FILED
May 13, 2021
Hon. Maritza Berdote Byrne, P.J.Ch.

PREPARED BY THE COURT

Paul Kardos, *Plaintiff* v. Fox Hills at Rockaway Condominium Association, Inc., *Defendant*	Superior Court of New Jersey Chancery Division Morris County Docket No. MRS-C-102-18 Civil Action *ORDER*

THIS MATTER having been opened to the court by way of motion for summary judgment filed by defendant's counsel, George Karousatos, Esq., counsel for defendant, and a motion to file a Second Amended Complaint by plaintiff, Paul Kardos, appearing *pro se*; and the court having read and considered the pleadings files, and for good cause shown;

IT IS ON THIS 13th DAY OF May 2021 ORDERED as follows:

1. Defendant's motion for summary judgment is **granted as modified**.
2. Defendant shall establish reasonable time, place, and manner restrictions within sixty (60) days of this Order for the purpose of permitting distribution of literature on matters relating to the governance of the common-interest community.
3. Plaintiff's motion for leave to file a Second Amended Complaint is **denied**.

/s/ Maritza Berdote Byrne
MARITZA BERDOTE-BYRNE, P.J.Ch.

Opposed.
A Statement of Reasons accompanies this Order.

Paul Kardos v. Fox Hills at Rockaway Condominium Association, Inc.
MRS-C-102-18

STATEMENT OF REASONS

This matter comes before the court by way of defendant, Fox Hills at Rockaway Condominium Association, Inc.'s (the "defendant" or "Fox Hills"), March 10, 2020 motion for summary judgment to dismiss "Paragraph 9 of Count One of the [Amended] Complaint[.]" Proposed Order. Plaintiff, Paul Kardos, (the "plaintiff" or "Mr. Kardos"), has filed opposition, and defendant has filed a reply. Additionally, on July 15, 2020, plaintiff filed a motion for leave to file a Second Amended Complaint, to which defendant filed opposition on July 30, 2020. Plaintiff filed a reply on August 3, 2020. This Statement of Reasons addresses both motions.

Plaintiff is a homeowner within Fox Hills, a condominium association consisting of 600 residential units pursuant to the Condominium Act, N.J.S.A. § 46:8B-1, et seq. See Defendant's Statement of Material Facts ("DSMF") ¶¶ 1-2 (citing Ex. A). This litigation arises from plaintiff's distribution of flyers within the community, contrary to Fox Hills Restated Rules and Regulations which provides, in relevant part, "[t]he distribution of literature to residential units without the prior written permission of the Board of Directors is prohibited[,]" and "[a]pproval may be granted if, in the sole discretion of the Board of Directors, the material is deemed appropriate and does not expose the Association to any liability." Id. ¶ 3 (citing Ex. B, at 1(3)(A)). Plaintiff's remaining claim in this litigation is for a declaration finding defendant's Rule 1(3)(A) facially violates the free speech guarantee in New Jersey's Constitution. See Amended Complaint ¶ 9; Plaintiff's Opposition at 3. Plaintiff highlights a particular phone message he received on May 17, 2018, from a defendant agent, Lynn Meekins, advising him: "regarding your flyer [(the "flyer")] for Friday folders, the board has decided not to post that, unfortunately you are attacking the board and calling

them liars and that's not acceptable to be posted." Plaintiff's Statement of Material Facts ("PSMF") ¶ 4. The remaining issue is entirely a legal one that may be resolved by way of summary judgment: whether defendant's Rule 1(3)(A), on its face, violates the New Jersey Constitution's free speech guarantee.

Defendant has provided a copy of the By-Laws of Fox Hill Condominium Association as part of Exhibit B, Schedule E. The By-Laws provide, in relevant part, "[a]ll present and future owners, … of Condominium Units and their agents and employees … are subject to these By-Laws, the Master Deed, and the Rules and Regulations of the Association." Id. Art. II, Sec. 2. Each owner becomes a member of the Association and is entitled to one (1) vote at meetings convened for the purpose of reviewing governing procedures and rules. Ibid. However, the Board of Directors is tasked with the "[a]doption and amendment of rules and regulations covering the operation and use of the Property and Common Elements." Id., Art. IV, Sec. 2(e).

Previously, on January 18, 2019, the Hon. Robert J. Brennan, P.J.Ch., denied defendant's motion to dismiss for failure to state a claim as it related to plaintiff's claim that rejecting its posting violated the New Jersey Constitution. See January 18, 2019 Statement of Reasons. There are three notable distinctions between the prior application and the one currently before the court: (1) the January 18, 2019 Order addressed a motion to dismiss pursuant to R. 4:6-2(e); (2) the January 18, 2019 Order dealt with an *as-applied* challenge to defendant's Board of Directors' (the "Board") authority to reject the specific flyer at issue; and (3) Judge Brennan's decision was an interlocutory finding. Ibid.

Here, the court addresses a summary judgment motion, requiring a different standard of review, as well as a *facial* challenge to defendant's Rule I(3)(A) as violative of the New Jersey Constitution. Plaintiff's Amended Complaint specifically seeks a declaration that Rule I(3)(A)

"violates the free speech guarantee in New Jersey's Constitution." Amended Complaint ¶ 9. In essence, plaintiff pleads Rule I(3)(A), which requires written permission of the Board to distribute literature, is unconstitutional on its face.

Defendant's Restated Rules and Regulations provide, with respect to Rule I(3)(A):

> The distribution of literature to residential units without the prior written permission of the Board of Directors is prohibited. Any Association member wishing to distribute literature must submit a written request including a copy of the literature to Association for review by the Board of Directors. Approval may be granted if, in the sole discretion of the Board of Directors, the material is deemed appropriate and does not expose the Association to any liability. Photo identification must be on your person at all times.

See DSMF ¶ 3 (citing Exhibit B).

Defendant's argument in favor of summary judgment is two-fold: (1) because Judge Brennan already determined the regulation at issue was "constitutionally sound," the "law of the case" doctrine applies and bars plaintiff from relitigating this issue; and (2) prior approval of the Board for distribution of literature to other community residents constitutes a reasonable restriction of the residents' free speech rights. Summary Judgment Brief in Support at 2-3. Regarding the first argument, defendant cites a passage from Judge Brennan's January 18, 2019 Statement of Reasons, which provides the following:

> Defendant has a right to review flyers before they are distributed on its private property and to ban flyers on its private property containing hateful or attacking language. Defendant's rules and regulations regarding flyers and their distribution are constitutionally sound and do not constitute an unreasonable restriction on Plaintiff's Freedom of Speech.

Id. at 5 (citing January 18, 2019 Statement of Reasons at 5).

However, despite Judge Brennan stating the provision, in general, was "constitutionally sound," he denied defendant's motion to dismiss because he found, pursuant to case law, the

Board's decision to reject the specific flyer at issue in this case was improper given that it "had a permissible purpose[]" insofar as "[c]ommenting on litigation that is a matter of public concern to residents of a private residential community should not be prohibited." January 18, 2019 Statement of Reasons at 4.[1] Given Judge Brennan's apparent concession regarding the constitutionality of the Rule, generally, defendant now moves for summary judgment relying on the "law of the case" doctrine, which "requires a decision of law made in a particular case to be respected by all other lower or equal courts during the pendency of that case." State v. Reldan, 100 N.J. 187, 203 (1985).

Regarding the second argument, defendant maintains granting plaintiff's request to "declare that Defendant Association Rules and Regulations [I(3)(A)] violates the free speech guarantee in New Jersey's Constitution[]" would create "a free-for-all for residents of common-interest communities to distribute material regardless of whether or not the material related to the governance of the community." Summary Judgment Brief in Support at 13. According to defendant, such a result would be untenable and run afoul of precedent as it relates to the New Jersey Constitution's Freedom of Speech guarantee. Id. at 14-15.

In opposition, plaintiff argues, citing to New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Judge Brennan was either "unaware of the permissibility of 'attacking language'" or intended "to overturn the *Times v. Sullivan* case law." Brief in Opposition to Summary Judgment at 3. Moreover, plaintiff argues the law on prior restraints is well-established, and "[i]mposition of prior restraints carries a heavy burden of justification[,]" citing two federal district court cases, although neither of them involved a common-interest community or is similar to the circumstances currently before the court. Next, plaintiff argues the pre-approval requirement is unlawful because

[1] The Statement of Reasons concluded that because the flyer called Board members "liars" within the context of litigation affecting the community, it was permissible notwithstanding the Rule prohibiting "hateful or attacking language."

the approval process "may take as long as four months" since the Board only meets in April, July, October, and December. Id. at 4. Plaintiff also maintains the regulation should be stricken because it is void for vagueness, as it does not describe specific standards for what sort of flyers are permissible. Id. at 5.

Pursuant to Rule 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." In Brill v. The Guardian Life Insurance Co., 142 N.J. 520 (1995), the Court explained, the "essence" of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52 (1986)). Moreover, "on a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Id. at 536.

Here, the parties agree there is no factual dispute. At a pretrial hearing before the court on October 18, 2019, the parties agreed the remaining issue before the court was a question of law that did not require a trial and agreed to submit the question of law to the court by way of cross motions for summary judgment. Defendant requests the court find the Rules and Regulation section I(3)(A) does not, on its face, violate the New Jersey Constitution's Freedom of Speech guarantee. This is distinct from defendant's prior application before Judge Brennan, in which the court evaluated whether defendant's decision to reject the flyer violated the New Jersey Constitution. For the reasons to follow, defendant's application is **granted as modified**.

As a threshold matter, the court rejects defendant's argument as it pertains to the "law of the case" doctrine. The court is mindful of the law of the case doctrine and wary to reexamine a

conclusion reached by another judge in the same matter. However, the standard applied by Judge Brennan in a motion to dismiss for failure to state a claim is broader than the standard applied on summary judgment motions. Additionally, even if Judge Brennan had applied the summary judgment standard, even partial summary judgment motions are by their nature interlocutory and can change over the course of the litigation. In Applestein v. United Board & Carton Corp., 35 N.J. 343 (1961) the Supreme Court stated "[a] 'partial summary judgment' differs from a 'complete summary judgment' in two essential respects. It is apparent that, by its very nature, a partial summary judgment cannot end a proceeding and is therefore an interlocutory adjudication. Applestein at 351. In Sulcov v. 2100 Linwood Owners, 303 N.J. Super. 13 (App. Div. 1997) the court found no abuse of discretion in the trial court's review of a partial summary judgment order entered by the motion judge nullifying certain fees. Citing Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987) it stated that a partial summary judgment order is subject to review in the sound discretion of the trial court and in the interest of justice. Sulcov at 29. Finally, the Appellate Division in Akhtar v. JDN Properties at Florham Park LLC, 439 N.J. Super. 391, addressed the law of the case doctrine and its application to findings made prior to final judgment. It stated "once made, such an interlocutory order may always be reconsidered, on good cause shown and in the interests of justice, prior to the entry of final judgment." It too cited Johnson v. Cyklops, going on to state: "Relitigation of an interlocutory order before successive judges of coordinate jurisdiction is generally disfavored, and the "law of the case" doctrine invests the court with discretion to decline relitigation of any legal decision made earlier by an equal court in the same case. The doctrine is not inflexible, however and the court maintains the discretion to revisit the earlier ruling whenever those "factors bear on the pursuit of justice and, particularly, the search for truth" outweigh "the value of judicial deference for the rulings of the coordinate judge."

Internal citations omitted. That court also found the second motion judge did not abuse his discretion in reconsidering the first motion judge's ruling and finding the plaintiff was not entitled to summary judgment on liability after partial summary judgment had been granted.

The "law of the case" doctrine, bearing similarities to the concept of collateral estoppel, is "guided by the fundamental legal principle … that once an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the same parties in the same or in subsequent litigation." State v. K.P.S., 221 N.J. 266, 277 (2015) (emphasis added). In the prior application, the issue of whether Rule I(3)(A) was not "fully and fairly litigated[.]" The court is mindful of the "law of the case" doctrine, however the only issue before the court then was whether the Rule, as applied to the Board's rejection of the flyer, failed to state a claim upon which relief could be granted, pursuant to R. 4:6-2(e). The parties did not litigate whether the Rule itself violated the New Jersey Constitution. Thus, while Judge Brennan may have commented, in dicta, Rule I(3)(A) was "constitutionally sound[,]" the doctrine is inapplicable here because the matter was not truly litigated.

Collateral estoppel is similarly inapplicable to the present set of facts. The doctrine of issue preclusion, in contrast, requires the party asserting the bar to show: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (citing Hennessey v. Winslow Township, 183 N.J. 593 (2005)). Like the "law of the case" doctrine, the constitutionality of Rule I(3)(A) was not "actually litigated[.]" A review of Judge Brennan's January 18, 2019

Statement of Reasons demonstrates the "constitutionally sound" comment did not result from any legal analysis, but a brief remark aimed at contrasting the issue with the one at hand: whether the rule as applied to plaintiff's distribution of the flyer was violative of the New Jersey Constitution.

In the context of free speech rights on private property, the New Jersey Supreme Court has developed a line of cases addressing restrictions like those at issue here. The Supreme Court has previously applied two tests: (1) the Schmid test, derived from State v. Schmid, 84 N.J. 535, 563 (1980); and (2) the Coalition balancing test, derived from N.J. Coalition Against War v. J.M.B. Realty Corp., 138 N.J. 326 (1994). The Schmid test considers the following factors: (1) the nature, purposes, and primary use of such property, generally, its "normal" use; (2) the extent and nature of the public's invitation to use that property; and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. Schmid, supra, at 563. In Coalition, the Supreme Court expanded the Schmid test to include the general balancing of expressional rights and private interests. Coalition, supra, at 362.

In Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 351 (2007), the Supreme Court grappled with the homeowners' association's sign policy restricting the use of signs on private property to no more than one sign per law and one sign in the dwellings' window. The court held this restriction did not violate the New Jersey Constitution because it still allowed expressional activities to take place, and the restriction was minor and reasonable. Id. at 367.

Following Twin Rivers, in Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482 (2012), a homeowner sought to advertise his political candidacy for a role within the town council, but his planned signs within the community violated a rule prohibiting the display of any signage except for "For Sale" signs. Id. at 488. Notwithstanding the Supreme Court's reasoning

that the "Association, of course, had the power to adopt reasonable time, place and manner restrictions to serve the community's interests[,]" a "total ban, with the exception of 'For Sale' signs[,]" was impermissible. Id. at 501-502. Specifically, the rule violated the New Jersey Constitution's Free Speech guarantee because it "hampered the most basic right to speak about the political process" and because it represented a "minimal interference with [plaintiff's] private property interest." Id. at 486. The Supreme Court employed the Coalition balancing test to determine the private interest was insufficient to degrade the expressional right at issue. Ibid.

The Supreme Court decision most relevant to the instant application, however, is Dublirer v. 2000 Linwod Ave. Owners, Inc., 220 N.J. 71, 73 (2014), which employed a hybrid of the Schmid and Coalition tests. In Dublirer, the plaintiff resident challenged a rule prohibiting the distribution of any written materials anywhere in the community without prior approval. But the board itself was subject to no such prior approval mechanism. Plaintiff sought to campaign for a board position and, after inquiring, was advised the prohibition extended to campaign materials and, as a result, could not distribute same throughout the community. The Supreme Court, in affirming the Appellate Division's decision to strike the rule, emphasized the importance of political speech in our society, "which is entitled to the highest level of protection[.]" Id. at 85.

In its analysis, the Supreme Court "clarif[ied] the standard to evaluate restrictions on the right to free speech and assembly for residents of a private common-interest community." Id. In such cases, "courts should focus on 'the purpose of the expressional activity undertaken' in relation to the property's use, an inquiry adapted from Schmid[,] and should also consider the 'general balancing of expressional rights and private property rights[.]'" Id. (citations omitted). Although the court ultimately held the rule must be struck because the importance of political speech outweighed the minimal intrusion caused by the plaintiff's distribution of campaign materials, Id.

at 87, part of the court's analysis—regarding the reasonableness of the restriction—turned on whether "convenient, feasible, and alternative means exist for [the plaintiff] to 'engage in substantially the same expressional activity.'" Id. (citations omitted). The court further emphasized the longstanding importance of permitting the defendant to "adopt reasonable time, place and manner restrictions to serve the community's interest[]" as it relates to the quiet enjoyment of their properties. Such examples might include limiting "the number of written materials that an apartment dweller can distribute in a given period[,]" or "limit[ing] the hours of distribution to prevent early morning or late evening activities." Id. at 87-88.

Here, the court considers whether Rule I(3)(A) must be enforced as a matter of law. Defendant asks the court to enter judgment affirming the propriety of Rule I(3)(A) and relies heavily on Dublirer for its motion, arguing "that speech not about governance, not about the qualifications of people who hold positions of trust, is not so protected under the State's Constitution." Brief in Support of Summary Judgment at 13. Yet this argument misses the mark. While its principle is true, affirming Rule I(3)(A) would have the following effect: The Board would have sole discretion to reject *any* literature it deems "appropriate and does not expose the Association to any liability." Id. If the court were to grant defendant's motion and affirm the provision as "constitutionally sound," then defendant would have the unchecked authority to reject any distribution of literature without exception. As the case law makes clear, this is untenable. If defendant is permitted to exercise its sole discretion in approving or rejecting the distribution of literature, with no exceptions for political speech, then there is no guarantee a resident will be permitted to engage in some forms of political speech, "which is entitled to the highest level of protection." Dublirer, supra, at 85.

Although the court is unwilling to grant defendant this unfettered authority, the court also recognizes defendant has a substantial interest in preserving its residents' right to quiet enjoyment of their respective properties, which includes not having their sidewalks, mailboxes or car windshields littered with flyers. Residents elect board members to establish rules and restrictions for the quiet enjoyment of their property. Free speech does not allow anyone to bombard someone with political speech in the privacy of their homes with copious amounts or flyers containing repetitive arguments at all times of the day and night. By employing the Dublirer test, which requires balancing of this interest against plaintiff's interest in expressional activity, the rights of both parties are harmonized. Of course, the expressional activity is still subject to the same libel and defamation laws as all other forms of like expression. Thus, the court finds it prudent to exercise its equitable powers to craft an appropriate remedy. See Wohlegmuth v. 560 Ocean Club, 302 N.J. Super. 306, 312 (App. Div. 1997) ("Equity regards that as done which ought to be done.")

Critical to the Supreme Court's analysis in Dublirer—which defendant fails to acknowledge—was the defendant Board's failure to "adopt reasonable time, place, and manner restrictions to serve the community's interest." Id. at 87. As the Supreme Court explained, "[t]hose types of restrictions would promote the quiet enjoyment of residents of the apartment complex without unreasonably interfering with free speech rights." Id. at 88. Given the defendant Board's failure to do so, the Supreme Court was constrained to bar enforcement of the provision like the one at issue here. However, the Supreme Court was faced with an as-applied challenge in Dublirer, whereas here the court is tasked with a facial challenge to Rule I(3)(A). Defendant's motion for summary judgment is **granted as modified.** The board's rules requiring prior approval shall be enforced but defendant shall establish and promulgate reasonable time, place, and manner restrictions for any resident's speech as it relates to governance of the common-interest

community, within sixty (60) days of this Order. Defendant shall also establish a reasonable time period for the review of proposed literature. Establishment of such provisions will ensure the protection of residents' right to quiet enjoyment, while also guaranteeing the rights of plaintiff and other residents to engage in expressional activity.

The second application before the court is plaintiff's July 15, 2020 motion to file a Second Amended Complaint. Plaintiff seeks to add a count as it relates to defendant's decision to close the community's outdoor pool for the 2020 season. Certification in Support of Plaintiff's Motion ¶ 3. Specifically, plaintiff charges defendant with violating a provision of the New Jersey Condominium Act for allegedly voting to close the pool after he received a memorandum stating the pool would be closed for the 2020 season. Id. ¶¶ 3-4. In plaintiff's words, this conduct suggests "merely a sham for superficial compliance while violating legislative intent[.]" Id. ¶ 6.

R. 4:9-1 permits a party to file a motion for leave to amend a pleading and such leave should be freely given in the interests of justice. Motions are to be granted without consideration of the ultimate merits of the amendment. Cmt. 2.1 to R. 4:9-1. The broad power of amendment should be liberally exercised at any stage of the proceedings. Id. This is especially true when the failure to join necessary parties may preclude a subsequent lawsuit because of the entire controversy doctrine and where no undue delay or prejudice will result from the amendment. Tomaszewski v. McKeon Ford, 240 N.J. Super. 404, 411 (App. Div. 1990).

However, the factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation. Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997). Because the achievement of substantial justice is the fundamental consideration, the denial of such a motion in the "interests of justice" is

appropriate only when there would be undue prejudice to another party. Franklin Medical Associates v. Newark Public Schools, 362 N.J. Super. 494, 506 (App. Div. 2003). However, "a motion to amend [is] properly denied where its merits are marginal, its substance generally irrelevant to the main claim, and allowing the amendment would unduly protract the litigation or cause undue prejudice. R. 4:9-1, cmt. 2.2.1 (citing Cutler v. Dorn, 196 N.J. 419, 441 (2000)).

As stated previously, on the eve of trial, both parties represented to the court the only remaining issue before the court was the constitutionally of the rule provision. Plaintiff's proposed amendment to the Complaint relates to an entirely different matter. The court rules do not allow plaintiff to use the Amended Complaint filed on May 10, 2019 as a forum to continually complain about the defendant's new actions. At some point litigation must end. Velasquez v. Franz, 123 N.J. 498, 538 (1991). After a previous motion to amend, two years of litigation, and after discovery has ended, plaintiff cannot be permitted to file an Amended Complaint regarding new allegations not related to the allegations in the Complaint. Plaintiff's motion to amend is **denied**. Importantly, plaintiff is not claiming the Board failed to follow mandated procedures for voting on issues like pool closure. Rather, he wants the court to "hear arguments and rule on legislative intent[]" as it relates to the provision of the Condominium Act requiring open meetings. Id. ¶ 5. In fact, upon review of plaintiff's proposed Second Amended Complaint, plaintiff does not seek any substantive relief regarding the Board's alleged "sham compliance[.]" In this instance, the court is unable to grant some nebulous, unsubstantiated relief, and thus "[t]here is no point permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Robinson, supra. Accordingly, plaintiff's motion to file a Second Amended Complaint is **denied**.