

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
Civil No. 14-3136-H

THE TRUSTEES OF THE  
CAMBRIDGE POINT CONDOMINIUM, & others<sup>1</sup>  
Plaintiff

vs.

CAMBRIDGE POINT, LLC, & others<sup>2</sup>  
Defendants

**MEMORANDUM AND ORDER ON  
DEFENDANTS' MOTIONS TO DISMISS**

Following Judge Miller's Memorandum of Decision and Order on Plaintiffs' Motion for Partial Summary Judgment ("Initial Memorandum") (Docket #20) as clarified by her ruling on plaintiffs' Motion for Reconsideration and/or Clarification ("Endorsement on Reconsideration") (Docket #29) (the Initial Memorandum and the Endorsement on Reconsideration are together referred to as "Judge Miller's Decision"), the matter is before me on 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. 12(b)(6) (Docket #32). Defendants all 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. For the following reasons, I take no action on the motions and will schedule a further hearing on this matter.

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<sup>1</sup> The individual trustees also purport to bring this action derivatively on behalf of the Cambridge Point Condominium Trust.

<sup>2</sup> Northern Development, LLC, CDI Commercial Development, Inc., Giuseppe Fodera, Frank Fodera, Frank Fodera, Jr., and Anahid Mardiros.

## DISCUSSION

The parties agree that section 1(o) of the By-Laws (“the By-Laws”) of the Cambridge Point Condominium (“the Condominium”) require an 80% majority of the beneficial unit owners to provide written approval before the Trustees of the Condominium may file litigation.<sup>3</sup> They also agree that the requisite 80% of unit owners did not approve filing this case. Therefore, the parties agree that the plaintiffs may not maintain this action if section 1(o) is enforceable as written.<sup>4</sup>

The case initially came before Judge Miller on plaintiffs’ motion for partial summary judgment. That motion asked the court to declare as a matter of law that the 80% approval requirement in section 1(o) was void as against public policy; or, alternatively, to declare that it had been met by obtaining the approval of 80% of the disinterested unit owners. Judge Miller refused to do so. I decline plaintiffs’ invitation to revisit the issues Judge Miller addressed.

Judge Miller’s Decision, however, does not mandate, as a matter of law, the dismissal of plaintiffs’ claims. Judge Miller specifically ruled that provisions such as section 1(o) are not necessarily void as against public policy, Initial Memorandum at 4; “the court should not

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<sup>3</sup> Section 1(o) states in relevant part: “Notwithstanding any provision of the Master Deed, or the Declaration of Trust of the Condominium Trust, or of these Bylaws or the Rules and Regulations to the contrary, neither 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 has been delivered to the Unit Owners and specifying as part of the written consent a specific monetary limitation to be paid his legal fees and costs and expenses to be incurred in connection therewith.” (Emphasis added).

<sup>4</sup> Notwithstanding the position they took in their written oppositions to the motions to dismiss, at argument plaintiffs conceded that they cannot pursue derivatively any claims that they could not pursue directly in their capacity as Trustees.

consider whether the Unit Owners are ‘disinterested,’” and “[t]he plaintiffs cannot proceed in compliance with section 1(o) by excluding owners they consider ‘interested’ parties.”

Endorsement on Reconsideration. As a result, Judge Miller denied plaintiffs’ motion for partial summary judgment “both as to the request for a declaratory judgment that Section 1(o) is void and as to the request that the court allow Plaintiff to proceed with litigation with less than 80% of the beneficial Unit Owners support.” *Id.* In reaching these conclusions, however, Judge Miller acknowledged section 1(o) may be void if it was the product of “overreaching or fraud,” Initial Memorandum at 4, quoting *Barclay v. DeVeau*, 384 Mass. 676, 682 (1981),<sup>5</sup> the fraud allegations in the complaint were not before her, and therefore “a determination of whether the execution of section 1(o) of the By-Laws is a product of fraud is premature.” Initial Memorandum at 4. Because she recognized the possibility of fraud invalidating section 1(o), Judge Miller acknowledged that “section 1(o) does not constitute an absolute bar to the plaintiffs’ ability to maintain this action.” *Id.* at 4-5.

Judge Miller’s Decision does not resolve the motions to dismiss because Judge Miller left open the narrow possibility that section 1(o) may be unenforceable if the developer engaged in “overreaching or fraud.” Judge Miller’s Decision goes a long way toward narrowing the case, at

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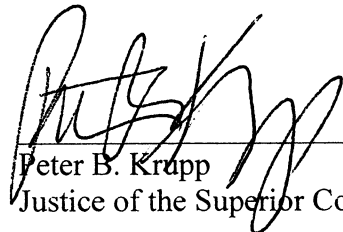
<sup>5</sup> The Supreme Judicial Court specifically held that “[a]bsent overreaching or fraud by a developer, we find no strong public policy against interpreting [the condominium statute] to permit the developer and unit owners to agree on the details of administration and management of the condominium unit.” *Barclay*, 384 Mass. at 682. In *Barclay*, the Court noted “the defendants do not allege that purchasers lacked access to any of the condominium documentation.” *Id.* at 682 n.14. The Court cited to *Point East Management Corp. v. Point East One Condominium Corp.*, 282 So. 2d 628, 630 (Fla. 1973), *cert. denied*, 415 U.S. 921 (1974), for the proposition that “because condominium documentation available to purchasers, enforcement of contract cannot be said to work hardship.” *Barclay*, 384 Mass. at 682 n.14. See also, e.g., *Scully v. Tillery*, 456 Mass. 758, 776 (2010); *Bd. of Trustees of Gates of Greenwood Home Owners’ Trust v. Gates of Greenwood, LLC*, 31 Mass. L. Rptr. 637, 2014 WL 861307 at \*\* 3-4 (Mass. Super. Feb. 6, 2014) (Curran, J.) (and cases cited).

least initially, to the threshold issue of whether section 1(o) was the product of some conduct that may make it unenforceable. In their written oppositions, plaintiffs do not argue they can prove the type of overreaching or fraud that may invalidate section 1(o), but because Judge Miller left this issue open, defendants cannot rely on Judge Miller's Decision, as far as it went, to support dismissal. If plaintiffs concede they cannot prove facts sufficient to demonstrate the developer engaged in the type of "overreaching or fraud" that may invalidate section 1(o), this action will be dismissed.<sup>6</sup>

### **ORDER**

No action is yet taken on 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. 12(b)(6) (Docket #32). The Clerk shall schedule a further hearing in the next thirty (30) days at which time the parties may address the issue of "overreaching or fraud" raised by Judge Miller's Decision. Any party who wishes to file a memorandum addressing what "overreaching or fraud" would be sufficient to invalidate section 1(o) may do so three days prior to the scheduled hearing.

Dated: July 8, 2016

  
Peter B. Krupp  
Justice of the Superior Court

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<sup>6</sup> The other arguments in favor of dismissal, which are advanced only by defendant Frank Fodera, appear preliminarily to be without merit or dependent upon factual issues that may not be resolved on a motion under Mass. R. Civ. P. 12(b)(6). Nonetheless, I take no action on those arguments at this time as the defense under section 1(o), which applies to all defendants, may ultimately be dispositive.