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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2006-01077-A

MARY ELLEN LaBRECQUE, Individually And Derivatively
On Behalf Of Brabo Condominium Trust,
Plaintiff

vs.

THE BRABO CONDOMINIUM TRUST, Through Its Trustees,
JOHN R. WADDELL, KRISTEN E. O'BRIEN and MATHEW
WUENSCHEL, and JOHN R. WADDELL, KRISTEN E. O'BRIEN,
and MATHEW WUENSCHEL, Individually,
Defendants

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

Plaintiff Mary Ellen LaBrecque ("LaBrecque"), and defendants John R. Waddell ("Waddell"), Kristen E. O'Brien ("O'Brien"), and Mathew Wuenschel ("Wuenschel") are owners/co-owners of three condominium units in a three-unit condominium in Newburyport, MA, called The Brabo Condominium (the "condominium"). LaBrecque purchased the third floor unit ("Unit 3") in the late 1980's. Waddell purchased the second floor unit ("Unit 2") in 1993. O'Brien and Wuenschel purchased the first floor unit ("Unit 1") in 2003. LaBrecque remains a resident at the condominium while the other unit owners rent their units. Each unit

owner, or in the case of Unit 1, either O'Brien or Wuenschel, is and has been a trustee of the condominium association at all relevant times. Under the various condominium documents, the condominium association is responsible for the operation and maintenance of the common areas of the condominium. The common areas are not extensive, but include the exterior of the condominium building, including the roof and two outside staircases that provide the required second means of egress for the second and third floor units.

The second amended complaint contains three counts. Count One asserts a derivative action against Waddell, Wuenschel, and O'Brien, as trustees of the condominium, claiming that they breached their fiduciary responsibilities to the condominium (collectively, Waddell, Wuenschel, and O'Brien will be referred to as the "trustees" even though LaBrecque is also a trustee, or alternatively, as the "defendants"). More specifically, LaBrecque claims that the trustees allowed the common areas of the condominium to deteriorate, failed to maintain an adequate reserve fund, delayed replacing the outside staircase to Unit 3, failed to replace the roof over Unit 3, and failed to act in the best interests of the condominium in administering insurance payments and common fee assessments.

Count Two asserts direct breach of contract claims (based on the condominium documents) against Waddell, Wuenschel, and O'Brien. More specifically, LaBrecque

claims, omitting some overlapping claims that she has asserted derivatively for harm to all unit owners, that the defendants delayed replacement of the outside staircase to Unit 3, failed to replace the roof over Unit 3, overcharged her for roofing work, cashed and converted an insurance check for her fire damage to the interior of her unit, charged her for legal fees related to the defendants' defense of this action, and failed to pay over insurance proceeds for roof leaks in her unit. She claims that the delay to the staircase replacement caused her to lose a sale of her unit at a price far above the price at which she could now sell her unit. She claims that the failure to replace the roof over her unit caused the collapse of her interior ceiling.

Count Three asserts a breach of contract claim (based on the condominium rules and by-laws documents) against Waddell for his alleged failure to control his girlfriend/wife's conduct on the common areas of the condominium.

This case was tried to the court without a jury over the course of three days, concluding on September 28, 2009. LaBrecque represented herself *pro se*. For reasons discussed below, the court finds that LaBrecque has failed to carry her burden of proof on all three counts in the second amended complaint, and orders judgment in favor of all defendants.

BACKGROUND

The condominium is a dwelling residence at 25 Barton Street in Newburyport, MA, that was created as a three-unit condominium by master deed in March 1988. It looks like it might one day have been a single family residence, but it could as easily have been a multi-family dwelling. The age of the building was not established in the record, but it is not recent construction, and appears from a photograph to be a fairly old building. It has an exterior of shingles and clapboard, and a roof that is split between tiles and asphalt shingles. At least during the time it has existed as a condominium, separate outside wooden staircases provided a second means of egress for the units on the second and third floors. One way or another, it is the staircases, and particularly the one providing access to LaBrecque's unit, that are central to almost all claims and disputes in this case.

Relations among unit owners were harmonious and friendly for years, or at least until LaBrecque returned to her unit after spending several years abroad. She rented her unit during her time away, and friction arose between her tenants and Waddell. LaBrecque acknowledges that her first tenants were a problem, ultimately prompting her to evict them from her unit. Upon LaBrecque's return to her unit in the early 2000's, relations among unit owners deteriorated, but the reason for that is unclear. There appears to have been no one incident or issue that precipitated the

breakdown. But the breakdown divided the units owners into two camps, LaBrecque in one, and Waddell and Wuenschel/O'Brien in the other. Communications between the two camps became strained and difficult. It appears that there were few verbal exchanges. E-mails became the means of communication, which is not a good sign among neighbors. Although fault is difficult to assess, the court took note during the trial that LaBrecque is not an easy or relaxed oral communicator.

The condominium always maintained two separate bank accounts, an operating account and a reserve account. The monthly common fees funded both accounts, with 85% of each unit's assessment funding the operating account and 15% funding the reserve account. The operating account paid expenses related to building insurance, water and sewerage fees, electric and carpet cleaning in common areas, and snow plowing. The minimal common area expenses permitted common area fees to be kept low. As of the fall of 2004, the units were assessed monthly, according to their respective percentage ownership of the condominium's common areas, as follows: (1) Unit 1, $142; (2) Unit 2, $135; and (3) Unit 3, $99.

The low common area fees dictated that the reserve account would remain correspondingly low, as it was funded by only 15% of the common area assessments. Waddell (and Wuenschel) credibly testified that it was the practice and intention of the condominium to keep the reserve account balance low, and to use it for small

projects and partial payments toward bigger projects. It was the condominium's plan and intention to fund larger common area improvements, such as roof and painting projects, through special assessments directed toward specific projects. That was done in the late 1990's when the building exterior was painted.

There is no basis in the evidence to conclude that LaBrecque did not concur in the manner in which the condominium funded its operating and reserve accounts. Only on one occasion, at the meeting of unit owners in the fall of 2004, did LaBrecque seek an increase in the monthly common area assessments. At that time, she requested that monthly fees be increased 35%, but did not request that the 15% allocation to the reserve account be changed. The trustees did not accept LaBrecque's proposed 35% increase, but did increase monthly common area fees by 28%.

The unit owners' meeting in the fall of 2004 dealt with two major improvement projects: repairing the roof and repairing/replacing the two outside staircases. The condominium approved both projects, although it is not totally clear from the record if the staircase project initially contemplated repairs to the existing structures or replacement of those structures. The court accepts Wuenschel's testimony that he raised the staircase issue at the meeting and he knew at that time that replacement would be necessary. The unit owners assigned various projects to different units. Unit 1 (Wuenschel/O'Brien) was assigned the roof project. Unit 3 (LaBrecque) was

assigned the staircase project. Neither project went smoothly.

Wuenschel/O'Brien obtained bids by June 2005 for roof repairs and the bid of E. B. General Contractors ("EB") was accepted by the condominium, with the record not reflecting any objection or disagreement by LaBrecque with that selection. The bid price was $7,300 and contemplated replacement of all asphalt shingles and spot repairs as needed to tiled areas of the roof. Although the reserve account could fund part of the roof expense, a special assessment based on pro rata shares was required. Numerous attempts to obtain LaBrecque's share of the roofing expense were unsuccessful. On June 29th, LaBrecque e-mailed Wuenschel and told him she would not pay for roof repairs until there was an agreement in place to repair her outside staircase. Wuenschel responded by stating, in part: "Using the fire escapes as an excuse is unacceptable. We have stated numerous times that these are 2 completely separate projects, both of which we need to have completed this summer." Ultimately, the condominium took LaBrecque's share of the roofing expense (or at least a share of it) in November 2006 out of an insurance check the condominium received to which LaBrecque was otherwise entitled, as the insurance payment was for damages to the interior of her unit. EB completed the roof repairs in the summer of 2005, except for a portion of the roof (asphalt shingles) on a dormer above LaBrecque's door that gave her access to the outside staircase. The defendants

contended that the dormer roof could not be repaired until after the staircase project was completed. No photographs of the old staircase were introduced into evidence, so the court has no basis to reject the defendants' contention.

The responsibility among unit owners for the staircase providing egress for LaBrecque's third floor unit was the single most contested issue of the trial. Defendants claim that it was LaBrecque's responsibility to obtain bids for the project and she failed to carry thorough her responsibilities until the end of 2006, after which the trustees approved the funding for the project promptly and Units 1 and 2 paid the outstanding balance of their pro rata share of the $37,000 expense. LaBrecque claims that the responsibility/fault for the delay was caused by the defendants, who refused to fund the expense for the preparation of design plans and thereby prevented her from obtaining the required bids for the project. She also claims that the other unit owners took responsibility for the staircase project for much of the time that it was delayed. The record does not permit a clear assessment of responsibility or fault. The defendants certainly thought that LaBrecque, who was most affected by the need for a second means of egress for her unit, was the responsible unit owner for that project. The court agrees with the relative importance of that stairway to LaBrecque, and on that basis, as well as on the burden of proof that LaBrecque carries, attributes any delay in the staircase project to LaBrecque. The record is simply not clear enough for

this court to understand and make a factual finding in support of LaBrecque's claim that the failure to fund the design drawings was the fault of the defendants.

Roof leaks and insurance claim proceeds were also the subject of a great deal of evidence. After EB repaired the roof, other than the dormer above LaBrecque's staircase egress, a leak developed in the dormer that collapsed a portion of her interior ceiling. LaBrecque claims that the other unit owners are at fault for not having had her dormer roof repaired with the rest of the asphalt portion of the building's roof. The defendants counter that the leaking dormer could not be repaired by EB until after the new staircase was installed, which did not occur until two years later when LaBrecque obtained bids for the new staircases. As the court has already found that the defendants were not responsible or at fault for the delayed stairway project, the court also finds they were not at fault for the ceiling collapse in LaBrecque's unit. After the roof repairs were authorized in the fall of 2004 and the project was assigned to Unit 1, Wuenschel/O'Brien promptly obtained a contractor and had the roof repaired. There is no evidence from which the court could find that the defendants' claim that the dormer roof repairs had to await completion of the delayed stairway project was not made in good faith at the time.

After the collapse of her ceiling, LaBrecque had her dormer roof repaired at an expense of $350. She would certainly be entitled to reimbursement of that expense,

but the record is unclear as to whether that amount was credited by the condominium against any outstanding assessments owed by LaBrecque.

Two payments from the insurance carrier on the condominium's building policy were received by the condominium. For a kitchen fire in LaBrecque's unit, $2,136.59 was received. Instead of disbursing that amount to LaBrecque, the trustees deposited the money into the operating account and credited it against a portion of LaBrecque's unpaid assessments, including her common area fee for April 2006, her portion of the EB roof repair expense, and her portion of assessed legal fees in connection with this matter. Even with the insurance claim proceeds, LaBrecque was in arrears in the amount of $889.41, still owed at that time to the condominium. In May 2006, the condominium also received an insurance check in the amount of $711 (or $791) for damages caused to LaBrecque by her dormer roof leak, and the subsequent collapse of her ceiling. The condominium also credited that amount against monies and assessments owed to the condominium by LaBrecque. The court finds the use of insurance proceeds as credits against outstanding assessments to be appropriate. For one thing, this court (Hogan, J.) already ruled that the trustees could treat their legal fees as common expenses, payable by unit owners on a pro rata basis. Secondly, G. L. c. 183A, § 7 provides that "no owner shall be entitled to an offset, deduction, or waiver of common expenses or other charges levied or lawfully

assessed by he organization of unit owners."

Besides the dormer leak, two other leaks have subsequently occurred on the tiled portion of the roof, which was only subject to spot repairs by EB. One insurance claim has apparently been paid to the condominium in the amount of $600, and a further claim is pending, but unpaid. LaBrecque expects it to be in the amount of $1,900. To the degree that LaBrecque claims that the trustees are at fault for her continued roof leaks, the evidence permits no such finding. The leaks did not occur in the portion of the roof replaced by EB, and there is no evidence that the recent leaks were related to the spot repairs EB made to the tiled portion of the roof. In fact, there was no evidence about the cause of the leaks.

Any insurance proceeds received by the condominium under its building policy for damages to the interior of LaBrecque's unit should accrue to her benefit, either by delivery of the payments to her or by credits against any outstanding assessments balance. The record does not permit this court to conclude that LaBrecque was not properly credited for any insurance claim proceeds received by the condominium under the condominium's master building policy. The allocation of deductibles is a less clear issue. But, the record is not sufficiently developed for this court to make any factual findings about the insurance deductibles. There was no evidence of LaBrecque's expenses incurred to repair her unit from roof leaks. The only evidence

about deductibles was LaBrecque's own testimony.

Finally, LaBrecque's claim against Waddell for failure to control his girlfriend/wife is supported only by LaBrecque's testimony, and is disputed by the testimony of Waddell and his wife Noreen. It is LaBrecque's burden to prove her claim by a preponderance of the evidence and this she has not done. The only evidence before the court is the testimony of witnesses. LaBrecque has not met her burden and convinced this court that the factual allegations of abuse and harassment from Noreen Waddell occurred.

RULINGS OF LAW

1. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, by failing to maintain an adequate reserve fund. It was not unreasonable for the defendants, with LaBrecque's acquiescence for years, to fund the reserve account with only 15% of common area fees and to deal with major capital expenditures by means of special assessments. The evidence does not show that the defendants ever failed to fund their pro rata shares of capital assessments.

2. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, by failing to increase common area fees by 35% as requested by LeBrecque in 2004. There was no evidence presented to show that

the 28% increase voted by defendants at that time was unreasonable or insufficient.

3. Defendants did not violate their fiduciary duty by failing to provide LeBrecque with access to the books and records of the condominium. LaBrecque has failed in her burden to convince this court that requested books and records of the condominium were not provided to her.

4. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, by delaying the replacement of the outside staircase for Unit 3. The court has found that any such delay has not been shown to be the fault or responsibility of the defendants.

5. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, by failing to replace the asphalt roof shingles over the dormer at LaBrecque's egress to the outside staircase. Defendants were not responsible or at fault for the delay in the staircase project, which in turn delayed the completion of the roof repairs to LaBrecque's dormer.

6. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, for any deterioration to the common areas. They supported the roofing and staircase projects, and voted to paint the exterior of the condominium. No evidence was introduced from which the court can find a breach of fiduciary duty regarding the current condition of the exterior of the house. Given

the litigation between the unit owners that has been ongoing for over three years, and in the absence of evidence other than photographs of the condominium exterior, the court will not find a breach of fiduciary duty or a breach of any contractual obligation the defendants had to LaBrecque.

7. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, in connection with her attempted sale of her unit. To the degree that delay in replacing the staircase to Unit 3 is claimed as a cause of any lost sale opportunities, the court has found that the defendants were not responsible or at fault for that delay. To the degree that general deterioration of the common areas is claimed as a cause of any lost sale opportunities, there is little to no non-hearsay testimony to that effect, any such evidence is speculative, and the court has found that LaBrecque has failed in her burden of proof to establish that any such deterioration during the course of this litigation was the responsibility or fault of the defendants.

8. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, by using insurance claim proceeds as a credit/offset against outstanding assessments owed by LaBrecque to the condominium. Insufficient evidence was introduced by LaBrecque for this court to find a breach of fiduciary duty or contractual breach with respect to reimbursement of repair expenses

and/or insurance deductibles.

9. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, in their handling of EB's roofing expenses and allocation of the pro rata shares for that work. Although the allocated assessment was based on EB's estimate, and the condominium did not pay EB the full amount of the estimate, all unit owners overpaid to the same pro rata extent, and the extra money went to the benefit of all unit owners to the same pro rata extent.

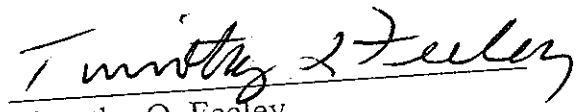
10. Defendants did not violate their fiduciary duty, or breach any contractual obligation they had to LaBrecque, by accessing her a pro rata share of their legal expenses in defending this action. Provisions of G. L. c. 183A and an order of this court support such assessments.

11. Defendant Waddell did not violate his fiduciary duty, or breach any contractual obligation he had to LaBrecque, in connection with LaBrecque's claims that his wife caused disturbances, upset, and harassed LaBrecque in the common areas of the condominium. LaBrecque has failed in her burden to convince this court that such incidents occurred.

ORDER FOR JUDGMENT

Judgment shall enter in favor of all defendants on all counts of LaBrecque's second amended complaint. All parties shall bear their own costs, with the

defendants' costs and attorneys' fees assessable as common area expenses of the condominium to the extent allowed by law.



Timothy Q. Feeley
Associate Justice of the Superior Court

September 29, 2009

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: **ESCV2006-01077-A**

RE: Labrecque v Waddell Trustee and individually et al

TO: Mark W Griffin, Esquire
Janos, Griffin & Tucker
6 Harris Street
Newburyport, MA 01950

NOTICE OF DOCKET ENTRY

You are hereby notified that on **09/29/2009** the following entry was made on the above referenced docket:

Findings of Fact, Rulings of Law and Order for Judgment: Judgment shall enter in favor of all defendants on all counts of LaBrecque's second amended complaint. All parties shall bear their own costs, with the defendants' costs and attorneys' fees assessable as common area expenses of the condominium to the extent allowed by law. (Timothy Feeley, Justice). 9/29/09
Dated at Salem, Massachusetts this 29th day of September, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: Judith Brennan / Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 744-5500 ext. 414 (Brennan) or 377 (Patten)

Disabled individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 788-8130

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: **ESCV2006-01077-A**

RE: Labrecque v Waddell Trustee and individually et al

TO: Maria E. DeLeo, Esquire
Janos Griffin & Tucker
6 Harris Street
Newburyport, MA 01950

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Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# **ESCV2006-01077**

Ellen Labrecque,
Plaintiff(s)

vs.

John R Waddell Trustee and individually, Kristen E O'Brien Trustee and individually, Mathew Wuenschel Trustee and individually, Brabo Condominium Trust,
Defendant(s)

JUDGMENT ON FINDING OF THE COURT

This action came on for trial before the Court, Timothy Feeley, Justice, presiding, and the issues having been duly tried, and Findings of Fact, Rulings of Law and Order for Judgment having been entered,

It is **ORDERED and ADJUDGED:**

That the plaintiff, Ellen Labrecque, take nothing, that the action be dismissed on the merits, and that judgment enter in favor of the defendants, Brabo Condominium Trust, John R Waddell Trustee of Brabo Condominium Trust and individually, Kristen E O'Brien Trustee of Brabo Condominium Trust and individually, and Mathew Wuenschel Trustee of Brabo Condominium Trust and individually, without costs.

Dated at Salem, Massachusetts this 30th day of September, 2009.

By: CPatten
Assistant Clerk

Entered: 09/30/2009
Copies mailed 09/30/2009