COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2384CV01771-BLS2

CAROLINE (RANDO) ALVES[1] & Another,[2]
On Behalf of Themselves and Those Similarly Situated

vs.

CLARENDON CONDOMINIUM TRUST & Another[3]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFFS' CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Caroline Alves (Alves) and Melissa White (White), two former unit owners at The Clarendon condominium (Condominium), filed this putative class action lawsuit alleging that a Resale Fee (or Transfer Fee) owners must pay when they sell their units violates G. L. c. 183A (the Condominium Act), The Clarendon Condominium Master Deed (Master Deed), and The Clarendon Condominium Trust Declaration of Trust (Declaration). Plaintiffs assert five claims: Declaratory Judgment that the Resale Fee violates G. L. c. 183A, the Master Deed, and Declaration (Count I), Unjust Enrichment (Count II), Fraud (Count III), Negligent Misrepresentation (Count IV), and Violation of G. L. 93A, §§ 2, 9 (Count V). Defendants move for judgment on the pleadings on all of Plaintiffs' claims. Plaintiffs oppose the motion and move for judgment on the pleadings on their claim for declaratory relief.

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[1] Trustee of the Clarendon BB2020 Realty Trust

[2] Melissa P. White, Trustee of the Melissa P. White 2016 Revocable Trust

[3] Related Management Company, L.P.

After hearing and review, and for the reasons stated below, Defendants' Motion for Judgment on the Pleadings is **ALLOWED-in-part** and Plaintiffs' Cross-Motion for Judgment on the Pleadings is **DENIED.**

BACKGROUND

In deciding a defendant's motion for judgment on the pleadings on a plaintiff's claims under Mass. R. Civ. P. 12(c), I accept as true the factual allegations in the complaint but not its legal conclusions. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 625 n.7, 632-633 (2008). I may also consider documents attached to or referenced in the complaint or relied upon in framing the complaint. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002); Polay v. McMahon, 468 Mass. 379, 381 n.3 (2014), and cases cited. For purposes of a plaintiff's motion for judgment on the pleadings, I must accept as true the denials and affirmative defenses contained in the answer to the extent they call into question the complaint's factual allegations. Tanner v. Board of Appeals of Belmont, 27 Mass. App. Ct. 1181, 1182 (1989). See Welch v. Sudbury Youth Soccer Ass'n, Inc., 453 Mass. 352, 354 (2009). The following is taken from the Amended Class Action Complaint, the Master Deed, the Declaration, and the June 24, 2013 resolution (Resolution) adopting the Fee.[4]

The Condominium is a residential condominium organized under the Condominium Act and located in Boston's Back Bay. The Clarendon Condominium Trust (Trust) is the organization of unit owners established pursuant to the provisions of G. L. c. 183A to manage and regulate the Condominium. Related Management Company, L.P. (Related) is the Condominium's property manager.

Alves, in her capacity as Trustee of the Clarendon BB2020 Realty Trust, owned Units 25A and 27D of the Condominium. She sold those units in June and July 2022

[4] To the extent Defendants deny any of Plaintiffs' allegations such denials are accounted for in the Discussion below regarding Plaintiffs' motion.

respectively. White, in her capacity as Trustee of the Melissa P. White 2016 Revocable Trust, owned Unit 17C of the Condominium. White sold her unit in August 2022. At the time of their sales, Plaintiffs each paid a Resale Fee equal to six times their respective monthly unit owner dues and parking fees to receive the G. L. c. 183A, § 6(d) certificates required for the sales.[5]

Neither Alves nor White knew of the Resale Fee before they bought their units and no information about the Fee was provided to them before they purchased their units. The Fee is not referenced in the Master Deed, the Declaration, or the Owner Reference Guide. Plaintiffs allege that the Resolution was adopted with and upon the advice of Related. The Board of Trustees (Board or Trustees) has said that the purpose of the Fee is to build up reserves and defray future assessments for common expenses for non-selling unit owners.

The Trustees unanimously adopted the Resale Fee via the Resolution pursuant to Article V, Section 17A of the Declaration,[6] which states:

> The Trustees shall have the right to require Condominium Unit Owners (other than the Declarant) to pay a non-refundable fee of five hundred dollars ($500.00) whenever a tenant or owner moves into, or out of a Condominium Unit. This fee shall be a Common Charge and shall constitute a lien on the Unit, enforceable in the manner set forth in Section 2(f) of Article V. The Trustees shall have the right to change the amount of such fee at their discretion, without the vote of the Unit Owners. The Trustees shall, in addition, have the right to assess other fees including, without limitation, transfer fees and renovation fees when a Unit is conveyed. The amount of said fees shall be determined by the Trustees at their sole discretion.

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[5] Section 6(d) provides: "A statement from the organization of unit owners setting forth the amount of unpaid common expenses and any other sums which have been assessed against a unit owner, including a statement of the amount which the organization of unit owners claims is entitled to priority with respect to any mortgage under subsection (c), shall operate to discharge the unit from any lien for other sums then unpaid when recorded in the appropriate registry of deeds[.]"

[6] Article V is entitled "Bylaws."

Relevant here, the Resolution provides that a "transfer fee" in the amount of "six (6) months' Common Charges then in effect (*i.e.*, as of the date of conveyance of the Condominium Unit in question) shall be payable to the Clarendon Condominium Trust by the Unit Owner of such Condominium Unit." It provides further that the "foregoing Transfer Fee shall be paid by the Unit Owner at the time of the sale . . . and shall be in the form of 'Common Charges' as described in Section 2 of Article V of the [Declaration]." The Resolution does not describe the purpose of the Fee or how the amounts collected will be spent. It merely provides that the amounts will be expended "as the Board determines subject to the terms of the Declaration and Bylaws."[7]

The Resolution was recorded with the Suffolk County Registry of Deeds on January 13, 2014 at Book 52581, page 173. Plaintiffs allege it was identified as a "certificate" for indexing purposes and, therefore, registry searchers, including prospective unit owners, would only uncover the Resolution if they searched all certificates and, by chance, located it amongst the many other certificates.[8]

DISCUSSION

A motion under Mass. R. Civ. P. 12(c) is assessed under the Mass. R. Civ. P. 12(b)(6) standard. See Iannacchino, 451 Mass. at 625 n.7. As such, my focus is on the factual allegations and reasonable inferences and not on labels and conclusions, which are insufficient. See id. at 636. "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief[.]" Id., quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

I. Declaratory Judgment Claim

[7] As noted, the Bylaws are found in Article V of the Declaration.

[8] There is no allegation that Defendants bore any responsibility for how the Resolution was indexed.

Plaintiffs and Defendants both move for judgment on the pleadings on Plaintiffs' claim seeking a declaration that the Resale Fee violates G. L. c. 183A and the Condominium's governing documents. As explained below, none of the parties can prevail on this claim based on the above standard.

The Condominium Act defines "common expenses" as "the expenses of administration, maintenance, repair or replacement of the common areas and facilities, and expenses declared common expenses by this chapter." G. L. c. 183A, § 1. "Common areas and facilities" are defined to include those areas and facilities used by all residents. Id.

The Condominium Act further provides:

> all common expenses shall be assessed against all units either in accordance with their respective percentages of undivided interest in the common areas and facilities or, if stated in the master deed or an amendment thereto duly recorded in the approximate relation that the area of the unit bears to the aggregate area of all the units, which may take into account unit location, amenities in the unit, and limited common areas and facilities benefiting the unit; provided, however, that such an amendment shall require the consent of all unit owners whose common expense assessment is materially affected. . . .

G. L. c. 183A, § 6(a)(i).

Consistent with the Condominium Act, Section 14(b) of the Master Deed provides that:

> All costs and expenses incurred in the maintenance and operation of the Building Common Elements (including utility and cleaning costs) and the repair and/or replacement thereof and those common area maintenance charges allocated collectively to the Condominium Units and the Condominium Unit Owners . . . shall be borne by the owners of the Condominium Units . . . ("Building Common Expenses") in accordance with the respective Percentage Interests of each such Unit in the Building Common Elements . . . .

Pursuant to Section 14(j) of the Master Deed, "Common Expenses shall be paid by Unit Owners in the form of 'Common Charges' as described in Section 2 of Article V of the [Declaration]." Article V, Section 2(a) of the Declaration, in turn, provides that

"Unit Owners shall be liable for Common Charges associated to their Unit . . . if such a charge is established by the Trustees, when applicable, as described in Section 14 of the Master Deed."

Here, the Resolution purports to impose a "transfer fee" pursuant to Article V, Section 17A of the Declaration in the amount of "six (6) months' Common Charges." 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.[9] Therefore, Defendants are not entitled to judgment on the pleadings because 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.[10]

Plaintiffs likewise are not entitled to judgment on the pleadings. Contrary to Plaintiffs' contention, the Resolution does not, on its face, evidence the imposition of an improper "common expense." While Plaintiffs argue that the term "Common Charge" in the Resolution should be read as synonymous with common expense, G. L. c. 183A nowhere suggests these terms should be read in this fashion and indeed, the

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[9] Defendants' argument that all unit owners will eventually have to pay the Resale Fee is unpersuasive where unit owners may or may not sell in the near or long term, and the Resolution can be rescinded. Nor am I persuaded by Defendants' argument that the purpose of the Resale Fee is not relevant. As discussed above, if the purpose of the Resale Fee is proved to be to defray future common expenses, it is not consistent with the Condominium Act, Master Deed, or Declaration. Lastly, I find the argument that the declaratory judgment claim is time barred to be without merit.

[10] I do not consider the extra-contractual facts and information attached as exhibits to Defendants' motion and to the Affidavit of Brian Makokha and will separately allow Plaintiffs' Motion to Strike.

Declaration and Master Deed make an express distinction between them.[11] See Hancock v. Chambers, 85 Mass. App. Ct. 1106, 2014 WL 959702, at *3 (2014) (Rule 1:28), and cases cited (condominium's declaration of trust interpreted using contract interpretation principles, which provide that contract interpretation is a matter of law for the court and that every word in a contract should be given meaning and read in light of the contract as a whole); Trustees of Beechwood Vill. Condo. Tr. v. US Alliance Fed. Credit Union, 95 Mass. App. Ct. 278, 284-285 (2019) (contract interpretation principles apply to master deeds).[12] Thus, it 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. 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.

In support of their position, Plaintiffs heavily rely on Micheve, L.L.C. v. Wyndham Place at Freehold Condo. Ass'n, 885 A.2d 35, 37–38 (N.J. App. Div. 2005). That case does not compel judgment on the pleadings, nor does it persuade me that judgment on the pleadings is appropriate. Micheve, L. L. C. was decided after summary judgment, and only after the Court found that "it [was] undisputed that" the

[11] For example, the $500 fee in Section 17A of the Declaration imposed on those moving in or out of a unit is referred to as a "Common Charge," even though such a fee is evidently not a common expense as the term is used in the Master Deed and Declaration.

[12] I am also unpersuaded by Plaintiffs' argument that the amount of the Resale Fee was inconsistent with Section 17A of the Declaration. Section 17A unambiguously provides that "[t]he amount of said fees shall be determined by the Trustees at their sole discretion." The Trustees, thus, have the absolute discretion to decide the amount of a transfer fee to be imposed under this section. The Declaration nowhere limits that broad power.

charge at issue was "used simply as an additional source of funds for defendant's common expenses." Id. Based on the record before me, Plaintiffs have not proved – as opposed to sufficiently alleged – that the Resale Fee is used only as an additional source of funds to defray common expenses. Thus, while I might find Micheve, L. L. C. persuasive if there was undisputed evidence before me supporting Plaintiffs' allegation, it cannot be relied upon for purposes of granting relief at this stage of the litigation.

Accordingly, Defendants' Motion for Judgment on the Pleadings on Count I and Plaintiffs' Cross-Motion for Judgment on the Pleadings on Count I must both be **Denied.**

II. Fraud and Negligent Misrepresentation

Plaintiffs based their fraud and negligent misrepresentation claims on omission – "Defendants fail[ure] to disclose the existence of the Resale Fee program . . . prior to and after their unit purchases" as purportedly demonstrated by the fact that the "fee is not articulated in the Condominium's Master Deed, Declaration of Trust, Rules and Regulations or even the Owner Reference Guide provided by Related to unit owners" entitled "Everything you Need to Know about Living at The Clarendon." To maintain these claims, they must show, among, other things, that Defendants had a duty requiring such disclosure and reliance on the omission to their detriment. See Equipment & Sys. For Indus., Inc. v. Northmeadows Const. Co., Inc., 59 Mass. App. Ct. 931, 931 (2003) (describing elements of fraud); Nota Constr. Corp. v. Keyes Assocs., 45 Mass. App. Ct. 15, 19–20 (1998) (describing elements of negligent misrepresentation); Buffalo-Water 1, LLC v. Fidelity Real Est. Co., LLC, 481 Mass. 13, 25 (2018) (discussing fraud claim based on omission); First Marblehead Corp. v. House, 473 F.3d 1, 9-10 (1st Cir. 2006) and authority cited (discussing negligent misrepresentation claim based on omission). Plaintiffs fail to satisfy these elements.

First, Plaintiffs have not alleged any facts that would establish that Defendants had any duty to inform Plaintiffs of the Resale Fee. Plaintiffs cite no case law supporting that either condominium boards or management companies have a duty to disclose every fee applicable to the units. And indeed, case law suggests otherwise. It is well established that sellers of condominium units and brokers who represent sellers "are not liable in fraud for failing to disclose every latent defect known to them which reduces materially the value of the property and of which the buyer is ignorant." Nei v. Burley, 388 Mass. 307, 310 (1983). Such a principle suggests that condominium boards and management companies similarly are not liable to purchasers for failing to disclose every fee applicable to the units.

Moreover, even setting this aside, neither the Trustees' power to impose a transfer fee nor the Resolution itself was, in fact, concealed from a potential purchaser. The Trustees had the express power to impose such a fee under Article V, Section 17A of the Declaration, which is specifically incorporated into the Master Deed.[13] Those documents were publicly available to potential purchasers. The Resolution was likewise duly recorded and publicly available.[14]

Finally, any claim based on the title of the Owner Reference Guide (Guide), which Plaintiffs allege is "a half-truth that is the equivalent of a full lie," fails because

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[13] The Trustees unanimously adopted the Resale Fee pursuant to Article V, Section 17A of the Declaration, which expressly permits imposition of a transfer fee. Section 15(f) of the Master Deed incorporates by reference Sections 16 through 23 of Article V.

[14] That Plaintiffs did not search the registry of deeds or did not search the registry carefully enough to locate the Resolution is immaterial. "[I]t is well established . . . that a person may be charged with constructive notice of a document recorded at the registry, provided that it would be discovered by a reasonably diligent title search." Mackey v. Santander Bank, N.A., 104 Mass. App. Ct. 1115, 2024 WL 3579625, at *3 (2024) (Rule 23:0 decision). See Tosney v. Chelmsford Vill. Condo. Ass'n, 397 Mass. 683, 687-688 (1986). Further, as noted above, there is no allegation that Defendants were responsible for the way the registry indexed the Resolution.

Plaintiffs nowhere allege either (i) when they received the Guide or (ii) that, had they been told about the Resale Fee *they would not have bought their units*. Plaintiffs cannot have "relied" upon the Guide in deciding to purchase their units if they received the Guide after their purchase. And Plaintiffs' allegation of reliance – that they and others similarly situated "justifiably relied on the information provided to them and the lack of information concerning the existence of [the] Resale Fee program" – is conclusory and wholly insufficient to plausibly suggest Plaintiffs relied on the Guide *to their detriment*. H1 Lincoln, Inc. v. South Washington St., LLC, 489 Mass. 1, 18 (2022) (claim of fraudulent misrepresentation requires showing of detrimental reliance).

Accordingly, Defendants' Motion for Judgment on the Pleadings on Counts III and IV must be **Allowed.**

III. Unjust Enrichment

"Unjust enrichment is defined as retention of money or property of another against the fundamental principles of justice or equity and good conscience." Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005) (quotations omitted). "An equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law." Id. Defendants argue that the unjust enrichment claim fails because Plaintiffs have an adequate remedy at law. That argument fails.

First, "[a] determination of unjust enrichment is one in which considerations of equity and morality play a large part." Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 644 (2013) (quotations and alteration omitted). "A plaintiff asserting a claim for unjust enrichment must establish not only that the defendant received a benefit, but also that such a benefit was unjust, a quality that turns on the reasonable expectations of the parties." Id. (quotations omitted). Determination of the justness or unjustness of the Trust's retention of the Resale Fee cannot be decided on a motion for judgment on the pleadings.

Second, Plaintiffs can plead in the alternative. At this stage of the proceeding, and where I must make all reasonable inferences from the facts alleged in the Plaintiffs' favor, it would be inappropriate to dismiss Plaintiffs' unjust enrichment claim simply because Plaintiffs may have a claim at law.[15]

However, the only allegation against Related is that it recommended that the Board pass the Resolution. That allegation alone is an insufficient hook on which to hang a claim of unjust enrichment as against Related. Accordingly, Defendants' Motion for Judgment on the Pleadings on Count II is **Allowed** to the extent the claim is asserted against Related and otherwise **Denied.**

IV. Chapter 93A

General Laws Chapter 93A makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." G. L. c. 93A, § 2(a). To state a claim under G. L. c. 93A, § 9, Plaintiffs "must plead sufficient facts to demonstrate, first that [Defendants have] committed an unfair or deceptive act or practice; second, that the unfair or deceptive act or practice occurred in the conduct of any trade or commerce; third, that [Plaintiffs] suffered an injury; and fourth, that [Defendants'] unfair or deceptive conduct was a cause of the injury.'" UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 410 (2019) (quotations omitted).

Here, Plaintiffs have not alleged a claim under G. L. c. 93A against the Trust because the Trust was not acting in trade or commerce. As a matter of law, the statute does not apply to claims of condominium owners against a board of trustees. See Williamson v. Barlam, 103 Mass. App. Ct. 727, 736 (2024) ("Because the 93A claim arises from the private relationship between Williamson and the trustees and condominium

[15] I am also not persuaded, at least at this stage of the litigation, by Defendants contentions that the claim fails because they themselves did not retain the Resale Fee and because it is time barred.

unit owners, these are principally private transactions that are not within the purview of a 93A claim[.]"); KACT, Inc. v. Rubin, 62 Mass. App. Ct. 689, 700 (2004) (condominium trustees not engaged in "trade or commerce" as "those terms are defined in the statute, an essential element requiring proof at trial").

Plaintiffs have also failed to allege that Related engaged in any trade or commerce with Plaintiffs in connection with the Resale Fee at issue. The only allegation against Related is that it recommended that the Board adopt the Fee. See G. L. c. 93A, § 1 (defining trade or commerce to include "the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed").

ORDER

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings is

- **ALLOWED** as to Counts III, IV, and V as to both Defendants;
- **ALLOWED** as to Count II to the extent it is asserted against Related Management Company, L.P.;
- **DENIED** as to Count II to the extent it is asserted against Clarendon Condominium Trust; and
- **DENIED** as to Count I.

Plaintiffs' Cross-Motion for Judgment on the Pleadings is **DENIED**.

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Debra A. Squires-Lee
Justice of the Superior Court

November __, 2024