NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
SUCV2013-03177

NOTICE SENT
01.02.15
G.&R.
N.J.R.
R.&C.
C.D.M.

GARY A. PAPPAS[1] and others[2]

vs.

UNION WHARF CONDOMINIUM TRUST and others[3]

(LAT)

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A JUDGMENT THAT NO ACTUAL CONTROVERSY EXISTS AND FOR THE COMPLAINT TO BE DISMISSED

The plaintiffs are a number of unit owners at the Union Wharf Condominium (the "Condominium") located at 343 Commercial Street in Boston. The defendants are the Trustees of Union Wharf Condominium Trust (collectively, the "Trustees"). In this case, because of their unhappiness with the process and result of an amendment to the Condominium's Declaration of Trust, the plaintiffs sue for declaratory judgments, in two counts.

The Trustees now move dismiss both counts pursuant to Mass. R. Civ. P. 12(b)(6) on the ground that no actual controversy is set forth in the Complaint. For the following reasons, I will deny the defendants' motion on both counts.

BACKGROUND

The plaintiffs allege the following facts, which I accept as true for purposes of this motion to dismiss.[4]

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[1] In his capacity as Trustee of PLZ Realty Trust.

[2] M. Reada Bassiouni, Matthew J. Conti, Robert B. King, James H. Thrall and Jean M. Thrall.

[3] Sarah N. Smith, Marshall Mazzarella, Nicole Campanelli, Judith B. Fox, William Jacobson, A. Michael Primo and Andrea D. Thomajan, Trustees.

The defendant Trustees are the elected representatives of the Union Wharf Condominium Trust (the "Trust"). The Trust was formed pursuant to the Declaration of Trust dated on November 10, 1978.[5] See Declaration of Trust § 4.1. The Trust is the "organization of unit owners" as defined in G. L. c. 183A, § 1, and governed by G. L. c. 183A, § 10.[6] Barkan Management ("Barkan") was hired by the Trustees to manage the Condominium and is an agent of the Trustees.[7]

The Condominium is comprised of 89 commercial and residential units. Collectively, the plaintiff unit owners represent approximately 10% of the beneficial interest of the Condominium.

On April 9, 2013, the Trustees, acting through Barkan, sought the consent of the Condominium unit owners to an amendment to the Declaration of Trust, entitled "Smoke-Free Policy." The proposed amendment stated, in relevant part, that "smoking shall be prohibited everywhere on the premises of the Condominium, including the common areas and facilities, the limited common areas and facilities, and the individual units and the decks and balconies that are part thereof."

The Trustees distributed a copy of this proposed amendment along with a one-page "ballot" entitled "Vote on Proposed Amendment to Declaration of Trust to Make Union Wharf

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[4] All documents cited or quoted in this section of this Memorandum of Decision are attached to the Complaint, and therefore I may consider them in ruling on a motion to dismiss. See Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

[5] Recorded at the Suffolk County Registry of Deeds, Book 9116, Page 596.

[6] G. L. c. 183A defines "organization of unit owners" as "the corporation, trust or association owned by the unit owners and used by them to manage and regulate the condominium."

[7] G. L. c. 183A defines "Manager" as "the managing agent, the trustees in a self-managed condominium, or any other person or entity who performs or renders management or administrative services to the organization of unit owners, including but not limited to preparation of budgets and other financial documents; the collecting, controlling, disbursing, accounting or custody of common funds; obtaining insurance; conducting meetings of the organization of unit owners; arranging for and coordinating maintenance and repair; or otherwise overseeing the day to day operations of the condominium for the organization of unit owners."

Condominium Smoke-Free." The first half of the ballot sheet requested certain identifying information and left blank spaces next to each, presumably to be filled out by hand. The information to be filled in included "Unit Number," "Percentage of beneficial interest," "Written name(s) of Unit Owner(s)," and "Signature(s) of Unit Owner(s)." The second half of the ballot sheet stated that "the above-named Beneficial Interest Owner(s) at Union Wharf Condominium votes as follows" and provided either a "YES (in favor of Smoke-Free Policy)" or a "NO (against Smoke-Free Policy)" option.

Barkan sent the proposed amendment and ballot to the individuals listed in Barkan Management's general database that Barkan uses for all correspondence with Unit owners. Barkan or the Trustees compiled that database from information supplied by the unit owners themselves.

According to Section 8.1 of the Declaration of Trust, the Trustees are required to obtain the "consent in writing" of not less than 75% of the Unit owners in order to amend the Declaration of Trust. On May 31, 2013, the ballots were tallied by Barkan Management, which reported that 75.3% of the beneficial unit interests consented to the amendment.

Following the Trustee's report to the unit owners of this result, certain unit owners demanded the right to inspect the ballots in order to verify the validity of the Vote. These unit owners believe that: (1) the database used by Barkan does not accurately reflect the legal owner of record of all units; (2) some ballots counted in the vote were cast by individuals who were not the individual owners or trustees of trusts holding record title to units; and (3) neither the Trustees nor Barkan took any steps to ensure or confirm that the ballots were executed by the actual owners of record.

By letter dated June 18, 2013, plaintiff Pappas requested that the Trustees produce correspondence regarding the smoke-free amendment vote and the original ballots submitted. On June 28, 2013, the Trustees provided the ballots in redacted form, blacking out all information identifying the individual casting each ballot and the unit for which each ballot was cast. The Trustees refused to provide the original unredacted ballots, claiming that a unit owner's vote was a "private matter," and public disclosure was neither expected by the owners nor desirable. In support of this decision, the Trustees stated that the ballots are "not part of the 'books, accounts and records of the Trustees that shall be open to inspection to the Unit owners,' per § 5.13 of the Declaration of Trust, but [are] private and confidential and not subject to disclosure."[8]

On July 16, 2013, the Trustees sent a letter to the unit owners responding to an email that was sent out to "the community about certain owners' concerns with the conduct of the Smoke-Free Policy vote." In that letter, the Trustees stated that Barkan Management mailed the ballots to the Unit owners whose names and addresses are in Barkan's Union Wharf database, which is the same "database that Barkan used for all correspondence with Union Wharf unit owners." The Trustees admitted that in some cases the ballot "may have been addressed to an *individual*, for example, when in fact the unit is owned by a *trust*," and may have come back signed by a person in his or her individual capacity, "when in fact that same person is the trustee of a trust that owns the unit" (emphasis in original).

Again by letter of July 22, 2013, the plaintiffs requested the unredacted ballots and again, by letter of August 12, 2013, the defendants denied their request. On August 13, 2013, the

[8] The Trustees also pointed out that the vote amended the Declaration of Trust, but *not* the Condominium's Master Deed. An amendment to the Master Deed requires recording at the Registry of Deeds of all of the signatures of the Unit owners who vote in favor of the amendment. However, a Declaration of Trust amendment requires the recording only of a recitation by the Trustees that the holders of no less than 75% of the beneficial interest had voted in favor of the amendment.

plaintiffs made a final demand for inspection of any and all ballots in unredacted form and for written notification of the designation of a unit owner authorized to vote. On August 20, 2013 the plaintiffs made an offer to simply inspect the identity of the unit owners on the ballot so the plaintiffs could verify that the person executing the ballot was the owner of record.

On September 5, 2013, plaintiffs filed the Complaint seeking declarations that the Unit owners have a right to inspect the unredacted ballots (Count I) and that the Vote taken in respect to the Non-Smoking Policy is invalid and of no effect (Count II).[9]

On October 28, 2013, the defendants moved for a judgment that no actual controversy exists in this matter, and for the Complaint to be dismissed, pursuant to Mass. R. Civ. P. 12(b)(6).

DISCUSSION

I. Standard of Review

Dismissal under Mass. R. Civ. P. 12(b)(6) is proper "where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." Nguyen v. William Joiner Center for the Study of War and Social Consequences, 450 Mass. 291, 295 (2007), quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 748 (2006).

To survive a motion to dismiss, the complaint must set forth "'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief," which "must be enough to raise a right to relief above the speculative level." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007). "We accept as

[9] The plaintiffs also request that this Court enjoin the Trustees or their agents from "taking any further action to amend or to record the Non-Smoking Policy amendment to the Declaration of Trust, and taking all necessary steps to remove and such amendment, unless and until a valid vote has been taken in compliance with the applicable condominium documents and law."

true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). "In making this determination, we look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." Id.

However, the Court "does not accept legal conclusions cast in the form of factual allegations." Schaer v. Brandeis University, 432 Mass. 474, 477 (2000). The rule that courts must accept a plaintiff's factual allegations as true and draw every reasonable inference in favor of the plaintiff "does not entitle [the plaintiff] to rest on 'subjective characterizations' or conclusory descriptions of a 'general scenario which could be dominated by unpleaded facts.'" Id. at 477-478, quoting Judge v. Lowell, 160 F.3d 67, 77 (1st Cir. 1998) (internal quotations omitted).

II. Alleged Invalidity of the Vote (Count II)

The defendant Trustees claim that the facts alleged in the Complaint create no actual controversy concerning the validity of the vote. The defendants first argue that the identity of the person who actually signed any given ballot is irrelevant. This is a two-step argument. First, the Trustees say, they were entitled to rely upon on accuracy of the database of the names and addresses of the unit owners maintained by Barkan Management when they mailed out the ballots. Upon the return of the ballots, the defendant Trustees further argue, they could rely on the accuracy of the responses based on the theory that the signatory acted with the apparent authority of the unit owner, who told the Trustees to mail materials to the person who received and signed and returned the ballot.

The defendant Trustees claim that they may rely upon the names and addresses in the database of unit owners maintained by the Trustees and their managing agent, Barkan, because

of notice provisions in the condominium statute and in the Declaration of Trust. Both the relevant statute and the Declaration of Trust put the burden on the individual unit owners to inform the Trustees of their names and mailing addresses, thereby providing the information that goes into Barkan's database.

G. L. c. 183A, § 4(4), provides that:

> Each unit owner shall provide to the organization of unit owners . . . written notice of the unit owner's name and mailing address. Thereafter, the unit owner shall provide written notice to the organization . . . of any changes in the name or mailing address previously provided by the unit owner. The organization . . . may rely in good faith upon the most recent notice of name and address for the purpose of providing notices to the unit owner under this chapter or under provisions of the loan documents or condominium documents, and such notices sent in writing to the address listed in the most recent notice of name and address, if relied upon in good faith, shall be deemed sufficiently given, provided that the organization . . . has complied with other requirements, if any, of this chapter and the loan or condominium documents.

Similarly, Section 5.12 of the Declaration of Trust includes the following provision:

> Every notice to any Unit Owner required under the provisions hereof or which may be deemed by the Trustees necessary or desirable in connection with the execution of the trust created hereby or which may be ordered in any judicial proceeding shall be deemed sufficient and binding if a written or typed copy of such notice shall be given by one or more of the Trustees to such Unit Owner by mailing it, postage prepaid, and addressed to such Unit Owner at his address as it appears upon the records of the Trustees if other than at his Unit or by delivering or mailing the same to such Unit, if no address appears or if such Unit appears as the Unit Owner's address . . . .

The defendant Trustees are correct, then, in arguing that they were permitted to rely on the Barkan database, compiled from information provided by the unit owners themselves, in sending out the ballots – assuming, that is, that they did so "in good faith," as required by the statute.[10] See G. L. c. 183A, § 4(4). I reject, therefore, the plaintiffs' argument that the Trustees were required by law to run a title search at the Registry of Deeds to ascertain the identity of the current record owner of each unit, and then to locate the mailing address of that person or entity and to mail the ballot only to that address.

[10] The Complaint does not allege a lack of good faith in the mailing of the ballots.

The defendants argue that since they were justified in relying upon the database in sending out the ballots, they also could rely on the returned ballots on a theory of apparent authority regardless of the name on the returned ballot. That is less clear. Even assuming the apparent authority doctrine would apply in this instance, the issue of whether or not the defendants could reasonably rely on the *responses* they received is a question of fact not appropriate for disposition on a motion to dismiss. Baldwin's Steel Erection Co. v. Champy Constr. Co., 353 Mass. 711, 715 (1968) ("authority of an agent is a question of fact").

It is entirely plausible that the defendants might have had reason to question the identity of the people or entities who signed some ballots. If the name on a ballot had no obvious connection to the name of the owner as found in the Barkan database, for example, the defendant Trustees might have been required to inquire about the validity of the ballot. In fact, as to any returned ballot signed by a voter with a name different from the name of the "owner" as listed in Barkan database – Mary Jones as opposed to John Jones, for example – the apparent authority argument might not work. Even if an actual unit owner of record clothed the person he listed as "owner" in the Barkan database with apparent authority to receive the ballot and therefore to exercise the owner's power to vote, he likely did not clothe any *other* person, even with the same last name, with such authority. But these are questions of fact.

The plaintiffs allege that the defendant Trustees did not make any inquiry about any name on any ballot, regardless of whether that name matched up with the name of the owner of the unit in the Barkan database. In fact, they allege that the defendants admit to counting votes cast by individuals even where the relevant unit was owned by trust and the defendants knew it, pointing to the defendant Trustees' letter of July 16, 2013.

Counting a ballot in that circumstance might well have been completely appropriate. But that is a question of fact requiring a trial, not a question of law susceptible to determination on a motion to dismiss.

III. Alleged Right to Inspect Ballots (Count I)

To determine who actually cast votes, the plaintiffs say, they need access to the unredacted ballots. That leads to the second legal issue raised by the Complaint, and the Trustees' motion to dismiss it: the right of the plaintiffs, as owners of units in the Condominium, to examine the ballots. As to this Count, the defendant Trustees support their motion to dismiss with a one-paragraph argument. At the motion to dismiss stage, at least, this argument is unpersuasive.

According to the defendants, the plaintiffs have no right to examine the unredacted ballots because the ballots contain sensitive information regarding a divisive condominium issue that should be kept private because it was never intended to be public. "Not every document maintained by condominium Trustees is fair game for inquiring eyes," the defendant Trustees suggest. Defendant's Memorandum at 10. Putting the argument into terms found in the condominium statute and the Declaration of Trust, the defendant Trustees suggest that the ballots are not the kind of "records" to which a unit owner has a right to access under either G. L. c. 183A, § 10, or Section 5.13 of the Declaration of Trust.

General Laws c. 183A, § 10(c) provides that the Trustees or their managing agent are responsible for keeping certain documents accessible to the organization of unit owners. These records include, but are not limited to, "a true and accurate copy of the master deed," the by-laws, the minute book of the organization of unit owners, and certain financial information. G. L. c. 183A, § 10(c). This information shall be "available for reasonable inspection by any unit

owner," and are the "property of the organization of unit owners." Id. Similarly, Section 5.13 of the Declaration of Trust provides that "[b]ooks, accounts and records of the Trustees shall be open to inspection to any one or more of the Trustees and the unit owners at all reasonable times."

The purpose of the vote at issue in this case was to amend the Declaration of Trust. The Declaration of Trust is a charter document, central to the creation and operation of the Condominium. See Complaint ¶ 17 ("The Condominium was formed pursuant to the Declaration of Trust, Mass. Gen. L. Ch. 183A and the . . . Master Deed"). Oddly, although Chapter 183A grants unit owners explicit inspection rights as to the Master Deed, and even the Condominium's bylaws, it does not specifically mention the Declaration of Trust – although the statute states that its list of records that Barkan must maintain, open to inspection by unit owners, is not exhaustive. ("The manager or managing agent shall be responsible, *without limitation,* for keeping the records in item (4) below . . .")(emphasis added). Nor does Section 5.13 of the Declaration of Trust list the Declaration of Trust itself among the "[b]ooks, accounts and records of the Trustees [that] shall be open to inspection." Nonetheless, given the centrality of the Declaration of Trust to the rights of condominium owners, I have no trouble concluding, at least at this early stage of this case, that the Declaration of Trust is one of the "records" that a unit owner has a right to inspect.

The ballots themselves are not necessarily part of the Declaration of Trust. However, the purpose to ballots was to amend (or not) the Declaration of Trust, and so the relationship between the ballots and that governing document is a close one. In addition, the Declaration of Trust (and the ballots that purportedly amended it) implicates property interests of the plaintiff Unit owners, in both the exclusive ownership and possession of their individual units and their

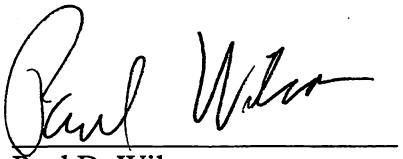
undivided interests, shared with all other unit owners, in the common areas. See Golub v. Milpo, Inc., 402 Mass. 397, 400-401 (1988); Noble v. Murphy, 34 Mass. App. Ct. 452, 455-456 (1993). For these reasons, I am not prepared to accept the defendants' invitation to conclude, at this early stage, that the Unit owners have no right to inspect the ballots as a matter of law.

Finally, at the hearing on this motion, the Trustees' counsel analogized the unredacted ballots to other types of information often in the hands of condominium trustees that nonetheless can (and should) be kept from condominium unit owners. One example was the medical or disability history of a unit owner, disclosed to the trustees so as to allow the Condominium to make physical accommodations. Another analogy concerned financial information about a unit owner's mortgage and yearly income, entrusted to the trustees by a unit owner having trouble meeting his financial obligations to the Condominium. Counsel also identified the compensation paid to an employee of the Condominium as private information, known to the trustees but not publicized to the unit owners. However, each of these examples involved a privacy interest of a third party that the law has traditionally recognized and protected.

In order to succeed on their motion to dismiss this Count of the Complaint, the defendant Trustees must establish that, as a matter of law, the Unit owners have no right to inspect the unredacted ballots. The defendant Trustees' brief argument fails to cite to any legal authority directly supporting their position, and their arguments by analogy are unpersuasive. For this reason, I must also deny their motion to dismiss Count I.

ORDER

For the foregoing reasons, Defendants' 12(b)(6) Motion for a Judgment That No Actual Controversy Exists in This Matter and for the Complaint to Be Dismissed is **DENIED.**



Paul D. Wilson
Justice of the Superior Court

December 30, 2014