

TWENTY-FIFTH JUDICIAL CIRCUIT  
OF VIRGINIA

CHARLES L. RICKETTS, III  
JUDGE  
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August 8, 2016

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Re: *Mark M. Roebuck and Julie H. Roebuck*  
*v. The Old Y Condominium Association, et als*  
*Staunton Circuit Court Case No. CL16-57*

Gentlemen:

Mark M. Roebuck and Julie H. Roebuck (The Roebucks) filed a nine count Complaint against the Old Y Condominium Association and a number of individuals who served as directors or officers of the corporation. In response, the defendants demurred, claiming that plaintiffs have failed to state a cause of action to support their breach of contract claim; that Virginia law does not recognize an independent breach-of-the-implied-duty-good-faith-and-fair-dealing claim; the individual director defendants' claim that plaintiffs have no standing to sue the individual directors; that the Association's lawful decision not to obtain a master flood insurance policy is not an unreasonable restraint on alienation; that plaintiffs have not properly pled fraud

claims against the Association or defendant, Don Wilson; and that plaintiffs are not entitled to injunctive relief.

“To survive a challenge by demurrer, a pleading must be made with sufficient definitiveness to enable the Court the find the existence of a legal basis for its judgment”. Moore v. Jefferson Hosp., Inc., 208 Va. 438, 440 (1967). “A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof.” Glazebrook v. Bd. of Supervisors, 266 Va. 550 (2003). Thus for purposes of this matter, the Court will assume that the facts as pled by the Roebucks are true and will draw reasonable inferences therefrom. E.I. DuPont De Nemours & Co. v. Snead’s Adm’r, 124 Va. 177 (1919). “No grounds other than those stated specifically in the demurrer shall be considered by the Court” Va. Code Section 8.01-273; CT MidAtlantic Dev.; Inc. v. Commonwealth 240 Va. 204 (2010).

The Roebucks allege that the Association has breached the contract between the parties by failing to obtain and maintain a master flood insurance policy. Plaintiffs cite Section 6.4(b) of the Association’s by-laws; which requires the Association to maintain flood insurance “if required by any governmental or quasi-governmental agency”. While there may be a dispute with respect to the strength of proof or the interpretation of Section 6.4(b) of the by-laws, plaintiffs’ pleading is sufficient to survive the demurrer in that they have alleged that there are governmental and/or quasi-governmental agencies which require the Association to maintain flood insurance. As to Count I of the complaint, the demurrer is denied.

Furthermore, there appears to be an actual controversy as to whether the Association was, and is, obligated to obtain or maintain a master flood insurance policy under the terms of the governing documents and therefore, the demurrer to Count V of the complaint is denied.

In Count II, plaintiffs assert a breach-of-implicit-covenant-of-good-faith-and-fair dealing, hence the Association. “When parties to a contract create valid and binding rights, as pled by the plaintiffs, an implied covenant of good faith and fair dealing is inapplicable to those rights.” Ward’s Equip. v. New Holland N.An., 254 Va. 379 (1997). For the foregoing, the demurrer to Count II is sustained without leave to further amend.

Defendants assert that plaintiffs do not have standing to assert their individual claims against the Director Defendants. Despite the fact that the Association is a non-stock corporation, it is clear in Virginia that fiduciary duties owed by Director Defendants are to the corporation and not to individual shareholders. This has been applied also to limited liability companies in Virginia. Remora Invs., L.L.C. v. Orr, 277 Va. 316 (2009). For the foregoing reasons the Court sustains the demurrers to Counts III & IV without leave to further amend.

Plaintiffs claim that defendant, Don Wilson, while acting as treasurer of the Association, made certain representations that the Association would maintain a master flood insurance policy in the future. Fraud must involve a misrepresentation of a present or pre-existing fact, fraud ordinarily cannot be predicated on unfulfilled promises or statements regarding future events. Only when a statement is made where there is no intention of performing, may the promise be considered a

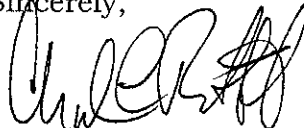
misrepresentation of present fact and may form the basis for a claim of actual or constructive fraud. *SuperValu, Inc., v. Johnson*, 276, Va. 356 (2008). Further, there is no allegation that Mr. Wilson, when he made the statements, had the authority to bind the Association to maintain the master flood insurance policy. For the foregoing reasons, the Court sustains the demurrer with respect to Counts VII and VIII, without leave to further amend.

The demurrer to Count VII is sustained, without leave to amend. The plaintiffs claim that the provision in the by-laws concerning flood insurance and the failure of the board to maintain a policy is an unreasonable restraint on alienation. There is no allegation that the plaintiff's cannot freely dispose of their unit. While it may be more difficult to sell because of the difficulty of a prospective purchaser being able to obtain financing, there are no allegations that their deed contains any impediment to their conveying clear title to their property. *Carneal v Kendig*, 196 Va. 605 (1955).

To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law. *Black & White Cars v. Groome Transp.*, 247 Va. 426 (1994). Economic loss is not irreparable harm and can be adequately remedied with a remedy at law. Therefore, the demurrer to Count VIII is sustained, without leave to further amend.

The Court would request that Mr. Sleeth prepare an order consistent with this letter.

Sincerely,



Charles L. Ricketts, III

CLR, III/epl

Cc: Clerk of Court