137 N.J. 238, 248 (1994). An agreement, made in advance of breach, fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. Ibid.; citing Restatement of Contracts § 339 (1932).

As the Defendants currently have it, there are "easement holder" privileges and "recreation membership privileges" which suggests that perhaps, at present moment, the Defendants do not consider mere "easement holders" to be members. [1] If the easement holders are mere "easement

[1] As noted above, the Plaintiffs challenge this notion as a direct contradiction of the Act.

holders" and not members, then there is no contract or agreement to permit attorney's fees, or liquidated damages such as late fees and interest. Of course, individuals who are not *members* of a corporation cannot be subject to Governing Documents of a corporation because if that were the case, a corporation may subject its rules and regulations to endless individuals. The ability to charge "easement holders" a maintenance fee is based on equity, and not contract, unless of course the easement holders are members subject to the Defendants' Governing Documents (and in that case they are entitled to all voting and participation privileges under the Act). In other words, there is no basis to charge attorney's fees, late fees and interest to anyone other than "members" because the ability to charge attorney's fees, late fees, and interest is dependent upon contract or statute. The only manner to bind property owners to a contract is to make them all members of the corporation.

III. ALTHOUGH THE COURT DID NOT OPINE AS TO THE ISSUE OF LIENS CASE LAW DOES NOT SUPPORT THE IMPOSITION OF LIENS ON PROPERTIES PURCHASED PRIOR TO THE RESOLUTION BECAUSE IT CANNOT BE REASONABLY ARGUED THAT THE PROPERTY OWNERS HAD ADEQUATE NOTICE OF A DEBT OBLIGATION AT THE TIME THEY PURCHASED THEIR PROPERTIES

For a covenant to create such a lien right in a home-owners' association, a property owner must have adequate notice. Because the covenant, if enforced, would affect the use and enjoyment of the land, covenant language must be construed strictly, and in favor of the owner's unrestricted use. Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 112, 892 A.2d 646, 653-54 (2006) (citing Hammett v. Rosensohn, 46 N.J. Super. 527, 535, 135 A.2d 6 (App.Div.1957), aff'd, 26 N.J. 415, 140 A.2d 377 (1958)).

Homeowners' association liens are classified as equitable liens because they are created by the covenants contained in members' deeds. First Fed. Sav. & Loan Ass'n v. Bailey, 316 S.C. 350, 450 S.E. 2d 77, 80 (S.C.Ct.App.1994)); see also 51 Am Jur. 2d. *Liens* § 30 (2004)

(defining equitable lien as "a right of a special nature over a thing, which constitutes a charge or encumbrance upon it."). An equitable lien constitutes a special right that is a combination of a legally cognizable debt and a binding agreement to subject property to the payment of that claim. Id. (citing Sisco v. New Jersey Bank, 151 N.J. Super. 363, 369, 376 A.2d 1287 (Law Div.1977)), aff'd in part, rev'd in part 158 N.J. Super. 111, 385 A.2d 890 (App.Div.1978). Stated otherwise, "[f]or an equitable lien to arise there must be a debt owing from one person to another, specific property to which the debt attaches, and an intent, expressed or implied, that the property will serve as security for the payment of the debt." Id. at 112 (citing Bailey, supra, 450 S.E. 2d 80-81 (citation omitted)).

For a covenant to create such a lien right in a homeowners' association, a property owner must have adequate notice. Because the covenant, if enforced, would affect the use and enjoyment of the land, covenant language must be construed strictly, and in favor of the owner's unrestricted use. Hammett v. Rosensohn, 46 N.J.Super. 527, 535, 135 A.2d 6 (App.Div.1957), aff'd, 26 N.J. 415, 140 A.2d 377 (1958).

In supporting the imposition of a lien, the Court in Highland Lakes stated as follows:

> We thus turn to the relevant language in the Bylaws that, coupled with the deed covenants, is asserted to provide notice…

Considering membership in Highland Lakes was always mandatory, the Court found adequate notice of a possible debt to the corporation.

However, that is not the case here. There was no mandatory membership, and no language anywhere to provide adequate notice of a debt obligation. One cannot reasonably assert that the covenant, i.e., the “right to boat, bathe and fish”, which allegedly formed the basis for the Court’s finding that Lake Parsippany is a common-interest community, provides adequate notice of the

potential imposition of a lien. In the absence of additional language, there is no practical way this Court can find adequate notice of a debt obligation or lien rights, especially considering the Defendants never attempted to impose a debt on property owners (or mandatory membership) until the Resolution (on October 19, 2016). Given the restrictive nature of an equitable lien a court must thoroughly consider language, and in the absence of language providing clear notice of lien rights, there can be none. Id.

Accordingly, only those property owners who take title after the Court's October 7, 2019 ruling, or, at the very best, after the Resolution, can be said to have adequate notice of a debt obligation or lien rights. Even an "equitable lien" must have some basis in contract, founded upon an exploration of language and conduct between the parties. Surely, the speculative language upon which the Defendants rely, and the conduct over the years that gives no inclination of a debt obligation [2], is insufficient to provide adequate notice to property owners prior to either October 7, 2019, or the date of the Resolution.

CONCLUSION

In summation, the Defendants cannot, as a matter of law, deprive the property owners of voting and participation rights as set forth under the Act. If the Defendants desire a two-tier membership structure to offer two pricing options, then the Defendants may only restrict recreational rights to the lower tier, not voting and participation rights. To hold otherwise, would directly contradict the Act.

In addition, unless the property owners are members of the corporation, there is no basis to charge stipulated damages for non-payment of an assessment, or attorney's fees, as unless the

[2] Aside from inadequate notice of a debt obligation or lien rights in any document, as thoroughly discussed in Plaintiffs' moving papers as part of the motion for summary judgment, the Defendants did many things defiant of a common-interest community scheme.

theory for assessing the property owners is based on membership, then the theory for assessment is an equitable one based on an easement right, and not a binding contract between the parties.

Lastly, the ability to impose an equitable lien warrants an entirely different analysis the crux of which is "adequate notice" and "intent". Once again, one cannot reasonably argue that the property owners had any notice of a debt obligation potentially secured by an equitable lien until the Defendants enacted the Resolution and took a step towards imposing a debt obligation. Hence, the only individuals who could be said to have adequate notice are those property owners who purchased property *after* the Defendants took a step towards imposing a debt obligation.

Respectfully submitted,

/s/ Brian M. Rader, Esquire

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