SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3069-20

THE ESTATE OF MARY JO MCNAMARA,

Plaintiff-Appellant,

v.

MICHAEL and BRONWYN KENEFIC, husband and wife, DONALD J. LA FASHIA, KEVIN GILLESPIE, and 7740 ROBERTS AVENUE CONDOMINIUM ASSOCIATION,

Defendants-Respondents.

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Submitted May 16, 2022 – Decided June 7, 2022

Before Judges Mayer and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. C-000032-20.

Law Office of Richard M. King, Jr., attorneys for appellant (Marisa J. Hermanovich, on the briefs).

Trimble & Register, attorneys for respondents Michael and Bronwyn Kenefic, Kevin Gillespie, and 7740 Roberts Avenue Condominium Association (Keith R. Trimble, on the brief).

Hyland Levin Shapiro, LLP, attorneys for respondent Donald J. LaFashia (Robert S. Baranowski, Jr., and Megan Knowlton Balne, on the brief).

PER CURIAM

Plaintiff Estate of Mary Jo McNamara (Estate) appeals from the following orders: a December 30, 2020 order dismissing the Estate's claims against defendant Donald LaFashia (LaFashia); a May 18, 2021 order dismissing its claims against defendants Michael and Bronwyn Kenefic (Kenefics) and defendant Kevin Gillespie (Gillespie); a May 18, 2021 order denying the Estate's cross-motion for reconsideration of the December 30, 2020 order; and an amended June 4, 2021 order dismissing with prejudice all claims, including the claims against defendant 7740 Roberts Avenue Condominium Association (Association). We affirm all orders on appeal.

I.

The facts are taken from the motion record. This case arises from a dispute regarding an escrow fund in connection with the sale of a unit at a two-unit condominium complex.

The Association's members are the current owners of the two condominium units, known as Unit 1 and Unit 2. The condominium units are located on the waterfront in Sea Isle City, New Jersey. The Association is responsible for the common elements belonging to the condominium units, including a bulkhead, fixed pier, and floating docks.

Mary Jo McNamara (McNamara) formerly owned Unit 2.[1] The Kenefics are the current owners of Unit 2. LaFashia is the former owner of Unit 1. He sold Unit 1 to the Kenefics. The Kenefics then transferred Unit 1 to Gillespie. Gillespie is the current owner of Unit 1. At the time McNamara filed suit, only the Kenefics and Gillespie were members of the Association.

According to Association's Master Deed, each unit owner is required to pay half the cost of expenses related to the Association's common elements. Under the Master Deed, the owners of Units 1 and 2 have equal votes and must agree prior to the Association undertaking any expenses related to common elements. If the unit owners are unable to agree, the Master Deed specifies the matter shall be resolved through binding arbitration.

On February 13, 2020, McNamara sold Unit 2 to the Kenefics for $1.2 million. Joseph McNamara signed the deed and contract of sale as power of

[1] Mary Jo McNamara died on September 3, 2020.

attorney. As part of the closing on the sale of Unit 2, the agency providing title insurance, Shore Title Company (Shore), identified a defect in the conveyance of title. According to Shore, the Association's bulkhead, a common element, was reconstructed and filled outside the area permitted by the State. Shore further identified two potential defects to the conveyance of title related to other common elements – the piers and docking facilities may have been constructed without necessary approvals or licenses from the State and the United States Army Corp of Engineers, and the existing condominium structure may have been constructed without appropriate state and federal approvals or permits. To issue title insurance for the sale of either Unit 1 or Unit 2, Shore required the $255,000 to be held in escrow (Escrow Fund).

McNamara agreed to contribute half the Escrow Fund amount from the proceeds associated with the sale of her unit. Prior to selling Unit 2, McNamara attempted to reach an agreement with LaFashia, the owner of Unit 1 at the time, for payment of the other half of the Escrow Fund. LaFashia declined to contribute to the Escrow Fund. McNamara never asserted a lien, requested an assessment, or demanded arbitration to secure reimbursement or contribution from LaFashia regarding the Escrow Fund.

According to a certification provide by McNamara's closing attorney, Cory Gilman, McNamara "fund[ed] the entire escrow amount so that [she] could close on the sale of Unit 2 to the Kenefics, with the intention of pursuing contribution from LaFashia and/or Unit 1 after closing." Gilman certified he advised Joseph McNamara that funding the entire escrow involved "[a] huge risk of being saddled with the entire costs relating to resolving the riparian and waterfront issues on both units."[2]

Because she wanted to proceed expeditiously with the sale of Unit 2 to the Kenefics, McNamara agreed to pay the entire Escrow Fund and signed a February 13, 2020 escrow agreement (escrow agreement).[3] Under the escrow agreement, Shore stated its

> unwilling[ness] to issue [title insurance policies] with affirmative coverage against the State riparian claim unless (1) a sufficient sum [was] deposited in escrow by the parties to cover the cost of purchasing a riparian grant from the State; and (2) both [McNamara] and [the Kenefics] make joint applications to the State for a riparian grant.

[2] These statements are not supported by any documents in the record.

[3] Joseph McNamara, the Kenefics, and Shore's title closing agent signed the escrow agreement.

In accordance with the escrow agreement, Shore "agree[d] to hold in a[n] interest bearing escrow the sum of $225,000.00 from the proceeds of the settlement of [Unit 2]." The escrow agreement stated Shore would hold the Escrow Fund "pending receipt of a recorded riparian grant from the State of New Jersey . . . ."

The escrow agreement provided the Escrow Fund would

> be utilized to pay the State of New Jersey any required back license fees, penalties or fees and the consideration for the grant, plus any costs associated with obtaining same, including but not limited to removal and/or reconstruction or revision to any existing waterfront improvements, the payment of any contractors necessary to complete any such removal and/or reconstruction or revision and any survey, appraisal, professional and/or attorney fees. The balance of the funds remaining shall be returned to [McNamara]. No funds shall be returned without the express consent of [Shore].

Pursuant to the escrow agreement, McNamara and the Kenefics

> agree[d] to cooperate and file joint applications for the Riparian Grant with the State of New Jersey within sixty (60) days from the date of this agreement. The parties acknowledge[d] that the tidelands licensing and permit fees shall be filed on their behalf by Water's Edge Environmental and the grant application shall be filed on their behalf by Fidelity National Title Group and/or an environmental consulting or engineering firm of [McNamara]'s choice, Water's Edge Environmental.

McNamara agreed to be liable for all costs incurred in the permit applications and construction and to deposit additional funds to address the title defects if necessary.

Under the escrow agreement, "the grant from the State of New Jersey must be issued to the current upland owner of the property or the condominium association." In the event the Kenefics conveyed their unit prior to receipt of a riparian grant, Shore stated it would "not be liable for any loss or damage which the [Kenefics] may sustain by reason of not being the upland owner at the time of the recording of the grant." The escrow agreement specified Shore would "be held harmless from any and all of its actions in this matter. Any and all legal fees and costs of suit incurred by [Shore] in any way related to this matter shall be paid by [McNamara]."

In July 2020, LaFashia sold Unit 1 to the Kenefics for $925,000. Shore advised LaFashia would not need to escrow any funds from the sale of Unit 1 because Shore held sufficient sums to address any title defects under the escrow agreement from McNamara's sale of Unit 2. Further, the contract of sale for Unit 1 provided the property was being sold "as is" and the Kenefics were not "rely[ing] on any representations made by [LaFashia] . . . . "

On August 18, 2020, McNamara filed a complaint against the Kenefics, LaFashia, and the Association. The complaint alleged breach of contract, quantum meruit, and unjust enrichment. She also sought to enforce the Master Deed, requesting the imposition of a lien for the common element title defects. The Kenefics filed an answer, counterclaim, crossclaim, and third-party complaint against Shore.

In October 2020, the Kenefics transferred Unit 1 to Gillespie.

II.

A.

On November 9, 2020, LaFashia moved to dismiss the complaint and crossclaim. An amended complaint was filed on December 8, 2020, substituting the Estate as plaintiff and adding Gillespie as a defendant.[4]

On December 23, 2020, the judge heard argument on LaFashia's dismissal motion and granted the motion in a decision placed on the record. The judge held only the Association had standing to pursue a claim for damages related to common elements and, therefore, the Estate lacked standing to assert such a

[4] The allegations contained in the amended complaint were the same as the allegations contained in the complaint.

claim. Additionally, the judge noted McNamara sold Unit 2 and was no longer a member of the Association when she filed the complaint.

The judge also rejected the Estate's contention that section 19 of the Association's Master Deed and Article 6 of the Association's bylaws supported her claims against LaFashia. The judge held section 19 of the Master Deed "did not permit a former owner of Unit 2 to sue a former unit owner of Unit 1 for title defects and certain common elements which existed at the time both owners were members of the association."[5] Similarly, the judge found only the Association, not the Estate, had standing to sue under Article 6 of the bylaws.[6]

The judge further explained the Association "did not make an assessment against LaFashia for repairs to the bulkhead, or issues with [r]iparian claim." After reviewing the escrow agreement and condominium documents, the judge concluded, "instead of calling a meeting or going to arbitration on the issue,

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[5] Section 19 of the Association's Master Deed states: "In a voluntary conveyance of a family unit[,] grantee of the unit shall be jointly and severally liable with grantor for all unpaid assessments by the association against the latter for his share of the common expenses up to the time of the grant or conveyance without prejudice to the grantee's right to recover from grantor the amounts paid by grantee therefor."

[6] Article 6 of the Association's bylaws states: "All owners are obligated to pay monthly assessments imposed by the association to meet all project communal expenses . . . ."

[McNamara] entered into, voluntarily, an escrow agreement with the Kenefics and agreed to solely fund [the] same." In granting the dismissal motion, the judge noted LaFashia was never a party to the escrow agreement.

The judge also dismissed the Kenefics' crossclaim against LaFashia because contract of sale for Unit 1 provided the property was sold "as is" and the Kenefics did not rely on any representations made by LaFashia prior to closing. The judge signed a December 30, 2020 order dismissing all claims against LaFashia.

B.

On March 17, 2021, the Kenefics and Gillespie filed a motion to dismiss the amended complaint based on the judge's granting of LaFashia's dismissal motion. The Estate opposed the motion and filed a cross-motion for reconsideration of the December 30, 2020 order. On May 4, 2021, the judge heard argument on the motions.

In a May 18, 2021 order and attached written decision, the judge denied the Estate's cross-motion for reconsideration and granted the Kenefics' and Gillespie's motion to dismiss. The judge, citing N.J.S.A. 46:8B-14(a) and (b) of the New Jersey Condominium Act (Condominium Act), N.J.S.A. 46:8B-1 to -38, concluded the Association bore the responsibility to "maintain, repair and

replace common elements, and assess and collect funds from unit owners for common expenses." Referring to N.J.S.A. 46:8B-17, the judge stated "[a] unit owner shall, by acceptance of title, be conclusively presumed to have agreed to pay his proportionate share of common expenses accruing while he is the owner of a unit." The judge noted the Condominium Act provides "the liability of a unit owner for common expenses shall be limited to amounts duly assessed in accordance with this act, the master deed and by-laws."

Instead of seeking an assessment by the Association for common element expenses, the judge found McNamara "unilaterally concluded that the Association was deadlocked, that it would not make the assessment, and hastily and voluntarily entered into the [e]scrow [a]greement with Kenefics whereby [McNamara] agreed to place the full amount for repairs into escrow." On the date McNamara sold Unit 2, the judge explained, "the Association still had not made any assessment relative to the common elements." In fact, the judge acknowledged the Association had not made any assessments related to the common element title defects as of the return date of the dismissal motions.

Additionally, because the Kenefics did not own a unit when the title defects were discovered, the judge held the Kenefics bore no responsibility to pay a proportionate share of any common expenses under N.J.S.A. 46:8B-17.

For these reasons, the judge concluded the Estate lacked standing to sue the Kenefics.

C.

As for the Estate's claims against Gillespie, the judge determined Gillespie acquired Unit 1 from the Kenefics on October 20, 2020, well after the discovery of the common element title defects and after McNamara signed the escrow agreement. Thus, the judge held Gillespie was not liable to the Estate for monies escrowed by McNamara related to the common element title defects discovered before Gillespie became the owner of Unit 1.

D.

In denying the Estate's motion for reconsideration, the judge initially deemed the motion untimely. However, in a June 4, 2020 amended order and written decision, the judge denied reconsideration because the Estate "failed to meet the standard required for a motion to reconsider" and failed to demonstrate "the [c]ourt's decision was based upon plainly incorrect reasoning, that the court failed to consider evidence, or that there is good reason to reconsider new information."

The judge found the Estate introduced no new evidence previously undiscoverable when opposing LaFashia's motion to dismiss. The judge

expressly declined to consider Gilman's certification because the information he provided as McNamara's closing attorney was not based on personal knowledge and contained information that was either known or should have been known prior to the court's decision on LaFashia's motion to dismiss.

Although denying reconsideration, the judge addressed, and rejected, the Estate's claim for relief under Rule 4:32-3, governing derivative actions by shareholders. The judge explained McNamara "fail[ed] to describe any effort to obtain an assessment from the Association or the reasons for not making a formal request for an assessment" to assert a claim under Rule 4:32-3. He further noted McNamara "fail[ed] to explain why [she] did not request arbitration on the issue prior to closing." Thus, the judge held the Estate could not "bring a derivative claim based upon the Association's failure to make an assessment, when [McNamara] never tried to obtain [the] same."

The judge concluded McNamara "chose to bare the huge risk of contributing the entire costs relating to resolving the title defects on both units and to seek reimbursement from the owner of Unit 1 through litigation if necessary." In denying reconsideration, the judge stated the Estate "is now discovering that the Condominium Act, the Master Deed and By-Laws, and applicable case law do not support [McNamara's] request for contribution where

no assessment, and no attempt at seeking and/or compelling an assessment, had been made previously."

III.

On appeal, the Estate raises argues the judge erred in dismissing McNamara's claims against defendants. We reject the Estate's arguments.

We "review[] de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e)." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). We "owe[] no deference to the trial court's legal conclusions." Ibid.

A motion to dismiss under Rule 4:6-2 focuses on the pleadings. Pursuant to Rule 4:6-2(e), a complaint may be dismissed if the facts alleged in the complaint fail to state a viable claim as a matter of law. The standard for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Green v. Morgan Props., 215 N.J. 431, 451-52 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "However, we have . . . cautioned that legal sufficiency requires allegation of all the facts that the cause of action requires." Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 385 (App. Div. 2010), aff'd as modified, 211 N.J. 362 (2012). When a complaint states no basis for relief and discovery

would not provide one, dismissal of a complaint is appropriate. Sparroween, LLC v. Twp. of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017).

A.

We first consider the Estate's argument the judge erred in dismissing the claims against the Association. There was no appearance filed on behalf of the Association before the trial court. However, the judge's June 4, 2021 order dismissed the Estate's complaint "as to all [d]efendants, including the Association, with prejudice." We note an appellate merits brief was submitted on behalf of the Kenefics, Gillespie, and the Association. Thus, we address the Estate's arguments regarding dismissal of the claims against the Association.

"Standing is a threshold justiciability determination of whether [a] plaintiff is entitled to initiate and maintain an action on the matter before the court." Spinnaker Condo. Corp. v. Zoning Bd. of Sea Isle City, 357 N.J. Super. 105, 110 (App. Div. 2003). To have standing, a plaintiff must have "a sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm . . . in the event of an unfavorable decision." Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645 (2009).

1.

The Estate argues McNamara had standing to sue the Association under Walker v. Briarwood Condo Association, 274 N.J. Super. 422 (App. Div. 1994). In that case, the plaintiff, a former unit owner, sued the condominium association to recover payment of an assessed fine for violation of the condominium association's rules and regulations while the plaintiff was a unit owner. Id. at 424-25. The plaintiff paid the assessment at the closing of her unit and then sued the condominium association to recoup the money. Ibid.

The Estate's reliance on Walker is misplaced because the facts in that case are distinguishable from the facts in this matter. Here, unlike Walker, the Association never levied any assessment to address title defects involving the common elements. Nor did McNamara follow the procedures for resolving common element expenditures as provided under the Association's governing documents. Thus, the Estate failed to demonstrate entitlement to relief under Walker.

2.

We also reject the Estate's standing argument to pursue common element title defect claims. Only the Association has standing to pursue claims related to common elements. See Siller v. Hartz Mountain Assoc., 93 N.J. 370, 378

(1983); Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 85 (App. Div. 2013). Thus, the Estate lacks standing to seek relief related to the common element title defects.

3.

We next consider the Estate's claim McNamara had standing to compel the Association to assess expenses related to the common element title defects. The Association's Master Deed provides the unit owners share common element expenses equally. Under the Master Deed, if the owners of Unit 1 and Unit 2 are unable to "agree on any item necessitating Condominium Association approval, the matter shall be referred to binding arbitration before an arbitrator."

Here, McNamara was no longer a unit owner when she filed the complaint. Further, McNamara never requested the Association issue an assessment for the common element defects. Nor did she submit the dispute to arbitration as required under the condominium's governing documents. Instead, McNamara elected to sign the escrow agreement, contribute the entire Escrow Fund amount, and proceed with the sale of Unit 1 to the Kenefics. McNamara chose to proceed in such a manner, ignoring relief available to her under the condominium's governing documents. As a result, the Estate is bound by the decisions made by McNamara and must abide by the terms of the escrow agreement.

4.

Nor does Rule 4:32-3 allow the Estate to bring a derivative action against the Association. To pursue a derivative action, a plaintiff must first demonstrate a specific request to the party having the primary right to bring suit, unless such a demand "would be futile." In re P.S.E.&G. S'holder Litig., 173 N.J. 258, 278-79 (2002) (noting Rule 4:32-3 requires a plaintiff to describe with particularity the actions taken to comply with the Rule or the reasons for the failure to comply).

Here, McNamara's pleadings did not include any statement regarding a demand for the Association to take action to cure the title defects related to common elements. Nor did the Estate explain why McNamara failed to do so. Thus, the Estate failed to satisfy the requirements to pursue a derivative action under Rule 4:32-3.

B.

We next consider whether the judge erred in dismissing the Estate's claims against the Kenefics and Gillespie. The Estate argues a unit owner can sue another unit owner for failing to comply with the Master Deed. However, the Estate's argument overlooks the fact that McNamara was no longer a unit owner when she filed her complaint.

1.

The Estate also claims the Kenefics and Gillespie were aware the dispute between McNamara and LaFashia related to title defects concerning common elements and the escrow fund created to cure such defects prior to their taking ownership of Units 1 and 2. Therefore, the Estate argues the Kenefics and Gillespie were obligated to contribute toward the repair of the common element title defects. However, the Condominium Act, N.J.S.A. 46:8B-17, limits liability for common element expenses to those expenses arising at the time of unit ownership.

Here, the title defects related to the common elements were discovered in December 2019, prior to the Kenefics or Gillespie taking ownership of Units 1 and 2. Thus, the defects did not accrue during their ownership as required under N.J.S.A. 46:8B-17.

2.

Additionally, the Estate contends unit owners may sue one another for damages to the common elements if the unit owner fails to comply with a provision in the Master Deed in a derivative lawsuit. As discussed supra, Rule 4:32-3 requires a plaintiff to describe with particularity the efforts to secure the

desired action from the managing directors, trustees, or shareholders, or an explanation for the failure to do so.

McNamara's complaint "demanded that LaFashia, as the owner/seller of Unit 1, fund the remaining one-half of the Escrowed Fund[]." Notably absent from the pleading is any statement explaining McNamara's efforts to address the common element title defects or explain why she failed to do so. As a result of McNamara's failure to comply with the requirements of Rule 4:32-3, the Estate cannot pursue a derivative action.

IV.

We next review the Estate's claim the judge erred in dismissing the claims against LaFashia. The Estate also contends the judge should have compelled LaFashia to participate in arbitration under the Master Deed regarding common element expenses. We reject these arguments.

Here, McNamara was no longer a unit owner as of February 2020 and the arbitration provision in the Master Deed applied to disputes between existing unit owners as members of the Association. Additionally, LaFashia had no legal obligation to pay the sums demanded by McNamara or the Estate under the condominium's governing documents, the escrow agreement, or case law.

1.

While she was a unit owner, McNamara could have sought to compel LaFashia's participation in binding arbitration to resolve the common element title defects identified by Shore. However, McNamara chose to forego the dispute resolution mechanism available to her under the condominium's governing documents. Instead, she voluntarily entered into the escrow agreement and assumed sole responsibility for remedying title defects associated with the common elements. Had McNamara invoked the arbitration provision under the condominium's governing documents while she was a unit owner, McNamara's claims against LaFashia might have been viable. However, McNamara is bound by the decision she made when she signed the escrow agreement in lieu of demanding binding arbitration.

Additionally, the judge properly dismissed the claims against LaFashia because he was not a party to the escrow agreement. In fact, the escrow agreement did not contemplate any financial obligation on the part of other unit owners.

2.

The parties provided no information regarding the distribution, if any, of the Escrow Fund held by Shore under the escrow agreement. Nor has the Estate

addressed efforts, if any, to enforce the terms of the escrow agreement. We note the complaint and the amended complaint failed to name Shore as a party or seek enforcement of the escrow agreement.[7]

Based on our review of the record, there appears to have been no further action by McNamara, or the Estate, despite clear language in the escrow agreement requiring action to remedy the title defects to the common elements.

Because we affirm the judge's orders dismissing the Estate's claims against defendants, we need not consider the Estate's argument the judge erred in denying its motion for reconsideration.

We take no position whether the Estate may have a right to declaratory relief under the escrow agreement against the parties to that agreement. Nor do we express any opinion whether the Estate may have possible claims against other parties related to the negotiation and execution of the escrow agreement.

To the extent we have not specifically addressed any arguments raised by the Estate, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

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[7] The Kenefics filed a third-party complaint against Shore. There is no information in the record reflecting whether the third-party complaint was served and, if so, the disposition of the third-party claims.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION