Madowitz v. The Woods at Killington Owners' Ass'n, No. 396-7-02 Rdcv (Teachout, J., Oct. 10, 2008)

STATE OF VERMONT
RUTLAND COUNTY

RICHARD MADOWITZ and	)	
DOUGLAS KOHL	)	
Plaintiffs,	)	**Rutland Superior Court**
	)	**Docket No. 396-7-02Rdcv**
v.	)	
	)	
THE WOODS AT KILLINGTON	)	
OWNERS' ASSOCIATION, INC.,	)	
Defendant.	)	

DECISION
Defendant's Motion for Summary Judgment, filed February 26, 2008
Plaintiff's Motion for Partial Summary Judgment, filed March 31, 2008

The crux of this action is a dispute about further development at the The Woods at Killington, a condominium complex located in Killington. The Plaintiffs are successors in interest to the original developer, and they seek to build additional condominium units. They are represented in this action by Alan P. Biederman, Esq. The Defendant is the Association of Unit Owners at The Woods, and its position is that the Plaintiffs have no right to develop the project further. The Defendant (hereafter referred to as "the Association") is represented in this action by Jon S. Readnour, Esq.

The Association has moved for summary judgment on the Plaintiffs' complaint. The Plaintiffs have responded and filed a cross motion seeking summary judgment on the issue of the Association's liability for damages. The undisputed facts are as follows:

The Woods at Killington was created by a Declaration of Condominium dated June 25, 1985. The original developer was Killington 43 Associates, Inc. It was always the developer's plan to build more units than now exist, as indicated by both the Declaration[1] and the Site Plan that was filed in the land records along with the Declaration. The parties agree that the plan was for 147

[1] Section 1(b) of the Declaration contains the declarant's statement of intention to build and develop a total of 145 residential units, as well as other kinds of units.

units, consisting of 127 apartments and 20 detached single family homes. To date, 105 apartments and two single family homes have been constructed.

In 1985, when the Declaration was filed, § 1306(b) of the Vermont Condominium Ownership Act, provided that "the percentage of the undivided interest of each apartment owner in the common areas … shall have a permanent character and shall not be altered without the consent of all the apartment owners expressed in an amended declaration…."

To avoid having to obtain unanimous consent of the unit owners each time a new phase of the project was added, the developer obtained advance consent to development of the units that were planned but not yet constructed. This consent was obtained by means of provisions in the Declaration that stated that the owner appointed the developer as the owner's attorney-in-fact with respect to amending the Declaration for the purpose of adding units.[2]

In 1985, the original developer conveyed the first two units to purchasers. Starting on January 4, 1986, the developer began conveying units using a standard form deed. This deed provided that the unit owner, by accepting the deed, consented to the amendment of the Declaration for the purpose of adding units, but it also provided that the consent would expire ten years from the date of the deed.[3] There was no amendment to the Declaration to mirror the ten-year limitation provision included in this standard form deed.

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[2] Paragraph 5, sections (c) and (e), of the Declaration of Condominium set out the developer's method of obtaining the power of attorney and the unit owners' advance consent to further development of the project:

> c) … [I]n the event additional Phases are developed …, the Declarant expressly reserves to itself, its successors and assigns, the right to amend this Declaration from time to time so that the Interim or Final Percentage Interest of a Unit Owner may be adjusted to reflect the additional Units …; by acceptance of deeds of their Units, Unit Owners shall be deemed to have designated and appointed Declarant as the attorney in fact for the sole … purpose of amending this Declaration … so that an Amendment filed by Declarant pursuant hereto shall result in the amendment and reduction of such fractional interest without further action or consent of the Unit Owners … so that upon conveyance of each Unit the grantee … by acceptance of the deed from the grantor, agrees … to have appointed the Declarant as their attorney-in-fact for the purposes set forth herein. The power-of-attorney granted herein shall automatically terminate upon filing by the Declarant of the Schedule of Final Percentage Interests. Furthermore, the acceptance of a deed or mortgage of a Condominium Unit shall expressly constitute consent of the grantees to the alteration of this undivided interest in the common areas and facilities ….
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> e) … [E]ach Unit Owner shall, at the time of purchase of a Unit, or at such other time as Declarant may request, execute a written consent/power of attorney to authorize any Interim or Final adjustment of Percentage Interests.

[3] The deeds provided: "By acceptance of this deed, the Grantees … consent to the amendment of the Declaration of Condominium for the purpose of adding additional units [etc.] and [consent to] the resulting alteration of the percentage of undivided interest in accordance with the Declaration and as set forth in a Limited Power of Attorney from Grantees to Grantor. This consent … shall expire by its terms ten years from the date hereof."

On August 13, 1988, the original developer Amended and Restated the Declaration. This Restated Declaration allowed for the creation of a commercial unit, called the Terra Median. All the while, the original developer was conveying units. It conveyed 107 units in all, with the last such conveyance being made in 1990. Although §5(e) of the Declaration (see footnote 1) refers to the developer's being able to request separate limited powers of attorney from the unit owners, it appears that only two such powers of attorney were ever executed. Of the 107 deeds given, 105 contained the ten-year expiration provision.

At some time in the development of the project, after many units had been conveyed, the original developer mortgaged its interest in the property, and subsequently fell on hard times. Foreclosure and other litigation ensued, and the Association was party to some of it. The litigation was settled by means of an agreement that called for the original developer to quitclaim its interest in the project to the most recent mortgagee, an entity called Probos, Ltd. (hereafter "Probos"). As a result, Probos succeeded to the interests of the original developer. The settlement agreement also determined that the Terra Median was not part of the common areas and facilities of The Woods. Instead, it was agreed that the Terra Median was a commercial condominium that would henceforth be owned by Probos.

Sometime after the litigation ended, Probos conveyed the Terra Median to the Association. This conveyance resulted in the Association's becoming a unit owner in its own right, in addition to its role as representative of the other unit owners.

In 1994, Probos executed a deed to Richard Madowitz and Jack F. Phelan, Jr. This deed stated that it conveyed all of the development rights that had not previously been conveyed to unit owners. Thereafter, Madowitz and Phelan filed for an amendment to the existing Act 250 Permit. The purpose of the application was to extend the completion date for the project until January 1, 2000.

The application was granted on June 14, 1995. The Association was never given official notice of this application, and it was not joined as a co-applicant in the District Environmental Commission proceeding.

In 1996, Phelan conveyed his interest in the project to Douglas Kohl. Since February 2, 1996, the developers of the project have been the Plaintiffs in this action, Madowitz and Kohl.

As the completion deadline of January 1, 2000, approached, Madowitz and Kohl applied for another amendment to the Act 250 permit, seeking to extend the construction completion date for another five years until January 1, 2005. Although the Association had notice of this application, it was not joined as a co-applicant. While this application was pending, the Association raised the issue of whether the previous amendment, granted in 1995, was valid. Among other arguments, the Association maintained that the amendment was invalid because the Association

had not received official notice of the application[4] and it had not been joined as a co-applicant.[5] The Association also argued that Madowitz and Phelan had had no practical right to develop the land at the time they applied for the previous amendment because the application was filed on May 17, 1995, just 7 ½ months before the ten-year limits on advance consent, contained in every unit deed issued after January 4, 1986, started to expire.

The District Environmental Commission denied the 1999 application for amendment, finding that the applicants had failed to show that they actually had the right to develop and that they had not shown good cause to waive the co-applicancy rule.

Madowitz and Kohl appealed the denial to the Vermont Environmental Board, and thereafter they asked the Environmental Board for a continuance. On April 4, 2002, the Environmental Board granted a continuance "to allow the Applicants to file litigation to resolve any ambiguity concerning the parties' interests in the Project site."

The Plaintiffs Madowitz and Kohl then brought the present action .

In their complaint, the Plaintiffs seek damages for the Association's alleged breach of the conditions of the Declaration, including its duty of good faith and fair dealing, as evidenced by the Association's interference with development of The Woods. As further relief, the Plaintiffs seek to have the court issue declaratory judgments with respect to the rights and duties of the parties. Specifically, they ask the court to declare (1) whether the Association can prevent the Plaintiffs from entering upon the project to construct additional units, (2) whether the Association has the right to obstruct the Plaintiffs from exercising powers reserved to them, or delegated to them, under the Declaration, as amended, (3) whether the Plaintiffs can apply for amendments to the Act 250 permit, without the consent of the Association, under the powers reserved, and delegated, to them by the Declaration, as amended, (4) whether the Association can oppose the amendment of Act 250 permits on the basis that only the Association can apply for such permits or that the Association has rights that entitle it to be a mandatory co-applicant, and (5) whether the Association has violated its obligations of good faith related to the condominium form of ownership**.**

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[4] In this claim, the Association relied on Act 250 Rules 10(E) and 10(F). Rule 10(E) provides that "[t]he applicant shall certify … that the applicant has forwarded notice and copies of the application to … the owner of the land if the applicant is not the owner." Rule 10(F) requires notice of the hearing on the application, or of a public comment period, to be given to adjoining landowners, unless this requirement has been waived by the chairman of the district commission.

[5] The Association relied in this argument on Rule 10(A) of the Act 250 Rules. This rule concerns applications for Act 250 permits, and it provides, in part, that "[t]he application shall list the … names of all persons who have a substantial property interest … in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission may … find that the property interest of any such person is of such significance, therefore demonstrating a lack of effective control by the applicant, that the application cannot be accepted or the review cannot be completed without their participation as co-applicants."

The Association filed a counterclaim, in five counts. The Association asks the court to declare that the 1988 Restated Declaration and subsequent amendments to the Declaration are invalid and that the limited-power-of-attorney provision in the Declaration was personal to the original declarant, that the benefits of the provision cannot be transferred and that the provision has expired. In addition, the Association asks the court to enjoin the Plaintiffs from doing anything further at The Woods. Finally, the Association seeks treble damages for illegal cutting of trees, and it seeks litigation costs and attorney fees.

On February 26, 2008, the Association filed a motion for summary judgment. Although the Association did not specify, the motion appears to be addressed to the claims in the Plaintiffs' complaint. Accordingly, the court views the motion as seeking a judgment in the Association's favor on the Plaintiffs' complaint, rather than on the Association's counterclaim. Specifically, the Association seeks a declaration (in relation to Plaintiffs' claim for declaratory judgment) that Plaintiffs' rights to develop, without further consent, expired 10 years after the execution of the first deed containing the ten year limitation, and it seeks judgment on the Plaintiffs' claim for money damages.

On March 31, 2008, the Plaintiffs filed a cross-motion for summary judgment on the issue of liability only, which the court views as going only to the Plaintiff's claim for damages.

Defendant's Motion for Summary Judgment

In its motion for summary judgment, the Association argues that the Plaintiffs are not entitled to the declaratory judgments they seek because the power of attorney/consent provisions of the Declaration are unenforceable, and that, even if they are enforceable, under § 5(e) of the Declaration, a written power of attorney, executed at the time of closing, is a necessary component of the consent described in § 5(c). Additionally, the Association argues that because the ten-year life of the consent contained in the deeds has passed, the Plaintiffs now must obtain the consent of the unit owners whose ten-year grant of the power of attorney has expired, and that this consent is a prerequisite to any amendment to the Declaration that provides for construction of additional units. Finally, the Association argues that the consents and powers of attorney provided for in the Declaration were personal to the original developer and could not be transferred.

In support of its position, the Association argues that the advance consent device employed by the original developers was of questionable validity at the time the Declaration was written, and that the device was later completely outlawed by passage of the Vermont Common Interest Ownership Act, 27A V.S.A. § 1-101 et seq. (hereafter "the New Act"), which became effective on January 1, 1999. The Association maintains that amendments made using the unit owners' advance consent are invalid (including the 1988 Restatement of Declaration and others) and that the Plaintiffs cannot rely on advance consent in the future.

The Association is correct that § 1-104 of the New Act expressly prohibits a declarant from "act[ing] under a power of attorney or us[ing] any other device to evade the limitations or prohibitions of this title or the declaration." Thus, in condominium projects governed by the

New Act, where the granting of additional development rights requires a vote of 80% of the unit owners,[6] the declarant could not obtain those votes in advance by appointing itself as the owners' attorney-in-fact for such purposes. But this prohibition of the New Act has prospective application only. It does not apply to condominiums that were already in existence when the New Act was passed.[7] Consequently, the consent/power-of-attorney provisions of The Woods' Declaration remain valid and enforceable, and the Association cannot prevail on its claim that the various amendments to the Declaration are invalid because they were approved pursuant to those provisions. The court expressly does not address whether the amendments were valid in every respect.[8]

The Association also argues that the advance consent provisions of the Declaration nonetheless require a specific written consent or power of attorney to be executed by each unit owner at the time of any reduction in fractional interest. The Association cites § 5(e) in support of this position (see footnote 1), but Section 5(e) simply allows the Declarant to require that a written consent or power of attorney be executed at its request, at the closing, or at some other time. This section does not require the declarant to obtain such a writing. By the terms of §5(c) of the Declaration, consent to amendment was operative as a function of acceptance of the deed, regardless of whether a written consent or power-of-attorney was later or ever requested or executed.

With respect to the ten-year limitation (on consent) contained in the deeds given from January 4, 1986 on, the Association argues that if the Declarant has the power to provide for advance consent in the Declaration, it must also have the power to limit such consent in the deeds it gives out. This argument flies in the face of the basic concept of common interest ownership, whose essence is that the unit owners, in accepting a deed, agree to be bound by a uniform set of rights and responsibilities that are set out in the Declaration of Condominium, which is the governing document of the community. If the declarant or its successors were permitted to vary the terms of the Declaration by deed, or if unit purchasers could negotiate deed terms by which they could consent or refuse to consent to amendments piecemeal, no one, not unit owners or prospective buyers or, indeed, a member of the public, could ever be certain of the current rights and responsibilities of the unit owners and the developer, without locating all the deeds to all the sold units and ferreting out inconsistencies. In addition, a current unit owner would have no way of knowing whether the terms of the Declaration had been varied in a deed subsequent to the owner's purchase.

Because allowing the Declaration to be changed by deed would undermine the concept of a common interest community, the court finds that the ten-year limitation on consent contained in most of the deeds to units in The Woods is ineffectual as it is in conflict with the terms of the

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[6] 27A V.S.A. 2-117(g)

[7] 27A V.S.A. §1-204 contains a list of New Act provisions that apply retroactively. The provision prohibiting the use of powers of attorney to obtain advance consent to Declaration changes is not listed.

[8] In its brief on the Plaintiff's motion for class action certification, the Association raises the possibility that issues exist with respect to compliance with provisions of the By-Laws, including provisions relating to the composition of its Board of Directors. It claims that these issues may impact the validity of at least some of the amendments to the Declaration, and it maintains that the present litigation presents a forum for a decision on this matter. These issues were not briefed in the present motions for summary judgment, and the court does not consider them at this time.

Declaration, which is the governing instrument.[9] If the original developer, or its successors, intended to place a time limit on development, the only way that could be accomplished was by amending the Declaration and recording the amendment on the land records as required by 27 V.S.A. §1315(a).[10]

Finally, the Association cannot prevail on its argument that the consent and power of attorney provisions were personal to the original developer and could not be acquired by successor developers. Nothing in the Declaration indicates that this is the case, and an inability to transfer would mean that only the original developer could expand the project, a result that simply makes no sense from a business and economic standpoint. The Plaintiffs now hold the rights and benefits of the original developer as set forth in the Declaration, and may use them to amend the Declaration to alter the percentage of the common areas allocated to each unit, as many times as necessary, until such time as the Plaintiffs file a Schedule of Final Percentage Interest, as provided in §5(c) of the Declaration (see footnote 1). This has not yet occurred.

For the foregoing reasons, the Association's motion for summary judgment is denied. Summary judgment is granted to Plaintiffs to the extent that the declaratory relief requested by them is set forth in this ruling, but to no greater extent.

In addition, at some time in the future, this matter will be taken up again by the Environmental Board, and one of the issues in that proceeding will be whether the Plaintiffs could properly seek a change to the Act 250 permit without the Association's joining as a co-applicant. The Environmental Board has jurisdiction to make this determination, but because a ruling on this issue falls within the scope of the parties' cross complaints for declaratory relief, the court will address it, to the extent that it involves an interpretation of the Declaration.

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[9] This holding disposes of the Association's argument that Madowitz and Phelan (Kohl's predecessor in title) never received the full panoply of development rights in the deed they received from Probos. The Association claimed that when the original developer gave deeds containing the ten-year limit on consent to further development, the developer was actually conveying to each unit owner a right that made up part of the development rights in the project. The Association noted that when Madowitz and Phelan received their deed from Probos, the deed conveyed "all land premises, rights, interests, [etc.] … not previously conveyed." Based on this language and on the Association's characterization of the ten-year limit on consent as a part of the development rights, the Association maintained that the Madowitz and Phelan took less than the full rights needed for further development. As noted in the text of this opinion, the ten-year limit in the deeds was of no effect. It did not amount to a conveyance of any part of the development rights in the project. Madowitz and Phelan received the original developer's full development rights in the deed from Probos, and the Plaintiffs, Madowitz and Kohl, now hold those rights.

[10] This result accords with the decision in *Multari* v. *Gress*, 214 Ariz. 557, 155 P.3d 1081 (App. Div. 1 2007), the only case located by the parties or the court that addresses a similar issue. That case involved a subdivision, not a condominium project, but the issue was identical in all practical respects: whether a developer could utilize restrictions contained in private deeds to multiple lots to alter the uniform covenants and restrictions contained in a Declaration that was otherwise applicable to those lots. The court in *Multari* observed that the Declaration provided that the covenants and restrictions could be amended by a two-thirds vote of the then owners of the lots. No other method of amendment was provided. The court held that permitting developers to use private deed restrictions to bypass the formal amendment process would destroy the right to rely on the terms of the Declaration and would "completely upset the orderly plan of the subdivision." *Multari* v. *Gress,* supra, 155 P.3d 1083. Accordingly, the court invalidated the provisions of the deeds that were in conflict with the Declaration. The Arizona Court of Appeals' reasoning applies as well to the condominium common ownership scheme in the present case.

Section 6(e) of the Declaration, and §19.12 of the Restated Declaration both state that the declarant, in its sole discretion, may amend existing state and local land permits. The court declares that this language means that the declarant has unfettered discretion to file an application for any amendment necessary to further development plans within the scope of the Declaration, without having to first obtain consent to file such application from unit owners. This does not diminish any rights that the Association, as a unit owner itself and as representative of the other unit owners, may have for participation under Act 250 Rules. It is clear that the a developer cannot override the due process provisions of the Act 250 Rules by including in the Declaration language whose intended effect is that the developer would be the sole participant in any application for Act 250 amendment.

This ruling is intended to declare and clarify the rights *between the parties* under the governing instruments. It is not intended to limit the Environmental Commission or Board in its interpretation of its rules, or the application of those rules to proceedings involving the parties. It will be the responsibility of the Environmental Board to determine, in light of the above declaratory ruling, issues such as right to notice and participation, or whether the Association is a necessary co-applicant for purposes of its proceedings

Plaintiff's Motion for Summary Judgment as to Liability

In Plaintiffs' motion for summary judgment, Plaintiffs seek judgment on the issue of liability for breach of the conditions of the Declaration and for interference with Plaintiffs' right of further development of The Woods. The court concludes that the Plaintiffs are not entitled to a ruling of law on liability on the state of the record.

The Plaintiffs' claim of interference with development has two bases. First the Plaintiffs claim that the Association thwarted the planned expansion of The Woods by appearing before the District Environmental Commission to question the validity of the 1995 amendment to the Act 250 permit and to prevent further amendment to the permit.

In support of their claim that the Association was acting without any right to do so, the Plaintiffs' point to §6(e) of the Declaration and §19.12 of the Restated Declaration, both of which reserve to the declarant, in its sole discretion, the right to amend currently-issued state and local land use permits, as necessary, for the development and construction of subsequent phases of the project. This reserved right would be useless, of course, if the developer had lost the right to develop, which is what the Association claimed.

The Association has the right, as the legal representative of the unit owners and/or as a unit owner in its own right, to come before the Environmental Commission to raise pertinent issues. Although the Association has not prevailed in its claim with respect to the legal effect of the ten-year limitation provision, its claim was not a frivolous claim, conjured up solely for purposes of delay. Indeed, the Plaintiffs' predecessors created the conflict between the Declaration and the

deeds by the terms of the deeds they delivered. Because of the conflicting terms, the Association's position was not clearly untenable.

Plaintiffs have not shown a legal basis for liability for damages for interference with their claimed rights where the claimed wrongful act is the Association's attempt to exercise and enforce rights and terms contained in the deeds of its members. Finding liability on this basis would have a serious chilling effect on an owners' association right to press a patently colorable claim before administrative agencies and the courts.

Plaintiff's second claim of interference is that when the Plaintiffs' contractor was working on constructing new infrastructure as part of the planned expansion, a representative from the Association approached the contractor and claimed trespass, causing the contractor to stop work. The record regarding this claim is not sufficient to support a summary judgment ruling of liability on the part of the Association for such interference.

Accordingly, the Plaintiffs' motion for summary judgment as to liability for damages is denied.

ORDER

For the foregoing reasons,

1) Defendant's Motion for Summary Judgment filed February 26, 2008 is *denied;* summary judgment is granted to Plaintiffs in the form of the declarations set forth in this ruling concerning the respective rights of the parties;

2) Plaintiffs' Motion for Partial Summary Judgment on the Issue of Liability Only filed March 31, 2008 is *denied.*

3) A status conference shall be scheduled to determine future scheduling in the case.

Dated this 10th day of October, 2008.

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Mary Miles Teachout
Superior Court Judge