SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY

Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE
WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

LETTER OPINION

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Re: Montgomery Greene Condominium Association, Inc. v. KTE Retail Associates LLC;
KTE Retail Associates, LLC v. Board of Directors of Montgomery Greene Condominium Association, Inc., Richard Barker, Dachao Wang, Joseph Leotta, John Eagan, Donna Jung, Nancy Eagan, and Stephen Brigandi, individually and as members of the Board of Directors of Montgomery Greene Condominium Association, Inc.
Docket No. HUD-C-154-16
Dates of Hearing: May 12, 2017
Date of Decision: May 19, 2017

Dear Counsel:

Introduction

Presently before the Court are dispositive summary judgment motions filed by: (1) Plaintiff Montgomery Greene Condominium Association, Inc.; (2) Defendant KTE Retail Associates, LLC; and (3) Third-Party Defendants, the individual members of the Association's Board of Directors and members of the Board's Architectural Review Committee, and the Association, as counterclaim-defendant. The Court held oral argument on the motions on Friday, May 12, 2017, which was attended by counsel for all parties, as well as representatives of the Plaintiff Association and Defendant KTE.

Background

This matter is before the Court to resolve the fundamental question of whether a condominium association may prevent, through the passage of rules by a subcommittee of its Board of Directors restricting the use of a commercial unit owner, that owned that commercial unit, from replacing one coffee shop with another. These motions arise out of the attempt of Defendant KTE Retail, which owns the four (4) commercial units at the Plaintiff's 113-unit, nineteen-floor luxury condominium complex at 105 Greene Street, Jersey City, to lease one of the commercial units, which had previously been occupied by a Café Van Houtte, to a Dunkin' Donuts in July 2016. The Defendant's plan, which was formally submitted to the Association's Board on August 12, 2016, however, was rejected by the Plaintiff Association on August 25, 2016, based on a rule promulgated by the Association's Architectural Review Committee (ARC) barring the commercial units from being used as fast food establishments.[1] The ARC's Guidelines, most of which were directed at architectural and aesthetical requirements for any proposed alteration to the commercial unit, with the exception of the use-restriction at issue here, were passed after the Plaintiff first learned of the Defendant's involvement with Dunkin' Donuts. No such restriction had previously been in effect for the Association, as no specific use-restriction had previously been contained in the Association's governing documents, including the Master Deed and By-Laws.

Plaintiff filed its action on September 21, 2016, seeking a declaratory judgment that the ARC Guidelines are valid, and that the Defendant's attempt to "veto" the Board's rejection of the application, based on provisions of the Association's By-Laws, was invalid. Defendant KTE Retail filed an answer, counterclaim, and third-party complaint against the Board of Directors and also the individual members of the Association's Board of

[1] As will be set forth in more detail, the Association first learned of the Defendant's intended use of the commercial unit on July 27, 2017. Thereafter, on that same day, the Association's Board created the ARC for the purpose of creating architectural guidelines for the unit. As acknowledged by counsel for the Plaintiff at oral argument, the ARC was created specifically in response to the Board learning of the Defendant's intended use for the unit.

Directors and ARC.[2] Defendant seeks to uphold its veto and to compel the Plaintiff to accept the Defendant's intended use of the property. The counterclaim and cross-claim seeks damages for breach of fiduciary duty, tortious interference with prospective economic advantage, and restraint on alienation. Now, all parties have moved for summary judgment.[3]

First, Plaintiff moves for summary judgment, arguing: (1) the decision to form the ARC, to enact the ARC guidelines, and to apply the guidelines to reject KTE's application are protected under the business judgment rule, or, in the alternative, were reasonable; (2) KTE's purported veto is invalid; and (3) the Plaintiff is entitled to an injunction permanently enjoining KTE from entering into a lease with Dunkin' Donuts or any other establishment which violates the ARC Guidelines.

Second, Defendant KTE has moved for summary judgment and for transfer of its damage claims to the Law Division, arguing: (1) its exercise of the veto pursuant to Section 5.02 of the By-Laws was valid and the ARC guidelines were not properly adopted as the ARC and its guidelines were not formed through an open meeting; (2) Plaintiff violated KTE Retail's right to due process in denying its application for renovations without notice of the ARC's newly-passed rules and an opportunity to be heard, as the restriction was a form of taking of property and imposed on Defendant's ability to alienate its property; (3) Plaintiff has failed to show any facts to prove its implied contract argument based on the residential unit owner's reliance on the Association's marketing materials depicting the property as a luxury property; and (4) Plaintiff's complaint must be dismissed because the Board failed to take steps required by law to authorize the lawsuit.

Finally, the third-party defendants and counterclaim defendant have moved for summary judgment to dismiss Defendant's damage claims, arguing: (1) Plaintiff's decision to deny KTE's request to modify was in the scope of its authority pursuant to the governing documents and was not fraudulent, self-dealing or unconscionable; (2) KTE cannot establish a breach of fiduciary duty; (3) KTE cannot establish tortious interference with economic advantage; and (4) KTE cannot establish restraint on alienation.

After reviewing the parties' initial submissions, the Court, pursuant to its letter dated April 20, 2017, requested additional briefing from the parties. Specifically, the Court requested that the parties: (1) "identify the applicable Jersey City zoning ordinances for the property, including any regulations or directives passed by the Jersey City Historic Preservation Commission, and state whether the Defendant's intended use of the

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[2] Specifically, the Defendant named the Association as a counterclaim defendant, and Richard Barker, Dachao Wang, Joseph Leotta, John Eagan, Donna Jung, Nancy Eagan, and Stephen Brigandi as third-party defendants.

[3] Defendant KTE also filed "cross-motions" for summary judgment, in response to the motions for summary judgment filed by the Association parties. The Court will consider the cross-motions as oppositions to the motions for summary judgment.

commercial unit is permitted by the applicable ordinances or regulations;" and (2) "identify whether there are covenants or provisions contained in the Association's Master Deed that limit the use of the commercial units," in light of N.J.S.A. 46:8B-9(m) of the New Jersey Condominium Act, which requires that use-restrictions be included in the Master Deed, and Amir v. D'Agostino, 328 N.J. Super. 141, 148-151 (Ch. Div.), aff'd 328 N.J. Super. 103 (App. Div. 2000). The Court has received and considered the responses and replies submitted by the parties to this inquiry.

Facts

The essential facts in this case are undisputed.

Plaintiff Montgomery Greene Condominium Association is a 113-unit, 19-floor luxury condominium located at 105 Greene Street, Jersey City, and is organized as a not-for-profit corporation pursuant to the New Jersey Condominium Act, N.J.S.A. 46:8B-1 et seq. Montgomery Greene is primarily residential, but also includes a few commercial spaces: (1) a dentist office; (2) a small restaurant; (3) a parking garage; and (4) the commercial unit that is the subject of this litigation. Montgomery Greene was marketed and sold as a boutique, luxury building, with units being recently listed for approximately $1,500,000.

The Condominium Association has a Master Deed dated April 12, 2006 and recorded April 28, 2006. Montgomery Greene Urban Renewal, LLC was the sponsor and developer of Montgomery Greene Condominium. Harry Kantor was the principal of Montgomery Greene Urban Renewal, and is also the principal of Defendant KTE. As the sponsor and developer, MG Urban Renewal drafted the Association's Master Deed and By-Laws and also marketed and sold the residential and commercial units.

MG Urban Renewal reserved the commercial unit at issue for itself following the sale of residential units. In July 2007, while MG Urban Renewal was still in control of the Condominium Association, MG Urban leased the commercial unit to Café Van Houtte. On June 13, 2008, MG Urban Renewal transferred title to the commercial unit to KTE Retail. Control of the Board transitioned from MG Urban Renewal to the Unit Owners in 2008.

Eight (8) years later, on July 27, 2016, after rumors had been circulating that Café Van Houtte would be closing, Taylor Management, the Condominium's managing agent, provided the Board with an artist's rendering of a sign that it had received from an awning installer seeking access to the building to install a Dunkin' Donuts awning over the commercial unit.

Therefore, the Board began to review the governing documents to determine what course would be in the best interests of the Association. John Eagan, the Board's Vice

President, volunteered to review the Master Deed and By-Laws, and thereafter identified relevant provisions and distributed them to the other Board members who were, at that time, Richard Barker, Dachao Wang, and Donna Jung. The Board proceeded to have discussions and to review the documents, ultimately determining that the review should involve input from the Condominium Association's Architectural Review Committee (hereinafter "ARC"). In July 2016, the Board apparently did not know whether the Association had established an ARC or if any architectural restrictions were in place, but Taylor Management confirmed that neither existed. Accordingly, the Board contacted legal counsel regarding the prospective tenant's submission and for advice on the creation of an ARC. The Board formed the ARC on that date, July 27, 2016, by e-mail pursuant to Article X, Section 10.01 of the By-Laws. It chose residential unit owners Stephen Brigandi, Nancy Eagan, and Gregory Marshall to join the ARC, as current board members were prohibited from serving on the ARC by the By-Laws under Article X, Section 10.01. Eagan and Brigandi were former Board members and Mr. Marshall was a custom furniture designer.

On July 27, 2016, the same day that the Board had received notice of the Defendant's intended use of the commercial unit, the Board's legal counsel sent a letter to the prospective tenant, Hetal Patel, notifying him that the owner of the commercial unit, KTE Retail, needed to submit a formal application with plans seeking approval of the Board and ARC. The letter reserved the Association's rights to determine whether a Dunkin' Donuts would be acceptable, but did not specifically mention the existence or contemplation of any use-restrictions upon the commercial unit.

On August 2, 2016, Mr. Kantor, the Defendant's principal and managing partner, e-mailed Taylor Management requesting an application for a renovation approval for the commercial unit, advising that he intended to replace the existing coffee shop occupying the unit with a Dunkin' Donuts. On August 4, 2016, Michael Henderson, the Taylor Management employee then-charged with responsibility for the on-site management of the Condominium, forwarded the application form to Mr. Kantor. At the time, Mr. Henderson did not indicate that there were any guidelines or regulations in existence, or being proposed, prohibiting a Dunkin' Donuts from occupying the unit.

The Board met with the ARC in late July or early August to discuss the objectives of the ARC and what guidelines the ARC would be charged with drafting based on the By-Laws. The ARC agreed to develop residential and commercial guidelines, but to initially focus on commercial guidelines, given the more immediate issues regarding the commercial unit.

Evidently, the ARC considered the following principals "incompatible" with the luxury nature of the condominium: high foot traffic, large volume of customers, quick transactions, and food establishments that provide primarily counter service. The ARC also discussed aesthetics, such as color scheme, signage and awnings, and also what

would be "appropriate for the community at large," citing to Jersey City Mayor Stephen Fulop's mission to promote local businesses. Another area of concern was the fact that the commercial unit's door was only ten (10) feet away from the Association's door and lobby, which made the ARC apparently concerned that increased foot traffic would have a negative impact on residents.

The ARC therefore set about drafting the guidelines, and would discuss each draft amongst themselves and the Board when complete. The drafts, and discussions regarding the drafts, were exchanged primarily by e-mail.

On August 15, 2016, the ARC forwarded revised guidelines to the Board, based on feedback it had received at an earlier meeting. While the ARC and Board were still drafting the proposed regulations, on August 12, 2016, Mr. Kantor submitted KTE's unit alteration application for the commercial unit, requesting the Board's approval of modifications of the unit "to include Dunkin Brands finishes," to the Board. On August 13, 2016, the Board forwarded KTE's unit alteration application for the commercial unit to the ARC. On August 16, 2016, the ARC provided the Board with comments and concerns after reviewing the application, based on the fact that the exterior signage was not consistent with the color scheme and included awnings, both in violations of the proposed guidelines. However, these comments were not provided to the Defendant.

After reviewing the guidelines with legal counsel, the Board enacted the final set of ARC Guidelines by unanimous vote on August 24, 2016. This vote was not done at an open meeting of the Board, as the Board members adopted the guidelines by e-mails sent by the Board members at approximately 9:00 PM that night.

On August 25, 2016, Management wrote a letter to KTE advising that the Board had rejected KTE's application because under the ARC's Guideline No. 15, fast food establishments, including Dunkin' Donuts, were prohibited.

By letter dated August 30, 2016, KTE purported to exercise its right under Article V, Section 5.02 of the By-Laws to veto the Board's decision rejecting the application and the Board's enactment of the ARC Guidelines.

On August 31, 2016, the Board ratified its decisions to form the ARC, appoint members to the ARC, and to enact and approve the ARC Guidelines governing the commercial units at its monthly open meeting.

By letter dated September 5, 2016, the Association rejected the Defendant's veto. By letter dated September 6, 2016, KTE rejected the rejection of the veto and purported to exercise the Developer's Veto contained in Article V, Section 5.01 of the By-Laws. By letter dated September 10, 2016, the Association rejected KTE's positions. On September 21, 2016, Plaintiff Association filed its complaint.

Relevant Provisions of the Governing Documents

Master Deed

Article V, Section 5.05 of the Master Deed governs voting of the unit owners, and provides that "Each Member in Good Standing" is entitled to cast one vote for each residential unit he owns in all elections of directors and in all questions submitted to the membership. In regards to the commercial and garage unit owners, the section provides:

> Although the Commercial and Garage Unit Owners shall have no right to vote for the election of Owner Directors or with respect to other questions submitted to the vote of the membership, provided, however, that the consent of either the Commercial or Garage Unit Owner shall be required in order for any matter which materially affects either the Commercial or Garage Unit to take effect, whichever the case may be. [sic]

Similarly, Article IX, Section 9.01 of the Master Deed governs the administration and operation of the complex, and provides that:

> The administration, operation and maintenance of the Condominium, the Common Elements and all other common facilities shall be by the Association in accordance with the provisions of the New Jersey Condominium Act, the Condominium Documents and any other agreements, documents, amendments or supplements to the foregoing . . . .

Article X, Section 10.01 provides a list of covenants and restrictions imposed upon the subject property, including prohibitions against non-permitted mortgages, restrictions on the use of common elements, restrictions on the keeping of pets, and the installation of carpeting in the units. Relevant provisions of Section 10.01 are:

> (a) All Units shall be used for the purposes permitted or contemplated by this Master Deed, the By-Laws and Rules and Regulations of the Association and by the applicable zoning and other governmental approvals for the Building.
>
> (h) . . . Only those businesses, trades or professions which are permitted by the Zoning Ordinance of the City of Jersey City shall be conducted in any Unit, regardless of type.
>
> (m) No noxious or offensive activities shall be carried on, in or upon the Common Elements or in any Unit nor shall anything be done therein either willfully or negligently which may be or become an annoyance or nuisance to the other residents in the Condominium.
>
> (r) No unlawful use of any Unit shall be permitted and all laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof shall be observed.
>
> (s) . . . No signs or displays of any kind (including for rent and for sale signs) shall be displayed or installed within the Condominium, except for . . . (iii) signs displayed within the Commercial or Garage Units. . . . In the event that the Commercial Unit Owner or the Garage Unit Owner wishes to install or erect exterior signs, the plans for such signs shall be submitted to the Architectural Review Committee, at the expense of the applicant, for

approval, which approval shall be required prior to the installation of such signs. If the Architectural Review Committee does not approve any such sign, the sign plans shall then be submitted to Lindemon Wincklemann Deupree Martin & Associates PC ("Building Architect") for approval. The Building Architect's determination shall be deemed final and legally binding upon the Association and the Commercial Unit Owner or Garage Unit Owner. If an Architectural Committee does not exist, such sign plans should be submitted directly to the Building Architect.

Section 10.02 provides further guidance for restrictions on alterations to the units of the Association. Relevantly, the section provides:

> Nothing shall be done to any Unit or on or in the Common Elements which will impair the structural integrity of the Building or which will structurally change the Building. No Owner (other than the Developer) may make any additions, alterations or improvements in or to his Unit or in or to the Common Elements or impair any easement without the prior written approval of the Board of Directors, the Architectural Review Committee established pursuant to the By-Laws, if any, nor without all required governmental permits and approvals. . . .
>
> The Board of Directors or the Architectural Review Committee shall have the obligation to answer any written request received by it from an Owner for approval of a proposed addition, alteration or improvement to his Unit within forty-five (45) calendar days after the receipt of such request, and failure to do so within the stipulated time shall constitute approval of the proposal. Any application to any municipal authority for a permit to make an addition, alteration or improvement must be reviewed by the Board of Directors or the Architectural Review Committee and, if approved, shall be executed by the Board and may then be submitted to the appropriate municipal authorities by the Owner. . . .The Owner(s) shall furnish the Board of Directors or the Architectural Review Committee with a copy of any such permit which he has procured. . . .

Article X, Section 10.03 contains various restrictions on leasing of the Association's residential units.

Article XV, Section 15.03 governs amendments to the Master Deed, and requires a vote by at least sixty-seven (67%) percent in interest of all the residential unit owners at a meeting held in accordance with the By-Laws, "[s]ubject to the approval right of the Commercial and Garage Unit Owners set forth in Section 5.05 of this Master Deed."

Pursuant to Article I, Section 1.05 of the Master Deed, the By-Laws are attached to the Master Deed and "made a part hereof as Exhibit 'E', together with all future amendments and supplements thereto."

By-Laws - Formation of the ARC and Passage of ARC Guidelines

Article X, Section 10.01 of the By-Laws provides, in relevant part:

> 10.01 Purpose. The Board may establish an Architectural Review Committee ("ARC"), consisting of three Members appointed by the Board, but not to include a Member of the

Board. Each Member shall serve for a term of one year, in order to assure that the Condominium shall always be maintained in a manner:

a. Providing for visual harmony and soundness of repair;
b. Avoiding activities deleterious to the aesthetic or property values of the Condominium;
c. Furthering the comfort of the Owners, their guests, invitees and lessees; and
d. Promoting the general welfare and safety of the condominium community.

Article X, Section 10.02 of the By-Laws sets forth the powers of the ARC, and provides, in relevant part, that:

> 10.02 Powers. The ARC shall regulate the structural modifications, use and maintenance of the Unit in accordance with standards and guidelines contained in the Master Deed or these By-Laws or otherwise adopted by the Board ("Architectural Restrictions"). The ARC shall have the power, or upon petition of any Owner or upon its own motion, to issue a cease and desist order to an Owner, or his lessees whose actions are inconsistent with the foregoing standards and guidelines. The ARC shall provide interpretations of the Architectural Restrictions when requested to do so by an Owner of the Board. Any action, ruling or decision of the ARC may be appealed to the Board by any party deemed by the Board to have standing as an aggrieved party, within forty-five (45) days of the receipt of the written determination of the ARC. If said action, ruling or decision is appealed to the Board within said forty-five (45) day period, the Board may modify, reverse or confirm any such action, ruling or decision. If said action, ruling or decision is not appealed to the Board within said forty-five (45) day period, the decision of the ARC shall be binding. The decision of the Board can only be appealed to a court of competent jurisdiction or, with the consent of all parties, to the ADR Committee, all subject to the rights of mediation or non-binding arbitration in Article XVI hereof.

Finally, Article X, Section 10.03 provides:

> The ARC shall carry out its duties and exercise its power and authority in manner provided for in the Master Deed or in any Rules and Regulations adopted by the Board. The ARC Committee shall serve indefinitely at the pleasure of the Board.

By-Laws - Commercial Unit Owner Veto

Article V, Section 5.02 provides the commercial unit owner a veto of certain actions of the Association that "which may have any direct or indirect financial, legal or other detrimental impact upon them, as may be determined in the sole and reasonable discretion of the Commercial or Garage Unit Owner exercising the veto." However, the veto right does not apply to "to violations of the covenants, restrictions, rules or regulations of the Association which apply to such Unit Owners."

By-Laws – Open Meeting Requirements

Under Section 5.05 of the By-Laws, the Board may conduct business at a meeting without notice so long as a quorum of the Board be present and "...either before or after

the meeting, each Director signs (a) a written waiver of notice, (b) a consent to the holding of the meeting, or (c) an approval of the minutes thereof or of the resolution or act adopted at such meeting."

Under Section 5.07 of the By-Laws, the Board has the power to take action without the need for a meeting, so long as each board director gives his consent in writing. The section provides:

> Consent in Lieu of Meeting and Vote. Despite anything to the contrary in these By-Laws, the Certificate of Incorporation or the Master Deed, and subject to the open meeting requirements of N.J.S.A. 46:8B-13a and N.J.A.C. 5.20-1.1, as now or hereafter amended, the entire Board of Directors shall have the power to take action on any matter on which it is empowered to act, whichever the case may be, shall consent in writing to such action.

Section 5.08 of the By-Laws governs Board meetings for the Association, and provides, in relevant part:

> All Board Meetings, except conferences or working sessions at which no binding votes are to be taken, shall be open to attendance by all Owners, subject to those exceptions set forth in N.J.S.A. 46:8B-13a and N.J.A.C. 5:20-11, as now or hereafter amended. The Board may exclude or restrict attendance at those meetings, or portions of meetings, at which any of the following matters are to be discussed 1) any matter the disclosure of which would constitute an unwarranted invasion of privacy; 2) any pending or anticipated litigation or contract negotiations; 3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer; or 4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the Association. Adequate written notice of the time, place and the agenda, to the extent known, of all such open meetings shall be given by the Board to all Owners at least forty-eight (48) hours in advance of such meeting in the manner required by N.J.A.C. 5:20-12(b). . . .

ARC Guidelines

The ARC Guidelines provide, in relevant part, that:

> (1) Exterior signage must be compatible with the Montgomery Greene color scheme and façade, both aesthetically and in terms of the size and materials used. Illuminated signs, including but not limited to back lit signs, are prohibited.
> (2) Awnings are not permitted over commercial-space windows or doors.
> . . .
> (6) Signage, decals, posters, banners, fliers and the like, are not permitted on the windows or doors of the commercial spaces or any other parts of the building. Signage indicating hours is permissible, but any such sign must be approved in writing by the ARC or the Association's Board.
> . . .
> (15) Fast food and/or drink establishments, are prohibited. For purposes of this paragraph 15, "fast food and/or drink establishment" shall be defined as any business engaged in the sale of food and/or beverages having any or all of the following characteristics:

(a) high-transaction business, involving customers who commonly are on the premises for less than 30 minutes;
(b) high-volume foot traffic;
(c) food that is prepared in quantity by standardized method and can be dispensed quickly;
(d) a substantial portion of its business is food/drink offered for take-out;
(e) a substantial portion of its business is food/drink for purchase at a counter.

For purposes of this Paragraph 15, the term "fast food and/or drink establishment" includes by way of illustration, but not by way of limitation, McDonald's, Burger King, Wendy's, Taco Bell, Dunkin' Donuts, Subway, Baskin-Robbins, KFC and Starbucks.

The ARC reserves the right to exercise its discretion to apply considerations which may not be included in these Guidelines when evaluating any commercial-unit owner application for alteration approval or other business architectural review in order to assure that the Condominium shall always be maintained in a manner (a) providing for visual harmony and soundness of repair; (b) avoiding activities deleterious to the aesthetic harmony or property values of the Condominium; (c) furthering the comfort of the Owners, their guests, invitees and lessees; and (d) promoting the general welfare and safety of the Condominium community.

Relevant Zoning Ordinance

The Montgomery Greene Condominium building, located at the corner of Montgomery and Greene streets, is in the Office/Residential (O/R) zoning district of the City of Jersey City. The permitted uses of properties in the O/R zone are set forth by Ordinance § 345-46, and include a "[p]ermitted principal use[]" of the property as either a category one or category two restaurant. Under municipal Ordinance § 345-6, a category two restaurant, relevantly here, is defined as "[a] restaurant or mobile food vendor whose primary function is the preparation and service by employees of food to customers as part of an operation designed to include substantial carry-out service; delivery service; self-service, and which may, but is not required to, include on-premises consumption, except that no drive-in, drive-thru, or service in vehicles is permitted." The zoning ordinances also set forth design and architectural standards. For example, Ordinance § 345-63 sets forth non-residential design standards and § 345-68 sets forth signage standards, prohibiting certain types of signs.

The property is not subject to any directives passed by the Jersey City Historical Preservation Committee, as it does not fall within a "historic" zone of the city.

All parties admit that the operation of a Dunkin' Donuts at the property would be a permitted use under the zoning ordinance.

Discussion

Summary Judgment Standard

Pursuant to R. 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact."

When deciding whether a genuine issue of material fact exists to preclude summary judgment, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74-75 (1954). All favorable inference must be drawn in favor of the party opposing the motion. Brill, supra, 142 N.J. at 536. The judge's function is not to weigh the evidence and determine the truth of the matter; rather, it is to determine whether there is a genuine issue for trial. Id. at 540.

Use-Restrictions for Condominium Associations

Condominium ownership is both governed by general principles of real property law and also statutory law. The condominium owner "owns his unit together with an undivided interest in common elements." Siller v. Hartz Mountain Ass'n, 93 N.J. 370, 375 (1983). "[T]his ownership interest constitutes a separate parcel of real property that the owner may deal with as he would any parcel of real property." Thanasoulis v. Winston Towers 200 Asso., 110 N.J. 650, 656 (1988). However, condominium ownership is distinguishable from real property ownership, as noted by the New Jersey Supreme Court:

> One aspect of condominium ownership that distinguishes it from other types of property interests, however, is the role of the condominium association. An association is comprised exclusively of the unit owners who, through their individual deeds, automatically become members. In essence, an association is responsible for the governance of the common areas and facilities used by the owners of the condominium units. It is a representative body that acts on behalf of the unit owners. Its powers derive from its by-laws, the master deed, and applicable statutory provisions. An association may enter into contracts, bring suit and be sued. The most significant responsibility of an association is the management and maintenance of the common areas of the condominium complex.

Id. at 656-57.

In Siller, the Court recognized certain basic principles in relation to the appropriate standard of review for actions by condominium associations. Siller, supra, 93 N.J. at 382. As described by the Supreme Court in Thanasoulis, the principles are as follows:

> [F]irst, that acts of an association "should be properly authorized;" and second, that the association's management has a "fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes its stockholders," and that "[f]raud, self-dealing or unconscionable conduct at the very least should be subject to exposure and relief."

Thanasoulis, supra, 110 N.J. at 657 (quoting Siller, supra, 93 N.J. at 382). Where, however, the condominium association's act is outside its authority as defined by the Condominium Act and master deed, courts do not have to undergo this type of analysis. Id. at 903. Likewise, a condominium association may pass "reasonable rules and regulations" that affect or touch upon powers that are designated to it by the master deed, for example, passing regulations concerning the size and price of parking spaces in the association's garage where the master deed gives the association power to manage the garage. Id. at 660-61.

Condominiums are governed by the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to 46:8B-38. The relationship between a condominium unit owner and the condominium association are governed by a master deed, as noted by the Appellate Division:

> In condominium communities, as well as other common interest developments, owners take title subject to a master deed or declaration:
>
> > Restrictive covenants are used to maintain or enhance the value of land by reciprocal undertakings that restrain or regulate groups of properties. These covenants are common in condominium and other "common-interest" housing subdivisions. Prior to selling the first unit or plat, the subdivision or condominium owner creates a declaration or master deed that contains all of the restrictions. Property owners who purchase their properties subject to such restrictions give up a certain degree of individual freedom in exchange for the protections from living in a community of reciprocal undertakings.

Cape May Harbor Village and Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 70 (App. Div. 2011) (quoting Villas W. II of Willowbridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274, 1278-79 (Ind. 2008)).

Under N.J.S.A. 46:9B-9, a condominium association is governed by a master deed, which must set forth, "or contain exhibits setting forth," a variety of specific information, including:

> Any other provisions, not inconsistent with the "Condominium Act," P.L.1969, c. 257 (C. 46:8B-1 et seq.), as may be desired, **including but not limited to restrictions or limitations upon the use**, occupancy, transfer, leasing or other disposition of any unit (provided that any restriction or limitation shall be otherwise permitted by law) and limitations upon the use of common elements.

N.J.S.A. 46:9B-9(m) (emphasis added). Under N.J.S.A. 46:8B-7, all agreements that violate the provisions of the Condominium Act are deemed void.

The provision under N.J.S.A. 46:9B-9(m) of the Condominium Act has been interpreted to require that use-restrictions be included in the condominium's master deed. See Amir v. D'Agostino, 328 N.J. Super. 141, 148-151 (Ch. Div.), aff'd 328 N.J. Super. 103 (App. Div. 2000). In that case, the court considered a dispute between unit owners, wherein a unit owner attempted to enforce restrictive covenants contained in the individual deeds to the commercial units of a condominium association, but not in the master deed, against other commercial unit owners. Id. at 144-47. The developer in that case created twenty-nine (29) commercial units for the association, and, as each unit was sold, "elected to utilize individual unit deeds to create what was intended to be a common scheme of covenants," which provided different use-restrictions for the different units. Id. at 145. However, the master deed and initial public offering statement did not include any such use-restrictions. Id.

The trial court, in a decision affirmed by the Appellate Division, determined, on cross-motions for summary judgment, that the covenants, as a matter of law, were unenforceable as they were not included in the master deed. Id. at 151. The court noted that:

> It is true, as plaintiff argues, that condominium developers are not required to impose restrictions on use and occupancy and thus there is no obligation to include them in the master deed or otherwise. The relevant portion of the Condominium Act refers only to such provisions as "may be desired." **On the other hand, if the developer or a condominium association does choose to impose such restrictions, the requirement that they be included in the master deed is mandatory.**

Id. at 149 (emphasis added) (noting that "where a statutory requirement is precise and all inclusive in its application, 'there is no leeway for statutory interpretation'"). This requirement "serves the goal of ensuring that potential purchasers of condominium units are fully informed as to any conditions that may impact on their ownership . . . [such as] restrictions on use, occupancy, transfer and leasing." Id.

The Court did note, though, that the "Master Deed and the Public Offering Statement are not the only vehicles for achieving [the goal that potential purchasers are noticed of use restrictions]." Id. The court questioned whether it was prudent that condominium developers may be treated differently than other land owners, as condominiums, under N.J.S.A. 46:8b-4, are intended to be addressed as the owners of

any other type of real property and the uses of real estate may generally be controlled through deed restrictions. Id. The court further provided that "[t]o assume a legislative intent that would insist on the use of the Master Deed as the exclusive means by which to fulfill the public policy that presumably underlies this statute, seems particularly questionable when one seeks to apply it to non-developer owned units," meaning that it may not be required to read the statute "to preclude **an individual unit owner's** attempt to restrict the future use of his or her unit absent specific authorization in the master deed," especially considering the fact that unit owners do not create the master deed. Id. at 150 (emphasis added).

Ultimately, the court held that the restrictions at issue in that case "represent[ed] something more than a simple agreement between an individual owner and his or her successors," and were the creation of the developer while the developer "was in control of the building process for this building." Id. The use-restrictions would impact all of the commercial units, and also all of the residential units, as "restrictions on the use of all of the commercial units in a high-rise condominium have the potential to impact the character of the entire building. As such they would affect all unit owners, . . . none of whom would have notice absent a reference in the Master Deed or Public Offering Statement." Id. at 150-51. Therefore, "to have created the kind of pervasive and integrated scheme attempted here, [the developer] was obligated to include it in either the original master deed or as part of a subsequent amendment," and the failure to include them rendered the covenants unenforceable. Id. at 151.

The Appellate Division affirmed this decision, for the reasons expressed by the trial court, noting that "we agree with [the trial judge] that the restrictions, on the specific use of the commercial units, must be 'placed within the master deed [or an amended master deed], at least when created by the developer.'" Amir v. D'Agostino, 328 N.J. Super. 103, 106 (App. Div. 2000).

Here, as an initial note, the provision upon which the Plaintiff Association based its rejection of the Defendant's application, ARC Guideline No. 15, which relevantly provides that "[f]ast food and/or drink establishments, are prohibited," is a use-restriction. As compared to the bulk of the other provisions in the ARC Guidelines, which dictate actual architectural and aesthetic requirements for the commercial units, such as describing the types of signage and awnings that may be appropriate, ARC Guideline No. 15 completely eliminates one type of use of the commercial unit. In fact, the provision only imposes a use-restriction, and in no way imposes any sort of aesthetic or architectural requirement for the unit.

The Plaintiff Association, and also Third-Party Defendants, argue that the use-restriction contained in ARC Guideline No. 15 was permitted and anticipated by the Master Deed and thus would be valid under N.J.S.A. 46:9B-9(m). Specifically, the Association parties argue that the statute requires that the master deed must set forth or

"contain exhibits setting forth" the use-restrictions. Accordingly, the Association parties urge the Court to consider a trail of documents leading almost in a venn diagram type argument, that leads from the Master Deed to the ARC Guidelines, passed after the Defendant submitted its application, as satisfying the requirements of the statute and the legislative intent of putting prospective buyers and unit owners on notice of the use-restriction.

Specifically, under the Association parties' theory, the By-Laws are attached as an exhibit to the Master Deed under Sections 1.5 and 15.11 of Master Deed, which provide that the By-Laws are "made a part" of the Master Deed and are attached as Exhibit E. Next, the Association parties direct the Court to look at Article VI, Section 6.01 of the By-Laws, which provide that the Board has the power "[t]o establish an Architectural Review Committee as hereinafter provided in Article X." Under Article X, Section 10.02 of the By-Laws, the ARC "shall regulate the structural modifications, use and maintenance of the Unit in accordance with standards and guidelines contained in the Master Deed or these By-Laws or otherwise adopted by the Board." Under these powers of the By-Laws, the Board created the ARC, and the ARC created the guidelines at issue. Therefore, under the Association parties' theory, the use-restriction guideline at issue here essentially relates back to the Master Deed through this chain of citations. Plaintiff argues that this chain provides adequate notice to the Defendant of the restrictions, given the dicta in the Amir decision that the master deed may not be the "only vehicle" for achieving the legislature's goal of providing notice to unit owners and purchasers. See Amir, supra, 328 N.J. Super. at 149. The Association parties argue that because the Defendant's principal was also the developer of the project, the Defendant must have had notice of a potential use-restriction in the future. The Court rejects this argument.

The plain language of the Master Deed, under Article X, Section 10.01, provides that the commercial unit may be used for purposes "permitted or contemplated" by the Master Deed, by-laws and rules of the Association, and that "[o]nly those businesses, trades or professions which are permitted by the Zoning Ordinance of the City of Jersey City shall be conducted in any Unit." As previously mentioned, the Defendant's proposed use of the property as a Dunkin' Donuts is permitted by the applicable zoning ordinance, Ordinance § 345-46.

The question, therefore, is whether the fact that the Defendant, at the time it took title to the commercial unit, was aware that at some future point the Association's Board might establish an Architectural Review Committee, which might establish an unspecified use-restriction, trumps the plain language of the New Jersey Condominium Act that requires that use-restrictions be placed in the Master Deed, or attached to the Master Deed. The Court determines that, as to the facts presented here, the use-restrictions at issue here must have been placed in the Master Deed or as an exhibit to the Master Deed to be valid under the statute, and therefore, the Association failed to comply with N.J.S.A. 46:9B-9(m) by passing the use-restriction as a Guideline of the Architectural Review

Committee, which effectively eliminated the ability of the Defendant to have notice of the use-restriction and the ability to comment and vote upon the use-restriction, as would have existed had the Plaintiff Association revised the Master Deed or even the By-Laws to include a use-restriction.[4] The gradational argument presented by the Association in support of its ability to restrict the use of the condominium units, which encourages the Court, and all future unit owners, to look from the Master Deed, to the By-Laws, to rules published by the ARC and thereafter approved by the Board, simply does not comport with the legislative intent underlying N.J.S.A. 46:9B-9.

The use-restriction at issue here likely substantively impairs the value of the property and also severely impacts the Defendant's ability to use the property as it intended to. The Defendant took title to the property in 2008 with the expectation that it would be able to use the property for all purposes permitted by the applicable zoning ordinances. In fact, at the time it took title to the unit, the unit was already rented to another coffee shop, Café Van Houtte, which may also have been barred by the use-restriction at issue here. Accordingly, the Defendant had a quantifiable interest in its continued ability to rent the unit to similar establishments, such as another coffee purveyor, Dunkin' Donuts.

The Board's decision to create the ARC, and then the ARC's decision to pass the use-restriction, were made without substantive notice to the Defendant, and to the members at large of the condominium association, and without any vote of the membership of the Association or written approval by the commercial unit owner. Accordingly, the ARC decision was contrary to the legislative intent of ensuring that potential purchasers of condominium units and also current owners are fully informed of the use-restrictions that would impact their ownership rights.[5] As held to be important by

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[4] The Master Deed may be amended pursuant to Article XV, Section 15.03 of the Master Deed, which requires a sixty-seven percent (67%) vote by all unit owners, subject to the approval of the commercial unit owner for any amendment that "materially affects" the commercial unit pursuant to Article V, Section 5.05. Further, N.J.S.A. 46:8B-11 governs amendments to the master deed and provides, in relevant part, that "[u]nless otherwise provided therein, no amendment shall change a unit unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed." Alternatively, the By-Laws, under Article XII, may be amended by an affirmative vote of fifty-one percent (51%) of members at a meeting with quorum, which has been noticed to the Owners." However, under that same section, "no such new By-Law, amendment or repeal shall in any way affect the Developer or the Commercial or Garage Unit Owners, including any successor of their successors, ***unless the Developer, the Commercial or Garage Unit Owners, or their successor have given their respective prior written consent thereto.***" (emphasis added).

[5] Defendant also argues that the Plaintiff Association improperly formed the ARC and passed the relevant Guidelines, without notice to the parties, primarily by email, which Defendant argues violates the open meeting requirements under Section 5.08 of the By-Laws. The Court does not find, however, that the Board violated the requirements of Section 5.08 when creating the ARC and passing the relevant ARC guidelines. Under Section 5.07 of the By-Laws, the Board has the power to take action without the need for a meeting, so long as each director gives his consent in writing, which was apparently done here. See also N.J.S.A. 15A:6-7(c). Likewise, under Section 5.05 of the By-Laws, the Board may conduct a meeting without notice as long as certain requirements are met. Importantly, here, the provision of the By-Laws enabling the Board to create the ARC, Section 10.01 does not require that the decision be made at an open meeting, as it

the Amir court, the restrictions impact all of the commercial units, and may also impact all of the residential unit owners as "restrictions on the use of all of the commercial units in a high-rise condominium have the potential to impact the character of the entire building. As such, they would affect all unit owners, including the residential owners, none of whom have notice absent a reference in the Master Deed." Amir, supra, 328 N.J. Super. at 150-51. It would be patently contrary to the Amir decision and N.J.S.A. 46:9B-9(m) to allow the Association to hold the power to severely alter the rights of a condominium unit owner to use its unit for certain purposes, previously permissible under the applicable zoning ordinances and the Association's governing documents, at the whim of the Association without real notice and without affording the Defendant the procedural protections of requiring that change be made by an amendment to the Master Deed.

This is not a case where an individual unit owner attempted to create a restrictive covenant by deed that would only affect one unit, which the Amir court noted, in dicta, may not require passing an amendment to the master deed, and instead could be achieved by other "vehicles." Amir, supra, 328 N.J. Super. at 149-50. Rather, the Association has attempted to modify the Defendant's fundamental right to use its property in the manner in which it intended at the time it took title pursuant to the governing documents in existence at that time, and therefore the Plaintiff must have made this change by amending the Master Deed or an exhibit to the Master Deed, which was not done here.[6]

The Court's analysis is aided by a consideration of the law surrounding restrictive covenants. The public policy of New Jersey is to disfavor restraints on the alienation of property. Cape May Harbor Village and Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 71 (App. Div. 2011); Hammett v. Rosensohn, 46 N.J. Super. 527, 535-36 (App. Div. 1957) ("It is firmly established that the policy of the law is against the imposition of restrictions upon the use and enjoyment of land and such restrictions are to be strictly construed."). However, "[w]hen the property in issue is part of a cooperative or

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simply provides that the Board "may establish an [ARC]." Therefore, there is no requirement in the By-Laws that the Board have an open meeting at the time it created the ARC, and the subsequent ratification of the Board's decision to create the ARC and pass the Guidelines at issue at its August 31, 2016 open meeting would be sufficient to meet the open meeting requirements of the By-Laws. See Grimes v. City of East Orange, 288 N.J. Super. 275, 281 (App. Div. 1996) (noting that ratification is "equivalent to an original grant of power . . . and relates back to the date of the original action"). However, the Court does note that the relative secrecy with which the Board created the ARC and passed the Guidelines, which apparently did not become known to the Defendant until its application was rejected, underscores the Court's decision in this case that the method by which the Board chose to pass the use-restriction, which fundamentally altered the Defendant's ability to use the unit, did not comply with the notice requirements envisioned by N.J.S.A. 46:9B-9(m) and the Amir court.

[6] As an additional note, there is no evidence before the Court that the Defendant waived any right to argue that future use-restrictions must be implemented by the Master Deed. Waiver of statutory rights under the New Jersey Condominium Act requires that the party "kn[ow] that there is statutory protection available and then elect[] to waive it." Amir, supra, 328 N.J. Super. at 160. This is because waiver must be "clear and unambiguous." Id.; Atalese v. U.S. Legal Services, L.P., 219 N.J. 430, 443-44 (2014).

condominium, there is general justification for greater levels of restraint on alienation." Id. at 72 (citing Restatement (Third) of Property: Servitudes § 3.4, comment g (2000)).[7]

Courts have developed a distinction between restrictive covenants that were originally recorded, and thus were available at the time of purchase, and "later-adopted ones." Id. (quoting Mulligan v. Panther Valley Property Owners Ass'n, 337 N.J. Super. 293, 302 (App. Div. 2001)). As noted by the Court of Special Appeals of Maryland, cited by the Appellate Division in Cape May Harbor Village and Yacht Club Ass'n:

> [R]ecorded use restrictions appearing in original condominium documentation deserve a higher degree of deference than those promulgated by a condominium Board of Directors. We emphasize, however, that in the case at hand, we are dealing with a bylaw amendment that was passed many years after appellees bought their units. This is an important difference, because the application of the less restrictive standard is based upon the concept that the unit owners had notice of the recorded use restrictions when they purchased their units. In this case, the notice aspect is lacking.

Ridgely Condo. Ass'n v. Smyrnioudis, 660 A.2d 942, 949 (Md. Ct. Spec. App. 1995); see also Cape May Harbor Village and Yacht Club Ass'n, supra, 421 N.J. Super. at 73.

Here, the "restrictive covenant" at issue was not contained in any deed, did not appear in any original documentation, and was not in existence when the Defendant applied to alter the unit. Rather, the use-restriction was passed only after the Defendant KTE actually applied to use the unit, and was not actually ratified by the Board at an open meeting until after the Board rejected the Defendant's application on the basis that it violated the newly-created rule. Given the significant public policy concerns surrounding restraints on alienation and restrictive covenant, and the relevant provisions of the Condominium Act, the use-restriction change needed to have been implemented by an amendment to the Master Deed or to an attachment to the Master Deed, such as the By-Laws, so as to adequately give the Defendant notice that its rights were being affected.

Accordingly, the Court finds that the ARC Guideline Number 15, which contains the use-restriction at issue here, is not valid as it was not set forth in the Master Deed or an exhibit to the Master Deed, or any amendments thereto. Regardless of whether the decision to create new architectural guidelines was reasonable, the method chosen to impose the use-restriction itself upon the Plaintiff was not proper, as it did not comply with the requirements of the New Jersey Condominium Act.[8] Therefore, because all

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[7] The more significant restraints "are justified by considerations of the degree of financial interdependence of the owners in a community, as well as the maintenance of shared common areas and recreational and social facilities." Cape May Harbor Village and Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 72 (App. Div. 2011);

[8] Ordinarily, "decisions made by a condominium association board should be viewed by a court using the same business judgment rule which governs the decisions made by other types of corporate directors." Walker v. Briarwood Condo. Ass'n, 274 N.J. Super. 422, 426 (App. Div. 1994). The test is "(1) whether the Associations' actions were authorized by statute or by its own bylaws or master deed, and if so, (2) whether

agreements that violate the provisions of the Condominium Act are deemed void, the Court will declare ARC Guideline Number 15 to be void and will strike the rule. See N.J.S.A. 46:8B-7

Furthermore, as the basis for the Association's rejection of Defendant's application was ARC Guideline Number 15, the Court declines to rule as to whether the remaining provisions promulgated by the ARC are valid exercises of the Association's authority. The Court does note, though, that the remaining restrictions do not generally impact the Defendant's use of the unit, and rather provide aesthetical guidelines to be followed in altering the unit, which may be subject to a less rigorous standard of review, as such decisions may fall squarely within the business judgment of the Association, pursuant to its governing documents. See, e.g., Courts at Beachgate v. Bird, 226 N.J. Super. 631, 638-39 (App. Div. 1988) ("A condominium association has the authority to enforce provisions in the condominium's by-laws restricting structural changes in the units. If the by-laws so provide, application must first be made to the board of directors of the association for permission to make such changes and approval received from the board for the changes.").

Damage Claims

The third-party defendants and the Association also move for summary judgment to dismiss Defendant KTE Retail's counterclaims and third party complaint for damages for breach of fiduciary duty, tortious interference with prospective economic advantage, and restraint on alienation.

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the action is fraudulent, self-dealing or unconscionable." Owners of the Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, 367 N.J. Super. 314, 322 (App. Div. 2004). The Court notes, however, that the cases cited by the Plaintiff in support of its positon that the passing of the ARC Guidelines here must be subject to a business judgment or reasonableness test are inapplicable, where the rule at issue is a use-restriction, and therefore was required to be passed with the procedural protections already articulated in this decision. First, Walker v. Briarwood Condo Ass'n, 274 N.J. Super. 422, 426 (App. Div. 1994) addressed the issue of whether the association may fine a unit owner for parking a truck on the lawn and having a pet in violation of pre-existing rules without resorting to judicial process. Papalexiou v. Tower West Condo., 167 N.J. Super. 516 (Ch. Div. 1979) addressed an association's power to impose special assessments of a certain amount in accordance with provisions of the association's by-laws. In Anklowitz v. Greenbriar at Wittingham Community Ass'n, No. A-3606-12T1, 2014 N.J. Super. Unpub. LEXIS 2123 (App. Div. Aug. 29, 2014), cited by Plaintiffs, the Court addressed whether an association could deny the plaintiff's application to build a sunroom onto their unit based upon the association's by-laws. Similarly, in Courts at Beachgate v. Bird, 226 N.J. Super. 631 (App. Div. 1988), the court addressed the association's power to require a unit owner to remove newly installed windows that were installed without permission of the association, in direct violation of a provision requiring association consent in the master deed. The cases cited by the Plaintiff do not address a situation in which the association's action concerned the creation of a use-restriction, which, as already discussed, triggers different provisions of the Condominium Act. The Court's decision, here, does not concern an issue of business judgment, as in whether the Association was correct in creating new guidelines or in desiring to ban a Dunkin' Donuts from operating on the premises, but rather focuses on whether the method of creation of the use-restriction guideline was proper, which the Court finds in the negative.

Defendant argues, generally, that these claims are supported by the facts of the case, including the fact that the Board members and ARC members passed these guidelines in response to the Defendant's application to lease the unit to Dunkin' Donuts. The Defendant argues that this timeline, and the absence of formal and open rulemaking procedures by the Board, show that the Board members attempted to furtively block the Defendant's right to lease the unit and specifically created rules to prevent the Defendant from leasing to Dunkin' Donuts. Defendant argues that the manner and method by which the Board formed the ARC and passed the guidelines were unreasonable, arguing that the record shows that the Board's actions were "confused, hurried, chaotic, and secretive," as apparently demonstrated by the Board members' failures to identify the correct version of the ARC guidelines passed, and failures to identify when the Board members adopted the guidelines, at their depositions. Defendant objects to the fact that the guidelines were passed by e-mail vote without a full meeting and approval by resolution of the B oard. Defendant also argues that there is no evidence that the guidelines even existed at the time of the ARC and Board's review of the Defendant's application. The Defendant argues that the guidelines, therefore, were passed in bad faith.

Breach of Fiduciary Duty

A condominium association's board of directors has a fiduciary duty to its members similar to that of a corporation's board to the shareholders of the corporation. Thanasoulis v. Winston Towers 200 Assoc., 110 N.J. 650, 656 (1988). As observed by the Appellate Division:

> That relationship requires that it act consistently with the Condominium Act and its own governing documents and that its actions be free of fraud, self-dealing, or unconscionability. Moreover, that fiduciary relationship requires that in dealing with unit owners, the association must act reasonably and in good faith. If a contested act of the association meets each of these tests the judiciary will not interfere.

Billig v. Buckingham Towers Condo. Ass'n I, Inc., 287 N.J. Super. 551, 563-64 (App. Div. 1996) (noting that the association's refusal to permit the owner to change the owner's HVAC system was not reasonable "was not reasonable because the change did not materially or appreciably affect the condominium property, the common elements, the limited common elements, the collective interests of the unit owners, or the interests of any individual unit owner") (internal citations omitted).

Furthermore, under N.J.S.A. 15A:6-14, the statute governing the liability of trustees for breaches of the standard of care, board members are normally charged to "discharge their duties in good faith and with that degree of diligence, care and skill which ordinary, prudent persons would exercise under similar circumstances in like positions." However, "[i]n discharging their duties, trustees and members of any committee designated by the

board shall not be liable if, acting in good faith, they rely on the opinion of counsel for the corporation . . . ." Id.

Here, the Court finds that the facts, as stated by the Defendant and looked at in the light most favorable to the Defendant, cannot support an action for breach of fiduciary duty by the directors of the association. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Regardless of the Court's decision, above, that the Board improperly failed to include the use-restriction as an amendment to the Master Deed, the Board's motivations in adopting the ARC Guidelines and denying the Defendant's applications were clearly based on a desire to preserve the "luxury" feel of the condominium complex, which they apparently believed would be harmed by the inclusion of a Dunkin' Donuts franchise on the property. The Board's duties run to all members of the Association, and not just the commercial unit owner, and therefore, the Board's decision to pass rules that might prevent the apparently offensive coffee shop from opening in the complex was reasonably based on a desire to protect the interests of all of the members of the Association.

The Defendant has failed to produce any evidence that the Board, or its members, acted in bad faith in deciding to create rules barring this use, which the Court finds may have been a reasonable decision based on the Board's concern for the atmosphere of the complex.[9] Further, the fact that the guidelines may have been passed without the necessary formality under the governing documents does not, by itself, create a claim for breach of fiduciary duty. Finally, the Board members apparently relied upon counsel, as certified by the Board member and third-party defendant John Eagan, which further shows their apparent good faith in attempting to preserve the "luxury" atmosphere of the condominium complex. See N.J.S.A. 15A:6-14. Accordingly, the Court grants the third party defendants and counterclaim defendant Association's motion for summary judgment as to this count, and the Defendant's counterclaim for damages for breach of fiduciary duty is dismissed.

Tortious Interference with a Prospective Economic Advantage

As determined by the New Jersey Supreme Court, a claim for tortious interference with prospective economic advantage has the following elements:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> > (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

[9] As stated previously, despite the desire to bar the incoming Dunkin' Donuts being potentially reasonable, the method by which the Association passed the use-restriction was improper.

(b) preventing the other from acquiring or continuing the prospective relation.

> In determining whether the conduct complained of is improper, the Restatement offers general guidance, identifying a variety of relevant considerations. Those considerations include an evaluation of the nature of and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party; the proximate relationship between the conduct and the interference, and the relationship between the parties. Ibid. As we have explained, these considerations are expressed as a balancing test for courts to apply in evaluating whether an act of interference is improper.

Nostrame v. Santiago, 213 N.J. 109, 122 (2013). Stated another way, to establish a cause of action for tortious interference with prospective economic advantage, the party must prove: "1) unlawful, intentional interference with [its] prospect of, or reasonable expectation of, economic advantage, and 2) a reasonable probability that plaintiff would have received the anticipated economic benefits had there been no interference." Snyder Realty v. BMW of N. America, 233 N.J. Super. 65, 76 (App. Div. 1989); see also Harper-Lawrence, Inc. v. United Merchants and Mfrs., Inc., 261 N.J. Super. 554, 568 (App. Div. 1993).

Further, as a general principle, "a claim for tortious interference with prospective economic advantage is not actionable without wrongful conduct." Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 203 (App. Div. 1995). The party must demonstrate that "the interference was done intentionally and with 'malice.'" Printing Mart-Morristown v. Sharp Electronic Corp., 116 N.J. 739, 751 (1989). "[M]alice is defined to mean that the harm was inflicted intentionally and without justification or excuse." Id. (citing Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 563 (1955)).

Here, the Court finds that the Defendant cannot maintain an action for tortious interference with prospective economic advantage, based upon the facts as stated by the Defendant and looked at in the light most favorable to the Defendant. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Defendant argues that the Board members made a "predetermined decision not to permit a Dunkin' Donuts based on its subjective standard of luxury." However, as noted above, the Court finds that the desire to not allow the Dunkin' Donuts franchise into the condominium unit may have been reasonable, based on the Board's desire to preserve the "luxury" atmosphere of the condominium complex. Accordingly, the Court finds that the Defendant has failed to produce any evidence to show that the Board members acted with the requisite degree of malice to maintain this cause of action. Further, the fact that the method by which the Board attempted to impose the use-restriction was improper, as discussed above, does not provide sufficient "illegality" of the actions by the board to maintain this cause of action. Therefore, the Court grants the motion for summary judgment as to the Defendant's counterclaim for tortious interference with prospective economic advantage.

Restraint on Alienation

The Association parties also move for summary judgment as to Defendant KTE's count seeking damages for restraint on alienation. New Jersey generally disfavors restraints on alienation as a matter of public policy, as noted by the Appellate Division:

> It is firmly established that the policy of the law is against the imposition of restrictions upon the use and enjoyment of land and such restrictions are to be strictly construed. Restrictions tend to protect property, but they also impair alienability. Nor will equity aid one man to restrict another in the use of his land unless the right to restrict is made manifest and clear in the restrictive covenant.

Cape May Harbor Village and Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 70 (App. Div. 2011). However, "when the property in issue is part of a cooperative or condominium, there is general justification for greater levels of restraint on alienation. Generally, those greater restraints are justified by considerations of the degree of financial interdependence of the owners in a community, as well as the maintenance of shared common areas and recreational and social facilities." Id. at 72.

In considering whether a restraint on alienation is reasonable, courts look to a variety of factors set forth in the Restatement (Third) of Property: Servitudes § 3.4, comment c, including;

> Factors tending to support a finding of reasonableness include:
>
> 1. the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint;
> 2. the restraint is limited in duration;
> 3. the enforcement of the restraint accomplishes a worthwhile purpose;
> 4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;
> 5. the number of persons to whom alienation is prohibited is small;
> 6. the one upon whom the restraint is imposed is a charity.
>
> On the other hand, the following factors tend to support the conclusion that the restraint is unreasonable:
>
> 1. the restraint is capricious;
> 2. the restraint is imposed for spite or malice;
> 3. the one imposing the restraint has no interest in land that is benefited by the enforcement of the restraint;
> 4. the restraint is unlimited in duration;
> 5. the number of persons to whom alienation is prohibited is large.

Cape May Harbor Village and Yacht Club Ass'n, supra, 421 N.J. Super. 56, 71-72 (App. Div. 2011) (citing Restatement (Third) of Property: Servitudes § 3.4, comment c (2000)).

Here, although the use-restriction was passed by an improper method as it was not included in the Master Deed, as previously articulated, the restraint itself may have been reasonable, had it been passed as an amendment to the appropriate governing

documents. The restraint was directly limited to only the commercial units and was designed to prevent the "luxury" atmosphere from being harmed, theoretically benefiting all unit owners. Further, there is no evidence before this Court that the Association created this use-restriction out of malice or any other sort of personal animus. Accordingly, the restraint was reasonable, at least when viewed in light of Defendant's counterclaim for damages for restraint on alienation. Therefore, the Court grants the Association parties' motion for summary judgment as to Defendant's restraint on alienation counterclaim, and hereby dismisses the count.

Conclusion

For the aforementioned reasons, the Court holds that the use-restriction contained in ARC Guideline Number 15 is void as an impermissible restrictive covenant on the use of the commercial condominium unit, as it was not contained in an amendment to the Master Deed, in violation of N.J.S.A. 46:9B-9(m) of the Condominium Act and Amir v. D'Agostino, 328 N.J. Super. 141, 148-151 (Ch. Div.), aff'd 328 N.J. Super. 103 (App. Div. 2000). Because the Association's rejection of the Defendant KTE Retail's application was based on that now-void ARC Guideline Number 15, the Court will remand this matter back to the parties. Defendant KTE is to reapply for permission to alter and use the commercial unit in accordance with the aesthetic principles enunciated in the ARC Guidelines and any of the provisions of the Master Deed which impact the occupancy and use of the commercial unit, such as Section 10.01(s) of the Master Deed.

The Court also grants the third-party defendants' motion for summary judgment, in part, and will accordingly dismiss Defendant KTE Retail's third-party complaint and counterclaims for damages for breach of fiduciary duty, tortious interference with prospective economic advantage, and restraint on alienation. Therefore, the Defendant's request that the damage claims be transferred to the Law Division is denied. To the extent that any other relief is sought in this matter, not addressed in this opinion or the order entered by the Court, it is denied.

The Court does not retain jurisdiction of this matter. However, the Court notes that this has been a contentious litigation between the parties.[10] To ensure that the remand "hearing" for Defendant's application, ordered under this decision, can be concluded in a fair and reasonable manner, the Court will appoint an experienced planning consultant to resolve all disputes as to the reasonable interpretation of the Guidelines to this application, as set forth in the order entered with this opinion. Furthermore, all hearings conducted by the ARC and Board in relation to this matter shall be recorded.

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[10] The parties in this case have presented the Court with a multitude of discovery issues during the pendency of this case, which resulted in the Court having to issue instructions regarding the production of discovery to the parties on at least six (6) separate occasions. Further, the parties have each asked, on different occasions, for the imposition of sanctions and attorneys' fees against opposing counsel based on these discovery disputes.

Although not specifically requested by the parties, the Court believes that this relief will ensure that the future resolution of this issue leads to a just result. It has long been held that equity "will not suffer a wrong without a remedy." Crane v. Bielski, 15 N.J. 342, 349 (1954). Accordingly, a court of equity, once the facts of the case have been fully developed, "has the power to tailor the remedy to insure a just result." Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 200 (1961). The Court has noted that:

> Equitable remedies "are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.'"
>
> A lack of precedent, or mere novelty in incident, is no obstacle to the award of equitable relief, if the case presented is referable to an established head of equity jurisprudence -- either of primary right or of remedy merely.

Sears Roebuck & Co v. Camp, 124 N.J. Eq. 403, 411-12 (NJ 1938) (quoting 1 Pomeroy, Equity Jurisprudence, § 109) (internal citations omitted); see also Roach v. Margulies, 42 N.J. Super. 243, 245-246 (App. Div. 1956) (upholding a court of equity's right to fashion a newly devised remedy by appointing a fiscal agent for a corporation). Accordingly, this Court has the power to fashion an equitable remedy, and appoint an appropriate expert to oversee the Defendant's application, in order to bring this conflict to a just result.

The Court has entered an order reflecting the above decision.

SO ORDERED,

Hon. Barry P. Sarkisian, P.J.Ch.