

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2011-CP-10-2232

John T. Lucas, Sr. as Trustee of the)
John T. Lucas Revocable Trust and)
Carolyn C. Lucas Revocable Trust,)

Plaintiffs,)

-vs-)

The Bristol Condominium Property)
Owners Association,)

Defendant.)

**ORDER DENYING PLAINTIFFS'
MOTION FOR A NEW TRIAL**

-and-)

The Bristol Condominium Property)
Owners' Association,)

Plaintiff,)

John T. Lucas, Sr. as Trustee of the)
John T. Lucas Revocable Trust)
Dated November 10, 2004, and)
Carolyn C. Lucas Revocable Trust)
Dated November 10, 2004,)

Defendants/)
Counterclaim Plaintiffs,)

-vs-)

The Bristol Condominium Property)
Owners Association,)

Counterclaim Defendant.)

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

RECEIVED
JAN 10 2014
Court of Appeals

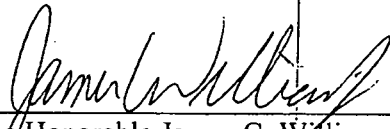
The Court, having reviewed the arguments of the plaintiffs in support of their motion for a new trial in this matter, respectfully denies that motion. Plaintiffs have failed to raise any new issues or arguments that were not already thoroughly argued at

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trial. As such, the court stands by its prior rulings for the reasons articulated in its final judgment entered on August 19, 2013.

IT IS SO ORDERED.

Nov 24, 2013



The Honorable James C. Williams, Jr.
Special Referee

[Handwritten initials]

2013-CP-10-1066

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: ~~2011-CP-10-2232~~

~~2010-CP-10-3240~~

John T. Lucas, Sr. as Trustee of the)
John T. Lucas Revocable Trust and)
Carolyn C. Lucas Revocable Trust,)

Plaintiffs,)

-vs-)

The Bristol Condominium Property)
Owners Association,)

Defendant.)

FINAL ORDER

-and-)

The Bristol Condominium Property)
Owners' Association,)

Plaintiff,)

John T. Lucas, Sr. as Trustee of the)
John T. Lucas Revocable Trust)
Dated November 10, 2004, and)
Carolyn C. Lucas Revocable Trust)
Dated November 10, 2004,)

Defendants/)
Counterclaim Plaintiffs,)

-vs-)

The Bristol Condominium Property)
Owners Association,)

Counterclaim Defendant.)

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JULIE J. ARMSTRONG
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Court of Appeals

This matter was tried before me sitting as a Special Referee on May 22nd and 23rd,
2013. In addition to two days of live testimony from the plaintiff John Lucas, Jan
Landry, John DeWitt and Lona Vest, the Court reviewed the deposition transcripts of

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numerous witnesses including the plaintiff John Lucas, and reviewed numerous exhibits consisting of, among other things, the defendant's Master Deed, correspondence between the defendant and homeowners, the minutes of board meetings, repair estimates, cost estimates for windows and doors, and other documentation offered by each party in support of their respective positions, as more fully would appear in the record of the proceeding.

PROCEDURAL HISTORY

This matter was initially filed by the plaintiff Dr. John Lucas as Trustee for the John T. Lucas Sr. Revocable Trust and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust. The Case Number for the original action was 2010-CP-10-3240. Thereafter, the defendant, Bristol Condominium Property Owner's Association, filed a separate action to foreclose on the plaintiffs' condo for unpaid assessments and fees. That action bore case number 2011-CP-10-2232. The Lucases counterclaimed in that matter by asserting all of the same causes of action as they had brought in the earlier filed case. In addition, they asserted counterclaims for abuse of process, alleging that the foreclosure was merely retaliation for filing suit against the Association.

With the consent of both parties, the two actions were consolidated into one under the case number of the earlier filed case, 2010-CP-10-3240. As of the trial, the plaintiffs' surviving causes of action were for negligence, breach of fiduciary duty, fraud/constructive fraud and abuse of process.

With regard to the foreclosure, the plaintiffs do not dispute that they have not paid certain fees and assessments. Rather, at the trial, they set forth substantive arguments why they believed the fees and assessments were imposed improperly and argued that

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they should not be required to pay those fees and assessments. In light of the plaintiffs' position, the parties consented to the Association's presenting its foreclosure case via written submissions to the Court, subject to the Court's determination of the other issues before it, including the validity and appropriateness of the fees and assessments at issue and whether the filing of the foreclosure action was in fact an abuse of process.

As a preliminary matter, the defendant made two pre-trial motions, which the Court took under advisement at that time and again at the directed verdict phase. The first motion was premised on the argument that all of the plaintiffs' claims should have been brought as a shareholder derivative suit because the plaintiffs were not claiming independent individual harm such that they would have standing to sue in their individual capacities. The second motion was premised on the argument that, absent a motion to amend the pleadings, the plaintiffs, were regulated to seeking the relief that was requested in their Amended Complaint. The defendant argued that because the factual underpinnings for all of the plaintiffs surviving causes of action dealt with the physical removal of the original windows from the plaintiffs' condo, that the entire case was essentially moot.

The Court finds it unnecessary to rule on these motions at this juncture because it prefers to address the substance of the case head on, giving full deference to the plaintiffs with regard to these procedural issues. Taking that approach, the Court finds in favor of the Defendant on all counts.

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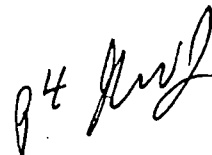
FINDINGS OF FACT

This matter arises out of the plaintiffs' ownership of a condo at the Bristol Condominiums in Charleston, South Carolina. The Bristol was developed by the Beach Company and built by Gulf Stream Construction, an affiliated entity.

Around 2004, residents at the Bristol began to notice problems with water intrusion into the building. While the Bristol Property Owners Assoc was still under the developer's control, certain unit owners hired experts to conduct investigations into the source of the water intrusion. These experts opined that there were numerous construction defects contributing to the problems.

Several owners filed suit against the Beach Company, Gulfstream and others in July 2005. One year later, control of the project was turned over the unit owners who constituted a new board of directors. Shortly thereafter, the Bristol Association filed its own suit against the Beach Company Gulfstream and others in February 2007. The third lawsuit was filed simultaneously by another sub-set of homeowners, who were represented by the same attorneys who filed suit on behalf of the Association. All three cases were subsequently consolidated for purposes of discovery and trial.

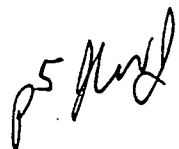
During the pendency of the litigation, the court ruled that the Bristol Property Owners Association could not bring an action on behalf of the homeowners for damages to the windows and doors of individual units because those items were property of the individual owners and not common property. Additionally, the Bristol Board was advised by several insurance professionals that because the exterior doors and windows at the Bristol were the property of the unit owners and not common elements under the Master



Deed, complications could arise such as gaps in coverage or inconsistent coverage in the event of a catastrophic storm that did extensive damage to the building.

The insurance professionals recommended that the Association amend the Master Deed to redefine the windows and doors as common elements. The Board acted on this advice by invoking a streamlined procedure for amending the Master Deed for occasions in which the regular procedures would be too slow or inefficient under the circumstances. Pursuant to the Master Deed, the Board sent notice of its recommendations to change the status of the windows and doors to all unit owners. The notice stated that any objections or questions should be submitted to the Board within 20 days or the amendment would automatically pass. Plaintiff John Lucas testified that he received this notice by certified mail, but that he was on vacation when the envelope arrived at his home in Travelers Rest, South Carolina. Although he received the letter within the twenty days, he did not bother to read it until after the 20 days had passed. In fact, no objections were received and the Master Deed Amendment took effect.

In March 2009, the judge assigned to the Association's construction design defect case granted summary judgment against the Association as to any claims related to the exterior doors and windows, finding that at the time the suit was filed, the Association did not have standing to raise claims to those components because they were not yet common elements. Most unit owners elected to assign their claims to the Association or to join the cases as individual plaintiffs. Not being aware of any leaking issues with their own windows and doors, the Lucases did neither. Dr. Lucas testified that he initially did not actively follow the litigation but that he did so once settlement and reconstruction issues arose. The Association and Landry suits were settled on March 19, 2009, the day



the trial was set to start. The settlement was approved by the Board using the requisite procedures set forth in the Bristol's governing documents. Following the settlement, the Board solicited bids from various repair contractors and eventually hired Cooper River Construction.

The Board then created a repair committee to oversee the repairs to the building. The scope of repair was defined by expert architects and engineers retained by the Association. At their recommendation, the Board, through its subcommittee, determined that it was necessary to replace all of the exterior windows and doors in order to meet all applicable building codes and to have a full new warranty. The committee chose to replace all the windows and doors with new ones instead of treating damaged windows to solve the issue. The unit owners were given several opportunities to ask questions about the various replacement windows that were under consideration and to give their input on the decision. The plaintiffs did not participate in those question and answer sessions. After the decisions regarding the repair had been made, the Board determined that a special assessment would be necessary to cover the costs of replacing the windows and doors throughout the building.

The plaintiffs claimed to have no damage to their windows and doors. Additionally, the plaintiffs requested through their attorney information regarding the settlement. Furthermore, the plaintiffs claimed they were never provided the requested documentation until they filed their lawsuit. The plaintiffs refused to pay their portion of the special assessment. Even though the plaintiffs contended that their windows did not need to be replaced, their expert's report, which is part of the record of this case, shows that at least two of the plaintiffs' windows did have a leakage issue.



In addition to these criticisms of the Bristol's leadership, the Plaintiffs argued that the Board of the Bristol failed to communicate with the members of the Association regarding the progress of the litigation while it was pending. However, the record of this case is replete with emails, memos and letters from the Board and its committees doing just that. In fact, the only specific example pointed to by the Plaintiffs in support of this position, was that the Board did not inform the members that Andersen Windows had presented the option of retrofitting the original exterior windows with kits to make them code compliant as an alternative to full window replacement. However, the record shows that the Board with consultation from its outside expert advisors had already determined that the retrofit option did not represent significant cost savings or sufficiently address the prospect of future water intrusion.

Additionally, the Plaintiffs disagreed with the Board's decision as to how to use a refund of flood insurance premiums to the Association. Specifically, the Board opted to replenish the Association's capital reserve fund, otherwise depleted by the cost of litigation with the refund. While Dr. Lucas testified that he believed that the refund should have been divided amongst the unit owners, he also testified that he took issue with the fact that the capital reserve fund was underfunded for a time. The Court finds these positions inconsistent with one another. However, they are generally indicative of the plaintiffs' disagreement with the leadership of the Association.

CONCLUSIONS OF LAW

As stated above, the Court chooses not to address the questions of the plaintiffs standing to sue or the propriety of suing the Bristol Association rather than individual

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Board members. However, while the named defendant is the Bristol Association, the entirety of this case deals with the propriety of the actions of several boards of directors who have made decisions with which plaintiff has disagreed. As such, the Court finds that the law that sets the standard for the conduct of directors of non-profit entities is applicable here.

S. C. Code Ann. § 33-31-830 reads as follows:

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

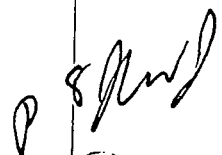
(b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and who the director believes is reliable and competent in the matters presented.



(c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.

(e) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of the property.

(f) An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered. This limitations period does not apply if the failure to act in compliance with this section has been fraudulently concealed.

It is within this context that the Court finds:

1. The plaintiffs do not appear to understand that the members of horizontal property regime give up certain individual rights in order to enjoy the benefits of shared ownership. They seem to have the belief that every issue which came before the Bristol Board should have been submitted to a vote by the homeowners.

2. The plaintiffs have not met their burden of proof that:

- (a) The Board has demonstrated bad faith in its management of The Bristol's business;
- (b) There has been an attempt to hide the actions of the Board or to keep the homeowners ignorant of The Bristol's business. (To the contrary, the evidence shows a concerted effort to keep the homeowners informed);
- (c) There has been fraud committed by the Board directed toward anyone;
- (d) There has been a breach of any duty by the Board;

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- (e) There has been mismanagement of The Bristol's affairs by the Board.

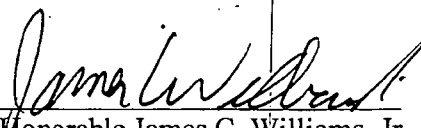
The uncontradicted testimony shows that the individual acts complained of by the plaintiffs, including: (1) the amendment of the Master Deed; (2) The decision to litigate; (3) The manner in which the litigation was handled; (4) The assessments made and (5) The disposition of the insurance refund, were (1) all based on decisions made after considering other options; (2) were made after consulting with counsel, and (3) affected all homeowners equally according to their circumstances.

There is no evidence that there was ever demonstrated, by any person at any time, any bias or prejudice toward the plaintiffs.

The foreclosure against the plaintiffs was filed lawfully, after the plaintiffs refused to pay certain assessments. Other homeowner arrearages which did not result in foreclosure were adequately explained by witnesses for the defense. There is no evidence that the plaintiffs were singled out for retaliatory treatment.

It certainly appears that the plaintiffs are sincere in their disagreement with the management of The Bristol. However, sincerity does not excuse their failure to abide by the written rules which they voluntarily accepted when they elected to purchase at The Bristol. Their only remedy is to participate in the governance of the association by exercising their right to vote.

August 1, 2013


The Honorable James C. Williams, Jr.
Special Referee

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