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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Marina View Condominium Association of Unit Owners v. Rehoboth Marina Ventures, LLC*
C.A. No. 2017-0217-PWG

Pending before me is the plaintiff's request for attorneys' fees and costs based upon the fee-shifting provision in the lease between the parties. The plaintiff's request is denied because the defendant has not been found to have breached the lease so the contractual fee-shifting provision is not implicated. This is a final report.

I. Background

On August 12, 2019, I issued a Final Report granting and denying Plaintiff Marina View Condominium Association of Unit Owners (the "Association")'s motion for

summary judgment, in part, and granting and denying Defendant Rehoboth Marina Ventures, LLC ("Marina")'s cross-motion for summary judgment, in part. The Final Report was approved by the Court on August 30, 2019. The main issue addressed in the cross-motions was whether the marina lease entered into by Marina Motel Ventures, LLC and Marina on July 25, 2006 ("Lease"), allowed Marina to construct and maintain apartments on leased property without the Association's consent. In the Final Report, I held that Marina's constructing and maintaining apartments was not a "violation of the Lease *per se* . . . but that those apartments must be used for purposes consistent with the Lease – the conduct of a marina, which includes use by Marina's on-site property manager."[1] I also concluded that "[u]se of the apartments for Marina's customers and guests, or for Marina's owners if they are not acting as the on-site property manager consistent with the Lease, represents a breach of the Lease."[2]

The Association requested attorneys' fees and costs "pursuant to the terms of the Marina Lease" in its complaint, and filed its supplemental submission in support of contractual attorneys' fees and costs on September 19, 2019.[3] It argues that fee-shifting should occur, because it complied with the requirements for fee-

[1] *Marina View Condo. Ass'n of Unit Owners v. Rehoboth Marina Ventures, LLC*, 2019 WL 3770215, at *7 (Del. Ch. Aug. 12, 2019).

[2] *Id.*

[3] Docket Item ("D.I.") 1; D.I. 93.

shifting in section 20(b) of the Lease, by filing this action to enjoin Marina's breach of the Lease when Marina failed to cure the breach after receiving notice from the Association that it had 15 days to cure the breach. The Association asserts the Court's granting of injunctive relief preventing the use of the apartments for private or commercial residential uses shows that Marina violated the Lease, and that the relief obtained was "exactly what the Association sought."[4] The Association also reviewed the extensive history in the two and one-half year long proceedings in this case in support of the reasonableness of the attorneys' fee request of $56,982.00.[5]

Marina responds that the fee-shifting is not appropriate because the Association did not meet any of the conditions for fee-shifting to occur in the Lease.[6] It argues that the Court did not conclude that the construction by Marina was a breach of the Lease and the parties did not litigate whether "Marina's actual

[4] D.I. 99, at 4.

[5] This case has been aggressively litigated by both parties. Aspects of the case history reviewed by the Association include Marina's motion to dismiss, which resulted in the Court's denial of some of Marina's claims (for the Association's failure to join indispensable parties under Court of Chancery Rule 19, and to plead the Association's representative capacity), and the granting of others (dismissing Count II and III of the complaint), and the Association's motion to supplement the complaint, which was denied. D.I. 93, at 9-12.

[6] D.I. 97, at 7.

uses of the marina constituted a breach."[7] Marina also argues that, even if the Association has established a basis for fee shifting, it has not established that the fee requested is reasonable, nor has it submitted an affidavit itemizing the fees and expenses sought as required by Court of Chancery Rule 88.[8]

II. **Analysis**

The issue concerning the Association's request for attorneys' fees and costs pursuant to the fee-shifting provision in the Lease remains to be addressed. "Under the American Rule and Delaware law, litigants normally are responsible for paying their own attorneys' fees."[9] "A recognized exception to this rule applies when a contractual agreement exists between the parties regarding payment of attorneys' fees."[10] The agreement "governs an award of costs, and the court looks

[7] *Id.*, at 7. And, Marina claims the other conditions for the fee-shifting clause to apply have not been met – the demand letter sent by the Association did not demand that Marina cease any activity or use other than construction, nor did it give Marina a 15-day cure period for anything other than construction. *Id.*

[8] *Id.*, at 9-14.

[9] *Benner v. Council of Narrows Ass'n of Owners*, 2014 WL 7269740, at *12 (Del. Ch. Dec. 22, 2014), *adopted*, (Del. Ch. 2015); *see also ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014); *Marra v. Brandywine Sch. Dist.*, 2012 WL 4847083, at *4 (Del. Ch. Sept. 28, 2012).

[10] *Dittrick v. Chalfant*, 2007 WL 1378346, at *1 (Del. Ch. May 8, 2007) ("In recognition that inclusion of such a clause may well have helped induce a party to sign an agreement, Delaware courts will 'routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of a contract.'"); *see also Benner*, 2014 WL 7269740, at *12; *Cove on Herring Creek Homeowners' Ass'n, Inc. v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005).

solely to that document,"[11] interpreting clear and unambiguous contract terms according to their plain meaning.[12]

Since the Association's request for attorneys' fees is based upon the fee-shifting provision in the Lease, I consider whether section 20(b) of the Lease can be interpreted to entitle the Association to an award of fees in this instance. Section 20(b) of the Lease provides:

> (b) Remedy for Other Default. If Lessee breaches any other term, covenant, condition, agreement or other provision of this Lease or otherwise defaults according to the terms stated in paragraph (19) above, and Lessee further fails to cure said breach within fifteen (15) days after written notice to Lessee from Lessor specifying said breach, Lessor may bring any action to compel Lessee's performance, and shall be entitled to recover its costs of litigation, including reasonable attorneys' fees, as determined by the Court;[13]

I find, under the plain meaning of section 20(b), there are three prerequisites for fee-shifting to occur: (1) a breach of any term, covenant, condition, agreement or provision of the Lease by Marina, (2) written notice from the Association to Marina specifying the breach, and (3) the failure of Marina to cure the breach within the 15-day period following the notice. A default and breach of the Lease is

[11] *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2 (Del. Ch. Apr. 27, 2004).

[12] *Cf. Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 683 (Del. 2013); *see also Brandin v. Gottlieb*, 2000 WL 1005954, at *28 (Del. Ch. July 13, 2000) (court's duty is to give effect to the most reasonable reading of the agreement).

[13] D.I. 76, Ex. A, §20(b).

defined in the Lease as the "failure to do, observe, keep and perform any of the other terms, covenants, conditions, agreements and provisions of this Lease required on the part of Lessee other than the payment of a charge or discharge of a lien."[14]

Here, the key issue is whether a breach of the Lease has occurred. In my August 12, 2019 Final Report, I did not conclude that Marina had breached the Lease through its actions constructing and maintaining apartments. I found that "Marina has not violated the Lease *per se* by constructing and maintaining apartments," and that it was "not the provision of lodging, in itself, that violates the Lease."[15] Instead, I held that the use of the apartments inconsistent with the purposes in the Lease would represent a breach of the Lease, and provided an example of a breach of the Lease as "use of the apartments for Marina's customers and guests, or for Marina's owners if they are not acting as the on-site property manager."[16]

The Association believed that Marina breached the Lease when it sent its written notice requesting that Marina cease construction of the apartments and, subsequently, alleged that Marina used the apartments for residential and

[14] *Id.*, §19(b).

[15] *Marina View Condo. Ass'n of Unit Owners v. Rehoboth Marina Ventures, LLC*, 2019 WL 3770215, at *7 (Del. Ch. Aug. 12, 2019).

[16] *Id.*

commercial purposes. Since I did not conclude that the construction and maintenance of the apartments was a breach of the Lease, I consider whether there was a finding, based upon evidence submitted, that Marina had breached the Lease by using the apartments in violation of the Lease. There was no such finding, nor was evidence presented to make such a finding. And, it is not reasonable to interpret section 20(b) to mean that fee-shifting would occur when there was an allegation of a breach, unless there was also a court determination based upon evidence that a breach had occurred. [17]

The parties cite a number of cases involving fee-shifting contractual provisions. In each of those cases, the court interpreted the meaning of a specific fee-shifting clause based upon the contract as a whole and applied to the circumstances of a particular case.[18] Courts decline to award fees if the contractual

[17] Because I find the Association has not shown that Marina breached the lease, I do not need to address whether the other conditions for fee-shifting in section 20(b) (written notice from the Association to Marina specifying the breach, and the failure to cure the breach within the 15-day period following the notice) have been met.

[18] In *Comrie v. Enterasys Networks, Inc.*, the parties' agreement provided that "the prevailing party" shall recover its costs, including reasonable attorneys' fees, in any action to enforce a right or remedy under the agreement, and the Court focused on whether the party predominated in the main issue in the litigation to determine its status as "prevailing party." 2004 WL 936505, at *2 -*3 (Del. Ch. Apr. 27, 2004). In this case, the Lease does not use "prevailing party" as the standard for fee-shifting, and it has not been shown that the plain meaning of the Lease's fee-shifting provision applies – that Marina has breached the Lease. In *Benner v. Council of Narrows Ass'n of Owners*, the Court found that the plaintiff's ability to recover attorneys' fees depended on whether she was an "aggrieved unit owner" who, under the fee-shifting provision in the code of

fee-shifting provision cannot be read to cover the specific situation before the Court such that fees are awarded to one party under the agreement. Here, I do not find evidence that Marina has materially failed to meet its obligations such that it has breached or defaulted under the Lease. There was no finding that Marina's construction of the apartments was a breach of the Lease, nor any conclusion that Marina had violated the Lease by using the apartments for purposes inconsistent with the conduct of a marina, including for lodging for marina owners, customers and guests.[19]

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regulations, would be entitled to recover those fees. 2014 WL 7269740, at *13 (Del. Ch. Dec. 22, 2014), *adopted*, (Del. Ch. 2015). The *Benner* Court concluded that the plaintiff did not meet that characterization, given the circumstances and the regulations' language. *Id.* Similarly, in *Fernstrom v. Trunzo*, the Court found that fee-shifting was not authorized under the condominium declaration in the situation before the Court. 2017 WL 6028871, at *4 (Del. Ch. Dec. 5, 2017), *aff'd sub nom. Fernstrom v. Ellis Point Condo. Ass'n, Inc.*, 198 A.3d 178 (Del. 2018). In *EDIX Media Group, Inc. v. Mahani*, the Court determined that Mahani had violated his employment agreement, which provided for Mahani to indemnify EDIX for all damages and costs, including attorneys' fees, arising out of, or connected to, the enforcement or breach of the agreement. 2007 WL 417208, at *1 (Del. Ch. Jan. 25, 2007). Mahani argued that the fees requested were excessive and the amount awarded should be proportional to EDIX's success on the merits. *Id.* The *Mahani* Court approved the full fee award, noting that the amount involved and results obtained at litigation are "only two of the many factors in determining the reasonableness of attorney's fee" under Rule 1.5 of the Delaware Lawyers' Rules of Professional Conduct and that Mahani "chose to draw out the conflict." *Id.*, at *1-*2.

[19] Also, I do not find that the Association has prevailed. In *Dittrick v. Chalfant*, the Court declined to award attorneys' fees because it had not found the non-defaulting party to have prevailed through the Court ordering "relief in their favor on the terms and conditions they advanced in [the] litigation." 2007 WL 1378346, at *2 (Del. Ch. May 8, 2007). The *Dittrick* Court also held that fee-shifting is generally "applied on an 'all-or-nothing' basis" to a prevailing party, however, it "should not be applied where interests

Finally, since I find the fee-shifting provision in the Lease is not implicated, I do not need to address the reasonableness of the fee.

I. Conclusion

For the foregoing reasons, I recommend the Court deny the Association's request for attorneys' fees and costs under the fee-shifting provision in the Lease. This is a final report and exceptions may be taken under Court of Chancery Rule 144.

Respectfully,

/s/ Patricia W. Griffin

Patricia W. Griffin
Master in Chancery

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of justice and equity oppose shifting fees and costs." *Id.* Here, the Association's main claim was that Marina's construction of the apartments was a violation of the Lease, without its consent. In contrast, the Court did not hold that Marina's construction of the apartments was a breach of the Lease, but that use of the apartments for purposes inconsistent with the conduct of a marina, including for lodging for marina owners, customers and guests, would be a violation of the Lease. Accordingly, the Association did not predominate in its main issue, nor did the Court order relief in its favor on the terms and conditions it advanced in the litigation, so it cannot be considered to have prevailed for purposes of shifting fees under the prevailing party standard. And, it is in the interest of justice and equity that each party bear their own fees in this case.