FAZIO v. TRUSTEES OF RIVER HOUSE CONDOMINIUM TRUST

81 Mass.App.Ct. 1140

DOLORES FAZIO & ANOTHER. [1]
v.
TRUSTEES OF RIVER HOUSE CONDOMINIUM TRUST.

Appeal Court of Massachusetts. June 4, 2012

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

By the Court (CYPHER, GRASSO & SIKORA, JJ.)

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The plaintiffs, unit owners in River House Condominium, a 220–unit residential condominium, appeal from a Land Court judgment in favor of the defendants, Trustees of River House Condominium Trust. At issue is whether the defendants may lawfully plant trees in a common area that block, or will block, [2] a view of the Charles River from the plaintiffs' unit. On summary judgment, the judge concluded that (1) the plaintiffs do not have a property right to a view, and (2) planting of the trees in the common area garden is within the defendants' authority to maintain the common areas, and does not constitute waste. For substantially the reasons set forth in the judge's well-reasoned memorandum of decision, we affirm. [3]

1. Right to a view:
The judge did not err in concluding that the plaintiffs hold no legally protected right to view the Charles River from their unit. [4] See *Hampe v. Elia*, 251 Mass. 465, 467 (1925); *Patterson v. Paul*, 448 Mass. 658, 662 (2007) (restrictions on land disfavored). Under Massachusetts law, property owners do not have an implied or inherent right to a view, and as the judge's opinion makes clear at pages ten through fifteen, the cases cited by the plaintiffs do not hold otherwise. [5] Nor may the plaintiffs rely on their nominal ownership interest (0.32834 percent) in the common areas to establish a protected view from their unit where they purchased subject to a master deed and by-laws giving them virtually no right to control the common areas and placing unfettered control of the common areas in the hands of the trustees. See *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass.App.Ct. 573, 577 (1995).

2. Right to maintain common areas:
The judge also did not err in concluding that the defendants acted within their authority to maintain the common areas when they replaced four ailing ash trees with eleven pine trees in a common area garden [6] bordering Storrow Drive. The master deed and declaration of trust grant the trustees “full power and uncontrolled discretion,” subject only to limitations stated in the deed and trust document and provisions of the condominium statute, to maintain, repair, and replace common areas and facilities. [7] [See G.L. c. 183A, §§ 5(e) & 10; Declaration of Trust §§ 5.1, 5.3. The defendants' actions at issue undoubtedly fall within the broad scope of that authority.

The defendants' replacement of the decaying ash trees [8] with pines, even more in number, does not expand the size of the garden or significantly alter it so as to amount to an "improvement" of a common area requiring approval by seventy-five percent of unit owners under the condominium by-laws. [9] See *Sea Pines Condominium III Assn. v. Steffens*, 61 Mass.App.Ct. 838, 843–844 (2004) (landscaping activities considered maintenance of common areas). The project is unquestionably within the defendants' management authority and of collective benefit to all unit owners, being reasonably related to concerns of privacy, security, and minimizing noise from Storrow Drive. The density, shade tolerance, and resistance to pollution of the pine trees make them well-suited to that end. See *Golub v. Milpo*, *Inc.*, 402 Mass. 397, 401 (1988); *Office One, Inc. v. Lopez*, 437 Mass. 113, 125 (2002).

*2 We also reject the plaintiffs' contention that the defendants' actions amount to an impermissible change of the intended use of the common area. The only restriction on the use to be made of the common areas is that it be solely for residential purposes. [10] The common area in question is a residential use, a garden, before and after replacement of the ash trees with pines. Nothing in the plaintiffs' deed, the master deed, or the trust document supports the plaintiffs' contention that the intended purpose of the garden is to provide their unit with a river view. [11]

Because the plaintiffs have no legally protected right to a view and the planting of the trees is within the defendants' authority to maintain the common areas, the judge also did not err in concluding that the defendants' actions do not amount to waste. See *Delano v. Smith*, 206 Mass. 365, 370 (1910).

Judgment affirmed.

FOOTNOTES:
[1] Joseph Fazio.

[2] Although the trees do not currently obscure the plaintiffs' view, the parties agree that they are likely to do so in the future, and at their request, the judge considered the issue.

[3] The judge did not err in concluding that the court lacked jurisdiction over the plaintiffs' nuisance claim. See G.L. c. 185, § 1 (2011). Even were that not so, we fail to discern how the defendants' lawful exercise of their authority to maintain the common areas for the benefit of the condominium as a whole would amount to an actionable nuisance as to another unit owner. See *Rattigan v. Wile*, 445 Mass. 850, 855–856 (2006).

[4] The plaintiffs concede that they lack a view easement.

[5] *Xifaras v. Andrade*, 59 Mass App.Ct. 789 (2003), involves encroachment by a condominium unit owner *into* a common area, a situation quite different from the facts in this case.

[6] Gardens are designated common areas under the master deed.

[7] Section 5.1 provides that, "The Trustees shall, subject to and in accordance with all applicable provisions of said Chapter 183A, have the absolute control and management of the Trust Property ... as if they were the absolute owners thereof, free from the control of the Unit Owners (except as limited in this Declaration of Trust) ... [and] shall have full power and uncontrolled discretion, subject only to the limitations and conditions herein and in the provisions of said Chapter 183A ... [t]o operate, care for, maintain, repair and replace the common areas and facilities of the Condominium...."

[8] After a large limb from one of the ash trees fell onto Storrow Drive, an arborist advised the defendants that the ash trees posed a safety hazard. The plaintiffs do not dispute that the removal of the ash trees is within the defendants' authority.

[9] Indeed, it is difficult to discern how replacing ash trees with pines is anything other than maintenance, as would clearly be the case had the defendants replaced the ash trees with other ash trees. Simply opting to plant different trees does not transform landscaping maintenance into a common area improvement.

[10] Section 6 of the master deed provides that unit owners "may use the common areas and facilities in accordance with their intended purpose ...," but does not designate specific purposes for the common areas. Section 10, entitled "Purposes," provides simply that "[u]nits and other facilities are intended to be used solely for residential purposes."

[11] Likewise, the judge did not err in striking the plaintiffs' affidavits as failing to comply with Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974). The affidavits were comprised of opinion, speculation, and inadmissible hearsay, and contained largely irrelevant material. See *Shapiro Equip. Corp. v. Morris & Son Constr. Corp.,* 369 Mass. 968 (1976).