NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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September 20, 2018

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Re: ***Patricia Rinker v. Oakton Condominium Unit Owners Association***
Case No. CL–2018–7525

Dear Counsel:

The issue before the Court is whether a condominium owner who sues her unit owners' association for damage to her unit caused by the common elements must join all of her fellow unit owners as necessary defendants. This Court holds that an owner need not do so and overrules Defendant Oakton Condominium Unit Owners Association's (the "Association's") Plea in Bar.

Plaintiff Patricia Rinker owns a condominium in The Oakton, a condominium community. She alleges, *inter alia*, her condominium is uninhabitable due to mold caused by water leaks from common elements. Compl. ¶¶ 1, 6–7. The Complaint alleges causes of action

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for nuisance, trespass, a violation of the Virginia Condominium Act[1] (the "Condominium Act"), negligence, negligent repair, and negligence per se. Compl. ¶¶ 38–77. Among others, Ms. Rinker sued the Association, which is responsible for governing The Oakton.[2] Compl. ¶ 2. Ms. Rinker did not name all of the other unit owners of The Oakton as co-defendants.

The Association filed and argued a Plea in Bar, asserting the Complaint should be dismissed because Ms. Rinker failed to join every unit owner of The Oakton. The Association reasons that, under the Condominium Act, each unit owner will have to pay a share of any judgment and therefore must be joined as co-defendants so they can protect their interests. It would not be fair, the Association argues, for the unit owners to be forced to pay a huge assessment resulting from a judgment where they were not named defendants.[3]

The Association analogizes this case with Virginia case law on mechanics' liens, chiefly relying upon *Mendenhall v. Douglas L. Cooper, Inc.*, 239 Va. 71 (1990) in support of its position. In *Mendenhall*, the Supreme Court of Virginia held that condominium unit owners were necessary parties to a mechanic's lien enforcement action where those owners were named in the recorded memorandum of mechanic's lien sought to be enforced. *Id.* at 73, 75. The Plea in Bar also relies on the basic principle that all necessary parties must be joined in a lawsuit, no matter how numerous. *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37, 49 (1924). Ms. Rinker rejects the Association's contention that she must join all her fellow unit owners, relying on the Condominium Act itself.

I. ANALYSIS

In Virginia, "a plea in bar is a defensive pleading that reduces the litigation to a single issue [of fact], which, if proven creates a bar to the plaintiff's right of recovery." *Baker v. Poolserv. Co.*, 272 Va. 677, 688 (2006) (quoting *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594 (2000) (citation omitted)). "The party asserting a plea in bar bears the burden of proof on the issue presented." *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010) (citations omitted).

In this case, the single issue of fact alleged is whether Ms. Rinker's claim is barred by her failure to join all necessary parties to the litigation. The Association's Plea in Bar specifically prays for this Court to "abate these proceedings unless and until Plaintiff has added all unit owners within the Association as parties." However, in Virginia, "[n]o action or suit shall abate or be defeated by the nonjoinder . . . of parties." VA. CODE § 8.01–5(A). Accordingly, this Court cannot sustain the Plea in Bar on the ground that Plaintiff failed to join the other unit owners as necessary parties. Nevertheless, the Plea in Bar makes a claim for general relief; praying "that this Court . . . grant such further relief as is just and proper."

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[1] Va. Code § 55–79.39, *et seq.*

[2] The other named defendants are the "Forkins," fellow residents of The Oakton, whose conduct Ms. Rinker also attributes the inhabitable state of her condominium; and Property Service Group, Inc. and the Minkoff Company, Inc., both of whom Ms. Rinker alleges to have provided inadequate remediation services to Ms. Rinker's apartment after she initially reported water damage to her condominium.

[3] The Complaint prays for damages in the amount of $9,000,000.

Where a party prays for general relief, a court sitting in equity may grant any proper relief consistent with the case stated in the equitable pleading and not inconsistent with the specific relief sought. *See Johnson v. Buzzard Island Shooting Club*, 232 Va. 32, 36 (1986) (citations omitted). This Court will therefore proceed under Rule 3:12 of the Rules of the Supreme Court of Virginia to "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent [unit owners] being thus regarded as indispensable." *See also Siska Trust v. Milestone Dev.*, 282 Va. 169, 179 (2011) ("By its express terms, Rule 3:12 was intended to govern the exercise of trial court discretion in dealing with cases where a necessary party has not been joined."). The Court concludes that proceeding in this manner is consistent with the case stated in the Association's Plea in Bar and is not inconsistent with the specific relief sought.

"'Common elements' means all portions of the condominium other than the units." VA. CODE § 55–79.41. Under the Condominium Act, the common elements are the responsibility of the unit owners' association. VA. CODE § 55–79.80(A). "An action for tort alleging a wrong done . . . in connection with the condition of any portion of the condominium which . . . the association has the responsibility to maintain, shall be brought against . . . the association." VA. CODE § 55–79.80:1(A). Similarly, a unit owners' association has "the irrevocable power as attorney-in-fact on behalf of all the unit owners . . . with respect to the common elements, including without limitation the right, in the name of the unit owners' association . . . [to] defend against, compromise, adjust, and settle any claims or actions related to common elements." VA. CODE § 55–79.80(B)(ii).

The Condominium Act "is designed to and does permit the exercise of wide powers by an association of unit owners." *Unit Owners Ass'n of Buildam. v. Gillman*, 223 Va. 752, 763 (1982). As the Supreme Court of Virginia explained in *Gillman*,

> The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners. While the unit owners are vested with an undivided interest in the common elements, the authority to control the use of the common elements is vested in the Association by the condominium documents.

Id. at 766.

In *Frantz v. CBI Fairmac Corp.*, 229 Va. 444, 445–46 (1985), a unit owners' association filed a complaint against the developer of the condominium alleging violations of the Condominium Act and violations of restrictive covenants. Twenty-seven unit owners moved to intervene. *Id.* at 446. Thereafter, the unit owners' association and the developer reached a settlement agreement. *Id.* Ultimately, because of the settlement, the trial court dismissed all claims of both the unit owners' association and the intervenors, concluding the unit owners were bound by the settlement. *Id.*

On appeal, the Supreme Court of Virginia held the unit owners were bound by the unit owners' association's settlement agreement with the developer. *Id.* at 452. The court explained, "the compromise involved a claim for the violation of a *common*, rather than an *individual*, right. The compromise was reached by the Association in a representative capacity on behalf of all the unit owners pursuant to its express and implied authority." *Id.* at 451 (emphasis added). The court recognized that the Condominium Act contemplates that where a claim concerns a right held in common by all unit owners, that claim shall be litigated by or against the unit owners' association, as opposed to by or against the unit owners themselves. *Id.* at 450–51.

The Condominium Act, coupled with the holding of *Frantz*, makes clear that the unit owners of The Oakton are not necessary parties to this lawsuit. Under the Condominium Act, the Association has the unlimited and irrevocable power to defend against Ms. Rinker's claims as attorney-in-fact on behalf of all of the other unit owners of The Oakton. VA. CODE § 55–79.80(B)(ii). Moreover, the Condominium Act provides that a cause of action arising from a condition of the common elements must be brought against the Association. VA. CODE § 55–79.80:1(A). There is no similar requirement to bring such a claim against every other unit owner.

Frantz clarifies that even if Ms. Rinker joins all the unit owners, a settlement agreement between her and the Association would legally bind the unit owners. 229 Va. at 451. By signing the condominium documents, the unit owners privately consented by contract to cede to the Association the wide power to act as attorney-in-fact with regard to claims concerning the common elements of The Oakton. *Gillman*, 223 Va. at 766. This is a major reason why a condominium owner should pay attention to what his or her unit owners' association is doing.[4]

The Association's reliance on *Mendenhall* and analogy to mechanic's lien is misplaced. In *Mendenhall*, the court defined "necessary parties" broadly:

> Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

239 Va. at 75 (citations omitted).

More recently, when determining necessary parties to mechanic's lien enforcement action, the Supreme Court of Virginia expounded, "the focus is on which parties actually have a *relevant* interest in the real property. Just because a party may be generally 'interested' in the mechanic's lien enforcement action, *such as having a pecuniary interest in the outcome of the*

[4] For example, the Condominium Act does not mandate the acquisition of liability insurance, but does permit unit owners' associations to purchase such insurance for circumstances like those alleged in the Complaint. VA. CODE § 55–79.81(A). Where a substantial monetary award is entered against a unit owners' association, such insurance might help protect owners from having to compensate for a substantial award out-of-pocket.

litigation, does not mean that the party is necessary to the proceedings." *Synchronized Constr. Servs. v. Prav Lodging, LLC*, 288 Va. 356, 365 (2014) (citation omitted) (emphasis added). "What constitutes the "subject matter" or res of a[n] . . . action narrows the necessary party analysis to a specific set of interests. . ." *Id.* at 364 (emphasis in original).

It is true that "[a] judgment for money against the unit owners' association shall be a lien against any property owned by the association, and against each of the condominium units in proportion to the liability of each unit owner for common expenses." VA. CODE § 55–79.80:1(D). Therefore, the unit owners of The Oakton do have a pecuniary interest in the outcome of this litigation, because if there is a verdict in favor of Ms. Rinker, a judgment lien may be imposed on each of the condominium units in proportion to the respective owner's liability for common expenses.

That said, the subject matter of this litigation precludes the conclusion that the unit owners of The Oakton are necessary parties. With only a pecuniary interest in the outcome, the other unit owners merely have a general interest in this litigation. Although the unit owners have "an equal undivided interest in the common elements," Ms. Rinker's claims do not implicate that property interest. VA. CODE § 55–79.55(a). Rather, the subject matter of this litigation is the Association's conduct as it relates to the common elements of The Oakton.

Thus, the circumstances of this case are readily distinguished from an action to enforce a mechanic's lien. A lawsuit to enforce a mechanic's lien necessarily implicates real property rights and resolution of such an action could defeat or diminish the interest of a person with a property interest in the real estate subject to the lien. *Prav Lodging*, 288 Va. at 364. Whereas, the causes of action contained in the Complaint here do not implicate real property rights. *Mendenhall* involved a perfected mechanic's lien already in existence that named specific condominium unit owners. 239 Va. at 73–74. In the case *sub judice*, no judgment lien exists, there only exists the possibility of a judgment lien in the future if Ms. Rinker prevails on her claims. Accordingly, the unit owners' property rights are not presently implicated. *See Deutshe Bank Nat'l Trust Co. v. Arrington*, 290 Va. 109, 118 (2015) (citing VA. CODE § 8.01–458) ("Ordinarily a judgment does not become a lien on real estate until 'such judgment is recorded on the judgment lien docket of the clerk's office of the county or city where such land is situated.'").

II. CONCLUSION

For the reasons stated herein, the Court holds that a condominium owner who sues her owners' association for common element-caused damages to her unit need not join all other unit owners as necessary defendants. Accordingly, the action may proceed without joinder of all unit owners of The Oakton as defendants. Va. Sup. Ct. R. 3:12(c). The Association's Plea in Bar is overruled.

An appropriate Order is attached.

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Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX

PATRICIA RINKER, *Plaintiff,* v. OAKTON CONDOMINIUM UNIT OWNERS ASSOCIATION, INC., *et al.*, *Defendants.*	)	CL-2018-7525

ORDER

UPON CONSIDERATION Defendant Oakton Condominium Unit Owners Association, Inc.'s Plea in Bar and Plaintiff's Opposition thereto; and

UPON HEARING oral argument by counsel for both parties on the Plea in Bar on September 14, 2018;

IT APPEARING to the Court that failure to join necessary parties is not a valid defense to the whole of Plaintiff's causes of action under Virginia Code § 8.01–5(A) but that this Court is without jurisdiction if all necessary parties to the action are not before the Court; it is hereby

ADJUDGED that the Plea in Bar will be treated as a Motion to Dismiss for Failure to Join Necessary Parties;

ADJUDGED that the unit owners of The Oakton, a condominium community, are not necessary defendants to this lawsuit pursuant to Rule 3:12 of the Rules of the Supreme Court of Virginia;

ORDERED that the Plea in Bar be, and is hereby overruled; and

DECREED that leave is granted to Defendant Oakton Condominium Unit Owners Association, Inc. to file an answer and such other responsive pleadings as it may be advised within twenty-one (21) days from the date of this Order.

The Honorable David A. Oblon

SEP 20 2018

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.