SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0691-15T4

JONATHAN DAYAN and
PAZIT DAYAN,

Plaintiffs-Appellants,

v.

CEDAR GREENS CONDOMINIUM
ASSOCIATION, INC. and
RICHARD SCHOFEL,

Defendants-Respondents,

and

JOHN HOPKINS,[1]

Defendant.

Submitted November 16, 2016 – Decided May 18, 2018

Before Judges Fuentes, Simonelli and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2194-14.

Gabriel J. Fischbarg, attorney for appellants.

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[1] In an order dated October 17, 2014, the Law Division dismissed with prejudice all claims against John Hopkins. This appeal does not include this order.

George J. Cieri, attorney for respondents (John J. Hopkins, III, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Plaintiffs Jonathan Dayan and Pazit Dayan are the owners of Unit 10 in the Cedar Greens Condominium Complex (Cedar Greens), comprised of ten individually owned apartments. Defendant Cedar Greens Condominium Association, Inc. (the Association), is a nonprofit entity created under the Condominium Act, N.J.S.A. 46:8B-1 to -38, "to serve as a means through which the condominium apartment unit owners (the "Unit Owners") may take action with regard to the administration, management, maintenance, repair and operation of the Condominium Property[.]" At all times relevant to this case, defendant Richard Schofel was the managing agent of Cedar Greens.

This civil dispute stems from an incident that occurred during the winter of 2014. At that time, plaintiffs rented their unit to students enrolled at Monmouth University. During the University's recess for the December holidays, a water pipe burst and spilled water inside the apartment for several days. The pipe was not located in a common area of the complex. The apartment was heavily damaged. The water short circuited the electrical

heating system in the apartment, causing the water to freeze and damage the common elements adjoining the apartment.

The Cedar Greens Master Deed and the Association's By-laws urge unit owners to acquire an individual insurance policy to cover any loss or damage to the contents of the apartment and indemnify them against personal liability.[2] The record also shows plaintiffs financed the purchase of the unit. On January 4, 2011, plaintiff Pazit Dayan executed both a promissory note in the amount of $293,000 and a non-purchase money mortgage, with the unit as collateral, in favor of JP Morgan Chase Bank. These loan documents required plaintiffs to obtain and maintain a hazard insurance policy insuring the lender "for not less than 100% of the insurable value of the improvements as established by the insurer OR replacement cost coverage[.]"[3]

It is undisputed that plaintiffs did not have a hazard insurance policy at the time of the water-damage incident. Plaintiffs submitted a claim for the damage to their unit to the Association. The Condominium Board refused to submit this claim to the Association's insurance carrier because "it would encourage

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[2] See Paragraph 13 of the Master Deed filed on April 4, 1986, and Article VI, Section 2B of the Association's By-laws.

[3] Plaintiffs defaulted on the loan on January 1, 2015. The mortgagee filed a foreclosure action on June 19, 2015, in the Chancery Division, General Equity Part in Monmouth County.

other unit owners to drop their homeowners insurance coverage." In a letter dated May 7, 2014, the Association's counsel notified plaintiffs' counsel of the Condominium Board's decision to impose "a fines schedule for [plaintiffs'] failure to maintain Unit 10." The Association's counsel also emphasized the inherent interdependence of individual unit owners in the condominium model:

> Further, because this is a condominium complex where all of the units share common elements and common walls, for safety reasons and fire code reasons, the board must be allowed access to the condominium [U]nit 10. Therefore, the act of changing the locks and refusing to provide the key is a detriment to each of the other condominium unit owners. Therefore, a second fine has been imposed for failure to provide a copy of the key.

In June 2014, plaintiffs filed a civil action against the Association alleging breach of contract of the Master Deed, negligence, and conversion. Plaintiffs claimed that the Association had filed a claim with its insurance carrier, Scottsdale Insurance Company (Scottsdale). Plaintiffs alleged that in March 2014, Scottsdale dispatched an adjuster to determine the extent of the damage, which included funds allocated to the repair of the interior of Unit 10. In April 2014, Scottsdale informed plaintiffs that the Association "had received payment on the insurance claim[.]"

Plaintiffs moved for summary judgment, claiming that in July 2015, the Association received $158,745.39 from Scottsdale to repair the water damage in Unit 10. Despite this, the Association had not taken any action to retain contractors or procure the materials necessary to restore the unit to a habitable condition. The Association responded and cross-moved for summary judgment. Defendant Richard Schofel, the Association's manager, submitted a certification in support of defendants' cross-motion for summary judgment noting that plaintiffs: (1) were uninsured at the time of the incident; (2) had not paid the maintenance fee to the condominium association since January 2015; and (3) had defaulted on their mortgage and their lender had filed a foreclosure action.

The Association argued that both the Master Deed and the By-laws required unit owners to maintain hazard insurance to cover the unit, its contents, and any collateral damage to the condominium's common areas. Based on a resolution adopted by the Board on April 24, 2012, "any homeowner who fails to obtain homeowners insurance is effectively self-insured." Based on an estimate of the cost to restore Unit 10 to its previous condition, the Association had asked the court to order plaintiffs to deposit $184,767.16. Schofel ended his certification with the following statement:

> I have not been able to perform all of the required repairs to the common areas because of the state of [disrepair] of . . . [p]laintiffs' Unit. For over one and one-half years, the unit has been gutted and empty. We have been threatened with fines by the City Health inspector because of the condition of the Unit. We additionally have had our insurance premiums raised because of the condition of the Unit.

The parties' cross-motions for summary judgment came for oral argument before the Law Division on August 21, 2015. The motion judge reserved decision while the parties discussed a possible settlement. When these efforts proved to be unsuccessful, the motion judge requested the attorneys return on September 4, 2015. On that day, Judge Dennis R. O'Brien issued an oral decision in which he placed his factual findings and conclusions of law on the record. Judge O'Brien found "undisputed" that in January 2014:

> [P]laintiffs did not have an insurance policy insuring the unit against casualties. The Condominium Association had an insurance policy that provided not only coverage for damage to common areas, but it also had a unique . . . provision for coverage to individual units if the damage to individual units would damage other units.
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> . . . .
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> But essentially if there's damage to my unit, and that might affect the unit next to mine or above mine, or below it, . . . then the policy would pay.

The judge found the Association filed a claim based on this incident. Its insurance carrier accepted and "adjusted" the claim; the Association ultimately received $158,745.39 "from the carrier to pay for repairs to the plaintiffs' unit." Judge O'Brien noted that Paragraph 15 of the Master Deed denoted Maintenance, Repairs and Replacements provides:

> If, due to the negligent act or omission of a Unit Owner, or . . . other authorized occupant . . . damage shall be caused to the Common Elements or to an Apartment Unit or Apartment Units owned by others, . . . maintenance, repairs or replacements shall be required which would otherwise be at the Common Expense, then such Unit Owner shall pay such damage and such maintenance, repairs and replacements, as may be determined by the Association. Maintenance, repairs and replacements to the Common Elements and the Apartment Units shall be subject to the By-Laws and the rules and regulations of this Association.

The judge found that plaintiffs were liable under this section of the Master Deed because they owned the unit at the time it was rented to the students. Section 3 of Article 6 of the By-laws complimented this provision of the Master Deed by clarifying that: "If the damage is only to those parts of an Apartment Unit for which the responsibilities of maintenance and repair are those of the Unit Owner, then the unit owner shall be responsible for reconstruction and repair after casualty."

Judge O'Brien concluded that as framed by the parties, no matter how he decided, one side would get an unwarranted windfall:

> There's no question that the Board has refused to pay for the repairs to the plaintiffs' unit saying that it is the plaintiffs' responsibility. And the argument is that the Board, therefore, gets a windfall of some $158,000[.]
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> The flip side of that is that if the Board does repair the unit, then the plaintiff[s] [get] a windfall because they voluntarily did not insure themselves. Or if they self-insure[d], as the case may be, by not getting insurance, then they would be responsible for the repairs, and they would get a windfall if the Association paid for it. Those are the competing arguments.
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> [(Emphasis added.)]

Judge O'Brien then stated the relevant standard of review for deciding motions for summary judgment, citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) and Rule 4:46-2(c), and referred to some of the reported decisions from this court concerning the interpretations of written documents. After a careful analysis, Judge O'Brien concluded that the Association should use the proceeds from the insurance policy to repair Unit 10. To preclude plaintiffs from benefiting from their failure to honor their contractual obligations, Judge O'Brien ordered "that whatever the Association spends on repair of the unit will become a judgment against the Dayans in favor of the Association and will

be a lien on the property. . . . That way neither party benefits from the malfeasance of the Dayans."

As a means of clarifying his ruling for the benefit of the parties and this court, Judge O'Brien stated: "So to the extent the motions are granted, they're granted in part. To the extent that they are denied, they are denied in part, consistent with this [c]ourt's ruling."

Against this factual and procedural backdrop, plaintiffs now argue that Judge O'Brien erred in his interpretation and application of Paragraph 15 of the Master Deed and Article 6, Section 3(a) of the By-laws. Plaintiffs also claim the judge mischaracterized their position in this case as seeking "a windfall." Finally, plaintiffs argue they are entitled to additional damages for the Association's failure to follow its own By-laws.

Because the Law Division's decision here is based strictly on issues of law, our review is de novo. Brill, 142 N.J. at 540. We also review the facts in the light most favorable to plaintiffs. Ibid.; R. 4:46-2(c). After applying these standards, we affirm substantially for the reasons expressed by Judge O'Brien in his oral opinion delivered from the bench on September 4, 2015.

Affirmed.