

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

GREENCORT CONDOMINIUM ASSOCIATION,	:	January Term 2004
	:	
Plaintiff,	:	No. 4045
v.	:	
GREENCORT PARTNERS,	:	COMMERCE PROGRAM
CHRISTOPHER J. CLARK, R. LAMAR	:	
KILGORE, RICHARD L. CANTOR,	:	Control Number 041893/052098
JEROME MILLER, PAUL E.	:	
OBERKIRCHER, ESTATE OF CHARLES	:	
G. ROACH, ESTATE OF ROBERT	:	
ROACH, JOHN C. SNYDER and	:	
ROBERT J. TARLECKY,	:	
Defendants.	:	

ORDER and OPINION

AND NOW, this 4th day of October 2005, upon consideration of Defendants Greencort Partners, Christopher J. Clark, R. Lamar Kilgore, Richard L. Cantor, Jerome Miller, Paul E. Oberkircher, Estate of Charles G. Roach, Estate of Robert Roach, John C. Snyder and Robert J. Tarlecky's Motion for Summary Judgment (cn 041893) and Plaintiff Greencort Condominium Association's Cross Motion for Summary Judgment (cn 052098), all responses in opposition, Memoranda, all matters of record and in accord with the Memorandum Opinion to be filed herewith, it hereby is **ORDERED** and **DECREED** that the parties Motions for Summary Judgment are **Granted in part** and **Denied in part** as follows:

1. Count I (Accounting) is dismissed as **Moot**.
2. Defendants' Motion for Summary Judgment as to Count V (Violation of the Uniform Condominium Act) is **granted** as to the disclosure regarding the

condition of the property and **denied** as to the disclosure regarding the budget.

Plaintiff's motion for Summary judgment is **denied**.

3. The parties' respective motions as they pertain to Count II (breach of fiduciary duty), Count III (breach of fiduciary duty) and Count VI (partnership liability) are **denied**.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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ROBERT J. TARLECKY,	:	
Defendants.	:	

OPINION

ABRAMSON, J.

This matter arises from the sale of condominium units to individual unit owners. Plaintiff Greencort Condominium Association (“Association”) instituted suit against moving defendants and others alleging breach of fiduciary duties and violations of the Uniform Condominium Act (“the Act”). The Association also seeks an accounting. Presently before the court are the parties cross motions for summary judgment. For the reasons discussed below, the parties’ motions for summary judgment are granted in part and denied in part.

BACKGROUND

Greencort Condominium consists of three buildings, each with its own entrance at 1701, 1709 and 1711 Green Street. The condominium is located in Philadelphia’s historic Spring Garden District. The condominium contains 26 units, consisting of five two bedroom units.

In 1985 Christopher J. Clark (“Clark”) entered into an agreement to acquire the properties at 1707, 1709 and 1711 Green Street with the intent of converting the property to condominiums. (Exhibit K to Dfts. Mt. for SJ). On June 15, 1986, Clark formed a general partnership with Richard L. Cantor, R. Lamar Kilgore, Jerome Miller, Paul E. Oberkircher, Charles G. Roach, John C. Snyder and Robert Tarlecky under the name Greencort Partners. (Exhibit L to Dfts. Mt. for SJ.). The purpose of the partnership was to acquire, renovate and rehabilitate the buildings at 1707, 1709 and 1711 Green Street (“Properties”). (Id.). Clark was designated the Manager responsible for the day to day operations of the partnership. (Id.).

On June 30, 1986, Clark assigned all of his rights to the Properties to Greencort Partners. (Exhibit “M” to Dfts. Mt. for SJ.). At the same time, Greencort Partners entered into a Construction Agreement with Michael F. Treacy Associates, Inc.¹ to renovate the properties into 26 luxury apartments consisting of 21 one bedroom and 5 two bedroom units at a cost of One Million Nine Hundred Thousand (\$1,900,000.00) Dollars. (Exhibit N to Dfts. Mt. for SJ.).

After the renovations were completed, a Declaration of Condominium for Greencort Condominium was filed identifying Greencort Partners as the declarant. (Exhibit “O” to Dfts. Mt. for SJ.). Bylaws were also written identifying Greencort Condominium Association as the Association. (Exhibit “P” to Dfts. Mt. for SJ.).

On August 29, 1986, Greencort Partners designated Historical Properties, Inc. as the exclusive agent for the maintenance and rental of the Properties. (Exhibit “Q” to

¹ Treacy and his company Historical Properties, Inc. are also named as defendants in this litigation. Moving Defendants filed a cross claim against these Defendants. A default judgment was entered against them on April 6, 2005.

Dfts. Mt. for SJ.). From 1986 to October 23, 2000, Greencort Partners rented the 26 units. (Clark dep. pp. 106-107).

In 2000, Greencort Partners decided to convert the units from rentals to condominiums. On September 23, 2000, Greencort convened a meeting with the tenants to discuss the process of converting from rental apartments to individually owned condominium units. On October 23, 2000, Greencort Partners prepared and distributed a Public Offering Statement which included a narrative description of the various aspects of the condominium, the form agreement of sale, the declaration of condominium and bylaws, the Association's proposed operating budget and an architectural condition report prepared by Kise Straw & Kolodner.² The Public Offering Statement proposed an operating budget of \$43, 200.00. Sale of the individual units commenced in 2001.

From October 23, 2000 to July 26, 2002, when the last unit was sold Greencort Partners retained Treacy and Historical Properties Inc. to perform all maintenance and repairs for the common areas and for any individual units that had not been sold.

In May 2002, when 75% of the units sold, the unit owners convened and elected officers. Val Chaverson was elected as the Association's first President. In June 2002, the elected officers assumed control of the Greencort Condominium Association.

On January 30, 2004, Greencort Condominium Association instituted suit against moving defendants as well as other defendants for breach of fiduciary duty and violations of the Pennsylvania Uniform Condominium Act for failing to use reasonable care and prudence in managing and maintaining the common elements of the Condominium, failing to establish a sound fiscal basis for the Association by imposing and collecting assessments and establishing reserves for the maintenance of the Common Elements of

² Kise, Straw & Kolander were dismissed as a Defendant.

the condominium, failing to maintain records and to account for the financial affairs of the Association from its inception, failing to disclose all material facts and circumstances affecting the condition of the property that the Association is responsible for maintaining and failing to disclose all material facts and circumstances affecting the financial condition of the Association. The complaint and amended complaint was followed by a series of preliminary objections by the various defendants. After ruling on the objections, the remaining counts consist of a request for an accounting (Count I), claims for breach of fiduciary duty against Greencort Partners (Count II) and Clark (Count III), breach of the Pennsylvania Uniform Condominium Act (Count V) and a request for partnership liability (Count VI). The parties have now filed cross motions for summary judgment.

DISCUSSION

I. STANDARD OF REVIEW

In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Potter v. Herman, 762 A.2d 1116, 1117-18 (Pa. Super. 2000). Summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Id. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment. Basile v. H & R Block, Inc., 761 A.2d 1115, 1118 (Pa. 2000). In a case where cross-motions for summary judgment

are filed, these applicable standards, of course, will be applied to each party in their capacity as both a moving and non-moving party.

II. All claims relating to conduct before October 23, 2000 are dismissed.

The Uniform Pennsylvania Condominium Act, 68 P.S. § 3101 et. seq. regulates the creation and operation of condominiums in Pennsylvania. The Act provides that a condominium is created when a declaration is recorded in the same manner as a deed by all persons whose interests in the real estate will be conveyed to unit owners. *See* 68 P.S. § 3201. The undisputed evidence produced in this matter demonstrates that a Declaration of Condominium for Greencort Condominium was recorded on December 30, 1986. Thus, pursuant to § 3201 of the Act, Greencort Condominium was created on December 30, 1986.³

The question presented for this court's consideration is once a condominium is created under the Act when does a fiduciary relationship commence between the developer on the one hand and the Association and prospective purchasers on the other hand. The Association in this case maintains that once the declaration of condominium is filed the fiduciary relationship commences. In most instances, this may be the case, however the court finds that here the fiduciary relationship between the developer and the Association and the prospective purchasers did not commence until the public offering statement was issued on October 23, 2000.

The Act defines Condominium as follows:

³ Greencort Condominium was created under the 1980 Pennsylvania Uniform Condominium Act which took effect on November 1, 1980. In 1992, the Act was amended; the amendments went into effect on February 1, 1993. In this Opinion, the Declaration and Bylaws of Greencort Condominium will be interpreted pursuant to the 1980 Act while any events or circumstances occurring after the effective dates of the amendment will take into consideration the 1992 amendments. *See* Act No. 1992-168 § 8.

“Real estate portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real Estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners” 68 P. S. § 3101. (emphasis added).

The record before the court demonstrates that from the filing of the Declaration to the filing of the public offering statement on October 23, 2000 Greencort Partners elected to **rent** the units of the subject properties. (See Exhibit Q.). Therefore ownership of the units as well as the common elements remained vested in Greencort Partners. The Act specifically states that real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners. *See* 68 P.S. § 101; *see also* Pleet v. Valley Greene Assoc. 1 Pa. D. & C. 4th 563 (1987)(In order for a residential unit to comply with the definition of a condominium under § 3103 of the Pennsylvania Uniform Condominium Act, the undivided interests in the common elements must be vested with the unit owners.). Since the ownership of the common elements remained vested in Greencort Partners the subject properties were not “condominiums” in fact. Therefore Greencort Partners was not subject to the duties and obligations of the Act.⁴

This conclusion is supported by the fact that the Act was designed to provide flexibility in the creation of condominiums and recognized that condominiums would be created long before the first unit would be conveyed. For instance, § 3105, Separate Titles and Taxation of the Act, spares the local taxing authorities from having to access each unit separately until such time as the declarant begins conveying units. Similarly, § 3301, Organization of Unit Owners’ Association, requires the organization of a unit owner’s association no later than the date the first unit of the condominium is conveyed

⁴ The 1980 Act required the creation of the Association at the time the Declaration was filed. *See* 68 Pa. C.S. § 3401. Like the “Condominium”, the “Association” also existed but only became functioning at the time the Public Offering Statement was issued.

to a person other than a successor declarant.⁵ Moreover, § 3314, Assessments for Common Expenses, which allows a declarant to pay the common expenses of the condominium up until the Association makes a common expense assessment. Thus, one could infer from these sections that the Legislature envisioned a situation much like this, where a Declaration is filed but the real estate is not functioning as a condominium.⁶

Moreover, the Act was also designed to protect consumers and to insure that he/she is provided with an opportunity to acquire an understanding of the nature of the product which they are purchasing. See 68 Pa. C. S. §§ 3301-3320 and 3401-3414. It is these very protections which the Association now seeks to enforce against Greencort Partners and Clark. However, the situation that existed during the subject time period does not lend itself to imposing liability upon Greencort Partners and Clark since no condominium existed at the time and therefore no fiduciary relationship existed between Greencort Partners and the Association and the prospective buyers. Based on the foregoing, the court finds that any claims relating to conduct that existed from 1986 to October 23, 2000 are dismissed.

III. The Public Offering Statement Issued by Greencort Partners is in Accordance with the Act as it Pertained to the Disclosure Regarding the Condition of the Property but not as it Pertained to the Budget.

In Count V of the Amended Complaint, the Association alleges that Greencort Partners failed to provide a public offering statement which contained all the information

⁵ Prior to the 1992 amendment, this provision required the creation of the Association at the time the condominium was created. The amendment reflects the awareness by the Legislature that *de facto* condominiums existed.

⁶ Significantly, at one time, counsel for the Association recognized that the “condominium” was dormant. On November 12, 2002 during a Greencort Condominium Association Board Meeting, counsel for the Association stated that based on his review of the Condominium documents he believed that that the origination date of the Association would be October 23, 2000, the date the Public Offering Statement was issued. (Exhibit “A”). This statement constitutes an admission by a party opponent pursuant to Pa. R. E. 803 (25).

required by the Act.⁷ Section 3402 of the Act sets forth a lengthy list of disclosures which must be provided to each purchaser in a public offering statement before an agreement of sale can be signed for a condominium unit. Additionally, since the properties at issue were converting to condominiums, the Act requires additional disclosures for such buildings. See 68 Pa. C.S. § 3404.

In the case *sub judice*, the Association maintains that Greencort Partners' disclosure in two areas was "grossly misleading". Plts. Memorandum of law in support of its cross motion for summary judgment p. 26. Specifically, the Association argues that the Public Offering Statement issued by Greencort Partners 1) did not disclose that the Association had a negative net worth and 2) provided no meaningful information about the long term needs of the property for both repairs and replacements." Id. After taking into consideration the parties respective papers as well as the plain and unambiguous statutory language of the Act, the court finds that the disclosures made by Greencort Partners as it pertains to the long terms needs of the property for both repairs and replacement complied with the requirements of §§ 3402 and 3404 of the Act. However the same conclusion could not be reached as it pertained to the disclosure made as it pertains to the budget.

A. Disclosure Regarding Repairs and Replacements.

Section 3402 (a) (21) of the Act provides:

(21) A statement containing a declaration as to the present condition of all structural components and major utility installations in the subject property including the dates of construction, installation and major repairs if known or ascertainable and the expected useful life of each item,

⁷ In addition to this claim, the Association also alleges that Greencort Partners violated § 3320 of the Act by failing to turn over required documents and that it failed to organize and administer the Association as required by the Act. These claims will be discussed *infra*.

together with the estimated cost (in current dollars) of replacing each of the same.

Section 3404(a) (1-3) of the Act requires a statement by the declarant, based on a report prepared by an independent registered architect or professional engineer (1) to describe the age and present condition and if known the dates of construction, installation and major repairs of all structural components and mechanical and electrical installations, including roofs, plumbing, heating, air conditioning and elevators; (2) a statement by the declarant of the expected useful life of each item reported above including the current replacement cost and 3) a list of any outstanding notices of uncured violations. *Id.*

The Association maintains that the architectural condition report dated September 5, 2000 prepared by Kise Straw & Kolander attached to the Public Offering Statement was deficient since it failed to disclose the needed repairs to the brick, masonry, retaining walls, roofs, and fire protections systems. A review of the condition report demonstrates that each of the Association's concerns were addressed therein. The condition report specifically states that the roof was in poor condition and in need of renewal, that the skylights, roof decks and railings were in fair to poor condition and were in need of renewal and that most of the mechanical systems, house lighting, windows and house fire alarm system reached their expected useful life.

With respect to the façade of the three buildings the condition report specifically stated that the wrought iron railings of the three marble entry ways and the main support posts needed replacement and that the marble required repair around the post anchorages. The condition report further stated that the rear and interior courtyard facades are in fair

condition and required repointing and that the exterior woodwork and windows are in need of paint.

Despite the Association's representations it is clear that the Public Offering Statement issued by Greencort Partners did provide the prospective purchasers with meaningful information about the long term needs of the property. The condition report attached to the Public Offering Statement put the purchasers on notice of the condition of the common elements and provided them with a replacement cost estimate for the near term as well as the long term repairs and improvements that would be necessary to the condominium complex.⁸ Based on the foregoing, the court concludes that the disclosures provided within the Public Offering Statement as it pertained to the condition of the properties were adequate to provide a prospective purchaser with an understanding of the nature of the property that was being purchased. Accordingly, Defendants' motion as it pertains to this matter is granted and Plaintiff's motion is denied.

B. Public Offering Statement was Deficient as it Pertains the Properties Net Worth.

The Association also maintains that the Public Offering Statement was deficient since it failed to disclose that the Association had a negative net worth. Section 3402 (6) of the Act requires the declarant to disclose any current balance sheet and a projected budget for the association for one year after the date of the first conveyance and a current budget for the Association. The budget must include a statement of the amount or no amount as a reserve for repairs and replacement and a statement containing a description of any provisions made in the budget for reserves for anticipated material capital expenditures or any other reserves or if no provision is made for reserves a statement to

⁸ In addition to the condition report, the unit purchasers also retained independent home inspectors to inspect the individual units as well as the common areas. The home inspectors also identified that the buildings required brick pointing, new roofs and skylights. (Exhibit W to Dfts. Mt. for SJ.).

that effect. *Id.* This disclosure is intended to eliminate the common deceptive practice of “lowballing”. *See* comment to Uniform Law.

The Comment defines “lowballing” as a practice by which a declarant intentionally underestimates the budget for the Association by providing many of the services himself during the initial sales period. *Id.* In such circumstances, the declarant commonly intends that after a certain time, these services will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. In order to comply with this requirement, the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the condominium during that budget year. *Id.* A review of the budget attached to the Public Offering Statement demonstrates that Greencort Partners participated in the practice of “lowballing”.

Comparing the budget attached to the Public Offering Statement by Greencort Partners to the Association’s 2004 budget it appears that some of the projections were “lowballed” (maintenance fees, professional fees, snow removal, landscaping) or not taken into consideration at all (parking lot maintenance). After managing the property as a rental for approximately fifteen years Greencort Partners should have had a better understanding of the expenses necessary to administer the subject properties. Based on the foregoing, the court finds that the disclosures provided within the Public Offering Statement as it pertained to the budget were not in compliance with the Act. Accordingly,

the Association's motion for summary judgment on this issue is granted and Greencort Partners motion for summary judgment is denied.⁹

IV. Greencort Partners Does Not Have a Duty to Fund Reserves Under the Act.

The Association alleges that Greencort Partners and Clark breached their fiduciary duty to the Association when they failed to budget for reserves. The court finds that the Act does not require an owner to fund reserves. However, the Act does require an owner to fund reserves once an assessment is made by the Association. See § 3314 (a).

Section 3314 (a) of the Act provides

Until the association makes a common expense assessment, **the declarant shall pay all the expenses of the condominium.** After any assessment has been made by the association, assessments shall be made at least annually and shall be based on a budget adopted at least annually by the association...(emphasis added).¹⁰

This section contemplates the fact that a declarant may find it advantageous, particularly in the early stages of the condominium development, to pay all the expenses of the condominium himself rather than assessing each unit individually. However, once an assessment is made against any unit including those owned by the declarant, the declarant is responsible to pay their full portion of the common expense liability. Uniform Law Comment § 3314. The court interprets "common expense liability" to include an assessment for replacement reserves.

⁹ Although the Public Offering Statement was deficient in this regard, the court is unable to determine from the record the amount of damage caused by the budget deficiency. During the trial, the Association will be given an opportunity to present such evidence if they so choose.

¹⁰ The Association also relies upon section 9.2 of the bylaws to support its claim that Greencort and Clark had a duty to fund reserves. Although 9.2 does direct the Executive Board of the Condominium to include in the budget estimates for repair and replacement of common expense as well as a general operating reserve and reserves for contingencies and replacements, section 9.2 specifically provides that preparation and approval of the budget in the first fiscal year is to occur at least thirty days before the date set for the beginning of assessments. (Exhibit P to Dfts. Mt. for SJ.). Thus, the duty to budget for reserves is to begin at least thirty days before the date set for the beginning of assessments.

At this time the court is unable to conclude from the record if Greencort Partners failed to pay its portion of the assessment. The evidence demonstrates that Greencort Partners and Clark elected to pay all the expenses of the condominium's common elements as well as the individual units that were sold during the transition period, October 23, 2000 to July 26, 2002. (Clark dep. 102). The evidence also demonstrates that unit owners were charged an assessment in 2001. (Clark dep. p. 78). Based on the conflicting testimony, the parties' respective motions for summary judgment are denied.

V. Accounting

Count I of the amended complaint seeks an accounting. Specifically, the Association alleges that Greencort Partners failed to account for the Association's finances from 1986 to October 23, 2000 and failed to provide the Association with the required documents set forth in § 3320 to pay the cost for same. In requesting an accounting, a complaint "seeks to turn over to the party wrongfully deprived of possession all benefits accruing to defendant by reason of its wrongful possession." Boyd & Mahoney v. Chevron U.S.A., 419 Pa. Super. 24, 35, 614 A.2d 1191, 1197 (1992). In reviewing a request for an accounting, "it is reasonable for the court to permit some latitude since often times it is not certain what claims a plaintiff may have until the accounting is completed." In re Estate of Hall, 517 Pa. 115, 136, 535 A.2d 47, 58 (1987). An equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. Rock v. Pyle, 720 A.2d 137, 142 (Pa. Super. 1998) (citations omitted).

Alternatively, plaintiff may seek his remedy for an accounting under Pa.R.C.P. 1021. However, the right to relief pursuant to Rule 1021 is "merely an incident to a proper assumpsit claim." Buczek v. First Nat'l Bank, 366 Pa. Super. 551, 555, 531 A.2d 1122, 1123 (1987).

Here the Association is not entitled to an accounting as it is unnecessary. Greencort Partners claims to have provided the Association with all documents in its possession, has offered to pay for a certified copy of the recorded Declaration of Condominium and has offered an explanation as to why the documents requested do not exist. Further, this court will not grant a request for an accounting "merely because the plaintiff desires information is could have obtained through discovery." Shared Commun. Servs. Of 1800-80 JFK Blvd., Inc. v. Albert M. Greenfield & Co., 2001 Phila. Ct. Com. Pl. LEXIS 63 (Phila. Com. P. LEXIS 2001) (Herron, J.)(*quoting Buczek*, 531 A.2d at 1124). Based on the foregoing, Count I is dismissed as moot.

VI. Genuine Issues of Material Fact Exist as to Whether the Defendants Breached their Fiduciary Duty to the Association.

As for the breach of fiduciary duty claims in Counts II and III, the court finds that summary judgment is inappropriate since genuine issues of material fact exist. Specifically the record presents a factual dispute as to whether the Association failed to maintain the properties once the Public Offering Statement was issued, failed to insure that any repairs made during the transition period were properly made and whether the financial affairs of the Association were properly administered. Accordingly, the parties' respective motions for summary judgment are denied.

CONCLUSION

For the foregoing reasons, the parties' motions for summary judgment are granted in part and denied in part as follows: 1) Count I is dismissed as moot; 2) defendants' motion for summary judgment as to Count V (violation of the Uniform Condominium Act) is granted as to the disclosure regarding the condition of the property and denied as to the disclosure regarding the budget; plaintiff's motion for summary judgment is denied and 3) the parties' respective motions as they pertain to Counts II, III and VI are denied. An order consistent with this Opinion will follow.

BY THE COURT,

HOWLAND W. ABRAMSON, J.