STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC	**Filed 7-29-10**	**SUPERIOR COURT**
CHARLES BURNS, PETER D'AMARIO, as Trustee of the Peter and Maria D'Amario Trust, PATRICIA GANEK, RICHARD H. KOZIARA, ANNE LIDDELL, CHARLES AND SELENA MANGAN, JANE MCCOOL, PAUL MILLER, LESLIE PARKS, as Trustee of the Leslie Parks Trust, MICHAEL AND ELYSE SPALDING, and BERNARD AND BARBARA WARD	:	**C.A. No. NC-2007-0610**
v.	:	
MOORLAND FARM CONDOMINIUM ASSOCIATION	:	

DECISION
Evidentiary Issues

NUGENT, J. This matter is before the Court for decision on the Plaintiffs' objections to certain evidence offered by Defendant. Attached as an appendix hereto and incorporated as a part of this decision is a table identifying the exhibits at issue.

BACKGROUND

This case centers around four special assessments issued by the Defendant Moorland Farm Condominium Association (hereinafter the "Association" or "Defendant") to pay for deck replacements for Phase I condominiums. The Plaintiffs' Declaratory Judgment Claim (Count I) on whether these decks are a "common area," a "limited common area," or a part of the individual condominium units under both the Moorland Farm Condominium Declaration (hereinafter the "Declaration") and the Moorland Farm Condominium By-laws (hereinafter the "By-laws") and Defendant's corresponding counterclaim for any unpaid special assessment fees are the only remaining claims for this Court to decide.

ANALYSIS

I. Historical References to "Decks" by the Association

Plaintiffs first object to Defendant's exhibits pertaining to all of the Association's board meeting minutes from 1996 through 2007 that make any reference to "decks" at Moorland Farm Condominium. (See Def.'s Ex. A, B, C, D, E, F, G, H, I, J, L, M, N, O, P, Q, R, S, T, U, W, Y, Z, BB, CC, GG, II, & NN, all marked for identification) (hereinafter, "Board Minutes"). Defendant seeks to introduce the Board Minutes to explain the meaning and intent of the Declarant, the drafter of the governing documents. Plaintiffs object on the basis of relevancy, under R.I. R. Evid. 401, in that any references to "decks" sixteen years after the recording of the Declaration, and well after the Declarant had any part in the business of Moorland Farm, are not relevant to the Declarant's intent. Plaintiffs specifically argue that the Board Minutes are irrelevant because (1) the Declaration and By-laws are clear and unambiguous to reveal the status of the decks; and (2) they have no bearing on the Declarant's intent to the extent that the Declaration and By-laws are ambiguous.

The admissibility of evidence is governed by the Rhode Island Rules of Evidence. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 holds that relevant evidence is generally admissible unless otherwise prohibited by law. Likewise, Rule 402 states, "Evidence which is not relevant is not admissible." These determinations are left to the sound discretion of the trial justice. See Accetta v. Provencal, 962 A.2d 56, 60 (R.I. 2009).

Defendant analogizes the Declaration and By-laws to a contract. Defendant's argument for admissibility of the Board Minutes is based on the premise that the Declaration and By-laws

are ambiguous, which requires extrinsic evidence, such as the Board Minutes, to determine the meaning of "decks" as intended by the author of those documents. It is well-settled that a court has no need to construe contractual provisions unless those terms are ambiguous. 1800 Smith Street Associates, LP v. Gencarelli, 888 A.2d 46, 52 (R.I. 2005). "In making this determination, the court should view the agreements in their entirety and give the contractual language its 'plain, ordinary and usual meaning.'" Id. Courts will deem agreements to be ambiguous when they are reasonably and clearly susceptible to more than one rational interpretation. Paul v. Paul, 986 A.2d 989, 993 (R.I. 2010).

Assuming arguendo that the Declaration and By-laws are ambiguous for the purposes of this evidentiary decision only, the Board Minutes would not bear on the intent of the Declarant nor would they be able to establish a so-called "course of performance." The Declaration was recorded on or about September 13, 1980. The Declarant, Louis A. Vaillancourt, Jr., transferred the property to Roy/Hill Associates on or about December 29, 1983. The earliest of the Board Minutes that Defendant seeks to admit is dated April 27, 1996. Conduct by persons other than the Declarant, and sixteen years after the Declaration was recorded, fails to give any indication about the meaning or intent of the Declarant as a matter of law. See D.T.P., Inc. v. Red Bridge Properties, Inc., 576 A.2d 1377, 1382 (R.I. 1990) (holding that if the terms of a contract are ambiguous, the court will look to the construction placed upon such terms by the parties themselves as an aid in determining their intended meaning).

Likewise, these Board Minutes have no bearing on the so-called "course of performance" because the Declarant did not participate in these meetings. As the author of the Declaration and By-law, the Declarant's course of performance is necessary for the interpretation of the documents as successors and non-parties' thoughts and ideas have no bearing on the intent of the

Declarant. See generally 17A AmJur. 2d Contracts § 354 ("The . . . practice of the parties under a contract is a consideration of much importance . . . in ascertaining the parties' understanding of the contract terms and language, since the parties are in the best position to know what was intended by the language employed.") Since the Declarant was not a party to these board meetings, his intent cannot be gleamed from the conduct evidenced by the Board Minutes as a matter of law.

Consequently, Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, L, M, N, O, P, Q, R, S, T, U, W, Y, Z, BB, CC, GG, II, and NN are excluded under Rule 402 because they are irrelevant.

II. Phase II & Phase III Design Plans (Def.'s Ex. WWW)

Defendant's Exhibit WWW for identification contains the design plans of Phases II and Phase III at Moorland Farm Condominium (hereinafter, the "Design Plans"). Defendant seeks to introduce the Design Plans to aid with determining the definition of "decks" as stated in the Declaration and By-laws (because Defendant argues that the Declaration and By-laws are ambiguous). Plaintiffs object on the grounds that the Design Plans are a legal nullity because they were recorded after the "drop-dead" date as specified in the Declaration and were not voted upon by the condominium owners as required by the Declaration. Further, Plaintiffs contend that the Design Plans are irrelevant to the Declarant's intent because the Design Plans were not the product of the Declarant.

The Design Plans were not created until 1986 (Phase II) and 1989 (Phase III), after the Declarant had transferred his interests in 1983. See discussion supra. The decks in question concern only the decks in Phase I. Consequently, the Court finds that the Design Plans are of no consequence to the Declarant's intent with regard to the decks in Phase I.

Therefore, Defendant's Exhibit WWW is excluded under Rule 402 because the Design Plans are irrelevant.

III. The Association's Commercial Insurance Policy (Def.'s Ex. DDDD)

Defendant's Ex. DDDD marked for identification is the Association's commercial insurance policy covering the period from May 2010 through May 2011 (hereinafter, the "Insurance Policy"). Defendant offers the Insurance Policy as further proof that the decks are the responsibility of the Association and not the individual condominium unit owners (again, to the extent that the Declaration and By-laws are ambiguous). Plaintiffs argue that the Insurance Policy should be excluded under Rules 402, 802, and 702 of the Rhode Island Rules of Evidence. Specifically, Plaintiffs contend that the policy period is well after the dispute arose and the lawsuit was filed, making it irrelevant under Rule 402. Additionally, Plaintiffs assert that the cover letter from the insurance agent is inadmissible hearsay under Rule 802. Plaintiffs also argue that the cover letter is inadmissible expert opinion under Rule 702 because the agent's qualifications and facts upon which his opinion is based have not been provided to the Plaintiffs or the Court. See R.I. R. Evid. 705.

At the outset, the opinion of the insurance agent contained in the Insurance Policy must be excluded as hearsay because it is an out of court statement used to prove the matter asserted. See R.I. R. Evid. 801. Further, the Insurance Policy was issued well after this litigation and controversy began in 2007. Additionally, the Court holds that the Insurance Policy in place currently has no bearing on the Declarant's intent for the meaning of "decks" as used in the Declaration and By-law when they were created in September of 1980.

As a result, Defendant's Exhibit DDDD is excluded under Rule 402 because the Insurance Policy is irrelevant, as well as under Rule 802 because the agent's opinion is inadmissible hearsay.

IV. Affidavit of Donald Leffert (Def.'s Ex. EEEE)

Defendant's Ex. EEEE marked for identification is the affidavit of Donald Leffert, a professional engineer hired by Defendant. Defendant offers Mr. Leffert's opinion in an effort to show that the decks in question act as "supports" for certain units, which would make them a "common area" as defined in the Declaration (again, to the extent that the Declaration and By-laws are ambiguous). Plaintiffs' object on the grounds of Rhode Island Superior Court Rules of Civil Procedure Rules 26(b)(4), 26(e)(1)(B), and 33(c), in that Defendant failed to disclose its expert, as well as the expert's opinion with the notice required by the various rules.

Rule 26(e)(l)(B) and Rule 33(c) are designed to give a party advance notice of the identity, facts, and substance underlying the opinions that an expert will advance during trial and "prevent trial by ambush." Neri v. Nationwide Mut. Fire Ins. Co., 719 A.2d 1150, 1152 (R.I. 1998). This Court has wide discretion to enforce the purposes and mandates of the rule. Id. Rule 26(b)(4) requires a party to disclose any and all expert witnesses he wishes to call when requested to do so by interrogatory of the opposing party. Rule 26(e)(1)(B) requires a party "seasonably to supplement" the response to such an interrogatory and provide the identity of an expert witness, the subject matter on which that expert is expected to testify, and the substance of such expert's testimony. Rule 33(c) provides, "If the party furnishing answers to interrogatories subsequently shall obtain information which renders such answers incomplete or incorrect, amended answers shall be served within a reasonable time thereafter but not later than 10 days prior to the day fixed for trial." However, the Rhode Island Supreme Court has held that

"Forbidding a party to call a witness after a Rule 33(c) violation 'is a drastic sanction that should be imposed only if it is apparent that the violation has or will result in prejudice to the party asserting the violation.'" Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 95 (R.I. 2006) (quoting Gormley v. Vartian, 121 R.I. 770, 775, 403 A.2d 256, 259 (1979)).

Defendant filed Exhibit EEEE with its summary judgment motion on June 2, 2010 for hearing in September, the same date that the case was assigned for trial. Defendant does not dispute that it never supplemented its answers to interrogatories originally propounded by Plaintiffs on July 21, 2008. Mr. Leffert indicates that he conducted his site visit on October 14, 2009. (Def.'s Ex. EEEE ¶ 4.) While the Court does not believe that Defendant intended to conceal the existence of Mr. Leffert's proposed testimony, Defendant has the responsibility to follow the rules of civil procedure and had engaged Mr. Leffert as an expert at least seven months before filing his affidavit. The Court finds that Plaintiffs were prejudiced by Defendant's failure to supplement its answers to interrogatories because Plaintiffs did not have enough time to depose Mr. Leffert nor hire their own engineering expert to conduct an examination and give them a report prior to trial. This situation did not "enable [Plaintiffs] to prepare for trial free from the elements of surprise." See Neri, 719 A.2d at 1152 (quoting Gormley, 121 R.I. at 775, 403 A.2d at 259).

Further, the status of the decks acting as supports for certain units in 2009 (when Mr. Leffert conducted his examination)—after the deck replacement was completed—is not relevant as to whether the decks were supports prior to their replacement in 2006 nor relevant as to the Declarant's intent with regard to meaning of "decks."

Therefore, under Rhode Island Superior Court Rules of Civil Procedure Rules 26(b)(4), 26(e)(1)(B), and 33(c), Defendant's Exhibit EEEE is excluded because of the prejudice

Defendant's nondisclosure has caused to Plaintiffs. Likewise, Defendant's Exhibit EEEE is excluded under Rhode Island Rules of Evidence Rule 402 because the affidavit is irrelevant.

CONCLUSION

For the foregoing reasons, Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, L, M, N, O, P, Q, R, S, T, U, W, Y, Z, BB, CC, GG, II, NN, WWW, DDDD, and EEEE are excluded.[1]

Counsel shall prepare an order in conformance with this Decision.

[1] In its memorandum concerning these evidentiary issues, Defendant raises, for the first time, an objection to Plaintiffs' Ex. 44, which has been marked for identification only. The record does not indicate whether this exhibit was offered as a full exhibit by Plaintiffs. Consequently, the Court will overrule the objection without prejudice and will allow the parties to argue the matter further at the hearing currently scheduled for August 6, 2010.

APPENDIX

EXHBIT	DESCRIPTION
A	April 27, 1996 Management Committee Meeting Minutes
B	September 7, 1996 Management Committee Meeting Minutes
C	January 14, 1997 Management Committee Meeting Minutes
D	July 17, 1999 Minutes of Annual Meeting of the Moorland Farm Condominium Association
E	April 7, 2001 Management Committee Meeting Minutes
F	July 14, 2001 Minutes of the Annual Meeting of the Moorland Farm Condominium Association
G	August 18, 2001 Management Committee Meeting Minutes
H	Moorland Farm Condominium Capital Replacement Reserve Fund, A Recommendation by the Long Range Planning Committee, dated January 2002
I	2001 Financial Report to Moorland Farm Unit Owners from the Treasurer of the Management Committee and Property Management Company
J	January 12, 2002 Management Committee Meeting
L	February 16, 2002 Management Committee Meeting Minutes
M	July 26, 2003 Minutes of Annual Meeting of the Moorland Farm Condominium Association with Executive Committee Meeting Minutes attached

N	July 27, 2003 Executive Committee Meeting Minutes
O	August 1, 2003 Memorandum to Unit Owners from Management Committee regarding Special Assessment for the Capital Reserve
P	February 21, 2004 Management Committee Meeting Minutes
Q	March 20, 2004 Management Committee Meeting Minutes
R	May 15, 2004 Management Committee Meeting Minutes
S	July 24, 2004 Management Committee Meeting
T	October 30, 2004 Management Committee Meeting Minutes
U	December 11, 2004 Management Committee Meeting Minutes
W	April 23, 2005 Management Committee Meeting Minutes
Y	June 11, 2005 Management Committee Meeting Minutes
Z	July 30, 2005 Management Committee Meeting Minutes
BB	October 22, 2005 Management Committee Meeting Minutes
CC	December 3, 2005 Management Committee Meeting Minutes
EE	June 24, 2006 Management Committee Meeting
GG	October 14, 2006 Management Committee Meeting Minutes
II	February 15, 2007 Management Committee Meeting Minutes

NN	July 21, 2007 Minutes to the Annual Moorland Farm Condominium Association Meeting
WWW	Certified copies of the design plans for the Phases II and III Units (13 – 33) at Moorland Farm delineating the decks as "limited common areas," recorded with the Land Evidence Records of the City of Newport in the mid to late 1980s
DDDD	Insurance Policy issued to Moorland Farm Condominium Association, effective from May 2010 through May 2011
EEEE	Affidavit of Donald Leffert, P.E.