

[Cite as *Brainard v. Villas at Bella Terra Condominium Assn.*, 2017-Ohio-9385.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

GARY BRAINARD)	
)	
PLAINTIFF-APPELLANT)	
)	CASE NO. 16 MA 0188
VS.)	
)	OPINION
THE VILLAS AT BELLA TERRA)	
CONDOMINIUM ASSOCIATION)	
)	
DEFENDANT-APPELLEE)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Austintown Area Court, No. 4, of Mahoning County, Ohio Case No. 2015 CVF 00350 AUS

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellant Attorney Christopher Sammarone
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JUDGES:
Hon. Mary DeGenaro
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: December 29, 2017

[Cite as *Brainard v. Villas at Bella Terra Condominium Assn.*, 2017-Ohio-9385.]
DeGENARO, J.

{¶1} Plaintiff-Appellant, Gary Brainard, appeals the trial court's judgment in favor of Defendant-Appellee, The Villas at Bella Terra Condominium Association. For the following reasons, Brainard's assignments of error are meritless, and this matter is affirmed.

Facts and Procedural History

{¶2} The Villas at Bella Terra is a condominium complex. Brainard purchased a unit in 2004. Bella Terra is governed by an Association created and controlled by a declaration and bylaws and governed by a board. Brainard, as a unit owner is a member of the Association and subject to its regulations.

{¶3} The interior of the unit is exclusively owned by the Association member. All other elements of the property, including the exterior of a unit, are considered common areas that are owned by all of the members of the Association in a proportionate share. The repair and maintenance of the exterior of each unit is the responsibility of the Association. With respect to the repair and maintenance of the common areas, the condominium documents provide as follows:

The Association, to the extent and at such times as the Board, in its exercise of business judgment determines to allocate funds therefor, shall maintain, repair and replace...the exterior portions of all buildings and improvements which are part of the Common Areas....

Article IX, Maintenance and Repair, Declaration and Bylaws.

{¶4} Prior to August of 2013, Bella Terra contracted with a landscaper to install mulch around the shrubs and exterior of the units. Because of the mulch's high moisture content, a fungus developed causing a black discoloration on the vinyl, spouting, shutters, porch, columns, and wrap-around metal on Brainard's unit.

{¶5} Brainard complained about the discoloration to Bella Terra's Board and was told he needed to file a written complaint. On August 29, 2013, Brainard filed a complaint setting forth the damage to the exterior of his unit. In response, board members conducted internet research and tried several different cleaning options,

none of which proved successful. The Board also had several contractors evaluate the situation. Although their appearance was diminished, the spots remained.

{¶16} On April 30, 2015, Brainard filed a two-count complaint in the trial court alleging that Bella Terra failed to meet its duty to make prompt “repairs and restore damage or destruction of all or any part of the common elements” of the Bella Terra property. Further, Brainard alleged that Bella Terra breached its contract with the Association members by failing to repair or restore the siding and pillars of his unit.

{¶17} In the summer of 2015, Brainard hired an expert, Anthony Aulisio, owner of American Dream Remodelers, to provide an estimate to repair the damage to the exterior of Brainard's unit. Aulisio believed there were no cleaning agents that could remove the spores, and the best way to fix the problem was to replace the siding. Aulisio's estimate to replace the discolored siding was \$8,256.00.

{¶18} At a trial before the magistrate, it was undisputed that the staining caused by the spores was cosmetic only; the spores did not cause any structural damage. Internet research revealed that "the weather and the sun will wear them away." Charlene Butryn, wife of the then Board president, testified that the spore problem was visible on every unit in the Association. Ruth Ann Grant, a former Board member, concurred in Butryn's testimony. Butryn and Grant both had the spores on their units. Ultimately, the Board chose to do nothing further about Brainard's complaint. Brainard offered no testimony that the value of his condominium or any other unit in the development had sustained a reduction in its fair market value as a result of the spores.

{¶19} The magistrate's decision was in favor of Bella Terra, finding the spores did not affect the structural integrity of the buildings, were cosmetic, and had affected many units. The magistrate further found the cost of repair or restoration would be nearly double what existed in the Association's reserve account if every unit had the same damage as Brainard's.

{¶10} Brainard filed objections which the trial court overruled and affirmed the decision of the magistrate.

Business Judgment

{¶11} For clarity of analysis Brainard's four assignments of error will be discussed out of order. The second and fourth are interrelated and assert:

The Trial Court erred in ruling that the Appellee's Board of Trustees in the exercise of its business judgment can unilaterally elect to maintain or repair a Common Element.

The Trial Court erred in concluding that every unit in the Appellee's Association suffered damages the same as or similar to the Appellant.

{¶12} R.C. 5311.14(A) provides:

Unless provided otherwise in the declaration, damage to or destruction of all or any part of the common elements of a condominium property shall be promptly repaired and restored by the board of directors of the unit owners association. The cost of the repairs and restoration shall be paid from the proceeds of insurance, if any, payable because of the damage or destruction, and the balance of that cost is a common expense. (emphasis added)

{¶13} With respect to the repair and maintenance of the common areas, the condominium documents provide as follows:

The Association, to the extent and at such times as the Board, in its exercise of business judgment determines to allocate funds therefor, shall maintain, repair and replace...the exterior portions of all buildings and improvements which are part of the Common Areas...

Article IX, Maintenance and Repair, Declaration and By-Laws.

{¶14} The declarations obligate the Board to exercise business judgment in determining whether or when to maintain, repair, or replace the exterior portions of

the condominium property. Brainard argues that this provision should not permit a board to elect not to maintain a common element in light of the statute. However, the plain language of R.C. 5311.14(A) permits Bella Terra to make other provisions in its declaration, which it did, vesting the Board with the discretion to evaluate whether or not to undertake a particular course of action, in the exercise of business judgment.

{¶15} The declarations require the Board to exercise business judgment, which it has done. Thus, neither the trial court nor this court can dictate *how* that business judgment is exercised. The Board made numerous attempts to remedy the discoloration of Brainard's unit, but the only alternative he suggested and sought was to replace the siding. Brainard's expert testified that replacing the siding to his unit would cost \$8,256. The trial court determined that replacing all 44 units would be double what the Board had in its reserve account and thus cost-prohibitive for a cosmetic issue.

{¶16} Brainard argues that not every unit suffered damages equivalent to him, and the trial court erred in ruling that all units were equally impacted and needed to be replaced. The trial court did not make that finding. The trial court stated it "will not speculate whether each of the forty-four units at Bella Terra Condominiums sustained the same damages Plaintiff alleges, the clear testimony was that damages were not limited solely to the Plaintiff's unit."

{¶17} Brainard contends there was no direct evidence to show that every unit suffered damages. However, Butryn and Grant testified that there were other units that had spores, including both of their units. Further, Butryn testified that there were spores on every unit. This testimony was uncontroverted.

{¶18} The declaration required the Board to exercise business judgment and the record demonstrates that the Board made numerous attempts to remedy the issue but decided not to fully replace the siding due to it being cost-prohibitive. As the trial court correctly determined that the Board complied with its obligations under the declarations, Brainard's second and fourth assigned errors are meritless.

Reserve Account

{¶19} In his first of four assignments of error, Brainard asserts:

The Trial Court erred in ruling the cost associated with repair or restoration of the Appellee's Common Elements would need to be addressed by way of payment from the Appellee's general fund or a special assessment of the unit owners.

{¶20} Brainard argues that the cost of repair or maintenance of a common element can also be paid from the reserve account as opposed to the general fund or a special assessment, citing Article 9, Section 1 of the Declaration:

The Association shall maintain an adequate reserve fund for the periodic maintenance, repair, and replacement of improvements constituting a part of the common areas, including the limited common areas.

{¶21} The trial court found:

The evidence further indicated that the insurance proceeds were not available for repair or restoration, assuming that same could be accomplished in some fashion, and accordingly any cost associated with repair or restoration would need to be a common expense and addressed by way of payment from the general fund or a special assessment.

{¶22} Brainard misconstrues the evidence and the trial court's finding of fact. At trial Tom Butryn, former president of the Association, testified that although there was a reserve account, the Board would issue a special assessment before they would make a withdrawal from the reserve account, again, in the exercise of business judgment. This testimony went unchallenged. The trial court's finding was aligned to Butryn's testimony. Accordingly, Brainard's first assignment of error is meritless.

Diminution of Value

{¶23} In his third of four assignments of error, Brainard asserts:

The Trial Court erred when it ruled that in order for Appellee to be responsible to carry out its duty under Ohio Revised Code 5311.14(A) Appellant must first show a diminution in value of his unit.

{¶24} Brainard argues "the trial court's ruling in essence required evidence of decreased value of the condominium property before the Appellee Board would be required to repair or restore the damages" to his unit. Although that is his interpretation of the trial court's judgment, that was not the holding. The trial court determined that the Board exercised its business judgment in a manner consistent with its obligation under the Revised Code and the declarations as discussed above. Accordingly, Brainard's argument regarding decreased valuation as a requirement for repair is meritless.

{¶25} For the aforementioned reasons, the trial court did not err and the judgment is affirmed.

Waite, J., concurs.

Robb, P. J., concurs.