COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1018

GOVERNOR'S PARK CONDOMINIUM ASSOCIATION

vs.

RUTH AMADI.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Governor's Park Condominium Association (association) filed this lawsuit in 2017, claiming that Ruth Amadi violated the condominium's master deed, declaration of trust, and rules and regulations (collectively, governing documents) by making disruptive noises in the middle of the night. The association was granted a preliminary injunction ordering that Amadi comply with the governing documents and cease making disruptive noises. Then, following a trial in 2019, a jury returned a special verdict in favor of the association. Amadi filed a motion for judgment notwithstanding the verdict or for a new trial (postverdict motion), which the trial judge denied.

After a hearing a second judge ordered the entry of a final judgment making the preliminary injunction permanent and awarding $89,242.10 in attorney's fees as a lien on Amadi's unit

under G. L. c. 183A, § 6. Amadi appeals, arguing among other things that there was fraud on the court, that the preliminary injunction was improperly granted, that the trial judge abused her discretion in declining to give a particular jury instruction and in denying the postverdict motion, and that G. L. c. 183A, § 6, does not authorize the award of attorney's fees. We affirm.[1]

Discussion. 1. Fraud on the court. Amadi argues that the association committed a fraud on the court by submitting forged affidavits with its complaint, which she says requires "the entire proceeding" to be set aside. "A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Munshani v. Signal Lake Venture Fund II, LP, 60 Mass. App. Ct. 714, 718 (2004), quoting Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 418 Mass. 596, 598 (1994). In denying Amadi's postverdict motion, the trial judge

[1] We reject the association's argument that the appeal must be dismissed because Amadi's brief was untimely. A single justice allowed Amadi's motions for enlargements of time and accepted her brief for filing. The association fails to establish that this was an abuse of discretion.

found that Amadi "failed to demonstrate any basis for her claims of fraud." We see no clear error in the judge's ruling. See Munshani, supra at 717-718.

The portions of the record cited by Amadi do not clearly and convincingly establish that the association forged affidavits or engaged in other fraudulent conduct. Neither Emanuela Korreshi nor Christine Cochrane denied making their affidavits, as Amadi claims. Korreshi testified only that she had not met the association's attorney in person; she did not deny executing her affidavit. Likewise, while Cochrane testified that she did not recall executing her affidavit, she did not disclaim it; rather, she testified, "If you have my signature, then I signed it . . . ." And although Amadi points to evidence that a third witness was suffering from dementia by the time of trial in 2019, there is nothing in the record supporting Amadi's assertion that the affidavit the witness signed in 2017 was forged or that she then lacked the capacity to execute it.

Furthermore, not only has Amadi failed to establish the existence of fraud, she has not shown that the affidavits "improperly influenc[ed] the trier [of fact]" or "unfairly hamper[ed] the presentation of" her case. Munshani, 60 Mass. App. Ct. at 718. As Amadi acknowledges, Korreshi's and Cochrane's testimony was consistent with their affidavits, and

Amadi had a full opportunity to cross-examine them. Amadi's allegation that the association improperly coached the witnesses is unsupported by any evidence in the record.

2. Preliminary injunction. A preliminary injunction "does not survive the entry of a final decree" even when the final decree makes the injunction permanent. Carlson v. Lawrence H. Oppenheim Co., 334 Mass. 462, 465 (1956), quoting Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 189-190 (1943). Amadi's challenge to the preliminary injunction is therefore moot. See Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 2), 424 Mass. 471, 472 (1997).

3. Jury instruction. Amadi contends that the trial judge erred by refusing to instruct the jury on her defense that the association selectively enforced the governing documents. We review to determine whether there was an abuse of discretion and, if there was, whether the verdict might have been different absent the error. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 385, 388-389 (2019).

"When determining the appropriateness of delivering an instruction, '[a] request correct in law but not appropriate to the conditions of a case is properly refused.'" Global Investors Agent Corp. v. National Fire Ins. Co., 76 Mass. App. Ct. 812, 826 (2010), quoting Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 126 (1974). Here, the judge

properly rejected Amadi's proposed instruction on the ground, among others, that the evidence did not support a defense of selective enforcement. See Global Investors Agent Corp., supra (judge properly declined to instruct on theory not supported by evidence). In arguing otherwise, Amadi raises only conclusory assertions that there was "abundant evidence" of selective enforcement. This is insufficient to show either that the judge erred by omitting the instruction or that the jury might have reached a different result had the instruction been given.[2] For the same reasons, there was also no error in the judge's decision not to include the defense on the special verdict slip.

4. Postverdict motion. When evaluating a motion for judgment notwithstanding the verdict, the judge considers the evidence in the light most favorable to the nonmoving party to "determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict" for that party. Phelan v. May Dep't Stores Co., 443 Mass. 52, 55 (2004), quoting Tosti v. Ayik, 394 Mass. 482, 494 (1985). We apply the same

[2] We also agree with the association, based on the portions of the trial transcript provided to us, that the evidence did not suggest selective enforcement. For instance, there was testimony that resident complaints were reviewed at a monthly board meeting and enforced by the property manager, that Amadi was not fined for every violation, and that another resident also received a violation notice.

standard in our review. See id. A motion for a new trial is committed to the judge's discretion. See Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 466-467 (2003). On such a motion, "the judge should only set aside the verdict if satisfied that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.'" Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 520, cert. denied, 493 U.S. 894 (1989), quoting Hartmann v. Boston Herald-Traveler Corp., 323 Mass. 56, 60 (1948).

Amadi argues in a conclusory fashion that the jury's verdict was against the weight of the evidence. We cannot assess this argument, however, because Amadi has not provided us with a full copy of the trial transcript. "An appellant's obligation to include those parts of the trial transcript . . . 'which are essential for review of the issues raised on appeal . . . is a fundamental and long-standing rule of appellate civil practice.'" Cameron v. Carelli, 39 Mass. App. Ct. 81, 84 (1995), quoting Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373 (1991), S.C., 411 Mass. 807 (1992). Because Amadi has failed to meet her obligation, we are unable to determine whether the verdict was unsupported by the evidence. See Cameron, supra at 83-84.

Amadi further argues that the verdict should be set aside because she did not have notice of the governing documents. But Amadi points to nothing in the record to support her claim of lack of notice; in fact, she testified that she was aware of the condominium rules and regulations. In any event, irrespective of actual notice, "[c]onstructive knowledge of the regulatory scheme of the condominium was chargeable to [Amadi] as of the time [she] acquired [her] unit." Noble v. Murphy, 34 Mass. App. Ct. 452, 458 (1993). See Tosney v. Chelmsford Village Condominium Ass'n, 397 Mass. 683, 687-688 (1986).

5. Attorney's fees. Finally, we turn to Amadi's argument that the award of attorney's fees was not authorized under G. L. c. 183A, § 6. According to Amadi, the only expenses that may be assessed under the statute are "common expenses," i.e., "the cost of maintaining, repairing or replacing a limited common area and facility." G. L. c. 183A, § 6 (a) (ii). This reading does not comport with the statutory language. Although § 6 (a) (ii) does authorize the assessment of common expenses, it also provides for the assessment of expenses resulting from a unit owner's violation of the condominium's governing documents:

> "If any expense is incurred by the organization of unit owners as a result of the unit owner's failure to abide by the requirements of this chapter or the requirements of the master deed, trust, by-laws, restrictions, rules or regulations, or by the misconduct of any unit owner, or his family members, tenants, or invitees, the organization of unit owners may assess that expense exclusively against the

> unit owner and such assessment shall constitute a lien against that unit from the time the assessment is due, and such assessment shall be enforceable as a common expense assessment under this chapter."

In addition, the last sentence of § 6 (a) (ii) expressly provides for the assessment of attorney's fees:

> "The organization of unit owners may also assess any fees, attorneys' fees, charges, late charges, fines, costs of collection and enforcement, court costs, and interest charged pursuant to this chapter against the unit owner and such assessment shall constitute a lien against the unit from the time the assessment is due, and shall be enforceable as common expense assessments under this chapter."

These statutory provisions authorized the award of attorney's fees in this case, once the jury found that Amadi violated the governing documents.[3]

6. Appellate attorney's fees. We allow the association's request for appellate attorney's fees and double costs in relation to defending this frivolous appeal. It is within our discretion to find an appeal frivolous "[w]hen the law is well settled, [and] when there can be no reasonable expectation of a reversal." Avery v. Steele, 414 Mass. 450, 455 (1993), quoting Allen v. Batchelder, 17 Mass. App. Ct. 453, 458 (1984). Here,

[3] Amadi's argument to the contrary is based on a misreading of a prior unpublished opinion of this court not binding on this panel. The panel in that case determined that fines were not authorized under G. L. c. 183A, § 6, because, unlike here, there was no evidence that the unit owner violated any of the condominium's governing documents and the fines could not otherwise be assessed as common expenses.

many of Amadi's arguments were raised in a conclusory manner without record support, and none gave rise to a reasonable expectation of a reversal. For these reasons, among others, we determine the appeal to be frivolous.[4]

The association may submit a petition for appellate attorney's fees and double costs, together with supporting documentation, within fourteen days of the date of issuance of this decision. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004). Amadi shall have fourteen days thereafter to respond.

7. Conclusion. We affirm the judgment and the order denying the motion for judgment notwithstanding the verdict or for a new trial.

So ordered.

By the Court (Sullivan, Sacks & Shin, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: November 23, 2021.

[4] To the extent we have not specifically addressed any of Amadi's arguments, we have reviewed them and determined that they are without merit.

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