[2018] JMSC Civ 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV00855

BETWEEN	**MICHELLE NAYLOR**	**1ST CLAIMANT**
AND	**ANDRE EARLE**	**2ND CLAIMANT**
AND	**YASMIN RHODEN**	**3RD CLAIMANT**
AND	**HEADLEY HINES**	**4TH CLAIMANT**
AND	**LENWORTH MARSHALL**	**5TH CLAIMANT**
AND	**MARIA DAVIS**	**6TH CLAIMANT**
AND	**GOLDA GAYLE**	**7TH CLAIMANT**
AND	**ANTONIE EDWARDS**	**8TH CLAIMANT**
AND	**ASTON SMITH**	**9TH CLAIMANT**
AND	**MARCIA SAWYERS**	**10TH CLAIMANT**
AND	**SYBIL WEBLEY**	**DEFENDANT**

IN CHAMBERS

Jacqueline Cummings instructed by Archer Cummings & Co. for the Claimants

Leroy Equiano and Denise McFarlane for the Defendant

November 9 and 21, 2017, December 19, 2017 and January 18, 2018.

PALMER, J

Contract – Maintenance of Common Areas to joint property not falling under the Registration (Strata Titles) Act – Reimbursement for sums expended – whether a legal obligation to pay maintenance exists.

EVIDENCE

[1] The Claimants and the Defendant are owners of units at a complex known as Wellington Manor located at Wellington Drive, Kingston 6 in the parish of St. Andrew ("the Complex"). The Complex was built in the 1960s and is comprised of twelve (12) units, with the proprietors of each unit sharing common areas to include the driveway, swimming pool, a garbage hut and a guard house. The Certificate of Title of each proprietor's unit entitles each registered proprietor to one undivided one-twelfth share in the common area. According to the Claimants, each proprietor has equal entitlement to the use and benefit of the common areas and is likewise responsible for maintaining the common areas. Expenses are incurred in paying for the use of utilities such as water and electricity, necessary for use in the common areas, as well as the cost to pay a gardener and caretaker to maintain and secure the Complex.

[2] The Defendant became a proprietor of her unit in or about 1996 and according to the Claim, has since paid nothing towards the maintenance of the common areas of the Complex. To be more specific, she has paid sums towards various expenses for the Complex but denies that these sums were intended to be treated as maintenance. The Claim does not state when the Wellington Manor Home Owner's Association ("the Association") was formed to manage the common areas of the complex, but it would appear that it was after the Defendant became a proprietor. The Association's membership is comprised of proprietors to the units in the Complex; that is, all the proprietors exclusive of the Mrs. Webley.

[3] The Association members determine the monthly maintenance charge due from each proprietor to maintain the Complex, as well as the amount for property taxes, insurance and maintenance of the common areas. Over the years as the

maintenance costs and demands have increased, Mrs. Webley had never paid a formal maintenance fee, despite judgments having been obtained in the Resident Magistrate's Court for arrears of maintenance.

[4] According to the affidavit of Charmain Rhoden, Secretary of the Association, (and 3rd Claimant herein) the Association has taken steps to bar the Defendant from use of the pool area and the garbage hut for her failure to pay anything towards the maintenance of the complex. These efforts however have borne no fruit. Several letters written in an attempt to persuade her pay, which has also proven unsuccessful. The evidence of Michelle Naylor (1st Claimant) suggests that she was never successfully barred from any of these amenities.

[5] By way of a Fixed Date Claim Form the Claimants sought the following remedies:

(a) *An Order and/or Declaration that the Claimants and the Defendant are liable to pay maintenance fees for the upkeep and maintenance of the common area of Wellington Manor;*

(b) *An Order and/or Declaration that the Wellington Manor Home Owners Association have the right and responsibilities to access and determine the appropriate fees to be paid by each owner of the property at Wellington Manor for maintenance fees herein;*

(c) *An Order and/or Declaration that the Defendant do pay to the Wellington Manor Home Owners Association all outstanding sums due and owing by her for maintenance fees for the property/ apartment in the said complex;*

(d) *Such further relief as this Honourable Court deems fit;*

(e) *Costs.*

[6] In her affidavit in response to the Fixed Date Claim Form, Mrs. Webley stated that in 1994 she lived in St. Mary when her now ex-husband bought the property at Wellington Manor for use as their Kingston home. Not until her separation from her

husband in 2003 did she start living at the Complex. She agrees that the common areas are for the joint use with the other proprietors and is aware that there are expenses associated with maintaining the common areas, to include for utilities and gardening. She however complained that there has never been transparency relating to the attendant costs for maintenance of the Complex.

[7] Mrs. Webley says there was no agreement arrived at with her regarding the payment of a fixed monthly maintenance fee and she is not a member of the Association. She has a different view as it relates to the claims filed in the Resident Magistrate's Court, as she claims that judgments were never entered in them. In the Affidavit in support of the Fixed Date Claim Form there is mention of three (3) payments made of $10,000, $6000 and $6000 for the months of March, May and August of 2008 which she states in her affidavit were made upon proof of expenses shown to her to justify payment. She maintains that these sums were not for maintenance.

[8] Mrs. Webley confirms that on occasions, members of her household have been denied access to the pool area, garbage hut and laundry room, and that changes were made to the automatic gate locking system without her being given the necessary access. She cannot however state whether it was as a result of the non-payment of maintenance or any other sum or for any other reason. She claims to be willing to pay her portion of the expenses but has not been given proof of expenses incurred in order to pay her portion, despite much dialogue between herself and other owners in the Complex. Mrs. Webley asserts that this claim is an attempt to force an agreement that she never entered into and has refused to consent to.

[9] In Mrs. Webley's said affidavit she exhibited a letter dated August 28, 2013 sent to Andre Earl, one of the proprietors of the Complex and the 2nd Claimant herein. In it she acknowledges paying money in the past towards repair of the pool area, laundry room, storage room and roof of the caretaker's cottage. In particular, she acknowledged paying a sum she referred to as 'back maintenance' for the period

prior to her moving in. In the letter she complained of the deficiencies in the maintenance of the property and that she is prepared to pay maintenance. She however clarified that while she was willing to pay it for certain expenses, her willingness did not extend to the cost of paying the caretaker due to her displeasure with him. The evidence is that the parties agreed that she would pay a reduced sum for maintenance because of this issue with the caretaker and the remaining proprietors would pay the cost of the caretaker.

[10] She states in the letter, *"I am willing to contribute towards hiring someone to come in to provide gardening and general upkeep and maintenance of the common areas only"*, but continued that she saw no need for a live-in caretaker. She saw no need to contribute to the maintenance of a laundry room that she agreed having used before, but which she was at the time locked out of. She agreed to contribute to the maintenance of the gate, and to the payment of charges associated with operating the outside lights, once she was able to see the bills in advance. She was amenable to contributing to the installation of a separate meter for the watering of planted areas, provided that she could see the bills. She also was in agreement with contributing to the cost of cleaning the garbage hut but not for maintaining the pool area. There were several other conditions that Mrs. Webley indicated that she wished to have addressed in order for the Complex to run smoothly, especially as it relates to maintenance of the common areas.

[11] The Claimants responded to the Defendant's affidavit in the affidavit of Michelle Naylor, the 1st Claimant and a proprietor in the Complex. Ms. Naylor's evidence revealed that there was an initial period in which the Defendant would pay her contribution to the maintenance expenses, however she eventually stopped making payments because she stated that she could not afford it. Ms. Naylor's evidence revealed that on an occasion when they obtained judgment against Ms. Webley, the Bailiff had nothing to seize as the Defendant only had a motor vehicle which was registered in her sister's name.

[12] Mrs. Naylor stated that Mrs. Webley attended a meeting of the Association where she agreed to contribute to the common area expenses, except for those relating to the caretaker and it was agreed that she would pay $1000 less than the $6000 being paid by the other owners towards maintenance. She asserts that Mrs. Webley was always kept abreast of the expenses and given documentary proof of them. Despite the complaints outlined by Mrs. Webley in the 2013 letter, Mrs. Naylor states that Mrs. Webley only raises issue about the caretaker.

[13] Mrs. Naylor asserted that all the information regarding the expenses associated with the maintenance of the common area were always available to all the unit owners including Ms. Webley. The books were kept by another unit owner who was an accountant and at no time did the Defendant indicate that there was a discrepancy with the accounts. She deposed that even when the utility bills are sent to Ms. Webley as requested or costs for the upkeep of the common areas such as buying chlorine for the pool, Ms. Webley has refused to contribute to them. On each occasion she would instead raise a new issue, make a fresh demand or criticize some aspect of the maintenance of the Complex and name that as the cause for her refusal. She would state that no payment would be made until the named issue was resolved. Mrs. Naylor stated that Mrs. Webley used to contribute to the expenses of the common area but expressed the view that she stopped, not because she believed them to be unfair or any other reason stated in the affidavit, but because she was unable to afford it.

[14] Ms. Naylor had exhibited a letter that Ms. Webley alluded to in her evidence and stated that as soon as Ms. Webley was provided with an estimate for the repair of the highlighted areas she came up with an excuse as to why she was unable to make a contribution. She stated that her letter suggests that they should have a structured management team but Ms. Naylor stated that had she shown interest in participating in owner’s meetings she would be aware that there is a team consisting of a president, treasurer, and personnel who assists with getting quotations and estimates for the major repairs to be done in the complex.

[15] Ms. Naylor stated that in her letter, Mrs. Webley, highlighted the damaged picket fence but she refused to contribute to the cost of repair, which was eventually completed with no contribution from Mrs Webley. While her letter expressed a willingness to paint her own apartment if made aware of the colour to be used, she remained unwilling to contribute to the painting of several other portions of the common area that also needed repainting.

[16] She recounted an incident in which Ms. Webley complained that there were potholes on the driveway that were so deep that residents found it difficult to walk from their cars to their apartments. When the proprietors came together and got a quotation to asphalt the driveway, Ms. Webley refused to contribute and when completed, claimed that the work was not properly done. The asphalting remained undamaged up to the time of trial, three years later.

[17] Mrs. Naylor stated that Ms. Webley cannot be locked out of the garbage skip and laundry room and as such she uses the facilities freely and her daughter would even sell Avon Products by the pool area at times, unimpeded. Mrs. Webley had goods and materials she kept in the storeroom on the property which was for the use of all the owners. Ms. Naylor also spoke of an incident when the Defendant had dumped building materials in bags by the skip, adjacent to unit one, and the other members of were forced to pay a contractor to dump the debris as the garbage truck does not collect building material.

[18] Contrary to Mrs. Webley's assertion, Ms. Naylor stated that the code to the gate has never been changed and she was unaware of any incident in which the remotes were changed without Ms. Webley's knowledge, as it can only by reprogrammed by the gate contractor. There were occasions when the gate had to be reprogrammed but she deposes that Ms. Webley is familiar with the gate contractor Company and has not only had her gate remote programmed, but has also ordered additional gate openers for her own use. To her knowledge Ms. Webley has never been barred from using the gate, yet when the gate motor and sensors required major repairs costing over One Hundred Thousand Dollars

($100,000.00) she refused to contribute to its repair. Mrs. Webley also complained of the main gate being in disrepair but refused to contribute to its replacement, despite the need to secure the complex.

[19] Mrs. Naylor deposes that many of the present unit owners were not owners of the complex in 1995 and as such all allegations of events occurring during that period are refuted by the current home owners and nevertheless her allegations have no bearing on the expenses continuously incurred to maintain the common area. None of the Claimants' witnesses were cross-examined.

CLAIMANTS SUBMISSIONS

[20] The Claimants argue that the Defendant is contractually bound by the Home Owners association to pay maintenance fees. The Claimants agree that the WMHOA cannot enforce a maintenance fee for common areas without the proprietor's consent to same. However, they are of the view that the Defendant has consented to be liable to the Association by express adoption and implied conduct.

[21] The Claimants argue that the Claimant had attended an Association meeting where a subsequent agreement was reached that she would pay maintenance fees with the exception of the fee to be paid to the caretaker. It was submitted that this created a legally binding contract between the Association and the Defendant. The Claimants however accept that thus agreement is not in writing and as such, the conduct of the Defendant is key in determining whether there was an acceptance of a contract to pay maintenance fees. Counsel argued that on the evidence, there is clear proof of the existence of an agreement.

[22] In support of this point counsel relied on the case of ***Reville Independent LLC v Anotech International*** (UK) Ltd [2016] EWCA Civ 443, in which there existed a term of the agreement that the acceptance must be in writing, however the arrangement broke down before the written agreement was signed by the Claimant. The question for the court was whether the Claimant's conduct was

sufficient to amount to a waiver of the requirement for signature and whether acceptance by conduct had occurred and had been communicated to the defendant. The Court of Appeal held that the Defendant's use of the Claimant's intellectual property as per the contract constituted an acceptance to be bound under the contract.

[23] Counsel argued that in the present case, the Defendant admitted in her affidavit that she had paid maintenance towards the property and this was further evidenced in her letter dated August 28, 2013 to Mr. Andre Earle. Counsel argued that her conduct clearly evidences an intention to be bound by the Associations requirement to contribute to maintenance, regardless of the fact that she has not signed an agreement committing to do same, she has by her conduct accepted that she is bound to the agreement.

THE DEFENDANTS SUBMISSIONS

[24] Counsel submitted that the evidence as presented by the Claimants is conflicting, and that in the absence of a Strata Corporation there should be a contractual agreement that is binding on the original and future owners of the units in the complex. Counsel argued that the Claimants have implemented a monthly maintenance fee without the Defendant's input and are seeking to impose on her an obligation to pay, which has been bluntly refused. He contends that there exists no contractual maintenance fee agreement between herself and the Claimants

[25] Counsel contended that the Defendant can only be said to be owing the Association maintenance fees if the Association and Defendant have entered into a contractual relationship. Counsel argues that as it stands there is no contract between the Association and the Defendant and the Association cannot ask that a contract be imposed on the Defendant.

[26] Counsel asserts that as is the case with laws and bi-laws of Strata Corporations the home owners contract should state the rules governing the contractual arrangements between each other. Counsel argued that because of the fact that

Manor is not governed by the Registration (Strata Titles) Act there is no obligation on the Claimants to keep and produce accounting records and annual statements to be audited. Consequently, counsel maintained that the Defendant is under no obligation to make contributions to the complex where she is not provided with statements, bills and other related documents of reasonably incurred expenses.

[27] Counsel contended that it is clear that the home owners do meet and make decisions via email which the Defendant is not privy to. It was asserted that the Defendant has a right to be involved in the decision making process and believes there should be transparency as to how the decisions are made and how fees for maintenance of the common areas are incurred.

[28] Counsel maintains that the Defendant has never been provided with documentary proof of these expenses. Counsel asserts that where a decision is being made in relation to the maintenance of the complex, it is essential that the associated costs are communicated to all home owners to allow them the option to agree or disagree with same.

[29] Counsel argues that the affidavit in support of the Fixed Date Claim Form does not outline how expenses are incurred and in absence of same the Defendant will have no knowledge of whether the costs incurred are equally apportioned among the twelve home owners and is resultantly unware of the basis on which she is being asked to pay the monies.

[30] Counsel argues that the Defendant is aware that there are maintenance fees associated with the common areas. The subdivision plan of the Certificate of Title for the complex states that maintenance is the responsibility of all the lot owners and as such it is an act in futility for the Claimants to seek a declaration that all the parties to the claim are liable to pay maintenance when such a responsibility has already been accepted.

[31] Counsel argues that there has been no reference to an implied contract between the association and the defendant throughout the pleadings, as such the court is

powerless to impose a contract without more. Counsel argued that the Claimants claim must fail.

ANALYSIS

[32] The Association is comprised solely of the proprietors of the Complex and Mrs. Webley, though a proprietor, is not a part of the Association. Mrs. Webley has in her evidence acknowledged that there are expenses associated with maintaining the Complex and even her willingness to contribute to these expenses. There is no question that there is no written agreement for her to pay maintenance but the Claimants' position is that there was an oral agreement with Mrs. Webley for the payment of maintenance. However, while it is evident that she benefits from all the amenities for the Complex, to include the presence of the caretaker, a compromised maintenance fee was agreed to that allowed for her issues with the caretaker.

[33] The contention for the Defendant is that in the absence of the Complex being she can only be bound to pay maintenance

[34] She says that She also never signed a maintenance agreement. She however benefits from all the amenities on the Complex being part of a Strata Corporation that there is no legal basis to compel Mrs. Webley to pay maintenance other than that she signs an agreement. I agree with Counsel that she cannot be compelled to pay maintenance unless mandated to by statute under the Strata Corporations legislation or that there is in fact an agreement in place. However, I do not agree that the agreement need be in writing, though that certainly would have been preferable.

[35] It is clear that with the many meetings, letters and other interactions between Mrs. Webley and the Association that there was every intention to enter into legal relations. Yes, it was born of the desire to see her contribute to the overall expenses of the Complex, the amenities of which she benefits entirely, but there was no question that the objective to ensure that she be legally bound to pay a

contribution to expenses rather than have to be approached and persuaded to pay on each occasion. I believe, on a balance of probabilities that Mrs. Webley agreed to pay this reduced maintenance and though she continued to benefit from the presence of the caretaker, that this compromise was reached. I accept that the parties negotiated on this point and she agreed to the lesser sum for which she made sporadic and ad hoc payments, but paid nonetheless on occasion. When approached for the sum agreed she would raise some added concern, acknowledging the agreement to pay but stating that until a particular frivolous requirement was met, she was no going to pay.

[36] This approach to the payment of the fee is untenable, as the expenses continue to accrue and they must accordingly be met by the other proprietors. Maintenance of the pool area, which she acknowledges that her daughter has access to, to conduct her business and maintenance of the other amenities come at a cost and having agreed to pay, it cannot be that Mrs. Webley choose when and how she complies with the obligation, but continues to benefit from the agreement nonetheless. Automatic gate access for example, was installed for which Mrs. Webley has not only had her own remote control but has had additional remote controls programmed for others of her household to use. She complained about the condition of the gate and it was replaced. I don't not accept her account that she was never supplied with documentation to support these expenses, and she would have had clear sight of the new gate and had the benefit of access even when the code was changed.

[37] As it regards the repair or renovation of the common driveway, once again Mrs. Webley expressed her willingness to contribute to same. In fact, from the evidence, it would appear that the move to conduct the resurfacing was in part spurred on because of her complaints about the potholes that one had to navigate to get from one's vehicle to their individual dwellings. After the resurfacing was done she did not object to paying a contribution but complained that the work was unsatisfactory, though she has continued to make use of it and there is no evidence to refute that of the Claimants that it continues to be in good and serviceable condition. I find

that while this did not form a part of the regular maintenance, that there was an agreement that she would contribute to the cost of resurfacing. Despite her complaints as to the quality of the work, the unchallenged evidence of the Claimants is that the asphalt has remained intact and she has continued to make use of the access. It is only fair and just that she pay her part towards the maintenance of the Complex and I find that she agreed to do same but has, through the various complaints and excuses, sought to avoid keeping to her agreed obligations.

[38] Applying the principles in the ***Reville Independent LLC*** case, Mrs. Webley actually negotiated terms for the agreement that would have her paying a lesser sum for maintenance. Prior to that negotiation, she agreed that a sum for maintenance was necessary to address expenses associated with maintaining the common areas and common amenities. She clearly acted as if she had the entitlement to continue to enjoy these facilities as she had agreed to pay maintenance and had even made paltry payments towards outstanding sums. She also acknowledged that it was necessary for her to pay something towards the repair of the common asphalted driveway and while acknowledging it, refused to carry out her obligation using the excuse of imagined defects in the workmanship. There is no indication that there was an agreement to sign a formal agreement, as in the case cited, but it was clearly the understanding that an agreement existed, in which she would commence paying an adjusted sum as her monthly contribution to maintenance.

[39] It is also an inescapable conclusion that from the inception of the Complex, each proprietor had a one-twelfth share in the common area. In practice each has exercise equal access and benefit of the areas. Mrs. Webley has paid little since coming into possession of her dwelling in the Complex to contribute to the maintenance and upkeep of the common areas. In effect, the other proprietors have always been substantially covering her portion of maintaining these areas, despite knowing that there are expenses associated with so doing and being furnished with same. It is unjust that she should accept the benefit of the one-

twelfth share, but none of the obligations. She has thus far been satisfied with the other proprietors covering those expenses as the nature of the common area does not make isolating her one-twelfth share possible.

[40] It was submitted on behalf of the Defendant that as a homeowner she has a right to know the expenses incurred in maintaining the common areas. There are general expenses that are mentioned that are generic and common place in nature such as the cost of a gardener or general maintenance of the common areas. It is different for unusual expenditure such as was undertaken for the driveway and for the gate. But it is impractical to require the association to produce documentation (which they nonetheless say they did) every time a regular expense involving the maintenance of the common area is to be undertaken. It is clear that this requirement was used more as a delay tactic than borne of any true need to be informed.

[41] I find the account given by the Claimants that she agreed to pay the adjusted maintenance charges, on a balance of probabilities, to be preferable to the account given by Mrs. Webley that she did not. I also prefer the Claimants' account regarding the agreement that she would contribute the cost of rehabilitating the driveway surface. I am prepared to give judgment in their favour accordingly.

Ruling

[42] Based on the foregoing it is declared as follows:

(i) That the Claimants and the Defendant are liable to pay maintenance fees for the upkeep and maintenance of the common areas of the Wellington Manor;

(ii) That all the proprietors of Wellington Manor have the right and responsibility to assess and determine the appropriate fee to be paid by each owner of units in Wellington Manor;

(iii) That for the period of March 2010 to February 2012 the sum of $4000 per month was an appropriate fee for the maintenance of the common areas and from March 2012 to February 2016 $6000 per month was an appropriate fee;

(iv) That based on oral agreement all the parties agreed that Mrs. Webley, the Defendant, would pay a sum that was $1000 less than what the other owners of units in Wellington Manor were paying for maintenance;

(v) That the Defendant has paid nothing towards the maintenance of the common areas of Wellington Manor for the period of March 2010 to present;

(vi) That the monthly sum due to be paid by Mrs. Webley for the period from March 2010 to February, 2012 is @ a rate of $3000/month and from March 2012 to February 2016 @ a rate of $5000 per month;

(vii) That the Defendant contributed nothing towards the repair/ renovation of the common driveway which was understood to be done at a cost in excess of the usual maintenance fees;

(viii) That her portion of the cost to repair/ renovate the common driveway and any maintenance due after 2016, are to be assessed in open court on July 20, 2018;

(ix) That the parties shall by June 1, 2018 file witness statements speaking to the issue of the cost of the repair/ renovation of the driveway as well as the maintenance fee for the period for March 2016 to present;

(x) Costs to the Claimants to be taxed if not agreed;

(xi) Leave to appeal is granted to the Defendant;