NOTIFY

Notice Sent 11/21/18 (BM)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS **SUPERIOR COURT NO.: 1884CV01594**

THE 1850 CONDOMINIUM TRUST

PLAINTIFF

v.

ALLIED RESIDENCES, LLC, et.als.,

DEFENDANTS

MEMORANDUM OF DECISION AND ORDER DENYING PLAINTIFIF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION:

This is an action brought by the 1850 Condominium Trust ("Trust") against the Defendant, Allied Residences, LLC., ("Allied") seeking Declaratory and Injunctive Relief against the Defendant for its alleged improper construction of Phase II of the Condominium beyond the "phasing deadline" set forth in the Condominium Master Deed.

The Trust filed a Motion for Preliminary Injunction seeking this court to prevent the Defendant from entering onto the Condominium property and enjoin the Defendant's construction of portions of the Phase II development

including "certain units and common area" that the Trust alleges Allied failed to construct prior to the expiration of its development rights which the Trust avers expired on June 9, 2018.

After hearing argument and upon review of the Motion, Memoranda filed by counsel, the affidavits and attachments, the Court **DENIES** the Plaintiff's Motion and finds that the Plaintiff has not met its burden of proving that it is likely to succeed on the merits of its legal claim and further, that the Plaintiff cannot establish it will suffer an irreparable injury/ harm should the injunction not be granted.

The Plaintiff, Trust, was created pursuant to a Declaration of Trust dated June 9, 2008 and recorded with the Suffolk County Registry of Deeds. The salient issue in this case is whether the Defendant, Allied acted within its rights when it "phased in" a second phase to the 1850 Condominium Trust. The Trust's claims arise out of Allied's exercise of its "development rights" under the Phase II Amendment to the Master Deed. The Trust argues that the "Phase II Amendment"[1] does not comply with G.L. c. 183A and the Master Deed because the building is incomplete and is not substantially completed and as such, the "as built" plans, recorded in the Phase II Amendment with the Registry are insufficient as a matter of law. Equally, they argue Allied has no legal right to develop Phase II as it did not own or control title to a unit at

[1] Which Allied recorded in the Suffolk County Registry of Deeds on June 5, 2018

the time of the exercise of the Phase II Amendment. It is the Trust's position that control of title or an ownership interest is necessary to comply with Section 13 of the Master Deed. Finally, the Trust avers it will suffer irreparable harm as the preliminary injunction is necessary to prevent Allied from continuing to build on the land that the Trust now controls.

Allied argues that it was within its rights when it "phased in" a second phase to the 1850 Condominium and that the Phase II Amendment to the Master Deed paragraph 13, dated June 5, 2018 along with the "as built" floor plans are legally sufficient and comply with the requisites of G.L. c. 183A and the Master Deed. Further, Allied argues that there is no requirement that the "as built" plans contain any other verification other than the preparer's signature and does not require units to be "substantially complete" for the purposes of generating an as-built floor plan. Equally, Allied argues that the Special Amendment to the Master Deed in 2009 eliminated the prior requirement that Allied have an ownership interest of control of title to a unit as a condition to the exercise of its phasing rights.[2] Allied posits that the Trust has no likelihood of success on the merits of its action as it has failed to raise any opposition to the phasing in of Phase II and that the Trust acquiesced and had full knowledge of the intent of Allied to construct Phase II and that the Trust unjustifiably raised its claim late which has caused significant prejudice to Allied.

[22] Allied controlled title to Unit 415 pursuant to a 99 year lease when it recorded the Phase II Amendment.

Further, Allied argues that it will incur substantial, irreparable harm should the injunction issue; Allied avers that it has paid substantial monies and entered into numerous contracts relative to the phasing in of Phase II and, should the injunction issue, it could incur losses of many millions of dollars.

II. ANALYSIS

It is well settled that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto." Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004).

To obtain preliminary relief, the individual plaintiffs must prove a likelihood of success on the merits of the case and a balance of harm in their favor when considered in light of their likelihood of success. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). "One ... is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent." Shaw v. Harding, 306 Mass. 441, 449-50 (1940). In determining the motion for preliminary injunction, the onus is on the Court to balance the "risk of harm in light of his chance of success on the merits." See, Siemens Building Tech., Inc., v. Division of Capital Mgmt., 439 Mass. 759, 762 (2003).

In this case, the Trust cannot establish a likelihood of success on the merits of its claims against Allied. It is well settled that G.L. c. 183A is essentially an enabling statute which sets forth the minimum criteria for condominium development and "[p]rovides planning flexibility to developers and unit owners." Tonsey v. Chelmsford Village condominium Association, 397 Mass. 683, 686 (1986). This flexibility is particularly important to developers with respect to phased condominium developments where financial and market conditions may be uncertain. See, Queller v. Showron, 438 Mass. 304 (2002). "The "as built" plan requirement of G.L.c. 183A is a vital part of condominium creation io Massachusetts. For plans, the commonly used phrase "as built" derives from the language of G.L. c 183A sec. 8(f) which lists the requirements for the Master deed which must be strictly followed. The "as built" requirements are: "[a] set of floor plans of the building or buildings, showing the layout, location, unit numbers and dimensions of the units, stating the name of the building or that it has not a name, and bearing a verified statement of a registered architect, registered professional engineer, or registered land surveyor, certifying that the plans fully and accurately depict the layout, location, unit number an dimensions of the units as built". Id. Nowhere in the statute is the term "substantial completion" mentioned.

Recording of the Master Deed must be accompanied by a set of floor plans that meets the requisites of G.L. c. 183A, sec. 8(f) and "[t]raditionally, this means including the appropriate verification language on the plan and

stamping of the floor plans with the stamp identifying the registered architect, registered professional engineer, ... with the signature of that professional affixed near the stamp." See generally, MCLE, Residential Condominiums, sec. 3.0 (3d. 2015).

In this case, the Trust seeks to add to the definition of "as built" plans the necessity that, "[b]efore an as-built plan can be, the building it depicts must be substantially completed." Trust Memorandum p. 5. No such requirement exists in the statute. The Trust's avers that Crasper stands for the proposition that the building had to be "substantially complete" before an as-built plan can be recorded. That argument is unavailing. In that case, the Land court did not rule that "substantial completion" was required. Rather, the Court affirmed that "[t]he provisions of G.L.c. 183A, sec 8(f) provide that a recorded master deed requires a set of the as-built floor plans of the building." See, Crapser v. Bondsville Partners, Inc. , 2006 WL 2237667 n. 4, (2006In this case, the Trust seeks to construe the word "completed" in that singular statement to create the requirement of "substantial completion" which is not the import of the statute or even the court's decision in Crasper[3].

[33] The Court rejects the extra-jurisdictional cases cited by the Plaintiff which counsel avers support its position. Those cases do not involve interpretation of Massachusetts law. The Rhode Island case involved interpretation of the RI condominium statute which contained the words "substantial completion", unlike our case and equally, the NH case is an unpublished decision. These cases bear no weight of authority in determining our case.

Further, there is no requirement in the plain language of the statute which requires "substantial completion" before the as-built plans can be recorded. This Court credits the Affidavit of Attorney Edward Rainen, an attorney licensed to practice law in the Commonwealth with over forty (40) years of experience in real estate practice. Attorney Rainen, a court appointed Title Examiner for the Massachusetts Land Court since 1978 affirms that in all his years of practice he is intimately familiar with the requirements of G.L. c. 183A sec 8(f) as well as the recording requirements of the Suffolk County Registry of Deeds.

Attorney Rainen's opinion, which the Court accepts as an expert practitioner in the field, is that the statutory requirements of G.L. c. 183A sec. 8(f) are met wherein the "as-built" plans bear the certification of a registered architect, professional engineer or land surveyor... together with a verification in the form of the preparer's signature and affixation of his or her professional seal". Further, he affirms that the "as-built" plans recorded by Allied comply with both the Suffolk County Registry of Deeds recording requirements and those of the Land Court. Equally, the court accepts Attorney Rainen's opinion that there is no requirement that the plans show "substantial completion', rather, to the contrary only that they meet the statutory requisites of "layout, location, and dimensions of the units". Additionally, the as-built plans in this case were not merely phantom units, but rather comply with the statutory mandate to show location, layout and dimensions.

The Court credits the Affidavit of Architect Healy whose stamp appears on the plans as well as the photographs which establish all of the elements of the building which show interior walls, exterior walls, floors and ceilings. The Court finds that the as built plans comply with the statutory mandates of G.L. c. 183A.

Equally, it should be noted that the statutory language of G.L. ch. 183A is clear and is absent any such requirement of "substantial completion". Where the meaning of the language is plain and unambiguous, the court interprets the statute to be "sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." See, Commonwealth v. Dodge, 428 Mass. 860 (1999), quoting Beeler v. Downey, 387 Mass. 609, 616 (1982) (holding a statute must be construed in a way to give it a sensible meaning). In this case, there is no uncertainty or ambiguity in the statutory language; had the legislature intended that the "as-built" plans show substantial completion, it would have used the terms.

The Trust further argues that Allied's right to construct Phase II expired on June 9, 2018 by virtue of the 2009 Special Amendment to the Master Deed. This argument is unavailing and fails to acknowledge that Allied obtained a 99 year least to Unit 415 on May 31, 2018 which satisfies the requirement that Allied own or have control of title under Section 13 of the Master Deed in order

to exercise its rights[4]. The Trust does not dispute that it is aware of the lease or even challenge the bone fides of the lease.

The Trust has no reasonable likelihood of success on the merits of its claims that Allied's right to construct expired on June 9, 2018. The Trust argues that the 2009 Special amendment imposes a deadline on Allied's right to continue construction. However, the Trust's review of the language in the Amendment is unavailing as it does not properly read the language and the disjunctive "OR" which appears in Section 13 of the Master Deed which sets forth deadlines for the exercise of Allied's construction. Review of Section 13 of the Master Deed makes it clear that the time limitations were triggered "as long as the Declarant (Allied) holds or controls title to any unit OR for such longer time as set forth below" which is the June 9, 2018 date. Therefore, Allied could exercise any reserved right if it either "owned or controlled title to a unit" OR by the June 8, 2018 deadline. Here, Allied "owned and/or controlled title to Unit 415 in May 2018 and, as such, it has satisfied the requirement in the Master Deed 2009 Amendment and is entitled to exercise its reserved rights. As such the Court finds that the Plaintiffs have no likelihood of success on the merits of these claims against the Defendant.

[44] The requirement of Unit ownership or control of title was removed in the 2009 Amendment to the Master Deed. So, under the Amendment to the Master Deed, Allied did not have to own or control title to a Unit as a condition precedent to the exercise of its phasing rights. Notably, the Trust did not oppose the Amendment until this suit.

Additionally, the Court finds that the Plaintiff has no likelihood of success on the merits of its claims that the 2009 Phasing Amendment to the Master Deed is invalid or that Allied's phasing rights expired. To this end, the Court credits the Affidavit of Allied's Manager Edward Nardi. In that Affidavit, Nardi affirms that the Plaintiff was well aware since as early as 2016[5] that Allied was intending to exercise its phasing rights to develop Phase II. He further details a meeting with the Trustees on 10/26/16 to specifically address construction schedules, development and other matters. At no time during that meeting or indeed, at subsequent meetings between the parties in 2017, or even in the recent negotiations in 2018, raise any issues or claims of the invalidity of the 2009 Amendment. Rather, the Plaintiff, knowingly allowed and watched Allied begin construction[6], incur substantial costs and now, nine years later, raises the issue of the invalidity of Allied's phasing rights.

Here, the Plaintiff unreasonably delayed in raising its challenge to the 2009 Amendment. There is no dispute that the Trust was aware at the time of the 2009 Amendment to the Master Deed, the import and consequences of that Amendment. The Trust knowingly elected not to pursue any challenge to the Amendment and further, acquiesced to Allied's planned development by its failure to raise any objection to the Amendment. The Plaintiff's claims against the exercise of Allied's phasing rights as set forth in the 2009 Special Amendment

[5] The actual notice to the Trust was in May 2015 when it learned that a representative of Allied wanted to meet with the Trust to discuss Phase II.

[6] Construction commenced on Phase II in January 2017.

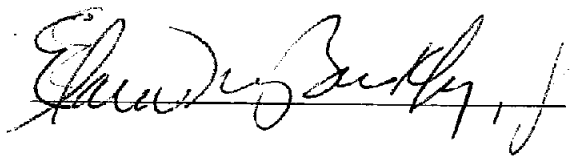
are barred by the doctrine of latches. The Trust knew as early as 2009 of its right to challenge if they wanted, the validity of the 2009 Amendment. The Trust had an opportunity to enforce its rights regarding the Amendment since that time and purposefully has not done so. The Trust cannot stand now after watching the construction begin on Phase II and after, knowing that Allied has incurred substantial costs associated with the development of Phase II, come forward and raise its objection to the Amendment made nine (9) years previous. The Court finds, that the Plaintiff has no reasonable likelihood of success on the merits of its claims that the Amendment is invalid as those claims are barred by latches. See, DeWolf v. Apvian, 2013 WL 139343 (Mass Land Ct. 2013). (holding latches barred a Plaintiff's claim where there was observable activity which provided constructive notice and the Plaintiff failed to exercise its right for years).

The Trust has alleged that its unit owners will suffer irreparable harm if the Preliminary Injunction is not granted. The vage, unsupported allegations of harm averred by the Trust are slight when compared to the significant financial harm which Allied will be caused to sustain if the Preliminary Injunction is granted[7]. The balance of the harms weighs heavily in favor of Allied. The Court finds that the Trust has not met its burden of establishing irreparable harm.

[7] The Court credits fully the Affidavit of Edward Nardi wherein he lists the significant financial costs which Allied would incur if the injunction were to issue.

ORDER

For the aforementioned reasons, this Court finds the Plaintiff cannot establish a likelihood of success on the merits of its action against the Defendant and that the balance of harm is in its favor. This Court DENIES the Plaintiff's Motion for Preliminary Injunction.



Elaine M. Buckley, J.

Dated: 10/31/18