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SHORT FORM ORDER

INDEX No. 12-27815

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-29-13
ADJ. DATE 2-7-13
Mot. Seq. # 001 - MD
002 - XMD

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VICTOR J. ZUPA and MARY ZUPA,

Plaintiffs,

- against -

PARADISE POINT ASSOCIATION, INC.,

Defendant.

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CIARELLI & DEMPSEY P.C.
Attorneys for Plaintiffs
737 Roanoke Avenue
Riverhead, New York 11901

MCNULTY-SPEISS, P.C.
Attorneys for Defendant
214 Roanoke Avenue, P.O. Box 757
Riverhead, New York 11901

Upon the following papers numbered 1 to 54 read on this motion for partial summary judgment' cross motion for partial summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34 ; Notice of Cross Motion and supporting papers 36 - 48 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 49 - 53 ; Other 35, 54 Memoranda of Law ; it is,

ORDERED that this motion by plaintiffs for an Order granting partial summary judgment in their favor on the causes of action for declaratory and injunctive relief is denied; and it is

ORDERED that the motion by defendant for summary judgment on its first counterclaim is denied; and it is further

ORDERED that the parties' attorneys shall appear before the undersigned on **May 30, 2013 at 9:30 a.m.** for a preliminary conference.

Plaintiffs Victor Zupa and Mary Zupa are the owners of a parcel of residential property in a private, waterfront community known as Paradise Point, which is located in the Town of Southold. The property, known as 4565 Paradise Point Road, consists of two lots designated as Lot 5 and Lot 6 in a subdivision map entitled "Map of Section One Paradise Point at Bayview" filed with the Suffolk County Clerk in April 1963 as Map Number 3761, and is improved with a single family residence, tennis court and dock. Defendant Paradise Point Association, Inc. (the "Association"), is a not-for-profit corporation that holds title to the common areas within the residential community, including the roads, boat basin and jetty, and has easement rights in certain private properties.

On June 7, 2012, the Association filed a lien against the subject premises in the sum of $47,594 for unpaid fees, charges and assessments allegedly incurred by plaintiffs during the period from July 2000 to July 2011. In addition to charges for association dues and dock fees, the statement of amount due set forth in the lien document, which contains the same charges as set forth in an August 2011 Statement of Member account allegedly served on plaintiffs by the Association, includes two "litigation assessment" charges totaling $10,000, four "working capital assessment" charges totaling $20,000, a "capital gains & improvement assessment" charge of $1,750, and a "dock owners share of dredging cost" charge of $2,044.

Subsequently, in September 2012, plaintiffs commenced this action for a judgment declaring that the Association lacks the authority to record such lien against the subject property. More specifically, the first cause of action in the complaint asserts that plaintiffs' property is not subject to any covenants or restrictions permitting the Association to impose and record a lien against the subject property, and the second cause of action asserts that the Association lacks the authority to impose and record a lien against the subject property for capital assessments. Plaintiffs, by their third cause of action, seek a judgment enjoining the Association from imposing and recording a lien against their property based on an alleged breach of covenants and resolutions. Plaintiffs also assert claims for damages based on breach of contract and willful exaggeration of the amount of the lien. Finally, plaintiffs assert a claim for unjust enrichment, alleging that they are entitled to compensation for costs they incurred in dredging the canal and boat basin. The Association, by its answer, asserts counterclaims for breach of an "implied agreement . . . to pay fees, dues and assessments charged . . . as a result of their ownership of the subject premises," and for foreclosure on the lien.

Plaintiffs now move for an Order granting summary judgment in their favor on the causes of action for declaratory and injunctive relief, arguing that the Association, in fact, is not a homeowners association and lacks the authority to assess common charges and place a lien against the subject property. Plaintiffs' submissions in support of the motion include copies of the pleadings, the lien filed by the Association with the Suffolk County Clerk in June 2012, the Association's Certificate of Incorporation, the subdivision map for the Paradise Point development filed in 1963, various member account statements and budget statements prepared by the Association, deeds transferring ownership of certain lots to the Association, and the deed transferring ownership of Lots 5 and 6 to plaintiffs. Plaintiff Victor Zupa also submits his own affidavit in support of the motion. The Association opposes the motion and cross-moves for an Order awarding it summary judgment on the counterclaim asserting breach of an implied contract to pay dues and other assessments. In support of the cross-motion, the Association submits, among other things, an affidavit of Peter Cooper, copies of its constitution and bylaws, and an uncertified transcript of Victor Zupa's trial testimony in a separate action brought by the Association against Mary Zupa. The Court notes legal arguments and documentary evidence presented for the first time in plaintiffs' reply papers were not considered in the determination of the motions (*see* ***Sanz v Discount Auto***, 10 AD3d 395, 780 NYS2d 763 [2d Dept 2004]; ***Dannasch v Bifulco***, 184 AD2d 415, 585 NYS2d 360 [1st Dept 1992]; ***Ritt v Lenox Hill Hosp.***, 182 AD2d 560, 582 NYS2d 712 [1st Dept 1992]).

It is well-settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of

any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Plaintiffs' motion for summary judgment in its favor on its claims for declaratory injunctive relief is denied. Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; ***Rockland Light & Power Co. v City of New York***, 289 NY 45, 43 NE2d 803 [1942]; ***Thome v Alexander & Louisa Calder Found.***, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations" (***James v Alderton Dock Yards***, 256 NY 298, 305, 176 NE 401 [1931]). The remedy of a declaratory judgment is appropriate "in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (***Dun & Bradstreet, Inc. v City of New York***, 276 NY 198, 206, 11 NE2d 728 [1937]), and a court generally should not entertain a declaratory judgment action when a conventional form of remedy is available (*see* ***Bartley v Walentas***, 78 AD2d 310, 434 NYS2d 379 [1st Dept 1980]). Similarly, a permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see* ***Gaynor v Rockefeller***, 15 NY2d 120, 256 NYS2d 584 [1965]; ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***McDermott v City of Albany***, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]).

Plaintiffs' submissions are insufficient to establish as a matter of law that they are not liable for association dues and other assessments made by the Association, because the deeds transferring ownership of Lots 5 and 6 in the Paradise Point development do not include a covenant for the payment of such charges. "Every instrument creating, transferring, assigning, or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law" (Real Property Law § 240 [3]). To enforce a restrictive covenant, a party must show that its property derives from the original grantor who imposed the covenant and whose property was benefitted thereby, as well as that the party to be burdened by such covenant derived his or her property from the original grantee who took the property subject to the restrictive covenant (***Malley v Hanna***, 65 NY2d 289, 291, 491 NYS2d 286 [1985]). For a covenant to run with the land, the following three conditions must be met: "(1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one 'touching' or 'concerning' the land which it runs; (3) it must appear that there is 'privity of estate' between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant" (***Neponsit Prop.***

Owners' Assn. v Emigrant Indus. Sav. Bank, 278 NY 248, 254-255, 15 NE2d 793 [1938]; *see* ***Riverton Community Assn. v Meyers***, 142 AD2d 984, 530 NYS2d 406 [4th Dept 1988]). Further, a property owners' association, formed as an instrument by which property owners can advance their common interests, may enforce a covenant running with the land in its capacity as the representative of the property owners (***Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank***, 278 NY 248, 262, 15 NE2d 793; *see* ***Westmoreland Assn. v West Cutter Estates***, 174 AD2d 144, 579 NYS2d 413 [2d Dept 1992]). Here, the documentary evidence submitted with the moving papers, particularly the uncertified copy of the 1981 deed, which was incomplete, and the uncertified copy of the 1998 deed pertaining to the subject premises, failed to establish as a matter of law that Lot 5 was not burdened with a covenant to join the Association and abide by the rules governing such association.

Moreover, people who knowingly acquire property within a residential community with services and facilities provided by a homeowners association may be held liable, on the basis of an implied contract, for their *pro rata* share of annual assessments levied by the homeowners association, even if there is no covenant to pay such assessment in the property owner's deed or if the property owners are not members of the association, if they benefit from such services and facilities (*see e.g.* ***Seaview Assn. of Fire Is. v Williams***, 69 NY2d 987, 517 NYS2d 709 [1987]; ***Perkins v Kapsokefalos***, 57 AD3d 1189, 869 NYS2d 667 [3d Dept 2008]; ***Douglas Manor Assn. v Popovich***, 167 AD2d 499, 562 NYS2d 170 [2d Dept 1990]; ***Tides Prop. Owners Assn. v Paolillo***, 56 AD2d 888, 392 NYS2d 670 [2d Dept 1977]; *see also* ***Mohegan Colony Assn. v Picone***, 61 AD2d 809, 402 NYS2d 40 [2d Dept 1978]; *cf.* ***Shrub Oak Park Community Assn. v Fiducia***, 66 AD2d 778, 410 NYS2d 666 [2d Dept 1978]). Plaintiffs failed to establish a *prima facie* case that they did not know of the homeowners association or that they did not enjoy any benefit from the services provided by the Association for residents of the Paradise Point community (*cf.* ***Mohegan Colony Assn. v Picone***, 61 AD2d 809, 402 NYS2d 40). Instead, Victor Zupa's affidavit indicates that plaintiffs dock their boat in the basin behind the subject property, that they paid $249,017 for dredging, revetments and bulkhead construction in the canal and basin, that they were actively involved in the Association until sometime in 1999, and that they were "barred" from membership from 2002 to the present (*see* ***Perkins v Kapsokefalos***, 57 AD3d 1189, 869 NYS2d 667). Plaintiffs' moving papers also failed to demonstrate they will be irreparably harmed by the cloud on title on the subject property created by the Association's lien.

The Association's cross-motion for judgment in its favor on the first counterclaim for breach of an implied contract also is denied. According to its certificate of incorporation and constitution, the purpose of the Association is to maintain the beaches, bulkheads, roads, clubhouse and other recreational structures on the property; "to supervise recreation, sports, bathing and boating"; "to perpetuate the standard and tone of the community"; and "to promote health, welfare . . . sociability and good fellowship for the members of the corporation." Section 1 of the Association's Bylaws states that "[a]ny individual holding title to real property in the premises known as Paradise Point . . . must become a member of this Association upon certification of eligibility and payment of annual dues and initiation fee." Section 1 further states that association members must pay their dues on or after July 1 of each year, that a member shall not be in good standing "when his dues shall have been allowed to lapse for a period not exceeding two months from the billing date," and that "[a] lien may be taken against the property, by the Association, and an assessment fee of 10% per year shall be charged from the beginning of the sixth month in arrears."

Absent claims of fraud, self-dealing, unconscionability or other misconduct, a court should apply a rule analogous to the business judgment rule when considering the actions of a not-for-profit corporation which owns and is responsible for maintenance and operation of a residential development's common areas, limiting its inquiry to whether the action at issue was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the corporation (*see* ***Forest Hills Gardens Corp. v West Side Tennis Club***, 23 AD3d 338, 806 NYS2d 591 [2d Dept 2005]; ***Captain's Walk Homeowners Assn. v Penney***, 17 AD3d 617, 794 NYS2d 82 [2d Dept 2005]; ***Gillman v Pebble Cove Homeowners Assn.***, 154 AD2d 508, 546 NYS2d 134 [2d Dept 1989]; *see also* ***Matter of Levandusky v One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807 [1990]). However, unlike the business judgment rule, the burden is on the board of the not-for-profit corporation to demonstrate it had the authority to act and that its action was reasonable (*see* ***Matter of Levandusky v One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807; ***LoRusso v Brookside Homeowner's Assn., Inc.***, 17 AD3d 323, 793 NYS2d 96 [2d Dept], *lv dismissed* 5 NY3d 783, 801 NYS2d 802 [2005]). The Association failed to submit admissible evidence establishing its authority to collect all of the charges assessed against plaintiffs, particularly the charges for "litigation assessments," "capital repairs and improvements," and "capital assessments" dating from July 2006 and earlier (*cf.* ***Board of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell***, 89 AD3d 657, 933 NYS2d 288 [2d Dept 2011]; ***Board of Directors of Hunt Club at Coram Homeowners Assn., Inc. v Hebb***, 72 AD3d 997, 900 NYS2d 145 [2d Dept 2010]). Although the affidavit of Peter Cooper avers that "fees are assessed uniformly against all property owners in Paradise Point," no evidence substantiating the amount allegedly owed or explaining how the assessments were calculated was submitted. Cooper also does not address the allegations by plaintiffs that they expended nearly $250,000 to make improvements to the Association's canal and boat basin, and that they were advised by the Association in 2010 that they would not be required to make payments towards the cost of dredging. In addition, the Association does not explain its extensive delay in seeking many of the dues and assessments allegedly owed by plaintiffs, nor does it address the allegation that it filed the lien at issue after plaintiff's placed the subject property on the market for sale in an effort to interfere with such sale.

Dated: May 6, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION