16-P-451 Appeals Court

MAC'S HOMEOWNERS ASSOCIATION & another[1] vs. JAMES GEBO & others.[2]

No. 16-P-451.

Essex. February 2, 2017. - November 9, 2017.

Present: Green, Meade, & Agnes, JJ.

Practice, Civil, Motion to dismiss, Consumer protection case. Manufactured Housing Community. Cooperative Housing. Consumer Protection Act, Standing, Unfair or deceptive act.

Civil actions commenced in the Northeast Division of the Housing Court Department on June 24 and July 1, 2014.

After consolidation, a motion to dismiss was heard by Timothy F. Sullivan, J., and entry of separate and final judgment was ordered by him.

Stephen A. Wasserman for the plaintiffs.
Joseph E. Kelleher, III, for the defendants.

AGNES, J. The plaintiffs, cooperative housing associations whose members (hereinafter homeowners) own mobile homes located

[1] Newbury Cooperative Corporation.

[2] Norman Lee and Greystone Properties, LLC.

in Mac's Trailer Park (Mac's Park) in Peabody, initiated this action claiming that the defendants (hereinafter developers) committed unfair or deceptive acts or practices in violation of G. L. c. 93A, § 2, when they appeared unannounced and declared that they were purchasing Mac's Park and that the homeowners would have to move or vacate. The developers' actions are alleged to have been premature, given that the owner of Mac's Park failed to provide the homeowners with the statutorily mandated notice of sale and opportunity to exercise a right of first refusal, see G. L. c. 140, § 32R, and unlawful, in that, by law, the homeowners' tenancies could only be terminated for certain specific reasons, none of which were applicable, see G. L. c. 140, § 32J. As a result, the plaintiffs allege that the homeowners put their lives "on hold," were unable to sell or lease their mobile homes, and suffered extreme emotional distress. Acting on a motion to dismiss filed by the developers, however, a Housing Court judge held that the plaintiffs failed to state a claim upon which relief could be granted. See Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974). This appeal followed, and upon the required de novo review, we conclude that the factual allegations in the plaintiffs' complaint are sufficient to plausibly suggest an entitlement to relief under G. L. c. 93A. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

Background. The following facts are derived from the plaintiffs' verified complaint. Mac's Park is a "manufactured housing community," see G. L. c. 140, § 32F, as appearing in St. 1991, c. 481, § 19, owned by Matthew Lowe. The park consists of twenty-two numbered lots for "manufactured homes," see G. L. c. 140, § 32Q, as appearing in St. 1991, c. 481, § 19, more commonly referred to as mobile homes. As of the time the complaint was filed, twenty of the units were occupied. Lowe owned ten of the twenty occupied units, and the other ten occupied units were owned by third parties who leased the lots from Lowe. Plaintiff Newbury Cooperative Corporation (NCC) is a cooperative housing corporation organized under G. L. c. 156B and c. 157B; all of its members are owners of mobile homes located at Mac's Park. Plaintiff Mac's Homeowners Association (MHA), in turn, is an association consisting of owners who actually reside in their mobile homes at Mac's Park. Members of both MHA and NCC represent a majority of the mobile home owners resident in Mac's Park. Lowe does not reside at the park. Nor is he a member of either NCC or MHA.

In early 2013, Lowe "advertised, listed or gave public notice" that Mac's Park was for sale. In accordance with G. L. c. 140, § 32R, as appearing in St. 1993, c. 145, § 19, therefore, he was required, within fourteen days, to give notice to "each [park] resident" of his intention to sell. This he

failed to do. And, according to the plaintiffs, his failure to do so, by law, constituted an unfair or deceptive act or practice under G. L. c. 93A, § 2. See G. L. c. 140, § 32L(7) (failure to comply with any of the manufactured housing community provisions set forth in G. L. c. 140, §§ 32A to 32S, constitutes a c. 93A violation); 940 Code Mass. Regs. § 10.02(3) (1996) (same); 940 Code Mass. Regs. § 10.09(1)(a) (1996) (failure to provide the notice required under G. L. c. 140, § 32R[a], is a c. 93A violation).

Subsequently, in or about August, 2013, Lowe entered into an agreement to sell Mac's Park to the defendant developers, James Gebo, Norman Lee, and Greystone Properties, LLC. The developers planned to expand the manufactured housing community, remove all of the existing mobile homes, and replace them with thirty-three new units that they would own and rent out to third parties. Under the agreement with Lowe, the developers were allowed to appear before various public boards and agencies to seek necessary approvals for the project. This fact was not disclosed to the homeowners.

In early February, 2014, the plaintiffs learned of the sale when the developers appeared unannounced at Mac's Park and went from door to door with blueprints for the proposed project. The message the developers conveyed during that visit was that the homeowners would have to move out to make way for the new units.

The developers further warned the homeowners "not [to] take this . . . lightly" and "not to stick your head in the sand." As alleged in the plaintiffs' complaint, the visit was emotionally upsetting to the homeowners, at least one of whom had to seek medical attention for the resulting anxiety.

Shortly thereafter, some of the homeowners found letters from the developers attached to the doors of their mobile homes, advising that an appraiser would be coming to Mac's Park to assess the fair market value of each unit. The letter also outlined the "options" available to each homeowner, including relocating the mobile home to another park, with reasonable moving costs to be covered by the developers, or accepting fair market value for the "buyout" of the mobile home and using that money to either move elsewhere or rent or purchase a new unit from the developers. The letter concluded by stating, "Please be aware that you are still under legal obligation to pay your monthly rental fee to the current/new owners during and up to the time you either move or vacate your unit."

In a letter dated March 26, 2014, Lowe sent the homeowners written notification of the sale, in purported, albeit belated, compliance with G. L. c. 140, § 32R. In response, plaintiff MHA and its members sent Lowe and the developers a demand letter pursuant to G. L. c. 93A, § 9(3), alleging various unfair or deceptive acts or practices. Among other things, the letter

asserted that the developers' threats to move or evict the homeowners violated the Massachusetts statute that allows for the termination of such a tenancy only under limited circumstances, none of which were applicable. See G. L. c. 140, § 32J, as appearing in St. 1991, c. 481, § 19 (a "tenancy or other estate at will or lease in a manufactured housing community" may only be terminated for nonpayment of rent, violations of the housing community's rules or health and safety laws and ordinances, discontinuance of the manufactured housing community, or conversion of an existing tenancy at will to a new tenancy at will at increased rent).

Some six weeks later, plaintiff NCC sent Lowe a letter exercising the right of first refusal, granted under G. L. c. 140, § 32R(c), to a "group or association of residents representing at least fifty-one percent of the manufactured home owners residing in the [manufactured housing] community," to purchase the property on substantially the same terms and conditions as the developers. Lowe rejected NCC's tender. See G. L. c. 140, § 32L(7); 940 Code Mass. Regs. §§ 10.02(3), 10.09(1)(c) (1996) (making it a violation of c. 93A to "unreasonably refuse to enter into, or to unreasonably delay the execution or closing on, a purchase and sale agreement or lease with residents who have exercised their right of first refusal"). Lowe, along with the developers, then initiated an

action in the Housing Court against both NCC and MHA, seeking an injunction authorizing the sale to the developers. According to Lowe and the developers, NCC and MHA did not have a right to exercise the § 32R right of first refusal because Lowe owned more than fifty percent of the mobile homes at Mac's Park.[3] After a hearing, however, a judge disagreed and noted that the statute affords the right of first refusal to "[a] group or association of residents representing at least fifty-one percent of the manufactured home owners residing in the community" (emphasis added). G. L. c. 140, § 32R(c). As the homeowners satisfied that requirement, the judge issued an order (1) enjoining the sale to the developers, (2) requiring Lowe to execute the purchase and sale agreement tendered by NCC, and (3) providing for the expiration of the injunction in ninety days if NCC had not secured a binding commitment to finance the purchase by that time.[4]

In the meantime, NCC and MHA initiated the present action against Lowe and the developers. Following issuance of the injunction enjoining the sale to the developers, the two actions were consolidated. Subsequently, NCC and MHA dismissed the

[3] The complaint filed by Lowe and the developers averred that Lowe and his wife, Lyse, who also was a named plaintiff in the action, owned twelve of the twenty-two housing units at Mac's Park.

[4] NCC was unable to secure financing to effectuate the purchase.

claims against Lowe,[5] leaving only the claim for violations of G. L. c. 93A, § 2, against the developers. The developers filed a motion to dismiss that surviving claim, pursuant to Mass.R.Civ.P. 12(b)(6), which was allowed by a different judge of the Housing Court. According to the judge's note in the margin of the motion, the claim was dismissed for the "reasons set forth in [the developers'] motion and supporting memorandum." Judgment entered for the developers pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974), and this appeal followed.

Standard of review. In reviewing a motion to dismiss under rule 12(b)(6), we take as true all factual allegations in the complaint and draw any reasonable inferences therefrom in the plaintiffs' favor. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011), S.C., 466 Mass. 156 (2013). "The ultimate inquiry is whether the plaintiffs alleged such facts, adequately detailed, so as to plausibly suggest an entitlement to relief." Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012), citing Iannacchino, 451 Mass. at 636. Our review is de novo. See Dartmouth v. Greater New Bedford Regional Vocational Technical High Sch. Dist., 461 Mass. 366, 373 (2012).

[5] NCC and MHA also dismissed the claims they had asserted against Lowe's wife, Lyse.

Discussion. To prevail on their claim under G. L. c. 93A, NCC and MHA must establish (1) that they are proper plaintiffs to bring a claim under § 9, (2) that the developers committed unfair or deceptive acts or practices in the conduct of any trade or commerce, and (3) that those acts or practices were a foreseeable cause of injury to the plaintiffs. See G. L. c. 93A, §§ 2(a), 9; Iannacchino, 451 Mass. at 630 n.12. The developers maintain that the c. 93A claim asserted by NCC and MHA is wanting in all three respects.

1. Proper plaintiff. On appeal, the developers argue for the first time that MHA, as an unincorporated association, has no standing to bring a claim under G. L. c. 93A, § 9.[6] "It is a well established principle that an unincorporated association cannot be a party to litigation." Save the Bay, Inc. v. Department of Pub. Util., 366 Mass. 667, 675 (1975). The Legislature, however, has created an exception to that rule in c. 93A. Any "person," other than one entitled to bring an action under § 11 of c. 93A, may bring an action under § 9. See G. L. c. 93A, § 9(1), as appearing in St. 1979, c. 406, § 1. A

[6] After the developers raised this issue in their appellate brief, the plaintiffs sought to substitute the individual MHA members as parties to the complaint, which motion was denied in the trial court. We consider the developers' argument because standing affects the jurisdiction of the court, and a court therefore must address such a question whenever it arises. Statewide Towing Assn. v. Lowell, 68 Mass. App. Ct. 791, 794 (2007).

"person," in turn, includes "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity" (emphasis added). G. L. c. 93A, § 1(a), inserted by St. 1967, c. 813, § 1. MHA, therefore, is a proper plaintiff.[7] See also Mass.R.Civ.P. 23.2, 365 Mass. 769 (1974).

2. Unfair or deceptive acts or practices. The developers also contend that the plaintiffs' allegations of acts or practices that are unfair or deceptive are legally deficient. The developers first argue that, as a matter of law, they, as mere prospective purchasers of Mac's Park, cannot be held liable under c. 93A for any alleged failures to comply with the applicable "manufactured housing community" statute and regulations, because the statute and regulations only restrict

[7] In this case, the complaint sought injunctive relief as well as damages on behalf of the individual members of the two plaintiff associations. As discussed above, the fact that MHA is an unincorporated association does not deprive it of standing to bring such a complaint. See G. L. c. 93A, § 9. Whether it is necessary for the plaintiffs to join the individual owners in order to obtain "individualized proof" for purposes of an award of monetary damages, see Modified Motorcycle Assn. of Mass., Inc. v. Commonwealth, 60 Mass. App. Ct. 83, 86 (2003), quoting from Hunt v. Washington State Apple Advertising Commn., 432 U.S. 333, 344 (1977), is a question that was not raised by the defendants and that we need not address here. Given the result we reach, this matter will be returned to the trial court, where, as the defendants acknowledge, the plaintiffs may renew their motion to amend the complaint to name the individual homeowners as plaintiffs in the action, and "leave shall be freely given" to do so. Mass.R.Civ.P. 15(a), 365 Mass. 761 (1974).

the actions of the "operators" of such communities.[8] In our view, however, the statute and the accompanying regulations encompass the conduct of the developers in this case based on the following considerations: (1) the existence of a purchase and sale agreement signed by the developers and Lowe; (2) that the developers appeared before municipal boards and agencies seeking approvals for their project; and (3) that the developers made representations to the homeowners that the sale of the park was a fait accompli. For those reasons, we conclude that the plaintiffs' complaint is sufficient to state a cause of action against the developers under G. L. c. 93A.

As to the allegations of deceptive acts or practices, the developers suggest that the "sole" allegation in the complaint that they committed unfair or deceptive acts or practices consists of the letter that they left on the doors of homeowners at Mac's Park, which concluded with the assertion that the homeowners needed to keep current on their rent until they

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[8] Whether the developers qualify as "operators" in this case is a question that we need not answer. We note, however, that, rather than being limited exclusively to "operators," the manufactured housing community statute and regulations use several different terms to refer to the actors whose conduct is targeted, including "owner," G. L. c. 140, § 32R; "licensee entitled to the manufactured home site or his agent," G. L. c. 140, § 32J; and "operator," 940 Code Mass. Regs. §§ 10.02(3) and 10.09(1) (1996). In addition, the term "operator" is broadly defined in the regulations. See 940 Code Mass. Regs. § 10.01 (1996) ("a person who directly or indirectly owns, conducts, controls, manages, or operates any manufactured housing community, and his/her agents or employees").

"either move or vacate [their] unit." The developers then argue that, as a matter of law, the letter is not actionable under c. 93A because it merely states the obvious: that the homeowners had a legal obligation to pay rent until the end of their tenancies. This argument, however, slices the allegations of the complaint too thinly.

The allegations of unfair or deceptive acts or practices are not limited to the aforementioned letter. According to the complaint, the developers also previously had paid an unannounced visit to Mac's Park, during which they notified the homeowners of the pending sale for the first time and generally conveyed the message that the homeowners would have to move out. The letter then followed, and the plaintiffs' objections to it are not limited to the closing paragraph, which reminded the homeowners to stay current on their rent until they move or vacate. The letter also outlined the options the homeowners purportedly faced as a result of the developers' purchase of, and plans for, Mac's Park. Upon a fair and reasonable reading, those options all can be interpreted to require, as the final paragraph seemingly confirms, that the homeowners either "move or vacate." Apart from the question whether the developers should be deemed to stand in the shoes of the owner and operator of Mac's Park, these alleged actions, combined with the allegation that the developers had no legal justification for

taking such actions, could constitute unfair or deceptive acts or practices under c. 93A. At the rule 12(b)(6) stage, those allegations are sufficient.

3. Reliance and injury. Finally, the developers maintain that the c. 93A claim must be dismissed because the plaintiffs have not alleged that the homeowners either relied upon or were injured by the unfair or deceptive acts or practices. The plaintiffs, however, are not required to show proof of actual reliance on a misrepresentation to recover under G. L. c. 93A, § 9, but, rather, must show "a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception." Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011), quoting from Iannacchino, 451 Mass. at 630-631 n.12. The complaint alleges more than simply subjective measures of harm. For example, the complaint alleges that as a result of the developers' misrepresentation that the homeowners would be required to move or vacate, they were forced to put their lives on hold, were unable to sell or lease their units, and suffered extreme emotional distress. Accordingly, the plaintiffs have satisfactorily alleged not only causation, but also that the homeowners suffered "injury" in an objective sense, cognizable under § 9. See Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc., 445 Mass. 790, 798-800 (2006) (holding that severe emotional distress or invasion of a legally

protected interest can constitute an "injury" under § 9 "even if the consumer lost no 'money' or 'property'"). This is not a case where the alleged injury lacks an identity that is separate from the claimed deceptive conduct. See Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503 (2013) ("[T]he violation of the legal right that has created the unfair or deceptive act or practice must cause the consumer some kind of separate, identifiable harm arising from the violation itself"). See also Shaulis v. Nordstrom, Inc., 865 F.3d 1, 10-13 (1st Cir. 2017).

Judgment reversed.[9]

[9] The plaintiffs' request for appellate attorney's fees is denied.