

99 Mass.App.Ct. 1106
Unpublished Disposition

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NOTICE: Summary decisions issued by the Appeals
Court pursuant to M.A.C. Rule 23.0, as appearing in
97 Mass. App. Ct. 1017 (2020) (formerly known as
rule 1:28, as amended by 73 Mass. App. Ct. 1001
[2009]), are primarily directed to the parties and,
therefore, may not fully address the facts of the case
or the panel's decisional rationale. Moreover, such
decisions are not circulated to the entire court and,
therefore, represent only the views of the panel that
decided the case. A summary decision pursuant to
rule 23.0 or rule 1:28 issued after February 25,
2008, may be cited for its persuasive value but,
because of the limitations noted above, not as
binding precedent. See Chace v. Curran, 71 Mass.
App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

TRUSTEES OF THE 10 PORTER STREET
CONDOMINIUM TRUST

v.

Elizabeth R. CERDA (and a companion case ¹).

19-P-1262

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Entered: January 5, 2021

By the Court (Blake, Massing & Neyman, JJ.²)

MEMORANDUM AND ORDER PURSUANT TO
RULE 23.0

*1 The plaintiff trustees initiated these lawsuits in the Superior Court to collect unpaid common charges, special assessments, fines, and late fees from the defendants, owners of two condominium units. A judge granted the trustees' motions for summary judgment on the ground that the defendant unit owners were required to, but did not, pay the charges under protest. Concluding that the judge correctly applied the pertinent law as to common area charges, but that, under the unique circumstances of

this case, genuine issues of material fact exist concerning the assessment of fines and late fees, we affirm in part and vacate in part.

Background.³ The plaintiffs are the trustees (trustees) of the 10 Porter Street Condominium Trust (trust), which governs a six-unit condominium in Salem. The defendant Elizabeth Cerda owns and resides in unit 1, and the defendant Carmen Berges, Cerda's mother, owns and resides in unit 3. Their ownership interests in the common areas are 16.08 and 13.93 percent, respectively. The trustees are either the owners, or closely aligned with the owners, of the remaining four units.

The relationship between the defendants and the other unit owners has been contentious. There have been at least six separate actions in Essex County Superior Court since 2007 involving Cerda, Berges, or both, concerning the management of the condominium.⁴ Three of these cases were resolved prior to the events that gave rise to this appeal. The fourth, commenced by Cerda and Berges in 2016 (2016 action), raised numerous claims regarding the governance and financial dealings of the trust, generally alleging a conspiracy among the trustees and other unit owners to force Cerda and Berges out of their units. The 2016 action was ultimately dismissed in October 2018, not on the merits, but as a sanction against Cerda and Berges for their repeated defiance of discovery requests and court orders. A panel of this court, in an unpublished memorandum of decision, subsequently affirmed the judgment of dismissal. See Cerda v. Rihane, 98 Mass. App. Ct. 1109 (2020).

On March 3, 2017, the trustees commenced separate actions against Cerda and Berges for unpaid charges on their units (collection cases), which are the subject of this appeal. The trustees alleged that Cerda owed \$29,184.20 in "duly assessed common expenses and charges," that Berges owed \$31,246.70, and that unspecified "[i]nterest and late fees have been charged for these overdue payments of common expenses." The amounts due included Cerda's and Berges's shares (\$22,512 and \$19,502, respectively) of a special assessment of \$140,000 for "immediate deferred maintenance work." The trustees gave the defendants notice of these charges on December 15, 2016, stating that payment was due two weeks later, on January 1, 2017. In addition, starting in late October 2016, the trustees began assessing Cerda and Berges fines of fifty dollars per day for installing unauthorized surveillance cameras in common areas. Cerda and Berges assert that the cameras were lawfully placed within their units and balconies and were necessary to defend themselves against the harassing and

intimidating conduct of the other unit owners and trustees. The two collection actions proceeded together in the same session of the Superior Court, although the parties continued to file pleadings in the individual matters.

*2 In November 2017, the trustees filed their first motions for summary judgment. The motion against Cerda asserted that she owed a total of \$47,082, including the \$22,512 special assessments, \$5,525 in fines, and attorney's fees and costs of \$1,485.72. The motion against Berges claimed she owed a total of \$43,933.50, including the \$19,502 special assessment, \$3,750 in fines, and attorney's fees and costs of \$1,485.72. No explanation was offered for the remaining balance. It appears to represent unspecified late fees.⁵ The motions were scheduled for a hearing on May 1, 2018.

About one month before the hearing, pursuant to Rule 9A of the Rules of the Superior Court (2018) (rule 9A), the defendants served on the trustees motions for preliminary injunctions in the collection cases, seeking to "stop the [trustees'] further collection action against [them], until there is judicial determination by the [c]ourt in the separate but related action/s which go to the legitimacy of the [trustees'] claims." The defendants stated in their affidavits that it was impossible for them to pay the challenged fees and assessments under protest without selling their units. Cerda and Berges also averred that the owners of the four other units had never paid their shares of the \$140,000 special assessment, yet the trustees had not instituted collection cases against them. On April 10, 2018, two days before the defendants filed their preliminary injunction motions with the court, a deposit of \$97,986 was made into the trust's bank account, representing the other unit owners' shares of the \$140,000 special assessment.⁶ The preliminary injunction motions were scheduled for hearing on the same day as the summary judgment motions.

The same day Cerda and Berges filed the preliminary injunction motions, they also filed a new complaint in the Superior Court against the trustees (2018 action). The 2018 action, as amended, challenges the legality of the charges and assessments that the trustees are pursuing in the collection cases. It is still pending.

At a hearing held on May 1, 2018, the judge denied the trustees' summary judgment motions, without prejudice, because they had failed to include a statement of undisputed facts, as required by rule 9A (b) (5). As to the preliminary injunctions, counsel for the trustees stated that the trustees would take no further action against the defendants until the summary judgment motions were decided. Based on counsel's representation that the status

quo would be maintained, the judge denied the defendants' preliminary injunction motions without prejudice.

The trustees filed renewed motions for summary judgment on June 6, 2018. They asserted that, as of May 1, 2018, Cerda owed \$62,590.23, while Berges owed \$59,767.77. These amounts included a few hundred dollars each for unpaid condominium fees, and special assessments of \$26,532 (Cerda) and \$22,984.50 (Berges).⁷ These common expense charges, however, were now dwarfed by amounts claimed to be owed for fines and late fees, which had grown to over \$35,000 for each defendant (notwithstanding the trustees' representation that they would maintain the status quo while the motions for summary judgment were pending). The motion judge deferred action on the summary judgment motions in the collection cases pending the resolution of the 2016 action.

*3 On February 6, 2019, after the 2016 action had been dismissed, the judge held a hearing on the deferred summary judgment motions. Because of the passage of time, she permitted the trustees to submit amended affidavits to reflect current alleged damages. The trustees sought, based on the accounts as of January 18, 2019, a total of \$94,117.07 from Cerda (\$62.96 in condominium fees, \$29,748 in special assessments, \$60,125 in fines and late fees, and \$4,181.11 in attorney's fees) and \$90,805.15 from Berges (\$253.54 in condominium fees, \$25,770.50 in special assessments, \$60,600 in fines and late fees, and \$4,181.11 in attorney's fees). Most of the increase was attributable to additional fines and late fees.

The judge allowed the trustees' motions for summary judgment on February 26, 2019, solely on the ground that the defendants were not permitted to challenge the charges by refusing to pay them. Accordingly, the judge did not address any of the defendants' challenges to the monies owed and issued judgments in the amounts set forth in the renewed affidavits. Cerda and Berges appeal.⁸

Discussion. 1. Summary judgment motions. Condominiums and their organizations of unit owners are governed by G. L. c. 183A and the provisions of the condominium's master deed. Common expenses must be assessed against all units either "in accordance with their respective percentages of undivided interest in the common area and facilities," or as otherwise determined in the master deed. G. L. c. 183A, § 6 (a) (i).⁹ In general, unit owners may not refuse to pay their share of common charges assessed by the condominium association, even if they claim such charges are invalid or unlawful.

The Supreme Judicial Court laid down this principle, with

respect to lawfully assessed charges, in [Trustees of the Prince Condominium Trust v. Prosser](#), 412 Mass. 723 (1992). In that case, a unit owner withheld from his monthly common charges an amount he claimed he was owed for loss of use of a parking space. The court held that such a set-off was impermissible, stating that “a condominium unit owner may not properly withhold payment of lawfully assessed common area charges by asserting a right of offset against those charges.” [Id.](#) at 725. See [G. L. c. 183A, § 7](#) (“no unit owner shall be entitled to an offset, deduction, or waiver of common expenses or other charges levied or lawfully assessed by the organization of unit owners”). The court reasoned that the daily functioning of the condominium required the regular collection of common charges. “A system that would tolerate a unit owner’s refusal to pay an assessment because the unit owner asserts a grievance, even a seemingly meritorious one, would threaten the financial integrity of the entire condominium operation.” [Trustees of the Prince Condominium Trust](#), *supra* at 726. Thus, the court announced that “a condominium unit owner may not decline to pay lawful assessments. If there were to be an exception to this principle, it would be due to extraordinary circumstances not shown on the record before us.” [Id.](#)

*4 Following [Trustees of the Prince Condominium Trust](#), this court held in [Blood v. Edgar’s, Inc.](#), 36 Mass. App. Ct. 402 (1994), that the principle applied even to allegations of unlawfully imposed assessments. In [Blood](#), a unit owner asserted that the trustees of the condominium had improperly assessed as a common expense the cost of operating a unit rental program. [Id.](#) at 404. Emphasizing that the “serious financial impact on the stability of a condominium association” that withholding might cause, this court held that “in the context of the condominium act, absent a prior judicial determination of illegality, a unit owner must pay its share of the assessed common expenses.” [Id.](#) at 405. The [Blood](#) decision further “suggest[ed] that aggrieved unit owners should timely pay -- under protest -- the common expense assessment. Thereafter, a judicial determination of the legality of the assessment, and suitable reimbursement, may be sought.” [Id.](#) at 406. “Self-help remedies, such as withholding condominium common expense assessments, are not available.” [Id.](#) at 405-406.

Our cases do not distinguish among the types of charges that must be paid under protest as a condition of obtaining judicial review of their propriety. See [Trustees of the Prince Condominium Trust](#), 412 Mass. at 726 (unit owner not permitted to withhold “lawfully assessed common area charges”); [Blood](#), 36 Mass. App. Ct. at 405 (unit

owners should timely pay “common expense assessment” and thereafter seek judicial determination of its legality and reimbursement). At issue in this case are three distinct type of charges: monthly condominium fees, special assessments, and fines and penalties.

Without differentiating among the types of charges and assessments, the motion judge granted the motions for summary judgment on the ground that the defendants had failed to pay them under protest. In deciding a motion for summary judgment, a judge must determine “whether, viewing the evidence in light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.” [Augat, Inc. v. Liberty Mut. Ins. Co.](#), 410 Mass. 117, 120 (1991). See [Mass. R. Civ. P. 56 \(e\)](#), 365 Mass. 824 (1974). “In reviewing the ... grant of a motion for summary judgment, we conduct a de novo examination of the evidence in the summary judgment record ... and view the evidence in the light most favorable to the part[y] opposing summary judgment, drawing all reasonable inferences in [the nonmoving party’s] favor” (quotations and citations omitted). [Bulwer v. Mount Auburn Hosp.](#), 473 Mass. 672, 680 (2016).

The fact that Cerda and Berges had not paid the charges and assessments at issue in the collection cases was uncontested. Under the [Blood](#) decision, whether the common area charges were assessed illegally is immaterial. Accordingly, with respect to the condominium fees and special assessments, the judge was not required to address the defendants’ multiple claims that the charges and assessments were unlawful, invalid, and imposed in bad faith. Nor was the judge required to scrutinize the trustees’ statements of the amounts owed for common area charges -- under clearly established principles, the defendants were required to pay these amounts under protest before they could challenge their propriety.

Reading the defendants’ brief generously, they assert for the first time on appeal that their case presents “extraordinary circumstances” warranting an exception to the pay-under-protest principle. See [Trustees of the Prince Condominium Trust](#), 412 Mass. at 726. Because they did not raise this claim in opposition to the summary judgment motions, or at any point in the Superior Court proceedings, it is waived. See [Carey v. New England Organ Bank](#), 446 Mass. 270, 285 (2006) (issue not argued in opposition to summary judgment may not be raised for first time on appeal, as “plaintiffs never put the judge on notice that they opposed summary judgment on this theory”); [Department of Revenue v. Estate of Shea](#), 71 Mass. App. Ct. 696, 701 (2008) (same).

*5 We acknowledge the defendants' claims concerning the trustees' collection of the special assessment for deferred maintenance. The assessment was significant, and it may be unreasonable to expect unit owners to be able to pay such large sums on such short notice.¹⁰ Even more troubling is the trustees' apparent failure to timely assess, collect, or litigate the other unit owners' shares of the special assessment. Although the trustees imposed the special assessment on the defendants in December 2016, it was not until April 2018 that the shares of the special assessment due from the four units that the trustees controlled, responsible for seventy percent of the common expenses -- that is, nearly \$100,000 of the special assessment -- were deposited. This course of conduct undermines the trustees' assertion that the defendants' prompt payment of their shares the special assessment was essential to "the financial integrity of the entire condominium operation," [Trustees of the Prince Condominium Trust](#), 412 Mass. at 726, and appears to support Cerda's and Berges's contention that the assessments were imposed against them in bad faith. Nonetheless, the other units' shares have now been paid, and the pay-under-protest principle -- as well as the defendants' failure to articulate an "extraordinary circumstances" defense to the trustees' summary judgment motions -- constrains us to affirm the judgments with respect to the special assessments.¹¹

In the unique circumstances of this case, however, we take a different view with respect to the fines and late fees. When the trustees commenced these proceedings, the unpaid penalties and late fees were merely an afterthought. By the time judgment entered, however, they had grown to enormous proportions: about \$60,000 assessed against each defendant, roughly two-thirds of the judgment. The record appendix sheds little light on the reasons for these charges. It appears that the defendants were fined \$50 per day, for the duration of the case, for placing surveillance cameras on their balconies. In addition, the statements of amounts due from the defendants include hundreds of charges for \$25, \$50, \$75, \$100, or \$125, imposed on the first day of each month, with no explanation apparent on the record. The charges accrued even after the trustees had promised the judge that they would do nothing to alter the status quo while the summary judgment motions were pending.

The rationale behind the pay-under-protest principle does not apply to these charges. They are not "common area charges," [Trustees of the Prince Condominium Trust](#), 412 Mass. at 726, or "common expense assessment[s]," [Blood](#), 36 Mass. App. Ct. at 405. Unlike monthly fees based on the annual operating budget, or special

assessments imposed to address unanticipated one-time expenses, fines and late fees are not necessary to keep the condominium solvent. The defendants made this argument in affidavits attached to their summary judgment oppositions, and the same argument appears in their appellate brief (albeit in the section regarding injunctive relief).

Moreover, the statute authorizing the assessment of fines requires that they be "reasonable." [G. L. c. 183A, § 10 \(b\) \(5\)](#). On the record before us, there are material issues of fact concerning the reasons for, and the reasonableness of, the assessed fines and fees. Finally, the trustees continued to levy fines and late fees against the defendants even after the judge had denied the motions for preliminary injunctions based on the trustees' representation that the status quo would be maintained. Under the unique circumstances of this case, the defendants should not have been required to pay the accruing, unsubstantiated fines and late fees in order to challenge them. We therefore vacate those portions of the judgments and remand the matter for a judicial determination of the basis for, and legality of, the penalties and late fees, and whether their accumulation was contrary to the trustees' representation relied upon by the judge in denying injunctive relief. It shall be within the judge's discretion on remand whether to hold an evidentiary hearing or conduct a trial to make this determination.¹²

*6 2. Miscellaneous claims. The defendants also claim that the motion judge erred by denying their requests for preliminary injunctions and by failing to address their "counter motions" for dismissal and sanctions, and by denying reconsideration of the summary judgments.¹³

a. Denial of preliminary injunctive relief. With respect to their motions for preliminary injunctions, the defendants primarily assert that they would be irreparably harmed if they were required to pay the challenged common charges -- and be forced to sell their units to do so -- before adjudication of their claims of impropriety. However, the judge found it unnecessary to decide the preliminary injunction motions, and denied them without prejudice, because the trustees agreed to take no actions to collect the charges, encumber the units, or otherwise alter the status quo before the summary judgment motions were decided. "A preliminary injunction ordinarily is issued to preserve the status quo pending the outcome of the litigation." [Doe v. Superintendent of Schs. of Weston](#), 461 Mass. 159, 164 (2011). The trustees' representation that they would take no action against the defendants left the judge with nothing to enjoin. See [Morgan v. Stoughton](#), 18 Mass. App. Ct. 977, 979 (1984) (no need to enjoin

town officials from taking action to suspend entertainment license where officials agreed to take no action until completion of ongoing judicial proceedings). As discussed, supra, on remand the judge may consider whether the trustees honored their representation.

b. Motions for dismissal and sanctions. In response to the trustees' summary judgment motions, Cerda and Berges served and filed "counter motions" for dismissal and sanctions alleging that the trustees' counsel breached his duty of candor to the court by failing to disclose that the owners of the other four units did not pay their shares of the \$140,000 special assessment until April 2018. The judge took no action on the motions. Cerda and Berges later raised the same claim in their Mass. R. Civ. P. 60 (b) (3) motions for relief from the judgment based on fraud and misrepresentation, which were denied. See note 7, supra.

A fraud on the court occurs when one party intentionally deceives the court or otherwise undermines the integrity of the judicial process. See Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 418 Mass. 596, 598 (1994). To warrant dismissal of an action for fraud on the court, the moving party must show a pattern of fraudulent conduct by clear and convincing evidence. Id. at 600. Examples of such conduct include forging documents, creating and presenting false evidence, or falsifying past deposition testimony. Id. at 599-600. As the judge

later determined in denying the Mass. R. Civ. P. 60 (b) (3) motion, the trustees' failure to affirmatively disclose the late deposit of the other unit owners' payments of the special assessment was not fraudulent conduct, did not prevent the defendants from addressing the merits of the cases, and did not distort the judicial process.

*7 Conclusion. The portions of the judgments regarding the amounts of the unpaid condominium fees and special assessments (that is, \$33,992.07 against Cerda and \$30,205.25 against Berges) are affirmed. The judgments are vacated with respect to the claimed penalties, fines, and late fees (\$60,125 alleged to be owed by Cerda, \$60,600 alleged to be owed by Berges) and the matter is remanded for further proceedings consistent with this decision. The orders denying the defendants' motions for reconsideration and to amend the judgments are affirmed.¹⁴

So ordered.

Affirmed in part; vacated in part and remanded.

All Citations

Slip Copy, 99 Mass.App.Ct. 1106, 2021 WL 28224 (Table)

Footnotes

¹ Trustees of the 10 Porter Street Condominium Trust vs. Carmen R. Berges.

² The panelists are listed in order of seniority.

³ As this action was decided on summary judgment against the defendants, we recite the facts established by competent record evidence in the light most favorable to them. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016).

⁴ An appellate court may take judicial notice of the "docket entries and papers filed in separate cases, [but] we may not take judicial notice of facts or evidence brought out in those separate actions." Home Depot v. Kardas, 81 Mass. App. Ct. 27, 28 (2011). See Mass. G. Evid. § 201 note (2020). We discuss the related litigation only to lend context to the issues before us.

⁵ For example, on March 1, 2017, Cerda was assessed twenty separate charges of \$25; on April 1 she was assessed eleven charges of \$25; on May 1, fifteen. On August 1, 2017, she was assessed seventeen charges of \$25, four of \$50, and four of \$75. On March 1, 2017, Berges was assessed twenty-one separate charges of \$25. On August 1, she was assessed twelve charges of \$125, three charges of \$100, four charges of \$75, four charges of \$50, and two charges of \$25. On September 1, she was charged \$25 twenty-eight times, plus another \$150. Each of these charges is attributed to a different invoice number; the invoices were not included in the record.

6 The checks for these payments were dated January 12, 2017, more than fifteen months before they were deposited.

7 The trustees had imposed a second special assessment, of \$25,000, to cover legal costs the trustees had accrued in the 2016 action. Cerda's share was \$4,020, and Berges's share was \$3,482.50.

8 The defendants filed timely notices of appeal from the entry of the summary judgments, and from the subsequent denial of their motions for reconsideration and to amend the judgment pursuant to [Mass. R. Civ. P. 59 \(e\)](#), 365 Mass. 827 (1974). They later filed motions for relief from the judgment based on fraud and misrepresentation, see [Mass. R. Civ. P. 60 \(b\) \(3\)](#), which were denied. However, they failed to file notices of appeal from the orders denying the [rule 60 \(b\) \(3\)](#) motions, and a single justice of this court subsequently denied their motion to file late notices of appeal. Accordingly, the propriety of the orders denying the motions for relief from judgment is not before us.

9 In addition, duly elected condominium trustees are empowered "[t]o impose charges ... for the late payment of common expense assessments or other charges, and to levy reasonable fines for violations of the master deed, trust, by-laws, restrictions, rules or regulations of the organization of unit owners" (emphasis added). [G. L. c. 183A, § 10 \(b\) \(5\)](#).

10 Cerda's and Berges's shares of \$22,512 and \$19,502, respectively, were due in fifteen days, and they averred that it was impossible for them to pay these assessments under protest without selling their units. To put these amounts in context, the purchase price of Cerda's unit was \$130,000 in November 2005, and Berges purchased her unit for \$102,945 in June 2005.

11 Because the claim was not adequately raised, we need not decide whether a common expense assessment charged in bad faith, against a unit owner who could not afford to pay it without selling the unit, would amount to "extraordinary circumstances" permitting the unit owner to challenge the assessment without paying first.

12 It is also within the judge's discretion to determine whether the collection cases should now be consolidated with the pending 2018 action.

13 The defendants' brief also includes perfunctory arguments, with no citations to legal authority, that the trustees' service of amended affidavits in support of their summary judgment motions and the service of other papers violated [rule 9A](#), and that their motion for reconsideration of the allowance of summary judgment was erroneously denied. To the extent these paragraphs rise to the level of appellate argument, see [Mass. R. A. P. 16 \(a\) \(9\) \(A\)](#), as appearing in 481 Mass. 1629 (2019), we discern no error or abuse of discretion.

14 The defendants' request for attorney's fees is denied.