

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1037

THOMAS P. HEALY, JR., & another¹

vs.

CLIFFORD L. HAGBERG, SR.,² & others.³

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury-waived trial in the Superior Court, defendant Clifford L. Hagberg, Sr., appeals from a judgment in favor of the plaintiffs, Thomas P. and Debra J. Healy (the Healys), on their claims against him individually and as trustee of the Beach Realty Trust for breach of contract and negligence arising out of the purchase of a timeshare. Hagberg also appeals from an order denying his posttrial motion to alter or amend the judgment, or for a new trial. We affirm the judgment of liability against Hagberg as trustee, and we remand for a

¹ Debra J. Healy.

² Individually and as trustee of the Beach Realty Trust.

³ Clifford Hagberg, Jr., individually and as trustee of the Beach Realty Trust; SPM Resorts, Inc.; Republic Bancorp., Inc.; and Robert Kayer, Ken Nordeen, Mark Fishbon, Kathy Kittredge, and Doug Manning, as trustees of the Ocean Club Condominium Trust.

determination as to Hagberg's individual liability and for reconsideration of the amount of damages.

Background. We summarize the facts as found by the trial judge, supplemented by uncontested facts from the record. See Connor v. Benedict, 481 Mass. 567, 568 (2019). Hagberg was a trustee of the Beach Realty Trust, an entity that owned and developed the Ocean Club at Smuggler's Beach Resort Condominium (the Ocean Club), a timeshare resort in South Yarmouth. In May 1988, the Healys entered into a timeshare interval purchase agreement (the agreement) with Hagberg, as trustee of the Beach Realty Trust, to purchase a flexible, interval timeshare unit at the Ocean Club for \$10,500.⁴ The Healys paid the mortgage and all other maintenance fees and special assessments to the Ocean Club as required, making payments of \$18,688.75 in mortgage interest and principal, and \$13,285 in condominium fees and assessments, for a total of \$31,973.75. The Healys exercised their right of full use and enjoyment of the timeshare.

Under the agreement, the Beach Realty Trust, as the seller, was to record a deed within five days of the Healys having performed the terms of the agreement, including having secured financing. However, unbeknownst to the Healys, no deed was ever

⁴ The purchase consisted of a payment of a \$2,100 deposit and financing of the remaining \$8,400. The mortgage was paid in full on June 16, 1995.

recorded. As a result, when the Healys decided to sell their timeshare in October 2013, and contacted the Ocean Club about obtaining the deed, they were informed that they did not legally own the timeshare as no deed had been recorded in their name and the interval in the unit had been sold to another party. That discovery led to this action.

The Healys originally brought claims against Hagberg individually and as trustee of the Beach Realty Trust, along with other related parties, for various contract and tort claims. After reaching a settlement with some of the parties, a jury-waived trial was held on January 12, 2018.⁵ The trial judge found Hagberg, in his capacity as trustee, liable for breach of contract and negligence, and awarded the Healys damages in the amount of \$18,688.75, which was the amount they paid in mortgage principal and interest, as well as interest and costs.⁶ Final judgment subsequently entered against Hagberg, but without specifying that the judgment was against him only as trustee. Hagberg moved to alter or amend the judgment, or for a new

⁵ Claims against SPM Resorts, Inc., which was the management company, and the trustees of the Ocean Club Condominium Trust, which was the successor-in-interest of the Beach Realty Trust, were reported settled in 2014 for \$17,000.

⁶ Judgment entered in favor of Hagberg as trustee on the remaining claims for fraud, unjust enrichment, and violation of G. L. c. 93A. Hagberg, in his individual capacity, and the remaining two defendants, Clifford Hagberg, Jr., and Republic Bancorp, Inc., were found not liable.

trial, on grounds related to damages, and included a request to amend the judgment to reflect that it should have been entered against him in his representative capacity as trustee. The motion was denied by endorsement shortly thereafter.

Hagberg appeals, challenging whether the Healys' claims were untimely, the damages award, and the order denying his motion to amend the judgment.

Discussion. Following a jury-waived trial, we review the trial judge's rulings of law de novo and factual findings for clear error. See Trace Constr., Inc. v. Dana Barros Sports Complex, LLC, 459 Mass. 346, 351 (2011); Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996).

1. Statute of limitations. Hagberg argues that the Healys' claims are barred by the statute of limitations. While a cause of action typically accrues upon injury, the discovery rule tolls the statute of limitation in circumstances where the plaintiff did not know or could not reasonably have known that he or she may have been harmed by the conduct of another. See Bowen v. Eli Lilly & Co., 408 Mass. 204, 205-206 (1990). Based on the facts before us, particularly that the Healys were able to use the timeshare and were billed and paid annual fees, we are satisfied that the limitations period accrued in 2013, when the Healys discovered Hagberg's failure to record the deed. As

the Healys filed their complaint in 2014, their claims were timely brought.⁷

2. Damages. The trial judge found that Hagberg, as trustee, was liable for breach of contract and negligence.⁸ The Healys were found to have sustained damages in the amount of \$18,688.75, plus interest in the amount of \$10,409.58 and costs in the amount of \$424.10. The award reflects the amount the Healys paid in mortgage interest and principal for the timeshare. While not contesting his liability, Hagberg argues that because the Healys had the full use and enjoyment of the timeshare, their damages were confined to their inability to sell their interest in 2013. Accordingly, Hagberg contends that the trial judge erred in calculating the Healys' damages based on the amount they paid for the timeshare itself as opposed to its residual market value at the time they sought to sell it. We agree.

⁷ Hagberg originally asserted this defense in a motion for judgment on the pleadings, which was denied as premature. Given our resolution, we need not address whether, as the Healys contend, by failing to reassert the defense at trial, Hagberg waived his right to argue it on appeal.

⁸ We note that Hagberg's failure to record the deed was also a violation of G. L. c. 183B, the Real Estate Time-Share Act (Act). Section 51 (b) of the Act provides that "the developer or the managing entity shall record the time-share deed . . . in the appropriate registry of deeds . . . within five days after the performance of the terms and conditions of the purchase and sale agreement or within six months of the date of contract to purchase whichever shall occur earlier."

The Healys argue that, pursuant to G. L. c. 183B, the appropriate measure of damages for Hagberg's failure to record the deed is the sum that flows from the missing deed, which they contend is the amount they paid for the timeshare. While we accept the general proposition as a starting point, we do not agree with their conclusion. Under G. L. c. 183B, an appropriate remedy shall be "liberally" fashioned so that "the aggrieved party is put in as good a position as if the other party had fully performed." G. L. c. 183B, § 7. See G. L. c. 183B, § 25 (c) (in actions involving wrongdoing by developer, "[i]f the tort or breach of contract occurred during any period of developer control, the developer shall be subject to liability for all unreimbursed losses suffered by the . . . time-share owners as a result, including costs and reasonable attorney's fees").

Here, Hagberg sold the Healys an interval of time they could use to occupy a unit at the Ocean Club, and the Healys exercised that right of occupancy. Moreover, as the contractual obligation to record the deed came only after the purchase, Hagberg's breach of the agreement could not have been material to the Healys' decision to enter into the agreement.⁹ Thus, the

⁹ Nor is there language in the agreement requiring a return of the purchase amount if the deed is not properly recorded. Cf. In re Shields, 147 B.R. 627, 628 (Bankr. D. Mass. 1992) (where

appropriate measure of damages is the sum that flows from the missing deed, and that sum is the amount the Healys could have realized on the sale of the timeshare, i.e., the market value of the timeshare, plus, pursuant to G. L. c. 183B, § 25, fees and costs incurred. As there was limited but conflicting evidence in the record as to the market value of the timeshare, we remand to the Superior Court for a reassessment of damages consistent with G. L. c. 183B, § 25.

Hagberg's posttrial motion to amend, denied by endorsement by the trial judge, sought, inter alia, a reassessment of damages on the grounds that, in fashioning the award, the trial judge erred by not considering mitigation and contribution. With respect to mitigation, Hagberg argues that the Healys failed to mitigate their damages by refusing to accept the substitute deed offered to them (if they paid \$500 in legal expenses) by the trustees of the Ocean Club Condominium Trust (the Ocean Club trustees). "[A] party cannot recover damages for loss that [the party] could have avoided by . . . reasonable efforts . . . as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise." Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 612 (2007), quoting Restatement (Second) of

timeshare buyers entered into agreement requiring return of purchase price if deed was not delivered within 180 days).

Contracts § 350(1) comment b (1981). However, the suitability of a substitute arrangement depends on whether it is "reasonable" in the circumstances. See Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 319 (1988) (plaintiff did not unreasonably fail to mitigate damages by refusing to accept partial payment on misdirected loan funds). Here, the Healys were offered, but rejected, a substitute deed for a different unit and week, albeit in the same period, in exchange for a payment of \$500 to cover legal expenses. Their rejection of this offer was not unreasonable in the circumstances for two reasons. First, the Healys had a unique property interest in the timeshare unit they contracted for and were under no obligation to substitute that interest for one in a different timeshare unit. Second, it is unreasonable to require the Healys to mitigate by paying money to an alleged tortfeasor associated with their injury. See id. (party's decision as to suitability of mitigation "enjoys wide latitude and is to be respected so long as it is not irrational"). In these circumstances, it was not irrational for the Healys to decline the substitute deed contingent on the payment of additional money, and as such, we conclude that they did not unreasonably fail to mitigate damages.

We also find no error in the trial judge declining to offset the award of damages by the \$17,000 that the Healys

received in settlement of their claims against SPM Resorts, Inc. (SPM), and the Ocean Club trustees. Hagberg argues that he is entitled to an offset pursuant to G. L. c. 231B, the Joint Tortfeasors Act. However, Hagberg is only entitled to an offset if he can show that the settlement was for the same injury as was the award against which the offset is sought. See G. L. c. 231B, § 4 (requiring offset only against those "liable in tort for the same injury"). Here, despite whatever comments the judge may have made during the trial as to his initial thoughts on the subject, the settlement involved different claims than those brought against Hagberg. While the claims against Hagberg were anchored in his failure to record the deed and in his selling the same unit to another party, the claims against SPM and the Ocean Club trustees arose from the collection of maintenance and other such fees. There also was not any stipulation by the parties, or finding by the trial judge, that Hagberg was, in fact, jointly liable in tort with the settling codefendants. Accordingly, it was not error that the award of damages was not offset by the amount in settlement.

3. Modification of the final judgment. Hagberg's posttrial motion to amend also included a request to modify the final judgment so as to provide that Hagberg was liable only as trustee and not individually, which the trial judge denied. The general rule is that trustees of a business trust or a nominee

trust, i.e., nondonative trusts, may be held individually liable for torts committed in the administration of the trust, whether or not they are personally at fault. See New Hampshire Ins. Co. v. McCann, 429 Mass. 202, 212-213 (1999); First Eastern Bank, N.A. v. Jones, 413 Mass. 654, 658-661 (1992). While we may affirm the judgment as to the negligence claim against Hagberg in his individual capacity "on any ground apparent on the record that supports the result reached in the [trial] court" (quotation and citation omitted), Lopes v. Commonwealth, 442 Mass. 170, 181 (2004), the instrument that created the Beach Realty Trust is not before us. As we cannot determine what type of trust is involved here, we remand to the Superior Court to determine the nature of the Beach Realty Trust, and whether Hagberg can be held individually liable.

Conclusion. For all of the foregoing reasons, we vacate so much of the judgment awarding damages and imposing individual liability, and we remand to the Superior Court for reconsideration of the amount of damages and for a determination as to Hagberg's individual liability consistent with this

memorandum and order. The judgment, and the order denying defendant's posttrial motion, are otherwise affirmed.

So ordered.

By the Court (Maldonado,
Henry & Wendlandt, JJ.¹⁰),

Clerk

Entered: August 14, 2020.

¹⁰ The panelists are listed in order of seniority.