

The State of New Hampshire

Carroll, SS.

Superior Court

James A. Fox

v.

Pine Harbor Condominium, Assoc., et al

90-E-169

Order

Plaintiff, James A. Fox, requests the Court to find that the Pine Harbor Board of Directors ("Board") violated both the Condominium Act and the Pine Harbor Condominium Declaration ("Declaration") by implementing the present allocation of dock space at the Pine Harbor Condominium ("Pine Harbor"). Mr. Fox claims the current policy of dock allocation denies his right to equal access and use of the docks of Pine Harbor. It is Mr. Fox's position that the Board abused its discretion by adopting the present dock assignment policy.

Mr. Fox requests that the Court require the Board to assign the docks in a manner permitting equal access with all 28 unit owners. He also asks for compensatory damages and attorney fees for his costs and expenses related to this litigation.

The defendant, Pine Harbor Condominium Association, ("Association") denies plaintiff's allegations and maintains the Board's dock allocation policy is reasonable and within the scope of its authority.

Plaintiff owns unit 28 at Pine Harbor Condominium in Wolfeboro, New Hampshire. The Pine Harbor Condominium Warranty Deed for unit 28 conveyed to Mr. Fox an undivided interest in the

common areas of Pine Harbor. The docks of Pine Harbor are defined in the Declaration as common area.

Pine Harbor has 34 units, of which owners 1-28 have rights of access and use of Lake Winnepesaukee. The deeds of conveyance conveyed the owners of units 1-20 dock rights with unit owners 21-28 receiving mooring rights.

The current policy of the Board for the allocation of dock space provides permanent access to the unit owners with the most seniority according to "longevity of ownership." Unit owners who have access to the docks under this policy possess the dock space until such time as it is voluntarily relinquished or transferred. At such time, that unit is placed at the bottom of the waiting list for dock space. Under the present policy, when a unit owner rents his unit, the owner is prohibited from allowing the tenant to use the dock space. Likewise, if a unit owner sells his unit, that unit is placed at the bottom of the waiting list for dock space.

In a December 31, 1992 order, this Court, Hollman, J., ruled that "the docks [at Pine Harbor] are common area in which each owner of units 1-28 has an equal undivided interest." Following this Order, the Board did not change its current dock allocation policy.

The Court finds the present dock allocation policy denies unit owners 1-28 their equal undivided interest in the common areas. The present allocation of dock space gives exclusive use to the unit owners who have the most seniority. This system

precludes use of the docks by a less senior unit owner until that unpredictable moment when a senior unit owner voluntarily relinquishes his dock space, and the less senior unit owner is taken off of the waiting list. Likewise, the unit owners with access to dock space are prohibited from allowing renters of the units to use the docks. A unit owner's access to dock space is effectively nontransferable, for once a unit is sold, the unit is placed at the bottom of the waiting list for dock space. Clearly, the present system of dock allocation denies the less senior unit owners undivided equal use of the common areas, and it limits the use of the docks by unit owners that have dock access.

The concept of ownership of common areas, such as dock space in a condominium, is analogous to the ownership of a tenancy in common. "A tenancy in common may be defined as that character of tenancy whereby two or more persons are entitled to land in such a manner that they have an undivided possession ...." 29 Am. Jur. 2d Cotenancy and Joint Ownership § 22 (1970). A tenancy in common is founded on the right to possession of **common** property. Id. at § 23 (emphasis added). The Pine Harbor docks are such **common** property. Indeed, the Pine Harbor Declaration and the New Hampshire Condominium Act refer to "[c]ommon area" or "common areas" as all portions of the condominium other than the units. RSA 356-B:3, II. As such, the dock spaces are part of the common area. Applying the ownership principles of a tenancy in common to this situation, the Court finds the less senior unit owners of

units 1-28 do not have the undivided equal access to the common areas to which they are entitled pursuant to the Pine Harbor Declaration and the Condominium Act.

Accordingly, the Court finds the Board abused its discretion by adopting the current policy for dock space allocation. The validity of a regulation enacted by a board of directors is determined by examining first whether the board acted within the scope of its authority, and second, whether the regulation reflects reasoned or arbitrary and capricious decision making. Beachwood Villas Condominium v. Poor, 448 So. 2d 1143 (Fla. Dist. Ct. App. 1984); Juno By The Sea North Condominium v. Manfredonea, 397 So. 2d 297 (Fla. Dist. Ct. App. 1981); Cf., Board of Managers of Surf East Condominium v. Cohn, 396 N.Y.S.2d 998 (1977). Whether the regulations of a board are reasonable must be considered upon the particular facts and circumstances of each case. Hidden Harbor Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975).

Although the evidence shows the Board acted in good faith and without any malicious intent, the Board's adoption of the current dock allocation policy is arbitrary and capricious. This Court's Order of December 31, 1992, Hollman, J., clearly states that the docks at Pine Harbor are common area in which each unit owner (1-28) has an equal undivided interest. The Board acts outside the scope of its authority by failing to implement Judge Hollman's order or to comply with the Condominium Act. The policy is arbitrary and capricious for it permits dock access to

only those unit owners with seniority of ownership, excluding all other unit owners of their rightful use of the common areas, contrary to the Declaration and the Condominium Act. Use of the dock facilities should be based on a common ownership of the unit owners, and not on a method which prohibits unit owners from their rightful use of the common area.

Therefore, the Court orders the defendant to adopt a policy that gives unit owners 1-28 an undivided equal access to the dock space. One acceptable method is to allow "even" numbered units access to the docks for a year, while the following year, "odd" numbered units may have dock access. Another permissible policy is a random drawing to select fourteen units for dock access for one year, while the other unit owners have dock access the following year. Either dock allocation policy should be repeated in following years. If there are more or less than fourteen docks available in any year, access to the docks should be allocated in a random drawing such that no owner has a an unfair or greater use than other owners. The new policy will apply to all units, even those which are transferred or rented.

The Court denies the plaintiff's request for compensatory damages.

The Court concludes the plaintiff does not establish the defendant intentionally caused him emotional distress. The elements for intentional infliction of emotional distress include extreme and outrageous conduct, that is intentional or reckless, and results in severe emotional distress. Morancy v. Morancy,

134 N.H. 493, 496 (1991). Plaintiff testified he had heart problems during the time he was disputing the dock allocation, but no connection was established between his medical condition and his law suit against the defendant. Plaintiff has not demonstrated he experienced severe emotional distress, or that the other elements of the tort exist in this case. Therefore, plaintiff's claim for damages from emotional distress fails.

The Court denies plaintiff's request for attorney fees. As stated above, there is no evidence the Board acted without good faith or with malicious intent. The plaintiff has not demonstrated the defendant was unjustifiably belligerent or obstinate, or that the action was commenced, prolonged or defended without any reasonable basis such that an award of attorney's fees is necessary. Daigle v. City of Portsmouth, No. 91-515, slip op. at 3-4 (N.H. Aug. 31, 1993); Keenan v. Fearon, 130 N.H. 494, 501 (1988); Harkeem v. Adams, 117 N.H. 687, 691 (1977).

#### Findings of Fact and Rulings of Law

The Court rules on the PLAINTIFF's Proposed Findings of Fact and Rulings of Law as follows:

**Granted:** 1-29, A-R, S (see opinion), T-V, Z.

**Denied:** W, X, Y.

The Court rules on the DEFENDANT's Proposed Findings of Fact and Rulings of Law as follows:

**Granted:** 1-21, 23-28.

**Denied:** 22 (see opinion).

Accordingly, the Court finds the Board abused its discretion

by adopting the current dock allocation policy, and orders the Board to adopt a new policy which implements the unit owners' equal undivided interest in the common areas. The Court denies the plaintiff's request for compensatory damages. The Court denies plaintiff's request for attorney fees and for damages resulting from emotional distress.

So ordered.

11/24/93

Date



Presiding Justice, Peter H. Fauver

12/1/93

cc: Philip T. McLaughlin, Esq.  
Philip H. Macchi, Esq.  
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