

NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

LAWRENCE D. TEDESCO and
CAROLYN TEDESCO,

Plaintiffs,

v.

FIELDSTONE CONDOMINIUM
ASSOCIATION, GARY FLAKER,
T.J. REILLY, NOEL BELLI, W.
GANGERI and RICHARD
ANDERSON

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET No. C-191-18

OPINION

Argued: n/a

Decided: November 16, 2018

Appearances: Mark Fierro, (Mark P. Fierro, Esq. LLC, attorneys) for plaintiff

Emery Mishky, (Margolis Edelstein, attorneys) for defendants

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter has been opened to the Court by Margolis Edelstein, attorneys for Defendants Fieldstone Condominium Association, Gary Flaker, T.J. Reilly, Noel Belli, W. Gangeri, and Richard Anderson (collectively hereinafter “Defendants”), for an Order dismissing Plaintiff’s Complaint in Lieu of Answer, filed on October 23, 2018. Plaintiffs Lawrence Tedesco and Carolyn Tedesco (collectively hereinafter “Plaintiffs”), filed opposition on November 2, 2018, along with a Motion for Leave to file an Amended Complaint that is inapplicable to the instant matter before the Court, by and through counsel Mark Fierro, Esq.

LEGAL STANDARD: MOTION TO DISMISS

A defendant may move to dismiss a plaintiff's complaint for failure to state a cause of action under R. 4:6-2(e). R. 4:6-2(e). Dismissal is warranted where no cause of action is identified or suggested by the facts of the complaint. Printing Mart, supra, 116 N.J. at 746.

When reviewing the complaint under such a motion, courts will accept well-pleaded facts as true and provide the non-moving party favorable factual inferences that are reasonable. Ibid. Moreover, a court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Ibid. Accordingly, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). However, if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

While legitimate inferences are to be drawn in favor of the non-moving party, a court need not credit a complaint's bald assertions or legal conclusions. Printing Mart, supra, 116 N.J. at 768. A motion to dismiss for failure to state a claim may be addressed to specific counts of the complaint, and the court, on a motion to dismiss the entire complaint, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. den. 153 N.J. 405 (1998) (dismissing contract and fraud claims, but sustaining intentional interference and promissory estoppel theories).

If the court relies on any materials outside of the pleadings, a motion to dismiss for failure to state a cause of action automatically converts to a summary judgment motion. R. 4:6-2(e); Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337 (App. Div.), certif. den. 188 N.J. 353 (2006). However, a motion to dismiss on the pleadings does not convert into a summary judgment

motion when a party files, and the court relies on, documents referred to in the pleadings. See N.J. Sports Prods., Inc. v. Bostick, 405 N.J. Super. 173, 178 (Ch. Div. 2007); see also Dickerson & Sons, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1 (App. Div. 2003) (reasoning that the courts may consider “a document integral to or explicitly relied upon in the complaint” without converting a motion to dismiss into a summary judgment motion), aff’d, 179 N.J. 500 (2004).

THE COMPLAINT

Plaintiffs’ Complaint in the instant matter centers around a property located at 808 Fieldstone Terrace, Wyckoff, New Jersey, and is situated within the Fieldstone Condominiums development.

Plaintiffs provide detailed photographs and a sworn affidavit outlining significant water accumulation on the exterior of the property, which they claim make the exterior of the property largely unusable. Plaintiffs subsequently provided notice and demands for remediation and repair of the exterior and interior flooding problems, which have allegedly reached the point of threatening the structural integrity of the property, as well as elevating the threat of mold accumulation and moisture related contaminants. In cold weather, the flooding problems described *infra* cause the water accumulation to freeze, not only complicating the flooding issue even more, but also creating a potential safety hazard.

Plaintiffs’ allegations include the following:

(1) In efforts to alleviate an environmental matter that caused water leakage and flooding in the basement of the property, Defendants did only “patchwork sodding” and “did the cheapest thing they could to fix the situation;” (2) the property manager has reviewed and recommended steps to remedy the area where water flows into the house, but no window well sealing has taken place to date; (3) Plaintiffs were told it was their responsibility to re-paint subsequent to the flooding; (4) An Ornamental Crab Apple tree located in a common element has branches that partially extend over the property that causes leaves to fall onto Plaintiffs’ patio.

Plaintiffs therefore contend that the wrongful acts and omissions of Defendants, taken “without any business justification whatsoever,” have caused Plaintiffs the loss of use and enjoyment of the premises, thus constituting a breach of fiduciary duty on the part of Defendants. Plaintiffs’ contentions take aim specifically at both inadequate attempts at remediation by Defendants, as well as several complete *inactions* by Defendants.

ANALYSIS

Defendants argue that the Fieldstone Condominium Association’s Board decisions are authorized by statute, the master deed, and the by-laws, and thus fall under the umbrella of protection of the business judgment rule, so long as the decisions are made in good faith.

The New Jersey Supreme Court has “uniformly invoked the business judgment rule in cases involving homeowners’ associations,” because “a homeowners’ association’s governing body has a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders.” Comm. For a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n., 192 N.J. 344, 369 (2007) (internal citations omitted). The business judgment rule is a means of “shielding internal business decisions from second-guessing by the courts. Under the rule, when business judgments are made in good faith based on reasonable business knowledge, the decision makers are immune from liability from actions brought by others who have an interest in the business entity.” Seidman v. Clifton Sav. Bank, 205 N.J. 150, 175 (2011) (internal citations omitted). “Although directors of a corporation have a fiduciary relationship to the shareholders, they are *not expected to be incapable of error.*” Mulligan v. Panther Valley Prop. Owners Ass’n., 337 N.J. Super. 293 (App. Div. 2001) (internal citations omitted) (emphasis added).

The scope and applicability of the business judgment rule as applied to Condominium Board’s decisions is a two-pronged test: (1) whether [an association’s] action was authorized by

statute or its own bylaws and, if so, (2) whether the action was fraudulent, self-dealing or unconscionable. Thanasoulis v. Winston Towers 200 Asso., 110 N.J. 650, 655 (1988) (internal citations omitted).

Here, there is no question that Defendant's authority to act in the instant matter is authorized *both* by statute and by its own bylaws. The New Jersey Condominium Act states, in relevant part, "the association provided for by the master deed shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of *common interest* to the unit owners." N.J.S.A. § 46:8B-12 (emphasis added). To further this emphasis, the New Jersey Supreme Court in Thanasoulis stated, "the most significant responsibility of an association is the management and maintenance of the *common areas* of the condominium complex." Thanasoulis, 110 N.J. at 655 (emphasis added).

In the Master Deed, page 2 states that the Association was "formed to administer, manage and operate the common affairs of the Unit Owners of the Condominium and to maintain, repair and replace the General and Limited Common elements of the Condominium as provided by the Master Deed and By-Laws." See Defendant Brief, p. 4. Specifically as well, pages 7-8 of the Master Deed identify "lawn areas, shrubbery, conduits, utility lines, underground sprinkler systems, if any, and water ways, and all other facilities or elements of any improvement within any building or within the condominium necessary or convenient to the existence, management, operation, maintenance or safety of the condominium or normally in common use" as common elements under the umbrella of authority of the association. Id. at 5.

What remains unclear before the Court, however, is what exact remedial action, *if any*, was taken by Defendants to in fact perform their statutory and contractual fiduciary obligations. Defendants moving papers provide the Court with no facts or arguments whatsoever as to what steps

were taken or decisions were made that warrant a business judgment rule analysis at this early stage of the litigation. All of the material facts that are before the Court at this time have been provided by the Plaintiffs. It is insufficient to hide behind the protection of the business judgment rule at such an early juncture of the case because it is unclear to the Court at this time whether the repairs needed to remediate the various issues constitute minor cosmetics, or in fact significant maintenance – of which failure to perform may rise to the level of unconscionable.

Therefore, affording all inferences to be drawn in favor of Plaintiff as the motion to dismiss standard requires, a cause of action for unconscionability can certainly be made to defeat Defendants business judgment rule defense and survive a motion to dismiss. It is clear based on the pleadings, that although aspects of this litigation pertain to the alleged unsatisfactory remedial performance by Defendants that may or may not fall under the business judgment rule, much of the litigation is a direct result by complete *inaction* by Defendants.

At this point, Defendants have provided no argument whatsoever as to exactly *what* decisions they made in which they relied on their business judgment, *what* remedial actions have or have not been taken, and *why* the business judgment rule applies. Defendant has only (1) cited legal authority as to what the business judgment rule is and how it applies to condominium associations; and (2) assumed responsibility and decision-making authority over the matter based on the terms of the Master Deed. There is no precedent, however, supportive of the argument insinuated by Defendants that condominium associations are entitled take no remedial action whatsoever and hide behind the protection of the business judgment rule to avoid liability for its failure to act.

The Master Deed is clear that “maintenance, painting, replacement and repair work” shall be done to Common Elements “as may be necessary,” and “lawn maintenance and clearing of snow from roadways and walkways *as the board may deem appropriate.*” *Id.* at 6. That does not imply,

however, that the board may simply refuse to exercise its responsibility to maintain, repair and replace at the peril and expense of the condominium owners.

Page 28, Article VIII § 3 of the Master Deed contains an exculpation clause, stating “unless acting in *bad faith*, neither the Board as a body nor any Director, officer or committee member shall be personally liable to any Unit Owner in any respect for any action or lack of action arising out of the execution of his office. Each Unit Owner shall be bound by the good faith actions of the Board, officers and committee members of the Association, in the execution of the duties and powers of said Directors, officers and committee members.”

As discussed *infra*, affording all in favor of the non-moving party, the Court is not inclined to grant relief as drastic as dismissing Plaintiffs Complaint with prejudice this early in the litigation simply because Plaintiff has not demonstrated a prima facie case of bad faith. Although the Court is undoubtedly in need of more facts from *both* parties as this case proceeds forward, the Court is not willing to assume the Defendants acted in good faith simply to satisfy the business judgment rule and the exculpation clause contained in the Master Deed. To the contrary, the motion to dismiss standard requires the Court to make all inferences in favor of Plaintiff based on the facts plead.

It is clear to the Court that Defendants are authorized contractually and statutorily to oversee the various maintenance and remediation of many of the problems and areas Plaintiffs' Complaint points to. It is also clear based on the business judgment rule that Defendants are shielded from liability for certain erroneous actions or inactions so long as they were exercised in good faith. What is not clear at this early juncture, however, is the extent to which Defendants are protected under the business judgment rule in this particular case. Significantly, in response to the many exterior and interior concerns Plaintiff has presented before the Court, Defendant provided the Court with insufficient facts to make a determination that it actually did act in good faith, and that its inaction

did not rise to the level of unconscionability. Ongoing discovery will reveal the true extent of the alleged problems and damage, as well as the proper course of remediation needed. Expert opinions may demonstrate the appropriateness of the remedial action, if any, taken as it pertains to the business judgment rule. Until such evidence is before the Court, an Order dismissing the Complaint would be premature.

For the foregoing reasons, Defendants' motion to dismiss is hereby denied without prejudice. An Order accompanies this decision.