

Subject:

FW: Available to comment for Lawyers Weekly story on Superior Court condo ruling?

LAWYER'S WEEKLY

Judge rules class action can proceed over condo 'resale fee'

Unit sellers claim charge violates Condominium Act

Eric T. Berkman//December 13, 2024//

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Practice must be reassessed

A Superior Court judge has ruled that a class action can proceed against a condominium association for imposing resale fees against unit sellers, allegedly to build up cash reserves to defray future common expenses.

Trustees of defendant Clarendon Condominium Trust had adopted by resolution a "transfer fee" — equal to six months of "common charges" — imposed on owners when they sold their units.

The plaintiffs, unit owners at the Clarendon Condominium in Boston who were forced to pay the resale fee in order to sell their units, sought a declaration that the state Condominium Act, G.L.c. 183A, bars such a fee as an impermissible "common expense" imposed on only a subset of unit owners.

The trust argued in a motion for judgment on the pleadings that the assessment represented merely a “common charge” to defray costs associated with the sale of a unit and that all unit owners would have to pay the resale fee eventually.

But Judge Debra A. Squires-Lee, sitting in the Business Litigation Session, denied the motion, finding a genuine issue of material fact as to how the resale fee should be characterized.

“Plaintiffs allege that the Board passed the Resolution for the purpose of defraying future common expenses. If this allegation is proven, the ‘transfer fee,’ a term not defined in the Declaration, violates the Condominium Act, Master Deed, and the Declaration because it is, in practice, a one-time additional payment for ‘common expenses’ that is assessed not against all unit owners but only against those who sell their units,” Squires-Lee wrote.

“Therefore ... Plaintiffs have stated a claim for declaratory relief to the extent they assert that the Resale Fee violates the Condominium Act, Master Deed, and Declaration.”

Still, Squires-Lee granted the defendant’s motion for judgment on the pleadings regarding the plaintiffs’ claims of fraud and misrepresentation, unjust enrichment and violation of Chapter 93A.

The 12-page decision is *Alves, et al. v. Clarendon Condominium Trust, et al.*, *Lawyers Weekly No. 09-135-24*.

‘Warning shot’

Plaintiffs’ counsel Matthew S. Furman of Boston said the ruling should serve as a “warning shot” for associations that have been trying to impose similar fees on unit sellers to build up their reserves.

“They’re essentially kicking people on their way out the door,” Furman said. “It’s my understanding that one of the reasons for adopting the fee was that other associations had been doing it. It’s a practice that’s going to have to be reassessed.”

Boston attorneys David A. Grossbaum and Rowan K. Moriarty, who represented the trust, could not be reached for comment.

But Boston condominium attorney Michael W. Merrill thought the claim should have been dismissed.

“Our feeling is this is a valid thing, and you can adopt it by rule and regulation and then you can collect it as an unpaid common charge,” he said.

At the same time, Merrill suggested that a condominium trust seeking to impose such a fee do so by specific amendment rather than by resolution.

“I’d amend the trust to say that’s what the unit owners want,” he said. “You’d need 67 or 75 percent of the vote, but then you could argue to the judge that this is what the community wants. That way the judge isn’t just looking at a resolution by trustees; they’re looking at an expression of community support.”

Edmund A. Allcock of Braintree said a finding that a transfer fee is illegal would have a broad impact on condominium governance, because in *Alves* the transfer fee was specifically authorized by the governing documents, and the trust specifically authorized the trustees to increase the fee.

“Such a decision would seem unprecedented in light of numerous Appeals Court and [Supreme Judicial Court] decisions providing that the Condominium Act is an enabling act and the details of condominium governance are best left to the parties in the absence of clear directive or prohibitions,” Allcock said.

Quincy attorney Thomas O. Moriarty took issue with the notion that permissibility of a fee hinges on what costs it might be meant to defray or how it is subsequently spent.

Money is fungible, and thus any income to an association defrays all expenses, including maintenance, repair and replacement, as well as costs associated with the sale of a unit, he said.

“Any money in an association’s bank account reduces the need to raise additional funds and, thereby, defrays costs,” Moriarty said. “If the answer to the question was based on such criteria, it would be so easily manipulated by accounting sleight-of-hand as to be meaningless.”

Boston attorney Austin S. O’Toole said he understood why the judge ruled as she did.



The tilt of this fee against seller owners and not others is likely to subvert the statute's careful description on what fees are mandatorily and typically spread according to ownership interest.

"For whatever it is used, money is fungible and this 'charge' is assigned only to selling owners, which the court notes some of the owners might not necessarily become," he said. "Under the statute, fees against certain owners only are typically fees sanctioning those owners' bad acts, such as fining and costs of collecting arrearages."

Given a fuller record beyond the pleadings, O'Toole continued, "the tilt of this fee against seller owners and not others is likely to subvert the statute's careful description on what fees are mandatorily and typically spread according to ownership interest."

Transfer fee

Plaintiff Caroline Alves owned two units of the Clarendon Condominium in Boston's Back Bay. She sold the units in June and July 2022.

Meanwhile, plaintiff Melissa White owned another unit, which she sold in August 2022.

At the time of the sales, each plaintiff paid a resale fee equal to six times her respective monthly unit owner dues and parking fees in order to receive the Chapter 183A, §6(d), certificates required for the sales.

Alves, et al. v. Clarendon Condominium Trust, et al.

THE ISSUE: Can a class action proceed against a condo association for imposing resale fees against unit sellers, allegedly to build up cash reserves to defray future common expenses?

DECISION: Yes (Superior Court, Business Litigation Session)

LAWYERS: Widmaier M. Charles, Matthew S. Furman and David H. Rich, of Todd & Weld, Boston (plaintiffs)

Neither the master deed, declaration nor owner reference guide referenced the resale fee, which the trust board had unanimously adopted by resolution under Section 17A of the declaration. Apparently, the plaintiffs were not aware of the fee when they purchased their units.

The board apparently said the fee's purpose was to build up reserves and defray future assessments for common expenses for non-selling unit owners, though the resolution itself, which was recorded with the Registry of Deeds, did not describe the purpose of the fee or how amounts collected would be spent.

The plaintiffs filed suit in Superior Court seeking a declaration that the resale fee violated Chapter 183A as an impermissible "common expense" that did not apply equally to all unit owners. They also brought fraud and negligent misrepresentation, unjust enrichment, and Chapter 93A claims.

The parties cross-moved for judgment on the pleadings.

Issue of fact

Squires-Lee found that neither side was entitled to judgment on the pleadings on the Chapter 183A claim.

For one thing, she said, if, in fact, the resolution was passed for purposes of defraying future common expenses, the transfer fee would violate the Condominium Act as well as the master deed and declaration because it would represent a one-time additional payment for "common expenses" assessed only against a subset of unit owners.

Accordingly, she said, the plaintiffs had at the very least stated a claim.

At the same time, Squires-Lee said, the plaintiffs were not entitled to judgment on the pleadings because the resolution did not, on its face, prove the imposition of an improper "common expense."

"[I]t is the purpose and function of the Resale Fee that will determine its lawfulness, and that must be evaluated on a fully fleshed out factual record," the judge said. "Either the Resale Fee was, as Plaintiffs assert, for 'common expenses' which cannot lawfully be

imposed upon only a subset of unit owners; or it was, as Defendants maintain, a 'fee' or 'charge' to defray costs associated with the sale of a unit, which is potentially lawful and consistent with the Condominium's governing documents."

Meanwhile, the judge found insufficient evidence for the fraud, misrepresentation, unjust enrichment and 93A claims to proceed.