COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1251

BRIAN ALLERA

vs.

HUNTINGTON WOOD CONDOMINIUM TRUST.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Brian Allera, timely appeals from an order allowing the defendant's motion to dismiss.[1] We affirm in part and reverse in part.

Background. The Huntington Wood Condominium (condominium) consists of 255 units in fifty-one buildings, all of which are townhouse-style homes in Peabody.[2] Some units, including Allera's, have attached garages, in which case there is also a

[1] Allera served a motion to alter or amend judgment within ten days of the entry of the order, tolling the appeal period. See Mass. R. A. P. 4 (a) (2), as appearing in 481 Mass. 1606 (2019). The trial court docket states that Allera also appealed from the order denying this motion. However, the notice of appeal in the record designates only the order allowing the defendant's motion to dismiss. On appeal Allera presents no argument on his motion to alter or amend judgment and we do not address it.

[2] The order allowing the motion to dismiss states that there are 257 residential units. The discrepancy is not material to our disposition.

driveway or parking area in front of the garage. Other units have detached garage bays, which hold one vehicle and may only be used by the unit owners. The condominium also has common area off-street parking spaces (parking spaces); these parking spaces are at issue here.

Prior to 2018, the parking spaces were available on a first come, first served basis. In 2018, the condominium board of trustees (board) implemented a parking program by which unit owners with a bay garage could request a parking space near their building. Requested spaces were assigned on a first come, first served basis for $200 per space for one year, or $20 per month up to $200, and required the unit owner to sign a parking space license and agreement (license). The fees generated by the parking program were common funds, "held by the [t]rust on behalf of all [u]nit [o]wners" for common purposes.

The license form provided that payments for a parking space were "for use and occupancy only" and "shall not create a tenancy." It further provided that "this is a license to park . . . it is not a lease, and no interest in real estate is granted." Either the board or the licensee can terminate the license at any time, with thirty days' written notice.

Allera alleges that in May 2018 he requested that the board "cease and desist the discriminatory practice immediately." The board continued the parking program for another year.

In August 2019 meeting minutes, the board communicated to the condominium unit owners that it had received a legal opinion that the parking program could continue indefinitely. Allera again requested that the board discontinue the parking program. Allera brought this suit to halt the parking program as then implemented.

The defendant, Huntington Wood Condominium Trust (trust), filed a motion to dismiss for failure to state a claim upon which relief can be granted. See Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). On August 12, 2020, a judge allowed the motion and the case was dismissed.

Standard of review. Our review of an order allowing a motion to dismiss for failure to state a claim is de novo. Polay v. McMahon, 468 Mass. 379, 382 (2014). We accept as true the factual allegations of the complaint and draw all reasonable inferences in favor of the plaintiff. Montanez v. 178 Lowell St. Operating Co., LLC, 95 Mass. App. Ct. 699, 702 (2019). The task is "to examine each of the plaintiff['s] theories, considering 'whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief.'" Kelley v. Cambridge Historical Comm'n, 84 Mass. App. Ct. 166, 173 (2013), quoting Dartmouth v. Greater New Bedford Regional Vocational Tech. High

Sch. Dist., 461 Mass. 366, 374 (2012). "Factual allegations must be enough to raise a right to relief above the speculative level." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Discussion. Allera contends first that the parking program "divided the common areas and affected changes to the intended use of the common areas" in violation of G. L. c. 183A, § 5 (b). The discussion of a similar claim in Sewall-Marshall Condominium Ass'n v. 131 Sewall Ave. Condominium Ass'n, 89 Mass. App. Ct. 130 (2016), disposes of Allera's argument. In that case, we concluded that a condominium association had the right to designate parking spaces in a common area for one year, with the possibility of change after each year, because such designation did not change unit owners' interest in common areas. Id. at 133-134. "[T]he parking agreement was instead simply an exercise of the boards' powers . . . '[t]o lease, manage, and otherwise deal with . . . [the] common areas.'" Id. at 134, quoting G. L. c. 183A, § 10 (b) (1). In addition, as here, "the parking agreement does not grant exclusive use of the condominium's common areas to any unit owner. Indeed, [it] created a procedure whereby parking space assignments [can] be changed each year. No unit owner's interest in the common area

diminished." Sewall-Marshall Condominium Ass'n, supra at 133-134.

Allera's second argument, that the board was required to obtain the permission of adjoining owners pursuant to G. L. c. 183A, § 5 (b) (2) (ii), fares no better.[3] This section permits a condominium governing body to:

> "designate for any unit owner the right to use, whether exclusively or in common with other unit owners, any limited common area and facility, whether or not provided for in the master deed, upon such terms as deemed appropriate by the governing body of the organization of unit owners; provided, however, that consent has been obtained from (a) all owners and first mortgagees of units shown on the recorded condominium plans as immediately adjoining the limited common area or facility so designated."

The trust argues that no consent was necessary because there is no unit immediately adjoining the parking spaces as, under the master deed, a unit's exterior walls are bounded by the "plane of the interior surface of the wall studs facing such [u]nit

[3] In several places in his brief, Allera conflates G. L. c. 183A, § 5 (b) (2) (i), which requires consent of a majority of unit owners for creation of easements, with G. L. c. 183A, § 5 (b) (2) (ii), which requires consent of adjoining property owners for creation of limited common areas. To the extent that Allera intended to make an argument pursuant to G. L. c. 183A, § 5 (b) (2) (i), his argument does not rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019). Even if we were to consider this argument, it would fail: the parking program did not create easements. See Sewall-Marshall Condominium Ass'n, 89 Mass. App. Ct. at 133 (parking program did not create easement because it did not create property interest appurtenant to land as no specific property burdened or benefitted).

and/or the plane of the interior surface of the concrete wall in the basement area." If this argument were correct, no condominium unit could adjoin any exterior common area other than the wall of a building.

In any event, Allera's argument fails for two reasons. First, G. L. c. 183A, § 5 (b) (2) (ii), provides the organization of unit owners the ability to "[g]rant to or designate for any unit owner the right to use, whether exclusively or in common with other unit owners, any limited common area and facility, whether or not provided for in the master deed" upon satisfying certain conditions. Nothing in the statute prohibits the provisions of the condominium bylaws at issue here from operation. Here, section 6.46 of the bylaws permitted the trustees "from time to time [to] assign additional parking spaces . . . for such periods and for such monthly charges as the [t]rustees may in their discretion determine"; however, "[a]ll such designations and assignments shall be made on a fair and equitable basis." Second, the parking program did not offer a permanent grant of rights but rather offers a time-limited license to use a designated area.

Dismissal of Allera's third claim, that the parking program was not fair and equitable as required by section 6.46 of the bylaws, was not correct on this record. Because the parking program was exclusively available to unit owners with a bay

garage, Allera has presented sufficient factual allegations to raise his "right to relief above the speculative level" (citation omitted). Iannacchino, 451 Mass. at 636. The trust responds that the purpose of the parking program was to "create equity among the [u]nit [o]wners and to afford owners with a bay area parking space a similar parking option as [u]nit [o]wners with a driveway and garage attached to their [u]nit." The flaw in this contention, at least for purposes of a motion to dismiss, is that the unit owners bought what they bought, and that did not include similar parking to the unit owners with attached garages. The motion judge did not address this argument, and we conclude that there are material facts at issue. For example, the record does not state how many units have attached garages and how many have bay garages, how many parking spaces are affected by the parking program, the market value of the different types of units, any reduction in value of a unit with an attached garage with fewer available parking spaces, or whether the cost of $200 per year is a fair market value price. On the record before us, we therefore lack the information necessary to conclude that a parking program available to only some unit owners because of a buying choice they made is fair and equitable as a matter of law.

For the reasons set forth above, so much of the order dated August 11, 2020, as dismisses Allera's claim that the parking

program was not fair and equitable as required by section 6.46 of the bylaws is reversed and the case is remanded for a determination of whether the program violated that provision. In all other respects, the order is affirmed.

So ordered.

By the Court (Massing, Henry & Ditkoff, JJ.[4]),

Clerk

Entered: April 7, 2021.

[4] The panelists are listed in order of seniority.