

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MALLARD LAKES SANDY INTEREST GROUP, to :
wit: PHILIP GOLDEN, MELISSA GOLDEN, :
RICHARD HEUBECK, GERALD F. CLUNAN, RHEA: :
R. CLUNAN, HARRY B. HAWKINS, JUDITH A. :
HAWKINS, LORI JOHNSON, TERRANCE C. :
WILES, KAREN A. WILES, AUDREY MORSE, :
and HELEN E. FIORE, :

Plaintiffs, :

v

MALLARD LAKES COMMUNITY ASSOCIATION, :
INC., a Delaware Corporation, :

Defendant, :
Third-Party Plaintiff, :

: Civil Action
: No. 11653-VCG

Caption Cont'd ...

- - -
Court of Chancery Courthouse
Courtroom No. 1
34 The Circle
Georgetown, Delaware
Wednesday, July 20, 2016
9:28 a.m.
- - -

BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor

- - -

ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

... Caption Cont'd

MALLARD LAKES COMMUNITY ASSOCIATION, :
INC., a Delaware corporation, :
 :
 Defendant, :
 Third-Party Plaintiff, :
 :
 v :
 :
 LINCOLN HANCOCK RESTORATION, LLC, :
 :
 Third-Party Defendant. :

- - -

1 APPEARANCES:

2 DEAN A. CAMPBELL, ESQ
3 Law Office of Dean A. Campbell, LLC
4 for Plaintiffs

4 CHAD J. TOMS, ESQ.
5 Whiteford, Taylor & Preston LLP
6 for Defendant/Third Party Plaintiff Mallard
7 Lakes Community Association, Inc.

7 RICHARD ABRAMS, ESQ.
8 Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP
9 for Defendant Lincoln Hancock Restoration,
10 LLC

11 - - -

12
13
14
15
16
17
18
19
20
21
22
23
24

1 THE COURT: Good morning.

2 ALL COUNSEL: Good morning, Your
3 Honor.

4 MR. TOMS: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. TOMS: May it please the Court.
7 Chad Toms from Whiteford, Taylor & Preston on behalf
8 of the defendant, Your Honor.

9 THE COURT: Welcome, Mr. Toms.

10 MR. TOMS: Thank you, Your Honor.
11 Pleasure to be here. This is the time the Court has
12 set aside for argument on the motion that we filed on
13 behalf of defendant, which is a preliminary injunction
14 motion. And, Your Honor, I am happy to provide a
15 recitation of the facts or to jump right into the
16 legal arguments.

17 THE COURT: Why don't you jump into
18 the legal argument, because I've had an opportunity to
19 review the briefs and I'm aware of the facts.

20 MR. TOMS: Okay. Wonderful, Your
21 Honor. So it's a well-worn standard for a preliminary
22 injunction, Your Honor. We need to prove that there's
23 a likelihood of success on the merits, that there will
24 be irreparable harm to the defendant, as well as that

1 there's a fair balancing of the harm. And, Your
2 Honor, what we believe is going to be the most
3 important analysis here, and what we focused on in our
4 papers, Your Honor, is success on the merits. And I
5 think the parties have very different --

6 THE COURT: What are the merits? What
7 is your underlying claim?

8 MR. TOMS: Your Honor, we're the
9 defendant, so --

10 THE COURT: Yeah. You don't have an
11 underlying claim.

12 MR. TOMS: We don't have --

13 THE COURT: So what are we doing here,
14 Mr. Toms? I'm lost.

15 MR. TOMS: Well, Your Honor --

16 THE COURT: I've never had -- a
17 preliminary injunction is to preserve the status quo
18 with respect to a legal issue until it can be finally
19 determined. What is the legal issue that underlies
20 your preliminary injunction?

21 MR. TOMS: Well, Your Honor, the legal
22 issue is that the status quo has changed since the
23 initiation of litigation, and that the --

24 THE COURT: But what's the legal issue

1 you've pled that will be determined at a final
2 resolution at a hearing for permanent injunctive
3 relief?

4 MR. TOMS: Well, Your Honor, we
5 believe the focus of the legal merit is going to be on
6 whether or not the governing documents control and
7 their interpretation. We believe --

8 THE COURT: That has nothing to do
9 with this preliminary injunction. That's what the
10 underlying case is about, I agree. But what is the
11 claim for injunctive relief, permanent injunctive
12 relief, on which you will ultimately prevail, for
13 which I must preserve the situation pending that
14 hearing?

15 MR. TOMS: Well, Your Honor, one of
16 the causes of action is a declaratory judgment
17 interpreting those documents. So, Your Honor, the
18 Court is going to go one way or the other on how they
19 declare the rights of the parties.

20 THE COURT: What does that have to do
21 with people disrupting meetings or writing e-mails to
22 realtors?

23 MR. TOMS: It's changing the status
24 quo. It's creating harm to the community.

1 THE COURT: No, no, no. Look, you can
2 win on the documents. You're either right or wrong on
3 the documents. But that won't stop people from having
4 opinions they may want to express, will it?

5 MR. TOMS: It won't, Your Honor. But
6 having resolution of where the Court believes we're
7 heading on the merits of the case will really affect
8 the way the rest of this litigation goes. And we
9 believe that the status quo should be maintained while
10 the litigation is ongoing. The --

11 THE COURT: And the status quo was
12 what? That people aren't allowed to write e-mails or
13 speak out at meetings?

14 MR. TOMS: Well, Your Honor, I
15 think --

16 THE COURT: How is that the status
17 quo, Mr. Toms?

18 MR. TOMS: -- the results of the
19 litigation should be resolved within these walls and
20 before Your Honor, not within the public opinion of
21 the community.

22 THE COURT: What is the status quo
23 that you're seeking to preserve?

24 MR. TOMS: The status quo is to seek

1 to protect the community from what is occurring, which
2 is that there are attempts to create turmoil, there
3 are attempts to make the --

4 THE COURT: Isn't there already
5 turmoil?

6 MR. TOMS: Well, the status quo is
7 about this much turmoil (indicates.) What the
8 plaintiffs seek to do is create significantly more
9 turmoil, Your Honor. And these issues have been
10 bouncing around ever since the flood occurred, and I
11 think that we've attached e-mails that show.

12 The parties have had divergent views
13 from the month after this happened. Exhibit D to our
14 reply brief shows, really, kind of the exchange
15 between the then-president of the association and some
16 of the plaintiffs that are in the courtroom today,
17 that shows that those plaintiffs wanted the
18 association to be proactive and go and solve the
19 problem for future flooding. And the association said
20 that's not within the confines of the powers and the
21 duties that we're obligated to do under our governing
22 documents.

23 And that turmoil continued. Those
24 owners then went off, did what they did. And now they

1 want to hold the association responsible for either
2 what they did or what the association said they didn't
3 have the authority to do under those documents.
4 That's the status quo. And that's the attempt of the
5 plaintiffs at this point to change that with what
6 they're doing.

7 And, Your Honor, we're looking for a
8 very narrow relief in this motion. I don't think
9 we're asking for --

10 THE COURT: You're looking for a very
11 broad relief. You're asking for "While this
12 litigation is ongoing, Plaintiffs shall not interfere
13 with sale of any unit in Mallard Lake Community
14 including but not limited to, communicat[ing] with the
15 buyers or sellers of units, [or] communicat[ing] with
16 realtors for buyers or sellers, or [to] seek to delay
17 or prohibit sale of any unit,

18 "While the litigation is ongoing,
19 Plaintiffs shall not contact the Association or
20 question the Association during open meetings related
21 to the substance of this litigation"

22 And "While this litigation is ongoing,
23 Plaintiffs shall not contact any governmental entity
24 related to the Association"

1 That's broad relief, it seems to me.
2 It's actually the broadest limitation on speech anyone
3 has ever asked for in my career, Mr. Toms.

4 MR. TOMS: Your Honor, I recognize
5 that proposed order is broad, and it was drafted as we
6 were pulling together this motion. I believe, through
7 the briefing, we're willing to narrow that relief.
8 And I think that what that relief really needs to be
9 is not necessarily that they can't go and speak to
10 their neighbors or that they can't speak to realtors.
11 What we don't want them to do is sending threatening
12 e-mails threatening jail time to anybody who is
13 willing to sell property in our community. That's
14 beyond the line. That is where I think that we have a
15 problem.

16 THE COURT: Well, if that's beyond the
17 line -- and it may be -- it's beyond the line because
18 it's illegal, and it should be reported to the police.
19 We don't enjoin crimes in this Court. We've already
20 got laws, criminal statutes, that do that. So if
21 someone is making a threatening e-mail that is across
22 the criminal line, then whoever receives that e-mail
23 has recourse.

24 MR. TOMS: And, Your Honor, I think

1 that that -- the status quo has changed, and if
2 plaintiffs are stepping over that line --

3 THE COURT: Tell me again. I'm sorry.
4 I can't quite grasp how the status quo has changed.

5 MR. TOMS: Your Honor, the dispute
6 that we have today in this courtroom is the same
7 dispute that's highlighted in a February 2000 e-mail,
8 Exhibit D to our reply brief. Since that time, the
9 parties have gone back and forth. We've had
10 mediation. We've had a CIC --

11 THE COURT: But how has the status quo
12 changed?

13 MR. TOMS: The status quo changed when
14 this litigation was filed and then it didn't move
15 forward through discovery quickly. And instead, the
16 public opinion began to be attacked. Every time the
17 association turned around to do something, they were
18 getting complaints to governmental entities.

19 THE COURT: Right. And so your
20 clients don't like being attacked in front of
21 governmental agencies. Your clients don't like the
22 disruptive and unpleasant tone of meetings of the
23 association. Your clients don't like the publicity.
24 I understand that. And it's understandable. I get

1 that.

2 MR. TOMS: Well, and particularly the
3 questions in open meetings about this litigation
4 should be improper. I mean, if they want to ask
5 questions about ongoing business of the association,
6 that's fine. But they're demanding answers about
7 what -- what positions are being taken in this case.

8 THE COURT: Can you address any U.S.
9 Supreme Court precedent on this request? And I'm
10 specifically looking at Organization for a Better
11 Austin v. Jerome Keefe. It wasn't cited in the brief.
12 So if you can't, that's fine.

13 MR. TOMS: Your Honor, I can't, but --

14 THE COURT: That's fair enough.

15 MR. TOMS: -- I don't think we're
16 asking this Court to impose any kind of limitations on
17 someone's constitutional rights to speech. It's
18 related to this litigation. And, Your Honor --

19 THE COURT: Well, if you can't write a
20 government official and say, "I don't like the way
21 that things are progressing in Judge Glasscock's
22 courtroom or the way my association is conducting
23 itself," that seems to me like a restraint on speech,
24 Mr. Toms.

1 MR. TOMS: Your Honor, we're not
2 saying that if they have a question about some ongoing
3 issue, they can't speak to a governmental entity. And
4 we're not even saying in this litigation they can't
5 seek third-party discovery or depositions from those
6 folks.

7 THE COURT: Well, aren't you asking me
8 to sign an order that says, "While this litigation is
9 ongoing, Plaintiffs shall not contact any governmental
10 entity related to the Association, except that counsel
11 for the Plaintiffs may freely correspond with counsel
12 for the Association"?

13 MR. TOMS: Your Honor, I recognize,
14 and I think I've already acknowledged, that I think,
15 as drafted, that order is broader than appropriate.
16 And we think that the Court, if the Court is going to
17 grant our motion, that it be a more narrowly tailored
18 order specific to the concerns of this litigation.

19 THE COURT: Fair enough.

20 MR. TOMS: So, Your Honor, I think
21 that we've kind of tip-toed through the harm and the
22 balancing of that harm with Your Honor's questions.
23 So if I could focus, I think, on the merits, just so
24 that I can get through them.

1 THE COURT: Sure.

2 MR. TOMS: We did address it in our
3 papers, but, Your Honor, I think what the real focus
4 of this case, and where it will go if that becomes
5 part of the Court's decision-making process under this
6 motion, is it has to look to the governing documents.
7 The code of regulations for this association is what
8 the association derives its powers from and its
9 limitations on what its duties are.

10 THE COURT: I don't mean to cut you
11 off, Mr. Toms, but I don't think that those are the
12 underlying merits which I need look at for this
13 motion. You may very well be right that if it were of
14 issue here, that you could demonstrate a likelihood to
15 prevail on the meaning of the governing documents.
16 I'm not stating that. I frankly didn't look very hard
17 at them, because that's not the underlying merits that
18 I need to address on a preliminary injunctive relief
19 motion.

20 The merits that need to be addressed
21 are those merits that would be presented at a hearing
22 for permanent injunctive relief, and you've not even
23 sought any such thing. You don't have an underlying
24 claim for permanent injunctive relief. Really what

1 you're asking me to do is put in place a restraining
2 order, saying "quit being disruptive during the
3 litigation." That's really what this amounts to.

4 And that doesn't depend on whether you
5 will be right or wrong in the litigation. It would
6 depend on whether there's some claim that there is
7 imminent harm that will occur from the behavior that
8 you're trying to enjoin.

9 MR. TOMS: Your Honor, I agree with
10 the Court's statements that what we're seeking in this
11 motion is not likely to be the permanent relief sought
12 at the conclusion of the merits of the case.

13 THE COURT: It has nothing to do with
14 the merits that you're trying to present. So I don't
15 need any more help with this. I'm willing to concede,
16 for purposes of this argument, even though it won't
17 have any bearing on the ultimate case, but for
18 purposes of the motion, I'm willing to assume that you
19 can prevail on the -- that there is a reasonable
20 likelihood of success; that the association will
21 ultimately be right in its argument that the governing
22 documents are such that it is the counterclaim
23 defendants who will have to pay for the damage to
24 their units, not the association members as a whole.

1 I'm willing to concede that.

2 I just don't know how we get from
3 there to the relief you're seeking.

4 MR. TOMS: Well, Your Honor, I'm not
5 sure we were looking for you to concede it. We kind
6 of expected today that you would also delve into that
7 and provide guidance on that issue.

8 THE COURT: Why? Why would I delve
9 into it? This is a preliminary injunctive relief
10 motion. It's not a motion for summary judgment.

11 MR. TOMS: But, Your Honor, this is a
12 court of equity, and I think what the defendants are
13 showing up here asking for the Court to do is to
14 exercise that power to maintain the status quo while
15 litigation is ongoing.

16 THE COURT: And I still don't
17 understand the status quo. The status quo, it seems
18 to me, is we live in America, and people can be
19 offensive in their speech if they want to be, if they
20 feel it's important to talk to their government
21 officials or stand up at a meeting or do whatever they
22 want to do. That's the status quo. It doesn't
23 represent unlimited rights to disruptive speech, but
24 the status quo is Mr. Campbell's clients and other

1 members of the public can say what they want to say.
2 Isn't it? Isn't that what the status quo is?

3 MR. TOMS: Well, Your Honor, I don't
4 disagree that they can say what they want to say, but
5 I think that there's a limitation on what's proper in
6 this litigation for them to ask or demand of my client
7 in those meetings related to this case.

8 THE COURT: There is? What they can
9 ask?

10 MR. TOMS: Or -- well, Your Honor --

11 THE COURT: Can't a cat look at a
12 king? Can't somebody ask for more than you think
13 they're entitled to get? When did that become the
14 standard?

15 MR. TOMS: Well, that's where the harm
16 comes in, Your Honor. It becomes disruptive to the
17 association.

18 THE COURT: Okay. You made that
19 argument. I understand that argument. But I don't
20 need to hear any more on the merits, because, as I
21 say, I assume for purposes of preliminary injunctive
22 relief only that your clients can show a reasonable
23 likelihood of success that they will prevail on the
24 underlying merits of the lawsuit. So to the extent

1 that's a hurdle on the way to preliminary injunctive
2 relief, you've cleared it for purposes of this motion.

3 MR. TOMS: Well, Your Honor, that was
4 the focus of what we thought our motion was about.
5 And I've heard the Court's concerns about the extent
6 of the relief --

7 THE COURT: Well, your motion is for
8 specific relief. You have to show likelihood of
9 success on the merits, you have to show imminent
10 irreparable harm, and that the balancing of the
11 equities is in your favor. So those are the three
12 things you need to show to get to your relief. I've
13 said, with respect to the first prong, I assume you'll
14 meet it. So I don't need to hear any more on it.

15 I don't quite understand -- and I'm
16 not trying to be critical, Mr. Toms, because it's
17 obvious to me that you have a sincere desire to
18 advance the interests of your clients through this
19 argument, and I'm not attempting to denigrate that or
20 cut you off. But if you want to file a summary
21 judgment motion, I'm happy to hear it, and we can hear
22 all about the merits and I can make a decision as to
23 whether, on the record that's before me, you're right
24 about the merits. And I'll be happy to do that.

1 That's my job. But that's not what we're doing here
2 today.

3 MR. TOMS: Understood, Your Honor.
4 And that might very well be what's appropriate. But I
5 think we've talked about the irreparable harm, Your
6 Honor, so let me just address the balancing --

7 THE COURT: Sure. I'm happy to hear
8 it.

9 MR. TOMS: And I think the balancing
10 really puts no limit to -- look, understand, Your
11 Honor, there is a broad order that we submitted with
12 our proposed motion, but I think there's narrow relief
13 that can be tailored in such a way that it puts no
14 harm upon the plaintiffs in this case.

15 THE COURT: And what relief would that
16 be?

17 MR. TOMS: Well, Your Honor, there
18 seems to be a real focus on the resale package
19 disclosures to potential purchasers. And we've
20 attached a couple of those to our papers to show that
21 there has been disclosures. I think the plaintiffs
22 were under the impression there were zero disclosures,
23 but there have been.

24 And I think that if the Court believes

1 that further disclosures are appropriate, it can
2 direct us to do so. But I think that that would be
3 a -- a methodology by which there could be protection
4 to purchasers, such that there's no harm to the
5 plaintiffs if they're not allowed to interfere with
6 the sales of future units.

7 THE COURT: All right. I understand.

8 MR. TOMS: So, Your Honor, with that
9 said, Your Honor, that's the sum and substance of what
10 we're seeking relief for from the Court today.

11 THE COURT: All right. Thank you,
12 Mr. Toms. I appreciate that.

13 Did you want to add anything, Counsel?

14 MR. ABRAMS: Your Honor, Richard
15 Abrams --

16 THE COURT: Yes, Mr. Abrams.

17 MR. ABRAMS: -- for Lincoln Hancock,
18 from Mintzer Sarowitz. I have no position with
19 respect --

20 THE COURT: I didn't think you had
21 any --

22 MR. ABRAMS: We're just a third-party
23 flooring contractor.

24 THE COURT: I didn't think you had a

1 dog in this particular fight.

2 Mr. Campbell, I really don't need to
3 hear anything. I know you've prepared. I know you,
4 like Mr. Toms, spent a lot of time talking about
5 underlying merits. They were both cogent
6 presentations of your respective positions. I'm happy
7 to hear them in summary judgment form, if you're far
8 enough along for a summary judgment motion, but I
9 don't have any questions for you, nor do I know what
10 you could say that would influence me one way or the
11 other, because I think I'm ready to rule on this
12 preliminary injunctive relief motion.

13 So if you want to say something, have
14 at it, but I don't really need anything.

15 MR. CAMPBELL: Your Honor, Dean
16 Campbell on behalf of the plaintiffs, and may it
17 please the Court. We have nothing to add.

18 THE COURT: All right. Thank you. I
19 appreciate that.

20 Counsel, as I've said, it is not my
21 point here to forestall argument that obviously has
22 been meticulously prepared and presented in the briefs
23 and that both sides, I know, are ready to present here
24 today about the underlying merits.

1 It's clear to me that both sides are
2 convinced they have a strong case. It's a case that's
3 largely based on the documents and interpretation of
4 those documents. And as I've said repeatedly -- and
5 I'll say it one more time -- I'm happy to address that
6 in an appropriate motion.

7 But what I'm here for today is a
8 motion for preliminary injunctive relief of a kind
9 that is really kind of extraordinary to me, because
10 the defendants don't really have an underlying claim
11 for permanent injunctive relief. What they're really
12 seeking here is a kind of a protective order. It
13 doesn't appear, to me, appropriate on the facts.

14 The case I was alluding to in the
15 colloquy is Organization for a Better Austin v. Keefe.
16 It's one of a number of similar cases, but it's
17 interesting to me, because it also involved a realtor.
18 The realtor was being accused, in this pre-e-mail era,
19 of unethical conduct, and the defendants were passing
20 out leaflets rather than e-mails. The leaflets
21 suggested that the conduct of the realtor was
22 unethical and that his license should be stripped and
23 people shouldn't deal with him.

24 And the Court below issued a

1 preliminary injunction directing people not to
2 distribute leaflets in the future. And the Court
3 said, "It is elementary, of course, that in a case of
4 this kind the courts do not concern themselves with
5 the truth or validity of the publication. ... the
6 injunction, so far as it imposes prior restraint on
7 speech and publication, constitutes an impermissible
8 restraint on First Amendment rights. Here, as in that
9 case" -- and they refer to *Near v. Minnesota* -- "the
10 injunction operates, not to redress alleged private
11 wrongs, but to suppress, on the basis of previous
12 publications, distributions of literature"

13 I can't enjoin people from getting up
14 at a meeting and complaining or demanding information.
15 I can't enjoin people from future e-mails telling
16 realtors they think that disclosures are insufficient.
17 I can't enjoin people from contacting government
18 agents and telling them that they think that they
19 should be entitled to redress because private
20 organizations are doing things that they think are
21 improper.

22 That speech may be obnoxious. It may
23 even, in some cases, be actionable. Certainly, if
24 there are threatening e-mails, those are improper and

1 they're redressable by law. But I cannot, based on
2 past behavior, enjoin speech in the future. And so I
3 think this matter fails, first, on the ground that
4 there is no evidence that on a permanent injunctive
5 relief motion the petitioner here could prevail;
6 second, that there is a constitutional prohibition
7 against the kind of prior restraint that would be in
8 place. And so I don't really even get to the other
9 parts of the motion.

10 I do want to stress, however, that the
11 briefing that was done that addressed the merits of
12 the actual litigation was helpful to me, and it's not
13 wasted. It was helpful to me in understanding the
14 case, and eventually I assume there will be some type
15 of dispositive motions in this case, assuming it
16 doesn't settle before, and that that will be quite
17 useful. So I don't want you to think that your
18 efforts in that regard were wasted.

19 What else can we do here this morning,
20 Counsel?

21 MR. TOMS: Well, Your Honor, as to our
22 motion, I think that's all that we have.

23 THE COURT: Right. I'm asking is
24 there anything else with respect to the case at large?

1 MR. TOMS: Your Honor put in your
2 letter to the parties that you wanted to address
3 jurisdiction. I assume that was a question directed
4 to plaintiff.

5 THE COURT: I'm trying to remember why
6 I had suggested that. I suppose it --

7 MS. KRUGER: Here is the letter.

8 THE COURT: Thank you. Give me just a
9 second.

10 Oh. I suppose that was the
11 third-party defendants' motion.

12 MR. ABRAMS: That's correct, Your
13 Honor.

14 THE COURT: All right. I'm sorry. I
15 had completely lost focus on that. Is that ready to
16 present? I don't want to --

17 MR. ABRAMS: Well, let me give you a
18 little background, Your Honor, and then you can make
19 that decision.

20 THE COURT: Sure.

21 MR. ABRAMS: May it please the Court,
22 Richard Abrams for Lincoln Hancock.

23 Your Honor, my client is a third-party
24 defendant in an action that they shouldn't be a part

1 of. They're essentially a flooring contractor. One
2 tiny piece of the issue in the case before Your Honor
3 involves the repairs done to the floors that were
4 damaged in these buildings, which are elevated above
5 the water. After Superstorm Sandy, the first-floor
6 floors needed to be repaired, and there was damage
7 beneath the floors as well.

8 To make a long story short, there was
9 a failed effort at repairing the floors. My client
10 came in, and we represent that he did what he was
11 supposed to do. The association made some repairs
12 independent of Lincoln Hancock that involved basically
13 closing in the crawlspace in a manner that elevated
14 the moisture levels in there, to a point where the
15 flooring that was placed on top failed.

16 This is a construction defect claim --

17 THE COURT: It's a damages case.

18 MR. ABRAMS: It's a damages case. And
19 I think most telling is the fact that third-party
20 plaintiff filed an action for contribution and
21 indemnity, which you would expect to see, and after I
22 filed my motion on behalf of Lincoln Hancock, the
23 third-party plaintiff amended the complaint to seek
24 equitable relief against Lincoln Hancock, including

1 damages that have nothing to do with their work, which
2 include the cost of elevating the buildings and things
3 we just had nothing to do with.

4 It's a damages case. Third-party
5 plaintiff could go out and hire another contractor to
6 come in and do an engineering analysis and fix this
7 properly and then seek recovery of that in Superior
8 Court.

9 THE COURT: All right.

10 MR. ABRAMS: That's it in a nutshell.

11 THE COURT: Thank you.

12 Do you want to address that?

13 MR. TOMS: Yes, Your Honor. Again,
14 Chad Toms, for the record, Whiteford, Taylor &
15 Preston.

16 Your Honor, there's a disagreement as
17 to that factual allegation. I don't believe the
18 association believes they've done any remediation.
19 They've hired a contractor.

20 THE COURT: And I understand. I know
21 there's a defense to that. Really what I want to hear
22 about is isn't this simply a claim for damages that
23 should be heard at law?

24 MR. TOMS: Well, Your Honor --

1 THE COURT: Why is it appended to this
2 matter?

3 MR. TOMS: What we believe is the
4 association has no dog in the fight. The claims that
5 the plaintiffs have put forth related to their
6 flooring is really a third-party beneficiary claim
7 that should have gone directly to Lincoln Hancock, and
8 to have us in the middle, we don't think is right.
9 But that's the way it's been structured. So to the
10 extent the Court wants to sever that, it should also
11 sever the plaintiffs' claims, because it's the
12 plaintiffs' claims that create that.

13 THE COURT: I understand that. I
14 understand that.

15 MR. TOMS: So, Your Honor, we don't
16 really care which court we're in, as long as the
17 plaintiffs' claim aren't in this court and the
18 third-party plaintiff's are in Superior Court.

19 THE COURT: I understand that.

20 Mr. Campbell, are you prepared to
21 address that?

22 MR. CAMPBELL: I did not come prepared
23 to address that, but on the other hand, the idea of
24 severing the claims does raise some concern, because

1 you have two courts hearing essentially the same
2 facts.

3 THE COURT: Well, they're not the same
4 facts, are they?

5 MR. CAMPBELL: To some degree they
6 are.

7 THE COURT: They overlap, but this is
8 purely a legal claim, is it not? The flooring
9 contractor did what it was supposed to do, or it
10 breached its contract or breached warranties or did
11 something that could be remedied in damages.

12 MR. CAMPBELL: Well, certainly there's
13 overlap there. I guess I'm thinking in terms of the
14 Court's time and effort that has to go into litigating
15 in two places, and some of the same facts will be
16 raised in both. But essentially it would appear,
17 under my analysis, that the cleanup doctrine would
18 apply here as well.

19 THE COURT: Right.

20 MR. CAMPBELL: And this Court --

21 THE COURT: That's what I've got to
22 consider. Why don't we do this: Rather than put you
23 on the spot, why don't you do just a letter memorandum
24 in response to the motion, and then I'll look

1 carefully through the claims, and I won't need a
2 further argument on it. I can resolve that.

3 MR. TOMS: Your Honor, if I might
4 address simply procedurally where we are.

5 THE COURT: Sure.

6 MR. TOMS: Lincoln Hancock --

7 THE COURT: Just before you do, is
8 that acceptable to you?

9 MR. CAMPBELL: Yes, Your Honor. Thank
10 you.

11 THE COURT: Just do that sometime in
12 the next three weeks, if you would, Mr. Campbell.

13 MR. CAMPBELL: Three weeks?

14 THE COURT: Does that give you enough
15 time?

16 MR. CAMPBELL: It gives me more than
17 enough time.

18 THE COURT: Okay. Do it in the next
19 21 days.

20 MR. TOMS: I think, Your Honor,
21 procedurally what --

22 THE COURT: And you can also file, if
23 you feel it's -- file a brief letter as well. I
24 understand your position, which is you don't care

1 where it's tried, you just want it whatever part your
2 client has should be with the other part?

3 MR. TOMS: Yes, Your Honor. And I
4 rise only to say that, procedurally, that motion was
5 withdrawn, and Mr. Abrams client and I stipulated that
6 we had an opportunity to amend the complaint. And as
7 part of that stipulation, his motion was withdrawn,
8 and the date by which they were going to file a
9 supplemental responsive pleading to the amended
10 third-party complaint is July --

11 MR. ABRAMS: 28.

12 MR. TOMS: -- 28. So that's coming
13 up. Our expectation is they'll be renewing their
14 motion or filing an answer. So I think that what
15 you've asked Mr. Campbell to respond to is not yet
16 technically before you.

17 THE COURT: All right. I
18 misunderstood.

19 Is that right, Mr. Abrams?

20 MR. ABRAMS: Well, it is, Your Honor,
21 but as a practical matter, the jurisdiction issue was
22 raised by the Court and it's before the Court.

23 THE COURT: It is. And it can always
24 be raised sua sponte. So with the understanding that

1 you're going to be, in any event, renewing that motion
2 once it is procedurally ready, Mr. Campbell, I think
3 there isn't any problem with you giving me the
4 memorandum I've asked for. Let's just get this
5 resolved. Either I'm going to hear it as -- it would
6 be a cleanup doctrine. The question is whether it's
7 reasonable to have a third party involved in a cleanup
8 doctrine matter or not. I've got to think about that
9 a little bit. I don't want to just go willy-nilly
10 dumping stuff on the Superior Court.

11 On the other hand, it certainly does
12 seem like a separate and legal claim. So I'll be
13 happy to look at whatever you cite for me,
14 Mr. Campbell. And then --

15 MR. ABRAMS: And Your Honor is
16 requesting that Lincoln Hancock file its renewed
17 motion on the 28th?

18 THE COURT: At the earliest time that
19 it is appropriate procedurally, I'd like you to just
20 go ahead and file it.

21 MR. ABRAMS: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. ABRAMS: A letter memorandum --
24 oh, I'm sorry. I have the brief.

1 THE COURT: Yes. I just want to do it
2 in the least expensive and most efficient way for
3 everyone, because I know there are not unlimited funds
4 here, and I certainly don't want to cause any
5 wheel-spinning.

6 So what else can we do here this
7 morning?

8 MR. CAMPBELL: Your Honor, if I may.
9 Dean Campbell on behalf of plaintiffs.

10 And if I'm mistaken, I'll ask the
11 clerk to correct me, but I believe our motion for
12 enlargement is still pending as well. There have been
13 requests for admissions filed by the defendants, and I
14 put in my motion that because of a -- a paralegal
15 quitting on the day I came back from vacation, the
16 timing got messed up and they weren't filed in time.
17 So -- essentially, I think they were three or four
18 days late after the extension was granted. And that's
19 not been heard by the Court or addressed by the Court
20 yet. I don't know if you are --

21 THE COURT: All right. I assume
22 that's without objection?

23 MR. TOMS: Actually, Your Honor, we
24 did file a response to that.

1 THE COURT: All right.

2 MR. TOMS: And, Your Honor, what our
3 response to that was -- and this focuses on the second
4 set of discovery that we served, which focuses on one
5 of the four buildings at issue, building 24. Building
6 24 is at or above the actual BFE, the base flood
7 elevations. It's our theory that that building should
8 really be summary judgmented out of this case, because
9 it's compliant and there's no reason why it's not
10 compliant other than those owners have told Sussex
11 County they don't want a CO while this litigation is
12 ongoing.

13 That's what discovery was targeted to,
14 and we found even when they did send us the request
15 for admissions -- they were late only by a few days --
16 they were incomplete under the court rules. So we
17 responded and cross-moved for our motion to compel.
18 What we said is these responses were inadequate under
19 the court rules because you have neither denied or
20 admitted, other than you said you don't have a basis
21 for it other than "Go see FEMA guidelines."

22 We don't think that's adequate, so
23 we'd ask the Court to compel more responses, better
24 responses. If the Court wants to enlarge the time, we

1 would like better responses than what we got.

2 THE COURT: Well, I'm going to grant
3 the motion to enlarge the time. You'll need to
4 respond to that, Mr. Campbell, either with revised
5 answers to requests or a response as to why your
6 requests are sufficient.

7 MR. CAMPBELL: My recollection -- and
8 I apologize, I don't have the docket in front of me --
9 my recollection was that that motion to compel was
10 withdrawn.

11 THE COURT: I don't know whether it
12 was or wasn't. I don't want to get into it right now.
13 I've enlarged the time.

14 If there is a motion outstanding to
15 compel compliant discovery responses, Mr. Toms, let
16 Mr. Campbell know. We'll get a set of memos in front
17 of me and I can decide it.

18 MR. TOMS: Mr. Campbell and I will
19 work that out, Your Honor.

20 THE COURT: Perfect. Anything else we
21 can do here this morning?

22 MR. CAMPBELL: No, Your Honor.

23 MR. ABRAMS: Not from us, Your Honor.

24 MR. TOMS: No, Your Honor.

1 THE COURT: Counsel, you've been very
2 patient with me. I appreciate your time and your help
3 with these issues. I know this has been to an
4 ombudsman mediation, which is a procedure I'm not
5 familiar with, and has not settled, but is there
6 anything the Court can do to facilitate settlement of
7 some or all of the issues in this case, or does it
8 simply need to proceed on the litigation track?

9 MR. CAMPBELL: Let me address that.
10 Dean Campbell on behalf of the plaintiffs.

11 The mediation through the ombudsman to
12 some degree was helpful, but I can tell you that my
13 clients believe that essentially it was a waste of
14 time. And until the association is willing to accept
15 responsibility for maintaining these units as it's
16 required to do under the governing documents, I don't
17 think there would be any possibility for resolution.

18 THE COURT: All right.

19 And, Mr. Toms, if you want to respond,
20 you may. I don't --

21 MR. TOMS: Your Honor, I think that
22 mediation might make sense down the road a little bit.
23 The problem with this particular case is the dollar
24 amount at issue is substantial, and there's really no

1 middle road. It's all or nothing.

2 THE COURT: All right. Well, then,
3 why don't we -- and I'm not insisting. It's your
4 case -- but it seems to me that we could get motions
5 for at least partial summary judgment on the meaning
6 of -- and this is really a document case, largely, and
7 what do the controlling contracts say. And so I would
8 suggest you think about briefing a motion for partial
9 summary judgment, and let's get that decided, if it
10 can be decided.

11 Is it the plaintiffs' position that
12 these are ambiguous, Mr. Campbell, or are they --

13 MR. CAMPBELL: I'm sorry? I'm not --
14 what's ambiguous?

15 THE COURT: The provisions that
16 require, in your view, the defendants to share in the
17 cost of remediating the problems with the units.

18 MR. CAMPBELL: Actually, we don't
19 think they're ambiguous at all. The documents clearly
20 put the responsibility for improvements and repair,
21 replacement, on the association. There is a provision
22 that Mr. Toms has alluded to in briefing that says if
23 there's damage caused by a catastrophe, a fire or
24 other catastrophe --

1 THE COURT: Let me stop you for a
2 second. I wasn't asking for argument on it. It
3 appeared to me, and I just wanted to confirm, that
4 it's your position that the documents are clear on
5 their face; that they can be interpreted by the Court
6 without extrinsic evidence. That's what I was driving
7 at.

8 MR. CAMPBELL: I believe the governing
9 documents can -- I think there's a factual background
10 that has to be developed, and I will alert the Court
11 that there are some ongoing discovery issues that
12 still need to be worked out with Mr. Toms and myself.
13 So we're not ready for summary judgment yet.

14 THE COURT: All right. That answers
15 that.

16 Mr. Toms, anything you want to add?
17 You don't need to, and I don't need to hear argument
18 on it. I understand that your client's position is
19 contrary.

20 MR. TOMS: Yes. Your Honor, I believe
21 we'd be in a position to file that brief, but I
22 anticipate the response from Mr. Campbell would be we
23 need more discovery, so I don't think we want to waste
24 the Court's time.

1 THE COURT: No, let's not do that.
2 Let's get discovery done. But I would suggest that
3 sooner, rather than later, we get at least the legal
4 issues resolved. That may make the rest of this fall
5 away, or largely fall away. So that would be my goal,
6 if I were able to control the litigation, which I have
7 a very limited ability to do. I would suggest that we
8 move in it that direction.

9 Anyway, thank you. I appreciate the
10 argument, and I look forward to hearing from you.

11 (Court adjourned at 10:03 a.m.)

12

13 - - -

14

15

16

17

18

19

20

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 39, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 23rd day of August, 2016.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public