BEFORE THE
COMMISSION ON COMMON OWNERSHIP
COMMUNITIES
MONTGOMERY COUNTY, MARYLAND

Kim Kreitner, et als
c/o David Gardner, Esq.
600 Jefferson Plaza # 309
"Rockville, Maryland 20852

Complainant

v. **CCOC # 04-16**

Grosvenor Park IV Condominium Association
c/o Justin Cameron, Esq.
7600 Hanover Parkway I # 202
Greenbelt, Maryland 21770

Respondent

RULING ON RESPONDENT'S MOTION FOR IMMEDIATE EXPEDITED RELIEF FROM STAY

The above-captioned case came before a Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland ("CCOC") for consideration of,

and a ruling on, the Respondent's Motion for Immediate Expedited Relief from Stay pursuant to Chapter 10B of the Montgomery County Code ("Code"). Based on the pleadings submitted the Panel, finds, concludes and orders as follows.

I. BACKGROUND

1. In a complaint dated January 29, 2016, Kim Kreitner "(A)nd (O)thers ("Complainant") identified on a list included with the complaint form, filed an action with the CCOC naming Grosvenor Park IV Condominium Association as the Respondent. ("Association" or "Respondent"). The Complainant alleges that the Board of Directors of the Association made a decision to replace carpeting in common areas; that the selection process involved the community extensively; that the carpeting delivered was not in conformance with the order; that the Board of Directors precipitously decided to substitute another carpet with very limited input from the community; that the action of the Board is in violation of Article V, Section 6 of the Association's Bylaws and that the Respondent has refused to delay the order despite a request from Complainant's counsel. Complainant requests that the Commission order the Board of Directors to cancel the order; that it instruct the Board to actively solicit the input of unit owners and that the "Board place this matter back on the agenda only after members of GPIV have had the opportunity to comment and vote be based on their selection"

2. Section 10B-9(e) of the Code states "(E)xcept as provided in Section 10B-9A, when a dispute is filed with the Commission, a community association must not take any action to enforce or implement the association's decision, other than filing a civil action under subsection (f) until the process under this Article is completed."

3. Section 10B-9A(a) of the Code states "At any time after a dispute is filed under Section 10B-9, a community association may submit a request to lift the automatic stay required under Section 10B-9(e) to a hearing panel appointed under Section 10B-12, or if no hearing panel has been appointed, a special standing panel authorized to consider requests for relief from stays."

4. Subsequently, in early March, the Respondent filed a Motion for Immediate Expedited Relief from Stay and Opposition to Petitioners Motion to Enforce Automatic Stay. In its Motion the Respondent states that the carpet has been ordered and that the continued Stay would prohibit the Respondent from "carrying out the contract terms and result in a substantial materials breach of the contract... and result in substantial harm to the Association...". The Respondent further alleges that "...conflicting requests from the Petitioner and the CCOC require immediate attention from the CCOC." Additionally the Respondent alleges that enforcement of the Stay involves a third party who is not before the CCOC which violates Maryland law, specifically Section 1- 403 (2) of the Maryland Corporations and Associations Code Ann. The Respondent cites *Attorney Grievance Com. v. Hyatt,* 302 Md. 653, 490 A2d. 1224 (1985) as authority for the proposition that "...attempting to litigate the rights of persons outside of this limited group of individuals is beyond the power of the Tribunal and the Tribunal is without power to hear the case because it lacks subject matter jurisdiction." The Respondent also argues that the CCOC ..."can only obtain jurisdiction over an owner, a governing body, and an occupant" and that it therefore lacks personal jurisdiction and "...cannot enter a judgment or order that will affect the contractual rights of parties that are not before the court" citing *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) as its authority. Finally the Respondent invokes Section 10, Clause 10

of the United States Constitution that "(N)o State shall…pass any …Law impairing the obligation of contracts."

5. On March 2, 2016 the CCOC, at its regular scheduled meeting, voted to accept jurisdiction of this matter for the limited purpose of ruling on the Respondent's Motion and a panel was chosen to consider and rule on said Motion.

6. The Complainant filed a pleading on March 8, 2016 entitled Opposition to Motion for Immediate Expedited Relief from Stay in which Complainant alleged that a request was made to Respondent's attorney by Complainant's attorney, orally, and subsequently in writing, late in January, that the order for the carpet be placed on hold "…until the issues raised in Petitioners' Complaint could be resolved" ; that the attorney had been "informed by his clients that the manufacturer was willing to give the Association time to decide what steps it should take after it delivered the wrong carpeting in December and that there was no need for any hasty decision by the Board."; that the Board had nevertheless elected to go forward; that any decision to vacate the Stay would render the matter moot thus frustrating the "main purpose of Article 10B of the Montgomery County Code…" to provide a mechanism to resolve disputes without undue haste and that no reason had been provided by Respondent why the scheduled installation of the carpet on March 14, 2016 constituted an emergency.

7. On March 10, 2016 the Panel issued a Preliminary Order to the parties requesting more information finding that it had insufficient information in the pleadings on which to base a determination and ordering the Respondent to admit or deny the allegations in the complaint.

8. In a document received by Consumer Protection on March 13, 2016 the Complainant filed a pleading entitled Petitioners' Response to Preliminary Order Concerning Motion to Lift Stay in which the Complainant points to the alleged failure of the Respondent to produce evidence of damages; questioned Respondent's interpretation of Section 1-403 of the Maryland Corporations and Associations Code; provided arguments to support Complainant's argument that the carpeting and painting was an "addition, alteration or improvement"; alleged that misleading information had been provided the Panel on the identify of the original carpeting chosen by the Board of Directors; and that the Respondent had continued with painting of the buildings in contravention of the Stay.

9. Subsequently, in mid March, the Respondent filed an Answer to Petitioners' Complaint which contained the following admissions, denials and allegations: that in June 2015 Respondent's board, at a regularly scheduled meeting, voted to replace carpeting in common areas and to paint common areas pursuant to Article V, section 5 of the Association's Bylaws; that the cost of the carpeting and installation exceeded $60,000; that the Board fully disclosed its' intentions in that respect and sought and received input from the unit owners before the vote and during the meeting; that there was a mistake "in the color of the carpet that was received from the manufacturer" but that it was "somewhat similar to the original pattern ordered"; that the zig-zag pattern of the carpet presented a safety issue; that the decision to change the carpet was made after consultation with attorneys and others; that all of this was explained at a subsequent board meeting; that the decision was not made precipitously and that unit owners were not denied the opportunity to make comments at the January Board meeting. Respondent reiterated arguments

made in previous pleadings and with reference to many allegations in the complaint stated that it is without knowledge or information sufficient to form a belief.

10. Respondent subsequently filed its Brief in Response to CCOC Order which contains many of the factual recitations, allegations and arguments set forth in previous pleadings. To its Brief the Respondent attached a copy of the carpet contract entered into with Carpet Palace & Interior. ("Carpet Palace"). Respondent disclosed that the original price of $78,000 was reduced to $68,162 and that an initial deposit of $26,000. 00 was made by the Respondent and that the carpeting was a reserve item in the Association's Replacement Reserve Fund. Respondent noted that the Carpet Palace had notified the Association that the carpet needed to be installed as soon as possible because storing such a large order was causing undue hardship and that the Association is "in serious danger of breaching its contract with Carpet Palace." The Respondent also sets forth its legal arguments that the replacement of the carpet was a repair of the common elements which the Board of Directors had a duty to replace under the Bylaws and that the decisions made by the Board are protected by the business judgment rule. Finally, the Respondent sets forth arguments in support of its allegations of undue harm.

II. RULINGS OF LAW ON PROCEDURAL ISSUES

Before consideration on the merits of the Respondent's Motion for Immediate Expedited Relief from Stay the Panel must rule on the jurisdictional issues raised by the Respondent.

A. Whether Section 1-403(b)(2) of the Maryland Corporations and Associations Code Ann. prohibits the CCOC from enjoining the performance of an existing contract when a party to that contract is not before the CCOC?

The Respondent states that the section of the Code cited "...only allow a 'court' to enjoin the performance of an existing contract between a corporation and third party 'if all the parties to the contract' are before the 'court'..." and given that the other party to the carpeting contract, (who is not identified by the Respondent but one assumes is the manufacturer, a regional representative or some such individual or entity), is not a party in this matter the CCOC has no jurisdiction.

The Section cited above reads as follows: "(2) If the act or transfer sought to be enjoined is based on a contract to which the corporation is a party and if all parties to the contract are parties to the proceeding, the court may set the contract aside and enjoin its performance."

This Section describes a circumstance under which a court may "set aside a contract". It does not require that all parties to a contract be parties to a legal action when another party is seeking to enjoin performance of the party who is both a party to the legal action and a party to the contract. Respondent cites no Maryland case supporting its' contention and the Panel's review of numerous cases of the Court of Appeals' review of a lower court order granting or denying injunctive relief finds no such requirement.

B. Whether the case of *Attorney Grievance Com. v. Hyatt,* 301 Md 683, 490 A.2d 1224 (1985) holds that "...where a statute or rule gives a Tribunal the power to hear cases only involving a limited group of individuals ...attempting to litigate the rights of persons outside of this limited group of individuals is beyond the power of the Tribunal..."

The Respondent argues that under Section 10B-9 of the Montgomery County Code the CCOC can only hear disputes between or among parties; and given that a party is defined under 10B-8(8) of said Code as "an owner, a governing body, and an occupant of a dwelling unit in a common ownership community" and given that the other party to the carpeting contract falls outside the definition of party under the Code and cannot therefore be a party to any action tried by the CCOC, according to the decision in the case cited above, the CCOC lacks jurisdiction to hear this matter.

Hyatt involved charges brought by the Maryland Attorney Grievance Commission against Joel Hyatt and others for alleged violations of the Code of Professional Responsibility. The Court held that there was no subject matter jurisdiction over Joel Hyatt because he was not an attorney under the definition of same in Rule BVI given that he was a member of the Ohio bar; had never been admitted to practice law in Maryland and had never been employed as counsel in any case in Maryland.

The Panel holds that *Attorney Grievance Commission v. Hyatt* is not applicable. No attempt is being made to make the other party to the carpeting contract a litigant in the instant case and jurisdiction over said other party is not necessary for the Panel to decide whether the Stay prohibiting the Association from

installing the carpet pending resolution of the issues should be lifted.

C. Whether *International Shoe Co. v. Washington* 326 U.S. 310, 66 S. Ct. 154 (1945) prohibits the CCOC from entering "a judgment or order that will affect the contractual rights of parties that are not before the court."

The Respondent's reasoning is similar to that stated in A. & B. above.

The most relevant issue litigated in *International Shoe* was the contacts or presence necessary for a state to exercise in personam jurisdiction against a corporation whose products were being sold in the state. The Panel concludes that *International Shoe* is also not applicable to the issues at hand.

III. RULINGS OF LAW ON THE MERITS OF THE RESPONDENT'S MOTION TO LIFT THE STAY

Having disposed of the procedural issues the Panel must now consider the Respondent's Motion on the merits. Chapter 10B-9A(d) & (e) of the Montgomery County Code provides a standard for the Panel's deliberations. These Sections of the Code read as follows:

"(d) If a request for relief from a stay which states facts sufficient to show a need for immediate action is not granted or denied within 20 days after the request was filed, the request must be treated as granted."

(e) Except as provided in subsection (d) a request for relief from stay may only be granted if the assigned panel finds that:

(1) enforcing the stay would result in undue harm to the community association; and

(2) lifting the stay will not result in undue harm to the rights or interests of any opposing party."

There are no CCOC decisions applying the standard set for above. With limited guidance the Panel turns to case law applicable to injunctions since the Respondent's Motion can be equated to a motion for lifting an injunction. Cases on this issue all agree on the factors to be considered in granting an injunction and conversely in continuing one. The court in *M. Leo Storch Ltd. Partnership v. Erol's Inc.* enunciated the "well-settled" factors as follows: "(a) proper exercise of discretion requires the court to consider four factors: likelihood of success on the merits; the balance of convenience; irreparable injury, which can include the necessity to maintain the status quo; and, where appropriate, the public interest." (95 Md. App. 253, 257; 620 A.2d 308,410, 1992).

The Panel feels that the "rights and interests of any opposing party" can be interpreted as having to consider whether said party is likely to prevail on the merits. Logic dictates that the rights and interests in question are those afforded in the matter at hand. The Panel therefore turns to an examination of the Complainant's likelihood of success which must start with the Complainant's allegation of a violation of the Bylaws in approval of the carpeting.

A. Whether the new carpeting is a replacement or alteration?

Article V, Section 5 of the Association's Bylaws makes the Board of Directors "...responsible for the maintenance, repair and replacement...of all of the Common Elements, the cost of which shall be charged to all Unit Owners as a Common Expense."

Section 6 of said Article states "...whenever in the judgment of the Board of Directors the Common Elements shall require addition, alterations or improvements costing in excess of Ten Thousand Dollars during any period of twelve consecutive months, the making of such additions, alterations or improvements shall be approved by a Majority of the Unit Owners and the Board of Directors shall proceed with such additions, alterations or improvements and shall assess all Unit Owners for the cost thereof as a Common Expense."

The Complainant argues that the carpeting is an alteration which requires approval by a majority of the unit owners. According to the pleadings both parties agree that the cost of said carpeting exceeded ten thousand dollars and that the expenditure would be incurred during a twelve consecutive month period.

The Court of Special Appeals of Maryland in *Balderston v. Balderston,* 526 A.2d, 71 Md. App. 390 (1987), has issued a clear standard by which to make a determination of whether the carpeting was a replacement or alteration. In the Balderston case the plaintiff sought to recover from her ex-husband the cost of what she classified as capital improvements to the former marital residence reimbursement for which she was entitled under the separation agreement executed by the parties. Included in her list of so-called capital expenditures, the total cost

of which exceeded $22,000.00, was kitchen remodeling, rebuilding the hot water heating system, repaneling the foyer, rebuilding a gate, installation of electrical wiring, refinishing walls in the master bedroom, installation of a new roof, replacement of water pipes, sanding and staining wood floors, new lighting fixtures and the installation of a new dishwasher for the kitchen. The Master had awarded Mrs. Balderston the entire amount requested. The Circuit Court found that "the only true capital improvements made were the addition of a dishwasher and new lighting fixture.." both of which were new additions and awarded Mrs. Balderston $359.86.

The Court of Special Appeals found the lower court's analysis too "simplistic" and remanded the case for further consideration with the following guidance: "We shall remand so that the court can look more closely at the various expenditures claimed by Mrs. Balderston. In judging whether to give credit for them, the court must consider their primary purpose. The mere fact that the work done or items purchased serve to increase the value or attractiveness of the property is not determinative for routine maintenance can do that. While there are few hard and fast rules and the standards applied in other settings (such as for tax purposes) need not be applied carte blanche, in this context, we think that, in general, the court may consider:

(1) as repairs or normal maintenance, expenditures made primarily to correct or ameliorate the effects of normal physical deterioration resulting from use, exposure to the elements, or the passage of time, i.e. to keep property in good condition during its probable useful life or to replace or substantially restore appliances or fixtures having a limited useful life that has essentially expired; and

(2) as capital improvements, expenditures made primarily for significant or substantial changes to the property." (71 Md. App. 390, 399, 526 A. 2d 59, 64.)

See also, Lee v. University Towers Condominium Ass'n CCOC #52-08 (2009) which involved the installation of an epoxy coating to halt pinhole leaks in copper piping. The panel held that this was a repair that did not require membership approval; *Glenn v. Park Bradford Condominium Ass'n* CCOC # 29-11 (2012) in which a contract over $25,000.00 to study the feasibility of installing central air conditioning in an apartment building which had no such amenity was at issue. The panel ruled that this was an improvement which required membership approval.

The amount in question is also not often dispositive as exemplified by the decision in *Gennis v. Pomona Park Bd. of Mgrs.,* 36 A. D. 3d 661, N.Y. App. Div. (2007), in which the court held that a 1.5 million dollar project for roof and other "restorations" of common areas were repairs which could be undertaken without the approval of unit owners.

Applying the standard set forth in the *Balderston* case the Panel hereby rules that the new carpeting was a replacement. Although it may have enhanced the value of the property it was acquired to address the effects of normal wear and tear. The Board of Directors was therefore not required to seek the approval of a majority of unit owners.

Having ruled that there no violation of governing documents the Panel then turns to the kind of examination which the Board of Directors' decision would undergo by a CCOC panel ruling on the merits and we are led to the issue of the application of the business judgment rule.

B. Whether the Board of Directors decision was covered by the Business Judgment rule?

It is well settled law that the management of the affairs of an association is the purview of a board of directors. The Board decides if and when to make repairs and improvements and has considerable flexibility with reference to same and the courts have repeatedly ruled that absent bad faith or fraud the courts will not second guess the Board's decisions. This is known as the business judgment doctrine. As noted in the *Staff's Guide to the Procedures & Decisions of the Montgomery County Commission on Common Ownership* "...the business judgment rule is derived from the law of corporations and it is applied to common ownership communities because most of them are also corporations, and even then they do not have a corporate charter they are governed like corporations." *Id* at 84.

The CCOC Staff Guide identified above summarized a number of decisions applying this doctrine.

Given the breadth of the rule's application which entertains no room to examine whether the decision was right or wrong it is the judgment of the Panel that based on the record before us the Complainant is unlikely to prevail. Consequently the Panel further finds that lifting the stay will not result in undue harm to the rights or interest of the Complainant given that the Panel finds no such rights afforded them in this matter.

The last consideration is whether the stay will result in undue harm to the community association. Although the harm is difficult to measure given that it is somewhat prospective, if the Stay is

continued the association faces possible breach of contract, storage charges, damages for delays in its failure to honor the contract, etc.

The Panel therefore concludes that enforcing the stay will result in undue harm to the community and hereby rules that the Stay should be lifted.

IV. DECISION AND ORDER

Accordingly, it is by the Panel, this 24th day of March, 2016, ordered that the Respondent's Motion for Immediate Expedited Relief from Stay is hereby granted.

Panel members Aimee Winegar and Mark Fine concur in this Decision and Order.

Marietta Ethier

Marietta M. Ethier, Panel Chair