

NOTIFY

2013

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2018-00175-H

JAH REALTY LLC,
Plaintiff,

vs.

CHRISTOPHER (BLADE) A. KOTELLY & others,¹
Defendants.

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

This action involves a dispute over the validity of a bylaw amendment to a condominium association's declaration of trust (the "Bylaw Amendment"). The plaintiff, JAH Realty LLC ("JAH Realty"), is the owner of the sole commercial unit in The 25 Channel Center Condominium ("Condominium") and argues that the Bylaw Amendment unfairly imposes onerous indemnity and other obligations on it. JAH Realty filed this action against the defendants, who are the current or former members of the Condominium's Board of Trustees ("Trustees"), seeking a declaration that the defendants' actions are not binding upon or enforceable against it. This matter is now before the Court on JAH Realty's motion for summary judgment. For the reasons set forth herein, the motion must be **DENIED** in part, and **ALLOWED** in part. Summary judgment shall enter in favor of the Trustees with regard to the indemnification provisions of the Bylaw Amendment, and in favor of JAH Realty with regard to the other challenged provisions of the Bylaw Amendment.

¹ Anthony J. Rich, William Meister, Gerald L. Pallotta, Edward H. Miller, Deborah J. Peckham, as trustees of The 25 Channel Center Condominium Trust.

RELEVANT FACTS

The following facts are undisputed, except to the limited extent noted herein. Further recitation of the facts shall be reserved for the discussion below.

On August 31, 2004, the Condominium was created pursuant to G. L. c. 183A by Master Deed, and The 25 Channel Center Condominium Trust ("Trust") was formed by Declaration of Trust. Statement of Facts ("SOF") ¶¶ 3-4. The individual defendants are current or former Trustees of the Trust. Id. at ¶ 2.

The Condominium consists of 77 units. SOF ¶ 5. Unit 101 is the sole commercial unit and the 76 remaining units are residential. Id. Prior to purchasing Unit 101, JAH Realty notified the Trustees of its intent to use and operate Unit 101 as an early education and child daycare facility. Id. at ¶ 8. JAH Realty addressed the Trustees concerns regarding proper noise attenuation, odor control and exterior appearance and signage. Id. at ¶¶ 9-10. The Trustees made no objection to JAH Realty's proposed use of Unit 101. Id. at ¶ 11.

On July 26, 2016, JAH Realty purchased Unit 101 for \$2,650,000. SOF ¶ 12. At this time, neither the Master Deed nor the Declaration of Trust required commercial unit owners to indemnify the Trust, the Trustees or the Condominium itself or to reallocate certain insurance costs from the owners of the residential units to the owner of Unit 101. Id. at ¶ 13. Nor did the Trustees inform JAH Realty of any intent to amend the terms of the Master Deed or Declaration of Trust to impose such obligations on JAH Realty. Id. at ¶ 14.

JAH Realty leased Unit 101 to Sunrise Learning Academy 3 LLC ("Sunrise"), a related entity, on July 27, 2016. SOF ¶ 16. Following its purchase of Unit 101, JAH Realty built out the space to make it suitable as an early education and child daycare facility. Id. at ¶ 17. In early 2017, Sunrise opened a daycare facility in Unit 101. Id. at ¶ 21.

Shortly thereafter, the Trustees were informed by the Trust's insurance agent that it could not renew its Directors and Officers ("D&O") insurance policy or its umbrella insurance policy unless a written indemnification was provided from the commercial unit owner, JAH Realty. SOF ¶ 22; Exhibit ("Ex.") 19, ¶ 4.² On April 4, 2017, the Condominium's property manager informed JAH Realty that an indemnification was necessary to renew the Trust's insurance policies. Ex. 19, ¶ 5; SOF ¶ 22. JAH Realty declined to indemnify the Trust. Ex. 19, ¶ 5.

On July 12, 2017, the Trustees presented the proposed Bylaw Amendment to the Condominium unit owners for a vote. SOF ¶ 28; Ex. 19, ¶ 6. A total of 71% of the beneficial interests in the Trust voted to approve the Amendment to Section 5.8.4 of the bylaws. Ex. 19, ¶ 8. Pursuant to the Condominium's Declaration of Trust, only 67% approval is required for such an amendment. Id.

JAH Realty challenges the Bylaw Amendment's changes to Section 5.8.4 of the Condominium's bylaws which require that commercial unit owners indemnify and hold harmless the Trustees and the Condominium, including paying for attorney's fees and costs incurred by counsel selected by the Trustees in their sole discretion (including attorney's fees and costs incurred in enforcing the indemnification agreement). Ex. 16; SOF ¶ 40. The Bylaw Amendment also requires that commercial unit owners represent and warrant that the operations or activities of invitees, guests, customers and clients will comply with all laws and regulations governing or related to the business being operated in the unit; pay for any increased premiums or other costs associated with maintaining or placing adequate insurance by the Trustees and Trust; and pay such increased premiums and costs for all types of insurance policies which the Trustees in their sole judgment may require or desire. Id.

² The D&O insurance policy covers the Trustees while the umbrella policy covers the Condominium common areas and facilities. Ex. 19, ¶ 4.

As of November 2018, JAH Realty had secured \$11,000,000 in total insurance coverage for Unit 101. SOF ¶ 43. The Trust was added as an additional insured and certificate holder on JAH Realty's commercial general liability and umbrella liability policies of insurance, although the Trustees note that the policies include a disclaimer. Id. at ¶ 42.

DISCUSSION

A. The Legal Standard for Summary Judgment

Summary judgment is properly allowed where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue and that the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting evidence negating an essential element of the non-moving party's case, or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See Flesner v. Technical Comm'n Corp., 410 Mass. 805, 809 (1991). Once the moving party satisfies its burden, the burden shifts to the party opposing summary judgment, who must allege specific facts establishing the existence of a genuine issue of material fact. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). Summary judgment, when appropriate, may be rendered in favor of the non-moving party. Mass. R. Civ. P. 56(c).

B. Application of the Legal Standard

Condominium ownership is recognized as "a hybrid form of interest in real estate" which grants an owner exclusive ownership and possession of his or her unit as well as an undivided

interest with other unit owners in the condominium's common areas. Noble v. Murphy, 34 Mass. App. Ct. 452, 455-456 (1993). “[I]n exchange for the benefits of association with other owners, [each owner] ‘must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.’” Id. at 456, quoting Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 182 (Fla. Dist. Ct. App. 1975). To that end, condominium associations may enact bylaws that regulate how each owner may use his or her unit. See G. L. c. 183A, §§ 11-12.

The Court assesses the validity of the bylaw as amended by applying the “equitable reasonableness” standard of review. See Noble, 34 Mass. App. Ct. at 457 (“The most common standard of review [of condominium use restrictions] is equitable reasonableness.”) (brackets in original).³ See also Board of Managers of Old Colony Vill. Condo. v. Preu, 80 Mass. App. Ct. 728, 729 (2011), rev. denied, 461 Mass. 1110 (2012). “This approach recognizes the discretion of the majority of unit owners while at the same time limiting their rule-making authority to those matters that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.” Noble, 34 Mass. App. Ct. at 457 (internal quotations and citation omitted). “[S]uch regulations are subject to invalidation if they violate a right guaranteed by any fundamental public policy or constitutional provision.” Preu, 80 Mass. App. Ct. at 730 (internal

³ The parties dispute the applicable standard of review. This Court accepts JAH Realty's position that the “equitable reasonableness” standard, commonly applied to condominium use restrictions that are governed by G. L. c. 183A, § 11(e), applies here. Although the indemnification obligations set forth in the Bylaw Amendment do not fall within the traditional realm of use restrictions, that standard has been applied outside of restrictions under § 11(e). See Trustees of Muzzey High Condo. Trust v. Lexington, 15 Mass. L. Rptr. 91, 2002 WL 1799736, at *11-*12 (Mass. Super. 2002) (Neel, J.) (extending reasonableness test to condominium trustees' parking rules under G. L. c. 183A, § 11(d)). Moreover, the Court rejects the Trustees' argument that the “legitimate purpose” standard of review as set forth in Franklin v. Spadafora, 388 Mass. 764, 775 (1983), is proper here. It is unclear to what extent the two standards are substantively different. During oral argument, the Trustees acknowledged that the standards are used interchangeably by the courts. To the extent that the standards are different, the “legitimate purpose” standard was applied to a constitutional challenge to a condominium's bylaw amendment, see id., and JAH Realty has not advanced a constitutional challenge to the Bylaw Amendment in this case.

quotation and citation omitted). “[T]he deference due [to] condominium restrictions might be less where they were adopted after a unit owner’s acquisition of his or her unit.” Id.

1. The indemnification provisions

Applying the above-noted standards, it is clear that the indemnification provisions in the Bylaw Amendment are valid. The undisputed material facts reflect that the Trustees introduced the Bylaw Amendment to the unit owners for a vote because the insurer of the Condominium and Trustees would not renew its coverage without an indemnification agreement from JAH Realty. No reasonable finder of fact could conclude that the Bylaw Amendment, which would protect the defendants against liability stemming from the daycare facility’s activities, was not reasonably related to the promotion of the unit owners’ health, happiness and peace of mind. See Noble, 34 Mass. App. Ct. at 457.

JAH Realty’s arguments that the Bylaw Amendment is unreasonable are without merit. First, JAH Realty contends that it was unreasonable for the Bylaw Amendment to single out and impose upon it, as the sole commercial unit, broad indemnification obligations which the remaining residential units are not required to share. This argument must fail given that it is entirely reasonable to conclude that commercial businesses—and in particular daycare facilities—pose liability concerns that are not present in residential units. See Woodvale Condo. Trust v. Scheff, 27 Mass. App. Ct. 530, 534-535, rev. denied, 405 Mass. 1205 (1989) (acknowledging “plausibility” of condo association’s concern that presence of children at a daycare facility on the premises threatened contingent liabilities that were either not contemplated by residential association’s insurance or were likely to raise premium in the future).

Second, JAH Realty argues that it was unreasonable to impose such obligations only after it disclosed its intention to use the unit as a daycare and expended hundreds of thousands of dollars to remodel the unit. It argues that it would not have bought Unit 101 if it had known that it would later be responsible for the obligations set forth in the Bylaw Amendment. Although less deference to condominium restrictions may be warranted when they were adopted after a unit owner's acquisition of the unit, Preu, 80 Mass. App. Ct. at 730, here the need to adopt the Bylaw Amendment arose only after JAH Realty purchased Unit 101.

Third, JAH Realty contends that indemnification was unnecessary and unreasonable because it provided adequate insurance for the benefit of the Condominium and the Trustees in the amount of \$11,000,000. However, even assuming that such insurance is available to the defendants, a point that the Trustees dispute, it was reasonable to require indemnification in order to allow the Trust to obtain insurance in its own name. Indeed, the Massachusetts Condominium Act, G. L. c. 183A, § 10(b)(3), expressly grants trustees the right to obtain such insurance in their own names in addition to each unit owner's right to insure his or her particular unit. Moreover, the Bylaw Amendment allowed the Trustees to fulfill their mandate under the Condominium's Declaration of Trust, which requires them to obtain insurance for the Condominium. See Ex. 5, § 5.8.1 ("The Trustees shall obtain and maintain ... master policies of insurance ... insuring the interests of the Trust, the Trustees, all Unit Owners, and their mortgagees").

Finally, JAH Realty argues that the Bylaw Amendment affected the marketability of Unit 101.⁴ Assuming, *arguendo*, that the Bylaw Amendment has negatively impacted the value of Unit 101, this does not render the bylaws unreasonable. JAH Realty knew at the time it

⁴ The Trustees dispute that the Bylaw Amendment affected the marketability of Unit 101.

purchased Unit 101 that the Trustees were required to obtain insurance for the Condominium, the Trust and themselves. It is therefore not unreasonable to affect Unit 101's marketability in order to allow the Trustees to fulfill their mandate and protect the residential unit owners.

This Court further notes that all provisions related to payment of attorney's fees and costs under the Bylaw Amendment must be interpreted to require that the fees and costs be reasonable. See Burke v. Commonwealth, 67 Mass. App. Ct. 88, 92 (2006) ("when actions are brought to recover indemnity either where the right to indemnity is implied by law or arises under a contract, and counsel fees are included as recoverable, they must be reasonable.") (internal quotations and citations omitted). The Trustees' right to select counsel of their choosing is subject to this limitation.

2. The other provisions


The other three provisions in the Bylaw Amendment are not reasonable, given this Court's decision upholding all of the indemnification provisions in the Bylaw Amendment. First, it is not reasonable to require commercial unit owners such as JAH Realty to warrant that the conduct of all third parties on the premises will comply with all "state, federal and local laws and regulations governing or in any way relating to the business(es) being operated therein," and all current and future "terms, covenants, restrictions, rules, regulations and conditions as set forth in the Condominium's operating documents." JAH Realty has no ability to assure such compliance, and this Court sees no reasonable purpose of such a warranty that is not achieved by full indemnification. Second, provisions requiring commercial unit owners to "pay for any increased premiums, special premiums, or other costs associated with maintaining or placing adequate insurance... which the Trustees may in their sole judgment require or desire to place" is fatally vague and overbroad. However, an amendment that limited this obligation to the cost of

additional riders based on the presence of a daycare facility on the premises might well be reasonable.

CONCLUSION AND ORDER

For the above reasons, Plaintiff's Motion for Summary Judgment (Docket # 12) is **DENIED** in part and **ALLOWED** in part. Judgment on Count I shall enter in favor of the Trustees with regard to the indemnification provisions in the Bylaw Amendment, and in favor of JAH Realty with regard to the three other challenged provisions of the Bylaw Amendment, to the extent set forth herein.

Dated: May 31, 2019


Robert Uilmann
Justice of the Superior Court