IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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The Council of the Pointe at Bethany)	
Bay Condominiums,)	Civil Action No. 7543-MA
Plaintiff)	
v.)	
)	
Michele A. Higgins and Terrence S.)	
Higgins,)	
Defendants)	
)	

MASTER'S REPORT

Date Submitted: June 3, 2013 Draft Report: March 13, 2013 Final Report: September 30, 2013

Pending before me is a motion for summary judgment filed by Plaintiff The Council for the Pointe at Bethany Bay Condominiums (hereinafter "the Council") in a case that involves a dispute between the Council and owners of a condominium unit in the Pointe at Bethany Bay Condominiums (hereinafter "The Pointe") over access to their unit. For the reasons set forth below, I recommend denial of the motion for summary judgment.

I. Procedural and Factual Background

On May 17, 2012, Plaintiff filed a verified complaint in this Court to enforce certain restrictions applicable to the property owned by Defendants Michele A. Higgins and Terrence S. Higgins.¹ Defendants own Unit 3401 at The Pointe and, as owners of this

¹ Docket Item ("D.I.") 1.

condominium unit, are subject to the Condominium Documents governing The Pointe, including Articles 6 C and 6 F of the Declaration which provide:

- C. The Council shall maintain, repair, replace, and manage, and make any additions or improvements to the Common Elements and Limited Common Elements as provided in the Code of Regulations;
- F. The Council shall have an easement to enter any Unit at any time to make emergency repairs necessary to protect any part of the Property from damage or further damage, and shall have the right to enter any Unit on reasonable notice to the respective Owner to perform such routine maintenance or other action as may be necessary to preserve any part of the Property.²

According to the complaint, Plaintiff undertook a repair and replacement project beginning in late fall of 2010 involving the outdoor siding and windows of the seven multi-level condominium buildings located at The Pointe. During the construction work, a number of units allegedly were found to have significant mold growth due to moisture infiltration on the outside wall sheathing under the siding adjacent to the units in the building. Where substantial mold growth was found on the outside adjacent to a unit, Plaintiff investigated whether mold had infiltrated into the inside of a unit by giving notice to the owner of the affected unit to obtain access and to have professionals test for mold growth. Where mold growth was discovered in the interior of any unit, Plaintiff again provided notice to the owner of such unit and obtained access for its professional contractors to undertake remediation and restoration work.

In its complaint, Plaintiff alleges that black mold was discovered on the outside sheathing walls adjacent to Defendants' unit, but that Defendants repeatedly refused Plaintiff access to their unit to test for mold. After several months had passed, and after

² Exhibt A of Affidavit of Robert J. Valihura, Jr.. D.I. 16.

Plaintiff had determined that mold existed in the units adjacent to Defendants' unit, Defendants allowed Plaintiff's professional mold expert to access their unit, whereupon the expert allegedly found mold in Defendants' unit at levels that, in the expert's opinion, require remediation. Defendants thus far have refused to grant access to their unit to Plaintiff's contractors in order for them to assess the amount of remediation work that is needed and to provide Plaintiff with a cost estimate.

In their Answer filed on July 16, 2012,³ Defendants deny that they have violated the Declaration, deny that the individual who performed the mold testing in their unit qualifies as a professional mold expert, and deny that any data obtained during that inspection was collected in conformity with accepted scientific standards. Accordingly, Defendants deny that the findings of this alleged professional mold expert represent any mold issue in their unit or any surrounding units, and deny that mold remediation is necessary in their unit.

Before engaging in any discovery, on November 20, 2012, Plaintiff moved for summary judgment on Counts I and II of its complaint, and moved for sanctions against the Defendants.⁴ After briefing was completed on two these motions, on Plaintiff's subsequent motion to stay discovery, and on Defendants' subsequent motions to compel discovery and to supplement their answering brief in opposition to Plaintiff's motion for

³ D.I. 9. Defendants were initially represented by counsel, but I granted counsel leave to withdraw on November 5, 2012, D.I. 12, and Defendants have represented themselves since that time

⁴ D.I. 15 & 16. In Count I, Plaintiff seeks an order granting it access to Defendants' unit to determine the cost and scope of the mold remediation repairs and to effectuate such repairs in Defendants' unit. In Count II, Plaintiff seeks an order instructing Defendants to permit Plaintiff access to their unit in accordance with the terms set forth in the Declaration.

summary judgment, I issued a draft report on March 13, 2013, in which I recommended the denial of Plaintiff's motion for summary judgment, which would have the effect of rendering moot Plaintiff's motion to stay discovery and Defendants' motions to compel discovery and to supplement their answering brief. I reserved decision on Plaintiff's motion for sanctions because the allegations contained therein were disputed by Defendants, and because it was unclear to me on what legal basis Plaintiff was seeking sanctions at such a preliminary stage of this proceeding. Plaintiff took exceptions to my draft report. The exceptions have been briefed, and I have decided to withdraw my draft report and issue my final report as follows.

II. Standard of Review

Under Court of Chancery Rule 56, the Court may grant summary judgment when there are no material issues of fact and the moving party is entitled to judgment as a matter of law. The Cove on Herring Creek Homeowners' Association, Inc. v. Riggs, 2003 WL 1903472, at *3 (Del. Ch. April 9, 2003) (citing Brazen v. Bell Atl. Corp., 695 A.2d 43, 47 (Del. 1997); Vornado PS, L.L.C. v. Primestone Inv. Partners, L.P., 2002 WL 31888349, at *11 (Del. Ch. 2002)). If the moving party can show that no genuine issue of material fact exists, then the burden shifts to the non-moving party to show that there are material issues of fact in dispute. See Sierra Club v. DNREC, 2006 WL 1716913, at *2 (Del. Ch. June 19, 2006) (citing Scureman v. Judge, 626 A.2d 5, 10 (Del.Ch. 1992), aff'd, Wilmington Trust co. v. Judge, 628 A.2d 85 (Del. 1993)(ORDER); Brzoska v. Olson, 668 A.2d 1355, 1364 (Del. 1995)). In reviewing a motion for summary judgment, the Court will look at all evidence in the light most favorable to the nonmoving party, but

the non-moving party cannot rest on its pleadings, but must come forward with admissible evidence creating a triable issue of material fact or else risk summary judgment against it. *See Sierra Club*, letter op. at *2, *supra* (citing *In re Gaylor Container Corp. S'holders Litig.*, 753 A.2d 462, 473 (Del. Ch. 2000); *In re Liquidation of Nat'l Heritage Life Ins. Co.*, 728 A.2d 52, 56 (Del. Ch. 1998, *aff'd*, 723 A.2d 397 (Del. 1998)).

The record at this stage of the proceeding reveals the existence of genuine issues of material fact regarding Plaintiff's actions in this matter precluding resolution of this case through the entry of summary judgment. The only evidence supporting Plaintiff's motion for summary judgment consist of inadmissible hearsay in the form of reports from environmental consultants and the single affidavit of Ann Bryan, president of the Council. In opposition to the motion, Defendants have argued that the mold testing and extreme remediation plans for their unit are a form of harassment and retaliation by Council for Defendants' previous complaint against one of Council's contractors, and have supplied supporting admissible evidence in their own affidavits. Defendants also have presented an affidavit from an industrial hygienist with over 25 years of experience, averring that the test results and remediation recommendations of Plaintiff's mold inspector were not based on any scientific methods or standards. In short, Defendants have raised questions whether Plaintiff's actions regarding the mold testing and remediation project were done in good faith and in furtherance of the legitimate interests of The Pointe.

II. Analysis

Plaintiff argues that Defendants have violated the terms of the Declaration by denying Plaintiff access to their unit for determining the estimated costs of mold remediation and repair in Defendants' unit, and for effectuating such work. Plaintiff further argues that un-remediated mold in Defendants' unit and in adjacent units represents a continuing threat to the unit owners in The Pointe, to the common elements in The Pointe, and to Defendants themselves. Plaintiff is seeking to permanently restrain and enjoin Defendants from precluding access to their unit for appropriate remediation and restoration efforts by Plaintiff and its representatives, including its managing agent, its contractor, and its mold expert.

The elements that must be demonstrated to obtain permanent injunctive relief are: (1) actual success on the merits; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result from a failure to enjoin the actions that threaten plaintiff outweighs the harm that will befall the defendant if an injunction is granted. Sierra Club, letter op. at *3, supra (citing Korn v. New Castle County, 2005 WL 2266590, at *14 (Del. Ch. Sept. 27, 2005)). Plaintiff contends that it has demonstrated actual success on the merits. According to Plaintiff, under the Declaration that governs the Defendants' unit, Plaintiff "is entitled as a matter of law to use the easement ... to repair, remediate and maintain the 'Property,' both the Unit <u>and</u> common elements of The Pointe."

⁵ Plaintiff's Brief in Support of its Motions for Summary Judgment and Sanctions, at 24-25.

Plaintiff also argues that it will suffer irreparable harm if injunctive relief is not granted. According to Plaintiff, the simple fact that Defendants have violated the Declaration provides the irreparable harm necessary to mandate the injunctive relief it seeks, citing *The Cove on Herring Creek Homeowners' Association, Inc.*, letter op. at *5, supra (citing Slaughter v. Rotan, 1994 WL 514873 (Del. Ch. Sept. 14, 1994)). If that were not enough, Plaintiff argues that banks and financial institutions are refusing to approve loan applications for the purchase of any units at The Pointe until all the units where mold was found to be present have been certified as properly remediated. According to Plaintiff, "[s]ales of units have been lost, and the opportunity loss for such sales will continue for as long as this un-remediated Unit remains outstanding."

Finally, Plaintiff argues that in contrast to the harm that it and owners of other units at The Pointe are suffering, Defendants will suffer no harm because they do not use their unit as their full-time residence and will not be inconvenienced by the work being proposed to be done there. Defendants will also obtain a significant financial benefit in having such remedial work done because then their unit will be available to be sold.

Plaintiff has provided the following documents in support of its motion for summary judgment: (1) a transmittal affidavit of Robert J. Valihura, Jr., containing copies of: (a) the Declaration, as amended, of The Pointe; (b) a field report of American Home Inspection Technologies LLC, dated May 6, 2011; (c) an inspection report of Hardy Environmental Services dated May 17, 2011; (d) an evaluation report of Susan E. White of Sussex Environmental Consultants dated November 14, 2011; and (e) the Code

⁶ *Id.* at 27.

of Regulations for The Pointe; and (2) an affidavit of Ann Bryan, President of the Council. The reports attached to Valihura's transmittal affidavit contain inadmissible hearsay since none of the authors of those reports have submitted an affidavit adopting their report as true. The affidavit of Ann Bryan, on the other hand, avers that she has "read Plaintiff's Brief in Support of the Motions for Summary Judgment and for Sanctions, and the facts set forth therein are true and correct to the best of [sic] knowledge, information and belief." The balance of Bryan's affidavit relates to the amount of time she has spent addressing Defendants' complaints, which she describes as "frivolous," and her belief that Defendants engage in harassing behavior to intimidate Plaintiff's managing agents and contractors in an attempt to get them to withdraw from providing services to The Pointe.

In their opposition to the motion for summary judgment, Defendants argue that they have complied with the terms of the Declaration, including the easement and entry rights of the Council. They claim that they are being harassed by Plaintiff for previously having filed a consumer protection complaint against one of Plaintiff's contractors, and that they have been targeted for aggressive mold inspection and remediation in retaliation

⁷ D.I. 16. Plaintiff also submitted an affidavit of Thomas Tipton, an officer of the company that provides management services to The Point, but this affidavit was submitted solely in support of Plaintiff's motion for sanctions.

⁸ D.I. 16. Affidavit of Ann Bryan, at ¶ 2. Court of Chancery Rule 56(e) provides that supporting affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The statement of facts in Plaintiff's brief is 13 pages in length. Given the brevity of paragraph two of Bryan's affidavit, it is unclear to me whether Bryan has personal knowledge of every "fact" set forth in Plaintiff's brief in support of its summary judgment motion.

⁹ Id. at ¶ 3. As a result, I do not give Bryan's affidavit any weight in this regard.

as a result. According to Defendants, none of the recommendations for mold remediation in their unit upon which Plaintiff relies were based on scientifically reliable principles or methods. Defendant Terrence S. Higgins provided a transmittal affidavit containing numerous exhibits to support Defendants' answering brief in opposition to the motion for summary judgment, including a report by Ctgroup Environmental, LLC dated January 2, 2013, which concluded that there were no signs of moisture intrusion or visible mold in Defendants' unit. Defendants also provided an affidavit of Caoimhin P. Connell, an expert industrial hygienist, who averred that there was no reliable or credible evidence to support White's opinion that the Defendants' unit had an unusual mold problem nor were there any standards or valid codes of conduct that would support her drastic remediation plan as proposed in her November 14, 2011 report.

Defendants also argue that Plaintiff has not demonstrated any impact on residential financing at The Pointe and, therefore, has not demonstrated any harm. The lack of sales, they contend, is due to the recent economic recession and the oversupply of condominium units in Sussex County. Defendants also argue that the proposed remediation and repair work in their unit would result in substantial harm to the unit, which is decorated with hand painted murals and coordinated designer paint colors on the walls, and would limit their use of the unit. According to Defendants, granting Plaintiff

¹⁰ Affidavit of Terrence S. Higgins, Ex. Q. Like the reports in Valihura's affidavit, this report contains inadmissible hearsay.

Afidavit of Caoimhin P. Connell, at p. 7. The report of Dr. White of Sussex Environmental Consultants recommended, among other actions, that the walls in the family room and master bedroom be opened, the carpeting in those rooms pulled back to assess damage, all base trims moldings in those rooms removed to assess the drywall behind trim, and the removal of all damaged drywall to 12 inches beyond the visible damage. Affidavit of Robert J. Valihura, Jr. at Ex. D. pp. 5-6.

injunctive relief to access their unit would require all units where mold or severe moisture infiltration has been discovered to undergo the same inspection, invalid testing protocol, and possible mold remediation, which would result in unnecessary work and expense for the owners of those units as well.

I issued a draft report in which I recommended the denial of the motion for summary judgment because I found that Plaintiff had not met its burden of demonstrating clearly the absence of any genuine issue of fact. In particular, I found that the Connell affidavit raised questions about the qualifications of Plaintiff's mold expert, the methodology used in her testing, and the scientific theories on which she based her conclusion that mold was present in the walls of Defendants' unit of such type and in such amount as to necessitate remediation work to preserve the property, which in turn would obligate Defendants to provide access to their unit for Plaintiff's contractors after reasonable notice.

In briefing its exceptions, Plaintiff concedes that these factual issues are disputed, but claims that none of these issues can serve as a basis for denying its motion for summary judgment and permanent injunctive relief. According to Plaintiff, its access rights are straightforward and unambiguous, and nowhere in the language of the Declaration does it permit a unit owner to restrict access to the dates, times and circumstances chosen by that owner or to veto access based solely on the unit owner's view of the reason for the access sought. According to Plaintiff, Defendants are challenging the Council's business judgment in undertaking this project, but Defendants are only concerned with their own unit and owe no duty to the other unit owners whereas

Plaintiff has a fiduciary duty to all owners with respect to the common elements. Therefore, Plaintiff argues, Defendants have failed to overcome the presumption that Plaintiff's business judgment to undertake the mold remediation project was made properly and in good faith.

Decisions made by condominium association boards such as Council are reviewed by a court using the same business judgment rule that governs decisions made by other types of corporate boards. 15B Am.Jur.2d *Condominiums and Cooperative Apartments* § 23. This rule protects the board's business decisions and authority from frivolous attack but permits review of improper decisions, such "as when a challenger demonstrates that a board's action has no legitimate relationship to the welfare of the condominium, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority." *Id.* (citing *Quinones v. Board of Managers of Regalwalk Condominium I*, 673 N.Y.S.2d 450 (1998)).

Here, the party seeking the permanent injunction is the same party seeking the protection of the business judgment rule. Plaintiff argues that since Defendants only disagree with Plaintiff's business judgment regarding the necessity of mold testing and mold remediation, it is entitled as a matter of law to access Defendants' unit for the purpose of remediating the common elements. Thus, Plaintiff is using the business judgment doctrine as a sword rather than a shield, shifting the burden of proof in a summary judgment motion from itself as the movant to Defendants, the nonmovants.

However, Defendants also have presented admissible evidence in the form of their own affidavits. Defendants averred that following their earlier complaint about Plaintiff's contractor, they were harassed by Plaintiff during meetings, told not to talk to Plaintiff's managing agent, have been accused of "terrorist' activities" by Bryan, 12 their unit was subjected to forced entry by an unfamiliar locksmith and handyman, and they observed Plaintiff's mold inspector conducting an unprofessional inspection and sampling process that showed her prejudicial determination to find mold in their unit. In a second affidavit, Defendant Terrence S. Higgins averred that he recently observed renovation work on his building where exterior siding was removed to reveal mold on the pressed board siding and exterior insulation. He observed, however, no efforts to inspect or treat the mold or inspect the unit wall under the insulation, and the insulation with mold was simply recovered with new board and siding.¹³ Defendants also have presented admissible evidence in the form of an affidavit by an industrial hygienist who averred that: (1) the work of Plaintiff's mold inspector was based on theories that are not generally accepted in the scientific community as reliable; (2) the inspector did not demonstrate that she had the background or experience to claim to be an industrial hygienist or perform a scientifically valid assessment of indoor molds; and (3) there was no reliable or credible evidence to support the inspector's opinion that the unit has an unusual mold problem. 14

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¹² Affidavit of Michelle A. Higgins at ¶ 13.

¹³ Affidavit of Terrence S. Higgins dated May 15, 2013, Exhibit D of Motion to Supplement Defendants' Answer Memorandum to Exception. D.I. 44.

¹⁴ Affidavit of Caoimhin P. Connell at ¶¶ 24-25.

Assuming that the business judgment rule is applicable in this case and looking at the evidence in a light most favorable to the non-moving parties, Defendants have presented admissible evidence that raises genuine issues of material fact, i.e., whether Plaintiff's mold testing and remediation project is in furtherance of the legitimate interests of The Pointe and whether Defendants have been singled out for harmful treatment. If the mold testing and remediation project is not "necessary to preserve any part of the Property" or to "maintain, repair, replace, and manage, and make any additions or improvements to, the Common Elements and the Limited Common Elements," or if Defendants are being treated more harshly than other unit owners in The Pointe, Plaintiff should have no easement to access Defendants' unit and Defendants would not be violating the Declaration by refusing Plaintiff access to their unit. In light of the existence of these material issues of fact, Plaintiff has not demonstrated actual success on the merits through its summary judgment motion.

Nor has Plaintiff demonstrated irreparable harm at this stage because if Defendants have not violated the Declaration, then the sanctity of the social contract among the unit owners of The Pointe has not been disturbed. *Compare Slaughter*, mem. op. at *2, *supra* (holding that defendants' breach of the restrictive covenant preventing placement of mobile homes on the development's lots constitutes irreparable harm to the other owners). Furthermore, Plaintiff has not met its burden of demonstrating a lack of genuine issues of material fact regarding irreparable harm since the parties dispute

¹⁵ Declaration for the Pointe at Bethany Bay Condominiums at pp. 4-5, Exhibit A of Affidavit of Robert J. Valihura, Jr.

whether the lack of financing for sales of other units at The Pointe has been caused Defendants' refusal to grant access to their own unit or other factors, such as the economic recession or an oversupply of similar units in the area. As a result, I recommend denial of the motion for summary judgment as to Count I of the complaint.

I also recommend denial of the motion for summary judgment as to Count II of the complaint where Plaintiff alleges that it is "mandated, by virtue of a Delaware State Police fiat, to refrain from accessing Defendant's Unit without a Court Order." Plaintiff is concerned that, without a court order, it will be unable to access Defendant's unit in some hypothetical emergency situation. This claim is not ripe for judicial review and to grant summary judgment on this count would amount to an impermissible advisory opinion. *See eBbay Domestic Holdings, Inc. v. Newmark*, 2009 WL 3205674, at *2 (Del. Ch. Oct. 2, 2009).

III Conclusion

For the foregoing reasons, I recommend denial of Plaintiff's motion for summary judgment on Counts I and II of its complaint. My recommendation, when it becomes final, should render moot Plaintiff's motion to stay discovery and Defendants' motions to compel discovery and to supplement their answering brief in opposition to the motion for summary judgment. The parties are referred to Court of Chancery Rule 144 for the process of taking exceptions to this final report.

¹⁶ Complaint at ¶ 31.