PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Pro Se – Appeal – Concise Statement of Errors – Post-Trial Motions – Waiver

Defendant Cynthia Kortz filed an appeal from a non-jury verdict of $19,475.80 in property damages awarded to her neighbors, Plaintiffs Robert and Renee Kane. Ms. Kortz represented herself at trial, as her legal counsel withdrew his appearance eleven months prior to the trial. Ms. Kortz failed to file a concise statement of errors on appeal in response to the Court's order to do so, although the Court recognized that her Notice of Appeal stated that she did not understand the verdict and had received limited documentation from the Plaintiffs. The Court noted that Ms. Kortz did not preserve any issues for appeal when she failed to file the concise statement of errors on appeal pursuant. Nor did Ms. Kortz preserve any issues through the filing of post-trial motions following entry of the non-jury verdict pursuant to Pa. R.C.P. 227.1(c). Nevertheless, the Court addressed the issues stated in her Notice of Appeal in its opinion filed pursuant to Pa. R.A.P. 1925 (b). The Court noted that Ms. Kortz made only a single objection to certain photographs being offered as exhibits at trial, which was overruled because the Court was satisfied with the authenticity of the photographs due to the accompanying witness testimony. In sum, based off the exhibits and trial testimony, the Court was able to find in favor of the Plaintiffs and determine the damages attributable to Ms. Kortz and so the non-jury verdict is supported by competent evidence and the there has been no suggestion of an error in the application of the law.

Foreclosure – Conservator – Petition to Intervene – Terminate Conservatorship

Intervenor, PNC Bank, successfully petitioned the Court to intervene in an action after a conservator was appointed for a property that was subject to a PNC mortgage. The Court then granted PNC's motion to terminate the conservatorship. PNC had originally obtained a default judgment in a mortgage foreclosure action in late 2019, but the sheriff's sale was indefinitely postponed due to an administrative order prohibiting sheriff sales during the COVID-19 pandemic. PNC did not reissue the writ of execution once the stay on sheriff sales was lifted. A neighboring property owner then initiated an action under Pennsylvania's Abandoned and Blighted Conservatorship Act (68 P.S. Section 1101 - 1111) ("the Act") and the Honorable Michael Marmo appointed a conservator for the property on August 24, 2021. In November, 2021, Judge John McVay, Jr. granted PNC's petition to intervene. Ultimately, Judge Alan Hertzberg granted PNC's motion to terminate the conservatorship for three separate reasons. First, the Act prohibits a property from being placed under a conservatorship when it is subject to a pending foreclosure action. Since the sheriff's sale was merely suspended and PNC never discontinued the action, the foreclosure proceeding remained pending and so a conservatorship should not have been granted in the first place. Second, the petitioner neglected to serve PNC with the original petition for appointment of a conservator, thereby depriving the trial court of subject matter jurisdiction for failure to join a necessary party. Third, the conservator failed to uphold its duty under the Act to properly maintain the property, which is a separate basis for termination of the conservatorship under the Act. The Act provides the court-appointed conservator with the authority to exercise various powers, such as to repair and maintain the property. The Court did not find the non-approval of a final plan of abatement as a suitable excuse for the conservator's failure to maintain the property.

Statute of Limitations – Statute of Repose – Discovery Rule – Unfair Trade Practices

Plaintiff Erin Tibbitt filed a lawsuit against the former owners of her home, Coldwell Banker Real Estate Services and Eagle Home Inspections, LLC after she discovered defects in the foundation of her home almost two years after she purchased it. The Court dismissed her claims against the home inspector pursuant to 68 Pa. C.S. Section 7512, which sets a one-year statute of limitations for actions based on home inspection reports. After Plaintiff settled her lawsuit with the remaining Defendants, she appealed the dismissal of her claims against the home inspector.

Plaintiff's first appellate issue is that the Court failed to apply the discovery rule to toll the statute of limitations for the time during which Plaintiff was unaware of the foundation defects. The Court found that the applicable statute of limitations is actually a "statute of repose," and therefore not subject to the discovery rule. Plaintiff's second appellate issue is that this statute of limitations violates the "remedies clause" of the Pennsylvania Constitution. The Court analyzed the case law cited by Plaintiff and found that it was based on a specific statute of limitations that was not substantially related to a government interest. In this case, however, the Home Inspection Law's statute of limitations is substantially related to the governmental interest in keeping home inspections affordable. Plaintiff's third appellate issue is that the inspection report did not meet the requirements of the Home Inspection Law due to its failure to incorporate certain language. The Court disagreed, finding that the report is a "home inspection report" as defined by Section 7502 of the Home Inspection Law even though it lacks the specific language cited by Plaintiff. The final issue on appeal is that Plaintiff argues her negligence and unfair trade practices claims are not subject to the Home Inspection Law's one year statute of limitations. Yet the Court found that the separate statutes of limitations for Plaintiff's causes of action only apply "unless…a different time is provided by…another statute…." 42 Pa. C.S. Section 5501(a). Since the Home Inspection Law provided a different time period and Plaintiff's claims arise from a home inspection report, the Court was correct in its ruling that all such claims are time-barred.

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Condominium Associations – Awarding of Attorney's Fees, Costs and Expenses – Molding Verdicts to Account for Pre- and Post-Judgment Interest

This case arose out of a dispute over Condominium Association fees assessed to the Declarant of the Condominium Association. Ultimately, the Plaintiff Association prevailed after a jury trial and was awarded $971,000.00 plus Attorney's fees, costs, and expenses in the amount of $1,374,493.50 and statutory pre- and post-judgment interest. On appeal by the Defendant Declarant, the Court issued an opinion pursuant to Pa.R.A.P. 1925(b), addressing thirteen assignments of error, including the awarding of attorney's fees, costs, and expenses, and the molding of a verdict to include pre- and post-judgment interest.

The Court awarded the full amount of attorney's fees, costs, and expenses requested by Plaintiff, despite the Plaintiff only prevailing on three of the five causes of action brought in this case. Defendant argued that Plaintiff is not entitled to fees spent on causes of action for which Plaintiff did not prevail. The Court opined that such a divisionof attorney's fees is appropriate when multiple causes of action are brought, where some include attorney's fees and others do not. Additionally, the Court reasoned that the causes of action for which Plaintiff did not prevail were inextricably linked to the causes of action for which it did prevail. As such, there was no need to further differentiate the time spent on each cause of action separately.

Pre- and post-judgment interest is a statutory remedy for any breach of contract claim. Defendant argues that pre- and post-judgment interest should not have been awarded, as the case at bar was over a condominium association's Governing Documents, and not over a contract. The Court ruled that issues related to a condominium association's Governing Documents are governed by the same principles as contract law, and therefore, the granting of pre- and post-judgment interest is awardable as of right in the amount of 6% per annum, with the date of accrual being set at the time Defendant wrongfully withheld funds from the Plaintiff, which started at the filing of the Association's Declaration.

The Court further granted pre- and post-judgment interest against Defendant Bishoff for breaching his fiduciary duty. Here, because the Association's Declaration called for a 15% per annum interest rate to be applied for late fees levied against unit owners, the Court adopted that percentage for all damages associated with this specific cause of action.

Pa.R.A.P 1925(a) Opinion – Granting of Summary Judgment – Piercing the Corporate Veil

Multiple Plaintiffs filed claims against Defendant Dravo LLC ("Dravo") for asbestos related illnesses. Plaintiffs also put forth a theory of piercing the corporate veil to attach Defendant Dravo LLC's asbestos liabilities to Carmeuse Lime Inc. ("CLI"). Multiple claims against Dravo and CLI were consolidated, and CLI filed a Motion for Summary Judgment on the veil piercing issue. Plaintiffs also filed a Countermotion for Partial Summary Judgment. Following argument on both motions, the Court ruled that there was no genuine issue of material fact in dispute, and that the undisputed facts supported a ruling in favor of the Defendants rather than the Plaintiffs. Plaintiffs then appealed the ruling, and following the filing of concise statements of matters complained of on appeal, the Court issued this order. Regarding the piercing theory, this matter stems from a reverse triangle merger wherein Dravo Corporation became a wholly-owned subsidiary of CLI through the use of an acquisition subsidiary, DLC Acquisition Corporation ("DLCAC"). Plaintiffs argued that CLI and Dravo had no separate corporate personalities and failing to pierce the corporate veil would be a miscarriage of justice. The Court relied upon the two-part test for piercing the corporate veil set forth in Mortimer v. McCool, 255 A.3d 261 (Pa. 2021), and it noted that there is a strong presumption in Pennsylvania against piercing the corporate veil, as cited in Lumax Indus. V. Aultman, 669 A.2d 893 (Pa. 1995). The Court ultimately held that Plaintiffs' evidence regarding the relationship between CLI and DLCAC, including the sharing of place of business and officers, was not out of the ordinary for a reverse triangle merger, and thus, none of the evidence could support a jury finding that CLI and DLCAC did not maintain separate personalities. The Court further noted that even had this hurdle been overcome, Plaintiffs still failed to demonstrate why the unity of interest between CLI and DLCAC supports piercing Dravo's corporate veil. Lastly, the Court ruled that Plaintiffs were unable to demonstrate injustice or fraud, primarily relying on the fact that Dravo maintained primary and excess liability insurance policies to cover its asbestos claims. For these reasons, the Court concluded that it did not err in granting summary judgment.

Malicious Prosecution – Petition to Open/Strike Judgment – Appeal of Interlocutory Order

Plaintiffs filed for Default Judgment against Defendant for failure to file a timely Answer to Plaintiffs' Complaint. Defendant successfully Petitioned the Court to open/strike the Default Judgment. Plaintiffs filed an appeal of the decision of the Court to open the Judgment immediately upon the Judgment being opened. In an opinion written pursuant to Pa.R.A.P. 1925(b), the Court stated that the granting of a Petition to open/strike Judgment is an interlocutory order, as it did not dispose of each claim for relief, and is therefore not ripe for appeal under Pa.R.A.P. 311(a)(1).

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Tax Assessment – Judicial Authority in Tax Related Matters

This case came about after it was discovered that Allegheny County failed to administer property tax assessment appeals properly. It was discovered that the common level ratio ("CLR") used to express percent increase in property value from a given base year was including sales data from sales that should not have been considered and ignoring data from sales that should have been considered. The Court ultimately granted an injunction to reset CLR based on data provided to the Court, which the School District of Pittsburgh appealed on the grounds of lack of jurisdiction, failure to hold an evidentiary hearing and failure to establish the new CLR correctly, among other issues.

The Court ruled that it had equity jurisdiction to rule over CLR in this matter. Under Beattie v. Allegheny County, 907 A.2d 519 at 524-425 (Pa. 2006), the Court has equity jurisdiction when taxpayers raise substantial constitutional issues and there is no remedy through administrative processes. The Plaintiffs had exhausted all administrative remedies, so the only body capable of fixing clear wrongs was the Court. Additionally, the Court was not claiming the administrative power to set CLR, as the proper administrative body could nullify the injunction by establishing a CLR based around the proper data.

Next, the School District appealed claiming that an evidentiary hearing should have been held in reference to the revised data used in calculating CLR. The Court ruled that Plaintiffs and the county had a contentious process in coming up with their revised data, and that there was no major dispute as to what numbers should be submitted. The Court ruled that, if the School District's contention is that they weren't involved in analyzing the data, it had months to petition the Court for such involvement and failed to.

Lastly, The School District argued that the data used was based around "sales chasing" instead of actual assessed values of properties. The Court posited that the assessed values of properties were likely calculated by the same flawed automated program that is the subject of litigation, use of assessed values would invalidate uniformity, and the property owners were told the county used a base year method, so doing so now was appropriate.

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Opinions

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ROBERT T. KANE and RENEE KANE vs. CYNTHIA KORTZ

Pro Se – Appeal – Concise Statement of Errors – Post-Trial Motions – Waiver

Defendant Cynthia Kortz filed an appeal from a non-jury verdict of $19,475.80 in property damages awarded to her neighbors, Plaintiffs Robert and Renee Kane. Ms. Kortz represented herself at trial, as her legal counsel withdrew his appearance eleven months prior to the trial. Ms. Kortz failed to file a concise statement of errors on appeal in response to the Court's order to do so, although the Court recognized that her Notice of Appeal stated that she did not understand the verdict and had received limited documentation from the Plaintiffs. The Court noted that Ms. Kortz did not preserve any issues for appeal when she failed to file the concise statement of errors on appeal pursuant. Nor did Ms. Kortz preserve any issues through the filing of post-trial motions following entry of the non-jury verdict pursuant to Pa. R.C.P. 227.1(c). Nevertheless, the Court addressed the issues stated in her Notice of Appeal in its opinion filed pursuant to Pa. R.A.P. 1925 (b). The Court noted that Ms. Kortz made only a single objection to certain photographs being offered as exhibits at trial, which was overruled because the Court was satisfied with the authenticity of the photographs due to the accompanying witness testimony. In sum, based off the exhibits and trial testimony, the Court was able to find in favor of the Plaintiffs and determine the damages attributable to Ms. Kortz and so the non-jury verdict is supported by competent evidence and the there has been no suggestion of an error in the application of the law.

Case No.: AR-18-004452. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. March 14, 2023.

Pa.R.C.P. 1925(b) OPINION

Procedural History

On January 20, 2023, Cynthia Kortz ("Kortz") filed this appeal of my January 10, 2023, Non-Jury Verdict that found in favor of Robert and Renee Kane ("Kanes") and awarded $19,475.80 for damages sustained to their property located at 4003 Melvin Street, Munhall, PA 15120. Kortz did appear pro se at her non-jury trial as her counsel withdrew on February 24, 2022, which was almost a year before the non-jury trial that was held before me on January 10, 2023. After her counsel withdrew there were three continuances granted for Kortz due to the deaths of her parents and her own illness.

On January 23, 2023, after receiving the notice of appeal filed on January 20, 2023, I ordered Kortz to file a concise statement of errors within twenty-one (21) days pursuant to Pa.R.A.P. 1925(b). I have not received a concise statement of errors as of the date of this opinion. While I did not receive a concise statement of errors, Kortz's Notice of Appeal appeared to include a letter stating her reasons for appeal were her confusion about my award and the fact that she had not received anything regarding receipts and insurance claims from the Kanes' attorney.

Discussion

Issues not included in the Concise Statement of Errors and/or not raised in accordance with the provisions of Pa.R.A.P. 1925(b)(4) are waived. Pa.R.A.P. 1925(b)(4)(vii). Here, Kortz did not preserve any issues for appeal when she failed to provide her reasons for appeal in the requested Concise Statement of Errors pursuant to Pa.R.A.P. 1925(b).

Further, Kortz did not file any post-trial motions preserving any issues for appeal after I had entered my Non-Jury Verdict pursuant to Pa.R.C.P. 227.1(c). "If an issue has not been raised in a post-trial motion, it is waived for appeal purposes." P.S. Hysong v. Lewicki, 931 A.2d 63, 66 (Pa. Commw. Ct. 2007). The purpose of this rule is to provide me with an opportunity to correct the errors and avert the need for appellate review. Id. Here, Kortz did not afford me an opportunity to address her issues for appeal by failing to file post-trial motions.

Assuming, arguendo, that Kortz did file the necessary motion and concise statement of errors, she contends that my order was not clear and that she did not have the necessary receipts. I entered my Non-Jury Verdict in accordance with Pa.R.C.P. 1038(b) which permits my decision to consist of only general findings as to all parties and dispose of all claims for relief.

The Superior Court in Davis v. Borough of Montrose, 194 A.3d 597, 605 (2018), defined its role in cases involving non-jury verdicts as:

to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of the jury.

Id.

At the non-jury trial, Kortz's only objection to the Kanes' exhibit book being admitted was directed towards what time the pictures in Exhibit No. 2 were taken and I overruled this objection, because I could determine the time that the pictures were taken through trial testimony. See Trial Transcript "TT" 1/10/2023 P. 8-10. There was no objection to Exhibit No. 4 which detailed the work performed, its cost, and what work was attributable to Kortz, which along with the testimony, I used to calculate my award amount. Id. Ms. Kortz also indicated that she had received a copy of the exhibit book in advance of the trial. TT 1/10/2023 P. 9.

Further, Renee Kane who is a plaintiff, testified that Exhibit No. 4 was a description of the work costs and the costs attributable to Kortz that the Kanes had paid, which I found credible. TT 1/10/2023 P.16-17. Then, Donald McFarland who worked for the contractor who had performed the work testified to how Exhibit No. 4 was broken down and detailed the work that was done. TT 1/10/2023 P.24-28. I further questioned Donald McFarland and found him credible, and there were no objections from Kortz regarding his testimony. TT 1/10/2023 P. 28-33. Based off of the admitted exhibits and trial testimony, I was able to determine the damages that were attributable to Kortz and make a finding for the Kanes and an award.

In conclusion, Kortz has failed to preserve any issues for appeal by failing to file a post-trial motion or a concise statement of errors. Assuming arguendo that my verdict was not clear and receipts were not provided to Kortz, my findings were based on credible testimony, and the trial exhibits were provided to Kortz prior to trial and properly admitted.

BY THE COURT:
/s/The Hon. John T. McVay Jr.

JEFFREY MISITIS vs. ROY P. WEAVER (deceased), CATHERINE M. WEAVER (deceased), MANDI RAMOUS vs. PNC BANK, NATIONAL ASSOCIATION, Intervener

Foreclosure – Conservator – Petition to Intervene – Terminate Conservatorship

Intervenor, PNC Bank, successfully petitioned the Court to intervene in an action after a conservator was appointed for a property that was subject to a PNC mortgage. The Court then granted PNC's motion to terminate the conservatorship. PNC had originally obtained a default judgment in a mortgage foreclosure action in late 2019, but the sheriff's sale was indefinitely postponed due to an administrative order prohibiting sheriff sales during the COVID-19 pandemic. PNC did not reissue the writ of execution once the stay on sheriff sales was lifted. A neighboring property owner then initiated an action under Pennsylvania's Abandoned and Blighted Conservatorship Act (68 P.S. Section 1101 - 1111) ("the Act") and the Honorable Michael Marmo appointed a conservator for the property on August 24, 2021. In November, 2021, Judge John McVay, Jr. granted PNC's petition to intervene. Ultimately, Judge Alan Hertzberg granted PNC's motion to terminate the conservatorship for three separate reasons. First, the Act prohibits a property from being placed under a conservatorship when it is subject to a pending foreclosure action. Since the sheriff's sale was merely suspended and PNC never discontinued the action, the foreclosure proceeding remained pending and so a conservatorship should not have been granted in the first place. Second, the petitioner neglected to serve PNC with the original petition for appointment of a conservator, thereby depriving the trial court of subject matter jurisdiction for failure to join a necessary party. Third, the conservator failed to uphold its duty under the Act to properly maintain the property, which is a separate basis for termination of the conservatorship under the Act. The Act provides the court-appointed conservator with the authority to exercise various powers, such as to repair and maintain the property. The Court did not find the non-approval of a final plan of abatement as a suitable excuse for the conservator's failure to maintain the property.

Case No.: GD20-11000. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J.

MEMORANDUM

I write this memorandum to explain my order granting PNC Bank's motion to terminate conservator.

On June 13, 2013 Catherine Weaver borrowed approximately $50,000 from PNC Bank, secured by a mortgage on her residence in Scott Township known as 2062 Elmbrook Lane, Pittsburgh, PA 15243.[1] Ms. Weaver failed to pay the monthly installments due on December 14, 2018 and each month thereafter. PNC Bank determined that Ms. Weaver had died, and on August 29, 2019 it filed a complaint in mortgage foreclosure at docket no. GD 19-12415. PNC Bank then obtained a default judgment on December 23, 2019 and filed a praecipe for writ of execution on January 17, 2020 and the Sheriff scheduled 2062 Elmbrook Lane for a foreclosure sale on April 6, 2020. On March 16, 2020 an Administrative Order was signed to prohibit all Sheriff Sales in Allegany County due to the COVID-19 pandemic, and thereafter other court orders, Governor's declarations and federal regulations prohibited most Sheriff's Sales in Allegheny County for at least two more years. PNC Bank accepted these directives from government that were intended to decrease transmission of the virus and stayed its writ of execution as docketed on June 9, 2020.

On October 21, 2020 Jeffrey Misitis, who resides near 2062 Elmrook Lane, initiated this proceeding under Pennsylvania's Abandoned and Blighted Conservatorship Act (68 P.S. §§1101-1111) by filing a petition for the appointment of a conservator. On August 24, 2021, following a hearing, the Honorable Judge Michael Marmo found that 2062 Elmbrook Lane met the statutory conditions for a conservatorship and appointed CP Development Trust to act as the Conservator of the property.[2] On November 15, 2021 the Honorable Judge John McVay, Jr. granted PNC Bank's petition to intervene. On October 21, 2022 PNC Bank filed a motion to terminate conservator, which I am granting by separate order.

The first reason that I am granting PNC Bank's motion is that 68 P.S. §1105(d) prohibits a property from being placed under a conservatorship when it is "subject to a pending foreclosure action by an individual or nongovernmental entity." Mr. Misitis and/or the Conservator argue that PNC Bank's stay of the foreclosure removes it from the "pending foreclosure" classification. I disagree.

BY THE COURT:
/s/The Hon. Alan Hertzberg

[1] The deed to the property is in the names of Roy Weaver and Catherine Weaver as husband and wife. Title vested by operation of law in surviving tenant by the entireties Catherine Weaver when Roy Weaver died on January 28, 2006.

[2] In the petition that commenced this proceeding Mr. Misitis recommended that Marlex Properties LLC be appointed Conservator of the property. His counsel represented during oral argument that Marlex Properties LLC should have been named the Conservator and CP Development Trust is an incorrect Conservator.

ERIN D. TIBBITT, formerly known as ERIN D. MILLER vs. DENNIS M. CLOUGHERTY and DEBORAH L. CLOUGHERTY, his wife, EAGLE HOME INSPECTIONS, LLC and COLDWELL BANKER REAL ESTATE SERVICES

Statute of Limitations – Statute of Repose – Discovery Rule – Unfair Trade Practices

Plaintiff Erin Tibbitt filed a lawsuit against the former owners of her home, Coldwell Banker Real Estate Services and Eagle Home Inspections, LLC after she discovered defects in the foundation of her home almost two years after she purchased it. The Court dismissed her claims against the home inspector pursuant to 68 Pa. C.S. Section 7512, which sets a one-year statute of limitations for actions based on home inspection reports. After Plaintiff settled her lawsuit with the remaining Defendants, she appealed the dismissal of her claims against the home inspector.

Plaintiff's first appellate issue is that the Court failed to apply the discovery rule to toll the statute of limitations for the time during which Plaintiff was unaware of the foundation defects. The Court found that the applicable statute of limitations is actually a "statute of repose," and therefore not subject to the discovery rule. Plaintiff's second appellate issue is that this statute

of limitations violates the "remedies clause" of the Pennsylvania Constitution. The Court analyzed the case law cited by Plaintiff and found that it was based on a specific statute of limitations that was not substantially related to a government interest. In this case, however, the Home Inspection Law's statute of limitations is substantially related to the governmental interest in keeping home inspections affordable. Plaintiff's third appellate issue is that the inspection report did not meet the requirements of the Home Inspection Law due to its failure to incorporate certain language. The Court disagreed, finding that the report is a "home inspection report" as defined by Section 7502 of the Home Inspection Law even though it lacks the specific language cited by Plaintiff. The final issue on appeal is that Plaintiff argues her negligence and unfair trade practices claims are not subject to the Home Inspection Law's one year statute of limitations. Yet the Court found that the separate statutes of limitations for Plaintiff's causes of action only apply "unless…a different time is provided by…another statute…." 42 Pa. C.S. Section 5501(a). Since the Home Inspection Law provided a different time period and Plaintiff's claims arise from a home inspection report, the Court was correct in its ruling that all such claims are time-barred.

Case No.: GD19-4089. Superior Court docket no. 1474 WDA 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. January 27, 2023.

OPINION

On February 11, 2017 Ms. Tibbitt entered into a written agreement with the Cloughertys to purchase their home known as 323 Victoria Drive, Monroeville, Pennsylvania. The written agreement gave Ms. Tibbitt 12 days to have the home inspected and a report from the inspection presented to the Cloughertys. Ms. Tibbitt hired Eagle Home Inspections, LLC ("Eagle") to inspect the home, and it inspected the home for a fee of $325 on February 16, 2017. Eagle's 35 page home inspection report was delivered to Ms. Tibbett before she closed on the purchase of the home on March 31, 2017.

In January of 2019, when Ms. Tibbitt had repairs done in the home's finished basement, she discovered substantial defects to the foundation. She commenced this proceeding on March 20, 2019. Ms. Tibbitt alleges Eagle should have identified the foundation defects in its home inspection report. Based on the one year statute of limitations in 68 Pa. C.S. §7512, on June 21, 2021 I granted Eagle's motion for judgment on the pleadings and dismissed all claims against Eagle.

With trial relative to the remaining Defendants (the Cloughertys and their realtor) scheduled to begin on November 4, 2022, I was able to get them and Ms. Tibbitt to reach an out-of-court settlement on November 2, 2022. Ms. Tibbitt then filed a notice of appeal to the Superior Court of Pennsylvania from the dismissal of all claims against Eagle on November 30, 2022. Since Ms. Tibbitt's brief opposing Eagle's motion for judgment on the pleadings identifies the errors I allegedly committed, I elected not to order a concise statement of errors complained of on appeal under Pennsylvania Rule of Appellate Procedure 1925(b).

Ms. Tibbitt first contends I made an error by not applying the "discovery rule" to pause the one year statute of limitations from beginning to run until she was aware of the foundation defects in January of 2019. I was unable to locate any reported Pennsylvania trial or appellate case concerning the statute of limitations for lawsuits against home inspectors. Pennsylvania's Home Inspection Law, in a section entitled "statute of limitations," states:

An action to recover damages arising from a home inspection report must be commenced within one year after the date the report is delivered.

68 Pa.C.S.§7512. If this falls under the classification of a "statute of repose," the deadline for filing lawsuits will not be paused (or "tolled") until the injury or damage is discovered. See Dubose v. Quinlan, 643 Pa. 244 at 261-262, 173 A.3d 634 at 644-645 (2017). A statute of repose establishes an absolute cutoff point in time, even though an injury has not yet been discovered or even occurred. Id., A statute of repose focuses on the conduct of the defendant and prohibits lawsuits brought a specified period of time after the conduct. Id. This is precisely what is set forth in 68 Pa. C.S. §7512 as it establishes a deadline for suing home inspectors of one year after the conduct of delivering a home inspection report. Hence, 68 Pa.C.S. §7512 is a statute of repose, to which the discovery rule is inapplicable. Thus, I correctly determined that the discovery rule is inapplicable to Ms. Tibbitt's claims against Eagle.

Ms. Tibbitt next contends that a one year statute of repose for lawsuits against home inspectors violates the Pennsylvania Constitution. She argues that it violates this portion of Article I, Section 11:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law….

Ms. Tibbitt cites Yanakos v. UPMC (655 Pa. 615, 218 A.3d 1214 (2019)), in which a statute of repose for medical malpractice lawsuits violated this "remedies clause," in support of her position. In Yanakos, the Pennsylvania Supreme Court held that the medical malpractice statue of repose would violate the remedies clause if it did not substantially relate to the government interest of controlling the cost of medical care and malpractice insurance rates by providing actuarial predictability to insurers. Id., 65 Pa. 615 at 633-634, 218 A.3d 1214 at 1225-1226. Since the medical malpractice statute of repose exempted foreign object cases and minors, it failed to provide actuarial predictability to insurers and, therefore, was not substantially related to the government interest. Id. The one year statute of repose in the Pennsylvania Home Inspection Law, however, has no exemptions. Additionally, its substantial relation to the governmental interest in keeping home inspections affordable (Ms. Tibbett's cost $325) is evidenced by the requirement that home inspectors have errors and omissions insurance during only the predictable one year statute of repose period. See 68 Pa. C.S. §7509. Hence, the one year statute of repose does not violate the remedies clause of the Pennsylvania Constitution.

Ms. Tibbitt next contends her claims are not timed barred because Eagle's home inspection report fails to set forth these statements required by 68 Pa.C.S. §7508(a)(3) of Pennsylvania's Home Inspection Law:

A home inspection is intended to assist in evaluation of the overall condition of the dwelling. The inspection is based on observation of the visible and apparent condition of the structure and its components on the date of inspection.

The results of this home inspection are not intended to make any representation regarding the presence or absence of latent or concealed defects that are not reasonably ascertainable in a competently performed home inspection. No warranty or guaranty is expressed or implied.

If the person conducting your home inspection is not a licensed structural engineer or other professional whose license authorizes the rendering of an opinion as to the structural integrity of a building or its other component parts, you may be advised to seek a professional opinion as to any defects or concerns mentioned in the report.

This home inspection report is not to be construed as an appraisal and may not be used as such for any purpose.

However, the 35 page report that Eagle provided to Ms. Tibbitt is a "home inspection report" as that term is defined in 68 P.C.S. §7502 of the Home Inspection Law, since it is "a written report on the results of a home inspection." Hence, while it may not contain the precise language above, Eagle's report is a "home inspection report" under the Home Inspection Law. Therefore, Mr. Tibbitt's claims arise from a home inspection report under 68 Pa.C.S. §7512 and correctly were time barred because her law-suit was filed more than one year after the report was delivered.

Ms. Tibbitt's last contention is that her common law negligence and statutory Unfair Trade Practices and Consumer Protection Law (73 P.S. §201-1 et seq. ("UTPCPL")) claims are not subject to the Home Inspection Law's one year statute of limitations. She argues the two year limitation period of 42 Pa. C.S. §5524 applies to her negligence claim and the six year limitation period of 42 Pa. C.S. §5527(b) applies to her UTPCPL claim. But, the "general rule" for those limitations of time is they apply "unless…a different time is provided by…another statute…." 42 Pa. C.S. §5501(a). The Home Inspection Law is another statute that does provide a different time period. The language of the of the Home Inspection Law subjects all claims "arising from" a home inspection report to the one year time limit. 68 Pa. C.S. §7512. I interpret the term "arising from" to broadly encompass any claim having a direct or indirect relation to the home inspection report. Claims of the inspection being done negligently and the report being deceptive under the UTPCPL clearly arise from Eagle's home inspection report and are, therefore, subject to the one year limitation period.

BY THE COURT:
/s/The Hon. Alan Hertzberg

THE CARLYLE CONDOMINIUM ASSOCIATION vs. SPRUCE STREET PROPERTIES, LTD and DAVID BISHOFF

Condominium Associations – Awarding of Attorney's Fees, Costs and Expenses – Molding Verdicts to Account for Pre- and Post-Judgment Interest

This case arose out of a dispute over Condominium Association fees assessed to the Declarant of the Condominium Association. Ultimately, the Plaintiff Association prevailed after a jury trial and was awarded $971,000.00 plus Attorney's fees, costs, and expenses in the amount of $1,374,493.50 and statutory pre- and post-judgment interest. On appeal by the Defendant Declarant, the Court issued an opinion pursuant to Pa.R.A.P. 1925(b), addressing thirteen assignments of error, including the awarding of attorney's fees, costs, and expenses, and the molding of a verdict to include pre- and post-judgment interest.

The Court awarded the full amount of attorney's fees, costs, and expenses requested by Plaintiff, despite the Plaintiff only prevailing on three of the five causes of action brought in this case. Defendant argued that Plaintiff is not entitled to fees spent on causes of action for which Plaintiff did not prevail. The Court opined that such a divisionof attorney's fees is appropriate when multiple causes of action are brought, where some include attorney's fees and others do not. Additionally, the Court reasoned that the causes of action for which Plaintiff did not prevail were inextricably linked to the causes of action for which it did prevail. As such, there was no need to further differentiate the time spent on each cause of action separately.

Pre- and post-judgment interest is a statutory remedy for any breach of contract claim. Defendant argues that pre- and post-judgment interest should not have been awarded, as the case at bar was over a condominium association's Governing Documents, and not over a contract. The Court ruled that issues related to a condominium association's Governing Documents are governed by the same principles as contract law, and therefore, the granting of pre- and post-judgment interest is awardable as of right in the amount of 6% per annum, with the date of accrual being set at the time Defendant wrongfully withheld funds from the Plaintiff, which started at the filing of the Association's Declaration.

The Court further granted pre- and post-judgment interest against Defendant Bishoff for breaching his fiduciary duty. Here, because the Association's Declaration called for a 15% per annum interest rate to be applied for late fees levied against unit owners, the Court adopted that percentage for all damages associated with this specific cause of action.

Case No.: GD 14-014988 (consolidated), GD 15-000925, GD 15-001894. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. THE PARTIES & BACKGROUND

This case involves the Carlyle Condominium (the "Carlyle"), a 61-unit condominium located in located at Fourth Avenue and Wood Street in downtown Pittsburgh, in the historic Union Bank Building. Spruce Street Properties, LTD ("Spruce Street" or "Declarant") and Duquesne Properties, LLC, owned and controlled by David Bishoff ("Mr. Bishoff"), who developed the Carlyle. Mr. Bishoff, acting as a managing member of Duquesne Properties, LLC, and a limited partner of Spruce Street, executed a Declaration of Condominium for the Carlyle (the "Declaration") on behalf of Spruce Street (the "Declarant") in May 2009. On or about June 10, 2009, the Declarant recorded the Declaration, which identified the Declarant as the owner of the Carlyle's single commercial unit and the Carlyle's building exterior. The Declarant also formed the Carlyle Condominium Association ("Association" or "Plaintiff")[1] and an Executive Board to govern the Association. However, the Declarant and Mr. Bishoff (collectively referred to herein as the "Defendants") controlled the Executive Board from May 29, 2009, until June 12, 2014, when the unit owners gained control of the Association and Executive Board pursuant to the Declaration and the Pennsylvania Uniform Condominium Act (the "Act").

We recite only what is necessary of the procedural history of this matter to resolve the current appeal in an effort to avoid delving into this case's vast and complex history. On or about August 24, 2014, the Association initiated the GD-14-014988 lawsuit against the Declarant, Mr. Bishoff, and other related entities.

On January 22, 2016, Plaintiff filed its Amended Complaint, setting forth the following relevant claims against the Declarant: Count I – Breach of Contract (Failure to Deposit Building Exterior Reserve Funds),[2] Count II – Breach of Contract (Failure to Pay Proper Condominium Assessments), Count IV – Breach of Contract (Failure to Complete Construction and/or Defective Construction), Count V – Breach of Warranty, Count VI: Request for Declaratory Judgment and Specific Performance

(Violation of Declaration Article 9.1(a)), Count VII: Request for Declaratory Judgment and Permanent Injunctive Relief (Violation of Declaration Article 2.7(a),[3] Count VIII – Request for Declaratory Judgment, Special Relief and Specific Performance (Violation of the Declaration Article 5.2), and Count IX – Request for Declaratory Judgment and Specific Performance (Violations of the Uniform Condominium Act). Plaintiff also set forth Count III – Breach of Fiduciary Duty (Failure to Assess fines, penalties and interest on late and unpaid Condominium Assessments) against both the Declarant and Mr. Bishoff. On June 10, 2020, Plaintiff filed its Second Amended Complaint, which incorporated its earlier Amended Complaint by reference.[4] On March 24, 2015, Defendants filed Counterclaim Count I – Breach of Contract and/or Unjust Enrichment (Failure to Reimburse Spruce Street for Amounts Expended on Behalf of Plaintiff), and Counterclaim Count II – Breach of Contract and Violation of the Uniform Planned Community Act, alleging that Plaintiff failed to distribute an operating surplus.

On February 22, 2016, Defendants filed the following counterclaims against the Association: Counterclaim Count I – Breach of Contract,[5] Counterclaim Count II – Unjust Enrichment,[6] Counterclaim Count III – Breach of Contract and Violation of the Uniform Planned Community Act,[6] Counterclaim Count IV – Breach of Contract and Violation of Uniform Condominium Act Section 3314 (alleging that Plaintiff improperly included expenses in the common expense assessments),[5] and Counterclaim Count V – Breach of Contract.[6,7]. On September 12, 2017, Defendants filed Amended Counterclaims, incorporating those filed in February of 2016 and asserting Counterclaim Count VI against the Association for Breach of Contract and Violation of Uniform Condominium Act (regarding the Association's alleged failure to repair a portion of the roof covering the penthouse). On March 4, 2021, Defendants filed their Answer to Second Amended Complaint and Amended Counterclaims, setting forth the following supplemental counterclaims against the Association: Supplemental Counterclaim Count I/Counterclaim Count VII – Intentional Interference with Contractual Relations,[5] Supplemental Counterclaim Count II/Counterclaim Count VIII – Conversion, and Supplemental Counterclaim Count III/Counterclaim Count IX – Demand for an Accounting.

The matter proceeded to a jury trial on April 27, 2022, during which evidence was presented on all outstanding claims in both the GD-14-014988 action, as well as the GD-15-000925 action.[8] On May 9, 2022, the jury returned a verdict in favor of the Association and against the Declarant as to Counts I and II, awarding $500,000 and $123,000 respectively, and against Mr. Bishoff as to Count III, awarding $348,000. The jury also found for the Declarant and against the Association with respect to Counterclaim Count VIII, awarding $50,000. On May 19, 2022, the Association filed a Post-Trial Petition for Attorney Fees and Costs ("Fee Petition") and a Motion to Mold the Verdict to Account for Prejudgment Interest and for Postjudgment Interest ("Motion to Mold").[9] On the same date, the Defendants filed a Motion for Post-Trial Relief. On August 10, 2022, this Court held a hearing to adjudicate all matters raised in the Association's Fee Petition and Motion to Mold, Defendants' Motion for Post-Trial Relief, and to address resolution of the remaining declaratory judgment claims in the GD-14-014988 and GD-15-000925 actions. Following the August 10, 2022 hearing, this Court granted the Association's Motion to Mold and Fee Petition, but denied Defendants' Motion for Post-Trial Relief.[10] In response to this Court's granting of the Association's Fee Petition, Defendants filed a Motion for Reconsideration on August 18, 2022.[11] On September 8, 2022, this Court entered judgment on all remaining claims in equity in both the GD-14-014988 and GD-15-000925 actions. Regarding the GD-14-014988 action, this Court entered judgment in favor of Defendants as to Counterclaim Count III (Demand for Accounting) and in favor of the Association as to Count IX (Request for Declaratory Judgment and Specific Performance - Violations of the Uniform Condominium Act).[12] With respect to the GD-15-000925 action, Court entered judgment in favor of the Association as to Count I (Declaratory Judgment), Count II (Permanent Injunction), and Count IV (Declaratory Judgment). On September 19, 2022, Defendants filed their Second Motion for Post-Trial Relief regarding this Court's September 8, 2022 non-jury verdict, which was subsequently denied following oral argument on September 30, 20202. Following the filing of the Association's Praecipe for Judgment on October 7, 2022, the jury's verdict was reduced to judgment. On November 1, 2022, Defendants filed a notice of appeal in the GD-14-014988 action, appealing this Court's 2022 Orders dated August 12th (granting Plaintiff's Motion to Mold and Fee Petition, and denying Defendants' Motion for Post-Trial Relief), October 3rd (denying Defendants' Second Motion for Post-Trial Relief and amending this Court's August 12th Order granting the Association's Fee Petition). Defendants also appealed this Court's oral order, rendered on or about April 22, 2022, granting the Association's Motion for Summary Judgment with respect to Counts I and IV of Defendants' Counterclaims, and Count I of Defendants' Supplemental Counterclaims. On November 2, 2022, this Court issued an order directing Defendants to file a Concise Statement of Errors Complained of on Appeal within 21 days of that order.[13] On November 23, 2022, Defendants timely filed their Concise Statement of Errors Complained of on Appeal.

II. DISCUSSION

Defendants' Concise Statement of Errors Complained of on Appeal pursuant to Rule 1925 contends the following thirteen assignments of error, which we address out of order:

1. The trial court erred in its Order dated May 12, 2021, denying Defendant's motion for partial summary judgment seeking to dismiss Plaintiff's Count I (i.e., failure to fund reserve claim).

2. The trial court erred in its Order dated August 12, 2022, granting Plaintiff's petition for attorneys' fees, costs, and expenses – in its entirety (i.e., $1,336,172) – without deducting any fees, costs, and/or expenses which are not properly shifted to Defendants.

3. The trial court erred in its Order dated October 3, 2022, granting Plaintiff's amended petition for attorneys' fees, costs, and expenses in the amount of $1,374,493.50 – again, without deducting any fees, costs, and/or expenses which are not properly shifted to Defendants.

4. The trial court erred in is [sic] Order dated August 12, 2022, granting Plaintiff's petition for prejudgment and post judgment interest with respect to:

a. Count I (Failure to Deposit Building Exterior Reserve Funds); and

b. Count IV (breach of fiduciary duty claim).

5. The trial court erred in its Order dated August 12, 2022, when it denied Defendants' motion JNOV with respect to Plaintiff's Count I (Failure to Deposit Building Exterior Reserve Funds).

6. The trial court erred in its Order dated August 12, 2022, when it denied Defendants' motion JNOV with respect to Plaintiff's Count II (Failure to Pay Proper Condominium Assessments).

7. The trial court erred in its Order Dated August 12, 2022, when it denied Defendants' motion JNOV with respect to Plaintiff's Count III (Failure to Assess fines, penalties and interest on late and unpaid Condominium Assessments).

8. The trial court erred in its Order dated October 3, 2022, when it denied Defendants' second motion for post-trial relief requesting that Plaintiff be deemed estopped from assessing principal, late fees, and/or interest on Spruce Street's units which could have been raised at trial.

9. The trial court erred in its Order dated October 3, 2022, when it denied Defendants' second motion for post-trial relief requesting a permanent injunction enjoining the Carlyle from claiming that Spruce Street is not current on assessments.

10. The trial court erred in its Order dated October 3, 2022, when it denied Defendants' second motion for post-trial relief requesting an order terminating the Consent Order dated February 26, 2015, and directing all overpayments be paid by the Court to Spruce Street and all other amounts be paid by the Court to the Carlyle. Any ordering that amount paid by the Court to the Carlyle shall decrease the verdict against Spruce Street and David Bishoff.

11. The trial court erred in its Order dated October 3, 2022, when it denied Defendants' second motion for post-trial relief requesting that certain provisions in the Declaration (Article 8.2 concerning Declarant's leasing rights; Article 9.3 concerning assessments on Declarant owner units; and Article 16.1(d) concerning Declarant's right to have the Declaration amended) remain and not be stricken.

12. The trial court erred in its Order (rendered orally on or about April 22, 2022) granting the Carlyle's motion for summary judgment on Spruce Street's claiming reimbursement for legal expenses incurred on behalf of the Association, argued before the trial court on April 11, 2022 (Count I Counterclaim).

13. The trial court erred in its Order (rendered orally on or about April 22, 2022) granting the Carlyle's motion for summary judgment on Spruce Street's claim concerning Plaintiff's inclusion of improper expenses in the budget and collecting for those costs through collection of the common expense assessments from Defendant Spruce Street, argued before the trial court on April 11, 2022 (Count IV Counterclaim).

a. This Court properly denied Defendants' Motion for Partial Summary Judgment seeking to dismiss Count I, and properly granted Plaintiff's Motions for Summary Judgment on Counterclaims Count I and Count IV.

Defendants' first, twelfth, and thirteenth assignments of error pertain to this Court's alleged erroneous summary judgment rulings, and thus we address them together. In reviewing a trial court's ruling on a motion for summary judgment, the appellate court views the record in the light most favorable to the non-movant and resolves all doubts as to the existence of a genuine issue of material fact against the non-movant. Hall v. CNX Gas Co., LLC, 137 A.3d 597, 601 (Pa. Super. 2016). While a movant is entitled to summary judgment where there is no genuine issue of material fact, Liss & Marion, P.C. v. Recordex Acquisition Corp., 983 A.2d 652, 657 (Pa. 2009), summary judgment is properly denied where there is evidence that would allow a factfinder to render a verdict in favor of the non-movant. Rourke v. Pennsylvania Nat. Mut. Cas. Ins. Co., 116 A.3d 87 (Pa. Super. 2015). A trial court's ruling on a motion for summary judgment should not be disturbed absent an error of law or an abuse of discretion. Id; see also Harman v. Borah, 756 A.2d 1116, 1123 (Pa. 2000) ("An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will").

First, Defendants argue that this Court erred in denying Defendants' Motion for Partial Summary Judgment seeking to dismiss Plaintiff's first count against Defendants for Breach of Contract (Failure to Deposit Building Exterior Reserve Funds). In support of their motion, argued that the Declaration was unenforceable on two grounds – first, there was no meeting of the minds and second, the relevant provision was "so lacking in precision, so indefinite and vague, that nothing certain about it can be formulated." Seiss v. McClintic-Marshall Corp., 188 A. 109, 110 (Pa. 1936).[14] In examining condominium declarations, Pennsylvania courts have applied contract principles. See MetroClub Condo. Ass'n v. 201-59 N. Eighth St. Assocs., L.P., 47 A.3d 137, 145 (Pa. Super. 2012). The determination of whether a contract is ambiguous, and the interpretation of unambiguous contracts, falls within the province of the court. Koval v. Liberty Mut. Ins. Co., 531 A.2d 487, 491 (Pa. Super. 1987); Vogel v. Berkley, 511 A.2d 878 (Pa. Super. 1986). See also Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999) (stating that contractual terms are ambiguous where they are "reasonably susceptible of different constructions and capable of being understood in more than one sense.") However, ambiguities are resolved by the fact finder. See Castellucci v. Columbia Gas of Pennsylvania, Inc., 310 A.2d 331 (Pa. Super. 1973).

In arguing their Motion for Partial Summary Judgment, Defendants first attacked the enforceability of the Declaration and Article 2.7(c) for the alleged lack of a meeting of the minds, relying on MetroClub, wherein the court agreed that the declaration at issue did not constitute an enforceable contract. 47 A.3d 137, 145 (Pa. Super. 2012). Nonetheless, Defendants fail to mention that despite the declaration not being a formal contract, the MetroClub Court ultimately enforced the declaration against the association after examining the declaration according to contractual principles, as other courts have. Id. at 145, 154. See, e.g., Condo. Ass'n Court of Old Swedes v. Stein-O'Brien, 973 A.2d 475, 480, 482-83 (Pa. Commw. Ct. 2009) (stating that a condominium's declaration and code of regulations, without more, may establish the terms of a contractual relationship); Riverwatch Condo. Owners Ass'n v. Restoration Dev. Corp., 980 A.2d 674, 683-84 (Pa. Commw. Ct. 2009) ("The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties"). Here, Article 2.7(c) of the Declaration provides that "[t]he Declarant, as Owner of the Commercial Unit, in full satisfaction of all such Unit Owner's obligations for the Building Exterior, shall deposit with the Association, an amount as a reserve for the maintenance, repair and replacement of the Building Exterior. . . which is a part of this Unit."[15] Article 9.14[16] and Article 2.7(a)[17] of the Declaration provide further support for Spruce Street's obligation to fund a reserve for exterior maintenance, repair, and replacement. Whether the Declaration constitutes a formal contract is of no consequence to whether the same is enforceable. See Stein-O'Brien, 973 A.2d. at 481 ("[T]he rules of condominium ownership are governed by the enabling statute, the terms of the condominium declaration, and the condominium association's by-laws, if any.") Section 17.1 of the Declaration provides that "[e]nforcement of this Declaration shall be by any proceeding at law or in equity against any person or person violating or attempting to violate any covenant, condition, or restriction, imposed by this Declaration either to restrain violation or to recover damages . . ."; see also 68 Pa.C.S. § 3108 (contemplating the application of "principles of law and equity" consistent with the Act). Indeed, Spruce Street, too, sought to enforce the Declaration against the Association in its counterclaims.

Defendants also argued that the Declaration, and specifically Article 2.7, fails for indefiniteness. In support of their proposition, Defendants cite Lackner v. Glosser, 892 A.2d 21, 32 (Pa. Super. 2006), wherein the court held that a promise to purchase a corporation without any specification as to price, time or terms did not constitute a contract, and Fahringer v. Strine's Estate, 216 A.2d 82 (Pa. 1966) (quoting Williston, Contracts, (Rev.Ed.), Vol. 1, § 43), wherein the Court provided that a promise too indefinite to enforce "where the promisor retains an unlimited right to decide later the nature or extent of his performance." We also find Defendants' indefiniteness argument to be without merit. Unlike in Lackner, where a promise failing to include price, time, or terms did not constitute a contract, 892 A.2d at 32, here, Article 2.7(c) provides language allowing for the factual determination of a deposit amount.[18] Though the Declaration does not specify an exact reserve amount or timeframe for deposits, it makes clear that a reserve amount is "for the maintenance, repair and replacement of the Building Exterior" consistent with a

unit owner's obligations, see Decl., Art. 9.14, and as a part of the annual budget. See Decl., Art. 9.1 ("all [common expenses] made in order to meet the requirements of the Association's annual budget shall be adopted and assessed on an annual basis . . .") The Building Exterior and obligations of unit owners are further defined. See Decl., Art. 1.3.2 (defining the Building Exterior), Art. 2.7(a) (stating that unit owners are "responsible for both performance and payment of all maintenance, repair and replacement required for his unit"). Furthermore, Defendants' wish to retain an unlimited right to decide the nature or extent of their performance simply does not make it so. Article 2.7(c) is not indefinite, and it does not merely state that the Declarant shall deposit an amount. Rather, the provision provides modifying language such as "in full satisfaction of all such Unit Owner's obligations for the Building Exterior" and "for the maintenance, repair and replacement of the Building Exterior. . ." Such language clearly anticipates that the "amount" must satisfy what is necessary to maintain, repair, and replace the Building Exterior during ownership and the Declarant does not comply with Article 2.7(c) merely by naming a price at its convenience.

At the summary judgment stage, there was ample evidence to allow a factfinder to enter a verdict in favor of the Association, and thus, this Court did not err in denying Defendants' Motion for Partial Summary Judgment.

Moving onto Defendants' twelfth and thirteenth assignments of error, Defendants allege that this Court erred in granting the Association's Motion for Summary Judgment on Counts I and IV of Defendants' Counterclaims. Defendants asserted Counterclaim Count I (Breach of Contract) contending that the Association breached the Declaration by failing to reimburse Defendants for common element expenses incurred during Declarant's control, exceeding $125,000.[19] In doing so, Defendants rely on Article 9.1 of the Declaration, which provides that "Common Expenses under the budget shall be allocated in accordance with each Unit's relative Percentage Interest . . ." On the other hand, the Association alleged that Defendants failed to comply with requirements set forth under Article 9.1 of the Declaration and Section 3402 of the Act. More specifically, Article 9.1 provides that "all [common expenses] made in order to meet the requirements of the Association's annual budget shall be adopted and assessed on an annual basis . . ." and Section 3402 of the Act requires that the Board disclose in Public Offering Statements to unit purchasers "services not reflected in the budget that the declarant provides, or expenses that he pays, and he expects may become at any subsequent time a common expense of the association."[20] Defendants neither disputed the allegations of non-compliance nor produced any evidence of disclosing the expenses in the Association's annual budget or in Public Offering Statements to prospective unit purchasers. As such, unit purchasers had no notice of Defendants' intent to be reimbursed for those expenses. Thus, even taking the facts in the light most favorable to Defendants, there is no genuine issue of material fact. As such, this Court properly granted summary judgment in favor of the Association as to Defendants' Counterclaim Count I.

Defendants also asserted Counterclaim Counter IV (Breach of Contract and Violation of the Uniform Condominium Act Section 3314) contending that the Association breached the Declaration and violated the Act by including improper expenses such as engineering and legal costs in common expense assessments collected from Defendants. Here, the Declaration provides that "[i]n general, the Association is responsible for performing and paying for the maintenance, repair and replacement of both the Common Elements and the Limited Common Elements," Art. 2.7(a), and "[n]o owner is exempt from liability with respect to the Common Elements by waiver of enjoyment of the right to use any of the Common Elements . . .")[21] See also Brickell Biscayne Corp. v. Palace Condo. Ass'n, 526 So. 2d 982 (Fla. 3d DCA 1998) (holding that defendant-developer/unit owner must pay assessments levied by plaintiff-condominium association, like other unit owners, even where the assessment is levied to finance legal action against the developer); Wash. Courte Condo. Ass'n-Four v. Adreni, 523 N.E.2d 1248, 1249 (Ill. App. Ct. 1988) (holding that the defendant-developer/unit owner must pay assessments for the purpose of funding plaintiff-condominium association's litigation against it). In support of their argument, Defendants contend that the alleged improper expenses associated with this litigation could not possibly benefit their units as a party adverse to the Association,[22] or constitute a common expense that the Association is entitled to assess because it does not involve the maintenance, repair, or replacement of common elements. See Decl., Art. 2.7(a). However, whether the expenses benefit Spruce Street in its capacity as Declarant is of no consequence. Rather, the inquiry is whether the expenses benefit Spruce Street as a unit owner. Defendants overlook that the instant litigation is brought on behalf of all the units as a whole.

Spruce Street's second contention is that litigation expenses are not the type of common expenses that the Association is allowed to assess. In this respect, Spruce Street distinguishes the Florida and Illinois cases on the ground that in those cases litigation was related to a common element of the associations. However, the Association has the right to institute litigation on its own behalf or on behalf of two or more unit owners. See 68 Pa. C.S.A. §3302(a)(4). Furthermore, "[u]nless the declaration otherwise provides … reasonable costs and expenses of the association, including legal fees, incurred in connection with collection of any sums due the association by the unit owner or enforcement of the provisions of the declaration, bylaws, rules or regulations against the unit owner are enforceable as assessments under this section." Id. at §3315. The Declaration does not provide otherwise; instead, it defines "Common Expense" as "those expenses … for which the Association is responsible under this Declaration and the Act."

Because no genuine issue of material fact existed as to Counts I and IV of Defendants' Counterclaims in light of the Declaration, the Act, and otherwise persuasive authority, this Court properly granted the Association's Motion for Summary Judgment as to the same.

b. This Court properly granted Plaintiff's petition and amended petition for attorneys' fees, costs, and expenses.

In its second and third assignments of errors, Defendants assert that this Court erred in granting Plaintiff's petition and amended petition for attorneys' fees, costs, and expenses in its entirety without deducting any amounts which Defendants allege were not properly shifted to them. Ultimately, this Court awarded the Association $1,374,493.50 for attorneys' fees, costs, and expenses.[23]

This Court is not required to, and will not, partake in a line-by-line analysis of legal invoices in explaining how it arrived at its decision. Twp. of Millcreek v. Angela Cres Tr. of June 25, 1998, 142 A.3d 948, 962 (Pa. Commw. Ct. 2016). In Pennsylvania, attorney fees and costs may be awarded to prevailing litigants "in such circumstances as may be specified by statute," 42 Pa. C.S.A. § 2503, and where a contract includes a provision that the breaching party must pay the other party's attorney fees. See, e.g., McMullen v. Katz, 925 A.2d 832, 835 (Pa. Super. 2007) (holding that a contractual provision entitled the prevailing party to attorney fees, with the reasonableness of such fees to be examined by the trial court). Fee awards are within the discretion of the trial court, which has the best opportunity to judge and know "the exact amount of labor, skill and responsibility involved, as well as . . . the rate of professional compensation usual at the time and place . . ." Estate of McClatchy, 424 A.2d 1227, 1230 (Pa. 1981). The trial court's award of fees is only reversible in cases of plain error, i.e., where an award is based on factual findings for which there is no evidentiary support or legal factors irrelevant to the award. In re Estate of Baker, 401 A.2d 737, 739 (Pa. 1979). The

Pennsylvania Supreme Court has provided that the following factors should be considered in determining fees or compensation payable to an attorney:

. . . the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

In re LaRocca's Tr. Est., 246 A.2d 337, 339 (Pa. 1968); see also Gilmore by Gilmore v. Dondero, 582 A.2d 1106, 1110 (Pa. Super. 1990) ("Consideration of any one or a combination of the LaRocca factors may convince the court that a different fee is justified.")

Here, the Association sought recovery of its attorney fees and costs under Sections 3315(a) and 3311(a)(3) of the Act, and Article VI(b) of the Bylaws.[24, 25, 26] The Association prevailed on Counts I for Breach of Contract (Failure to Deposit Building Exterior Reserve Funds), II for Breach of Contract (Failure to Pay Proper Condominium Assessments), III for Breach of Fiduciary Duty (Failure to Assess fines, penalties and interest on late and unpaid Condominium Assessments). On the other hand, the Association did not prevail on Counts IV for Breach of Contract (Failure to Complete Construction and/or Defective Construction) and V for Breach of Warranty. Defendants now claim that "any fees relating to those [losing] claims must be disregarding – along with the many other claims, counterclaims, and separate lawsuits otherwise not compensable under the Condo Act."[27] In doing so, Defendants cite Neal v. Bavarian Motors, 882 A.2d 1022 (Pa. Super. 2005). There, the court remanded for a re-computation of an award for attorney fees where the plaintiff sought attorney fees permitted under the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), after proceeding to trial with one cause of action under the UTPCPL and five causes of action under non-UTPCPL theories. Id. at 1032. While the UTPCPL allows for the recovery of attorney fees, see 73 Pa. Stat. Ann. § 201-9.2, the plaintiff did not set forth a separate statutory or contractual basis to recover attorney fees for the five claims brought forth under non-UTPCPL theories. Neal, 882 A.2d at 1032; see also Merlino v. Delaware County, 728 A.2d 949, 951 (Pa. 1999) ("[T]here can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established exception.") More specifically, the Neal Court reasoned that "permit[ting] plaintiff to recover counsel fees for all of the counts upon which she recovered damages, would not only be inequitable, but would be contrary to the law." Neal, 882 A.2d at 1032.

The case at bar is distinguishable from Neal, where the plaintiff sought to recover attorney fees for five claims brought under different theories without any contractual or statutory basis, see 882 A.2d at 1032. Unlike in Neal, here, the Association pointed to Sections 3315(a) and 3311(a)(3) of the Act, and Article VI(b) of the Bylaws as a basis to recover attorney fees. Moreover, despite being separate causes of actions, it cannot be said that the Association's losing claims were unrelated to the Association's prevailing claims. For instance, while the condition of the building was necessary to the Association's losing claims (i.e., failure to complete construction and breach of warranty), the condition of the building was equally as crucial to the Association's prevailing claim for breach of contract regarding the building exterior reserve funds.

Although we, again, decline to outline this case's entire procedural history, we note that the attorneys have labored on this matter since its initiation in 2014. During its eight-year lifespan, this case has involved significant discovery, an overabundance of protracted motions practice, and various causes of action (as discussed at the outset), ultimately leading to a two-week jury trial which required substantial preparation from the attorneys involved. Considering this, we properly determined that the Association's request for attorneys' fees, costs, and expenses in the amount of $1,374,493.50 was reasonable.

c. This Court properly granted Plaintiff's Motion to Mold the Verdict to Account for Prejudgment Interest and for Postjudgment Interest regarding Counts I and IV.

Defendants' fourth assignment of error contends that this Court erred in granting Plaintiff's Motion to Mold the Verdict to Account for Prejudgment Interest and Postjudgment Interest with respect to the Association's first count (for Breach of Contract (Failure to Deposit Building Exterior Reserve Funds) and third count for Breach of Fiduciary Duty (Failure to Assess fines, penalties and interest on late and unpaid Condominium Assessments).[28]

Statutory prejudgment interest is awardable as of right in contract cases. Daset Mineral Corp. v. Industrial Fuels Corp., 473 A.2d 584, 595 (Pa. Super. 1984); see also Somerset Cmty. Hosp. v. Allan B. Mitchell & Assocs., Inc., 685 A.2d 141, 148 (Pa. Super. 1996) (providing that an award of prejudgment interest is also regarded as an equitable remedy). In contract cases, "interest has been allowed at the legal rate from the date that payment was wrongfully withheld, where the damages are liquidated and certain, and the interest is readily ascertainable through computation." Id. Although contracting parties may stipulate to a higher rate of prejudgment interest in anticipation of non-payment of money due, Reliance Security Service, Inc. v. 2601 Realty Corp., 557 A.2d 418, 419 (Pa. Super. 1988), the Commonwealth has fixed the statutory rate of interest at 6% in the absence of a higher contractual rate. Pittsburgh Const. Co. v. Griffith, 834 A.2d 572, 591 (Pa. Super. 2003) (citing 41 P.S. § 202). Furthermore, "a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award [.]" 42 Pa.C.S. § 8101; see 41 P.S. § 202 (setting this Commonwealth's legal rate of interest at "six per cent per annum.") Likewise, compound interest on a debt is permitted "when the parties have provided for it by agreement or a statute expressly authorizes it." Powell v. Ret. Bd. of Allegheny Cnty., 246 A.2d 110, 115 (Pa. 1968).

Defendants contend that this Court erred in molding the jury's verdict regarding Count I (breach of contract claim asserted against the Defendants regarding the failure to deposit building exterior reserve funds) to allow for 6% statutory prejudgment and postjudgment interest. We disagree. Here, the jury awarded the Association $500,000, finding that Spruce Street was liable for breach of contract with respect to its failure to deposit exterior reserve funds. This count arises under the Declaration which is enforced through contract principles, see MetroClub, 47 A.3d at 145, 154, and thus, statutory prejudgment interest is awardable to the Association as of right with respect to this count. Though the Declaration did not provide for a specific reserve amount or timeframe for deposits, Article 9.1 contemplated that the reserve amount would be at least incorporated into the annual budget and Article 2.7(c) contemplated that the "amount" be "in full satisfaction of all such Unit Owner's obligations for the Building Exterior" and "for the maintenance, repair and replacement of the Building Exterior. . ." As the Declaration was filed in May 2009, we find that Defendants' wrongful withholding of the exterior reserve deposit began at that time. Furthermore, the proper reserve amount is readily ascertainable through computation by looking to the amount necessary for maintenance, repair and replacement. Being that the Declaration is silent with respect to a contractual interest rate regarding delinquencies of the exterior reserve deposit, see Pittsburgh Const. Co., 834 A.2d at 591, this Court properly allowed for 6% statutory prejudgment and postjudgment interest in accordance with 41 P.S. § 202 and 42 Pa.C.S. § 8101.

Defendants also contend that this Court erred in molding the jury's verdict regarding Count III (breach of fiduciary duties claim asserted against the Defendants) to allow for 15% compounding prejudgment interest and 15% postjudgment interest. We also believe that this assertion is without merit. As noted above, this Court is guided by both law and equity in awarding prejudgment interest. Somerset Cmty. Hosp., 685 A.2d at 148. The Supreme Court of Pennsylvania has held that when a defendant holds money belonging to a plaintiff and "the objective of the court is to force disgorgement of his unjust enrichment, interest upon the funds . . . so held may be necessary to force complete restitution . . . in law as well as in equity." Sack v. Feinman, 413 A.2d 1059, 1065 (Pa. 1980).

Here, the jury awarded $348,000 to the Association in finding Mr. Bishoff "liable for breaching his fiduciary duties by failing to assess and/or collect assessments and/or fines, penalties, and interest on late and unpaid condominium assessments."[29] In other words, the jury found that Mr. Bishoff held money belonging to the Association. As such, it is the duty of this Court to force disgorgement of Defendants' unjust enrichment by holding interest upon the assessments deemed to be due by the jury in order to force complete restitution. See Sack, 413 A.2d at 1065. In relation to assessments due, Article 9.8 of the Declaration provides that "[s]ums assessed by the Executive Board against any Unit Owner shall also bear interest thereon at the rate of fifteen (15%) percent per annum[.]" The same provision also contemplates compound interest in that any owed assessments, interest, and late fees would become immediately due following 60 days, thus becoming the principal.[30] Lastly, the jury apparently adopted the 15% compounding interest from 2009 through 2014 as reflected in RJ Community Management's calculation produced at trial, which totaled to $470,473.54.[31] The jury awarded the Association $123,000, finding Spruce Street to be liable for failing to pay condominium assessments between 2009 and 2014, and $348,000 to the Association, finding Mr. Bishoff to be liable for breaching his fiduciary duties. These two awards total to $471,000, which indicates the jury's adoption of 15% interest from 2009 to 2014. Looking to equity, and law, we see no reason to cut off the 15% compounding prejudgment interest from 2014 to 2022. See 68 Pa.C.S. §3314(b). It then follows, considering the Declaration authored by Mr. Bishoff and principles of equity, that this Court properly applied a 15% postjudgment compounding interest rate with regard to the breach of fiduciary duties count.

In light of these aforementioned reasons, this Court properly granted Plaintiff's Motion to Mold the Verdict to Account for Prejudgment Interest and Postjudgment Interest.

d. This Court properly denied Defendants' Motion JNOV with respect to Plaintiff's Counts I, II, and III.

Defendants' fifth, sixth, and seventh assignments of error contend that this Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict ("JNOV") with regard to the Association's first, second, and third counts by way of its August 12, 2022 Order, and thus we address these alleged errors together.

Judgment notwithstanding the verdict ("JNOV") is properly entered where "the movant is entitled to judgment as a matter of law" or where "the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." Janis v. AMP, Inc., 856 A.2d 140, 143-44 (Pa. Super. 2004). In reviewing an order denying JNOV, the appellate court must determine whether there is sufficient competent evidence to sustain the verdict while viewing the evidence in the light most favorable to the verdict winner. Birth Ctr. v. St. Paul Companies, Inc., 787 A.2d 376, 383 (Pa. 2001) (JNOV should only be entered in clear cases, with doubt resolved in favor of the verdict winner). A trial court's denial of a motion for JNOV will only be disturbed for an abuse of discretion or an error of law controlling the outcome of the case. Hammons v. Ethicon, Inc., 190 A.3d 1248, 1264 (Pa. Super. 2018), aff'd, 240 A.3d 537 (Pa. 2020).

The Association asserted Count I against Spruce Street for Breach of Contract (Failure to Deposit Building Exterior Reserve Funds), for which the jury found Spruce Street liable. In moving this Court to enter JNOV as to Count I, Defendants renewed their previous Motion for Partial Summary Judgment argument (i.e., that Article 2.7 is too indefinite to be enforceable). This Court rejected this argument in denying Defendants' Motion for Partial Summary Judgment,[32] and again here. We refer to our discussion above, which reviewed this nearly identical argument at length, albeit at the summary judgment stage. At trial, much of the same evidence remained, which was sufficient to allow the jury's finding in favor of the Association. Although the Declaration does not precisely spell out price, time, or terms for the exterior reserve deposit, Article 2.7(c), among other provisions, equipped the jury with language to allow for a factual determination of a deposit amount.[33] Defendants also argue that the Association "failed to proffer the requisite evidence through expert testimony to meet its burden of proof on damages," however, we disagree.[34] The jury also heard testimony from Attorney Brenda Sebring regarding the drafting of the declaration, Expert Robert Lewis, regarding the Building's condition and associated repair costs, and Expert Peter Miller regarding reserve calculations.

The Association also asserted Count II against Spruce Street for Breach of Contract (Failure to Pay Proper Condominium Assessments), for which the jury found Spruce Street liable. In moving this Court to enter JNOV as to Count II, Defendants merely claimed that "the evidentiary record at trial was such that a verdict in Spruce Street's favor was beyond doubt."[35] Without recounting all evidence presented in support of Count II throughout the two-week trial, we point to the Declaration itself, which detailed assessment obligations, invoices that detailed assessment rates,[36] and a master spreadsheet that detailed principal fees owed by unit owners.[37]

The Association presented ample evidence in support of Count III, which the Association asserted against both Defendants for Breach of Fiduciary Duty (Failure to Assess fines, penalties and interest on late and unpaid Condominium Assessments). The jury found Mr. Bishoff liable on Count III. As with Count II, Defendants simply claimed that "the evidentiary record at trial was such that a verdict in Spruce Street's favor was beyond doubt" without more in moving this Court to enter JNOV.[38] In addition to the evidence noted above in support of Count II, which also supports Count III, the Association presented testimonial evidence through Robert Gillenberger, Jr. and William Larrow. Mr. Gillenberger and Mr. Larrow's testimony supported the proposition that Mr. Bishoff intentionally avoided proper assessment.

Viewing the evidence in the light most favorable to the Association, see Birth Ctr., 787 A.2d at 383, it cannot be said that no two reasonable minds could disagree that the outcome should have been rendered in favor of the Defendants with respect to Counts I, II, or III. See Janis, 856 A.2d at 143-44. As such, this Court properly denied Defendants' Motion for JNOV as to these counts.

e. This Court properly denied Defendants' second motion for post-trial relief.

Lastly, Defendants' alleged errors eight through eleven assert that this Court erred in denying Defendants' second motion for post-trial relief by way of its Order dated October 3, 2022 with regard to remaining declaratory judgment claims disposed of by this Court's Order dated September 8, 2022.[39] More specifically, Defendants make objection to this Court's failure to (1) deem the Association estopped from assessing principal, late fees, and/or interest on Spruce Street's units which could have been raised at trial, (2) issue a permanent injunction enjoining the Association from claiming that Spruce Street is not current on assessments,

(3) issue an Order terminating an earlier consent order, direct that all overpayments be paid by the Court to Spruce Street, and direct that other amounts be paid by the Court to the Association, with such amounts decreasing the verdict against Defendants, and (4) preserve, rather than strike, Articles 8.2, 9.3, and 16.1(d) of the Declaration. We now address these arguments in turn. On appeal, a trial court's denial of a motion for post-trial relief is reviewed for an abuse of discretion or error of law. Irey v. Com., Dep't of Transp., 72 A.3d 762, 771 n.8 (Pa. Commw. Ct. 2013); Ryals v. City of Philadelphia, 848 A.2d 1101, 1103 n.3 (Pa. Commw. Ct. 2004).

With respect to Count I for Declaratory Judgment in the GD-15-000925 action, Defendants requested that this Court modify its decision, asking that the Association be "enjoined from retroactively assessing fees on Spruce Street owned properties because there was already a trial and verdict on past-due amounts"[40] and that this Court "declare that the Association is precluded from claiming assessments owed prior to the jury's May 9, 2022 verdict."[41] However, this Court cannot unilaterally prevent the Association from exercising execution rights, such as the ability to place liens on units with unpaid amounts due. See, e.g., 68 Pa.C.S. § 3315(a) ("[t]he association has a lien on a unit for any assessment levied against that unit or fines imposed. . . from the time the assessment or fine becomes due[.]"; Decl., Art. 9.11 (providing that delinquent amounts constitute a lien against units until fully paid). Until the verdict amount is fully satisfied, interest continues to accrue.

With respect to Count II for Permanent Injunction in the GD-15-000925 action, Defendants requested that this Court "direct[] the [Association] to cease and desist from interfering with the marketing, sale and ownership of units owned by, or formerly owned by, Spruce Street by way of claiming that Spruce Street is not current on assessments."[42] A party is only entitled to a permanent injunction where they have established a clear right to relief, in the absence of an adequate remedy at law. PA EnergyVision, LLC v. S. Avis Realty, Inc., 120 A.3d 1008, 1013 (Pa. Super. 2015); see also Buffalo Twp. v. Jones, 813 A.2d 659, 663-64 (Pa. 2002) (stating that a trial court's grant or denial of a permanent injunction is reviewed for error of law). Defendants are not current on assessments, as determined by the unsatisfied jury verdict, and thus have not established a clear right to relief. We reiterate our discussion above in that this Court cannot deprive the Association of its execution rights where, as here, the verdict regarding unpaid assessments has not been satisfied.

With respect to Count IV for Declaratory Judgment in the GD-15-000925 action, Defendants requested that this Court enter a non-jury verdict to terminate an earlier consent order[43] and direct that all overpayments be paid by the Court to Spruce Street, and that other amounts be paid by the Court to the Association and be decreased from the verdict against Defendants.[44] However, "where a decree in equity is entered by the consent of the parties, it is binding upon the parties until they choose to amend it." Dravosburg Hous. Ass'n v. Borough of Dravosburg, 454 A.2d 1158, 1162 (Pa. Commw. Ct. 1983); see also Com. by Creamer v. Rozman, 309 A.2d 197, 200 (Pa. Commw. Ct. 1983) ("A court has neither the power nor the authority to modify or vary the terms set forth in a consent decree . . . in the absence of fraud, accident, or mistake.") Here, the purpose of the Consent Order was to allow Defendants the ability to sell Declarant-owned units without a lien, so long as Defendants deposited 150% of the amount set forth in a Certificate of Assessment Status in escrow to be held "pending further Order of Court so that [the parties] may assert and prove their claims thereto."[45] This language indicates that the amount held in escrow was collected against a potential future verdict, which is now in existence against Defendants. Defendants make no argument that the Consent Order was entered by way of fraud, accident, or mistake. Although the circumstances have changed, in that the jury found in favor of the Association regarding the assessment-related claims, equity requires that the Consent Order remain in place absent mutual termination between the parties and that the verdict be offset by the amount held in escrow once the Consent Order is eventually vacated.

Lastly, with respect to Count IX for Request for Declaratory Judgment and Specific Performance (Violations of the Uniform Condominium Act) in the GD-14-14988 action, Defendants contend that this Court erred in striking certain provisions from the Declaration – namely, Articles 8.2, 9.3, and 16.1(d). In doing so, Defendants set forth three primary arguments: (1) that this Court's order striking the provisions constituted an impermissible advisory opinion "because there was no controversy between and/or among the parties,"[46] (2) that this Court struck language in Article 16.1(d), which is identical with language in the Act, and (3) that there is a live controversy with respect to the language within Article 16.1(d) in a separate action filed at GD-22-001146.

We agree that declaratory relief is only available where an actual controversy exists, is imminent or inevitable. Rich v. Com., Dep't of Gen. Servs., 566 A.2d 1279, 1280 (Pa. Commw. Ct. 1989). In other words, declaratory relief is not proper absent "antagonistic claims indicating imminent and inevitable litigation coupled with a clear manifestation that the declaration sought will be of practical help in ending the controversy[.]" Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist., 587 A.2d 699, 701 (Pa. 1991) (vacating court orders declaring an act that gave teachers the limited right to strike unconstitutional, reasoning that no party with standing attempted to halt the teacher's strike or collect damages). At the center of this case is the controversy of the rights afforded to the Declarant versus those afforded to all other unit owners under the Declaration. These claims have led to years of ongoing litigation, during which non-declarant unit owners were held to different standards in violation of the Act. Indeed, Defendants' proposition that the Association may place Article 16.1(d) at issue in the recently filed lawsuit at GD-22-001146 makes clear that providing declaratory relief with regard to the above provisions was pertinent to providing practical help in ending this ongoing litigation. See Gulnac, 587 A.2d at 701. As such, this Court's September 9th Order does not constitute an advisory opinion.

Likewise, Defendants' contention that this Court struck language identical to that found in the Act is at best very misleading. Article 16.1(d) of the Declaration provides, in relevant part, that:

Notwithstanding the foregoing, the Declarant reserves the right to change the location, interior design, and arrangement of all Units and to alter the boundaries between Units, to subdivide or convert Units, or portions thereof, into two or more Units, Common Elements, or a combination of Units and Common Elements, as well as to combine Units so long as Declarant owns all the Units so changed or altered. Said changes shall be [sic] become effective through an amendment which need only be executed by Declarant, or upon application of the Declarant, the Association shall prepare, execute and record an amendment to this Declaration and the Declaration Plans which reflects such change/s or alteration/s. (emphasis added).

Defendants now argues that this Court erred in striking the above-bolded language, as a portion of the language within Article 16.1(d) is copied verbatim from Section 3215 of the Act, which provides that "upon application of a unit owner to subdivide a unit or upon application of a declarant to convert a unit the association shall prepare, execute and record an amendment to the declaration, including the plats and plans, subdividing or converting that unit." (emphasis added). While Article 16.1(d) of the Declaration and Section 3215 of the Act may share some language, Defendants conveniently fail to mention that Section 3215 does not provide that the declarant may reserve the right to change the location, interior design, and arrangement of all units, alter the boundaries between units, or combine units by the unilateral execution of an amendment. As such, this Court appropriately struck

the inconsistent language (bolded above) while concurrently making clear that "[a]ny subdivision, relocation of boundaries, or conversion of units or common elements in the Carlyle must comply with the Condominium Act."[47]

Considering the above, we see no reason to depart from our September 8th Order and thus properly denied Defendants' second motion for post-trial relief.

III. CONCLUSION

In light of the aforementioned reasons, the judgment below should be affirmed.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] The Association is an unincorporated association of Carlyle unit owners.

[2] On May 12, 2021, this Court denied Defendants' Motion for Partial Summary Judgment as to Count I – Breach of Contract (Failure to Deposit Building Exterior Funds).

[3] On December 17, 2019, Count VI: Request for Declaratory Judgment and Specific Performance (Violation of Declaration Article 9.1(a)) and Count VII: Request for Declaratory Judgment and Permanent Injunctive Relief (Violation of Declaration Article 2.7(a)), were dismissed with prejudice by stipulation.

[4] The Association filed its Second Amended Complaint setting forth four counts against RJ Development, LLC ("RJ Development"). On July 8, 2022, the parties filed a joint praecipe marking such claims settled and discontinued with respect to RJ Development.

[5] On April 22, 2022, this Court granted the Association's Motion for Summary Judgment with respect to Counterclaim Counts I, IV, and VII.

[6] Defendants' Counterclaim Counts II, III, and V have been withdrawn.

[7] In their March 4, 2021 filing, Defendants incorporated by reference all paragraphs within their February 22, 2016 Answer, New Matter, and Counterclaims aside from those relating to Count V – Breach of Contract, which was effectively withdrawn.

[8] See TT, p. 764 ("Regardless of whether we send it to the jury or not. We send it to the jury in an advisory capacity or we cannot send it to the jury at all, but at the end of the day, present your evidence because we're not going to have a separate trial on those issues. This is the trial on everything, and it's just a matter of who the decision maker is.")

[9] On August 9, 2022, the Association filed a Supplement to its Motion to Mold the Verdict to Account for Prejudgment Interest and for Postjudgment Interest.

[10] Order of Court dated August 12, 2022. On September 30, 2022, this Court amended its Order dated August 12, 2022 to include additional fees and costs set forth in the Association's Supplement to Award of Attorney Fees and Costs, which was filed September 27, 2022.

[11] Denied on September 30, 2022, following oral argument.

[12] This Court denied the Association's request for specific performance as to Count IX.

[13] Pursuant to Pa.R.A.P. 1925(b).

[14] Defs.' Motion for Partial Summary Judgment, ¶ 4.

[15] Section 1.3.2(c) defines the building exterior as "the Building's exterior, including but not limited to all exterior walls (including but not limited to front wall, side walls, and back walls), elevations, building height, roofs, color, building materials, windows and doors, and all air space above the Building."

[16] Article 9.14 of the Declaration provides that: "As set forth in Article 2.7(c), the budget shall include an amount deposited by Declarant as a reserve for the maintenance, repair and replacement of the Building Exterior as defined in Article 1.3.2 (above) . . ."

[17] Article 2.7(a) provides that "Unit Owner is responsible for both performance and payment for all maintenance, repair and replacement required for his unit."

[18] "The Declarant, as Owner of the Commercial Unit, in full satisfaction of all such Unit Owner's obligations for the Building Exterior, shall deposit with the Association, an amount as a reserve for the maintenance, repair and replacement of the Building Exterior. . ." Decl., Art. 2.7(c).

[19] Defs.' Answer, New Matter, and Counterclaims (in GD 14-14988 action), ¶¶ 142-150, 02/22/16.

[20] 68 Pa. C.S. §3402(a)(7)

[21] Decl., Art. 9.1

[22] See 68 Pa. C.S. § 3314(c)(2) ("[A]ny common expense benefitting fewer than all of the units shall be assessed exclusively against the units benefited.")

[23] This Court initially awarded the Association $1,336,172.00 after granting its Post-Trial Petition for Attorney Fees and Costs on August 12, 2022, following oral argument. On October 3, 2022, this Court amended its earlier order to include an award for additional fees, costs, and expenses incurred by the Association, following its supplemental submission on September 27, 2022, resulting in a total award of $1,374,493.50 for attorneys' fees, costs, and expenses.

[24] Section 3315(a) of the Act provides for the recovery of "[r]easonable costs and expenses of the association, including legal fees, incurred in connection with collection of any sums due the association by the unit owner or enforcement of the provisions of the declaration, bylaws, rules or regulations against the unit owner are enforceable as assessments under this section." (Emphasis added)

[25] Section 3311(a)(3) of the Act provides that "[i]f [a] tort or breach of contract occurred during any period of declarant control (section 3303(e)), the declarant is liable to the association for all unreimbursed losses suffered by the association as a result of that tort or breach of contract, including costs and reasonable attorney's fees" (emphasis added).

[26] Article VI(b) of the Bylaws provides that "[i]n any proceedings arising out of any alleged default by a Unit Owner under the Declaration, these Bylaws, the Rules and Regulations or the Act, the Association shall be entitled to recover the reasonable costs and expenses of the Association, including attorney's fees" (emphasis added).

[27] Defs.' Response in Opposition to Pl.'s Petition for Attorneys' Fees, p.1.

[28] See Order of Court, August 12, 2022.

[29] Verdict Slip, p. 2, ¶¶ 5-6.

[30] ". . . the total amount assessed against the Unit Owner for that fiscal year but not yet paid shall become immediately due and payable." Decl., Art. 9.8.

[31] RJ Community Management calculated assessments of $122,175.26 (principal assessment balance) and $348,298.28 (late fees and interest). See Pl.'s Ex. 343.

[32] Order of Court dated May 12, 2021

[33] "The Declarant, as Owner of the Commercial Unit, in full satisfaction of all such Unit Owner's obligations for the Building Exterior, shall deposit with the Association, an amount as a reserve for the maintenance, repair and replacement of the Building Exterior. . ." Decl., Art. 2.7(c).

[34] Defs.' Motion for Post-Trial Relief, ¶ 4.

[35] Defs.' Motion for Post-Trial Relief, ¶ 5.

[36] Pl.'s Ex. 287.

[37] Pl.'s Ex. 344.

[38] Defs.' Motion for Post-Trial Relief, ¶ 6.

[39] Defendants make no reference to GD-15-000925 in their notice of appeal dated November 1, 2022. As such, there is an issue as to whether Defendants have perfected their appeal regarding this Court's Order dated October 3, 2022. We will address the matter on its merits, nonetheless.

[40] Defs.' Second Post-Trial Motion, ¶ 5.

[41] Id. at ¶ 6.

[42] Id. at ¶ 9.

[43] See Consent Order dated February 26, 2015, in the GD-15-000925 action.

[44] Id. at ¶¶ 12-16.

[45] Consent Order dated February 26, 2015, GD-15-000925, ¶ 3.

[46] Defs.' Second Post-Trial Motion, ¶ 18.

[47] Order of Court dated September 8, 2022, ¶ 7.

IN RE: DRAVO LLC – DERIVATIVE CLAIMS AGAINST CARMEUSE LIME, INC., and CERTAIN AFFILIATED ENTITIES

Pa.R.A.P 1925(a) Opinion – Granting of Summary Judgment – Piercing the Corporate Veil

Multiple Plaintiffs filed claims against Defendant Dravo LLC ("Dravo") for asbestos related illnesses. Plaintiffs also put forth a theory of piercing the corporate veil to attach Defendant Dravo LLC's asbestos liabilities to Carmeuse Lime Inc. ("CLI"). Multiple claims against Dravo and CLI were consolidated, and CLI filed a Motion for Summary Judgment on the veil piercing issue. Plaintiffs also filed a Countermotion for Partial Summary Judgment. Following argument on both motions, the Court ruled that there was no genuine issue of material fact in dispute, and that the undisputed facts supported a ruling in favor of the Defendants rather than the Plaintiffs. Plaintiffs then appealed the ruling, and following the filing of concise statements of matters complained of on appeal, the Court issued this order. Regarding the piercing theory, this matter stems from a reverse triangle merger wherein Dravo Corporation became a wholly-owned subsidiary of CLI through the use of an acquisition subsidiary, DLC Acquisition Corporation ("DLCAC"). Plaintiffs argued that CLI and Dravo had no separate corporate personalities and failing to pierce the corporate veil would be a miscarriage of justice. The Court relied upon the two-part test for piercing the corporate veil set forth in Mortimer v. McCool, 255 A.3d 261 (Pa. 2021), and it noted that there is a strong presumption in Pennsylvania against piercing the corporate veil, as cited in Lumax Indus. V. Aultman, 669 A.2d 893 (Pa. 1995). The Court ultimately held that Plaintiffs' evidence regarding the relationship between CLI and DLCAC, including the sharing of place of business and officers, was not out of the ordinary for a reverse triangle merger, and thus, none of the evidence could support a jury finding that CLI and DLCAC did not maintain separate personalities. The Court further noted that even had this hurdle been overcome, Plaintiffs still failed to demonstrate why the unity of interest between CLI and DLCAC supports piercing Dravo's corporate veil. Lastly, the Court ruled that Plaintiffs were unable to demonstrate injustice or fraud, primarily relying on the fact that Dravo maintained primary and excess liability insurance policies to cover its asbestos claims. For these reasons, the Court concluded that it did not err in granting summary judgment.

Case No.: GD-20-010198. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. BACKGROUND

Carmeuse Lime Inc. ("CLI") is a corporate entity that specializes in mining and the sale of other natural resources that is organized under the laws of Pennsylvania and located in Pittsburgh, Pennsylvania. Dravo Corporation ("Dravo") is a company specializing in the industrial sector, whose business included manufacture of heating equipment, and provision of construction and engineering services in steel mills, chemical plants, and other industrial settings. Dravo became CLI's wholly-owned subsidiary through CLI's acquisition subsidiary DLC Acquisition Corporation ("DLCAC"), and later organized under other subsidiaries before converting to Dravo LLC as part of their wind-up process. Asbestos Disease Plaintiffs ("Plaintiffs") are a group of persons suffering from asbestos related illnesses allegedly caused by Dravo.

Plaintiffs claim CLI is liable for Plaintiffs' claims against Dravo based on a theory of piercing the corporate veil, which is the subject of this opinion. Before becoming a wholly-owned subsidiary of CLI in 1998, Dravo had been in the industrial manufacturing industry for over a century. By the late 1990's, most of their industrial operations had been discontinued. However, Dravo faced a myriad of civil lawsuits seeking damages from exposure to asbestos from their products and services. These suits caused Dravo to purchase multiple insurance policies from 1971 through 1986. It purchased a number of primary liability insurance policies that provided coverage for defense and resolution of asbestos claims from Liberty Mutual Insurance Company ("Primary Policies"). In addition to these Primary Policies, it purchased excess liability insurance from certain London Market insurers during the same period ("Excess Policies").

In 1998, CLI sought to acquire Dravo as a means of acquiring Dravo's wholly-owned subsidiary, Dravo Lime. CLI was and is based in the United States, and part of a privately owned corporate family based in Europe that specialized in the mining and sale of minerals in the United States. Later that year, CLI formed an acquisition subsidiary, DLCAC, in order to execute a reverse triangular merger. In this merger, DLCAC would purchase all public shares of Dravo stock and then merge with Dravo. Under this type of merger, Dravo would remain as the only surviving entity, thereby becoming a wholly-owned subsidiary of CLI by virtue of its merger with DLCAC. On October 19, 1998, DLCAC successfully purchased Dravo's stock at a total cost of $230,000,000. The result of this successful merger was that Dravo became a wholly-owned subsidiary of CLI, and CLI acquired all of Dravo's ownership interests without assuming Dravo's liabilities.

After purchase, Dravo continued to exist as an independent corporate entity, though still completely owned by CLI. They maintained officers and directors, separate financial records, and their own corporate records and minute books. However, all of Dravo's corporate officers were simultaneously officers or employees of CLI. Dravo still maintained and used their Primary and Excess Policies to pay for asbestos litigation. Most of their business over this time became managing its asbestos liabilities, while it relied on Dravo Lime as its sole source of revenue. At some point prior to 2002, Dravo Lime changed its name to Carmeuse Lime and Stone, Inc. ("CLS").

In 2007, CLI obtained a third-party appraisal of CLS, which was subsequently valued at $249.3 million. On July 31, 2007, CLI's directors executed an "Action by Unanimous Written Consent", which approved the purchase of CLS stock for the appraised amount. On August 31, 2007, CLI and Dravo entered into a "Stock Purchase Agreement", which approved sale of all outstanding CLS stock for $249.3 million in the form of a Demand Note. This note listed CLI as the payor and Dravo as the payee, and carried the lowest applicable federal interest rate. On the same day, the directors of Dravo executed an "Action by Unanimous Written Consent of the Board of Directors" that had the effect of issuing a special dividend to its primary shareholder, CLI, in the amount of $235.3 million, as well as cancelling the Demand Note issued by CLI. This was done in exchange for a new Demand Note issued by CLI to Dravo for $14 million for "discontinued operations" and "working capital." The effect of this was CLI's purchase of CLS for significantly less than its appraised value.

After the sale of CLS, Dravo continued managing its liabilities, including asbestos claims. In 2009, Dravo issued a dividend of $125.3 million to CLI. This sum was from excess intercompany receivable accounts, as well as $6.3 million from an outstanding demand note. The issuance of this dividend did not alter Dravo's ability to cover their asbestos related claims under its Primary and Excess policies. In 2015, Dravo reached a settlement agreement with Liberty Mutual Insurance Company in which Dravo received $8 million in exchange for releasing claims under their Primary Policy. The payment from this agreement was used to pay the costs of defending and resolving asbestos claims.

In 2018, Dravo determined it was time to dissolve. CLI, as Dravo's sole shareholder, exercised its right to approve plans for termination, and subsequently formed Dravo 2018, a subsidiary to serve as a holding company for Dravo for the purposes of dissolution. Dravo and Dravo 2018 reorganized such that Dravo 2018 became the direct parent of Dravo. CLI also transferred all Dravo stock to Dravo 2018. The result of this reorganization was that Dravo 2018 became the direct parent of Dravo, while CLI was the direct parent of Dravo 2018 and, by extension, an indirect parent of Dravo Corp.

Dravo subsequently began the process of termination. After its conversion to an LLC, on July 5, 2018, Dravo filed for a certificate of dissolution. Under Pennsylvania law, Dravo LLC would still be subject to any type of claims or suits within a two-year period from when they dissolved, namely, July 13, 2020. Dravo LLC also reached a settlement with their London Market insurers that was similar to their settlement with Liberty Mutual Insurance Company, in which Dravo LLC released claims against their excess policies in exchange for $7,000,000. Dravo LLC stated that they believed this amount would be sufficient to cover any potential asbestos claims that may arise within the two-year period of dissolution.

Plaintiffs brought claims against Defendant for asbestos related illnesses after July 13, 2020. Plaintiffs put forth a theory of piercing the corporate veil to attach Dravo's asbestos liabilities to CLI. Plaintiffs argue that CLI and Dravo had no separate corporate personalities, because CLI and Dravo had performed a de facto merger by virtue of Dravo's merger with CLI's acquisition subsidiary, DLCAC. Plaintiffs maintain that failing to pierce would be a miscarriage of justice.

On September 18, 2020, Plaintiffs' claims were consolidated and reassigned to this Court. On December 3, 2021 CLI filed a Motion for Summary Judgment on the veil-piercing issue, and in response, on January 2, 2022, Plaintiffs filed a Countermotion for Partial Summary Judgment. On May 27, 2022, this Court heard oral arguments on both motions.

II. ISSUES COMPLAINED OF ON APPEAL

This Court granted summary judgment in favor of Defendants, CLI and Dravo, and the Plaintiffs appealed. There are two separate appeals in this case, each from Plaintiffs represented by two different law firms: those represented by Goldberg, Persky & White ("GPW Plaintiffs"), docketed at 1210 WDA 2022; and those represented by Savinis, Kane & Gallucci ("SKG Plaintiffs"),

docketed at 1284 WDA 2022. Because the appeals taken by both the GPW and SKG Plaintiffs are substantially identical, this Court will address both here for the sake of judicial economy.

The issues complained of on appeal are, essentially, twofold: (1) that this Court erred in denying Plaintiffs' motion for partial summary judgment by failing to find no genuine issue of material fact, and that the undisputed facts supported a judgment in favor of Plaintiffs, and (2) that this Court erred in granting Defendants' motion for summary judgment by failing to find a genuine issue of material fact as to (a) whether the Defendants had unity of interest and ownership and/or (b) whether adhering to the corporate fiction would promote injustice or fraud, thereby usurping the role of the jury to make factual findings. The SKG Plaintiffs add that this Court further erred by giving undue weight to Lumax Industries v. Aultman, 669 A.2d 893 (Pa. 1995) in its application of the law.

Given the difficulty of addressing the Plaintiffs' conflicting assignments of error that this Court erred both in finding there was and was not a genuine issue of material fact, the Court here outlines and clarifies its position that follows in the discussion. Firstly, this Court found that there was no genuine issue of material fact, and, secondly, that the undisputed facts, such as they were, supported a ruling in favor of the Defendants rather than the Plaintiffs.

III. DISCUSSION

"A trial court should grant summary judgment only in cases where the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden to demonstrate the absence of any issue of material fact, and the trial court must evaluate all the facts and make reasonable inferences in a light most favorable to the non-moving party." Bourgeois v. Snow Time, Inc., 242 A.3d 637, 649-50 (Pa. 2020).

The central issue to these appeals is whether the Plaintiffs have produced sufficient evidence to support their theory of liability against CLI, namely, to pierce the corporate veil between Dravo and CLI. The Pennsylvania Supreme Court has provided a two-part test for piercing the corporate veil: "First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and second, adherence to the corporate fiction under the circumstances would sanction fraud or promote injustice." Mortimer v. McCool, 255 A.3d 261, 286-87 (Pa. 2021).

Additionally, "there is a strong presumption in Pennsylvania against piercing the corporate veil." Id. at 268 (citing Lumax Indus. v. Aultman, 669 A.2d 893, 895 (Pa. 1995)). Thus, even though Plaintiffs enjoy having the evidence viewed in their favor as the non-movants, Plaintiffs' burden at trial to overcome the "strong presumption" against piercing the corporate veil is nevertheless germane to this Court's analysis. Therefore, it is not enough that Plaintiffs can produce some evidence to support their theory, but enough evidence from which a jury could reasonably find that Plaintiffs have overcome this presumption.

A. Unity of Interest and Ownership

The first prong of the Mortimer test requires this Court to examine whether the evidence presented supports a finding that the corporate entities at issue here were of such unity of interest and ownership that the separate entities are essentially the same. 255 A.3d at 286-87. The Mortimer Court did not elucidate further on the factors to be applied in determining whether such unity exists. Rather the Supreme Court left in place the factors applied by previous courts, including Lumax, 669 A.2d 893. Contrary to the SKG Plaintiffs' contention, Justice Donohue, in a concurring opinion joined by Chief Justice Baer, stated that the Supreme Court "specifically refused to examine the trial court's application of traditional veil piercing jurisprudence … [and] accepted a case stripped of any potential error in the application of the factors enunciated in Lumax [], so that our decision would be laser focused on the singular issue of enterprise liability." Mortimer, 255 A.3d at 289 (J. Donohue, concurring).

Thus, it is clear from the Supreme Court's opinion in Mortimer that the Court did nothing to overturn or hold irrelevant the factors laid out in Lumax. While the SKG Plaintiffs argue that they are not beholden to the four factors of Lumax but rather to the much broader "unity of interest and ownership" standard of Mortimer, they SKG Plaintiffs conveniently offer no guidance or caselaw from which this Court might correctly apply this broader standard. Rather, the SKG Plaintiffs expect that this Court should divine the factors to be applied. Seeing as Lumax and similar cases remain good caselaw, and the factors applied therein remain relevant to the issue of separate corporate personalities, this Court discerns no error in continuing to rely on that caselaw to aid its application of Mortimer.

1. Plaintiffs Failed to Present Sufficient Evidence That CLI Failed to Maintain Separate Corporate Personalities Between Itself and Dravo and/or DLCAC.

In Lumax, the Supreme Court held at least four factors relevant for determining whether distinct corporate personalities remained separate: (1) undercapitalization (2) failure to adhere to corporate formalities (3) intermingling of personal and corporate affairs and (4) use of the corporate form to perpetrate fraud. 669 A.2d at 985. The Supreme Court has also held that "total ownership of the stock of the subsidiary by the parent nor the fact that a single individual is the active chief executive of both corporations will per se justify a court in piercing the corporate veil if each corporation maintains a bona fide separate and distinct corporate existence." Botwinick v. Credit Exchange, Inc., 213 A.2d 349, 353-354 (Pa. 1965).

Under Plaintiffs' theory, CLI can be held liable for Dravo's asbestos liabilities by piercing the corporate veil of DLCAC, CLI's acquisition subsidiary used to acquire Dravo, to reach CLI. Essentially, Plaintiffs argue that, by proving a unity of interest and ownership between DLCAC and CLI, it was CLI and not DLCAC that merged with Dravo, thus creating a unity of interest and ownership between CLI and Dravo. Of course, it is vital to Plaintiffs' claim that they prove a unity of interest and ownership between CLI and Dravo because Dravo is directly liable to asbestos claimants, not DLCAC. Despite this, the only evidence that Plaintiffs are able to proffer points only to the relationship between CLI and DLCAC. Although this theory of liability is problematic for several reasons which will be addressed herein, even assuming that a unity of interest and ownership between DLCAC and CLI simultaneously establishes a unity of interest and ownership between Dravo and CLI, the Plaintiffs have failed to produce sufficient evidence.

In light of the foregoing settled Pennsylvania precedent, the evidence to which Plaintiffs point to support their claim is legally incapable of meeting the requirements for veil piercing. Taking the facts in the light most favorable to the Plaintiffs, the evidence which Plaintiffs suggest evinces a unity of interest and ownership between CLI and DLCAC may be briefly summarized as follows:

- That DLCAC's existence was brief and its articles of incorporation and articles of merger were the only two documents filed with the Pennsylvania Department of State
- That DLCAC was controlled by CLI and served only to facilitate CLI's acquisition of Dravo
- That CLI announced in a press release that it had "merged" with Dravo
- That CLI's officers and/or employees could not recall or identify DLCAC

• That due diligence to the merger was conducted by CLI prior to DLCAC's existence, and that CLI primarily negotiated the merger

• That DLCAC shared the same place of business and officers

As an initial matter, the fact that CLI and DLCAC both shared corporate addresses and officers is not alone demonstrative of unity of interest and ownership. Botwinick, 213 A.2d at 353-354. Thus, there must be other evidence from which a jury could find unity of interest and ownership. Plaintiffs can point to no evidence that DLCAC was purposefully undercapitalized or that it failed to adhere to corporate formalities, the first two of the Lumax factors. Neither can Plaintiffs show that DLCAC's corporate form was used to accomplish fraudulent purposes, i.e. was used as a shell to protect its parent from conduct that the parent knew would result in liability against the subsidiary. See In re Thorotrast Cases, 26 Phila.Co.Rptr. 479, 494 (Pa. Ct. Com. Pls. 1994) (finding that creating an acquisition subsidiary to perform a triangular merger was not a scheme to create a shell corporation to defraud plaintiffs). The sole express purpose of DLCAC was to facilitate a reverse-triangular merger whereby CLI would become the parent of Dravo as a wholly-owned subsidiary. It is, of course, not fraudulent or illegal to acquire a company as a wholly-owned subsidiary. Notably, DLCAC has caused no harm to Plaintiffs, nor do Plaintiffs have any contractual relationship with DLCAC.

Given the undisputed and admittedly appropriate reason for DLCAC's existence, none of the evidence to which Plaintiffs point demonstrates anything unusual about the relationship between DLCAC and CLI. See Mortimer, 255 A.3d at 268 (only "unusual circumstances" call for piercing the corporate veil). This Court cannot disregard this reality, even when viewing facts in a light favorable to Plaintiffs. DLCAC's brief existence and its limited undertakings do not create an inference that DLCAC was used as a shell, but rather are consistent with DLCAC's existence as an acquisition vehicle. The fact that CLI controlled the merger process from the beginning, from running due diligence to negotiating the merger to sending the offer, does not raise any alarm bells since the ultimate goal was CLI's acquisition of Dravo as a wholly-owned subsidiary. See Shared Comms. Servs., Inc. v. Bell Atlantic Props., Inc., 692 A.2d 570, 573 (Pa. Super. Ct. 1997) ("Although a parent and a wholly owned subsidiary do share common goals, they are still recognized as separate and distinct legal entities."). Indeed, it would be inappropriate for the prospective parent of a subsidiary to engage in no due diligence or negotiation when acquiring that subsidiary. As such, the evidence does not create a genuine issue of fact nor a reasonable inference that DLCAC was not a distinct corporate personality from CLI, but is rather consistent with DLCAC's existence as an acquisition vehicle.

At most, when the evidence is viewed in the light favorable to Plaintiffs, it creates a factual dispute about whether CLI's officers and/or employees may have confused its own personality for that of DLCAC's. For example, Plaintiffs point to the press release where CLI stated incorrectly that it was "merging" with Dravo, and that some of its officers mistook or forgot the identity and existence of DLCAC. While this evidence may create an inference that DLCAC's separate corporate existence was conceptually confused with CLI's own existence by officers and employees, it does little to create a genuine issue of a material fact. Keeping in mind that Plaintiffs' ultimate burden of proof at trial is to overcome a "strong presumption" against piercing the corporate veil, resolving this issue in Plaintiffs' favor does little to overcome that burden in light of all the evidence to the contrary.

This Court can reach this very conclusion relying on the language of Mortimer alone. The Mortimer Court required that the evidence must demonstrate "such unity … that the separate personalities … no longer exist." 255 A.3d at 255 A.3d at 286-87 (emphasis added). The word "such" is one of degree, implying that the evidence which demonstrates a unity of corporate personality must be significant enough to justify their treatment in the eyes of the law as one entity. This makes practical sense, otherwise the mere mistaken press release or the neglect of a corporate officer to delineate in his mind at all times distinct corporate personalities could nullify the existence of a corporate entity entirely. Thus, simply put, even if a jury were to resolve these factual questions in Plaintiffs' favor, there would still not be enough evidence for a jury to find that CLI and DLCAC were of "such" unity as to be indistinct.

2. Plaintiffs' Failure to Pierce Dravo's Corporate Veil, Rather than DLCAC's, is Fatal to Their Underlying Theory of Liability

This Court now returns to the underlying issue with Plaintiffs' theory, which is that, assuming CLI and DLCAC had such unity of interest and ownership as to be indistinct, CLI thereby entered a de facto merger with Dravo. Not only has Plaintiff failed to present any evidence to suggest that CLI and Dravo are indistinct corporate personalities, but the absurd implications of their theory are reason alone to dismiss it. If CLI merged with Dravo, is this Court to hold that either of the entities' corporate existence was extinguished upon the merger? If so, how is this Court to account for the past two decades of CLI's existence as a corporation, or Dravo's? And if Dravo has since dissolved, does that mean CLI has also now dissolved? If so, what is to become of CLS and what was the legal effect of its sale to CLI? These implications are endless and demonstrate the absurd result that Plaintiffs are attempting to reach, namely, the nullification of reverse-triangular mergers as a method for acquiring a company as a subsidiary.

Other courts, applying Pennsylvania law, have found similar reason to dismiss veil piercing claims in the context of reverse-triangular mergers. A Philadelphia Common Pleas Court addressed precisely this issue and determined that the relationship between the parent and its subsidiary, which was formed as an acquisition vehicle, was standard for this type of transaction. In re Thorotrast Cases, 26 Phila.Co.Rptr. at 494 ("This type of transaction does not, in itself, implicate Pipeline as a corporate 'Godfather' involved in a corporate shell game to unjustly avoid potential liabilities as plaintiffs suggest. Rather, this type of triangular transfer, where a parent corporation (Pipeline) creates a subsidiary (HDN) in order to acquire a 'target' corporation (Heyden), is a recognized and legitimate type of corporate evolution.").

Similarly, the United States District Court for the Western District of Pennsylvania, applying Pennsylvania law, held that a parent corporation and its acquired subsidiary maintained separate corporate personalities where the subsidiary's existence and nature of its business had not changed as a result of the triangular merger. Norfolk S. Railway Co. v. Pittsburgh & W.Va. Railroad, 153 F. Supp. 3d 778, 808 (W.D. Pa. 2015). Here, nothing in the nature of Dravo's existence or business changed as a result of the triangular merger. It continued to maintain its own records and accounts, and conduct its own business. For the next two decades after the merger, Dravo independently continued to manage its asbestos liability free of any intermingling with CLI's affairs. Plaintiffs have produced no evidence to suggest that Dravo and CLI did not maintain separate corporate existences during this time.

In sum, Plaintiffs have pointed to no disputed facts in the record nor to any facts from which a reasonable jury could find that CLI and Dravo, or CLI and DLCAC, had a unity of interest and ownership. Taking all facts and reasonable inferences in Plaintiffs' favor – that DLCAC was under complete control of CLI, that they shared the same officers, that CLI negotiated the merger prior to DLCAC's existence, that DLCAC existed for a short period of time and for a limited purpose, that CLI sent Dravo the offer letter on DLCAC's behalf – a jury could not legally find in Plaintiffs' favor based on these facts alone. The evidence to which Plaintiffs point does nothing more than to describe what the corporate fiction is and how it works. However, it does not give any

reason why the corporate fiction should be disregarded in this case. The relationship between CLI, Dravo, and DLCAC was intended to accomplish a reverse-triangular merger whereby CLI could acquire Dravo as a wholly-owned subsidiary specifically for the purpose of avoiding a direct merger between Dravo and CLI. CLI cannot be held liable for utilizing the corporate form to accomplish precisely what the corporate form was made to accomplish. Plaintiffs' arguments, therefore, are not arguments for disregarding the corporate form on equitable principles, but arguments against the wisdom of enacting statutes which enable the creation of limited-liability entities altogether.

B. Injustice or Fraud

Assuming, for purposes of this Court's analysis, that the facts to which Plaintiffs point above do demonstrate a unity of interest and ownership between CLI and Dravo, this misuse of the corporate form must have worked towards some injustice to the Plaintiffs. As already stated, the Plaintiffs have not alleged that any harm was caused to them by DLCAC. CLI formed and used DLCAC to accomplish a reverse triangular merger, which is a legitimate purpose. Thus, even if CLI's utter control over DLCAC would render it CLI's alter ego, no injustice or fraud was accomplished.

The only injustice that Plaintiffs claim is that they will be unable to seek compensation for asbestos injuries from Dravo after it has dissolved. While this may be an unfortunate consequence of Dravo's dissolution, this does not mean that the dissolution will defraud Plaintiffs. In similar circumstances, two Philadelphia Common Pleas Courts have held that there is no injustice in allowing a parent company to dissolve a subsidiary when that subsidiary has no longer become profitable. In re Thorotrast Cases, 26 Phila.Co.Rptr. at 495 (no injustice where parent dissolved subsidiary to avoid further losses due to the costs of lititgation); Nazarewych v. Bell Asbestos Mines, Ltd., 19 Phila. Co. Rptr. 429, 434 (Pa. Ct. Com. Pls. 1989) (same).

In the typical veil piercing case, the injustice to be avoided usually stems from the fact that the shell entity to be pierced was intentionally undercapitalized by the owner/parent so that when it is inevitably sued for tortious conduct, the plaintiffs are unable to satisfy their judgments. As evidence of Dravo's undercapitalization, and hence injustice, Plaintiffs point only to the fact that Dravo issued two dividends to CLI in 2007 and 2009 totaling about $360 million. However, the Mortimer Court, in addressing the question of undercapitalization, stated that "lack of insurance to cover reasonably foreseeable risks provides the primary grounds to pierce in favor of tort claimants." 255 A.3d at 272, n.36. This is important because Plaintiffs' proffered evidence of undercapitalization ignores the fact that Dravo carried both primary and excess insurance policies to pay asbestos claims.

For more than a decade after CLI allegedly "looted" Dravo of all its capital, Dravo continued to pay and settle asbestos claims. Quite different from the typical case of undercapitalization, Dravo reached settlement agreements with its insurers whereby its insurers agreed to continue to pay claims, collectively, in the amount of about $15 million. This can hardly be considered a case where a shell entity is undercapitalized in order to avoid paying claims. The Defendants made a legitimate business decision that there was no point in continuing to operate Dravo ad infinitum when its only remaining purpose was to pay out asbestos claims. Thus, there is no more injustice in this case, where the only entity directly liable for Plaintiffs' injuries is dissolved, than in the case of an insolvent tortfeasor who is unable to satisfy a judgment. The inability to fully compensate the injured plaintiff alone is not reason to attach liability to the nearest deep pocket. Even assuming Plaintiffs could show an injustice in this case, their failure to demonstrate a unity of interest and ownership under the first Mortimer prong is nevertheless fatal to their claim.

IV. Conclusion

Plaintiffs' theory of piercing the corporate veil is legally insufficient. None of the evidence to which Plaintiffs' point about the relationship between CLI and DLCAC is out of the ordinary for a reverse-triangular merger. None of the evidence, therefore, can support a jury finding that CLI and DLCAC did not maintain separate personalities. Even if the evidence could support such a finding, the Plaintiffs have failed to demonstrate why a unity of interest between CLI and DLCAC supports piercing Dravo's corporate veil. Other courts in this Commonwealth have refused to entertain such a theory, and this Court will not be the first. Finally, Plaintiffs' are unable to demonstrate injustice or fraud, where Dravo maintained primary and excess insurance policies to cover its asbestos claims. Thus, the evidence is insufficient to support Plaintiffs' veil piercing theory, and this Court did not err in granting summary judgment.

BY THE COURT:
/s/The Hon. Christine A. Ward

RAMON OSORIO III and MIRIAM OSORIO vs. LESLIE SMITH a/k/a LARRY LOBSTER INTERNATIONAL, LLC

Malicious Prosecution – Petition to Open/Strike Judgment – Appeal of Interlocutory Order

Plaintiffs filed for Default Judgment against Defendant for failure to file a timely Answer to Plaintiffs' Complaint. Defendant successfully Petitioned the Court to open/strike the Default Judgment. Plaintiffs filed an appeal of the decision of the Court to open the Judgment immediately upon the Judgment being opened. In an opinion written pursuant to Pa.R.A.P. 1925(b), the Court stated that the granting of a Petition to open/strike Judgment is an interlocutory order, as it did not dispose of each claim for relief, and is therefore not ripe for appeal under Pa.R.A.P. 311(a)(1).

Case No.: AR-22-000225. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. February 24, 2023.

Pa.R.C.P. 1925(b) OPINION
Procedural History

On November 15, 2022, Ramon Osorio III and Miriam Osorio ("Osorios") filed this appeal of my November 15, 2022, order that granted Leslie Smith aka Larry Lobster International, LLC's ("Smith") petition to open/strike judgment. In my order I granted Smith's petition to open and ordered he file an answer to the complaint. I also ordered Smith to obtain counsel to file his answer for Larry Lobster International. My order then states that once the answers are filed, Osorio is to praecipe for an arbitration hearing date. My order did not end the case but granted Smith the opportunity to respond and have an arbitration hearing.

Discussion

My November 15, 2022, order granting Smith's petition to open/strike default judgment was an interlocutory order as it did not dispose of each claim for relief which would make it a final order.

Pursuant to Pa.R.A.P. 311(a)(1), an appeal may be taken as of right and without reference to Pa.R.A.P. 341(c) from an order affecting judgment that refuses to open, vacate, or strike off a judgment. However, if orders opening, vacating, or striking off a judgment are sought, an appeal may not be filed until the court has disposed of each claim for relief. Pa.R.A.P. 311(a)(1).

Here, my order granted Smith's petition to open/strike default judgment and did not dispose of each claim. My order placed the parties in the position they were prior to the entry of the judgment and ordered that Smith obtain an attorney, file an answer, and the parties proceed to an arbitration hearing.

In conclusion, my November 15, 2022, order granting Smith's petition to open/strike default judgment is an interlocutory order and is not appealable as of right under Pa.R.A.P. 311 because it did not dispose of each claim for relief.

BY THE COURT:
/s/The Hon. John T. McVay Jr.

MADELYN GRACE GIOFFRE and SHAQUILLE CHARLES, EITAN SOLOMON and OREN SOLOMON, CAA INVESTMENTS, INC., SANDRA CHIHYUN KIM, RAMESH REDDY ARUMALLA and SRILAKSHMI DURGA and MARIOIN MAZZOCCO vs. RICHARD FITZGERALD, in his capacity as the COUNTY EXECUTIVE, WILLIAM D. McKAIN, in his capacity as the COUNTY MANAGER, COUNTY OF ALLEGHENY and ALLEGHENY COUNTY BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW, Defendants, and SCHOOL DISTRICT OF PITTSBURGH, Intervenor

Tax Assessment – Judicial Authority in Tax Related Matters

This case came about after it was discovered that Allegheny County failed to administer property tax assessment appeals properly. It was discovered that the common level ratio ("CLR") used to express percent increase in property value from a given base year was including sales data from sales that should not have been considered and ignoring data from sales that should have been considered. The Court ultimately granted an injunction to reset CLR based on data provided to the Court, which the School District of Pittsburgh appealed on the grounds of lack of jurisdiction, failure to hold an evidentiary hearing and failure to establish the new CLR correctly, among other issues.

The Court ruled that it had equity jurisdiction to rule over CLR in this matter. Under Beattie v. Allegheny County, 907 A.2d 519 at 524-425 (Pa. 2006), the Court has equity jurisdiction when taxpayers raise substantial constitutional issues and there is no remedy through administrative processes. The Plaintiffs had exhausted all administrative remedies, so the only body capable of fixing clear wrongs was the Court. Additionally, the Court was not claiming the administrative power to set CLR, as the proper administrative body could nullify the injunction by establishing a CLR based around the proper data.

Next, the School District appealed claiming that an evidentiary hearing should have been held in reference to the revised data used in calculating CLR. The Court ruled that Plaintiffs and the county had a contentious process in coming up with their revised data, and that there was no major dispute as to what numbers should be submitted. The Court ruled that, if the School District's contention is that they weren't involved in analyzing the data, it had months to petition the Court for such involvement and failed to.

Lastly, The School District argued that the data used was based around "sales chasing" instead of actual assessed values of properties. The Court posited that the assessed values of properties were likely calculated by the same flawed automated program that is the subject of litigation, use of assessed values would invalidate uniformity, and the property owners were told the county used a base year method, so doing so now was appropriate.

Case No.: G.D. 21-007154. Commonwealth Court docket no. 922 CD 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. November 14, 2022.

OPINION

I. Introduction

As every tax is a burden, it is important that the public has confidence that property taxes are administered in a just and impartial manner, with each taxpayer contributing his or her fair share of the cost of government. This lends legitimacy to the property-tax system in the eyes of the public which, in turn, tends to suppress both the desire to evade taxes and the tendency to embark upon protracted litigation---which, itself, consumes large quantities of societal resources.

Valley Forge Towers Apartments N, LP v. Upper Merion Area School District, 640 Pa. 489, 517, 163 A.3d 962, 979-980 (2017). Allegheny County failed to administer the property tax assessment appeal system in a just and impartial manner. After this was detected and exposed, Allegheny County agreed to rectify the situation. School District of Pittsburgh, a beneficiary of taxpayers contributing more than their fare share, refuses to allow Allegheny County to accept responsibility and correct its improper assessment appeal system. Instead, the School District wants the taxpayers that it targets with property assessment appeals to continue paying more than their fair share.

II. Background

Plaintiffs are Allegheny County real estate owners involved in the assessment appeal system because of school district efforts to increase their assessments. In June of 2021, after learning the "common level ratio" for real estate sales in 2020 would

be 81.1 percent, Plaintiffs sued Allegheny County, its Board of Property Assessment, Appeals and Review, its elected Executive and its Manager. Plaintiffs' complaint requested equitable relief from an unconstitutional system through recalculation of the artificially inflated "common level ratio" and hiring of a properly credentialed Chief Assessment Officer.

The purpose of the common level ratio or CLR is to express the percent by which a county's property values have changed since the "base year" (see 72 P.S.§5020-102) or year of the most recent county-wide reassessment. In Allegheny County, 2012 is the most recent county-wide reassessment. CLR is a fraction comprised of a numerator that is the assessed values and a denominator that is the market values of a county's real estate. See 72 P.S. §5020-102. The State Tax Equalization Board or STEB, which has three members who are appointed by the Governor, annually establishes each county's CLR from specified assessment and sales data compiled by the counties. See 71 P.S. §1709.1509. Each county's data includes a code with every conveyance of real property that indicates whether the conveyance is valid or rejected. STEB's annually published "Sales Validation and Submission Operations Manual," authorized by 71 P.S. §1709.1516(b), provides and explains the numerous rejection codes. To establish a county's CLR, STEB considers the fractional value of the assessed value divided by the sale price for only conveyances that the county has coded as valid. STEB's annually published "Policy and Procedures Manual for Common Level Ratio" sets forth the method it uses for selecting the fractional value or ratio that is the median or middle of the valid conveyances, and that selected median or middle value becomes the CLR. Most property assessment appeals, particularly when owners are unable or unwilling to hire an expert, are decided through multiplication of a property's sale price by the CLR. Thus, the higher the CLR, the higher the assessment and property tax levied on the owner. With Pennsylvania Constitution article VIII, §1 requiring tax uniformity, if Allegheny County were artificially inflating the CLR, assessments for those subject to it would be unconstitutional.

On March 18, 2022 Plaintiffs filed a motion for preliminary injunctive relief identifying an Allegheny County Office of Property Assessment automated nightly computer program that improperly invalidated special warranty deeds outside the .80 to 1.20 ratio of assessment to sale price and improperly validated family transfers and other invalid transfers in the .90 to 1.10 ratio of assessment to sale price. Plaintiffs documented this violation of STEB's published manual in depositions and Allegheny County's discovery responses. Allegheny County's Office of Property Assessment Manager, during his deposition, testified that its computer program automatically invalidated the special warranty deeds outside the .80 to 1.20 ratio and automatically validated the transfers in the .90 to 1.10 ratio and then sent both groups of data to STEB without any review by a human. See April 6, 2022 deposition transcript, pp. 130-132, in exhibits filed 8/17/2022 at Document 83. The County's answers to interrogatories further confirmed the accuracy of this testimony. See interrogatories and answers in 11/9/2022 order of court filed 11/9/2022 as Document 102. Allegheny County's acting Chief Assessment Officer, during her deposition, admitted the automated nightly computer programming operated to increase the CLR calculated by STEB. See April 20, 2022 deposition transcript, pp. 143-144, in exhibits filed 8/17/2022 at Document 83. Plaintiffs identified 1,195 of the 5,357 valid "sales" submitted to STEB that were automatically validated because they were in the .90 to 1.10 ratio and approximately 5,600 special warranty deeds from the 34,637 total transactions reported to STEB that were automatically invalidated because they were in the .80 to 1.20 ratio. From this evidence there could be no doubt that Allegheny County's Office of Property Assessment had been "cooking the books" on CLR data submitted to STEB.

On March 29, 2022, I held a conference with counsel for the Plaintiffs and Defendants and counsel for the School District of Pittsburgh, which presented an uncontested petition to intervene that stated, among other things, its "intervention will not materially delay or impede these proceedings." ¶ 9, petition to intervene in 11/9/2022 order of court filed 11/9/2022 as Document 102. I informed counsel the evidentiary hearing on Plaintiffs' motion for a preliminary injunction would begin on April 27, 2022 and convene each day thereafter until concluded (I set aside three and a half days in my calendar for the hearing). On April 19, 2022 I informed the parties only two issues would be considered at the evidentiary hearing-what the common level ratio should be and whether the Chief Assessment Officer had the appropriate qualifications. The School District, notwithstanding its representation of not delaying or impeding, on April 26, 2022 served and filed a motion to continue the April 27, 2022 evidentiary hearing for 60 days. I denied that motion on April 27, 2022, also ruled on a motion in limine and was about to begin hearing testimony from Plaintiffs' witnesses, but instead found counsel for the Plaintiffs and Allegheny County reached a settlement in lieu of the evidentiary hearing. The terms of the settlement, which are set forth in the April 27, 2022 consent order of court, are for the Office of Property Assessment to reexamine and recode those sales from the automated nightly computer program that had been provided to STEB, provide Plaintiffs with the recoded sales on a weekly basis and reexamine sales and coding submitted by Plaintiffs, with the Plaintiffs and Allegheny County to "submit their data and conclusions to the Court" at the end of the process. The School District was present at the depositions of the County's Property Assessment Manager and acting Chief Assessment Officer (but had no questions for either witness) and therefore was aware the 81.1 percent CLR was incorrect. Instead of working on the reasonable resolution of the situation agreed to by the other parties, the School District refused to be a party to the settlement to correct this injustice.

The Plaintiffs and Allegheny County anticipated the process outlined in the consent order would take approximately 30 days (see transcript of proceeding, September 1, 2022 ("T" hereafter), p. 10), and I anticipated they would at that time furnish me with a recalculated CLR. After the passage of over 30 days I scheduled a status conference for June 15, 2022. Among other topics discussed at the status conference was a dispute over whether the County should be using the 2012 assessed value (or base year value) for properties with higher assessments from a school district assessment appeal filed between 2013 and 2020, which Plaintiffs referred to as "sales chasing." On July 19, 2022 I ruled that the 2012 base year value should be the assessed value in cases of "sales chasing." I also attempted to expedite completion of the process by confining the CLR recalculation to the 10,114 sales identified by the Plaintiffs and the County at that time, and I gave them two more weeks to conclude the process. At the County's request, an extension to August 12, 2022 for concluding the process was granted. However, on August 11, 2022 the School District of Pittsburgh filed an appeal to the Commonwealth Court of Pennsylvania from my ruling on sales chasing. See no. 869 CD 2022. The School District, which had promised not to delay the proceedings, argued that this appeal from an unappealable order resulted in a stay of the proceedings. I rejected this argument and on August 19, 2022 ordered the Plaintiffs and the County to promptly submit their data and conclusions. On August 24, 2022 the County submitted data to the Plaintiffs, the School District and me and refused to submit any conclusion on a recalculated CLR. The Plaintiffs filed a petition for a rule to show cause why the County should not be held in contempt, which was argued on September 1, 2022. During argument the Plaintiffs declined to pursue the contempt of court allegation against the County and proffered a CLR they had recalculated from the County's data. After argument, I entered a preliminary injunction setting the CLR at 63.53 percent for 2020 sales of property. I additionally ordered the County to send the data to STEB for it to also perform a recalculation of the CLR.

The School District discontinued its appeal to the Commonwealth Court from my July 19, 2012 ruling on sales chasing and filed another appeal from my September 1, 2022 order that provided the injunctive relief of a 63.53 percent CLR. The School District has filed a concise statement of errors complained of on appeal that will be addressed in the following portion of this opinion.

III. Errors Alleged by School District

The School District first contends that, because a statute provides for STEB to set the CLR, I made an error by exercising jurisdiction to grant a preliminary injunction that set the CLR. But, when some of the same Plaintiffs filed objections with STEB under 71 P.S. §1709.1516a(c) to the CLR being set at 81.1 percent in June of 2021, STEB declined to review Allegheny County's coding of valid and invalid sales and dismissed the objections. See objections and 8/18/2021 State Tax Equalization Board Minutes in exhibit 18 in Plaintiff's answer to preliminary objections filed 9/20/2021 as Document 11. Thus, the statutory remedy under §1709.1516a is absent. Taxpayers with assessment appeals in which the artificially inflated CLR is used to determine the assessed value will have higher assessments than taxpayers with expert witnesses that determine the assessed value with 2012 appraisals of comparable properties or via the common law uniformity challenge explained in Downington Area School District v. Chester County Bd. Of Assessment (590 Pa. 459, 913 A.2d 194 (2006)). This would violate Pennsylvania Constitution article VIII, §1, which requires tax uniformity. There is equity jurisdiction for a preliminary injunction when taxpayers raise a substantial constitutional issue and there is no remedy through the administrative process. See Beattie v. Allegheny County, 589 Pa. 113 at 122, 907 A.2d 519 at 524-525 (2006). Since both of these conditions exist in this proceeding, there was equity jurisdiction for me to grant a preliminary injunction setting the CLR.

Equity jurisdiction also may be exercised "to restrain acts of officials which are contrary to positive law…." Rankin v. Chester Upland School Dist., 11 Pa. Cmwlth. 232, 238-239, 312 A2d 605, 608 (1973). The County automated computer program is contrary to the positive law on validating property sales set forth by STEB. Hence, there is an additional basis for my exercise of equity jurisdiction to set the CLR.

Even if only STEB has jurisdiction to set the CLR, my September 1, 2022 ruling also ordered the County to submit the recoded data to STEB for recalculation of the CLR. If STEB's recalculation would result in the same 63.53 percent CLR or a different one, the CLR established by STEB will prevail and nullify my injunction. Hence, STEB's authority to set the CLR was not violated.

For the three reasons described above, my exercise of equity jurisdiction to set the CLR was correct.

The School District next contends that, because the Plaintiffs did not exhaust their administrative remedies set forth in 71 P.S. §1709.1516 a(c), I made an error by exercising jurisdiction. While the cited statute above provides Plaintiffs the remedy of filing objections with STEB to the CLR it set at 81.1 percent (under the statute STEB "may grant a hearing and may modify or adjust its finding and computations…."), this remedy was exhausted when STEB summarily dismissed the objections they filed. See objections and 8/18/2021 State Tax Equalization Board Minutes in exhibit 18 in Plaintiff's answer to preliminary objections filed 9/20/2021 as Document 11. The cited statute above allows for an appeal de novo to Commonwealth Court, but this remedy also was exhausted when an appeal from STEB was taken by Plaintiffs (see no. 1100 CD 2021) and STEB settled the Commonwealth Court proceeding by agreeing to recalculate the CLR after completion of the process set forth in the April 27, 2022 consent order that I signed. See T, pp. 11-12 and ¶ nos. 3 and 11 in the brief filed by Plaintiffs on 8/31/2022 as Document 88. Since Plaintiffs did exhaust their administrative remedies, my exercise of jurisdiction was correct.

The School District next contends that I made an error because the deadline for filing tax assessment appeals expired six months before I set the CLR at 63.53 percent. However, the only alternative, utilization of the artificially inflated CLR, would have been worse. If the Allegheny County Board of Property Assessment, Appeals and Review is "in a state of administrative assessment limbo" (¶ 12, Intervenor School District of Pittsburgh's concise statement of errors complained of on appeal), that is not because I made an error. It is because Allegheny County provided incorrect data to STEB that inflated the CLR to 81.1 percent and because the School District attempted to cast uncertainty on the CLR of 63.53 percent by its unjustified appeal to the Commonwealth Court.

The School District next contends I made an error by ordering the County to resubmit its revised data to STEB without an evidentiary hearing or independent review. An evidentiary hearing, however, is not required under the law. See Walter v. Stacy, 2003 PA Super 458, 837 A.2d 1205 at 1210. Since there was not much disagreement on the revised data and recalculated CLR (see T, p. 25, 1.19- p. 27, 1.18), an evidentiary hearing was unnecessary. Further, the agreement by STEB to use the revised data to recalculate the CLR was likely to produce the recalculated CLR before an evidentiary hearing could have been scheduled. As to the contention that there should have been an independent review of the revised data before I ordered it to be sent to STEB, sole responsibility for electronically delivering that data to STEB is vested in the Allegheny County Office of Property Assessment. See 71 P.S. § 1709.1509. If what the School District really means is the revision of the data was "based on a largely unilateral analysis by the Challenging Property Owners which was at best, passively blessed by the County" (Intervenor's concise statement, ¶14), nothing could be further from the truth. The analysis that the County reported to me on September 1, 2022 showed a contentious process in which the County's viewpoint prevailed when there were disagreements. See T, pp. 12-17. If the School District is complaining because it was not involved in this analysis of the data (see T, p. 30), it should have filed a motion to bring the issue to my attention before the County submitted the revised data to me on August 24, 2022. If I were made aware earlier that the School District wanted to be involved in the data analysis, the docket demonstrates that I would have interceded as happened when I held argument on that County's motion for sanctions on April 19, 2022, when I held a status conference on June 15, 2022, when I held argument on the School District's and County's motions for reconsideration on July 18, 2022 and when I held argument on Plaintiff's motion to compel on August 18, 2022. Therefore, it was not erroneous for me to order the County to resubmit its revised data to STEB without an evidentiary hearing or independent review.

The School District's final contention is that my "sales chasing" ruling was erroneous. The School District argues that a home with a 2012 assessed value, or "base year value" of $100,000, that was sold in 2017 for $200,000 triggering a School District assessment appeal in which the Board of Property Assessment, Appeals and Review ("BPAAR") found the assessed value to be $160,000, should have $160,000, rather than $100,000 reported as the assessed value to STEB if the home sold for $300,000 in 2020. This would drive the assessment to sales price ratio, used in calculating the CLR, higher, from .33 percent to .53 percent. The first problem with using $160,000 as the assessed value is that BPAAR would likely have calculated it by use of a CLR established through use of the previously described computer automation the County began to use in 2014. The second problem is that, according to the International Association of Assessing Officers, using $160,000 instead of $100,000 for the assessed value invalidates uniformity results. See pp. 7-8 in Plaintiffs' brief re sales chasing filed 6/27/2022 as Document 68. Lastly, to represent to property owners that a county uses a base year method to set assessed values but then use an increased assessment from a later sale to

calculate this ratio that is central to assessment appeals would be a misrepresentation to them. Therefore, my ruling that the base year should be the assessed value when there has been "sales chasing" was correct.

BY THE COURT:
/s/The Hon. Alan Hertzberg