

**Lesal Assoc. v Board of Mgrs. of the Downing Ct.
Condominium**

2003 NY Slip Op 30261(U)

January 13, 2003

Supreme Court, New York County

Docket Number: 605851/99

Judge: Marilyn G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

INDEX NO ,605851/99

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

LESAL ASSOCIATES,

Plaintiff,

-against-

BOARD OF MANAGERS of the DOWNING COURT
 CONDOMINIUM, on behalf of all Unit Owners of such
 Condominium, and MICHAEL VOLTZ, GERALD
 FINKEL, MARIANNE STEWART and VICKIE
 McMAHON in their capacities as the Residential Managers
 of the Board of Managers of such Condominium,

Defendants.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Plaintiff Lesal Associates is a New York limited partnership which, pursuant to article 9-B of the Real Property Law, sponsored the conversion of a building located on Downing Street in Manhattan to a condominium. As established, the condominium consists of 32 residential units, 1 commercial unit and 1 professional unit. **As** provided for in the condominium's Offering Plan, Lesal sold its shares in the residential units but retained ownership and control over the commercial professional units. Pursuant to its Declaration and Bylaws, the condominium's Board of Managers consists of five residential managers and one commercial manager. The defendants in this action are the residential managers and the Board itself

This dispute concerns the proper method for assessing and allocating common charges for the various units in the condominium. Under Real Property Law §339-m, common charges in a condominium may be apportioned based on the respective individual interests ("common interests") of each unit in the commonly owned areas of the land and building ("common elements"). Under this method, the common charges assessed on a particular unit will reflect the percentage of the total space in the building which it occupies. If this method were used, Lesal would be responsible for 21.31% of the common charges. However, section 339-m also provides that, if authorized by the Declaration and Bylaws, a unit's common charges may be calculated under an alternative method "based on special or exclusive use or availability or exclusive control of particular units or common areas by particular unit owners." Under this method, the common charges assessed on a particular unit would reflect the unit's use of the common elements.

Here, it appears that prior to 1999, the method used by the condominium to calculate the common charges was based on the exclusive use or control of common elements by the respective residential, commercial and professional units so as to reflect the expenses attributable to each such unit. However, at a meeting of the Board of Managers on November 22, 1999, the residential managers approved a proposal under which each of the unit owners would be responsible for a fixed percentage of the budget for operating the condominium allocated in a manner based solely upon each owner's common interest and not upon the actual expenses attributable to the unit.

Lesal then commenced this action seeking a declaratory judgment that defendants can not allocate residential common expenses to Lesal but, rather, are limited to allocating to Lesal only common charges for the portions of the condominium which it uses. Lesal also seeks a judgment declaring that defendants may not change the allocation of common charges to the commercial and professional units without the vote

of the commercial manager. In their answer, defendants asserted a counterclaim for **\$361,264.33, the amount** of outstanding common charges which Lesal has allegedly refused to pay since 1999: They also seek a declaratory judgment that the condominium's annual expense requirements shall be assessed as a single sum against all units and prorated against each unit according to their respective common interests. Lesal now moves for summary judgment on its request for a declaratory judgment. Defendants have cross-moved for summary judgment on their two counterclaims.

Discussion

Lesal argues that by attempting to **change the method** of allocating common charges from one based on actual use to one based solely on the unit **owner's common interest** in the condominium as a whole, the residential managers are improperly forcing the commercial and professional units to subsidize the residential operations. In support of its argument, Lesal **points out** that the Declaration and Bylaws specifically provide for the allocation and apportionment of the **expenses** of the condominium to the professional unit, the commercial unit and **the residential units in a manner that is different** from the respective common interests of these units.

In fact, the Declaration and Bylaws contain a number of seemingly contradictory provisions. Paragraph nine of the Declaration **provides that all expenses** of the condominium shall be "Common Expenses" which shall be "apportioned among all the Unit Owners according to the method set forth in the By-Laws." Article VI, section 2 of the ByLaws **provides that all** of the assessments shall be deemed to be common charges and that "the total **annual requirements shall** be assessed as a single sum against all Units and prorated against each of said Units according to the respective Common Interests appurtenant to such Units." These provisions support the defendants' present method of calculating the common charges. However, there are other, more specific provisions in the Declaration and ByLaws which provide that certain expenses are to be allocated exclusively to the residential units, certain expenses exclusively to "the commercial and professional units, and other expenses allocated to all of the units. The Declaration defines certain charges or assessments as **Commercial Common Charges**, Professional Common Charges and Residential Common Charges and provides that these charges will be assessed against the specific units to which they apply. Thus, definition 26 of the Declaration provides that:

"Residential Common Charges" shall mean the charges allocated and assessed by the Condominium Board from time to time against the Residential Unit Owners, pro-rata in accordance with their respective Common Interests (except as otherwise provided in the Declaration or the Bylaws), to meet the Residential portion of the Common Expenses.

Analogous definitions are given for "Commercial Common Charges" and "Professional Common Charges." In addition, definition nine of the Declaration breaks down the common elements of the condominium into "General Common Elements," "Limited **Common** Elements," "Residential Limited Common Elements" and "Commercial Limited Common Elements." These definitions demonstrate that the Declaration's intent is to segregate certain common charges and assess them only against the unit that incurred them.

An even more detailed provision for the allocation of expenses can be found in article 111, section 6 of the ByLaws, which breaks down the **expenses incurred** by the condominium for maintenance, repairs and/or improvements and, consistent with Real Property Law §339-m, specifically allocates those expenses to unit owners based on their particular use or control of the subject areas. It does this by creating four categories of expenses: (1) expenses to be borne exclusively by **an individual residential unit owner**; (2) expenses to be borne exclusively by the commercial unit owner for the Commercial Limited Common Elements; (3) "Common Expenses" to be borne **by** all unit owners; and (4) "Residential Common Expenses" to be borne only by the owners of the residential units for the Residential Limited Common Elements.

It is well settled that when resolving a conflict between provisions of a contract, a court should adopt

an interpretation which attempts to give meaning to every provision of the agreement. *See Hudson Iron Works, Inc. v. Beys Speciality Contracting, Inc.*, 262 AD2d 360, 362 (2nd Dept. 1999); *Trump v. Refco Properties, Inc.*, 194 AD2d 70, 75 (1st Dspt. 1993). To the extent that there are inconsistencies between a general provision and a specific provision of a contract, the specific provision controls. *See Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner*, 243 AD2d 1, 8 (1st Dept. 1998). Here, the provisions of the Declaration and Bylaws which segregate expenses according to a unit's category are far more detailed and comprehensive than the provisions upon which defendants rely in arguing that all expenses are common charges to be divided according to the unit owners' respective common interests. Defendants' interpretation ignores or misconstrues key portions of the Declaration and ByLaws. It is also significant that for the twelve years prior to November, 1999, the resident managers approved common charge assessments which were consistent with Lesal's interpretation of the Declaration and the Bylaws. In this respect, the parties' course of performance under the contract is considered to be the "most persuasive evidence of [their] agreed intention." *Federal Insurance Company v. Americas Insurance Company*, 258 AD2d 39, 44 (1st Dept. 1999). Defendants' assertion that the residential managers were misled or deceived by the commercial manager is conclusory and without any evidentiary support.

Finally, the court agrees with Lesal that the Offering Plan is valuable in helping to interpret the Declaration and Bylaws even if the Plan itself is not a contract which binds subsequent purchasers of the residential units. The Offering Plan here clearly provided that the commercial unit would be required to pay only for the services it directly received **and the portion** of the common elements that it utilized. Since they were all part of the same transaction, it is **entirely appropriate** to read the Offering Plan, the Declaration **and** the Bylaws together and to then conclude that the commercial and professional units are only obligated to pay common charges and expenses fairly attributable to those units. *See Nancy Neale Enterprises, Inc., v. Eventful Enterprises, Inc.*, 260 AD2d 453 (2nd Dept. 1999)

Lesal is therefore entitled to summary judgment on its first cause of action for a judgment declaring that defendants can not allocate residential common expenses to Lesal and are limited to allocating to Lesal common charges which reflect its use of the common elements of the condominium.

As to Lesal's second cause of action **for a judgment** declaring that the defendants improperly changed the allocation of common charges to the **commercial and** professional units without the approval, of the commercial manager at the November 22, 1999 Board meeting, the parties have not adequately addressed the issue and, in any event, the court need **not resolve the** matter since it **has** already ruled that the change was otherwise improper.

As to the defendants' first counterclaim for the common charges which Lesal has allegedly refused to pay since 1999, the court is unable at this time to determine the amount that is actually due in light of the declaratory relief granted herein. The defendants' cross-motion for summary judgment on the first counterclaim **must therefore be denied.**

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on February 18, 2003 at 11:30 a.m. for a status conference.

ENTER ORDER

Dated: 1/13/03

Check one: FINAL DISPOSITION



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION