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ROBERTA J. GOLLON *vs.* ALFONSO CARAMAZZA & others.[1]

1 Kathryn L. Link, and Jules Fried, John Mccullough, and Laurence Onie, "as Board Members of the Sewall-Marshal Condominium."

15-P-1535

APPEALS COURT OF MASSACHUSETTS

90 Mass. App. Ct. 1108; 2016 Mass. App. Unpub. LEXIS 949

October 4, 2016, Entered

JUDGES: Cohen, Trainor & Grainger, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this dispute between condominium neighbors, the plaintiff Roberta J. Gollon, owner of a unit in the Sewall-Marshal Condominium (condominium), asserted a claim of breach of fiduciary duty against the condominium's board of trustees (board), and claims of nuisance and defamation against owners of another unit. She also sought injunctive relief, a declaratory judgment, and attorney's fees. The judge allowed the defendants' motions to dismiss Gollon's complaint on all counts except the request for declaratory judgment, with respect to which he ruled in favor of the defendants. For the following reasons, we affirm the dismissal of the breach of fiduciary duty claim and the dismissal of the nuisance claim. We vacate the declaratory judgment.[2]

2 Gollon did not appeal the dismissal of her defamation claim. The parties have agreed that the injunctive request is moot.

We recite the facts from the pleadings, drawing any inferences in the plaintiff's favor. *Eigerman* v. *Putnam Invs., Inc.*, 66 Mass. App. Ct. 222, 223, 846 N.E.2d 418 (2006). In 1999, defendants Alfonso Caramazza and Kathryn L. Link (collectively Caramazza) purchased a unit below Gollon's unit in the condominium. Caramazza did not own a dog at the time but acquired a dog in 2004. Section 5.7(a) of the condominium by-laws forbade unit owners from keeping a pet unless they did so in accordance with certain exceptions specified in the condominium rules and regulations (rules). Rule 3 states that owners may keep a pet without board approval if they owned that pet at the time of unit purchase.

Gollon took exception to Caramazza's acquisition of the dog and complained to the board, claiming that the dog barked incessantly, that the dog relieved itself in common areas, and that the dog's dander irritated her. Although the board initially asked Caramazza to remove the dog, it reversed itself after determining that Caramazza took steps to control the dog's behavior. The

board waived the pet ownership restriction rule prohibiting after-acquired pets in reliance on its power to waive rules as allowed by the by-laws.

As stated, Gollon filed a complaint in the Superior Court alleging breach of fiduciary duty against the board members and claims for nuisance and defamation against Caramazza, seeking injunctive relief.[3] Gollon timely appealed the dismissal of the breach of fiduciary duty claim, the nuisance claim, and the order stemming from her count for declaratory judgment. We review the grant of a motion to dismiss de novo.[4] *Okerman* v. *VA Software Corp.*, 69 Mass. App. Ct. 771, 774-775, 871 N.E.2d 1117 (2007).

> 3 She also sought an injunction to remove the dog and legal fees from the board and Caramazza. These issues are not before us.
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> 4 "A complaint may properly be dismissed for failure to state a claim when it appears certain that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Okerman* v. *VA Software Corp.*, 69 Mass. App. Ct. 771, 774, 871 N.E.2d 1117 (2007) (quotation omitted).

Breach of fiduciary duty. Gollon asserts that the board breached their fiduciary duty by failing to remove the dog. The judge dismissed the breach of fiduciary duty claim on the grounds that the board's permissible waiver of the rule did not breach the duty. However, we note as a predicate that the board owes no such duty to individual unit owners such as Gollon. *Office One, Inc.* v. *Lopez*, 437 Mass. 113, 125, 769 N.E.2d 749 (2002), citing *Cigal* v. *Leader Dev. Corp.*, 408 Mass. 212, 219, 557 N.E.2d 1119 (1990). Accordingly, the result was correct. See *Hawthorne's, Inc.* v. *Warrenton Realty, Inc.*, 414 Mass. 200, 606 N.E.2d 908 ("[W]e are free to adopt different reasoning and affirm a judgment on grounds not specifically relied upon by the judge").

Nuisance. Gollon relies on *Asiala* v. *Fitchburg*, 24 Mass. App. Ct. 13, 17, 505 N.E.2d 575 (1987): "A private nuisance is actionable when a property owner creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another." She fails to address additional requirements that are well established in our case law. Specifically, to find a nuisance, a property owner's conduct must be intentional and unreasonable or unintentional and negligent, reckless, or ultrahazardous. *Morrissey* v. *New England Deaconess Assn.*, 458 Mass. 580, 588 n.15, 940 N.E.2d 391 (2010).

The judge did not err in concluding that Gollon's allegations, taken as true, did not set forth a substantial and unreasonable interference with her enjoyment of the property. In her complaint, Gollon alleges that the dog barked in a "loud and often continuous" manner that lasted "more than ten minutes at a time," and that Caramazza would walk the dog in the condominium garden and let it urinate there. She further alleges that she has a history of allergic reactions to dogs, and that she suffered such allergies after the dog's arrival.

Although Gollon correctly claims that excessive barking can be a nuisance, facts under which barking has been found to be a nuisance are significantly more extreme than the instant case. See *Commonwealth* v. *Ferreri*, 30 Mass. App. Ct. 966, 966-967, 572 N.E.2d 585 (1991) (between nine and fifteen dogs barking "in chorus" which "disturb[ed] sleep" and "frightened children"); *Bailey* v. *Shriberg*, 31 Mass. App. Ct. 277, 278-279, 576 N.E.2d 1377 (1991) (multiple dogs barking and blaring radios that were "pervasive" and "intended to cause and did cause emotional upset"); *Larsen* v. *McDonald*, 212 N.W.2d 505, 508 (Iowa 1973) ("at least 40 dogs on the property" and "a sickening odor" from dogs' urine). Her reliance on *Rattigan* v. *Wile*, 445 Mass. 850, 857, 841 N.E.2d 680 (2006), is unavailing as the judge found in that case that the defendant acted intentionally to harass his neighbors and in doing so, disregarded public safety.

The only physical ailment Gollon alleges are her allergies. However, "[i]njury to a particular user of specially sensitive characteristics does not render [the objected-to behavior] an actionable nuisance." *Lynn Open Air Theatre, Inc.* v. *Sea Crest Cadillac-Pontiac, Inc.*, 1 Mass. App. Ct. 186, 187, 294 N.E.2d 473 (1973). See *Wade* v. *Miller*, 188 Mass. 6, 7, 73 N.E. 849 (1905) ("Where the question of a private nuisance is raised, the result produced by it upon persons of ordinary health and sensitiveness rather than upon those afflicted with disease or abnormal physical conditions is to be taken as the criterion"). Gollon claims no other ill effects from the dog's presence. The judge correctly dismissed Gollon's cause of action for nuisance. See *Mills* v. *Keeler*, 351 Mass. 502, 503-504, 222 N.E.2d 749 (1967) (affirming dismissal of nuisance complaint where plaintiff failed to allege "intentional, wanton or reckless, or negligent" conduct regarding purported "excessive barking" when "no physical force [was] applied to the plaintiff" by dog).

Declaratory judgment. Gollon sought a judgment declaring that the board must enforce the by-laws and rules with respect to after-acquired pets, and can neither waive nor selectively enforce them. The judge ruled that the board had the authority to refuse to require Caramazza to remove the dog from his unit.

However, G. L. c. 183A, § 11(*d*), inserted by St. 1963, c. 493, § 1, requires by-laws to provide a "method

of adopting and of amending administrative rules and regulations governing the details of the operation and use of the *common areas and facilities*" (emphasis added). This language permits administrative rules and regulations to govern only the usage of common areas, not that of the units themselves. Therefore rule 3, which purports to allow unit owners to keep pets in their unit is without statutory authorization. *Johnson* v. *Keith*, 368 Mass. 316, 318-320, 331 N.E.2d 879 (1975) ("[A]n administrative rule or regulation [that] undertakes to regulate conduct in individual units [is] without statutory authorization").

Section 5.7(a) of the by-laws requires owners to "maintain [their] Unit in good order and repair, and . . . not keep pets or animals therein, except as may be permitted by the rules and regulations." To the extent the last clause of this provision implies that a right to keep a pet in a condominium unit may be delegated to the rules, G. L. c. 183A, § 11(*d*), is to the contrary and governs the result here. A restriction on pet ownership in the by-laws is a valid restraint on a condominium unit owner's usage of their unit under G. L. c. 183A, § 11(*e*). See *Noble* v. *Murphy*, 34 Mass. App. Ct. 452, 455-460, 612 N.E.2d 266 (1993).

The board does not have discretion to modify or waive the by-laws sua sponte; only an approval of two-thirds of the unit owners may amend the by-laws. By-laws § 10.1. Accordingly, we vacate the judge's order on the count seeking declaratory judgment.

Conclusion. We vacate the portion of the judgment declaring that the board has no duty to order the removal of the dog from Caramazza's unit.[5] We otherwise affirm the judgment. The case is remanded for the entry of a declaration that the board cannot waive by-law provisions regulating the possession of pets in individual condominium units without a two-thirds vote of the unit owners required by the by-laws. The defendants' requests for attorney's fees and costs are denied.

5 Based on this record, we do not preclude the possibility that the issue of the board's obligation to enforce the by-laws is an issue capable of repetition yet evading review. See *Seney* v. *Morhy*, 467 Mass. 58, 61, 3 N.E.3d 577 (2014).

So ordered.

By the Court (Cohen, Trainor & Grainger, JJ.[6])

6 The panelists are listed in order of seniority.

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