

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4631-14T4

TOSHIBA FOSTER,

Plaintiff-Appellant,

v.

ALEXANDRA RODRIGUEZ,
individually, MORRIS
HABITAT FOR HUMANITY,
INC., a non-profit
corporation of the
State of New Jersey,

Defendants-Respondents.

Argued September 20, 2016 – Decided January 24, 2017

Before Judges Messano and Espinosa.

On appeal from the Superior Court of New
Jersey, Chancery Division, Morris County,
Docket No. C-115-14.

Brian F. Curley argued the cause for
appellant.

Gina M. Apostolico argued the cause for
respondent Alexandra Rodriguez (O'Toole,
Fernandez, Weiner, Van Lieu, attorneys; Robert
J. Gallop, of counsel; Ms. Apostolico, of
counsel and on the brief).

Sean Robins argued the cause for respondent
Morris Habitat for Humanity (Marks, O'Neill,

O'Brien, Doherty & Kelly, P.C., attorneys; Mr. Robins, on the brief).

PER CURIAM

Plaintiff Toshiba Foster filed a verified complaint against defendants Alexandra Rodriguez and Morris Habitat for Humanity (Habitat), alleging violations of the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to -38 (the Act), breach of contract, breach of fiduciary duty and negligence. The motion judge granted Habitat's motion to dismiss the complaint, and subsequently denied plaintiff's motion for reconsideration. The judge also granted Rodriguez's motion to compel arbitration and dismissed the complaint as to her.

The motion record was largely undisputed and included exhibits to plaintiff's complaint. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir.)) ("In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'"), cert. denied, 543 U.S. 918, 125 S. Ct. 271, 160 L. Ed. 2d 203 (2004).

Plaintiff and Rodriguez are unit owners in a single building, two-unit condominium developed by Habitat. As such, they are equal shareholders in the 37 Willow Street Habitat Condominium Association, Inc. (the Association), and constitute its full

membership. Each owns a fifty-percent undivided interest in the common elements of the condominium, defined by the Association's By-Laws to include "yards, gardens, walkways, parking areas and driveways" and "any . . . exterior common stairs, steps, landings, [and] stoops"

The By-Laws also provide for a Board of Directors to manage the Association's affairs. Both unit owners are Directors, both must be in attendance at any meeting for the Board to have a necessary quorum to transact business and "both Directors present and voting shall constitute a valid decision." The Directors are authorized to take action without a formal meeting upon written consent. Habitat's Executive Director serves as a permanent Director on the Board, "whose rights, obligations, powers and duties [are] limited to voting to break a tie of the Unit Owner . . . Directors."

According to the Master Deed, the prior consent of the Board is required if a unit owner wants to "build, erect, plant, place and/or maintain any matter . . . upon, in, over or under the Common Elements" Further, a unit owner who wishes to make any "additions, alterations or improvements" to the Common Elements must obtain "prior written consent of the Board." The By-Laws contain a mandatory arbitration provision, stating that all unresolved disputes between members of the board, unit owners, the

Association and individual unit owners "shall be resolved before one arbitrator appointed under the rules of either the American Arbitration Association, or another impartial third party and pursuant to rules mutually agreed upon by the parties"

On August 17, 2012, plaintiff received the following email from Habitat's director of homeowner relations:

I wanted to reach out to let you know that [Rodriguez] has plans to change her dining room window to a door and add a small deck on her side of the house. Technically this should have been brought before the . . . Association for a vote since it involves a common area. It's my fault that I forgot this formality and I told her she could go ahead. It should not have any impact on you at all and I hope that you will be ok with it and just let things proceed peacefully. I left you a voicemail at work to call me but you only have to call me if you have questions.

Plaintiff responded by email:

This is music to my ears J and I [sic] share the say [sic] interest in wanting to change the dining room window to a door. I had a carpenter come to look at the area and give me a design plan months ago, however as you said it would have needed to be brought to the . . . Association and being that there were some disagreements with [Rodriguez] and I in the past, I wasn't 100% sure if she'd be in agreement so I never pursued it. In any event, thank you for letting me know. She has my blessings and if you would please let her know that I will be doing the same thing and ask the same of her (for things to proceed peacefully) I'd greatly appreciate it.

Rodriguez subsequently constructed a deck that covered most of the common area behind her unit, and a privacy fence between the units that extended approximately ten feet above ground. Photographs in the record support plaintiff's claim that the deck blocks her access to a stairway through a retaining wall providing egress to the wooded area at the rear of the condominium's property.

After hearing oral argument, the judge granted Habitat's motion to dismiss, reasoning "as a matter of law[,] . . . [p]laintiff ha[d] no claim" because Habitat had "no legal right to allow or approve" an alteration to the common elements of the condominium. He dismissed the complaint over the objections of plaintiff and Rodriguez.

Plaintiff moved for reconsideration, particularly as to the breach of fiduciary duty count. In his written statement of reasons denying reconsideration, the judge concluded plaintiff was estopped from pursuing a claim because she ratified Habitat's conduct, as evidenced by the exchanged emails. He also determined there was no violation of the Act because Habitat's only power under the By-laws was to break a deadlocked vote, and "therefore, [Habitat] ha[d] no responsibility as a very limited board member" since plaintiff's approval of the deck meant "there was not a controversy or deadlock" requiring Habitat to act. Furthermore,

Habitat did not breach any fiduciary duty since plaintiff had not established Habitat owed such a duty to plaintiff. Lastly, the judge determined plaintiff failed to provide any new information to the court, rendering her motion for reconsideration meritless.

Subsequently, over plaintiff's opposition, the judge granted Rodriguez's motion to compel arbitration. In his written statement of reasons, the judge determined the By-Laws were a legally-binding contract entered into by the unit owners, and the contract's plain language required arbitration of all disputes. Rejecting plaintiff's primary reliance on the Court's holding in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015), the judge concluded "Atalese . . . concerns consumer contracts and what is coined a 'contract of adhesion.' Here, the [By-laws] . . . are not a consumer contract with a buyer and seller but rather form the basis of a Condominium Association."

I.

Plaintiff argues the judge erred in dismissing her complaint against Habitat because she sufficiently pled a cause of action in each count. She also argues the judge erred in denying reconsideration because he resolved disputed factual issues in Habitat's favor without permitting discovery.

"The standard a trial court must apply when considering a Rule 4:6-2(e) motion to dismiss a complaint for failure to state a claim upon which relief can be granted is 'whether a cause of action is "suggested" by the facts.'" Teamsters Local 97 v. State, 434 N.J. Super. 393, 412 (App. Div. 2014) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "Rule 4:6-2(e) motions to dismiss should be granted in 'only the rarest [of] instances.'" Banco Popular, supra, 184 N.J. at 165 (alteration in original) (quoting Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993)). The plaintiff's version of the facts are treated "as uncontradicted[,] . . . accord[ed] . . . all legitimate inferences . . . [and] accept[ed] . . . as fact" for purposes of review. Id. at 166. The critical concern is whether, upon review of the complaint, exhibits attached thereto and matters of public record, there exists "the fundament of a cause of action" Id. at 183 (citing Printing Mart, supra, 116 N.J. at 746).

Nonetheless, "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.) (citation omitted), certif. denied and appeal dismissed, 208 N.J. 366 (2011). We review the trial court's

decision de novo. Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 287 (App. Div. 2014).

Plaintiff contends the complaint stated a claim against Habitat for violating the Act and for breach of contract. She argues Rodriguez had no unilateral right to impair plaintiff's enjoyment of the common elements, Rodriguez regarded Habitat as having "de facto management authority" and sought and obtained Habitat's permission and Habitat "irrevocably appointed [itself] attorney-in-fact" for the Association in the Master Deed. Plaintiff contends "by virtue of its permanent appointment as attorney-in-fact for the Association" and its position as a Director of the Board, Habitat also breached its contract as reflected in the condominium's governing documents. We reject these contentions.

Plaintiff completely misconstrues the language of the Master Deed. Habitat did not violate the terms of the Master Deed or By-Laws because, as sponsor, Habitat reserved to itself the power to act as attorney-in-fact for the Association only until the last unit in the condominium was conveyed. Here, the last unit had been conveyed.

Moreover, the record is clear and undisputed. Although Habitat gave preliminary permission for Rodriguez to "go ahead" with her plan, it advised plaintiff, apparently before any

construction began, that there had been a lack of compliance with the governing documents. Yet, plaintiff never sought to convene a meeting of the Board or otherwise stop Rodriguez from proceeding. Habitat's "rights, obligations, powers and duties" under the governing documents and the Act were limited to casting a tie-breaking vote when necessary. The judge properly dismissed the first and second counts of the complaint.

Plaintiff also contends the complaint stated a cause of action against Habitat for breaching the fiduciary obligation it owed to her as a Director on the Board. Plaintiff argues Habitat "was obligated to act in the best interest of [plaintiff], and . . . preserve the common area[s] and [plaintiff's] rights." She also argues the complaint adequately stated a cause of action against Habitat sounding in common law negligence. Again, we disagree.

"The governing body of a condominium association has a fiduciary obligation to the unit owners 'similar to that of a corporate board to its shareholders.'" Jennings v. Borough of Highlands, 418 N.J. Super. 405, 420 (App. Div. 2011) (quoting Kim v. Flagship Condo. Owners Ass'n, 327 N.J. Super. 544, 550 (App. Div.), certif. denied, 164 N.J. 190 (2000)). "A condominium association's governing body has 'the duty to preserve and protect the common elements and areas for the benefit of all its members.'" Id. at 420-21 (quoting Siddons v. Cook, 382 N.J. Super. 1, 7 (App.

Div. 2005)). "Condominium association board members are required to 'act reasonably and in good faith in carrying out their duties.'" Id. at 421 (quoting Papalexiou v. Tower W. Condo., 167 N.J. Super. 516, 527 (Ch. Div. 1979)).

We recognize these general principles upon which plaintiff relies. However, plaintiff fails to appreciate Habitat's unique role in this particular condominium regime. Specifically, by the express terms of the governing documents, Habitat did not stand on equal footing with the other Board Directors. It could not convene a meeting or take any action, except as necessary to break a tie vote among the unit owner Directors. We agree with the motion judge that the fiduciary duty Habitat owed to plaintiff was strictly circumscribed, and since it was never called upon to exercise the only power it had under the governing documents, plaintiff failed to state a cause of action for breach of that fiduciary duty. For similar reasons, plaintiff's argument that her complaint stated a common law negligence claim lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Lastly, we affirm the order denying plaintiff's motion for reconsideration. We do not necessarily agree with all the reasons expressed by the judge. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) (noting that appeals are taken from orders and final judgments and not decisions). In particular, we need

not decide whether plaintiff was estopped from suing Habitat because, as the judge reasoned, she "ratified" Rodriguez's plan. Plaintiff correctly notes the judge's determination implicitly resolved factual disputes regarding plaintiff's actual knowledge of the size of the deck. This is particularly true in light of Habitat's statement in the email that the deck was intended to be "small."

However, reconsideration is to be utilized narrowly, and reserved for situations where the court relied "on plainly incorrect reasoning," where the court failed to consider probative, competent evidence, or where "there is good reason for [the court] to reconsider new" evidence. Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super. 159, 175 (App. Div. 2005) (quoting Pressler, Current N.J. Court Rules, comment on R. 4:49-2 (2005)). Motions for reconsideration are addressed to "the sound discretion of the Court, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). It suffices to say that plaintiff simply re-packaged her earlier opposition to Rodriguez's motion to dismiss. The judge did not mistakenly exercise his discretion in denying the motion for reconsideration.

II.

The order dismissing plaintiff's complaint and referring the matter to arbitration is subject to our de novo review. Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013). Plaintiff contends the arbitration provision in the By-Laws is unenforceable because she never agreed to waive her right to bring an action against Rodriguez in a judicial forum. See Atalese, supra, 219 N.J. at 442-45. We reject this argument.

The Act provides:

An association shall provide a fair and efficient procedure for the resolution of housing-related disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation. A person other than an officer of the association, a member of the governing board or a unit owner involved in the dispute shall be made available to resolve the dispute. A unit owner may notify the Commissioner of Community Affairs if an association does not comply with this subsection. The commissioner shall have the power to order the association to provide a fair and efficient procedure for the resolution of disputes.

[N.J.S.A. 46:8B-14(k).]

We have said:

[B]ecause a condominium association is required to provide a procedure for the resolution of 'housing-related disputes' as an 'alternative to litigation,' . . . qualifying disputes must be sent to arbitration if, after suit is filed, either party chooses to invoke

the alternative dispute remedy that must be made available under the Act.

[Bell Tower Condo. Ass'n v. Haffert, 423 N.J. Super. 507, 516 (App. Div.) (quoting N.J.S.A. 46:8B-14(k)), certif. denied, 210 N.J. 217 (2012).]

The judge properly dismissed plaintiff's complaint against Rodriguez and referred the matter to arbitration at Rodriguez's request.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION