EFiled: Jul 24 2014 03:30PM EDT
Filing ID 55782720
Case Number 117,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL HYNSON,	)	
	)	
Plaintiff Below, Appellant,	)	Case No. 117, 2014
	)	
v.	)	
	)	
BURNBRAE MAINTENANCE ASSOCIATION,	)	
	)	
Defendant Below, Appellee.	)	

ANSWERING BRIEF OF DEFENDANT BELOW, APPELLEE, BURNBRAE MAINTENANCE ASSOCIATION

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By: _____

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DATED: July 24, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutory Authority **Page**

NATURE AND STAGE OF THE PROCEEDINGS

On December 24, 2013, the Superior Court issued an opinion and order which granted summary judgment to Defendant Below, Appellee Burnbrae Maintenance Association. The Court Below held that the Plaintiff Below, Appellant Darnell Hynson was a guest without payment as to Burnbrae Maintenance Association. The Court further held that the only duty owed by Burnbrae Maintenance Association to Darnell Hynson was to refrain from willful and wanton conduct, an allegation which had not been made by the Plaintiff.

On January 2, 2014, the Plaintiff filed a Motion for Reargument on the issue as to whether a benefit was conferred upon by Burnbrae Maintenance Association so as to make 25 *Del. C.* §1501 inapplicable. That motion was denied by the Superior Court. Thereafter, Plaintiff filed the instant appeal.

This is the Answering Brief of Defendant Below, Appellee Burnbrae Maintenance Association.

RESPONSE TO SUMMARY OF ARGUMENT

1. The Superior Court was required to construe the facts in the light most favorable to the Plaintiff as the nonmoving party. The Superior Court committed reversible error by failing to construe the fact that approximately 60% of the Burnbrae Condominiums are rented by their owners and that some owners own and rent multiple units in favor of the plaintiff. Viewed through the appropriate lens, the reasonable inference to be drawn from the fact that a significant number of unit owners are acting as landlords is that they are doing so for a financial business purpose and they are, therefore, more likely to be able to pay their dues in full and on time which directly benefits the BMA. The Delaware precedent set forth in *Hoksch v. Stratford Apartments* that a landowner or occupier receives a benefit from allowing social guests of tenants on the premises aptly applies in this case.

   Appellee's Response: Denied.

COUNTER STATEMENT OF FACTS

While a significant percentage of the units at the Burnbrae Condominiums were rented to tenants, the record contains only estimates provided by witnesses. Cecilia White, the President of the Council, indicated that 60% of the units were occupied by their owners and 40% were occupied by renters. (A-651) The estimate provided by Shounda Harrison, the property manager, was that at the time of her deposition on August 16, 2013, 60% of the units were non-owner occupied and 40% were owner occupied. (A-765) The Plaintiff noted that there was a range of estimates at oral argument. (A-189)

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONSTRUE THE FACT THAT 60% OF THE CONDOMINIUMS ARE RENTED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF AND IN ACCORDANCE WITH THE PRECEDENT SET FORTH IN *HOKSCH V. STRATFORD APARTMENTS* WHICH ESTABLISHES A BENEFIT TO THE BMA.

Denied.

A. Question Presented

Whether the Burbrae Maintenance Association received a benefit from allowing its owners to rent their condominiums and having the social guests of their tenants on the premises?

B. Scope of Review

"In an appeal from a Summary Judgment Decision, this Court's scope and standard of review is one of *de novo* consideration." The entire record is reviewed, including the Trial Court's Opinion. *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del. 1999) (*citing Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 923 (Del. 1982)). If this Court determines that the Court Below's findings are wrong, the Court will draw their own conclusions as to the facts. *Id.*

In this litigation, Summary Judgment may only be granted if Appellee demonstrates, on the undisputed facts that it is entitled to judgment as a matter of law. *Gutridge v. Iffland*, 889 A.2d 283 (TABLE), 2005 Del. LEXIS 518, at *15 (Del. 2005). When deciding Appellees' Motion for Summary Judgment, the Court

Below must not weigh evidence and accept that evidence which appears to have the greater weight. *Wilson*, 537 A.2d at 188 (*citing Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969)). "If it appears from the evidence there is any reasonable hypothesis upon which the non-moving party might recover, or if there are material facts in dispute or inferences to be drawn therefrom, the motion for summary judgment must be denied." *Wilson*, 537 A.2d at 188 (*citing Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 720 (Del. 1970)).

C. Merits of Argument

1. The Court Below properly determined that the Plaintiff was a guest without payment of the Burnbrae Maintenance Association and it had no duty to protect the Plaintiff from the criminal activities of third persons on the common areas of the Burnbrae Condominiums.

Although the facts of the present situation differs from prior decisions by this Court interpreting 25 *Del. C.* §1501, the decision by the Court Below properly applied the legal standards applicable when that statute is considered.

The Plaintiff, Darnell Hynson, was at the Burnbrae Condominiums as a social guest of Delorna Marks, who rented Unit 221B from its owner Brenda Korban. The Court Below held that the Plaintiff had the status of a business invitee vis-à-vis Ms. Korban. The Court followed the reasoning of *Hoksch v. Stratford Apartments, Inc.*, 283 A.2d 687 (Del. Super. 1971), in that "it would be

difficult if not impossible for a landlord to lease an apartment with the stipulation that the lessee was prohibited from inviting any people whomsoever to that apartment, regardless of the purpose of the visit." *Id.* at 689.

When considering the status of the Plaintiff to Burnbrae Maintenance Association, the Court Below concluded that "the social guest of the tenant of a condominium unit is not a business invitee of the condominium association." *Hynson v. Whittle, et al.*, C.A. No. N11C-11-142 EMD, slip op. at *10 (Del. Super. Dec. 24, 2013) (*citing Koons v. Sea Colony Inc.*, C. A. No. 95C-08-001, 1997 Del. Super. LEXIS 290 (Del. Super. 1997)). *Koons* involved a personal injury lawsuit filed by Ms. Koons against a number of Sea Colony entities as well as Carl M. Freeman & Associates, Inc. for injuries she sustained while walking through the parking lot of the Annapolis building at the Sea Colony complex. The Superior Court noted that the Declaration permitted some commercial use on the plaza level of the building and assumed that the garage would be used both for residential and business purposes. In analyzing the status of the plaintiff in *Koons* to the defendants, the court determined that *Hoksch* did not apply, stating:

> [H]ere, plaintiff has not presented anything to show that the owner/occupier is expected to receive the benefit of value from her presence on the premises.
>
> Plaintiff has argued that the case of *Hoksch v. Stratford Apartments, Inc.*, Del. Super., 283 A.2d 687 (1971) applies. . . . The case at hand differs in that the unit owners are not attempting to attract social guests of

> themselves and the co-owners to the premise in order to receive an economic or business benefit for themselves. Accordingly, I find plaintiff was a guest without payment.

Koons, 1997 Del. Super. LEXIS 290, at *14-15.

In the present case, the Affidavit of Shounda Harrison, (A-44), as well as her deposition testimony, (A-765), establish that none of the units at Burnbrae Condominiums were used for any purpose other than as a residence. Thus, unlike in *Koons*, §1501 did apply, as decided by the Court Below.

Plaintiff makes much of the fact that the Declarations allowed the leasing of the units and that at the time of the shooting, approximately 40% of the units were not occupied by the owners but rather were occupied by tenants of the unit owners. For example, Ms. Marks occupied a unit as a tenant of Ms. Korban.

The fact that substantial portions of the condominium units are held by the unit owners for rent to tenants has been held inadequate to change the status of a condominium complex from a residential complex into a commercial complex. In *Consolidated American Insurance Co. v. Chiriboga*, 514 A.2d 1136 (Del. Super. 1986), condominiums at Pilot Point in Lewes, Delaware, had been damaged by a fire and suit was filed by the property insurance carrier against certain defendants involved in the design and construction of the condominiums. Certain defendants argued that 10 *Del. C.* §8127, the Builder's Statute of Repose, barred the lawsuit. The statute, however, excluded from the types of improvements covered by the

Statute of Repose "buildings, entrances, walkways and structures used or intended to be used at the time such construction primarily for residential purposes and uses." Although Pilot Point was a seashore summer community, the Court applied the exception to the Statute of Repose and declined to apply the statute.

A similar argument, in that the exception in §8127 for improvements used primarily for residential purposes should not apply to condominiums, was made in *Council of Unit Owners of Sea Colony East, Phase VI Condominium v. Carl M. Freeman Assoc., Inc.*, C. A. Nos. 86C-AU-49, 86C-AU-50, 86C-AU-51, 1989 Del. Super. LEXIS 384 (Del. Super. Aug. 24, 1989). In that case, a defendant argued that "the condominiums would be more appropriately defined as commercial property since 90% of the units are owned by investors who generally rent these units." *Id.* at *10. This argument was rejected by the Court even in the situation where 90% of the units were held as investments for rental purposes by the unit owners.

In discussing the *Sea Colony* decision and the specific language in the statute, the Court Below posed the following inquiry: "90 percent is used for leasing, that's not primarily?" (A-179)

Lacking any evidence that Mr. Hynson's presence at the condominium conveyed a benefit to BMA, the Plaintiff can only offer speculation. First, the Plaintiff contends that the Declaration, by allowing the unit owners to lease units,

makes Burnbrae a more attractive place to purchase a unit from. This argument is flawed, as any benefit received would go to the original developer rather than BMA. Second, the Plaintiff contends that, by allowing leasing, BMA increases the likelihood that the unit owner can pay their assessments, a theory solely based and supported by a magazine article produced by the Plaintiff for the first time in his Motion for Reargument. (A-575) Again, this is mere conjecture. BMA is entitled to the monthly fee and each unit owner is obligated to pay whether or not the unit is occupied. 25 *Del. C.* §2221(5). While noting that the Plaintiff's use of the magazine article was not appropriate in the context of a Motion for Reargument, the Court Below observed that the article merely commented on the issue and did not take a definitive position. (A-625)

Having concluded that the Plaintiff was a guest without payment, the Court below held that the only duty owed by BMA to the Plaintiff was to refrain from willful or wanton conduct. *Simpson v. Colonial Parking, Inc.*, 36 A.3d 333 (Del. 2012).

2. As the Court below properly determined the Plaintiff was a guest without payment as to BMA, the Court was not required to determine if the actions of BMA breached a duty which would have been owed to a business invitee.

The Court Below determined that the Plaintiff had made no allegations that BMA committed willful or wanton conduct as to him. As the Court had ruled that the only duty owed by BMA to the Plaintiff was to refrain from willful and wanton

conduct towards him, the Court properly did not consider the expert testimony offered by the Plaintiff as to the protection of business invitees from the criminal actions of third persons on the premises.

3. The application of §1501 to residential condominiums, albeit some units are occupied by tenants of the unit owners, is consistent with Delaware law that residential property is to be treated differently than commercial property.

The Delaware Unit Property Act, 25 *Del. C.* §2202(11) states that "'nonresidential purposes' means used for a purpose other than use for a dwelling and appurtenant recreational purposes, or both." The same definition is contained in the Delaware Uniform Common Interest Ownership Act at 25 *Del. C.* §81-103(41). Similarly, 25 *Del. C.* §2202(10) states that "'nonresidential condominium' means a condominium in which all units are restricted exclusively to nonresidential purposes." An analogous provision is contained at 25 *Del. C.* §81-103(29).

Title 25 *Del. C.* §2246 provides in part that ". . . Nothing herein shall prevent the establishment of a condominium for residential purposes and a nonresidential condominium for the same real estate." A similar provision relating to common interest communities can be found at 25 *Del. C.* §81-122(e). The former provision was added to the Unit Property Act by 77 Del. Laws 92 §11. That provision was in the original version of the Delaware Uniform Common Interest Ownership Act. Significantly, it is specific to Delaware and is not part of

the comparable provision of the Uniform Common Interest Ownership Act, §1-207. These statutes clearly indicate that the legislature intended a residential condominium to retain the legal status of a residence as long as it was used for a dwelling and appurtenant recreational purposes or both.

Recognizing that some condominiums already had a mixed use between commercial and residential units, the Legislature determined that the condominium could not be determined to be a nonresidential condominium until "all units are restricted exclusively to nonresidential purposes."

Apparently addressing the issues raised in *Koons*, the Legislature in both statutes indicated that there could be both a residential condominium as well as nonresidential condominium in the same piece of real property. An example could be the parking lot at issue in *Koons*.

Lastly, 25 *Del. C.* §81-108 reads in part "the principles of law and equity, . . . the law of real property, . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter. . . ." Section 1501 is a law of real property which is not inconsistent with the provisions of either the Unit Property Act or the Delaware Uniform Common Interest Ownership Act.

This Court has recognized the resemblance of the language and intent in the Delaware Guest Premises Statute and the Delaware Automobile Guest Statute, 21 *Del. C.* §6101 [repealed]. *See Stratford Apartments, Inc. v. Merrill Fleming*, 305

A.2d 624, 626 n.1 (Del. 1973). This Court had analyzed cases involving efforts to expand the Delaware Automobile Guest Statute prior to its being repealed as authoritative on the issue of expanding the application of the Delaware Guest Premises Statute. This Court, concerning the Delaware Automobile Guest Statute, held the following:

> [B]ecause application of the Automobile Guest Statute so often results in harsh, unfair, and unreasonable results, courts have shown a general tendency to carve out exceptions to the operation of the Statute in the interest of justice. Our own courts have demonstrated that tendency. As a matter of policy, however, we do not favor further judicial creation of exceptions to the Statute. If, as many believe, the Delaware Automobile Guest Statute leads so often to unreasonable and unjust results and should be repealed forthwith, let its evil stand reveal to the General Assembly without further judicial effort to avoid a bad law by patchwork exceptions.

Loper v. Street, et al., 412 A.2d 316, 319 (Del. 1990) (*quoting Justice v. Gatchell*, 325 A.2d 97, 104 (Del. 1974)). The Plaintiff is urging judicial creation of an exception to §1501, when such changes should be left to the Legislature.

Moreover, since the limitation of the Real Property Guest Statute to residential and farm property in §1501, the General Assembly has in fact shown a desire to further protect owners of property by limiting certain circumstances in which they can be sued. In 1995, the Legislature enacted 11 *Del. C.* §466(d), which states "[W]here a person has used force for the protection of property and has not been convicted for any crime or offense connected with that use of force,

such person shall not be liable for damages or be otherwise civilly liable to the one against whom such force was used." In situations where the statute applies, the Legislature has not merely removed negligent acts as the basis for liability, but also willful and wanton conduct, and, in effect, has raised the standard of proof to beyond a reasonable doubt. Rather than the Legislature seeing evil in statutes protecting property owners, the Legislature obviously sees them as a necessity.

There was no indication that enacting legislation permitting residential property to be owned in the form of condominiums, cooperatives and other like entities, the Legislature intended that they be treated differently from more traditional forms of ownership such as fee simple. Just as the latter owners will have exposure limited by §1501, so should the former.

CONCLUSION

The Court Below properly determined that 25 *Del. C.* §1501 controlled the relationship between the Plaintiff and the Defendant, Burnbrae Maintenance Association, and that the Association gained no benefit from the fact the Plaintiff was visiting a tenant of a unit owner. Consequently, the Court Below properly held that there could be no liability of Defendant Burnbrae Maintenance Association to the Plaintiff since there was no allegation that its conduct was willful or wanton. The decision by the Court Below should be affirmed.

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