WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: November 21, 2007
Decided: February 13, 2008

John A. Sergovic, Jr.
Sergovic & Ellis, P.A.
9 North Front Street
P.O. Box 875
Georgetown, DE 19947

Eric C. Howard
Wilson, Halbrook & Bayard
107 W. Market Street
P.O. Box 690
Georgetown, DE 19947

Re: *Pilot Point Owners Ass'n, et al. v. Bonk*
Civil Action No. 2717-CC

Dear Counsel:

This dispute arises out the modification of the walkway that leads to the front of a condominium unit (the "lead walk") owned by defendant, Harry Bonk. During 2005 and 2006, the lead walk to defendant's unit was modified; the original wood planks and/or wood composite material was removed and replaced with stone. Plaintiffs, Pilot Point Owners Association (the "Association") and the Condominium Council of Pilot Point Owners Association (the "Council" and, together with the Association, "Pilot Point"), move for summary judgment. For the reasons discussed below, I grant their motion in part.

I. BACKGROUND

The following facts are not in dispute. Pilot Point Condominium is subject to the Delaware Unit Property Act at Title 25, Chapter 22 of the Delaware Code by its adoption of the Declaration Submitting Real Property to the Provisions of the Unit Property Act (the "Original Declaration"), the

amendment to the Original Declaration (the "Amended Declaration" and, together with the "Original Declaration," the "Declarations"), the Original Code of Regulations of Pilot Point (the "Original Regulations"), and the various amendments to the Original Regulations (the "Amended Regulations" and, together with the Original Regulations, the "Regulations"). Defendant owns unit 34 of Pilot Point, which is governed by the documents listed above, and leases it to his tenants, Shauna Thompson and Wayne Hawkins. Pursuant to the Original Declaration, "[t]he lead walks leading into each of the units in each of the buildings" were specifically included in paragraph 4, which describes the "common elements."[1] Additionally, under the Pilot Point Condominium Maintenance Policy (the "Maintenance Policy"), which was incorporated as part of the Amended Regulation, each unit owner has responsibility for the maintenance and repair of certain items, including the lead walks.[2]

II. CONTENTIONS

Plaintiffs argue that summary judgment is appropriate because there are no disputed factual issues because defendant concedes: (1) the lead walk servicing unit 34 was modified with defendant's consent or authorization;[3] (2) as the owner of unit 34, defendant is subject to the Delaware Unit Property Act, the Declarations and the Regulations;[4] and (3) the lead walk is a common element.[5] Under the Maintenance Policy, the rights and responsibilities of unit owners with respect to the lead walks are limited to maintenance and repair. Plaintiffs conclude that the modification by defendant to the common element—which exceeded the scope of "maintenance and repair"[6]—was improper because the modification was not

[1] *See* Ex. 2 to Pls.' Compl. (Original Declaration) at ¶ 4. The Act defines common elements as the "yards, parking areas and driveways" and "[s]uch facilities as are designated in the declaration as common elements." 25 *Del. C.* § 2202(3). The Declarations are the governing instruments in disputes concerning condominium common elements. *Murray v. Wang*, C.A. No. 1384, 1995 WL 130727, at *2 (Del. Ch. Mar. 16, 1995).

[2] *See* Ex. 9 to Pls.' Compl. (Maintenance Policy) at ¶ III.

[3] *See* Ex. C to Pls.' Mot. for Summ. J. (Def.'s Answer) at ¶ 13 ("Admitted, such construction was completed with the consent of the owner.").

[4] *See id.* at ¶ 6.

[5] *See id.* at ¶ 9; *see also supra* note 1.

[6] In Article VI, Section 1, the Court observes that the Regulation obligate owners to pay monthly assessments for "those expenses for maintenance, repair and replacement of the common elements." I find that this supports the argument that defendant's

authorized and, moreover, could not be authorized under the Declarations and the Regulations governing Pilot Point because the lead walks, as common elements, cannot be modified.

Responding to defendant's reliance on Article VI, Section 3 of the Amended Regulation to support his argument that he was authorized to replace the lead walk with stone,[7] plaintiffs point out that this section addresses "structural modifications or alterations of the unit or installations location therein"[8] and is therefore inapplicable to the lead walk at issue here. Defendant relies on Article VI, Section 3 in conjunction with his contention that Pilot Point is estopped from enforcing the Regulations governing the Condominium because, as defendant alleges, other unit owners have caused alterations of or additions to the common elements. Specifically, defendant alleges that unit owners, including defendant, have relied on Article VI, Section 3 to make both internal and external alterations to common elements. For the reasons stated below, I conclude that the current state of the record precludes entry of full summary judgment in favor of plaintiffs.

III. ANALYSIS

A. Legal Standards

Under the familiar standard, summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[9] In ruling on this motion for summary judgment, I examine the facts in a light most favorable to defendant.[10] As the party asserting the defense of equitable estoppel, defendant bears the burden of demonstrating by clear and convincing evidence that: (1) defendant lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (2) defendant reasonably

---

modification—replacement of the wood composite with stone—goes beyond the "maintenance and repair" contemplated by the Maintenance Policy.

[7] Article VI, Section 3 provides that the Council has sixty days within which to respond to a unit owner's written notice; if sixty days elapses without a response, this means that there is no objection to the proposed modification or alteration. *See* Ex. 4 to Pls.' Compl. (Original Regulation) at Article VI, Section 3; Ex. 5 to Pls.' Compl. (Am. Regulation).

[8] *Id.*

[9] Ct. Ch. R. 56(c).

[10] *See, e.g., HIFN, Inc. v. Intel Corp.*, C.A. No. 1835-VCS, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007).

relied upon the conduct of the party against whom the estoppel is claimed (here, Pilot Point); and (3) defendant suffered a prejudicial change of position as a result of his reliance upon that conduct.[11] Such reliance must be both reasonable and justified under the circumstances.[12] Thus, the standards for establishing the elements of equitable estoppel are stringent; the doctrine is applied cautiously and only to prevent manifest injustice.[13]

Only if defendant fails to satisfy his burden with respect to asserting a defense of equitable estoppel or fails to raise another issue of genuine material fact will summary judgment in favor of plaintiffs be appropriate.

B. Equitable Estoppel: Pre- and Post-May 24, 2005 Conduct

In assessing defendant's equitable estoppel argument on this motion for summary judgment, I construe the facts in a light most favorable to defendant and draw all reasonable inferences in favor of defendant. Defendant's reliance on past, purportedly unauthorized modifications and alterations undertaken in other units of the Pilot Point arguably may have been initially reasonable, as discussed below. Nevertheless, at a certain point—May 24, 2005—defendant's reliance became unreasonable. I therefore find that, because his post-May 24, 2005 reliance was not reasonable as a matter of law, defendant has failed to establish the necessary elements of an equitable estoppel defense as to his post-May 24, 2005 conduct.

1. Defendant's Post-May 24, 2005 Reliance Was Not Reasonable

The significance of the May 24, 2005 date is that, on this date, the property manager of Pilot Point (at the direction of the Council) sent a letter

[11] *See, e.g.*, *Nevins v. Bryan*, 885 A.2d 223, 249 (Del. Ch. 2005); *see also Employers' Liab. Assurance Corp. v. Madric*, 183 A.2d 182, 184 (Del. 1962).

[12] *Progressive Intern. Corp. v. E.I. Du Pont de Nemours & Co.*, No. 19209, 2002 WL 1558382, at *6 n.26 (Del. Ch. July 9, 2002) (citing *Two South Corp. v. City of Wilmington*, No. 9907, 1989 WL 76291, at *7 (Del. Ch. July 11, 1989 (*revised* July 18, 1989))).

[13] *Id.* (citing *Two South Corp. v. City of Wilmington*, No. 9907, 1989 WL 76291, at *7 (Del. Ch. July 11, 1989 (*revised* July 18, 1989)); 28 AM. JUR. *Estoppel and Waiver* § 129 (2001); *Singewald v. Girden*, 127 A.2d 607, 617 (Del. Ch. 1956).

to defendant directing defendant to cease all work on his unit.[14] At this point, regardless of whether or not defendant submitted a proposal for plans to modify the lead walk and whether such proposal was received,[15] defendant knew that the in-progress modification was prohibited. Though he may have questioned whether the Council's determination was correct, the reasonable course of conduct would have been to seek clarification or appeal of the determination, not to continue to build in direct contravention of this express prohibition. Therefore, as of his receipt of the May 24, 2005 letter, defendant's reliance on the alleged past conduct of Pilot Point regarding modifications cannot be characterized as reasonable. Defendant has, therefore, failed to satisfy at least one of the elements necessary to assert equitable estoppel as to his post-May 24, 2005 conduct and reliance.[16]

2. The Record as to the Reasonableness of Defendant's Pre-May 24, 2005 Reliance Is Unclear

Based on the record before me, I am unable to determine, as a matter of law, whether or not defendant's pre-May 24, 2005 conduct was unreasonable. I am uncertain whether defendant could show that he lacked knowledge or the means of obtaining knowledge of approval process and the effect this would have on a determination of the reasonableness of defendant's conduct. Though neither side addresses whether or not defendant read the Declarations and Regulations, I note that defendant had the obligation to exercise reasonable diligence to protect himself and must not have been misled through his own negligence.[17] On the one hand, the argument that defendant lacked the knowledge (or lacked the means of obtaining knowledge) of the approval process for modification of the common elements seems untenable. First, the terms of Article VI, Section 3 contemplate only modifications to the unit or installations located in the unit,

[14] Pls.' Ex. 10 to Compl. (May 24, 2005 letter to defendant).

[15] The parties dispute whether or not this proposal was submitted. *See* Pls.' Ex. 12 at 1 (Dec. 7, 2005 letter from plaintiffs' counsel to defendant) (defendant's tenant forwarded a proposal of work that was "allegedly sent on November 17, 2004), *but see* Def.'s Ex. A to Def.'s Answer (March 22, 2006 letter) ("Enclosed is a copy of our proposal and drawing that were [sic] sent to you on November 17, 2004.").

[16] As discussed below, it is unclear whether defendant could also show that he lacked the knowledge or the means of obtaining the knowledge as to the approval process for modifications to the common elements.

[17] *See* DONALD J. WOLFE AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11-3 (supp. 2006).

not to the common elements. The process outlined in Article VI, Section 3 therefore applies, by its explicit terms, to only the unit or installations therein. Second, the Declaration and the Regulations defined the scope of the owners' responsibilities with respect to the lead walks. In so defining the scope in this way, the Declaration and Regulations limit the permissible actions of the owners to only maintenance and repair.[18] The governing documents thus undermine an argument that defendant lacked the means of obtaining the knowledge, if he lacked the knowledge itself, regarding the approval process for modifications to the common elements.

On the other hand, defendant argues that, historically, owners of the condominium units have made alterations—with or without Council approval—to the common elements. Defendant alleges that, despite the terms of Article VI, Section 3, in reality, its approval process also applies to alterations of the common elements. Thus, if a request for approval of a proposed modification were not denied by the Council within sixty days of its submission, the failure to answer would mean that there is no objection to the proposal. He contends he and other unit owners have relied on this provision to make internal modifications as well as alterations to the common elements.[19] Defendant, apparently, was not alone in his understanding of the approval process,[20] which supports his position that his understanding was not unreasonable. Additionally, defendant argues that there have been numerous modifications made to other common elements[21] and that plaintiffs' attempt to distinguish between the lead walks and other common elements is unfounded.

Plaintiffs contend that, even assuming that Pilot Point either permitted modifications to the common elements pursuant to Article VI, Section 3 or failed to protest when unit owners made such modifications, because it is undisputed that none of the modifications were modifications of lead walks, defendant's reliance could not have been reasonable. Plaintiffs argue that

---

[18] *See* Pls.' Ex. 9 to Compl. (Maintenance Policy) ("The following items . . . will be the responsibility of the individual owners for maintenance and repair . . . . These items are: walks leading to the individual units . . . .").

[19] *See* Ex. B. to Def.'s Answering Mem. in Opp'n to Pl.'s [sic] Mot. for Summ. J. (Oct. 31, 2007 letter from Leslie Ridings).

[20] *See id.* (stating that a letter to owners from then-president Richard Ward dated July 4, 1996 "re-iterates" this practice and that "I have not received any notification the procedure has changed").

[21] *See* Aff. of Wayne Hawkins at 2–3 (citing Exs. C to M).

the modifications upon which defendant alleges he relied are mostly landscape alterations and are modification to "different, less obvious common elements."[22] Though this may be true,[23] it does not necessarily make defendant's reliance unreasonable because it appears that plaintiffs are willing to concede, or at least for purposes of this motion allow the Court to assume, that modifications to non-lead walk common elements were accomplished via the Article VI, Section 3 approval process or were not objected to by the Council. There does not, however, appear in the governing documents to be any clear distinctions between the lead walks and other common elements to support a differential treatment of approval of changes to a lead walk versus a non-lead walk common element.[24]

Therefore, though plaintiffs raise a question as to the reasonableness of defendant's pre-May 24, 2005 conduct, plaintiff has not shown conclusively that defendant's reliance was unreasonable as a matter of law. Defendant has shown a genuine issue of material fact that precludes the entry of summary judgment against him.

C. Conclusion

After defendant's receipt of the May 24, 2005 letter, any reliance by defendant necessary to establish a defense of equitable estoppel is, I conclude, unreasonable as a matter of law. Because the record before me presents no genuine issue of material fact as to the post-May 24, 2005 conduct, I grant partial summary judgment to plaintiffs with respect only to that period of time forward. As to defendant's alleged reliance before receipt of this letter, however, I cannot make a determination as to the reasonableness of defendant's reliance on the disputed record before me. Further evidence would be required to enable me to make a finding as to

[22] Pls.' Reply in Support of Its Mot. for Summ. J. at ¶ 7.

[23] *See* Exs. A and B to Pl.s' [sic] Mot. for Summ. J. (Aff. of Ed Kingman and photographs of lead walks at Pilot Point). The photographs submitted appear to demonstrate that the other lead walks are constructed of wood or a wood composite.

[24] The Court notes that the Original Declaration appears to distinguish between "general" common elements and "restricted" common elements. *See* Ex. 2 to Pls.' Compl. (Original Declaration) at ¶ 4 (describing the driveway, parking areas, sidewalks, roof, foundations, pilings, outside exterior walls of the buildings, and party walls located between the units as "general" common elements; the outside step, small decking, and any handrail leading to the entrance of the building as "restricted" common elements; but not ascribing any modifier to the lead walks).

whether defendant may rely on equitable estoppel for his pre-May 24, 2005 conduct. Upon application from the parties, an evidentiary hearing as to only this narrow issue will be granted.

In granting partial summary judgment to plaintiffs, my determination is limited to the issue of liability: I find only that, as to his post-May 24, 2005 conduct, defendant is liable to plaintiffs. I am unable, however, based on the state of the record before me, to fashion the appropriate relief to which plaintiffs are entitled based on this determination of liability. A further evidentiary hearing is necessary to provide me with sufficient information to remedy the wrong and return plaintiffs to their pre-May 24, 2005 position.

Lastly, in their complaint, plaintiffs make a number of additional requests for relief. First, plaintiffs request attorneys' fees and costs. Though the issue is not presently before me as plaintiffs have not briefed this issue, I find no evidence in the current record to suggest that shifting fees and costs would be appropriate. I withhold judgment, however, until such a time as plaintiffs may more fully explain the basis for their request. Second, plaintiffs also request a permanent injunction prohibiting defendant from construction in any other common element. Plaintiffs have made no showing whatsoever that would entitle them to this future permanent injunction; injunctive relief may issue only when there is a threat of immediate harm. Therefore, because issuance of the injunction is patently premature, I deny their request. Should plaintiffs require such relief from this Court in the future, plaintiffs know how seek it at that time.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:mpd