SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Freibott v. Miller et al.***
C.A. No. S08C-11-025-RFS

Upon Defendants Indian Harbor Villas Condominium Association, Inc., Randall A. Snowling, Marie-Louise Caravatti, William Gearhart, Jr., Michael Streckfus, and Stephen Fuss's Motion for Summary Judgment. Granted in part. Denied in part.

Submitted: March 13, 2009
Decided: June 2, 2009

Dear Counsel:

This is my decision regarding Indian Harbor Villas Condominium Association, Inc., Randall A. Snowling, Marie-Louis Caravatti, William Gearhart, Jr., Michael Streckfus, and Stephen Fuss's ("Defendants") Motion to Dismiss Counts II - IV of the Complaint. For the reasons set forth herein, the motion is granted in part and denied in part.

BACKGROUND

Frederick and Elaine Freibott ("Plaintiffs") are the owners of Unit 2 of the Indian Harbor Villas Condominiums in Bethany Beach, Delaware. Plaintiffs allege that on or about February 8, 2007, a sprinkler unit located in Unit 3 froze, leaked, and/or burst. A large amount of water flowed into their unit as a result. Plaintiffs were not aware of this occurrence until several days later, when a representative of the Indian Harbor Villas Condominium Association ("IHV") discovered water and ice flowing out of the unit during a routine drive-by inspection. Plaintiffs returned to their unit shortly after learning of the damage.

Plaintiffs allege that there was significant water damage to their unit and that mold began to grow as a result. Plaintiffs have claimed damages of $398,514.66 for cleaning, sanitizing, mold remediation, and reconstruction of their unit.

STANDARD OF REVIEW

The Court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a motion to dismiss under Rule 12(b)(6). *RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 WL 1442009 (Del. Super. 1999) at *2. The Court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof. *Id.* The complaint must be without merit as a matter of fact or law to be dismissed. *Id.* The plaintiff will have every reasonable factual inference drawn in his favor. *Ramunno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

"Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted." *Hedenberg v. Raber*, 2004 WL 2191164 (Del.

Super. 2004) at *1. "Where allegations are merely conclusory, however (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss." *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

DISCUSSION

A. Count II is a negligence claim against Indian Harbor, Inc., Indian Harbor Villas, Inc., and IHV. IHV is the only one of those parties which is asking for dismissal in this motion. Plaintiffs have alleged that IHV was negligent in failing to maintain the proper temperature in the Common Elements and failing to inspect these Common Elements to determine the risk of pipes bursting, leaking, or freezing during the winter. The Common Elements include the water irrigation/sprinkler system, among other things. Compl. ¶ 16. While IHV may have responsibility for the maintenance, repair, and replacement the Common Elements, however, each Unit Owner is responsible for the maintenance, repair, and replacement of any "parts of the plumbing system which solely benefit his Unit." Compl. ¶ 17. IHV also requires each Unit Owner to heat their units to at least 40 degrees and to be responsible for any damages or repairs caused by any freezing of the sprinkler system which results from a lower heating level. Compl. ¶ 18.

IHV argues that the sprinkler unit which burst was located within Unit 3 and was not a Common Element. Plaintiffs concede that to be true. IHV further argues that since the sprinkler unit was not a Common Element, it cannot be responsible for the damage. IHV argues correctly that Plaintiffs have not alleged facts which would demonstrate that IHV had any duty to Plaintiffs to warn of or protect them from the sprinkler unit. If Plaintiffs cannot show that a party had such

a legal duty, they cannot state a claim for negligence against them. *Booker v. White Oak Condominium Ass'n, Inc.*, 2007 WL 2677065 at *1 (Del. Super. 2007).

While all agree that the sprinkler unit is not a Common Element, Plaintiffs have alleged that the cause of the incident may not have been the sprinkler unit itself. Plaintiffs have claimed that inadequate insulation of the wall system piping may have caused the sprinkler unit to burst. A forensic report supports this contention. The allegations that IHV was negligent with regard to the Common Elements do not refer to the sprinkler unit itself; they refer to other aspects of the plumbing system which are the responsibility of IHV. The factual questions of what caused the sprinkler unit to burst, whether Common Elements caused it to happen, and whether IHV was negligent in maintaining those Common Elements remain for discovery to elaborate. Count II, the negligence claim against IHV, cannot be dismissed as recovery is feasible under a reasonable interpretation of alleged facts.

B. Count III is a negligence claim against Randall A. Snowling ("Snowling") for actions taken individually and as President of Indian Harbor Villas Condominium Association, Inc. The allegations against Snowling in the complaint are that he delayed the investigation of the water leak incident and that he instructed others to delay submitting Plaintiffs' claim to IHV's liability carrier. Plaintiffs claim that he "acted negligently, intentionally, willfully, and/or wantonly . . ." Compl. ¶ 33. Snowling has argued that this claim is barred under the business judgment rule.

The business judgment rule extends to officers and directors of corporations and creates "a presumption that in making a business decision 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." *Underbrink v. Warrior Energy Services Corp.*, 2008 WL 2262316 at

*10 (Del. Ch. 2008). The business judgment rule does not allow a simple negligence standard to bring a negligence claim against a director; it requires a standard of gross negligence which is extremely stringent under Delaware law. *In re Lear Corp. Shareholder Litigation*, 967 A.2d 640, 651-652 (Del. Ch. 2008). Since the business judgment rule applies to officers, as well as directors, this standard should apply to Snowling.

Plaintiffs argue that the personal participation doctrine is an exception to the business judgment rule which allows a claim to be brought against Snowling. This doctrine states that "corporate officers are liable for their tortious conduct even though they were acting officially for the corporation in committing the tort." *T.V. Spano Bldg. Corp. v. Wilson*, 584 A.2d 523, 530 (Del. Super. 1990). It is not for the courts to question the judgment of a corporate officer in deciding what is best for his company; however, he is still liable for any torts he may commit.

Even if the business judgment rule applied, Snowling may have responsibility for actions taken largely to benefit himself although acting in the corporate format. *See Smith v. Hercules, Inc.*, 2002 WL 499817 at *3 (Del. Super.).

In reviewing the allegations of Count III, it cannot be said that Plaintiffs could not recover under "any reasonably conceivable set of circumstances" that are susceptible to proof for personally participating in a tort or for advancing his own interests. This is a subject area for discovery; however, a summary judgment motion may be considered later if appropriate.

C. Count IV is a vicarious liability claim against Snowling, Marie-Louis Caravatti, William Gearhart, Jr., Michael Streckfus, and Stephen Fuss. On March 19, 2009, the five defendants named in this claim and Plaintiffs stipulated that this aspect of the count be dismissed.

CONCLUSION

Considering the foregoing, Defendants' Motion to Dismiss is GRANTED concerning the vicarious liability claim in Count IV. It is DENIED as to Counts II and III.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary