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5280-D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Judge Kathleen G. Kennedy

APR 04 2016

Circuit Court - 1718

CHRISTOPHER PARKER, an individual,
Plaintiff,

v.

11 CH 19867

PARK TOWER CONDOMINIUM
ASSOCIATION, an Illinois not-for-profit
corporation,
Defendant.

OPINION AND ORDER

This case involves a bed-bug sniffing dog residing in a condominium that does not allow dogs. Each party filed a motion for summary judgment which was fully briefed and argued. Additionally, the court granted Plaintiff's motion to supplement authority to which Defendant responded and Plaintiff replied. For the reasons that follow, Plaintiff's motion is granted and Defendant's motion is denied.

PLEADINGS

On June 2, 2011, Plaintiff, Christopher Parker (Parker), filed a two-count complaint seeking declaratory and injunctive relief against Park Tower Condominium Association (Association or Board) and David Nicosia. On October 28, 2014, the court granted David Nicosia's motion for judgment on the pleadings effectively dismissing him from the case.

In his complaint Parker alleges that despite the provisions of the condominium declaration, the Board voted to permit a dog to be kept on the premises for bed bug inspections. In Count I Parker seeks declaratory relief regarding (1) entering his unit, (2)

enforcing the Board's resolution against him, and (3) keeping animals on the premises for the purpose of sniffing for bed bugs. In Count II Parker seeks an injunction prohibiting (1) entry into his unit "with a dog or any other animals without his permission for any purpose, including but not limited to sniffing for bed bugs on June 3, 2011 or any other date;" and (2) enforcement against him for refusing to comply with directives regarding canine bed bug inspections. He also seeks an injunction against keeping animals on the premises for purposes of sniffing for bed bugs and "that any such animal be removed from the premises immediately."

The Association filed amended affirmative defenses: (1) business judgment rule, (2) necessity, and (3) "canine is not a pet," along with waiver and laches, pled for purposes of appeal only, because they were dismissed by prior order. Parker answered the affirmative defenses. In particular, he denied the allegations in "Business Judgment Rule," paragraphs seven and eight, that "All actions taken by the Board of Directors, on behalf of the Association, were done to protect the health and safety of its unit owners and residents, including to adhere to the mandate of the Declaration to protect the desirability of the units - which desirability is adversely affected by the known infestation of bed bugs" and "Plaintiff cannot allege that the Association, acting by and through its Board of Directors, engaged in any improper conduct sufficient to overcome the presumption of the Business Judgment Rule." He also denied the allegations in "Necessity," paragraphs one and four, that "In response to a health and safety risk to the unit owners and residents, the Association has taken an aggressive approach to the ever increasing bed bug infestation at the Association building" and "The removal of

the bed bug dog would cause irreparable harm to the Association, in that the Association's buildings' nearly 1,200 residents would be exposed to further health and safety risks, including exposure to drug-resistant MRSA and VRE bacteria, as described in the foregoing affirmative defense and incorporated herein by this reference." Further, Parker denied the allegations in "Canine is Not a Pet," that the canine residing in the building is not a household pet, but is akin to a service animal.

DECLARATION

Section 11 of the Declaration made February 1, 1979, certified March 8, 1979, and entitled "Use and Occupancy of Units and Common Elements" states, in pertinent part:

(a) No part of the Property shall be used for other than housing and the related common purposes for which the Property was designed. Each Unit or any two or more adjoining Units used together shall be used as a residence for a single family or such other uses permitted by the Declaration and for no other purposes...

(b) Except as set forth above with respect to the Commercial Units, no industry, business, trade, occupation or profession of any kind, commercial, religious, educational, or otherwise, designed for profit, altruism, exploration, or otherwise, shall be conducted, maintained or permitted on any part of the Property...

(f) No animals, livestock, fowl or poultry of any kind shall be raised, bred, or kept in any Units or in the Common Elements, except that household pets, other than dogs or cats, may be kept in Units, subject to rules and regulations adopted by the Association, which rule or regulation may exclude any kind of pet by type or category, provided that permitted household pets are not kept, bred, or maintained for any commercial purpose; and provided further that any authorized pet causing or creating a nuisance or unreasonable disturbance shall be permanently removed from the Property upon three (3) days written notice from the Association. Dogs or cats which are kept in Units as of the date this Declaration is recorded and dogs or cats owned by grantees of the Developer at the time Units are conveyed to such grantees may be kept in Units subject to the terms of this paragraph, but once said dog or cat dies, or is otherwise no longer kept in a Unit, the Unit Owner owning said dog or cat may not replace it with another dog or cat. Provided, further, that no Unit Owner shall use any passenger elevator to transport his dog or cat to or from his Unit and if a Unit

Owner shall use a passenger elevator for such purpose, the dog or cat shall be exclusively presumed to have created a nuisance.

UNCONTESTED FACTS

The parties submitted evidence in support of their respective motions for summary judgment, including condominium management reports, Board meeting agendas and minutes, and the depositions of Parker; Tim Patricio, property manager at Park Tower since October 2007; George Pauley, Board president; William Kay of AEGIS; George Rotramel, Ph.D.; and Bill Whitstine. Many facts are uncontested including those in the paragraphs that follow.

Parker owns a condominium unit in the high rise condominium tower located at 5415 North Sheridan Road in Chicago. He purchased his unit in 1996. He does not like animals. When he bought the unit he understood that dogs and cats “were explicitly not allowed after a grandfathering period.” (Parker Dep., p. 28). Parker resides in his unit for two days every other week. He has never seen the resident dog.

Defendant is an Illinois not-for-profit corporation which administers the condominium as an association in accordance with and subject to the Illinois Condominium Property Act, 765 ILCS 605/1 *et seq.* (the Act). Defendant is governed by the members of its board of managers.

In 2007 an attempt to amend the Declaration to allow cats in the building failed. The votes to amend the Declaration fell short of the required percentage for passage.

Beginning in the spring of 2008 the Board received complaints about the presence of bed bugs in the condominium and considered how to address the problem. The following reflects what occurred from August 2010 to early June 2011:

8/9/10 The Board voted to permit a contractor to enter units with a dog for the purpose of sniffing for bedbugs.

Management Report: "Exterminating Contract" in July, management reported working on a proposal for preventative bed bug inspection contract...we have developed a standard operating procedure for response to Bed Bugs to include canine inspection. Once a bed bug case is confirmed, we contact Bed Bug Solutions to inspect the adjacent units. If any units come back positive, then we continue inspecting adjacent units. Any infected units are treated - and because we inspect the surrounding units with the dog, the exterminator will guarantee the treated unit without treating the surroundings...*A sample resolution for approval follows:* **Be it resolved that the Board of Directors does hereby approve the contract with Bed Bug Solutions to perform bed bug inspections of two floors and two common elements a visit for a cost of \$600.00 per visit.**

11/10 The Board obtained competitive proposals from vendors.

12/13/10 Management Report: In the August Board Meeting, the Board approved a three year contract with Bed Bug Solutions to provide twice monthly canine bed bug inspections of two floors and two common elements a visit at a cost of \$20 per unit. With the present budgeting in place, this allows us to inspect 56 units and 4 common areas per month. Within a year, we are able to reach each unit in the building. At the November Board Meeting, the Board President reported that he would like to get more aggressive with these inspections based on the worsening situation with Bed Bugs in Chicago. We were directed to seek out competitive proposals for canine inspections for additional consideration and debate by the Board, as well as the possibility that a Unit Owner has proposed acquiring a bed bug dog that would essentially be at the buildings disposal to fight this pest.

With this in mind, management has sought out additional proposals for canine bed bug inspections. Three new vendors supplied bids for this service.

Bed Bug Solutions*:	\$20/unit - the budgeted rate of inspection is \$14,400/year
AEGIS Bed Bug Detection**:	\$15/unit - the budgeted rate of inspection would be \$10,080/year
Detective Bed Bug:	\$22.50/unit - the budgeted rate of inspection would be \$16,200/year

Canine Detection/Inspection: \$29/unit – the budgeted rate of inspection would be \$20,880/year

* Our current service provider

** This dog would live on site. Also proposes a \$10/unit fee if paid one year in advance. This arrangement would also include complimentary daily inspections of the receiving room and any additional units as needed at \$10/unit, including emergency service as needed. *At this rate we could double our inspections and reach every unit twice per year which is very desirable given the worsening conditions throughout Chicago.*

1/4/11

Special Meeting Agenda

II. PURPOSE OF MEETING

- A. Bed Bug Response – History and Ongoing Efforts
- B. Presentation of Proposed Contract for Canine Inspection Services by Board Member
- C. Dog to Reside at Park Tower

III. PROPOSED CONTRACT

- A. 3 Year Term
- B. 90 day no-cause termination by either party
- C. Payment made quarterly by invoice
- D. \$10 per unit for inspection service; 50% less than closest competitor
- E. Daily access to inspection service
- F. Dog to reside at Park Tower
- G. If service is cancelled, the dog may remain on site
- H. Personal Guarantee
- I. Summary Legal Consideration: this contract does not require disclosure under the Illinois Condo Act as a conflict of interest, neither a Board Member nor immediate family member will have 25% or more interest in the corporation. Regardless, the Board is opting for complete disclosure prior to consideration and should weigh whether the terms are fair and benefit the building.

IV. DOG TO RESIDE AT PARK TOWER

- A. Declaration prohibits cats and dogs from being “kept on the premises”
- B. Summary Legal Consideration: the Declaration could be amended by a vote of owners to permit dogs, otherwise the Board must weigh the advantages and disadvantages of the dogs presence against the risk of hypothetical adverse judicial ruling; on the flip side, enforcing the ban on pets could subject to the Association [sic] to adverse judicial

ruling as well due to a previous Boards action 'grand-fathering' cats.

The Board voted to permit a dog to be kept on the premises even though it acknowledged in its own agenda that the Declaration prohibits cats and dogs from being kept on the premises. The Board voted to approve the vendor's proposal, including the on-site canine bed bug detection services of Aegis.

2/1/11 Defendant distributed a notice of inspection for bed bugs
6/1/11 Parker received notice, as set forth below, dated June 3, 2011
6/2/11 Parker filed this lawsuit
6/3/11 A notice dated 6/3/11 is a Memo to 4th Floor from Management Office
Re: Notice of Inspection for Bed Bugs

URGENT - INSPECTION FOR BED BUGS

As a preventative measure, management has scheduled your unit to be inspected by a trained and certified dog...We will be inspecting your kitchen, bathroom(s), bedroom(s), and living rooms...Because of the nature of this pest control issue, **WE MUST ENTER YOUR UNIT ON THIS DATE AND TIME - WE WILL NOT RESCHEDULE...BECAUSE BED BUGS ARE CONSIDERED A SERIOUS HEALTH AND SAFETY ISSUE, AND BECAUSE IT IS POSSIBLE THEY CAN SPREAD FROM UNIT TO UNIT, IF YOU ARE NOT AT HOME AND IF WE DO NOT HAVE A KEY, WE WILL DRILL THE LOCK AND ENTER.**

It is undisputed that after Parker filed this case he received a notice from Defendant that canine bed bug inspections are preferred but there is the option for an inspection by a human. This is Defendant's current policy. Defendant is neither currently demanding access to Parker's unit to inspect with a canine nor threatening to "drill out" the locks on his unit to gain access.

Parker does not contest the following facts: having a dog in the building to detect bedbugs could be helpful, saves money, and is more efficient, and the board believes that the resolution providing for the resident dog is a good idea.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c). When the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a question of law. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. However, if the court determines that an issue of genuine material fact exists, it is not obligated to render summary judgment. *Id.*

ANALYSIS

There is no genuine issue of material fact that Defendant authorized a dog to be kept in the condominium despite the terms of the Declaration which prohibits dogs. On this basis Parker asks for a summary judgment granting him declaratory and permanent injunctive relief. Defendant argues that for several reasons Parker is not entitled to the summary judgment he seeks and that Defendant is entitled to summary judgment.

Parker’s claim for a declaratory judgment is not moot.

Defendant contends that Parker’s request for declaratory relief is moot because Defendant no longer requires a unit owner to allow a canine into his or her unit to perform an inspection. Additionally, Defendant points out that Parker failed to request an order that Defendant cannot allow a dog to reside in the building.

Parker argues that because “the offending resolution” is still on the books, the issue is not moot. Further, he points out that he prays for the declaration of invalidity of

Defendant's "resolutions, votes or actions...as they purport to authorize any person or entity to raise, breed or keep a dog or any other animal in any unit or in the common elements for the purposes of sniffing for bed bugs." Additionally, Parker's declaratory judgment count includes a general prayer for relief. "It is well established that a prayer for general relief is sufficient to authorize any judgment warranted by the facts alleged in the pleadings." *Heritage Standard Bank and Trust Company v. Heritage Standard Bank and Trust Company as Trustee*, 149 Ill. App. 3d 563, 568 (1986).

"An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Dixon v. Chicago and North Western Transportation Company*, 151 Ill. 2d 108, 116 (1992). Here, an actual controversy exists. Although events have occurred while the case has been pending, it is not impossible for the court to grant effectual relief. Therefore, Defendant's mootness argument fails.

Parker established that he is entitled to declaratory relief.

The plain meaning of the Declaration prohibits the keeping of dogs in the building. Defendant recognized this, but acted contrary to the Declaration and approved the use of a resident dog to provide bed bug detection services. On this basis Parker is entitled to a summary judgment for the declaratory relief he seeks.

Parker established that he is entitled to permanent injunctive relief.

"A permanent injunction is of unlimited duration and 'alters the status quo,' meaning that it adjudicates rights between the interested parties." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 224 (2000). To obtain a permanent injunction a plaintiff must

establish that he or she has no adequate remedy at law, that he or she possesses a certain and clearly ascertainable right, and that he or she will suffer irreparable harm if no relief is granted. *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 538 (2004).

“For the purposes of a permanent injunction, an inadequate remedy can be the threat of irreparable harm or other harm that cannot be adequately corrected by the payment of monetary damages.” *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 124 (1990). “Irreparable harm is the most common method of proving an inadequate remedy at law and denotes transgressions of a continuing nature so that redress cannot be had at law.” *Id.*

Defendant focuses on the irreparable harm element of permanent injunctive relief. Defendant contends that Parker has not provided any evidence of the irreparable harm he suffers as a result of a canine in residence that he has never seen during the 48 days a year that he resides in his unit. Parker responds that his part-time use of his unit is not relevant to the harm analysis. He purchased the unit with the understanding that cats and dogs are not allowed. He asserts that “[t]he fact that he must now deal with a dog living at Park Tower is enough to show irreparable harm.” (Resp. to Def. MSJ, p. 3). Parker relies on case law establishing that a plaintiff satisfies the element of irreparable harm by showing that his injuries are of a kind which should not be inflicted upon him.

Parker established the elements for a permanent injunction. There is no question that he has the right to reside in his condominium unit pursuant to the provisions of the recorded declaration and established bylaws. He has no adequate remedy at law for residing in a unit in a dog-free building that now has a dog in residence. He is irreparably harmed by the continuing presence of a dog in residence in the dog-free

building in which he purchased a unit and occasionally resides. This is the type of injury which should not have been inflicted upon someone who purchased a unit in a dog-free condominium.

Defendant failed to establish its business judgment rule defense.

A condominium's board of directors owes a fiduciary duty to the members of the association. *Davis v. Dyson*, 387 Ill. App. 3d 676, 692 (2008). Case law makes it clear that the fulfillment of this duty requires directors to comply with the provisions of the Act, as well as the condominium declaration and bylaws. See, e.g., *Palm v. 2800 Lake Shore Drive Condominium Association*, 2014 IL App (1st) 111290. As long as the requirements of the Act are followed, a board may impose rules that are additional to or more restrictive than the Act. *Board of Directors of 175 East Delaware Place Homeowners Association v. Hinojosa*, 287 Ill. App. 3d 886, 891 (1997). The Act provides that the declaration prevails over the bylaws or other instruments, unless the declaration conflicts with the Act, in which case the Act prevails. 765 ILCS 605/4.1(b); *Palm*, at ¶ 128.

In *Palm*, the court upheld the finding that the board breached its fiduciary duty by failing to mail notices of board meetings as required by the declaration. Recently, the appellate court decided *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Association*, 2015 IL App (1st) 150169, the import of which the parties briefed on Parker's motion to supplement authority. In *Alliance*, the condominium bylaws contained a provision limiting the board's authority to hire management companies to contracts for no more than 24 months. In upholding the trial court's decision, the court in *Alliance* rejected the argument that the board had the power to

waive the bylaws and execute a 36-month agreement. The court emphasized a condominium board's duty to follow the association's bylaws. 2015 IL App (1st) 150169, ¶ 33.

Here, Parker explains that he makes no claim for breach of fiduciary duty by the board. Rather, he contends that Defendant's failure to follow the Declaration obviates reliance on the business judgment rule. As Parker aptly puts it, "a Board obviously may not exercise its business judgment in a manner that violates its own instruments." (Resp. to Def. MSJ, p. 5).

The business judgment rule exists to protect corporate directors who have been diligent and careful in performing their duties from being subjected to liability for honest mistakes of judgment. *Stamp v. Touche Ross & Company*, 263 Ill. App. 3d 1010, 1015 (1993). "Absent evidence of bad faith, fraud, illegality, or gross overreaching, courts are not at liberty to interfere with the exercise of business judgment by corporate directors." *Fields v. Sax*, 123 Ill. App. 3d 460, 467 (1984). However, the directors' exercise of due care is a prerequisite for the application of the business judgment rule. *Stamp*, 263 Ill. App. 3d at 1016.

Here, the uncontested facts show that the board expressly recognized that the declaration prohibits cats and dogs from being "kept on the premises," and acknowledged that "the Declaration could be amended by a vote of owners to permit dogs, otherwise the Board must weigh the advantages and disadvantages of the dog's presence against the risk of hypothetical adverse judicial ruling." When a board properly exercises its business judgment in interpreting its own declaration, a court will

not find the board's interpretation to be a breach of fiduciary duty. *Henderson Square Condominium Association v. Lab Townhomes, LLC*, 2015 IL 118139, ¶ 77.

Defendant argues that the terms of the Declaration were ambiguous at best, thus authorizing the Board to make a discretionary decision Board's to interpret the Declaration as not precluding a canine from residing in the Association as long as the canine was not a household pet. However, the declaration's no-dogs provision is unambiguous and not subject to interpretation by the board.

Defendant cites no authority for the proposition that a condominium board exercises due care when it acts contrary to the express and unambiguous terms of its declaration. Proper exercise of business judgment precludes such action. Thus, the business judgment rule simply doesn't apply to the uncontested facts of this case. Further, Defendant provides no genuine issues of material fact that could be tried to bring its action within the protection of the business judgment rule. Parker is entitled to summary judgment on Defendant's business judgment rule defense.

Defendant failed to establish that it is entitled to summary judgment based on the necessity of having the dog in residence.

Defendant alleges the necessity of taking an aggressive approach to the health and safety risk posed by increasing bed bug infestation at the building. Further, Defendant alleges that as a result it "made the business decision," after consulting with professionals, to engage the detection services of a "bed bug dog" in residence at the building and able to conduct inspections regularly. However, the uncontested facts establish the benefits but not the necessity of having the dog on the premises. Notably,

as Parker points out, Defendant's expert, Dr. Rotramel, confirmed that an integrated prevention and remediation plan need not include a dog residing in the building. Dr. Rotramel, who has developed acceptable integrated plans, has never designed a program calling for a dog living in the building. Therefore, Defendant has not met its burden to show that it is entitled to summary judgment by virtue of the necessity of its actions.

Defendant failed to establish that it is entitled to summary judgment because the dog is a service animal or akin to a service animal.

Parker correctly notes that Illinois law defines "service animal" in two statutes, and a dog trained to detect bed bugs does not fall within the statutory definitions. See 105 ILCS 5/14-6.02 and 720 ILCS 5/48-8(a). Defendant offers no contrary authority that would entitle it to summary judgment on this basis. Testimony by a board member or an expert cannot establish that the dog is a service animal. Additionally, a determination that the dog is not a pet is not conclusive because the plain meaning of the declaration prohibits all animals except household pets that are not dogs or cats. Defendant more than once quotes the declaration as follows: "...household pets, other than dogs or cats, may be kept in Units..." (Def. MSJ, p. 14; Def. Reply, p. 4). However, this quote is somewhat misleading because it omits the beginning of the provision which states: "No animals, livestock, fowl or poultry of any kind shall be raised, bred, or kept in any Units or in the Common Elements, except that household pets, other than dogs or cats, may be kept in Units." (emphasis added). Therefore, Defendant has not

met its burden to show that it is entitled to summary judgment because the dog is a service animal or akin to a service animal.

IT IS HEREBY ORDERED:

1. Plaintiff's motion for summary judgment is granted, and Defendant's motion for summary judgment is denied.
2. A declaratory judgment is entered in favor of Plaintiff as follows:
 - A. All resolutions, votes or actions that purport to authorize Park Tower, its directors, officers, managers, residents, employees, agents and/or contractors, to enter Parker's unit with a dog or any other animal for any purpose, including but not limited to sniffing for bed bugs are declared invalid, null, and without legal effect.
 - B. All resolutions, votes or actions that purport to authorize Park Tower, its directors, officers, managers, residents, employees, agents and/or contractors to enforce against Parker his refusal to comply with directives to enter Parker's unit with a dog or any other animal for any purpose, including but not limited to assessments, liens, fines, or other financial or legal redress, are declared invalid, null, and without legal effect.
 - C. All resolutions, votes or actions that purport to authorize any person or entity to raise, breed or keep a dog or any other animal in any unit or in the common elements for the purposes of sniffing for bed bugs are declared invalid, null, and without legal effect.
3. Defendant is permanently enjoined from (a) entering into Parker's unit with a dog or any other animals without Parker's permission for any purpose, including but not limited to sniffing for bed bugs; (b) enforcing against Parker any resolutions, votes,

4. Defendant shall immediately remove from the premises any animal kept for the purpose of sniffing for bed bugs.

4-4-16