

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC

SUPERIOR COURT

(FILED – AUGUST 27, 2009)

BENNIE SISTO, AS THE TRUSTEE OF THE :  
GOAT ISLAND REALTY TRUST :

v. :

No. NC-2008-0508

GOAT ISLAND SOUTH CONDOMINIUM :  
ASSOCIATION, INC., AMERICA :  
CONDOMINIUM ASSOCIATION, INC., :  
CAPELLA SOUTH CONDOMINIUM :  
ASSOCIATION, INC., AND HARBOR :  
HOUSES CONDOMINIUM :  
ASSOCIATION, INC. :

**DECISION**

**CLIFTON, J.** This matter is before the Court for decision on Defendant Harbor Houses Condominium Association, Inc.’s (“Harbor Houses”) Cross-Motion for Summary Judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. In this action, Plaintiff Bennie Sisto, as Trustee of the Goat Island Realty Trust (“Plaintiff”) challenges the validity of the adoption of Goat Island South Condominium Association, Inc.’s (“GIS”) Second Amendment and Restated Declaration (the “Second Declaration”). Additionally, Plaintiff specifically challenges the validity of § 2.3 of the Second Declaration. In support of Plaintiff’s Complaint, Harbor Houses contends that no genuine issue of material fact exists as to whether GIS is statutorily bound to abide by and enforce all provisions of the Second Declaration, including § 2.3, while another decision on a separate motion in this case<sup>1</sup> is pending. Harbor Houses also asserts that GIS is estopped from claiming that total approval by all Residence Unit Owners is required to approve the expansion of a Harbor Houses unit owner.

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<sup>1</sup> Filed on September 12, 2008, hereinafter referred to as “Sisto III.”

## Facts and Travel

GIS is a condominium originally created in 1988 by Declaration of Condominium (the “Declaration”). GIS is the Master Condominium for Goat Island South and consists of 154 “Residence Units,” which are governed by the following three associations: Harbor Houses, America Condominium Association, Inc. (“America), and Capella South Condominium Association, Inc. (“Capella”). The Declaration was first amended on March 1, 1988, and was thereafter known as the First Amended and Restated Declaration (the “First Declaration”). Over the next two decades, the First Declaration continued to be amended from time to time. Finally on August 25, 2007, at a meeting of the unit owners and members of GIS, the Second Amended and Restated Declaration (the “Second Declaration”) of Condominium was approved and adopted. The Rhode Island Condominium Act<sup>2</sup> (the “Act”) and the Second Declaration, together with each respective Residence Condominium Declaration, govern the rights, responsibilities and obligations between the condominium associations and the GIS unit owners.

Plaintiff objected to the Second Declaration, and subsequently filed Sisto III, claiming that the Second Declaration adversely affects Plaintiff’s rights and obligations. Plaintiff also claimed that the Second Declaration is invalid because the voting procedures utilized to adopt the Second Declaration violated the amendment provision of the First Declaration, as well as Sections 34-36.1-2.17(a) and 34-36.1-2.17(d) of the Rhode Island Condominium Act. Currently, Plaintiff seeks to expand his Harbor Houses Condominium Unit onto a GIS Limited Common Element.<sup>3</sup>

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<sup>2</sup> See Section 34-36.1-1.01, et al.

<sup>3</sup> The Harbor Houses Declaration defines the term “Limited Common Element” as “that portion of the Common Elements appurtenant to or associated with and intended for the exclusive *use* [but not ownership] by one or more but fewer than all Units, and intended for the exclusive *use* of such Units . . . .” Harbor Houses Declaration at § 1.16 (emphasis added). Similarly, the Act defines a “Limited Common Element” as “a portion of the common elements allocated by the declaration . . . for the exclusive *use* of one or more but fewer than all of the units.” Section 34-

Rhode Island General Laws 1956 § 34-36.1-2.11 allows condominium unit owners to make alterations to their units, subject to the provisions of the Act and the governing condominium declaration. Generally, Section 2.3 of the Second Amended and Restated GIS Master Declaration (Second Declaration) authorizes expansion of Harbor Houses units so long as such expansions are 1) authorized by the Harbor Houses executive Board; 2) comply with certain dimensional requirements; and 3) do not significantly diminish the water view of not more than two Residence Units in reasonable proximity to the proposed expansion, to be determined in good faith by a majority of the GIS Board Members following a hearing. See generally, Second Declaration, § 3.2. Specifically, Section 2.3 of the Second Declaration states that if a unit owner's proposed improvements would extend beyond the footprint of the building as it existed on January 20, 1988, then such plans must be "submitted to the GIS Executive Board for review and a written advisory opinion from the GIS Executive Board before final approval is given by the Harbor Houses Condominium executive board." See Second Declaration § 3.2(a)(i)(M). Further, if the proposed improvements would extend the current building or stand-alone unit beyond its "footprint," and would "significantly diminish the water view of other Resident Units," then "not less than two" unit owners located within "reasonable proximity" to the proposed improvements may "request in writing review by his/her Residence Condominium Board." See Second Declaration § 2.3(a)(i)(N).) If, on review, the Board determines that "the diminution of water view is significant," the Board may, by majority vote of its members, refer the matter for "final and binding review by the GIS Board." Id.

In accordance with the Second Declaration, Harbor Houses approved Plaintiff's proposed expansion of its unit. Certain unit owners of the America and Capella Condominiums, however,

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36.1-1.03(19) (emphasis added). Therefore, Harbor Houses' Limited Common Elements are owned in an undivided percentage interest by all 154 unit owners.

complained to their respective Executive Boards that Plaintiff's proposed expansions would substantially diminish their water views. These complaints were communicated to and referred to the GIS Executive Board for hearing and determination under § 2.3. GIS has yet to process these complaints and hold the hearings mandated by § 2.3 as they relate to Plaintiff's applications.

In support of Plaintiff's complaint, Harbor Houses filed this Cross-Motion for Summary Judgment, asking the Court to declare that GIS is statutorily bound to abide by and enforce all provisions of the Second Declaration, including Section 2.3, despite the fact that Sisto III has yet to be decided. By failing to adhere to the Second Declaration, Harbor Houses claims that GIS caused substantial and unnecessary litigation and raised questions concerning the validity of the condominium documents. Harbor Houses further asserts that Plaintiff has complied with Section 2.3 of the Second Declaration, as well as the applicable provisions of the Rhode Island Condominium Act, and GIS may not halt the application process merely because litigation is pending. Harbor Houses goes on to contend that GIS is estopped from claiming that total approval by all Residence Unit Owners is required to approve the expansion of a Harbor Houses unit owner.

### **Analysis**

The Rhode Island Supreme Court has held that a preliminary injunction is the appropriate avenue for maintaining "the status quo pending a final determination of the merits of the controversy in question." American Medi-Lab, Inc. v. Kennedy, 492 A.2d 1234, 1235 (R.I. 1985) (citing Gilbane Building Co. v. Cianci, 117 R.I. 317, 366 A.2d 154 (1976); Coolbeth v. Berberian, 116 R.I. 188, 354 A.2d 120 (1976)). Thus, in an action for a declaratory judgment, it is proper to issue an injunction to preserve the status quo of the properties *pendente lite* to

determine the respective rights of several parties under a contract with respect to certain property. 155 A.L.R. 501 (citing Berman v. Wreck-A-Pair Bldg. Co., 243 Ala. 293, 175 So. 269 (1937)).

Further, in a declaratory judgment action, the court may enjoin the prosecution of another action between the parties until the determination of the declaratory action. 155 A.L.R. 501 (citing Maryland Cas. Co. v. Tighe, 24 F. Supp 49 (D.C.Cal. 1938)). In the specific context of condominium litigation, it has been held that a unit owner who sues for a declaratory judgment may also seek a temporary injunction forbidding the condominium board from attempting to enforce a restriction against the owner pending the action. 14 Causes of Action 2d 315 (citing Quinones v. Board of Managers of Regalwalk Condominium I, 242 A.D.2d 52, 673 N.Y.S.2d 450)).

In the instant matter, GIS should have anticipated the current litigation and preventatively sought injunctive relief from this Court to preserve the status quo of Plaintiff's application pending a decision in Sisto III. Instead, GIS did not seek to enjoin Harbor Houses, or any other party, from prosecuting GIS, pending a decision in Sisto III. Consequently, the Second Declaration remains in full force and effect unless and until this Court finds otherwise. Therefore, until injunctive relief is sought, GIS remains obligated to enforce its Second Declaration and By-laws. Consequently, this Court grants Harbor Houses' Cross-Motion for Summary Judgment.

Additionally, this Court finds that the GIS Board has not timely and adequately performed its functions under § 2.3 as it relates to Plaintiff's Application. Specifically, GIS has refused to process Plaintiff's application and has failed to conduct a hearing to address the impact of Plaintiff's proposed expansion on the water views of complaining neighbors as

required by Section 2.3 of the Second Declaration. See Second Declaration § 2.3(a)(i)(N). The Court will issue an Order requiring GIS to process Plaintiff's expansion applications and any challenges to the application involving the issues of substantial view interference under § 2.3 of the GIS Master Declaration.

Next, this Court finds that GIS is also estopped from claiming that total approval by all Residence Unit Owners is required to approve the expansion of a Harbor Houses unit owner. Under the doctrine of equitable estoppel, a party may be precluded from enforcing an otherwise legally enforceable right because of previous actions of that party. Retirement Bd. of Employees' Retirement System of State v. DiPrete, 845 A.2d 270, 284 (R.I. 2004). Equitable estoppel will apply when there is "an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury." Id.

Here, GIS adopted an Amendment to § 2.3 of the GIS Master Declaration, which is being challenged by Plaintiff in the current litigation. This Amendment, which solely focuses on the expansion of Harbor Houses units, was approved by 80% of the GIS Residence Unit Owners, including America and Capella representatives of the GIS Executive Board. The Amendment expressly delineates the procedure to be followed by a Harbor Houses unit owner who wishes to expand his or her unit beyond the building's footprint as it existed in 1988. Total resident unit owner approval is not contemplated or stated anywhere in the amended provisions of Section 2.3 of the Second Declaration. Consequently, this Court concludes that GIS, by enacting its Declaration, affirmatively represented that a Harbor Houses unit owner was permitted to expand his or her unit by complying with the procedural requirements included in § 2.3.

Further, the Second Declaration, as the governing condominium document, was enacted to induce unit owners to invest in Harbor House's condominiums. Condominium owners, including Plaintiff, ultimately purchased their units with the assumption that such units may be expanded pursuant to the Second Declaration and without unanimous consent from all unit owners. Therefore, this Court finds that GIS is now estopped from now claiming that unanimous consent of all Residence Unit Owners is necessary where it has created and approved contradicting provisions regarding expansion applications.

Finally, an award of attorney's fees is appropriate in the instant matter. Section 34-36.1-4.17 states:

“If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class or persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded in the case of a willful failure to comply with this chapter. The court, in an appropriate case, may award reasonable attorneys fees.” Section 34-36.1-4.17.

In Mullowney v. Masopust, 943 A.2d 1029, 1034-1035 (R.I. 2008), our Supreme Court awarded attorney's fees against a condominium board due to the board's “unreasonable contravention of the condominium declaration.” The Mullowney Court went on to hold that the award of attorney's fees is a “matter confided to the sound discretion of the presiding judicial officer.” Id. Here, GIS failed to comply with § 2.3 of the Master Declaration by refusing to process the complaints of America and Capella unit owners regarding the potential impact of Plaintiff's proposed expansions on their water views. Neither GIS nor the record offers a reasonable explanation for GIS's decision to halt the application procedure until Sisto III is resolved. Thus, the record sufficiently supports the conclusion that GIS acted unreasonably when it failed to consider Plaintiff's application in accordance with the process expounded in its Second

Declaration. Accordingly, Harbor Houses is entitled to reasonable attorney's fees. Upon submission of Harbor Houses' motion for such attorney's fees, supported by affidavit, the Court will schedule a hearing to determine an appropriate amount.

**Conclusion**

For the foregoing reasons, Harbor Houses' Motion for Summary Judgment is granted. Counsel shall prepare an appropriate order for entry.