

Docket

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. NOCV2008-1259

BOARD OF TRUSTEES OF  
PINE BROOK EAST  
CONDOMINIUM TRUST

V.

SARAH THORLEY

**FINDINGS OF FACT, RULING, AND ORDER FOR JUDGMENT**

The plaintiff is the Board of Trustees of a residential condominium building located in Weymouth, in which the defendant, Sarah Thorley, owns a unit. The parties dispute centers around the Board's claim that Thorley is keeping a dog in her residence in violation of restrictions relating to the keeping of house pets on the property. The Board has brought suit against Thorley which seeks injunctive and declaratory relief that Thorley not be permitted to keep the dog on the condominium premises, and in a second count, requests that she be ordered to pay the Board's costs and attorneys fees in enforcing the claimed restriction against Thorley.<sup>1</sup>

Trial was conducted on April 12 and 13. Findings of Fact and the Court's Order for Judgement follow.

**Finding of Fact**

1. During November of 2007, the owners of Unit 35 at the Pinebrook East Condominium, James J. and Christine M. O'Brien, discussed the purchase of their unit with a prospective buyer, the defendant, Sarah Thorley. During their discussions, Thorley informed the

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<sup>1</sup> The Board's complaint also requests that it be awarded "fines" against Thorley, but at argument, the Board asserted that it was not pursuing this portion of its original prayer for relief.

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O'Briens that she had a dog, and she wanted to make sure that she could bring the dog with her after purchase of the unit.

2. James O'Brien e-mailed the condominium's managing agent, David Isenberg, to inquire about the issue. (Exhibit 5). Isenberg responded promptly by e-mail, providing the text of number 6 of the condominium rules and regulations. That regulation provides in part:

"Customary house pets may be kept in any unit or in the common elements with the prior written consent of the Board of Trustees, provided such pets do not create a nuisance . . ."

3. The Master Deed of the Pinebrook East Condominium provides in section 10(d) that:

"No pets shall be kept in any Unit or under any circumstances except as provided in the rules and regulations of the condominium trust.

The Condominium's Declaration of Trust and the Master Deed also grant to the Board the authority to manage the condominium. (Exhibits 1 and 2).

4. The O'Briens and Thorley then entered into an Offer to Purchase agreement for that unit with Thorley, which called for a date of sale of December 21, 2007. Thorley, who had been informed of the regulation, had inserted a provision in the agreement that her offer to purchase the unit was contingent upon such approval of her dog. (Exhibit 4).

5. At some point after the execution of the offer, Thorley had a telephone conversation with Isenberg. He informed her that there were dogs living in units at the condominium and that securing of consent normally was not a problem. He never told her, however, that she did not have to seek the Board's approval.

6. On December 19, two days before the scheduled closing, Thorley e-mailed Isenberg and asked how she should go about securing permission for her dog to live at the condominium.

Isenberg responded that she would need to submit a request through the O'Briens, the present unit owners. (Exhibit 7).

7. Thorley took title to the property on December 21, 2007. She had not received nor sought the Board's written consent for the dog by that date. Subsequent to the closing, Thorley moved into the unit with her boy-friend, Julian Diaz, and with her dog.

8. The dog, whose name is Malu, is a mixed breed. Two DNA analyses of the dog's ancestry had been performed by two commercial testing firms. While their results differed, both indicated that Malu had a significant strain of Bull Terrier.<sup>2</sup>

9. In January of 2008, one of the unit owners observed Malu being walked in the condominium's common area, and took note of his pit-bull like appearance. Concerned, she approached a Board member to ask if the unit owner had permission to have that dog at the condominium premises.

10. The Board contacted Thorley and told her of their concerns about Malu, asking that she attend a meeting with them. That meeting took place at the unit of one of the Board's members, Merle Bamberg on February 3, 2008.

11. At the meeting, the tone of which was cordial, Thorley and the Board members discussed their respective concerns. After Thorley left the meeting, the Board members voted

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<sup>2</sup> Those analyses were introduced as Exhibits 17 and 18. The former cited Malu's predominant strain as American Staffordshire Terrier noting that that American Kennel Club recognized breed traces its antecedents to Bulldog Terrier crossings, and that once the breed had been used primarily for fighting. (See *American Dog Owners Assn. v. City of Lynn*, 404 Mass. 73, 74-80 (1989) referencing the commonality of lineage of American Staffordshire Terriers and Pit Bulls and Bull Terriers in connection with review of a municipal ordinance.) While each of the analyses did point out the particular breed's virtues, one noted reported instances of the breed's aggressiveness, and the other referred to the unsuitability of keeping that breed with other pets.

unanimously to deny permission to Thorley to keep Malu at the condominium.

12. Written notice of the Board's decision was sent to Thorley on March 11, 2008.

When Thorley continued to keep Malu at the condominium, further letters were sent to her from the property manager and from the Board's attorneys informing her that her retention of Malu at the property was in violation of the rules governing the condominium and that she faced financial sanctions including fines if she did not comply.

13. Malu has remained at the condominium through the time of the trial.<sup>3</sup> Malu has not been involved in any actions of violence or aggression toward other persons or animals on the premises.

14. It is estimated that about fourteen unit owners at the condominium have dogs. While a few of these unit owners had sought and received the Board's written consent, the great majority have not. Most of these dogs are of smaller breeds and none of those are of the American Staffordshire Terriers or pit bull breeds.<sup>4</sup>

15. One unit owner at the condominium, Laura Neill, had a visitor who was staying with her at her residence and had brought with him a pit bull. When the animal had been noticed and complained about by other unit owners, the Board had written promptly to Neill that under the rules governing the building, they were not giving permission for that dog to remain at the

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<sup>3</sup> After the filing of this action, the Board had sought a preliminary injunction for removal of Malu. That motion was denied.

<sup>4</sup> During the trial, Thorley called as a witness Roy Schoenfeld, a unit owner who owns a dog who is a Labrador Retriever mixed breed. Thorley's attempt to establish that Schoenfeld's dog, who has been allowed to remain at the condominium, is a "pit bull" misfired, as Schoenfeld's testimony merely included an assertion that an unnamed person with whom he had once spoken upon observing the dog had speculated that he might have some pit bull ancestry.

condominium and the dog would have to be removed. Neill had complied immediately.

### **Ruling**

The plaintiff contends that it is entitled to a permanent injunction, enforcing its directive to the defendant that Malu be excluded from the condominium property. It predicates its request upon its authority as the governing entity under the Master Deed and the Declaration of Trust which brought Pine Brook East Condominium into existence. The defendant contends that the Board should not be allowed to exclude Malu, contending that the Board's authority in the condominium does not extend to permitting the exclusion of the dog as the Board seeks to effect here.

The form of interest in real estate denoted by the term condominium is strictly a creature of statute. See G. L. c. 183A. "Ownership of a condominium unit is a hybrid form of interest in real estate, entitling the owner to both 'exclusive ownership and possession of his unit, G. L. c. 183A § 4, and . . . an undivided interest [as tenant in common together with all the other unit owners] in the common areas . . ." *Noble v. Murphy*, 34 Mass. App. Ct. 452, 455-56 (1993), quoting *Kaplan v. Boudreaux*, 410 Mass. 435, 438 (1991). That format of ownership provides an opportunity to combine the benefits of fee simple ownership with "the economic advantages of the joint acquisition and operation of various amenities including recreational facilities, contracted caretaking, and security safeguards." *Id.*, at 456. The Appeals Court has noted that central to this concept of ownership is the principle that the individual unit owner "in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.'" *Id.*, quoting *Hidden Harbour Estates, Inc., v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

Flowing from this conceptual underpinning of the law relating to ownership of real estate in the condominium format is the principle that the individual unit owner is subject to restrictions and limitations imposed by the master Deed and condominium by-laws. *39 Joy Street Condominium Assn. v. Board of Appeal of Boston*, 426 Mass. 485, 487 (1988). The restrictions on use by unit owners is not fixed in time to the creation of the condominium, but may be subject to regulations properly promulgated by the condominium's governing board. See *Noble v. Murphy, supra*, at 453-454 (upholding restriction premised upon amendment to by-law enacted by governing board).

In the present case, the condominium Master Deed makes express reference to restriction on animals which may be housed on the premises of the condominium. Master Deed, § 10(d). That section states that no pet shall be kept except as provided by the rules and regulations of the condominium association. Rules and regulations were promulgated by the Board, and these include number 6, which states the need for Board approval prior to a unit owner's housing of an animal in the unit. That restriction plainly sets forth a condition which limits the ability of the defendant to have brought Malu onto the condominium property and housed her in her unit until she had acquired the written consent of the Board. Such a restriction relating to the presence of a pet appears to be a valid exercise of authority by the Board upon conduct permitted at the premises, which is enforceable against a unit owner. See *Noble, supra*, upholding a restriction on pets by a condominium's governing authority.

The defendant raises several arguments to support her contention that the regulation should not be enforceable against her on the facts as adduced at trial. She first points to a claimed lack of consistency in the enforcement of the requirement for written consent for pets contending

that this reflects that application of the regulation against Malu is arbitrary and unfair. The defendant is correct that the trial evidence does reflect lack of uniformity in the Board's requiring exclusion of those pets for whom written consent has not been secured by the unit owner. However, this fact does not preordain that the Board's action in seeking to enforce the restriction with respect to Malu is invalid, on principles of waiver or otherwise. Here, the Board concluded after having received a complaint from a unit owner that the presence of a dog of Malu's breed would not be given its permission. This was a judgment the Board was entitled to make, based upon the members' appraisal of circumstances relating to the characteristics of the dog's breed.

The defendant's argument that the Board has enforced the restriction premised upon Malu's breed in an unfairly discriminatory manner, moreover, is not borne out by the evidence. Instead, the evidence reflects consistent action on the Board's part on the sole occasion when it was confronted with the presence of a dog of the same breed background as Malu being sheltered in one of its units—the denial for permission and order for removal directed to Laura Neill. The defendant's attempt to assert that the Board has tolerated the presence of a pit bull owned by another unit owner did not find evidentiary support.<sup>5</sup>

The defendant makes a second and more fundamental argument which is directed against the regulation itself requiring written consent. She contends that a regulation such as that promulgated by the Board lawfully can affect only the common areas of the condominium and not the area of her exclusive use within her unit in which Malu resides. This argument misperceives the scope of activity subject to governance through the condominium form of ownership under c. 183A. The subject matter of the regulation, the maintenance of a dog, does

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<sup>5</sup> See note 4.

relate to the wider condominium premises beyond the area of the unit owner's exclusive use. The trial evidence established that Malu was walked in the common areas, and thereby would have likely interaction with other unit owners and their children and their pets. Further, the law which governs condominiums does give its governing authority the right to restrict pet ownership on the condominium premises. See *Noble v. Murphy, supra*.

The defendant cites a case which she contends abnegates the right of the Board to have imposed the pet restriction in regulation number six. *Johnson v. Keith*, 368 Mass. 316 (1975). While that case did invalidate the enforcement of such a condominium regulation, the facts there do not support the defendant's argument. That case did not assert any subject matter restriction on the limitation or regulation of the retention of pets in condominium units, but instead focused on specifics relating to the promulgation of the regulation at issue. In *Johnson*, the Board had acted through a regulation which was not referenced or supported in its Master Deed or in its properly adopted by-laws. *Id.*, at 318-319. Here, in contrast, the Master Deed specifically provided that the allowance of animals was to be governed by regulations issued by the Board. The issue of the legitimate scope of the regulation, and of notice to a unit owner, which were found problematic in *Johnson*, are not present here. As made plain in *Noble v. Murphy*, decided subsequently to *Johnson*, the promulgation of a regulation which places restriction on the housing of pets at the condominium was not beyond the authority of the Board.

In this case, the defendant was on notice from the terms of the Master Deed that a restriction on pets applied at the condominium. Indeed, the evidence establishes that she had been provided by the Board's agent with a copy of the regulation requiring written consent before she had taken title to Unit 35. The enforcement of the regulation against her is not legally barred.



**Order**

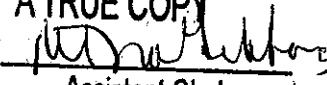
After full consideration of all of the evidence including the exhibits, judgement enters for the plaintiff, Board of Trustees of Pine Brook East Condominium.

- 1.) A declaratory judgement is to issue that the defendant, Sarah Thorley, is in violation of the regulation properly issued by the plaintiff Board of Trustees.
- 2.) The defendant, Sarah Thorley, is enjoined permanently from keeping her dog Malu in her unit or elsewhere on the premises of the Pine Brook East Condominium in Weymouth, Massachusetts.
- 3.) Pursuant to G. L. c. 183A § 6(a)(ii), the plaintiff Board is awarded its court costs and reasonable attorneys fees in securing compliance with the regulation against the defendant.<sup>6</sup>

Date: May 11, 2010



Thomas A. Connors  
Justice of the Superior Court

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Attest:   
Assistant Clerk 5/11/10

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<sup>6</sup> The plaintiff is given ten days from the date of this decision to file with the court a statement supported by affidavit as to these amounts. The defendant is provided twenty days from this date to file any written response to such request.