REBA DISPUTE RESOLUTION, INC.

MICHAEL L. ROBERT

vs.

149-159 MEADOW POND CONDOMINIUM TRUST

ARBITRATION DECISION

The arbitration hearing was conducted on December 22, 2009, at the office of REBA Dispute Resolution, Inc. (REBA DR), 50 Congress Street, Boston. Michael L. Robert (Robert) and 149-159 Meadow Pond Condominium Trust (Trust) were represented by counsel. The present trustees of the Trust are Van Emond (Emond) and Jeannine E. Martin, now known as Jeannine E. Collins (collectively, Trustees). This matter concerns the proper distribution of insurance proceeds after the complete casualty loss of a six-unit residential condominium building located in the Whitinsville section of the Town of Northbridge.

RECORD

On December 10, 2009, Robert and the Trust submitted Joint Statement of Agreed Facts (Joint Statement) consisting of thirty-five numbered paragraphs. The Joint Statement also contained thirty attached exhibits.

Robert and the Trust each filed a motion for summary judgment with a supporting memorandum on or about December 15, 2009. One of the unit owners, Timothy Robin Bentley (Bentley), notified REBA DR in writing on December 15, 2009, that he was in "complete agreement" with the motion submitted by Robert.[1] At the commencement of the hearing held on December 22, 2009, each party filed a reply brief to the motion filed by the opposing party.

[1] Bentley had previously submitted by e-mail dated December 9, 2009, a document entitled "Interested Party/Unit Owner Summary."

FACTS

I adopt and incorporate herein the agreed facts together with the exhibits found in the Joint Statement. In order to provide a context for the discussion that follows, I will recite a few of those facts.

With the recording of a Master Deed and Declaration of Trust/By-laws (Trust Declaration) with the Worcester District Registry of Deeds on February 28, 2006, Kalidas Patel submitted a certain parcel of land with a three-story building thereon to the provisions of G. L. c. 183A and created 149-159 Meadow Pond Condominium (Condominium). The Condominium consisted of six residential units, each with a 16.666% percent undivided interest (1/6 interest) in the common areas and facilities.[2]

A casualty loss of all the units and the common areas comprising the Condominium occurred as a result of a fire on April 30, 2009. At the time of the loss, the Condominium was insured by a master insurance policy issued by Vermont Mutual Group (Policy).

On behalf of the Trust, Law Office of W. Robert Knapik forwarded to the owner or owners of each unit on or about August 25, 2009, a copy of Condominium Unit Owner Agreement (August 2009 agreement). In pertinent part, the August 2009 agreement provided that if, at a meeting of unit owners, less than seventy-five percent of said owners vote to rebuild the Condominium, the settlement proceeds of the Policy (insurance proceeds) would be distributed to the unit owners in proportion to the unit owners' respective undivided interest in the common area and facilities, following the payment of (1) all debts, liabilities, fees and costs

[2] Section 5(a) of G. L. c. 183A provides that the percentage interest in the common areas and facilities attributable to each unit "shall be in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all the units."

of the Trust and (2) the outstanding mortgage balances of each unit owner.[3] The parties agree that, as of July 25, 2009, approximately $1,092,300 remain from $1,200,000 of insurance proceeds and are available for distribution.

By letter dated September 15, 2009, to Attorney W. Robert Knapik, Attorney Charles A. Perkins notified the Trust that Robert, as the owner of Unit E, dissented from the August 2009 agreement. Thereafter, Robert and the Trust each designated an arbitrator pursuant to Section 5.5.3. of the Trust Declaration (Section 5.5.3.). Those two arbitrators then named me to serve as the third arbitrator. In pertinent part, Section 5.5.3. provides that the arbitration "shall be binding upon the parties."

Notwithstanding anything to the contrary in Section 5.5.3., the parties agreed that their controversy be submitted to me to act as the sole arbitrator. The parties also released any right they may have relating to or arising out of the provisions of Section 5.5.3. that may require the matter be submitted to a panel of arbitrators.

DISCUSSION AND DECISION

This decision is rendered utilizing well-established law of summary judgment. Where no genuine issue of material fact exists, summary judgment may be entered as a matter of law. O'Connor v. Redstone, 452 Mass. 537, 550 (2008); Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974).

The position of the Trust is that the insurance proceeds should be divided among the owners of the six units in equal 1/6 shares after the payment of all debts of the Trust, "plus any and all secured debts representing a lien or encumbrance on any of the units or the common areas

[3] The record does not disclose whether any unit owner ever executed the August 2009 agreement.

and facilities of the [C]ondominium." Robert and Bentley (collectively, Robert) contend that the insurance proceeds represent common funds as that term is defined by G. L. c. 183A, § 1. While acknowledging the Trustees may deduct the debts, liabilities, fees, and costs of the Trust as common expenses from the insurance proceeds, Robert maintains that the net insurance proceeds must be "distributed among unit owners in the same manner as common expenses are charged to the unit owners." G. L. c. 183A, § 6 (a)(iii).

The parties have not cited, nor have I found, any case law germane to the issue to be decided. Thus, I rely upon the statutory framework of G. L. c. 183A for guidance and the explicit terms of the Master Deed and Trust Declaration.

The fact is undisputed that more than 120 days have passed since the April 30, 2009 casualty loss. During those 120 days, no vote has taken place by which seventy-five percent of the unit owners have agreed to proceed with the repair or restoration of the Condominium. Therefore, the Condominium is subject to partition at the suit of any owner and "[t]he net proceeds of a partition sale together with any common funds shall be divided in proportion to the unit owners' respective undivided ownership in the common areas and facilities." G. L. c. 183A, § 17 (b)(1).

As noted above, each unit is entitled to an undivided percentage interest in the common area and facilities based upon its fair value on the date of the master deed in relation with the then aggregate fair value of all the units. Accordingly, each unit in this Condominium has a 1/6 interest. The owner of each unit enjoys equal voting power in Trust affairs and bears the equal responsibility for common expenses of the Condominium. See G. L. c. 183A, § 6 (a)(ii). This equality among the six units exists in spite of the fact that no two purchase prices paid by the

current unit owners are the same. Those purchase prices range from $102,500 paid by Robert for Unit E to $185,888 paid by Emond for Unit F.

In relevant part, G. L. c. 183A, § 3, states that "[e]ach unit together with its undivided interest in the common areas and facilities . . . shall constitute real estate, and may be the subject of . . . mortgage . . . as if it were sole and entirely independent of the other units in the condominium of which it forms a part." Each unit is presently encumbered by one or two mortgages. The original principal amounts of those mortgages vary from a low of $102,500 on Unit E to $185,000.[4]

If no mortgages of record appeared on the record concerning any of the units in this Condominium, the question of insurance proceed distribution would be straightforward. Each unit owner would receive 1/6 of approximately $1,092,300 or $182,500.[5] Differences in the original purchase prices paid by the unit owners, if any, would be irrelevant.

When they granted loans to unit owners and took back mortgages, mortgagees knew or should have known that their security interests were limited to the extent of ownership of their borrowers. Thus, the mortgages granted to the mortgagees each stated that the notes were secured by the borrowers' interest in the Condominium. Each mortgage either expressly or impliedly acknowledged that such security interest encumbered the particular unit and its 16.666% interest in the common areas and facilities.[6]

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[4] The actual amounts outstanding on the unit mortgages as of the time of this arbitration are not part of the record.

[5] The amount available for distribution, however, will be subject to a final account of income and expenses. The common profits distributable to unit owners may include such additional sums such as condominium reserves.

[6] Exhibit A to the mortgage to Bank of America, N.A. from David R. Bott securing Unit C makes no reference to its 16.666% interest in the common area and facilities.

It is axiomatic that unit owners can only convey by mortgage or deed what they own. Any responsible lender understands that basic principle of property law. Consequently, one owner can only encumber his or her own title and has no claim to the property or interests of another unit owner.

The Trust argues that the mortgage granted by Robert contains language in a rider that is similar to that found in most if not all of the mortgages on record. Such language states, in relevant part, that

> "[i]n the event of a distribution of hazard insurance proceeds in lieu of restoration or repair . . . , any proceeds payable to Borrower are hereby assigned and shall be paid to Lender for application to the sums secured by this [mortgage], with any excess paid to the entity legally entitled thereto."

Related to such assignment, the Trust relies upon its obligation to maintain master policies of casualty and physical damage insurance for its benefit and for that of the unit owners, "with loss proceeds payable to the Trustees hereunder . . . as Insurance Trustees for all of the Unit Owners collectively of the Condominium and their respective mortgagees, as their interests may appear . . . ." Trust Declaration, Section 5.8.1. Furthermore, the last sentence of Section 5.8.3. of the Trust Declaration provides that "[w]ith respect to losses covered by [casualty loss] insurance which affect portions or elements of a Unit, or more than one Unit to substantially the same or to different extents, the proceeds relating thereto shall be used, applied, disbursed by the Trustees in a fair and equitable manner." Thus, the Trustees insist they have a fiduciary obligation as Insurance Trustees to see that the sums owed to the mortgagees are repaid before unit owners receive any monies.

For support, the Trust cites National Title Ins. Co. v. Lakeshore I Condominium Assn., Inc., 691 So. 2d 1104 (Fla. App. 1997). While it is true that Insurance Trustees owe the

mortgagees a "duty to use reasonable care in the management of the [insurance] proceeds," id. at 1106, National Title does not stand for the proposition that the Trust may pay over to one mortgagee the money belonging to those unit owners who did not grant the mortgage in question.

According to the Trust, the Trustees enjoy broad discretion as to how the insurance proceeds are to be distributed. Section 5.1 of the Trust Declaration states that in addition to the powers granted by G. L. c. 183A and the Master Deed, the

> "Trustees may, with full power and uncontrolled discretion . . .
>
> (xx) generally, in all matters not herein otherwise specified, to control and do each and every thing necessary, suitable, convenient, or proper for the accomplishment of any of the purposes of the Trust . . . , manage and dispose of the Trust property as if the Trustees were the absolute owners thereof and to do any and all acts, including the execution of any instruments, which by their performance thereof shall be shown to be in their judgment for the best interest of the Unit Owners."

Accordingly, the Trust believes that (a) in order to carry out their duties as insurance trustees, (b) in exercise of their discretion to act in the best interest of the unit owners, and (c) to distribute the insurance proceeds in a fair and equitable manner, the Trustees must pay off all the outstanding mortgage balances for individual units before distributing to unit owners the remaining insurance proceeds. As proposed by the Trust, each unit owner would receive a net distribution of approximately $17,502 after the payment of all debts, expenses, and unit mortgages.[7] I disagree with the Trust's view of the Trustees' duties, and I accept the opposing argument of Robert.

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[7] Relying upon the face values of the mortgages attached as exhibits to the Joint Statement, Robert believes that the Trust would pay approximately $977,314 to the various mortgagees with each unit owner receiving approximately $19,164. Based upon the outcome of this decision, I need not resolve this apparent conflict.

The Trustees do not possess the "full power and uncontrolled discretion" to act "in their judgment for the best interest of the Unit Owners" due to the fact that the matter of the distribution of the insurance proceeds is otherwise governed by statute and various provisions of the recorded documents that created this Condominium.

A unit owner can only mortgage his or her own unit together with "its" undivided interest in the common areas and facilities. G. L. c. 183A, § 3. As such, one unit owner has no claim to the share of common profits belonging to any other unit owner, and a unit mortgagee is limited in its recourse only to the mortgaged unit and the undivided interest to which it is entitled. For those mortgagors who have executed riders with language similar to that found in Robert's rider, those unit owners cannot deny that they have assigned to their mortgagees "any proceeds payable to Borrower," and such proceeds "shall be paid to Lender for application to the sum secured" by the mortgages. The amount payable to each unit owner is equal to the unit's 1/6 interest, and the Trustees, as Insurance Trustees, will act as the agent to pay such sum to the appropriate Lenders.

The Trust claims that certain unit owners with less mortgage debt would be unjustly enriched if those unit owners received a full 1/6 share of the insurance proceeds before the satisfaction of all unit mortgage debt. I see the issue from the exact opposite perspective. Each unit has had an equal 1/6 legal interest in the Condominium since its first day of existence. Thus, it was a result of marketplace conditions and lending decisions as to how much a person paid for a unit and how much debt that person would carry. For those who may have paid a higher purchase price and opted to carry a greater amount of debt, it is not the obligation of other unit owners to pay such debt. Under these circumstances, fair and equitable means an equal 1/6

claim to the net insurance proceeds before any unit mortgage payoff. G. L. c. 183A, §§ 5 (a), 6 (a)(i), 6 (a)(iii).

If the real estate constituting the Condominium were to be partitioned, "[t]he net proceeds of a particular sale together with any common funds shall be divided in proportion to the unit owners' respective undivided ownership in the common areas and facilities." G. L. c. 183A, § 17 (b)(1). This statutory directive calls again for an equal 1/6 share for each unit owner in this Condominium. While G. L. c. 241, § 31, permits a court to order a commissioner to "distribute the proceeds so as to make the partition just and equal," I do not find this statutory provision to require a different result here. "The equality is not absolute, but is an equality according to the respective rights of the parties in interest." Batchelder v. Munroe, 335 Mass. 216, 218 (1957). In the instant matter, the identical 1/6 interest of each unit owner in fact requires strict equality among all unit owners.

CONCLUSION

For the reasons stated herein, I allow the motion for summary judgment filed by Robert and deny the motion for summary judgment brought by the Trust. Each unit is entitled to a 1/6 share of the net insurance proceeds. As of June 25, 2009, the Trust estimated the amount available for distribution, without first paying off all the unit mortgages, was $1,092,300, or $182,500 per unit. The actual sum available will have to be determined by a final audit. Once such sum has been determined, Trustees, acting as Insurance Trustees, shall select legal counsel to assist them in obtaining a mortgage payoff statement from each mortgagee. Upon receiving such payoff statements, said counsel shall pay to the mortgagees of each unit the sum due to the mortgagees up to but not exceeding the 1/6 interest in the insurance proceeds attributable to the

particular unit. If more than one mortgage is of record pertaining to a particular unit, funds shall be utilized out of that unit's 1/6 to first satisfy the most senior mortgagee, with the remaining funds, if any, being paid to the next most senior mortgagee. If any sum remains after paying the mortgagee or mortgagees of a particular unit, the Trustees shall pay such balance directly to the unit owner or owners of record.[8]

Hon. Leon J. Lombardi (Ret.)
Abritrator

Date: December 30, 2009

[8] Should the unit owners decide to remove the Condominium from the provisions of G. L. c. 183A and to sell the real estate, the net proceeds are to be divided equally among the six unit owners after payment of expenses related to the land that constituted the common area. If any unit mortgage remains undischarged at the time of the real estate sale, the amount payable to the particular unit owner may be reduced by the sum necessary to satisfy the mortgagee in question.