

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001221-MR

REX DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 11-CI-007023

INNWOOD CONDOMINIUM PROPERTY
OWNERS ASSOCIATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Rex Davis, appeals the March 4, 2013, memorandum and order of the Jefferson Circuit Court granting summary judgment in favor of Appellees, Innwood Condominium Property Owners Association, Inc. (“Inwood”), and dismissing Davis’s claims that in violation of the Master Deed that Innwood failed to maintain the common areas of the condominium complex

where Davis owned a unit. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Innwood was established by the Master Deed, which was recorded on January 14, 1981, and amended on July 22, 1985. The Master Deed provided for the creation of a Kentucky not-for-profit corporation, “Innwood Condominium Association, Inc.” to act on behalf of the Counsel of Co-Owners and which is governed by the Board of Directors. The Board is to be composed of between five and nine members who must be unit owners.

Innwood residents are a mix of low and fixed income individuals including many elderly individuals and those receiving government assistance pursuant to Section 8 of the Housing Act of 1937 (42 U.S.C. §1437(f)). As noted by the court below, since 2009, Innwood has had several issues which have required the expenditure of significant funds. In 2009-2010, Innwood was charged with violations of the Louisville Metro Building Codes which prompted Innwood to make certain brick repairs to buildings in the complex at a cost of nearly \$100,000. In 2010, Innwood made significant repairs to the heating system. Most recently, Innwood suffered a fire which resulted in damage to eight units. While insurance covered some of those expenditures, Innwood’s claims caused its insurance premium and deductible to rise significantly. As a result, Innwood’s Board of Directors approved a Special Assessment to collect the funds required by the insurance company for its reserves.

Davis purchased a unit in Innwood in the early 1980s, and initially rented it out. In 2000, he moved into the unit himself and has lived there since that time. In 2006, Davis ran for and was elected to the Innwood Board of Directors. He was re-elected in 2010, but was not re-elected in 2011. Recently, Davis was again elected to the Board and at the time of the lower court's decision in this matter was again serving as a Board member.

Davis filed this suit on October 27, 2011, in an attempt to force Innwood to immediately, completely, and uniformly enforce the terms of the Master Deed, bylaws, and rules, and for his attorney fees and costs. Davis asserted that the Board breached its duty by failing to maintain the common elements, including the sidewalks, parking lots, streets, gutters, basements, hallways, bushes, and the exterior of the buildings; by failing to limit the occupancy of the units to two adults; by failing to enforce parking regulations and pet rules; and by failing to require a criminal background check. Davis asserted that the value of his unit had been diminished as a result of the Board's breach of duty and submitted an appraisal which stated that his unit was only worth \$17,000, while specifically citing that the Property Valuation Administrator valued it at \$30,000. The appraisal stated that the exterior at Innwood was "inferior" and caused a direct loss of value between 25% and 50%. Davis states that the Master Deed requires that the condominiums be maintained as a "first-class condominium," and that this was not done. Davis asserts that he presented evidence of this through the submission of pictures, the aforementioned appraisal, and an affidavit.

Shortly after Davis filed this suit, Innwood moved to dismiss the suit on January 4, 2012, and that motion was denied by the court in an order dated March 5, 2012. Written discovery was exchanged and Davis was deposed after which time he filed a motion for summary judgment on November 16, 2012. Innwood filed a response and cross-motion for summary judgment on December 21, 2012. At the close of briefing, the court entered the aforementioned March 2013 order denying Davis's motion, granting Innwood's motion, and dismissing all claims upon the finding that the business judgment rule applied in this case. Davis filed a post-judgment motion on March 20, 2013, which was denied by the court on July 5, 2013. Davis now appeals to this Court.

On appeal, Davis makes two assertions: First, that Innwood did not comply with the Master Deed; and second, that material issues of fact exist. Davis asserts that the pictures which he submitted indicate problems with gutters, sidewalks, parking lots, streets, halls, bushes, and building exteriors. Davis asserts that the pictures clearly indicated a breach of duty, which was not satisfied through discussion of problems, voting, or approval of assessments. Davis argues that material issues of fact need to be decided before a finding is made that the business judgment rule applies in this case, and that the court had no facts on which to base its finding that there was no self-interest on the part of the Directors in making their decisions. Accordingly, he urges this Court to reverse the lower court's grant of summary judgment and to allow this matter to proceed to trial.

In response, Innwood argues that the court below properly granted summary judgment, as no genuine issue of material fact exists with respect to whether the Board violated its fiduciary duties in this case. Innwood asserts that despite Davis's assertions to the contrary, his claim is one for breach of fiduciary duty, and that no fiduciary duty was breached in this instance. Innwood argues that the Board took appropriate action regarding each of the issues raised by Davis. While the Board concedes that not all issues have been fixed in light of lack of funding, or in light of the fact that certain tenants and owners continue to violate the rules, that it has exercised appropriate business judgment with respect to the actions that it has taken, and that it has made reasonable, ongoing attempts to address the matters at issue in light of the best interests of its owners.

In Davis's complaint and in the arguments he made to the court below in various pleadings that he filed, Davis asserted that if the Innwood Board of Directors failed to exercise its duties in violation of the Master Deed and that if such failure resulted in costs, damages, or injury, then the individual board members could be held personally responsible and that the failure of the Board to comply with the Master Deed could result in diminished values of the condominiums.

Prior to addressing the arguments of the parties, we note that in *Lewis v. B&R Corporation*, 56 S.W.3d 432 (Ky. App. 2001), this Court set forth the standard of review when a court grants a motion for summary judgment as follows:

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” While the Court in *Steelvest* used the word “impossible” in describing the strict standard for summary judgment, the Supreme Court later stated that that word was “used in a practical sense, not in an absolute sense.” Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

Lewis at 436. (Internal citations omitted). We review this matter with this standard in mind.

Upon review of the record, we find it of import that Davis’s complaint alleges that Innwood’s Board of Directors breached its duties in violation of the Master Deed. The Master Deed provides, in pertinent part:

22.1 RIGHTS OF ACTION: The Council of Co-Owners acting by and through Innwood Condominium Association, Inc. and/or any aggrieved Unit owners, is hereby granted the right of action against unit owners for failure to comply with this Master Deed or the By-Laws or equivalent documents, or with decisions of the Council

of Co-Owners made pursuant to such documents. Individual unit owners shall have similar rights of action against the Council of Co-Owners or the incorporated association.

The Master Deed sets out the duties of the Association, and this Court agrees with the court below that the Association functions as a fiduciary for the co-owners. As the court below correctly noted, “A fiduciary relationship is ‘founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another’s benefit in matters connected with such undertaking.’”

Quadrille Business Systems v. Kentucky Cattlemen’s Association, 242 S.W.3d 359, 364-5 (Ky. App. 2007), *quoting Steelvest*, 807 S.W.2d 476 at 485 (Ky. 1991). To prevail on a claim for breach of fiduciary duty, a plaintiff must prove that: (1) the defendant owed a fiduciary duty to the plaintiff; (2) the defendant breached that duty; and (3) the plaintiff suffered damages as a result of the breach. *Sparks v. Re/Max Allstar Realty, Inc.*, 55 S.W.3d 343, 348 (Ky. App. 2000).

We agree with the court below that the Board owed a fiduciary duty to its owners.¹ However, upon review of the record, the arguments of the parties, and the applicable law, we are not convinced that the Board breached its duties in this instance. During his deposition, Davis conceded that the Board addressed many of

¹ In so finding, we recognize the currently unpublished case of *Ballard v. Willow Council of Co-Owners, Inc.*, 2013 WL 6134150 (Ky. 2013)(2010-SC-000533-DG), with respect to which a motion for rehearing is currently pending. That opinion also addressed the issue of whether a condominium association owes a fiduciary duty to an individual owner, and found that the statute establishing fiduciary standards for directors did not apply to the condominium association itself. While we have found differently herein, we note that regardless of whether Innwood owed a fiduciary duty to Davis, that duty was not breached for the reasons set forth herein.

the issues that he raised during the course of Board meetings. Davis testified that the Board determined that they would repair the complained-of conditions, and that the Board notified him of a special assessment made for the parking lots, sidewalks, and gutters, and that the Board properly voted to do away with the background check rule of which he had complained. Davis testified that he did not know what actions the Board had taken with respect to many of his complaints, but asserts, in essence, that because tenants and owners are still violating the rules and because the reported problems still exist, the Board is breaching its fiduciary duties. We disagree.

In so finding, we note that the court below correctly determined that the business judgment rule applies in this case. The business judgment rule is codified for non-profit corporations, such as Innwood, at Kentucky Revised Statutes (KRS) 273.215 (standards for directors) and KRS 273.229 (standards for officers). The court relied on, and Innwood cites to, the corresponding provisions in KRS Chapter 271B; the Kentucky Business Corporation Act: KRS 271B.8-300 (standards for directors); and KRS 271B.8-420 (standards for officers). Since these respective provisions in KRS Chapter 273 and KRS Chapter 271B are virtually identical, the legislature has clearly expressed its intent that the business judgment rule applies to both non-profit and for-profit business corporations.

The business judgment rule is “a presumption that in making a business decision, not involving self-interest, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken

was in the best interests of the company.” *Allied Ready Mix Co., Inc. ex. rel. Mattingly v. Allen*, 994 S.W.2d 4, 8 (Ky. App. 1998). The record below indicates that the Board sought guidance from its management company, Prudential Parks, and Weisberg Realtors in making decisions as to how to best address the issues raised by Davis. The record further reflected that the Board did not have all of the necessary funds at its disposal to immediately fix each of the problems raised by Davis. However, the Board, based upon the advice it received, in consideration of the financial status of the tenants and owners at Innwood, did vote to approve a Special Assessment for repairs and maintenance. By considering the economic standing of its residents and the problems at issue and making such a decision, this Court is not persuaded that the Board breached any fiduciary duty in this instance.

The general rule of law in this Commonwealth is that courts will not interfere with the management of a majority unless there is actual fraud, or such a wasting of the corporate property as practically amounts to fraud. *Cumberland Public Co. v. Adams Real Estate Corp.*, 432 S.W.2d 808, 812 (Ky. 1968), citing *Graham v. McAdoo*, 135 Ky. 677, 123 S.W.260, 262 (1909). Davis has not alleged fraud in this case, and we find no evidence that fraud occurred. Accordingly, we believe that the court below properly granted summary judgment and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the March 4, 2013, memorandum and order of the Jefferson Circuit Court, granting summary judgment in favor of Appellees, Innwood Condominium Property Owners

Association, Inc., and dismissing Davis's claims, the Honorable Susan Schultz
Gibson, presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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