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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
Civil No. 14-3136-H

THE TRUSTEES OF THE CAMBRIDGE POINT CONDOMINIUM, & others[1]
Plaintiffs

vs.

CAMBRIDGE POINT, LLC, & others[2]
Defendants

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

The trustees of the Cambridge Point Condominium ("the Condominium") filed this action to hold the developer of the Condominium responsible for certain construction defects, but did so without obtaining prior approval from 80% of the unit owners as required under the Condominium's Bylaws. After Judge Miller narrowed the issue in her Memorandum of Decision and Order on Plaintiffs' Motion for Partial Summary Judgment (Docket #20) and ruling on plaintiffs' Motion for Reconsideration and/or Clarification (Docket #29) (together, "Judge Miller's Decision"), the matter came before me on defendants' motions to dismiss.[3] Defendants contend that Judge Miller's Decision compels dismissal of the case because plaintiffs did not receive approval from 80% of the beneficial owners of the Trust before filing suit and plaintiffs

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[1] The individual trustees also purport to bring this action derivatively on behalf of the Cambridge Point Condominium Trust.

[2] Northern Development, LLC, CDI Commercial Development, Inc., Giuseppe Fodera, Frank Fodera, Frank Fodera, Jr., and Anahid Mardiros.

[3] After an initial argument, I requested further briefing from the parties, see Memorandum and Order on Defendants' Motions to Dismiss (July 8, 2016) (Docket #34), and then heard argument from the parties again.

cannot demonstrate that the applicable provision of the condominium bylaws that requires 80% approval prior to filing was procured by overreaching or fraud. For the following reasons, defendants' motions are **ALLOWED**.

BACKGROUND

In April 2014, plaintiffs filed this action against Cambridge Point LLC and others (collectively, "the Developer") seeking damages for common area construction defects at the Condominium. The Bylaws of the Condominium ("the Bylaws"), among other provisions, require 80% of the unit owners to agree before the Trustees may file litigation. Specifically, Section 1(o) of the Bylaws states, in relevant part:

> [N]either the Trustees acting in their capacity as such Trustees or acting as representatives of the Unit Owners, nor any class of the Unit Owners shall bring any litigation whatsoever unless a copy of the proposed complaint in such litigation has been delivered to all of the Unit Owners, and not less than eighty percent (80%) of all Unit Owners consent in writing to the bringing of such litigation within sixty (60) days after a copy of such complaint had been delivered to the Unit Owners and specifying as part of the written consent a specific monetary limitation to be paid as legal fees and costs and expenses to be incurred in connection therewith. (Emphasis added).

The parties agree that 80% of the unit owners did not approve filing this case, at least in part because at the time they filed the Complaint the Developer retained and still owned 20% of the units at the Condominium. The parties agree plaintiffs may not maintain this action if section 1(o) is enforceable as written.

In November 2014, plaintiffs moved for partial summary judgment, arguing that the 80% approval requirement in section 1(o) was void as against public policy; or, alternatively, had been met by obtaining approval of 80% of the disinterested unit owners. Judge Miller rejected these arguments. Plaintiffs then moved for reconsideration and clarification of Judge Miller's

initial ruling. Judge Miller clarified that plaintiffs could not exclude owners they consider "interested" parties and that section 1(o) was not void as a matter of public policy. Judge Miller acknowledged, however, that section 1(o) may still be void if it was the product of "overreaching or fraud." Because the allegations of overreaching or fraud were not before Judge Miller, she found it premature to rule on the narrow residual question.

After oral argument and further briefing, the matter came before me for determination of whether Section 1(o) of the Bylaws was the product of the type of "overreaching or fraud" by the developer that might invalidate Section 1(o). Plaintiffs argue Section 1(o) was the product of overreaching, but not of fraud. Accordingly, I address only the issue of overreaching.

DISCUSSION

Absent "overreaching or fraud" by a developer, public policy favors the developer and unit owners agreeing on the details of administration and management of a condominium. See Barclay v. DeVeau, 384 Mass. 676, 682 (1981) ("[a]bsent overreaching or fraud by a developer, we find no strong public policy against interpreting [the condominium statute] to permit the developer and unit owners to agree on the details of administration and management of the condominium unit"). In Barclay, the court did not define the term "overreaching," nor have I found the term defined in subsequent relevant cases. Black's Law Dictionary defines "overreaching" as "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." Black's Law Dictionary at 1104 (6th ed. 1991). In this case, there is no question that the purchasers had access to the condominium documents, particularly the Bylaws, at the time they purchased their units. These documents were on file with the Middlesex Registry of Deeds on July 5, 2007 before the closing on any condominium unit sales. Although individual unit

owners were not able to bargain for changes to the condominium documents, each purchaser was or should have been aware that Section 1(o) of the Bylaws required 80% of the unit owners to consent before litigation could be filed, and each purchaser could have chosen not to purchase a unit in the Condominium.

Plaintiffs argue that it was impossible to obtain the consent of 80% of the unit owners because of the share of units still owned by the Developer. Plaintiffs, however, do not identify any substantively or procedurally unconscionable aspects of the consent requirement. See Bettencourt v. Trustees of the Sassaquin Village Condominium Trust ("Bettencourt"), 90 Mass. App. Ct. 1106, 2016 WL 5328493 at ** 2-3 (Sept. 22, 2016) (Rule 1:28 decision) (upholding bylaw requiring 80% of unit owners to consent before litigation filed). All purchasers were aware of the 80% consent requirement for litigation and had the option not to purchase a unit if they found the terms unacceptable.

Both parties agree that G.L. c. 183A governs the provisions in question in this action. The purpose of Chapter 183A "was to clarify the legal status of the condominium in light of its peculiar characteristics," Grace v. Brookline, 379 Mass. 43, 52 (1979), and "imprint the condominium with legislative authorization." Barclay, 384 Mass. at 682. The "statute provides planning flexibility to developers and unit owners. . . . Unless expressly prohibited by clear legislative mandate, unit owners and developers may validly contract as to the details of management." Id.

Plaintiffs cannot show that provisions requiring consent before filing litigation, as found in Section 1(o) of the By-Laws, were "expressly prohibited by clear legislative mandate," and, therefore, the unit owners and developers were able to validly contract as to the details of management. Section 11 of Chapter 183A identifies specific matters that any condominium is

required to include in its bylaws. It does not reference or require a provision addressing how litigation may be initiated. Similarly, no such provision or subject matter is expressly identified in G.L. c. 183A, § 12, which sets out other optional provisions in condominium bylaws. Section 12 does provide generally, however, that bylaws may include "[s]uch other provisions as may be deemed necessary for the management and regulation of the organization of unit owners or the condominium not inconsistent with this chapter and the master deed." G.L. c. 183A, § 12(d). Plaintiffs do not point to any specific provision of the Act or master deed inconsistent with Section 1(o).

It is not persuasive for plaintiffs to argue that if the Legislature wanted to limit the power to conduct litigation to an 80% unit owner vote it could have done so. As discussed above, the Supreme Judicial Court held in Barclay that "[u]nless expressly prohibited by clear legislative mandate, unit owners and developers may validly contract as to the details of management." 384 Mass. at 682. The Act does not prohibit adoption of a bylaw that requires a percentage of unit owners to consent to litigation before litigation is filed by the trustees of a condominium. Consequently, the condominium was free to include such a provision in its bylaws. See Scully v. Tillery, 456 Mass. 758, 769 (2010) (the Act "sets forth certain minimum requirements for the establishment of condominiums, but those matters that are not specifically addressed in the statute are to be worked out by the involved parties."); Bettencourt, supra.

The Act also contains a number of provisions requiring more than a majority of unit owners to consent to certain actions. For example, the Act requires the consent of at least 75% of unit owners to rebuild after fire or casualty loss, G.L. c. 183A, § 17, or to remove a condominium or a portion thereof from the provisions of Chapter 183A. G.L. c. 183A, § 19. These sections are relevant for two reasons. First, they provide instances where the Legislature

expressly defined specific portions of the condominium relationship. If the Legislature intended to prevent parties from requiring unit owner approval before filing litigation, it could have done so. Second, these sections evidence legislative recognition that in certain instances a vote by much more than a majority of unit owners is appropriate.[4]

The Trustees also argue that the requirements in Section 1(o) requiring distribution to unit owners of a copy of the proposed complaint and specification of the total amount to be charged in legal fees for the case overreaches because it invades the sanctity of the attorney/client relationship. This argument is unpersuasive. First, it discloses little to a unit owner/defendant to send an advance copy of the draft complaint to that unit owner/defendant. Frequently in civil litigation a plaintiff will send a draft complaint to a defendant before filing in an effort to stimulate discussion about resolving the case. Similarly, the disclosure of anticipated costs of litigation would not unduly infringe on attorney work product or attorney-client communications. Such estimates may be reasonably deduced by sophisticated counsel. Moreover, if the Trustees were able to meet the 80% unit owner threshold to permit suit against the Developer, the Developer as unit owner would be required to pay its proportionate share of legal fees to be expended on the case from inception to completion. As the Developer would be aware of the percentage of units it owned and the amount it was assessed for the legal fees, the Developer would easily be able to discern the total monies incurred to date. Disclosure of such information does not unduly prejudice the Trustees, create a lack of equality of bargaining power or deprive any party of a meaningful choice.

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[4] Plaintiffs argue that where 75% of unit owners are statutorily required to terminate the existence of the Condominium, it must be overreaching for a developer to include a provision in the bylaws requiring more than 80% of unit owners to approve litigation. This argument is unavailing. The 75% requirement for termination of the Condominium is an express legislative provision, while the 80% unit owner vote is a privately contracted percentage. Section 1(o) is a creature of private negotiation and contract, not one of legislative mandate.

Finally, plaintiffs argue that the 80% consent requirement violates Article XI of the Massachusetts Declaration of Rights because it "effectively curtails the Trustees' right to seek redress from the courts."[5] This argument fails because, among other reasons, "constitutional rights may be waived by contract." Bettencourt, 2016 WL 5328493 at * 3. See, e.g , Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248, 251-252 (1992) (right to jury trial may be waived by contract).

ORDER

Defendant Frank Fodera's Motion to Dismiss Pursuant to Mass. R. Civ. P. Rule 12(b) (Docket #27) and Defendants' Joint Motion to Dismiss Pursuant to Mass. R. Civ. P. Rule 12(b) (Docket #32) are **ALLOWED**. Plaintiffs' complaint shall be dismissed as having been filed without the requisite percentage of unit owners' approval.

Dated: November 18, 2016

Peter B. Krupp
Justice of the Superior Court

[5] Article XI of the Massachusetts Declaration of Rights states: "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

Entered: 11/29/16