FILED

OCT 28 2013

STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION

PREPARED BY THE COURT:

UNFAIR SHARE LAKE ARROWEAHD 2010, INC.,

Plaintiff,

vs.

LAKE ARROWHEAD CLUB, INC.

Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: GENERAL EQUITY
PART-MORRIS COUNTY
Docket No. MRS-C-43-11

Civil Action

ORDER OF JUDGMENT

THE COURT, having considered the testimony and evidence of the parties at trial conducted on August 20, 2013, August 21, 2013, August 22, 2013, September 3, 2013 and September 5, 2013; and for good cause shown;

IT IS on this 28th day of October, 2013;

ORDERED AND ADJUDGED that Count One and Count Four of the Complaint in the within matter be, and hereby are, dismissed; and it is further

ORDERED that a case management conference is scheduled for November 14, 2013, at 9:30 a.m. for the purpose of determining how to proceed as to Count Two of the Complaint only.

The Court has served a copy of the within order be served upon counsel of record in this action.

STEPHAN C. HANSBURY, P.J.,Ch.

UNFAIR SHARE LAKE ARROWHEAD 2010, INC. v.
LAKE ARROWHEAD, CLUB, INC
Docket No. MRS-C-43-11

STATEMENT OF REASONS

For the reasons stated hereinafter, the Court dismisses Count One and Count Four of the Complaint finding for the defendant in regard to those Counts. Count Three was previously dismissed. Therefore, Count Two seeking an accounting is the only claim that remains.

In 2009, defendant Lake Arrowhead Club, Inc., determined to impose an assessment of $324.00 per year on all 242 residents of the Lake Arrowhead Community for the purpose of fulfilling the Club's obligation to maintain the roads, parks, dams, beaches, lakes, waters, streams, docks, piers, pavilions, Clubhouse, buildings and other structures, tennis courts and other grounds used for recreation and sport, boating, bathing and fishing in the Community of Lake Arrowhead. (See Paragraph 4 Certificate of Incorporation) Lake Arrowhead Club, Inc. (hereinafter referred to as "LAC") established two levels of assessment. This is the first time LAC imposed an assessment on all residents of the Lake Arrowhead Community for this purpose. Those who chose to belong to the Lake Arrowhead Club itself were to pay a higher amount , an additional $115.00, in order to cover expenses limited only to the Club itself but all members were to be obligated at least for the "easement assessment" of $324.00 per year.

Plaintiff was incorporated in 2010 and consists of 73 property owners within the 242 homes in the Lake Arrowhead Community. Although its Certificate of Incorporation was not provided in evidence, the Complaint states that it was formed "for the purpose of representing the common interests of more than 80

property owners" of Lake Arrowhead. (Paragraph 1) Approximately 100 residents of the Lake Arrowhead Community belong to LAC, leaving approximately 69 residents as neither members of Unfair Share Lake Arrowhead or LAC; nearly 29% of the homes in the Lake Arrowhead Community.

LAC was incorporated in 1927 and as noted above, was designated to be responsible for the roads within the development, parks, dams, beaches, lake, waters, streams, docks, piers, pavilions, Clubhouse buildings and other structures throughout the entire Community. A portion of the lands developed as Lake Arrowhead Community lies within Mountain Lakes with the majority of the lands being within the Township of Denville. A portion of the properties lies to the south of Route 46, in Denville.

The Court accepts as fact that each of the 242 deeds either includes the following language or the language is located within the predecessor deed as part of the original development of Lake Arrowhead:

> "Together with the rights to use Lake Arrowhead and roads as may property owners generally in the Community of which the above-described property forms a part, subject, however, to the rules and regulations established or hereafter established governing same."

It is noted that the existence of an easement can be established by means other than a recorded deed. The Court, in Camp Clearwater v. Plock, 52 N.J. Super. 583, at 598 (Ch. Div. 1950) noted that "physical inspection of the property" may be sufficient. The Lake Arrowhead Community has a sign at its entrance from Route 46 and is visibly a lake oriented community.

Historically, LAC was a voluntary Club. Each Lake Arrowhead resident was invited to become a Club member and if that person joined, would pay an annual

assessment. The Club dues, until 2009, were the only revenue source of the Community, as well as the Club itself.

Plaintiff attempted through a few of the LAC minutes dating back to the 1920/1930's to establish that the Club operated on a discriminatory basis permitting one blackball to preclude someone from becoming a member. The minutes introduced into evidence suggest that certain groups were excluded from membership in the Club; however, the minutes also reflect that a membership type entitled "Lake Membership" existed as it was offered to an LAC applicant as an alternative to membership in the LAC. (P-34, p. 2) Michael Bertram, current President of LAC, testified that "Lake Membership" was not an option today. He had no knowledge of its existence over the 20 years he has resided in the Community. There is, therefore, no evidence by which the Court can conclude that in the early years, LAC access was denied on a discriminatory basis. In any event, even if it had done so, the argument is not relevant to the decisions made here.

There is no question, however, that if a resident of the Lake Arrowhead Community wished to use the Lake up until 2009, he must join the Club and pay the modest annual assessment.

The Court notes here that the roads within the Lake Arrowhead Community were owned by the LAC until sometime in the 1970's or 1980's when they were dedicated to the municipalities. This fact has some relevance to the issues before the Court. This means that for fifty or more years, the members of the LAC paid for the maintenance of the roads which benefitted all residents. Residents who were not members of LAC did not pay to use roads for 50 or more years. A majority of the residents throughout LAC's history were not members. Although it

may be that those who were not members of the Club did not use the lake, they clearly enjoyed the use of the roads which are included within the same deed covenant.

On March 11, 2011, plaintiff filed a Verified Complaint which set forth four separate causes of action. Count One seeks a "claim to quiet title and for declaratory judgment against defendant Club." It alleges that by the conduct of the defendant, the language in each deed had been abandoned "and otherwise relinquished." (Paragraph 25 of the Complaint) Nowhere in Count One does the plaintiff allege that its members "relied upon" the continuous representation until 2009 that membership in the Club was voluntary. In any event, as will be explained subsequently, plaintiff corporation does not have standing to assert that some or all of its members could claim reliance as that conduct is uniquely related to the party who relied and the individuals are not parties to this litigation.

Count Two seeks an accounting presumably for the purpose of determining that the amount of the Fair Share assessment is appropriate.

Count Three was a claim against counsel for LAC which was dismissed previously.

Finally, Count Four is a claim for injunctive relief which is denied since the defendant has prevailed on Counts One and Three.

During the course of the trial, the Court suggested and the parties agreed to divide this litigation into two phases. The first phase included the conduct of the defendant; i.e. did the defendant abandon or relinquish any right to impose assessments on non-LAC members? The second phase of the litigation was to focus on the conduct of the members of the plaintiff; did plaintiff rely upon the fact

that the Club membership was optional? As the Court concludes, as a matter of law, the reliance claim was not plead and plaintiff as a corporation created in 2010 has no standing to bring such a claim obviating the need for the second phase of the trial.

The issue of standing has been raised in the past by defendant. The manner in which the reliance claims of the members of plaintiff were to be tried has been unclear. The Court too has struggled with these issues. It is now clear, however, that the plaintiff has no standing to bring a challenge of the easement itself for the reasons stated hereafter. Because the issue of abandonment and defendant's conduct has been fully litigated, however, the Court will go beyond the issue of standing in reaching a decision favorable to the defendant and deal on the merits.

The Appellate Division in Lake Shawnee, Inc. v. Akhtar, et al., in an unpublished decision, decided July 15, 2010 (unpublished *Lexus 2277*) brought light to this confounding issue. Count One of this Complaint seeks "quiet title and for declaratory judgment against defendant Club." Relying upon N.J.S.A. 2A:16-56 and 57, the Appellate Division stated, at 18:

> "We further note that if the Club or defendants seek a declaratory judgment, it is incumbent upon them to join all persons having or claiming any interest which would be affected by the declaration."

Referring to Garnick v. Serewitch, 39 N.J. 486 (Ch. Div. 1956), the Court concluded that determining the validity of an easement is not a quiet title action, but is a declaratory judgment action. Stating at 497,

> "It is also a well settled principle in equity that when the court undertakes to settle a question at issue, it should do so effectively and permanently by bringing before it all parties necessary for that purpose."

Litigation involving the validity of an easement, therefore, must be brought pursuant to the Uniform Declaratory Judgment Act, N.J.S.A. 2A:16-50. Specifically, N.J.S.A. 2A:16-56 states:

> "When declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding."

Next, provision N.J.S.A. 2A:16-57 states:

> "No declaratory judgment shall prejudice the rights of persons not parties to this proceeding."

Therefore, this Court's decision, were it favorable to the plaintiff, would not address the rights of approximately 69 residents who were not members of the plaintiff, or the rights of the members of defendant LAC.

Many cases have been cited by both parties relating to similar issues. However, not one of the cited cases authorizes the procedure employed by plaintiff herein.

As previously pointed out, the Lake Shawnee case clearly states that a declaratory judgment proceeding is the appropriate proceeding. The Court acknowledges that this is an unpublished decision subject to the limitation of R. 1:36-3. It does rely upon Garnick, supra, and N.J.S.A. 2A:16-56, however.

Lake Lookover Property Owner's Association v. Olsen, 348 N.J. Super. 53, unreported case decided February 14, 2002, (2002 N.J. Super. *Lexus 86*), as well as the Lake Shawnee case, involves claims by the equivalent of LAC against those residents who had not paid the required assessment. Neither was really a declaratory judgment action, but a collection action against individuals who had not paid the assessment.

Citizens Voices Association v. Collings Lakes Civic Association, 396 N.J. Super. 432 (App. Div. 2007) named all property owners of Collins Lake as defendants. The primary defendant, Collings Lake Civic Association, is an association, the equivalent of LAC. Interestingly, the plaintiff, Citizens Voices Association, is not defined within the decision. For the purpose of this argument, the Court assumes that it is similarly situated as the plaintiff herein. However, all defendants were parties to that litigation directly.

The matter of Mountain Springs Association v. Wilson, 81 N.J. Super. 564 (Ch. Div. 1963) involves a plaintiff which represented all property owners against certain specific defendant property owners who claim that they were not subject to the easement by virtue of conduct unique to their chain of title.

Finally, the Court considers Island Improvement Associates of Upper Greenwood Lake v. Ford, et al., 155 N.J. Super. 571 (App. Div. 1978) which employed another mechanism to bring similar issues; class action pursuant to R.4:32-1. The matter sub judice is not a class action. No one has sought certification as a class action.

Plaintiff has previously relied upon Crescent Park Tenants Association v. Realty Equities Corp., 58 N.J. 98 (1971) to claim proper standing. The Crescent Park litigation, however, does not give plaintiff standing to assert claims under Count One, but does provide standing for plaintiff's claims as to Count Two.

The Crescent Park litigation involves claims by a substantial majority of tenants relating to living conditions and wrongful conduct of the landlord. In that litigation, plaintiff sought injunctive relief, appointment of a rent receiver, accounting and other equitable relief based upon deficiencies in condition and

maintenance of the building with respect to matters in which the tenants had a common interest. Specifically, they asserted that the elevators were in poor working condition, security and protection was inadequate, certain health and fire hazards existed, air conditioning and heating were extremely noisy, facilities had been neglected and in need of repair, and certain repairs of appliances and physical structure had not been performed. The general public interest is clearly present. Given the broad standard recognized by our Supreme Court on the issue of standing, such claims relating to the defendant's conduct clearly affect all residents, not simply those who joined plaintiff Association. The Court also notes as noted above, that the plaintiffs did constitute a "substantial majority of tenants." Clearly, that is not the case here. That fact, however, is not dispositive. The nature of the issues raised, repairs vs. individual property rights, distinguish Crescent Park from Count One of this litigation. It is also noted parenthetically in Garnick, supra, at 496 that: "...the mortgagees as well have an interest in the realty which would be affected by the declaration" suggesting that they too might be proper parties. The Court notes this in passing but does not conclude that a properly brought declaratory judgment proceeding or class action proceeding would require mortgagors to be named as defendants.

As to the accounting, the Court concludes that Crescent Park, supra, does permit the plaintiff to bring an issue before the Court regarding the accounting; i.e. the amount of the assessment to be charged. That does not involve individual property rights but is a matter of finance only.

The Court is aware that by prior Court Order, plaintiff was required to mail a copy of the Complaint to each of the parties who were not members of plaintiff or

defendant LAC. That does not constitute service and they were not named as defendants. Their mere silence does not permit the Court to conclude that they agree to be bound to a final judgment in this matter.

The Court is aware that some of the residents of the Lake Arrowhead Community are located on the southern side of Route 46 and that access to Lake Arrowhead and the Club facilities is difficult. It may be that the language of Lake Lookover Property Owner's Association, supra, at 64-65 may have relevance. The Appellate Division suggested that identical assessment to all residents may not be appropriate. The Court suggested that an assessment may be altered based upon "size of an individual property, its proximity to the lake, and whether it had been developed." Those may be factors to consider here, particularly as to the Forest Section of the Lake Arrowhead Community.

As to the merits set forth in Count One, the Court concludes after considering all of the evidence presented at trial that defendant did not abandon, relinquish, waive or give up its rights under the easement. The property owners of the Lake Arrowhead Community are the dominant tenant in regard to the easement. By virtue of the beneficial use of the easement, the dominant tenant also has the duty to maintain and repair the easement as needed. This is recognized as to roads in the Island Improvement Association of Upper Greenwood Lake, supra matter. Plaintiff argues that since the plaintiff did not have the use of the Lake, defendant has abandoned its right to impose assessments upon non-LAC member because its members chose not to join LAC. This matter is clearly distinguishable from Mountain Springs Association v. Wilson, supra. The Chancery Division there

concluded that there was no right of the servient estate, the Association, to impose costs upon owners of the dominant estate. The Court noted, at 578:

> "In the absence of an agreement, the owner of the servient estate cannot require contribution by owners of the dominant estate for expenses incurred for the maintenance of the lake and stream. Furthermore, plaintiff Association cannot impose rules and regulations upon defendant property owners in their use of the facilities granted under the easements."

One must then examine the exact nature of the language of the easement. The relevant language is set forth at 569 which states:

> "It is the intent and purpose of this instrument to convey to the grantee, in common with all other purchasers or owners of land at Mountain Springs the use of the lake and stream for boating, bathing, fishing, etc."

No conditions to use the Lake are imposed in that provision nor in any other provision set forth within the deed. In the matter sub judice, plaintiffs may enjoy the use of the Lake roads, etc. subject to LAC's rules and regulations.

Plaintiff argues that rules and regulations in their common meaning simply mean LAC's right to control the use of the Lake, such as entry points, types of boats, etc. The Court disagrees. One of the equitable maxims by which this Court must live is that substance shall always prevail over form. See Applestein v. United Board and Carton Corp., 60 N.J. Super. 333, at 348 (Ch. D. 1960) *aff'd* O.B. 33 N.J. 72 (1960). The Supreme Court noted Highland Lakes Country Club v. Franzino, 186 N.J. 99 (2006), at 116, requires courts to give "fair reading of the provisions..." it must employ "common sense."

The facts are uncontroverted that up until 2009, defendant did not permit the use of the Lake by anyone who was not a member of LAC. It does appear from the minutes of defendant Board of Trustees on August 24, 1934 that there was a

separate classification called "Lake Member." But, the current President of LAC could not explain what membership that was, but did confirm that it was not available currently. (P-34, p 2) The LAC made a conscious determination at its outset that it would fulfill its responsibilities to maintain the lakes and roads, etc. by requiring only those who became members of LAC to make contribution for the maintenance of the facilities under its ownership. It would be unreasonable for this Court to conclude that the LAC could not now seek payment of the necessary expenses to fulfill its responsibilities from all those who enjoyed residence in the Lake Arrowhead Community. The Court rejects the narrow reading of "rules and regulations," but concludes that LAC had responsibility for determining the conditions under which one could use the Lake. Initially, and until 2009, those conditions were simply membership in LAC which from its inception, compelled payments. LAC has the right to change the rules and regulations to impose the assessment on all Community residents to fulfill its responsibilities to the Community.

The testimony is uncontroverted that the language which existed in the documents creating the Lake Arrowhead Community was not known to the current Board until sometime after the year 2000. Only then did LAC conclude, based upon the easement language with the advice of its attorney, that it did have the right to impose assessments on all those within the community but with the understanding that with the duty of payment toward the common good came the right to use the common facilities. In essence, therefore, defendant did not abandon its right as to non-members of LAC, but chose to exercise that right in a different fashion. The initial Board of LAC and the subsequent Boards into this century concluded that the

contribution by club members was sufficient to meet its obligations to maintain the various facilities. Subsequently, the Board determined that all should contribute and so it imposed the Fair Share easement assessment. It is a settled principle of easement law that "mere non-use of an easement will not suffice to destroy the right." See Fairclough v. Baumgartner, 8 N.J. 187 (1951), at 189. In Fairclough, supra, the Supreme Court went on to state, at 190:

> "The facts in this case fail to establish an intention on the part of the owners to abandon the easement. On the contrary, in the conveyances in defendant's chain of title, the existence of the right-of-way is asserted and transferred to each succeeding grantee."

In Friedman v. Lieberman, 2 N.J. Super. 537 (Ch. D. 1949), at 544, the court concluded:

> "Where an easement is created by deed, no duty is cast upon the owner of the dominant estate to make use thereof. The mere non-use of such an easement will not extinguish it. In order to constitute an abandonment, the facts must clearly undertake such an intention."

The facts are clear here that from the inception of LAC, the residents of the Lake Arrowhead Community could enjoy lake privileges by simply becoming a member of LAC. As previously noted, the existence of lake membership in 1934 indicates that even though members might be rejected from LAC membership on a personal basis, they could still be lake members in order to obtain lake privileges.

Similar language exists in the matter of Rossi v. Sierchio, 30 N.J. Super. 575 (App. Div. 1954). The Court stated at 580:

> "To establish that the owner of an easement has abandoned it, there must be clear and convincing proof of either an intention on the part to abandon it forever or an acquiescence by him in some action taken by the owner of the servient tenement adverse to the easement."

The evidence is clear here that LAC was unaware of the nature of the easement and certainly there is no clear and convincing evidence that they intended to abandon the right to assess all members "forever."

Citizens Voices Association, supra discusses at great length the issue of abandonment of an easement. The Court rejected the argument of abandonment, laches and waiver and reaffirmed that there must be clear and convincing evidence of an actual intention to abandon an easement. As in the case sub judice, there was an allegation that the Association was lackadaisical in its collection efforts, as well as maintenance. In concluding Citizens Voice Association, supra, the Appellate Division upheld the right of the Association to collect only $48 as set forth in the original creating documents. Based on the record before it, the Court concluded the Association could not raise the monthly assessment. However, the Court went on to acknowledge its equitable powers to modify that amount in the future if circumstances change warranting such a change. At 22 and 23, the Court went on to say:

> "Therefore, if there were a material change in circumstances pursuant to law, a court could modify the covenants restricting increasing the annual $48 charge providing modification was equitable as to all parties and will preserve the purpose of the servitude."

As a court of equity, this Court must examine these issues also from the point of view of the public interest. LAC has concluded that it must obtain significantly more revenue in order to meet its obligations to maintain the lakes, its dams, etc. The only alternative to assessing all members of the community is to considerably increase the assessment of the Club members. It is not speculation to argue that if the costs of maintaining the lake, its dams, etc. could only be obtained from voluntary Club membership, the future of the Lake, the dam and the

appurtenant facilities is in question. As the Appellate Division noted in Lake Lookover Property, supra, at 68:

> "To permit those in a position such as defendants to avoid their maintenance obligation by some purported abandonment or surrender of the easement rights which they or their predecessors have enjoyed for so many years, would quite obviously represent a default in the obligations of those easement holders to their fellow easement holders. It would render it difficult if not impossible for anyone to enjoy the benefit of the easement or to enjoy the lake itself which might well be destroyed if the DEP followed through with its stated intent to remove the dam if required repairs are not made."

The Court acknowledges that in Lake Lookover, the benefit of the Lake was available and the DEP was pressing for dam repairs. The fundamental principle, however, remains the same. This Community was also created in the 1920's as an entirely private community with private roads, lakes and the lifestyle created within the community.

The Court also considers the argument raised by a few of the witnesses, members of the plaintiff, that they had purchased property within the Lake Arrowhead Community based upon representations by realtors prior to buying that the Club membership was voluntary. After purchasing, members of the Club made the same assurance.

As noted before, the reliance argument can only be made by a party who relied upon the statements made. Here, the corporate plaintiff took no action in reliance upon anything and as the only plaintiff cannot, therefore, raise that argument as a matter of law. See generally Toll Brothers v. Board of Chosen Freeholders, 194 N.J. 223 (2008).

The reliance argument arises in the context of waiver or equitable estoppel. Waiver "is generally defined as an intentional relinquishment of a known right."

See Connell v. American Funding Ltd., 231 N.J. Super. 409, 416 (Ch. Div. 1987) As in Connell, supra:

> "There was neither knowledge of the right in question (to impose the easement assessment) nor any basis to find an intent to relinquish the same." See also West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 152-153 (1958).

The Court in Connell, at 416, then goes on to discuss estoppel which:

> "arises when one party is led to change his or her position in reliance on a course of conduct followed by another."

The plaintiff took no action in reliance upon defendant's conduct.

Plaintiff's burden to assert promissory estoppel requires four elements. There must be a clear and definite promise. Here, at best, there was a representation to individuals that the current rules and regulations of defendant permit memberships then required membership dues. Next, there must be an expectation that promisee will rely on the promise. Clearly as to this plaintiff, that fails. But, even as to individuals were they the plaintiff, it fails. There is no evidence by which the Court can conclude that LAC expected individuals would rely on the promise. Two deeds in evidence reveal that in the Chan/Yip purchase in 1999, consideration was $345,000 (p-121). The Katt purchase in the same year in the amount of $220,000. Finally, if there were individual plaintiffs, each would have to establish "detriment of a definite and substantial nature must be incurred in reliance on the promise." See Royal Associates v. Concannon, 200 N.J. Super. 84, 91-92 (App. Div. 1995). An assessment of $324.00 per year falls short of "definite and substantial detriment."

But, in summary, the arguments of waiver and estoppel simply cannot be claimed by this plaintiff. Plaintiff didn't change its position in reliance on any

conduct of defendant. (Carlsen v. Masters, Mates and Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979).

The party seeking the relief "must have detrimentally relied upon the tortfeasor's conduct, and the reliance must be reasonable. (See Lesniewski v. W.B. Furze

Corp., 308 N.J. Super. 270, 286 (App. Div. 1998). Unfair Share Lake Arrowhead 2010, Inc. did not rely upon any conduct of LAC. Even as to individuals, were they plaintiff, is it reasonable to assert that a representation that they would not be charged $324 per year was the deciding factor in purchasing a home costing several hundred thousand dollars?

Unlike Lake Shawnee v. Akhtar, supra, the duty of membership was not stated within the easement language. Those individuals who were granted relief from payment of membership fees did so because the clear language of their documents was contradicted by the Club's conduct. Here, those facts are different. The right to use the Lake (and until recently the roads) was always subject to the control of defendant which initially interpreted its rights as imposing membership as a condition of use of the Lake. Such control could always be asserted as to any member of the Community. The reliance argument cannot be applied as to the plaintiff corporation, but in addition, cannot be employed by individuals because clearly they were aware that they were members of the Lake Arrowhead Community and use of all available facilities was subject to the control of LAC. The rules and regulations could change as events evolved.

For all those reasons, the Court concludes that the only remaining issue is expressed within Count Two seeking financial information and a review of the precise assessment.

STEPHAN C. HANSBURY, P.J., Ch.