

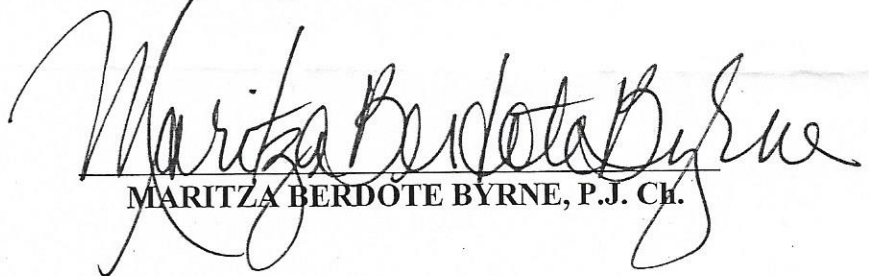
PREPARED BY THE COURT:

PAUL KARDOS,	:	SUPERIOR COURT OF NEW JERSEY	
	:	CHANCERY DIVISION	
Plaintiff,	:	MORRIS COUNTY	
	:		
v.	:	DOCKET NO. MRS-C-102-18	FILED
	:		
FOX HILLS AT ROCKAWAY	:		APR 09 2019
CONDOMINIUM ASSOCIATION	:		
INC.,	:	CIVIL ACTION	Maritza Berdote Byrne, P.J.Ch.
	:		
Defendant.	:	ORDER	
	:		

THIS MATTER comes before the court by way of notice of motion filed by plaintiff Paul Kardos, *pro se*, and opposition filed by Marc Z. Edell, Esq., counsel for defendant, and the court having read and considered the pleadings filed, and for the reasons set forth in the attached statement of reasons, and for good cause shown;

IT IS ON THIS 9th DAY OF APRIL 2019 ORDERED as follows:

1. Plaintiff's request to dismiss defendant's counterclaim is **GRANTED**.
2. Defendant is permitted leave to file an amended Answer and counterclaim as necessary alleging additional supportive facts and attaching the Agreement it seeks to enforce.


MARITZA BERDOTE BYRNE, P.J. CH.

Statement of Reasons

MRS-C-102-18

Kardos v. Fox Hills at Rockaway Condominium Association, Inc.

This matter involves a dispute between Paul Kardos (“plaintiff”), a member of the Fox Hills at Rockaway Condominium Association (“defendant”), and such association. Defendant “is a community organization made up of owners of units in the Fox Hills Condominium located in Rockaway Township, New Jersey.” Id. ex. A. Plaintiff is the owner of a condominium unit and member of defendant. Complaint ¶ 1. Defendant has established rules and procedures for the distribution of flyers within the condominium complex. Id. ¶ 2, ex. A. On Thursday, May 17, 2018, plaintiff submitted a flyer to defendant for distribution. Id. ¶ 3, ex. B. Later that same day, defendant denied plaintiff’s flyer for distribution. Id. ¶ 4. Plaintiff claims defendant refused to distribute his flyer on the grounds that the flyer attacked defendant’s Board of Directors (the “Board”). Id.

This matter began on September 20, 2018, with the filing of plaintiff’s Complaint. Plaintiff alleges defendant has violated his Right to Free Speech as guaranteed by the New Jersey Constitution. Complaint ¶ ¶ 1-13. Plaintiff further alleges defendant has violated the New Jersey Condominium Act, in particular N.J.S.A. 46:8B-13(a). Id. ¶ ¶ 14-22. On January 18, 2019, the court denied defendant’s motion to dismiss plaintiff’s Complaint. On February 14, 2019, defendant filed his first amended Answer, which included a counterclaim alleging breach of the Settlement and Release Agreement (the “Agreement”) signed by the parties at the conclusion of the parties’ prior Chancery Division case in docket no. C-130-17. First Amended Answer to Complaint, Counterclaim. With his instant motion, plaintiff requests the dismissal of defendant’s counterclaim.

Motion to Dismiss

Plaintiff requests the dismissal of defendant's counterclaim. Certification of Paul Kardos ("Kardos Cert.") ¶ 1. Plaintiff sets forth the relevant facts as follows: On February 15, 2018, the court dismissed defendant's Complaint against plaintiff in the parties' prior litigation in docket no. C-130-17 based on failure to find evidence of defendant's alleged conspiracy. Kardos Cert. ¶ 4. Plaintiff states on February 16, 2018, he found a posting on the condominium community's bulletin board providing commentary on the court's February 15, 2018 decision, including that defendant "was disappointed in these rulings" and that it "stands by its decision to file [its] Complaint." Id. ¶ 5, ex C. On April 18, 2018, plaintiff signed a Settlement and Release Agreement (the "Agreement") resolving the litigation in its entirety. Id. ¶ 7-8. Plaintiff states on May 10, 2018, he found another posting from defendant commenting on the litigation, indicating the "outstanding lawsuit involving certain homeowners has been resolved by Confidential Settlement and Release Agreements" but refusing to comment further based on advice of counsel. Id. ¶ 9, ex. D. Plaintiff states on May 17, 2018, he requested defendant post a flyer in the clubhouse with content responding to defendant's postings, but plaintiff states defendant would not post the flyer because its content "attack[ed] the board and call[ed] them liars." Id. ¶ 10-11. Plaintiff attaches his proposed flyer to his instant motion. Id., ex. B. Plaintiff states his flyer was later referenced at defendant's Board meeting on July 9, 2018. Id. ¶ 12-13.

Plaintiff argues the terms of the Agreement he signed at the conclusion of the prior litigation do not prohibit either plaintiff or defendant from discussing the litigation, other than maintaining the confidentiality of the Agreement itself. Plaintiff's Letter Brief in Support of Motion ("Supp. Brief") ¶ 1. Plaintiff states defendant in fact openly discussed the litigation at its Board meeting on July 9, 2018. Supp. Brief ¶ 2. Plaintiff states defendant's statements show they

“fe[el] free to criticize [him]” but “do[] not allow accurate criticism of themselves.” Id. ¶ 4. Plaintiff states the contents of his May 17, 2018 flyer are “beyond the effective date of the Settlement Agreement” and as a result, “the Settlement Agreement has not been breached.” Id. ¶ 7. Plaintiff further argues the terms of the Agreement are contrary to New Jersey law and public policy and therefore cannot be enforced. Id. ¶ 8-11.

Defendant opposes plaintiff’s request to dismiss its counterclaim and states it has presented a “valid cause of action.” Brief in Opposition to Plaintiff’s Motion to Dismiss Defendant’s Counterclaim (“Opp. Brief”) at 1. Defendant states the Agreement provided “mutual release” for plaintiff and defendant in the prior litigation and states the Agreement provided that the parties “unconditionally and irrevocably, remise, [relinquish], release, forever discharge, and covenant not to sue one another. . .from any and all claims. . .arising at law or in equity. . .including but not limited to facts that arose from or are related to the facts and circumstances giving rise to/or being part of the initial litigation, the Complaint, or the Counterclaim.” Opp. Brief at 5. Defendant states the language of the Agreement constituted a “full and complete release” by plaintiff to assert claims against defendant and resulted in plaintiff “relinquish[ing] any rights of whatever kind or character he would otherwise have” against defendant. Id. at 7. Defendant states its counterclaim details how plaintiff breached the terms of such Agreement, allegedly “by filing []his instant lawsuit and by preparing a flyer regarding the lawsuit and making it public record.” Id. at 5-6. Specifically, defendant states plaintiff’s flyer “(1) makes claims and charges, (2) creates controversies and disputes, (3) demands information and answers to questions, and (4) asserts the Board and/or Association and its attorney violated its duties and obligations” relating to the facts that arose from the parties’ prior litigation. Id. Defendant states these facts set forth a *prima facie* case for breach of the Agreement. Id. at 6-7.

In his reply, plaintiff states defendant improperly omits “key text” of the Agreement. Plaintiff’s Brief in Reply to Defendant’s Opposition to Motion to Dismiss Counterclaim (“Reply Brief”) at 3. Specifically, plaintiff states defendant does not state the effective date of the Agreement, which plaintiff states goes to “the heart of the entire agreement.” Reply Brief at 3.

In considering a motion to dismiss under R. 4:6-2(e), the court must apply the test set forth in Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989). “[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the [pleading].” Printing Mart, 116 N.J. at 746. The test is essentially, “whether a cause of action is ‘suggested’ by the facts.” Id. A “reviewing court searches the [pleading] in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Ibid. The party opposing a motion to dismiss is “entitled to every reasonable inference of fact.” Id. “The examination of a [pleading’s] allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.” Id.

In reviewing the motion at this stage, the court is not ascertaining the “ability of [a party] to prove the allegations contained in the [pleading].” Id. The pleading need only allege sufficient facts as to give rise to a cause of action or *prima facie* case. Dismissal of the pleading is only appropriate after the pleading has been “accorded ... [a] meticulous and indulgent examination ...” Id. at 772. Although a pleading is entitled to the generous review described above, it is incumbent upon a party to allege facts supporting a cause of action. Nostrame v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011). If dismissal of the pleading is appropriate, the dismissal “should be without prejudice to a [...] filing of an amended [pleading].” Printing Mart-Morristown, 116 N.J. at 771-72. “In evaluating motions to dismiss, courts consider ‘allegations in the

[pleading], exhibits attached to the [pleading], matters of public record, and documents that form the basis of a claim.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 at n.3 (3d Cir.)).

Plaintiff moves to dismiss defendant’s counterclaim based on failure to state a claim on which relief can be granted. Accordingly, to grant plaintiff’s request, the court must find defendant failed to allege sufficient facts to support its counterclaim. Defendant’s counterclaim is based on plaintiff’s alleged breach of the parties’ Agreement entered into for the purpose of resolving prior litigation. However, defendant fails to attach a copy of the Agreement it seeks to enforce against plaintiff. Plaintiff also does not attach a copy of this Agreement to his pleadings. Both parties instead provide what they believe to be the relevant excerpts of the Agreement and argue respectively for their broad or narrow interpretations. In their pleadings, the parties dispute the enforceability of the Agreement, the effective date of the Agreement, and if plaintiff’s conduct violated the Agreement. However, without access to the full text of the Agreement, the court is unable to determine if there are sufficient facts to sustain defendant’s counterclaim. While the court need not consider if the alleged facts prove defendant’s allegations, without the full text of the document that is the basis for the allegations, the court is unable to determine if sufficient facts are present. As such, plaintiff’s request to dismiss defendant’s counterclaim is **GRANTED**.

However, pursuant to the liberal standard outlined in Printing Mart-Morristown, the court will provide defendant an opportunity to file an amended pleading to address the stated deficiencies. Defendant is permitted leave to file an amended Answer and counterclaim, as necessary, alleging additional supportive facts and attaching the Agreement it seeks to enforce.

Oral Argument

After a review of the papers submitted and after consideration of the procedural history of the case and applicable court rules, the court in its discretion has determined it does not need to conduct oral argument to decide the issues in contest. Notwithstanding R. 5:5-4, oral argument remains in the sound discretion of the court. Oral argument is for the benefit of the court to fully and completely decide matters in difference between the parties. Absent extraordinary circumstances, the court will not grant oral argument on routine matters or on matters in which it finds oral argument will not assist it in reaching a determination. It should be noted that the purpose of oral argument is not to offer additional arguments, but rather oral argument is limited to the arguments raised in the motion papers.

Plaintiff requests oral argument with respect to his motion to dismiss defendant's counterclaim. R. 5:5-4 states:

[I]n exercising its discretion as to the mode and scheduling of disposition of motions, the court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions.

In Palombi v. Palombi, the Appellate Division clarified R. 5:5-4 and the oral argument standard, finding the following:

This provision has generally been interpreted to require oral argument when significant substantive issues are raised and argument is requested. The denial of oral argument when a motion has properly presented a substantive issue to the court for decision deprives litigants of an opportunity to present their case fully to a court. [. . .]

However, the Rule still permits a trial court to exercise its discretion to deny such requests, even in cases involving substantive issues. The discretion afforded by Rule 5:5-4(a) is designed to give the judge the option of dispensing with oral argument . . . when no evidence beyond the motion papers themselves and whatever else is already in the record is necessary to a decision. In short, it is the sole purpose of these rules to dispense with what is regarded as unnecessary or unproductive advocacy. Such advocacy is plainly unnecessary when there is no factual dispute

between the parties. Advocacy does not become necessary or productive simply because the parties disagree as to facts, however minor. There are cases in which factual disputes exist, but because a motion is deficient on its face, the motion fails to properly present substantive issues to the court for determination. [. . .]

The inquiry does not end because the nature of an issue presented can be labeled as pertaining to a substantive issue or because the parties do not agree on all facts. Other circumstances, such as the sufficiency of the supporting facts alleged are also relevant to the exercise of discretion. [. . .] When the record presented to the court in support of a motion is deficient on its face to satisfy such requirements, oral argument does not afford litigants an opportunity to cure such evidentiary deficiencies.

414 N.J. Super. 274, 285-86 (App. Div. 2010) (emphasis added; quotation marks and citations omitted).

With the principles of Palombi in mind, the court finds oral argument would be superfluous and would be of no assistance to the court in rendering its decision with regards to plaintiff's motion. The court does not require anything other than the motion papers themselves and what is already in the record to render a decision.