Wojeck v. Latimer Point Condo. Ass'n

Superior Court of Connecticut, Judicial District of New London At New London
January 7, 2014, Decided
KNLCV116010879S

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Julie A. Wojeck et al. v. Latimer Point Condominium Association, Inc. et al.

Core Terms

movant, fiduciary duty, bylaws, unit owner, plaintiff's claim, commerce, owed, condominium association, ascertainable, condominium, shareholder, fiduciary, unfair trade practice, individual owner, unfair

Judges: **[*1]** Leeland J. Cole-Chu, J.

Opinion by: Leeland J. Cole-Chu

Opinion

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO STRIKE (#142)

The plaintiffs in this case are Julie A. Wojeck and James Wojeck (the Wojecks) and a Florida limited liability company called Latimer Financial, LLC (Latimer Financial), of which the Wojecks are the managing members. Latimer Financial owns unit #24 in the Latimer Point condominium association in Stonington, Connecticut.[1] The plaintiffs, by an Amended Complaint dated November 29, 2011 (complaint), have sued Latimer Point Condominium Association, Inc. (LPCA or the association), and nine individual defendants, each of whom is a member of the LPCA. The complaint includes ten counts, all relating to actions by the LPCA and the LPCA's Architectural Control Committee (ACC) concerning alleged failures to follow the LPCA bylaws in handling an application by Genarro Modugno and Elizabeth Modugno[2] for approval of construction at their Latimer Point unit, #7. Seven members of the ACC are named as individual defendants: Andrew Feinstein, Jill Bennett, Grace Ann Conti, Douglas Delahanty, Malcolm Smith, Michael Guidera, and Sharon Stryker (individual movants). By motion filed on June 28, 2013, the **[*2]** individual movants and the LPCA (collectively, "movants") have moved to strike (1) all claims against the individual movants;[3] (2) counts four and five, which respectively allege breach of fiduciary duty by the LPCA and the individual movants; and (3) count eight, the plaintiffs' claim under the Connecticut Unfair Trade Practices Act (CUTPA). The plaintiffs filed an opposing brief on August 30, 2013. The motion was argued on September 9, 2013.

FACTS

For present purposes, the court takes the facts to be those alleged in the complaint, construed in favor of its legal sufficiency. See *New London County Mutual Ins. Co. v. Nantes*, 303 Conn. 737, 747, 36 A.3d 224 (2012); see also *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 252-53, 990 A.2d 206 (2010) (complaint is construed broadly; necessarily implied allegations are accepted as true). Viewing the complaint in this light, the key facts pertinent to this motion are as follows.

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[1] Without alleging that they, personally, own a unit in the Latimer Point condominium association, the Wojecks allege that they, as well as Latimer Financial, are members of the LPCA. That is an allegation of which the court is skeptical. However, their standing has not been challenged and the correctness of that allegation is not important to this decision.

[2] Genarro and Elizabeth Modugno are defendants in this action, none of the ten counts in the complaint is against either of them in the sense of alleging any wrong done by them or any liability to the plaintiffs. Apparently, and reasonably, the Modugnos have been sued to ensure that they have notice of, and the opportunity to defend, this because the entire lawsuit and key parts of the relief **[*3]** sought (particularly injunctive relief) concern their Latimer Point unit.

[3] The two-page motion to strike challenges these claims only in counts one and six, but the brief (#143) filed with the motion is not so limited. Like count six, count five is against "Defendant, ACC Chairman Feinstein and ACC members." Count eight also is against the LPCA and the individual movants. The court deems the motion to seek to have all claims against the individual movants stricken. That is the clear intent of the motion, read in light of the brief and the plaintiffs' opposing brief. The court finds there is no prejudice to the plaintiffs from this construction of the motion.

Latimer Financial **[*4]** is the owner of unit 24 at Latimer Point, a common interest ownership community located on the Long Island Sound shoreline in Stonington, Connecticut. The Wojecks are the managing members of Latimer Financial. Latimer Point consists of real property owned by members of the association and was created by declaration of the LPCA recorded in the Stonington land records on November 25, 1998. The Modugnos are the owners of unit 7, which is situated within the water view of the plaintiffs' unit.

The ACC is a ″standing committee″ of the LPCA and consists of the seven individual movants. Defendant Feinstein is the chairman of the ACC and acted in that capacity for purposes of this action. The LPCA is the reviewing body for all decisions rendered by the ACC. The LPCA and the ACC are governed by the LPCA's bylaws, which were in effect at all times relevant to this action. In accordance with the bylaws—particularly a detailed sequence of events for the processing of construction applications and objections to such applications—all building construction by members of the association is regulated by the ACC and the executive board of the LPCA.

The association's bylaws include a ″Ten Percent Rule,″ **[*5]** to protect members' units' water views from new obstructions, including by construction and renovation of buildings. This rule mandates that ″[t]he Association shall ensure that no member's water view shall ever be diminished by more than 10% due to cumulative constructions of other units and/or the Association″ (at least without the affected unit owner's consent). The ACC basically enforces the Ten Percent Rule in accordance with the bylaws.

In 2010, in anticipation of future construction applications, the ACC recommended that unit owners file with the association a ″Primary Water View Designation Form″ and the Wojecks did that concerning unit 24. In April of 2011, James Wojeck was provided with a copy of a purported application by the Modugnos for construction at unit 7 (the application), which sought, among other things, to increase the height of the roof on their unit. The proposed construction would be directly within the water view of the plaintiffs' unit. (Mr. Wojeck was later told by an employee of the association that no such application was on file.) A substantially similar application by ″Defendant, Modugno″ was denied by the ACC in 2007 because the project would exceed the **[*6]** Ten Percent Rule as to the Wojecks' water view. The Wojecks objected to the application in April of 2011. On June 18, 2011, the ACC held a hearing on the application. After that hearing, the Modugnos provided the ACC with additional documents in support of their application, including amended construction plans. The ACC met on August 10, 2011, to decide the application (among other matters). Not until that meeting did the ACC determine how the Ten Percent Rule applied to the Modugnos' proposed construction in relation to the plaintiffs' unit's views. On August 10, 2011, the ACC granted the Modugnos' application over the objections of the plaintiffs and despite the facts that the application had not been filed, the required fee had not been paid to the association, the plaintiffs' objections had not been considered and mediated, the ACC had not first determined whether the proposed construction impacted the plaintiffs' units' primary water view, the ACC had made no finding as to the effect of units other than the Modugnos' unit on the plaintiffs' unit's view, and numerous other failings. The plaintiffs appealed the ACC decision to the LPCA. On September 27, 2011, the LPCA issued a decision **[*7]** denying the plaintiffs' appeal.

DISCUSSION

″Whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint . . . or of any one or more counts thereof . . . that party may do so by filing a motion to strike the contested pleading or part thereof.″ *Practice Book §10-39(a)(1)*. The purpose of a motion to strike is to challenge the legal sufficiency of the allegations of a complaint or count to state a claim upon which relief can be granted. *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). In determining the sufficiency of a pleading, all well-pleaded facts and all necessarily implied facts are taken as admitted. *Coe v. Board of Education*, 301 Conn. 112, 116-17, 19 A.3d 640 (2011). If any facts provable under the stated and implied allegations support a cause of action, the motion must be denied. *Bouchard v. People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991).

The claims relevant to the present motion are stated in counts one, four, five, six, and eight. In count one, the plaintiffs claim that the individual movants, as members of the ACC, violated the bylaws of the association and failed to follow proper procedure in **[*8]** their handling of the Modugnos' construction application. As a result, the plaintiffs claim that the individual movants violated *General Statutes §47-278*.[4] In count four, the plaintiffs claim that the LPCA breached a fiduciary duty owed to the

[4] That the defendants ″violated″ §47-278 is a misnomer. General Statutes §47-278 provides, in relevant part: ″(a) A . . . unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the **[*9]** bylaws . . .″ Section 47-278 does not create duties the violation of which could be the subject of

plaintiffs. The plaintiffs likewise claim in count five that the individual movants, as members of the ACC, breached a fiduciary duty owed to the plaintiffs. Count six is against the LPCA and the individual movants, as members of the ACC, for violation of *General Statutes §47-250*, for failure to allow the Wojecks and their attorney to comment at an August 10, 2011 meeting of the ACC that pertained to the Modugnos' construction application.[5] In count eight, the plaintiffs claim that the actions of the LPCA, the ACC and the individual movants violated the Connecticut Unfair Trade Practices Act, *General Statutes 42-110b*.[6] Additional facts shall be provided as needed.

First, the present motion asks that all claims against the individual movants be stricken because said claims are prohibited by *General Statutes §47-253(b)*. That statute provides, in pertinent part, that "[a]n action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be **[*11]** maintained against the association and not against any unit owner." The plaintiff's claims that *§47-253(a)*, which provides that "[a] unit owner is not liable, solely by reason of being a unit owner, for injury or damage arising out of the condition or use of the common elements," means that *§47-253(b)* is no bar to suing a unit owner in his or her capacity as members of "the regulatory body for Latimer Point when it comes to building construction and vegetation regulation in relation to unit owner's water view protection at Latimer Point." The court finds the plaintiffs' argument flawed for two reasons. First, the part of *§47-253(b)* relied upon by the movants is plain and unambiguous. Applying it literally yields no strange results. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." *General Statutes §1-2z*. The court sees no reason to infer an exception **[*12]** to the statutory bar against suits against unit owners for alleged wrongs of the common interest community association. Indeed, the court perceives a very sound reason for that bar: without it, the risk of personal litigation could easily discourage unit owners from serving on common interest community association boards and committees and threaten the vitality and functioning of those communities and the value of interests in them.[7]

Second, the specific allegations of the complaint reveal no reason *§47-253(b)*'s bar against suing unit owners does not apply. No portion of the complaint alleges that the individual movants engaged in personal misconduct, individually violated the bylaws, or committed wrongdoings outside the scope of their duties performed on **[*13]** behalf of the LPCA. Rather, the allegations are directed at the individual movants collectively, as members of the ACC, through which they act on behalf of the LPCA. Consequently, the plaintiffs' claims only allege wrongs done by the LPCA, as a whole, or the ACC as its instrumentality. Under similar circumstances, the court in *Lake Forest of Bridgeport, LLC v. Lake Forest Assn.*, Superior Court, judicial district of Fairfield, Docket No. CV-07-5011120-S (March 3, 2008, Frankel, J.) (45 Coun. L. Rptr. 77, 2008 Conn. Super. LEXIS 494), granted a motion to strike the claims against the

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this suit. Rather, it is an enabling statute: it gives rights, for the most part, such as in this case where it is being utilized as the basis for a unit owner to bring a legal action to enforce a right granted or obligation imposed by the bylaws of a common interest community. Although §47-278 creates some duties—such as subsection (c), requiring the association to hold a hearing before suing a unit owner—the plaintiffs' complaint alleges no facts that support a claim of violation of any duty created by §47-278. Instead, it is clear that what the plaintiffs intend to convey is that their claims are brought *pursuant to*§47-278(a). For that reason, and because it is a conclusion of law, that the defendants violated §47-278 is not here taken as true.

[5] Section §47-250 is part of the Connecticut Common Interest Ownership Act, §47-200 et seq. The plaintiffs, in their complaint, direct the court to §47-250(a)(4) and (b)(5), as the specific provisions of §47-250 violated by the individual movants for purposes of count six. Section 47-250(a)(4) provides: "The following requirements apply to unit **[*10]** owner meetings: . . . Unit owners shall be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association." Section 47-250(b)(5) provides in relevant part: "The following requirements apply to meetings of the executive board and committees of the association authorized to act for the association: . . . [T]he secretary or other officer specified in the bylaws shall give notice of each executive board meeting to each board member and to the unit owners. The notice shall be given at least five days before the meeting . . ."

[6] In their prayer for relief, the plaintiffs request, *inter alia*, a temporary injunction against giving effect to the association's approval of the application and against the Modugnos' proposed construction, as well as money damages including under CUTPA.

[7] The plaintiffs' argument for an exception to §47-253(b) for claims "for injury or damage arising out of the condition or use of the common elements" is without merit for two reasons. First, none of the counts of the complaint concerns common elements. Second, even if any of them did concern common elements, General Statutes §47-75(c) bars such claims except in proportion to a unit owner's percentage interest in the common elements.

individual members of a condominium association's board of directors, pursuant to §47-253. This court finds *Lake Forest* well reasoned and persuasive on this issue. Because §47-253(b) provides that "[a]n action alleging a wrong done by the association . . . may be maintained against the association and not against any unit owner," all of the claims against the individual movants—which can be found in counts one, five, six, and eight—shall be stricken.

Next, the movants move to strike count four, which claims that the LPCA breached a fiduciary duty it owed to the plaintiffs, and count five, which claims that the individual movants breached **[*14]** a fiduciary duty they owed to the plaintiffs. The following additional facts from the complaint, here taken to be true (unlike conclusions of law), are pertinent to the analysis for these two counts.

The LPCA appointed the members of the ACC to act on the LPCA's behalf. The LPCA sustained the ACC's decision on the Modugnos' application for construction knowing that the ACC's decision was outside the scope of the rules governing construction applications set forth in the bylaws. The ACC and its chairman, Feinstein, ruled in favor of the application that they knew was outside, and in violation of, the LPCA bylaws.

The plaintiffs claim that the ACC was established to protect the water views of the individual owners and a fiduciary relationship exists between the plaintiffs and the association (count four) and the ACC and its members (count five). The movants argue that these two counts should be stricken because the movants do not owe a fiduciary duty to the plaintiffs and, even if they did, the plaintiffs fail to allege conduct that constitutes a breach of the alleged fiduciary duty. The plaintiffs counter by arguing that the bylaws require the LPCA and ACC to "protect each member's water **[*15]** view," particularly through enforcement of the Ten Percent Rule, and that said requirement of the bylaws creates a *de facto* fiduciary relationship but cite no cogent authority for that proposition. The court agrees with the movants.

"[A] prerequisite to finding a fiduciary duty is the existence of a fiduciary relationship . . . [U]nder Connecticut law, a fiduciary or confidential relationship is broadly defined as a relationship that is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Internal quotation marks omitted.) *Ahern v. Kappalumakkel*, 97 Conn.App. 189, 194, 903 A.2d 266 (2006). For gnidance on this issue in the context of an association board and unit owner relationship, the court looks to *General Statutes §47-245(a)*—part of the Connecticut Common Interest Ownership Act (CIOA), *§47-200 et seq.*—which provides in relevant part: "In the performance of their duties, officers and members of the executive **[*16]** board appointed by the declarant shall exercise the degree of care and loyalty *to the association* required of a trustee and officers and members of the executive board not appointed by a declarant shall exercise the degree of care and loyalty *to the association* required of an officer or director of a corporation . . ." (Emphasis added.) Relying primarily on its interpretation of *§47-245(a)*, the court in *McCreary v. One Strawberry Hill Assn., Inc.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-10-6006749-S (April 29, 2011, Tobin, J.) (51 Conn. L. Rptr. 892, 894, 2011 Conn. Super. LEXIS 1140), determined that "Connecticut condominium law presently recognizes that the board [of an association] owes a duty of care and loyalty *to the association but not to an individual owner*." (Emphasis added.) As a result, the court in *McCreary* granted a motion to strike a claim alleging that a condominium association's board of directors breached its fiduciary duty to an individual owner. In doing so, *McCreary* also drew an analogy to the fiduciary duty that a corporation's board of directors owes to shareholders. As the court pointed out, "a corporate director's various [fiduciary] duties are owed **[*17]** to the corporation directly, and only indirectly [to] the corporation's shareholders . . . Thus, a shareholder bringing a claim against a corporate director for breach of fiduciary duty must allege facts demonstrating that a special relationship exists beyond the basic relationship between director and shareholder because [t]he board of directors has a general fiduciary duty to shareholders, but not a specific duty to an individual shareholder, absent a special relationship." (Citation omitted; internal quotation marks omitted.) *Id.* *McCreary* analogized these principles to the situations involving condominium associations, holding that "[u]nder the CIOA a condominium association's board of directors owes a fiduciary duty only to the association and not to an individual owner, absent a special relationship." *Id.* This court finds *McCreary* well reasoned and adopts its conclusions.

In the present case, the plaintiffs have failed to allege facts that support a special relationship between themselves and the LPCA or ACC. The court of course agrees that the movants had a duty to adhere to the bylaws of the association, including properly applying the Ten Percent Rule to protect a member's water **[*18]** view. But that duty runs to the association and to the unit owners collectively, not to any individual owner specifically. The duty does not create a fiduciary relationship between

the LPCA or ACC and the plaintiffs. A claim alleging a breach of that general CIOA duty is appropriately brought pursuant to *§47-278*, as the plaintiffs have already done elsewhere in their complaint. Accordingly, counts four and five are not legally sufficient claims for breach of a fiduciary duty.

Lastly, the movants argue that count eight should be stricken because it fails to allege a legally sufficient CUTPA claim. The plaintiffs allege that the conduct of the LPCA and the ACC in handling of the Modugnos' application constituted a willful, malicious, unfair and deceptive trade practice in violation of CUTPA, *General Statutes §42-110b*. They further allege that the movants ″have a practice . . . of implementing unequal and unfair tactics in the manner in which the bylaws are applied to unit owners. These tactics effectuate a strategy of implementing their duties in an inconsistent manner as to unit owners in order to achieve desired results.″ As a consequence of that conduct, the plaintiffs claim that they **[*19]** have suffered and will continue to suffer harm and financial loss.

The movants argue that count eight is legally insufficient because it fails to plead two essential elements of a valid CUTPA claim. First, count eight does not state facts showing that the alleged misconduct relates to trade or commerce within the meaning of CUTPA. Second, it does not allege the plaintiffs suffered an ascertainable loss of money or property. The plaintiffs claim that they have adequately pleaded both of those elements. They argue that some trial courts have concluded that the conduct of a condominium association can, under certain circumstances, relate to trade or commerce. Second, they claim to have pleaded an ascertainable loss—specifically, that the conduct of the defendants has adversely impacted the value of their property. Again, the court agrees with the movants.

CUTPA prohibits unfair trade practices. ″No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.″ *General Statutes §42-110b(a)*. The purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce. *Sovereign Bank v. Licata*, 116 Conn.App. 483, 493, 977 A.2d 228 (2009), **[*20]** appeal dismissed, *303 Conn. 721, 36 A.3d 662 (2012)*. ″'Trade' or 'commerce' means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.″ *General Statutes §42-110a(4)*. Management activities of condominium associations do not fall within CUTPA's statutory definition of ″trade or commerce.″ *Rafalowski v. Old County Road, Inc.*, 245 Conn. 504, 507, 714 A.2d 675 (1998) (affirming and adopting trial court's decision; see *Rafalowski v. Old County Road, Inc.*, 45 Conn.Sup. 341, 354-55, 719 A.2d 84 (1997)). Although in some Superior Court cases the court has permitted CUTPA claims against condominium associations, those cases generally involve entrepreneurial activities, such as advertising or the sale or purchase of condominium units. *DiDomenico v. Strawberry Woods Condominium Assn., Inc.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-11-6011644-S, 2012 Conn. Super. LEXIS 1959 (August 2, 2012, Tierney, J.T.R.) (discussing cases). Accordingly, ″[m]anagerial duties of a condominium association **[*21]** will be excluded from CUTPA but a condominium association's entrepreneurial activities will be subject to CUTPA.″ *Id.*

The court agrees with the movants that the conduct alleged in this case relates strictly to the LPCA's and ACC's managerial activities and does not involve ″trade or commerce.″ The plaintiffs' allegations pertain exclusively to the movants' violation of the association's bylaws and their management of the association, in general, and the construction application process, in particular, concerning the conduct (or omission) of meetings, implementation of bylaw procedures, enforcement of the Ten Percent Rule, and resolution of disputes between unit owners. These are managerial functions. The plaintiffs' allegations do not relate to entrepreneurial activities of the condominium association or other activities of the association that are colorably within trade or commerce.

Furthermore, for the plaintiffs to have a valid CUTPA claim, they must allege facts supporting an ″ascertainable loss of money or property, real or personal″ caused by an unfair trade practice by the defendants. *General Statutes §42-110g(a)*. The word ″ascertainable″ is not talismanic. The plaintiffs do allege **[*22]** they ″have suffered and will continue to suffer harm and financial loss.″ The plaintiffs claim that they ″primarily allege that the defendants' violations of the bylaws . . . [have] adversely impacted the value of the plaintiffs' property.″ However, apart from the conclusory nature of their allegation of loss, the plaintiffs failed, as stated above, to allege an unfair trade practice by the defendants and, perforce of that failure, allege no ascertainable loss from such a practice. Accordingly, in addition to not meeting the ″trade or commerce″ requirement of CUTPA, the plaintiffs have also failed to plead the requisite ascertainable loss. The eighth count is legally insufficient.

CONCLUSION

For the above reasons, the motion to strike all allegations of the complaint as to the individual movants and

counts four, five and eight is granted. The CUTPA damages claims in the plaintiffs' statement of relief demanded must be, and hereby are, stricken along with count eight.

Cole-Chu, J.