IN THE MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

THE VILLAGE AT OCEAN'S END CONDOMINIUM ASSOCIATION,	:	**Docket No. BCD-23-395**
Plaintiff-Appellant,	:	Appeal from the Business and Consumer Court
-vs-	:	
SOUTHWEST HARBOR PROPERTIES LLC, et al.,	:	
Defendants-Appellees	:	

REPLY BRIEF OF APPELLANT

THE VILLAGE AT OCEAN'S END CONDOMINIUM ASSOCIATION

Russell A. Kelm (6513)
Law Offices of Russell A. Kelm
300 West Spring Street, Unit 1801
Columbus, OH 43215
(614) 223-9562
and
14 Village at Ocan's End Blvd.
P.O. Box 694
Southwest Harbor, ME 04679-0694
(207) 244-8645
kelm@kelmlawfirm.com

Attorney for Appellant

Table of Contents ii
Table of Authorities iii
Cases iii
Statutes iii
I. Reply to Statement of the Facts 1
II. Reply Argument 2
Conclusion 15
Certificate of Service 16

TABLE OF AUTHORITIES

CASES:

Carey v. Donley, 261 Ill.App.3d 1002,
633 N.E. 2d 1015 (Ill App. 2nd Dist. 1994) 8

Cuisimano v. Port Esplanade Condominium Association, Inc.,
55 So.3d 931 (La. Ct. App. 4th Cir. 2011) 8, 12

Fox v. Kings Grant Maintenance Assoc., 167 N.J. 208,
770 A. 2d 707 (2001) 8

Jarvis v. Stage Neck Owners Assoc., 464 A.2d 952 (Me. 1983) 13

Levy v. Reardon, 42 Mass.App.Ct. 431, 439,
683 N.E.2d 713 (Mass Ct. App. Norfolk 1997) 8, 9

Penney v. Assoc. of Apartment Owners, 70 Haw. 469,
776 P.2d 393 (1989) 8

Reyhani v. Stone Creek Cove Condominium, 329 S.C. 206,
494 S.E.2d 465, 468 (Ct. App. 1997) 8

Ridgely Condominium Assoc. v. Smyrnioudis, 343 Md. 357,
681 A.2d 494 (Ct. App. 1996) 8

St. Jean Place Condominium Assoc. v. DeLeo, 745 A.2d 738,
745 A.2d 738 (2000) 8, 12

STATUTES

Maine Statutes:

33 MRS § 51 1

33 MRS § 560 6

33 MRS §565 (2) 7

33 MRS §573 7

Maine Condominium Act 33 MRS §§1601 et seq.

1601 et seq. 2

1601-102 7

1602-101.. 2

1602-105 .... 2, 9, 10

1601-103 .... 2, 5, 7

1602-107 (e) 6, 7, 9

1602-110 .... 6, 9

1602-118 9

1603-101 2

1603-102 .... 3, 9, 11

1603-103 .... 2, 15

1603-107 10

1603-111 .... 4, 10, 15

1603-112 .... 1, 3, 4, 5, 6 , 7, 9, 10, 11, 12, 14

1603-103 11

1603-117 6

1604-102 4

1604-103 4

1604-116 4

Other Statutes:

Rhode Island Condominium Act § 34-36.1-3.12 13

I. Reply to Statement of the Facts

Once defendant Southwest Harbor Properties LLC purchased development rights from the bank, it promptly attempted to transfer the common element Shoreline Property to its own private real estate company without disclosing in its Public Offering Statement that the Shoreline Property had previously been a part of the common elements of the condominium or that they intended to transfer those common elements out of the condominium. In the subsequent sale of 7 new homes (units) over the next 7 years from 2014 to 2020, [A-284] they never once disclosed that the shoreline property, that they had now leased back to the homeowner association, had once been a common element of the condominium. They never sought or obtained unit owner approval of the split off and transfer of that land from the condominium to their own private company, as required by Section 1603-112 of the Maine Condominium Act ("MCA"). [SMF16, A-164].

In their Brief of Appellees, the developers state that the two non-declarant unit owners at the time of the transfer of the shoreline never objected to the removal. However, the statute of frauds, 33 MRS § 51(4), requires a contract for any interest in land to be in writing, and MCA Section 1603-112 creates a special statute of frauds for any attempt to remove common elements from a condominium, which must be in a signed agreement recorded with the Registry of Deeds. Defendants satisfied neither statute. [SMF 16, A-164, Aff. ¶18-19, A-135].

II. Reply Argument

Maine law prohibits a successor declarant of a Condominium from transferring common element land in the Condominium, other than as a part of a sale of a unit, without written consent of the unit owners.

A Condominium is formed in Maine by a developer filing a Declaration with the Registry of Deeds in the County in which the land is located in accordance with the requirements of Section 1602-101 of the Maine Condominium Act, 33 MRS §§ 1601 et seq. No one reviews and approves the contents of the Declaration, but no provision of the Declaration may conflict with the requirements of the Maine Condominium Act [MCA § 1602-103(c)]. What needs to be in the Declaration is spelled out in §1602-105 of the MCA. The Declarant must set up a non-profit corporation for a Condominium Association before selling any unit. [Section 1603-101]. The Declarant has absolute control over the Association for at least the first 7 years [MCA § 1603-103(d)], but as long as the declarant holds 50% of the 3-member Executive Board, it owes a fiduciary duty to the unit owners [MCA §1603-103(a); A-130]. This Condominium was subject to declarant control [A-130] for a period of 12 years, from 2009 until February of 2021, when the non-declarant unit owners took over and elected their own members as directors of the Association. [A-130, A-53 ¶20]. During the period of declarant control defendants did whatever they wanted to do with the Association. They set the amount of monthly dues [SMF 109], paid a daughter to walk the grounds [SMF 109, A-202],

failed to hold quarterly Association meetings, for years did not keep minutes of Board or even annual meetings, collected money from dock rentals on the shoreline property to outsiders, paid themselves management fees [SMF 109, A-202], collected rental agent kickbacks on unit owners renting out their homes weekly and for 3 years pocketed those fees [SMF 116, A-204], charged outsized bookkeeping fees [SMF 109, A-202], and charged rent for homeowners walking to the shoreline that they previously owned [A-62-72]. As a result of their activities, once the unit owners gained control of the Association Board and appointed their own officers, they investigated what had gone on and filed this lawsuit, resulting in a $43,000 settlement payment to the Association in July of 2023, and the continuing fight over who properly owns the shoreline. The Association is granted by Section 1603-102(a)(4) of the MCA the authority to institute litigation in its own name on behalf of unit owners, on matters affecting the condominium. With that authority, the Association is in effect the owner of the common elements on behalf of the unit owners and protects their interests. If the Association gets unit owner approval under § 1603-112, it can actually convey the common elements under Section 1603-102(a)(8). A mutual release was signed as a part of the settlement of the lawsuit releasing all claims against each side up to July 18, 2023, but no release was ever made of any claims for attorney's fees on this appeal, which was filed months later, or for any wrongdoing occurring after that date. The

breach of fiduciary duty claim asserted in this lawsuit makes the declarant liable for litigation expenses and attorney's fees, as does the common law, for all tort losses not covered by insurance suffered by the Association [1603-111] and "any statute of limitation affecting the association's right of action (under the tort liability statute for asserting a claim of a breach of fiduciary duty) is tolled until the period of declarant control terminates" [1603-111], which was in February of 2021.

Although the Public Offering Statement, which must be supplied to any new home purchaser must, under Section 1604-103(a)(18), disclose "a description of any common elements which may be alienated pursuant to section 1603-112", no disclosure has ever been made that common elements on the shoreline were to be taken away and no compliance was ever attempted with the 80% unit owner approval requirements of §1603-112.[SMF97, 100, A-198,199]. Liability is established by Section 1604-102(c), as well as by 1604-116 for any materially false or misleading statement or omission of material fact in the public offering statement defendants prepared and distributed in the same form to new unit owners, since October of 2013. In their brief in this court the declarant falsely states that unit owners were provided with the declaration and amendments in the public offering statement which disclose the prior ownership of the shoreline common elements by the unit owners, [SMF 97, 100, A-198-9] but they intentionally omitted from including in the attachments to the public offering

statement, the Amended Condominium Plat [A-285-286], which clearly shows the shoreline as a common element. [A-286]. Why would they include the First, Second, Third, Fourth, and Fifth Amendments to the Declaration in the Public Offering Statement but not include the initial Amended Plat, [A-285-286] unless they were trying to conceal from unit owners that the shoreline had been a common element? The Third Amended Declaration adds the shoreline to the Condominium in 2012, but never says that it is added as a common element. They never once mention the fact in the narrative of the Public Offering Statement given to all new home purchasers, that the shoreline was once a common element. [A-264-276]. Concealing their wrong-doing was a part of a pattern of conduct by the developers here.

There are certain protections of unit owners in the MCA that are not required to be set out in the Declaration. All of the Condominium land initially set up by the Declaration becomes a part of the common elements, except the units that are created by the developer [§1601-103(4)], which when sold are deeded to new homeowners. The Act makes it clear that "real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners". [§1601-103(7)]. The MCA [§ 1601-103(11)], does not provide for the use of development rights to withdraw common elements from the condominium. The MCA in fact sets up a variety of protections of the common elements from over-

reaching by the developer. Under Section 1602-107(e), common elements may not be divided, conveyed, sold or transferred unless attached to a unit and any other transfer of them is void unless the 80%-unit owner approval requirements of Section 1603-112 are satisfied. The Declaration for this development raises that number to 100% approval. [A-214 Section 7.1]. Section 1603-112(d) says that "any purported conveyance ... or other voluntary or involuntary transfer of the common elements, unless made in accordance with this section (80% unit owner written and recorded approval), or in accordance with section 1603-117 (lien against the Association), is void". The developer may reserve development rights and exercise them under Section 1602-110. What may be developed is subject to approval by the town in which the development is located. [A-231-232]. Here 40 units could be developed on the 19.52-acre condominium. [A-231-232]. No development rights were ever requested or granted for the shoreline property, [SMF 12, A161], which was added to the development 3 years after development rights were approved by the town of Southwest Harbor. [A-285-286]. Development rights were never granted by the town of Southwest Harbor to do anything other than to build units. [A-231-232].

The Maine Unit Ownership Act [UOA] was adopted in 1965 to regulate an association of unit owners acting as a group in accordance with a declaration and bylaws. 33 MRS §560 et seq. It is still in effect. It made the undivided interest of

each unit owner in the common areas have a "permanent character" which could not be altered without the consent of 100% of the unit owners. [UOA § 565]. The common areas were to remain "undivided" and any covenant to the contrary was null and void. [UOA § 565 (3)]. Property could be removed from the provisions of the UOA by a recorded written instrument signed by 90% of the unit owners. [UOA § 573]. The Maine Condominium Act was adopted in 1981 and applied to all condominiums created after it was enacted and to all prior condominiums that amended their instruments to make them subject to the Act. [MCA §1601-102(a)]. The Declaration which created the Village at Ocean's End Condominium was expressly made subject to the Maine Condominium Act when created in 2009. Article I "submits the land" to "the Maine Condominium Act". [A-207]. The new MCA makes all of the land in the condominium be common elements, except the units [MCA §1601-103(4)], and vests all of the undivided interests in the common elements in the unit owners [MCA § 1601-103(7)]. Although the declarant can create units and own or sell them [§ 1601-103(27)], nothing in the Act makes the declarant otherwise an owner of any of the common elements, which cannot be divided or transferred except with a unit [§ 1602-107(e)], or with 80%-unit owner written and recorded approval [§ 1603-112]. So, the MCA lowered the approval of removal percentage from 90% to 80% but allowed the declaration to change that to 100%, [MCA § 1603-112(a)], which was done here [A-214 § 7.1].

Other states have similar protections of common elements. *Ridgely Condominium Assoc. v. Smyrnioudis,* 343 Md. 357, 681 A.2d 494 (Ct. App. 1996)(100% unit owner consent required to alter interests in the common elements); *Fox v. Kings Grant Maintenance Assoc.*, 167 N.J. 208, 770 A. 2d 707 (2001)(because unit owners have an undivided interest in the common elements any governance scheme that conflicts with that interest violates the Act; unit owners, not the developer, exercise control over their common elements; the association has the exclusive right to sue a party to protect the rights of the unit owners in the common elements); *Reyhani v. Stone Creek Cove Condominium*, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997)(once the common elements are set aside and vested in the co-owners, they may not be unilaterally deprived of their interests in the common elements by the actions of the developer); *St. Jean Place Condominium Assoc. v. DeLeo*, 745 A.2d 738, 745 A.2d 738 (2000)(common elements cannot be transferred without 80% vote of the members); *Penney v. Assoc. of Apartment Owners*, 70 Haw. 469, 776 P.2d 393 (1989)(conversion of common elements into limited common elements required consent of all the apartment owners); *Cusimano v. Port Esplanade Condominium Assoc.*, 55 So.3d 931, 55 So.3d 931 (La. Ct. App. 2011)(unanimous consent of all owners required to change common elements to limited common elements); *Carney v. Donley*, 261 Ill.App.3d 1002, 1009, 633 N.E.2d 1015 (Ill. App. 1994)(approval of all the

owners required before common elements could be diminished); *Levy v. Reardon*, 43 Mass App. 431, 683 N.E. 2d 713 (1997)(approval of 75% of unit owners required to remove land from the condominium).

In its decision on the motion for partial summary judgment, the Business Court sanctioned the ability of the developers to withdraw any of the common elements whenever they wanted, without any approval of the unit owners [A-31-42]. The decision does not limit the removal of common elements to building units, which is sanctioned by the MCA Section 1602-110. [Decision A-31-42]. The Condominium Act only permits the removal of common elements not attached to a unit, when there is compliance with the 80% unit owner approval requirements of § 1603-112, which is repeated in several sections dealing with common elements, e.g. §1602-107(e) barring partition of common elements, § 1602-118(a) on termination of the condominium, Section 1603-102(a)(8) providing for the association to convey title to real property except common elements which may only be conveyed by complying with 1603-112, Section 1603-112(d) conveyance or transfer of common elements. Under the terms of the trial court's ruling, what if the developers decided to remove one or more of the 3 storm drainage ponds from the condominium and lease out fishing rights to outsiders. Or remove the main street from the development and lease it back to the residents, or the sidewalks and lease the right to walk on them to the residents. The implications of the ruling on the

unit owners is draconian. It is also draconian on the developers. Section 1601-105 says that any portion of the common elements, for which the declarant has reserved any development right to withdraw real estate from the condominium, shall be separately taxed and assessed against the declarant and the declarant alone is liable for payment of those taxes. MCA § 1601-105(c). The trial court sanctioned the developers withdrawing any of the common elements, so all of the land in the development should be taxed to the developers. Section 1603-107(b) makes the declarant alone liable for all expenses in connection with real estate subject to development rights and no unit owner is subject to a claim for payment of those expenses. The lower court ruling subjects the developers to paying for all of the maintenance costs of the common elements. Frankly, the Business Court got this wrong and the implications of the ruling show just how wrong it is.

Defendants next argue that the release as a part of the settlement agreement excuses them from liability for attorney's fees on appeal. The transcript of the settlement was filed on August 3, 2023 [A-26]. The mutual release was for all claims up to the date of trial on July 18, 2023. Attorney's fees for this appeal, as allowed by MCA Section 1603-111 and for a common law claim for breach of fiduciary duty, arise after July 18, 2023, and are not barred by the release.

Defendants argue that honoring the 80%-unit owner approval requirements of Section 1603-112 would mean that the first homeowner would have a veto power

for years over development rights. That is not what the MCA provides. Nothing in 1603-112 stops the developers from building and selling units, which is the only development rights given to them by the town of Southwest Harbor. What it does prevent is declaring a large area for a condominium and selling the first unit by showing what a large area of land is included in the Condominium, then cutting back the size of the land over time as more and more units are sold. The disclosures in the Public Offering Statement required by Section 1604-103(18), of what common elements may be alienated, should protect the early unit owners, but offered no protection in this case since they were never disclosed even though the shoreline was transferred within days of the date of October 1, 2013, on the Public Offering Circular [A-264-276], which has never been updated. Section 1603-112 provides no obstacles to a developer building and selling units, and then transferring a fee simple interest in those units, and the land underneath a unit, to a customer. It was contemplated in the original Declaration that the shoreline would eventually be transferred to the Condominium. [Declaration A-207-230, Section 4.1 and Schedule B]. Section 4.1 contemplates that the additional land (the shorefront land) "may be added to the Condominium ... from time to time." In fact the original declarant built walking paths, and a very high pier and floating docks on the shorefront land [Crafts Affidavit at ¶ 7, 8, A-133], paid for by money borrowed from the bank, that went to the bank with the deed in lieu in 2012.

Despite their allegations, defendant did not construct the path to the shore or the pier and floating docks, that was all done by the original declarant.

The MCA makes the Association the entity that expresses and protects the rights of the unit owners under Section 1603-102(a)(4), which allows the Association to convey real property, but the common elements can be conveyed only if there is compliance with the 80%-unit owner approval provisions of 1603-112. In 2013 when the shorefront was transferred out of the condominium by defendants, they had exclusive declarant control of the Association, which they exercised until early 2021, so if the unit owners in common owned all of the common elements and the Association was their representative, in 2013 the defendants could use their powers to run the Association or their purported development rights to transfer the shoreline, but in any case that transfer needed to be approved by 80% of the unit owners in an agreement filed with the Registry of Deeds. Since the developers do not own any of the common elements unless they propose to build, or actually build, a unit in the common elements, they have no ownership right in any of the common elements to transfer them to themselves or anyone else except in the process of building and selling units. Some case law reinforces this concept. In *Cusimano v. Port Esplanade Condominium Association,* 55 So.3d 931, 55 So. 3d 931 (La. App. 2011), a pool and passageways were built in the common elements and the developers attempted to transfer them to some, but

not all, of the unit owners. The Court concluded that doing so required the unanimous consent of all unit owners. In *St. Jean Place Condominium Association v. DeLeo*, 745 A.2d 738, 741-742 (R.I. 2000), the developers tried to transfer Unit C-6, which was a part of the common elements, to themselves and the Court held that it would be an involuntary transfer of the common elements and barred the transfer without 80% unit owner approval, which was required by a similar provision to Maine Section 1603-112 contained in Section 34-36.1-3.12(a) of the Rhode Island Condominium Act. In *Jarvis v. Stage Neck Owners Assoc.*, 464 A.2d 952 (Me. 1983), 80% of the unit owners approved use of a pool and other facilities by an adjacent hotel, actually following the requirements of the Maine statute.

Plaintiff has never asserted that the developers ever needed approval from the unit owners to build or convey units to prospective home-owners, but they make that absurd argument at page 20 of their brief. They also cite at pages 21 and 22 of their brief to cases in Massachusetts, which has never adopted the Uniform Act, and from North Carolina to a case involving land with no units on it, and to a Washington Appellate case where the unit owners initially disclaimed any ownership rights in the common elements in an air space condominium. None of those cases are relevant to the situation in this case in Maine which has a Condominium Act, which does not have a provision that says that development rights include the right to withdraw common elements. There is no exception in

the 80%-unit owner approval requirement in Maine law that says that doesn't apply if there are only one or two unit owners, or that you can get a verbal consent from former unit owners signing an affidavit 10 years later. Section 1603-112 has very specific requirements that need to be met, and here they were admittedly not complied with. No court has sided with defendants' position in similar factual circumstances applying similar statutes.

Next defendants argue that current unit owners lack standing to complain about the loss of their shorefront property once they take over the shroud of declarant control of their Board and Association in February of 2021 and file suit 6 months later in August of 2021. Loss of the most valuable part of the condominium certainly creates an injury in fact that affects all current unit owners and if not remedied will result in the likely loss of 50% of the value of their homes through defendants' failure to maintain the growth on the shoreline which blocks their view of the ocean. They all paid a premium for their units based on an ocean view which is gradually being eroded by defendants' lack of maintenance of the shoreline. They next raise laches, but plaintiff did not gain control of the Association by non-declarant unit owners until 2021 and filed suit soon thereafter. Until summer of 2021 the Association, at the direction of defendants, were maintaining a lawsuit against Jeff Crafts and his wife Anne, and he maintained a countersuit, so the former declarant Crafts was not communicating with the unit

owners about possible claims until his lawsuits were settled in July of 2021, shortly before the claims in this lawsuit were finalized. Waiver and estoppel have no application to these claims and there has been no waiver by settlement of claims to the shorefront. Jeff Howland's breach of fiduciary duty imposed by common law on him as a director of the non-profit Maine corporation Association is in addition to his fiduciary duty under Section 1603-103(a). The fiduciary duty claim tolls the statute of limitations, as does Section 1603-111, until declarant control terminated in 2021.

For these reasons the judgment of the Business Court should be reversed and the case remanded to the Business Court to re-covey the shoreline property to the plaintiff condominium association and to award attorney's fees for this appeal.

Dated: April 30, 2024

/s/ Russell A. Kelm

Russell A. Kelm (6513)
Law Offices of Russell A. Kelm
300 West Spring Street, Unit 1801
Columbus, OH 43215
(614) 223-9562
and
14 Village at Ocean's End Blvd.
P.O. Box 694
Southwest Harbor, ME 04679
(207) 244-8645
kelm@kelmlawfirm.com

Attorney for Plaintiff-Appellant
The Village at Ocean's End
Condominium Association

CERTIFICATE OF SERVICE

This is to certify that two copies of the forgoing Reply Brief of Appellant were this 30th day of April, 2024 sent by U.S. Mail to the offices of the attorneys for Defendants-Appellees and one electronic copy was filed with the Court and sent by email to Appellees counsel:

Michael D. Traister
Nicholas J. Bernate
Murray, Plumb & Murray
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085
(207) 773-5651
mtraister@mpmlaw.com
nbernate@mpmlaw.com
Attorneys for Defendants-Appellees
Southwest Harbor Properties LLC and
Jeff Howland

/s/ Russell A. Kelm
Attorney for Appellant