IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GIOR G.P., INC., ET AL.,	:	**OCTOBER TERM, 2013**
	:	
Plaintiffs,	:	**NO. 1150**
	:	
vs.	:	**COMMERCE PROGRAM**
	:	
WATERFRONT SQUARE REEF, LLC, ET AL.,	:	
	:	**Superior Court Docket No.:**
Defendants.	:	**2357 EDA 2016**

OPINION

BY: Patricia A. McInerney, J. November 7, 2016

I. BACKGROUND

On October 15, 2013, Gior, LP ("Gior") and Isle of Capri Associates Reef, LP ("IOC-Reef") (collectively, "Plaintiffs") commenced the instant action by way of a complaint against Waterfront Square Reef, LLC ("WSR"), Waterfront Square Condominium Association (the "Association"), and GH Property Management, LLC ("GH Property Management") (collectively, "Defendants" or the "WSR Parties"). On November 22, 2013, following the filing of preliminary objections, Plaintiffs filed an amended complaint as of right.

In their amended complaint, Plaintiffs averred "[t]his case concerns the ownership of parking licenses at Waterfront Square Condominiums, a luxury, high rise condominium complex located on the Delaware River in Philadelphia, Pennsylvania." (Am. Compl. ¶ 1). In their amended complaint, Plaintiffs asserted "they are the sole owners of...179 parking licenses (valued at approximately $50,000 each)," "which they obtained pursuant to their roles...as [, or from,] declarants and developers for the Waterfront Square Condominiums." (Id. at ¶¶ 2, 6-7).

According to Plaintiffs, Gior is the owner of 91 of the 179 parking licenses as they "were assigned from Isle of Capri Associates, LP ('IOC'), the initial Declarant, to Gior for valid consideration in or about May 2012." (Id. at ¶ 7). According to Plaintiffs, IOC-Reef is the owner of 88 of the 179 parking licenses "as the subsequent Declarant for the residential condominium located in the Reef Tower at Waterfront Square." (Id. at ¶ 8). In their amended complaint, Plaintiff's argued that "[a]lthough certain condo units in the Waterfront Square Condominiums were subject to foreclosure by the lender for the condominium project, Plaintiffs retained their parking licenses pursuant to a settlement agreement reached with the lender." (Id. at ¶ 3).

"Pursuant to that settlement agreement, the lender was permitted to foreclose upon and a receiver was appointed over the property..., but Plaintiffs' parking licenses were excluded from the foreclosure and receivership because...the licenses were not part of the collateral securing the loans[,]" according to Plaintiffs. (Id. at ¶ 4 (emphasis original)). According to Plaintiffs, "[d]espite [their] rights in the parking licenses, the Defendants named herein – the condominium association, the purchaser of the condo units at the foreclosure sale, and the receiver – have all wrongfully...asserted dominion and control over the licenses...." (Id. at ¶ 5). Based thereon, Plaintiffs asserted causes of action for declaratory judgment, conversion, unjust enrichment, and replevin against WSR (the purchaser at foreclosure sale); GH Property Management (the receiver); and the Association.

After their preliminary objections to the amended complaint were overruled, Defendants filed an answer to the amended complaint with new matter and counterclaims on March 3, 2014, and named IOC as an additional defendant. In their answer, Defendants denied "Plaintiffs retained the parking licenses as a result of any settlement agreement with the lender, Union Labor Life Insurance Company...('ULLICO')." (Defendants' Answer ¶ 3). Rather, Defendants

stated the "parking licenses were included in the [m]ortgaged [p]roperty and were sold and transferred to [WSR] at the June 5, 2012 Sheriff Sale..." and "were included in the receivership orders entered in the [f]oreclosure [a]ctions...." (Id. at ¶¶ 3-4). As such, Defendants averred the purported transfer of 91 parking licenses from IOC to Gior was ineffective as parking licenses were subject to the receivership orders "entered by the Honorable Idee C. Fox in both [f]oreclosure [a]ctions," and they had not wrongfully asserted dominion and control over the licenses as WSR "is the owner of the [m]ortgaged [p]roperty, inclusive of the parking licenses and other common elements, as the purchaser of the [m]ortgaged [p]roperty." (Id. at ¶¶ 5, 7).

The answer asserted counterclaims against Plaintiffs and IOC (collectively, the "IOC Parties") for: (1) declaratory judgment; (2) breach of contract; (3) fraudulent transfer pursuant to 12 Pa. C.S. § 5104; (4) fraudulent transfer pursuant to 12 Pa. C.S. § 5105; (5) conversion; and (6) civil contempt. On March 25, 2014, the IOC Parties filed a reply to the new matter and an answer with new matter to the counterclaims. On April 11, 2014, the WSR Parties filed a reply to the answer with new matter to the counterclaims, thereby closing the pleadings.

On June 15, 2015, following the completion of discovery, Defendants filed a motion for summary judgment. On July 31, 2015, Plaintiffs filed a response in opposition thereto. And on August 18, 2015, Defendant's filed a reply brief to Plaintiffs' memorandum of law in opposition to Defendants' Motion for Summary Judgment. The evidentiary record for summary judgment established the following.

IOC is the original fee simple owner of the property upon which the Waterfront Square Condominium was to be built. (*See* Defs.' Exs. 3-4). IOC planned to construct condominium towers on each of five undeveloped condominium pads as well as a parking garage. (Defs.' Ex. 1, Ruppin Dep., pp. 59-64). Two condominium towers, the Peninsula Tower and the Regatta

Tower, were constructed on two of the pads during Phase I of the project. (Id. at 59-60). The principals of IOC created another entity for construction of the third tower, the Reef Tower, during Phase II of the project. (Id. at 60-62). That entity is IOC-Reef. (Id.). The other two pads were not developed, but IOC had planned to construct a fourth and fifth tower, the Tides and the Horizon, on those sites. (Id. at 60-63).

Dated July 19, 2006, and recorded July 20, 2006, IOC created the Waterfront Square Condominium by filing a declaration of condominium pursuant to Pennsylvania's Uniform Condominium Act (sometimes, the "Act"). (Defs.' Ex. 6). Dated April 27, 2009, and recorded April 28, 2009, IOC-Reef created the Reef Condominium and Spa at Waterfront Square (or Reef Tower) by filing a declaration of condominium pursuant to the Act. (Defs.' Ex. 7). The Reef Tower is itself part of the Waterfront Square Condominium, the "Master Condominium." (Id. at § 1.2).

The Waterfront Square Condominium declaration (or Master Declaration) states "[t]he Parking Garage will be a common element of the Waterfront Square Condominium and will be operated by the...Association." (Defs.' Ex. 6 § 4.4(a). The Master Declaration further provides:

> If residential condominiums are constructed on the Pad Units, Declarant (or the declarant of such residential condominiums, if not the Declarant) may grant Parking Licenses to the purchasers of Residential Units and Commercial Units in the condominiums developed on the Pad Units. When each buyer of a Residential Unit or Commercial Unit in a Building is conveyed title to its Unit, that buyer may receive a non-exclusive license to park one car in the Parking Garage (a "Parking License") for no additional consideration. The Declarant reserves the right to grant to buyers of Units Parking Licenses for no consideration, and reserves the right to grant buyers of certain Units one or more additional Parking Licenses for additional consideration. Declarant also reserves the right to allow perspective purchasers and visitors the right to park in the Parking Garage on a limited basis.

(Id. at § 4.4(b)). "The holders of Parking Licenses must be owners or tenants of Units." (Id. at § 4.4(c)). "Unit Owners [could] sell, resell, or assign a Parking License [] as part of the sale of the

Unit to which the Parking License was assigned" or could sell or lease a Parking License under other limited circumstances. (Id.).

IOC and IOC-Reef borrowed substantial sums from ULLICO to construct the Waterfront Square Condominium. ULLICO's loan to IOC was in the aggregate principal amount of $39,265,840 and was secured by a mortgage (the "IOC Mortgage"). (Defs.' Exs. 10, 12). ULLICO's loan to IOC-Reef was in the aggregate principal amount of $97,300,000 and was secured by a mortgage (the "IOC-Reef Mortgage"). (Defs.' Ex. 9, 14). The IOC Mortgage and the IOC-Reef Mortgage (collectively, the "Mortgages") encumbered the individual condominium pads and their interests in the common elements, and specifically included the parking facilities. (*See* Defs.' Exs. 10 §§ 2.1-2.1.6, 14 § 2.1.2). IOC and IOC-Reef also mortgaged any right, title, and/or interest they had under the declarations. (*See* Defs.' Exs. 10 § 2.1.19, 14 § 2.1.16). This, and the other property encumbered by the Mortgages, was collectively referred to therein as the "Mortgaged Property." (Defs. Exs. 10 § 2.1, 14 § 2.1).

At a certain point, IOC and IOC-Reef defaulted on their loans with ULLICO. (Defs.' Ex. 1 pp. 115-16, 119-20, 160-61, 165-66). As a result of the defaults, ULLICO commenced separate foreclosure actions in the Court of Common Pleas of Philadelphia County against IOC and IOC-Reef (collectively, the "Foreclosure Actions"). (*See* id.). Shortly after commencing the Foreclosure Actions, ULLICO filed petitions therein to have a receiver appointed to protect and preserve the "Mortgaged Property" as defined in the petitions. (*See* id. at 129-31, 168-72; Defs.' Exs. 18-19). IOC and IOC-Reef consented to the orders that appointed GH Property Management as receiver (collectively, the "Receivership Orders"). (Defs.' Exs. 18-19). The Receivership Orders were entered on December 20, 2011 by the Honorable Idee C. Fox. (Id.).

IOC and IOC-Reef also consented to the entry of judgments against them in the Foreclosure Actions as part of a settlement of the Foreclosure Actions, which was finalized in February of 2012. (Defs.' Exs. 20-21; Pls.' Ex. G). By order dated February 16, 2012, and docketed February 17, 2012, judgment in mortgage foreclosure was entered in favor of ULLICO and against IOC in the amount of $25,337,351.88. (Defs.' Ex. 21). By order dated February 16, 2012, and docketed February 17, 2012, judgment in mortgage foreclosure was entered in favor of ULLICO and against IOC-Reef in the amount of $79,020,015.54. (Defs.' Ex. 20).

After the judgments in mortgage foreclosure were entered, ULLICO commenced proceedings on March 8, 2012 to complete the Foreclosure Actions by filing praecipes for writ of execution. (Pls.' Ex. L). Thereafter, a Sheriff's Sale was scheduled for June 5, 2012 to sell IOC's Unit R 2801 in the Regatta Tower and interest in the two undeveloped pads as well as all of IOC-Reef's unsold units in the Reef Tower. (*See* Pls.' Ex. M).

Pursuant to a purchase and sale agreement dated May 15, 2012, Gior avers it purchased 91 Parking Licenses from IOC for $215,000.00. (Defs.' Exs. 22-23). The IOC-Gior agreement was executed by Arthur Ruppin ("Ruppin") on behalf of IOC and Doron Gelfand ("Gelfand") on behalf of Gior. (Defs.' Ex. 22). Ruppin and Gelfand own and/or control both IOC and Gior.

Gelfand is the key principal controlling IOC. (Defs.' Ex. 1 p. 43). At a certain point, Ruppin became the chief operating officer for IOC. (Id. at 16-17). Gelfand and Ruppin either directly or indirectly own Gior. (*See* id. at 48-49). They are also the officers of its general partner. (Id. at 47-48).

On or about June 5, 2012, the Sheriff's Sale went forward. (Id. at 175-78; Defs. Ex. 25). Plaintiffs, however, aver "to this day, Gior, as IOC's assignee, and [IOC-Reef], as the subsequent [d]eclarant for the Reef [Tower], own the rights to the [179] Parking Licenses [because]

ULLICO, as the foreclosing party, and WSR, as the purchaser at the Sheriff's Sale, clearly elected not to include the Parking Licenses as part of the foreclosure and sheriff's sale process." (Pls.' Resp. to Mot. For Summ. J. (Mem.) p. 10).

In their motion for summary judgment, the WSR Parties argued "[n]either IOC and/or IOC-Reef created any valid parking licenses which could form the basis of a lawsuit against [them]." (Defs' Mot. For Summ. J. (Mem.) p. 38). Regarding IOC-Reef, the WSR Parties argued Plaintiffs' "claims are premised on the belief that excess parking existed at the time of... [f]oreclosure which could possibly permit another 88 Parking Licenses." (Id. at 39). Citing section 4.4(b) of the Master Declaration, Defendants argued "[a]t best, IOC-Reef had the right to 'grant' a parking license to a unit owner...." (Id. at 40). "However, unlike IOC, IOC-Reef never attempted to grant these 88 Parking Licenses to anyone." (Id. at 39-40). And citing a section of the Act titled "Rights of declarant following foreclosure, etc. proceedings[,]" which provides "[u]pon foreclosure, tax sale, judicial sale...or receivership or similar proceedings of all units and other real estate in a condominium owned by a declarant...the declarant ceases to have any special declarant rights...[,]" 68 Pa. C.S. § 3304(d), Defendants argued IOC-Reef's "right to grant such licenses terminated with the June 5, 2012 Sheriff Sale." (Id. at 40).

Regarding IOC, Defendants argued it "could not legally create or transfer [] any parking licenses [on May 15, 2012,] because all such property rights were in the ward of the Court, in *custodia legis* pursuant to the Receiver[ship] Orders and IOC was enjoined from doing so." (Id. at 40). Here, citing various cases, the WSR Parties argued Pennsylvania and other courts recognize "that property subject to an order of court is deemed in *custodial legis* (under the ward of the court) pending compliance with the order to which such property is subject." (Id. at 40-41). Defendants then argued "[p]aragraph 3 of the Receiver[ship] Order[s] provided the

[r]eceiver with complete possession of the Mortgaged Property, inclusive of all of the portions of the Mortgaged Property which were subject to the security interests of the Mortgages[,]" "making the attempt of Gelfand and Ruppin to shuttle an asset from one of their companies to another null and void." (Id. at 42-43). As such, the WSR Parties argued IOC's attempt to create and/or transfer the 91 Parking Licenses to Gior null and void.

Regarding IOC, Defendants also argued in the alternative that if this Court found "IOC was capable of making [the May 15, 2012] transfer of [] 91 Parking Licenses to Gior, than Gior's claims would still fail as a fraudulent transfer that would be avoided as a matter of law." Here, the WSR Parties argued, among other things, that IOC failed to receive a reasonably equivalent value for the Parking Licenses, pointing to the fact that Plaintiffs pled the value of each Parking License is approximately $50,000 and "[a]ssuming for the sake of argument that Gior *had* paid the full $215,000 amount, which it did not, this equates to $2,362.64 per license. This amount equates to less than 5% of the value the IOC Parties have placed on the Parking Licenses." (Id. at 47-48).

In their response in opposition to the motion for summary judgment, Plaintiffs argued generally "the Parking Licenses were never subject to the Receivership Orders...." (Pls.' Resp. to Mot. For Summ. J. (Mem.) p. 30). Specifically, Plaintiffs argued "[u]nder the terms of the Receivership Order[s], GH [Property Management] was only appointed [r]eceiver over the 'Mortgaged Property,' as that term was defined in the Petitions for Appointment of Receiver, which incorporated the 'Mortgaged Property' identified in and defined by the [m]ortgages at issue in the Foreclosure Actions." (Id. at 30). "In those [m]ortgages, there are 'Permitted Exceptions' to the definition of 'Mortgaged Property,' one of which are the 'terms, conditions and obligations' emanating from the Declaration of Condominium...." (Id.). According to

Plaintiffs, one of those "terms, conditions and obligations," or exceptions, are "the terms and conditions of Plaintiffs' Parking Licenses...in the [] Association's Parking Garage." (Id.). Thus, according to Plaintiffs, under the terms of the Mortgages at issue in the Foreclosure Actions, Plaintiffs' Parking Licenses were expressly excepted and excluded from the definition of 'Mortgaged Property.'" (Id.).

Regarding the 91 Parking Licenses that IOC purported to transfer to Gior, Plaintiffs further argued "Defendants' fraudulent transfer theories cannot result in summary judgment in Defendants' favor and void Gior's purchase of the Parking Licenses." (Id. at 35). In this regard, Plaintiffs arguments included that "[q]uestions as to whether 'reasonable equivalent value' was obtained in a challenged transaction are questions of fact so long as a defendant can show the transaction was supported by value – questions of reasonableness cannot be resolved at summary judgment." (Id. at 38).

Regarding the 88 Parking Licenses that Defendants asserted IOC-Reef never attempted to grant to anyone prior to foreclosure, Plaintiffs further argued their right to issue these licenses did not terminate as a result of the Sheriff's Sale because the right to do so is not a "special declarant right." Here, citing the special declarant rights specifically enumerated in the Act and *Mayflower Square Condo. Ass'n v. KMALM, Inc.*, 724 A.2d 389 (Pa. Commw. Ct. 1999), Plaintiffs argued:

> Defendants' attempts to equate Plaintiffs' Parking License rights with "special declarant rights" that terminate at foreclosure must be rejected. The Parking License rights are not identified in the list of special declarant rights, and the decisional case law on the issue plainly demonstrates that ownership rights to real or personal property – such as the right to license parking spaces in the Parking Garage by way of a parking license – are simply not "special declarant rights."

(Id. pp. 26-29).

In their reply brief, the WSR Parties argued Plaintiffs "fundamentally misstate Pennsylvania law in arguing that special declarant rights do not encompass the interests IOC and IOC-Reef had in issuing Parking Licenses under the [d]eclarations." (Defs.' Reply Br. p. 5). Here, citing *MetroClub Condominium Association v. 201-59 North Eighth Street Associates, L.P.*, 47 A.3d 137 (Pa. Super. Ct. 2012), Defendants contended "[t]he Pennsylvania Superior Court has determined that a declarant's interest in parking **is** included within the definition of special declarant rights." (Id. at 7 (emphasis original)). In that case, according to Defendants, the Superior Court rejected the very same argument Plaintiffs are making and found a declarant's interest in parking was a special declarant right because "the legislature did not intend to confine all conceivable declarant powers to those specifically enumerated in the 'Special declarant rights' list in the definitions section of the [Act]." (Id. (quoting *MetroClu*b, 47 A.3d at 152)). As such, Defendants argued the IOC Parties' right to issue Parking Licenses terminated at foreclosure.

In their reply brief, the WSR Parties also noted Plaintiffs did not contest in their brief "that if the Parking Licenses are determined by this Court to be Mortgaged Property, then they were within the scope of the Receiver[ship] Orders, were in *custodia legis* (in the ward of the Court) and IOC was incapable of creating or transferring [the] 91 Parking Licenses to Gior." (Id. at 10-11). These parties, nevertheless, further noted Plaintiffs had no meritorious defense to Defendants' fraudulent transfer counts regarding the 91 Parking Licenses purported transferred from IOC to Gior following the scheduling of the Sheriff's Sale. In this regard, Defendants argued in part Plaintiffs admitted to failing to pay reasonably equivalent value. Defendants based this admission on the disparity between what Gior purported to pay for the 91 Parking Licenses and what Plaintiffs have valued Parking Licenses at in their amended complaint, etc. As

such, Defendants contended there were no factual issues and the Court could award them summary judgment regarding the 91 Parking Licenses based on their fraudulent transfer counterclaims.

By order dated August 28, 2015, and docketed August 31, 2016, this Court granted in part and denied in part Defendants' Motion for Summary Judgment. Specifically, the Court granted the motion "as to the 88 Parking Licenses that IOC-Reef had not granted to any [u]nit [o]wner prior to the foreclosure sale[,]" but denied the motion "as to the 91 Parking Licenses that IOC granted to Gior prior to the foreclosure sale." (Order, Aug. 28, 2015).

In so ruling, the Court noted it "concluded, *inter alia*, IOC and IOC-Reef's interest in issuing Parking Licenses was a special declarant right that terminated at the foreclosure sale and fell within the definition of Mortgaged Property...." (Order, Aug. 28, 2015, n.1). The Court also noted, however, that it "concluded a number of legal and factual issues precluded granting Defendants summary judgment in terms of the 91 Parking Licenses that IOC had purported to grant to Gior prior to the foreclosure sale." (Id.). These issues included:

- Whether IOC was incapable of granting the 91 parking Licenses to Gior where the Mortgaged Property was subject to a receivership order, *cf. In re Domum Locis, LLC*, 2015 WL 4697747 *8 (9th Cir. 2015) (unpublished) (affirming in part and reversing in part *In re Domun, LLC*, 521 B.R. 661 (Bankr. C.D. Cal. 2014), which was cited by Defendants, and determining it could not conclude "the mere facts that the receivership existed and that the receivership orders, including the injunctions, had been entered, render[ed] the transfers of the [p]roperties [to a related third party] void as a matter of law" and "[i]t [wa]s within the jurisdiction of the receivership court to vacate (or even ratify in circumstances it might deem appropriate) the transfers that took place in contravention of its orders."); and
- Whether IOC failed to receive reasonably equivalent value, *cf. In re Burry*, 309 B.R. 130, 139 (Barnk. E.D. Pa. 2004) (stating: "Even though the debtor makes a transfer, or incurs an obligation for consideration that moves (in form or substance) directly to a third person, the debtor nevertheless receives value if she receives an economic benefit [i]ndirectly (in form or substance). The consideration need not flow directly to her to satisfy the value component of

> reasonably equivalent value. Value requires only that the transfer result, whether directly or indirectly, in economic benefit to her.")

(Id.).

Following the issuance of this Court's August 28, 2015 Order, WSR and GH Property Management (collectively, "Movants") filed a motion with the court in the Foreclosure Actions, the Honorable Idee C. Fox, to void the transfer of the 91 Parking Licenses from IOC to Gior. Therein, Movants argued "the 91 Parking Licenses [were] part of the Mortgaged Property subject to [Judge Fox's] Receivership Order. Therefore, the transfer of the 91 Parking Licenses without the permission of [Judge Fox] [w]as done in violation of the Receivership Order." *The Union Labor Life Ins. Co. v. Isle of Capri Assocs., L.P.*, Sept. Term, 2011, No. 2940, p. 10 (C.C.P. Phila., June 6, 2016). Judge Fox agreed and on April 10, 2016, issued an order revoking and voiding the 91 Parking Licenses IOC issued to Gior. *Id.* at 14, 17.

First, Judge Fox concluded that "[a]s the [c]ourt which issued the Receivership Order, [her] [c]ourt [wa]s the proper forum to address the transfer of the 91 Parking Licenses from IOC to Gior." *Id.* at 12. Next, having reviewed the parties' filings and hearing their oral argument, Judge Fox concluded "the Parking Licenses were Mortgaged Property subject to the Receivership Order and IOC's transfer violated [her] Receivership Order." *Id.* at 12.

In Judge Fox's opinion, the right to issue the 91 Parking Licenses was Mortgaged Property subject to her receivership order in part because IOC had mortgaged all of its rights in and under the Master Declaration. *Id.* at 13-14. In this regard, Judge Fox precisely found "[t]he right to grant a Parking License to a unit owner was a right specifically granted to IOC pursuant to §4.4(b) of the Master Declaration. As a result, [Judge Fox concluded] ¶2.1.19 [of the IOC Mortgage] includes as Mortgaged Property IOC's rights under the [c]ondominium [d]eclarations to grant and/or transfer Parking Licenses, and therefore the 91 Parking Licenses at issue." *Id.* at

14. And ultimately, after rejecting IOC's arguments made in opposition, including that the right to issue Parking Licenses was neither a special declarant right nor part of Mortgaged Property, Judge Fox granted the motion and declared the 91 Parking Licenses null and void.

As this Court's August 28, 2015 Order was interlocutory, case management for the above-captioned matter proceeded. On November 3, 2015, however, Defendants requested, with Plaintiffs' consent, that a pre-trial conference for this case not be scheduled until on or after January 15, 2016 so as to allow a response to the motion in the Foreclosure Actions to be filed. Waiting would also allow Judge Fox an opportunity to rule on the motion, which Defendants in particular viewed as having "the potential to resolve all remaining issues in this pending action...." (*See* Mot. for Extraordinary Relief, Nov. 3., 2015). On November 4, 2015, this Court granted the parties' motion and stated the pre-trial conference would be scheduled on or after February 8, 2016.

On January 20, 2016, Defendants again, with Plaintiffs' consent, motioned the Court to further delay the instant matter in order to give Judge Fox time to rule. And on January 21, 2016, this Court placed the instant matter in deferred status for 60 days for that purpose.

On March 7, 2016, Defendants again, with Plaintiffs' consent, motioned the Court to further delay the instant matter. This time, "[c]ounsel for all parties respectfully join[ed] in a request that this case continue in deferred status for an additional sixty (60) days in order to permit Judge Fox to address the pending [m]otion [in the Foreclosure Actions]." (Mot. for Extraordinary Relief, Mar. 7, 2016). And on March 8, 2016, this Court placed the instant matter in deferred status for an additional 60 days.

On May 16, 2016, an appeal of Judge Fox's decision regarding the 91 Parking Licenses was filed in that action. On June 13, 2016, this Court received a letter request from Plaintiffs,

stating "all parties [were] in agreement the Court's August [28], 2015 Order should simultaneously be appealed...." (Letter, June 13, 2016). To that end, Plaintiffs' asked this Court to order in accordance with the parties' stipulation that "said Order should be determined to be a final, appealable Order pursuant to Pa. R.A.P. 341(c)." (*Id.*). On June 20, 2016, the Court entered an order denying the parties' request without prejudice to seeking relief in the Superior Court, noting it knew "of no authority that would allow it to sign off on [such a] request, which d[id] not satisfy the time constraints of Pa. R.A.P. 341(c)...." (Order, June 20, 2016).

On July 14, 2016, this Court received a letter request from Plaintiffs and IOC to sign the parties' stipulation and order to dismiss the remaining claims in this case so that an appeal could go forward. On July 20, 2016, the Court signed the stipulation and order and on July 25, 2016, Plaintiffs filed the instant appeal.

Subsequently, the Court ordered Plaintiffs to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement, which they did on August 22, 2016. In their 1925(b) statement, Plaintiffs set forth the following as their errors complained of on appeal:

> 1. Whether the rights to issue parking licenses possessed by the Declarant under the Declaration were "special declarant rights" as defined by the Pennsylvania Condominium Act?
>
> 2. Whether the Parking Licenses at issue were "special declarant rights" under the Pennsylvania Condominium Act?
>
> 3. Whether the rights to issue parking licenses possessed by the Declarant under the Declaration were part of the "Mortgaged Property" and subject to the Receivership Orders under the definitions in the subject Mortgages, related Condominium Documents, and Receivership Orders?
>
> 4. Whether the Parking Licenses were part of the "Mortgaged Property" and subject to the Receivership Orders under the definitions in the subject Mortgages, related Condominium Documents, and Receivership Orders?
>
> 5. Whether the Trial Court erred in permitting the Court in the Foreclosure [Actions] to rule on the legitimacy of [IOC's] May 2012 transfer of

> Parking Licenses to Gior...where: (a) The Parking Licenses were not part of the "Mortgage Property" subject to the Receiver[ship] Order; (b) [] WSR and its Receiver waived, are estopped, and/or barred by the doctrine of laches from treating the Parking Licenses as "Mortgage Property" or as part of the Receivership; and (c) Gior, a non-party in the Foreclosure Matter, was deprived of a jury trial to resolve the genuinely disputed issues of material fact concerning its rights and entitlements to the Parking Licenses, including issues related to the waiver, estoppel, and laches arguments?

(Pls.' 1925(b) Statement).

Plaintiffs' complaints have no merit or are irrelevant. Thus, the Court issues this opinion in support of its August 28, 2015 Order.

II. DISCUSSION

A. Standard of Review.

"Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." *Gutteridge v. A.P. Green Servs., Inc.*, 804 A.2d 643, 651 (Pa. Super. Ct. 2002). "In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party." *Id.* "Thus, summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Id.* And it is "only when the facts are so clear that reasonable minds cannot differ," that a trial court may properly grant summary judgment. *Id.*

B. Plaintiffs' Appeal

In their *Pennsylvania Rule of Appellate Procedure* 1925(b) statement, Plaintiffs complain this Court erred in determining the right to issue Parking Licenses was a special declarant right that terminated with the foreclosure sale, which was this Court's basis for granting Defendants summary judgment as to the 88 Parking Licenses that IOC-Reef had not granted to any unit owner prior to the foreclosure sale.

> [T]he "Definitions" section of the [Act], contain[s] the following enumerated list of "special declarant rights":
>
> > "**Special declarant rights.**" Rights reserved for the benefit of a declarant to:
> > (1) Complete improvements indicated on plats and plans filed with the declaration (section 3210).
> > (2) Convert convertible real estate in a flexible condominium (section 3211).
> > (3) Add additional real estate to a flexible condominium (section 3211).
> > (4) Withdraw withdrawable real estate from a flexible condominium (section 3212).
> > (5) Convert a unit into two or more units, common elements, or into two or more units and common elements (section 3215).
> > (6) Maintain offices, signs and models (section 3217).
> > (7) Use easements through the common elements for the purpose of making improvements within the condominium or within any convertible or additional real estate (section 3218).
> > (8) Cause the condominium to be merged or consolidated with another condominium (section 3223).
> > (9) Make the condominium subject to a master association (section 3222).
> > (10) Appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (section 3303(c)).

MetroClub, 47 A.3d at 151, *quoting* 68 Pa.C.S. § 3103. A Uniform Law Comment thereto provides that this definition/list "seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek

in the course of creating or expanding a condominium." *MetroClub*, 47 A.3d at 151 (quotations omitted), *quoting* 68 Pa. C.S. § 3103 at Unif. Law Cmt. 13.

Plaintiffs argued that because the right to issue parking licenses is not specifically identified in the above list, it is not a special declarant right. The Superior Court, however, has already concluded in the case of *MetroClub Condominium Association v. 201-59 North Eighth Street Associates, L.P.* that this list is not exhaustive. 47 A.3d at 152. Rather, the court determined in that case that "the legislature did not intend to confine all conceivable declarant powers to those specifically enumerated in the 'Special declarant rights' list in the definitions section of the [Act][,]" in part because the above comment indicates the list is not meant to be viewed as exhaustive. *Id.*

In *MetroClub*, the declaration gave the declarant/developer control over unallocated parking spaces so that it could assign those spaces to purchasers of units, or lease them to other persons, so long as it owned any unit. *Id.* After the declarant was no longer in control of the board of the association, the association brought suit against the declarant after it refused to cede control of unallocated parking spaces to the association. *Id.* at 142. At the time of suit, the declarant continued to own 17 of 130 units and maintained control over 41 parking spaces that had not been assigned or allocated to any particular unit; 34 of which the declarant leased and retained the profits from. *Id.*

On appeal, the Superior Court was faced with the issue of whether the declarant could maintain control over the unassigned parking spaces, which constituted limited common elements of the condominium. *Id.* at 140. In concluding that it could, the court rejected an argument from the association that as the declarant's right to control the unassigned parking spaces was not included in the list of special declarant rights at 68 Pa. C.S. § 3103, it should be

invalidated. *Id.* at 151-52. Rather, the Superior Court determined the right was a special declarant right that continued even after the declarant was no longer in control of the board of the association. *See id.* at 152.

IOC's and IOC-Reef's rights to issue Parking Licenses emanate from section 4.4 of the Master Declaration, which provides in relevant part:

> If residential condominiums are constructed on the Pad Units, **Declarant [(i.e. IOC)] (or the declarant of such residential condominiums, if not the Declarant [(e.g. IOC-Reef)]) may grant Parking Licenses to the purchasers of Residential Units and Commercial Units in the condominiums developed on the Pad Units**. When each buyer of a Residential Unit or Commercial Unit in a Building is conveyed title to its Unit, that buyer may receive a non-exclusive license to park one car in the Parking Garage (a "Parking License") for no additional consideration. **The Declarant reserves the right to grant to buyers of Units Parking Licenses for no consideration, and reserves the right to grant buyers of certain Units one or more additional Parking Licenses for additional consideration**.

(Defs.' Ex. 6 § 4.4(b)(emphasis added)).

Similar to the declarant's right to assign parking spaces at issue in *MetroClub*, IOC's and IOC-Reef's rights to issue Parking Licenses at issue in this case were special declarant rights as such rights were reserved for the benefit of IOC and IOC-Reef as the declarants and were unique to IOC and IOC-Reef and not shared in common with other unit owners. But as special declarant rights, IOC's and IOC-Reef's rights to issue Parking Licenses, as well as any other special declarant rights, terminated at the Sheriff Sale by statute.

In a section titled "**Rights of declarant following foreclosure, etc. proceedings**[,]" the Act provides: "Upon foreclosure, tax sale, judicial sale, sale by a trustee under a deed of trust or sale under 11 U.S.C (relating to bankruptcy) or receivership or similar proceedings of all units and other real estate in a condominium owned by the declarant...the declarant ceases to have any special declarant rights...." 68 Pa. C.S. § 3304(d)(1) (emphasis original). Here, all units and

other real estate in Waterfront Square Condominium owned by IOC and IOC-Reef were subject to mortgage foreclosure, which culminated with the Sheriff's Sale of such on June 5, 2012. Thus, by statute, and unlike the declarant in *MetroClub* that continued to own units, IOC and IOC-Reef ceased to have any special declarant rights, including the right to issue Parking Licenses, following the foreclosure proceedings that relieved them of all the units and other real estate in the condominium that they had still owned.

Furthermore, Plaintiffs' reliance on *Mayflower Square Condo. Ass'n v. KMALM, Inc.* is completely misplaced and does nothing to change the above analysis. In that case, a successor declarant was sued by an association to recover unpaid monthly fees and assessments for twelve garage parking spaces that were assigned to twelve townhouses that had not yet been built. 724 A.2d at 390-91. Under the declaration, each parking space in the garage became "a 'limited common element' when it [wa]s allocated to a unit by a declaration, deed or assignment." *Id.* at 393. The successor declarant argued it was not obligated to pay the fees and assessments because "it only acquired a successor declarant status, not the ownership of the twelve townhouse units..., and that therefore, it [wa]s not obligated to pay the assessments and fees for the parking spaces." *Id.* at 392.

On appeal, the Commonwealth Court disagreed because the units were identified in the plats and plan for the condominium, which also "assigned the parking spaces to the units and assigned percentage interests for the units." *Id.* at 392-94. Moreover, the court determined:

> Section 3304(c) of the Act...provides that in case of sale by a bankruptcy trustee, a person acquiring title to the units succeeds to "all special declarant rights" upon request. Our review of the June 4, 1991 Agreement of Sale and the February 10, 1992 Assignment indicates that the bankruptcy trustee assigned the special declarant rights reserved by [the original declarant] in the [d]eclaration to [the successor declarant]. However, [the successor declarant] totally disregards the fact that it acquired not only the special declarant rights but also the title to the twelve townhouse units and the exclusive right to use the parking spaces

> designated for those units by accepting the 1992 deed. Even assuming *arguendo* that the twelve parking spaces have never been allocated to either the [a]ssociation or [the successor declarant], as [the successor declarant] asserts, [the successor declarant] would be still liable for the parking space expenses as a successor declarant under the...the [d]eclaration.

Id. at 394.

Based on the above passage, Plaintiffs argued at summary judgment that the *Mayflower* court "acknowledged that the 'special declarant rights' were, indeed, separate and apart from the ownership rights to use the parking spaces...[,]" which Plaintiffs argued "here took the form of [] Parking Licenses...." (Pls.' Resp. to Mot. For Summ. J. (Mem.) p. 28). *Mayflower*, however, is completely inapposite.

Unlike IOC-Reef here, the successor declarant in *Mayflower* was not divested of all units and other real estate in the condominium or its special declarant rights following a foreclosure proceeding. Rather, it had acquired special declarant rights and twelve townhouse units and the exclusive right to use the parking spaces designated for those units, among other things, by accepting a deed of sale that came out of a bankruptcy proceeding. Thus, the court in *Mayflower* determined the successor declarant would be responsible for paying the fees and assessments as the holder of title to the twelve townhouse units to which the parking spaces had been designated or as the successor declarant if the parking spaces have never been allocated. Accordingly, *Mayflower* is factually and legally distinguishable and completely irrelevant to the present case.

IOC-Reef believes because at one time it had the ability to issue Parking Licenses as the declarant for the Reef Tower, it should be awarded these 88 Parking Licenses now despite the fact that it did not create them before June 5, 2012 and its right to create them terminated with the June 5, 2012 Sheriff Sale, which extinguished all of its ownership of units and other real estate in Waterfront Square Condominium and all of its special declarant rights. IOC-Reef's

belief is contrary to Pennsylvania law and common sense. As such, this Court's grant of summary judgment in favor of Defendants as to the 88 Parking Licenses that IOC-Reef had not granted to any unit owner prior to the foreclosure sale should be affirmed.

In their *Pennsylvania Rule of Appellate Procedure* 1925(b) statement, Plaintiffs also complain this Court erred in determining the right to issue Parking Licenses fell within the definition of Mortgaged Property. As IOC's right to issue Parking Licenses was subject to a receivership order as it fell within the definition of Mortgaged Property, this Court denied summary judgment in favor of Defendants as to the 91 Parking Licenses that IOC purported to transfer to Gior because this Court determined "[i]t [wa]s within the jurisdiction of the receivership court to vacate (or even ratify in circumstances it might deem appropriate) the transfer[] that took place in contravention of its order[]." (Order, Aug. 28, 2015, n.1, *quoting In re Domum Locis, LLC*, 2015 WL 4697747 *8 (9th Cir. 2015)).

Plaintiffs had argued the rights to issue Parking Licenses were not part of the Mortgaged Property and subject to the Receivership Orders because the Mortgages permitted exceptions, one of which was the terms, conditions, and obligations emanating from the Master Declaration. Plaintiffs argued one of those terms, conditions, and obligations are "the terms and conditions of Plaintiffs' Parking Licenses…in the [] Association's Parking Garage." (Pls.' Resp. to Mot. For Summ. J. (Mem.) p. 30). Addressing IOC specifically as the entity at issue here, this Court disagrees.

First, Plaintiffs' argument ignores the definition of "Mortgage Property," which expressly covers any interests or rights IOC had to issue Parking Licenses. Pursuant to section 2.1.19 of the IOC Mortgage, "Mortgaged Property" included "[a]ll of [IOC's] right, title and interest in and to

the Master [] Declaration...**or any interest therein or rights thereunder**, now owned or hereafter acquired. (Defs.' Ex 10 § 2.1.19 (emphasis added)).

The right to issue Parking Licenses was a right of IOC as a declarant derived from the Master Declaration, or a "right thereunder." It was not a "term, condition, restriction, or obligation" imposed upon IOC as a declarant. As stated above, section 4.4 of the Master Declaration provides in relevant part:

> If residential condominiums are constructed on the Pad Units, **Declarant** (or the declarant of such residential condominiums, if not the Declarant) **may grant Parking Licenses** to the purchasers of Residential Units and Commercial Units in the condominiums developed on the Pad Units. When each buyer of a Residential Unit or Commercial Unit in a Building is conveyed title to its Unit, that buyer may receive a non-exclusive license to park one car in the Parking Garage (a "Parking License") for no additional consideration. **The Declarant reserves the right to grant** to buyers of Units **Parking Licenses** for no consideration, and **reserves the right to grant** buyers of certain Units one or more additional **Parking Licenses** for additional consideration.

(Ex. 6 § 4.4(b)).

Besides the fact that the word "right" is repeatedly used, this is clearly a right reserved for the benefit of IOC as discussed above, not some obligation imposed upon it. As Judge Fox has also found, "[t]he right to grant a Parking License to a unit owner was a right specifically granted to IOC pursuant to §4.4(b) of the Master Declaration. As a result, [§]2.1.19 [of the IOC Mortgage] includes as Mortgaged Property IOC's right under the [Master] Declaration[] to grant...Parking Licenses, and therefore the 91 Parking Licenses at issue." *The Union Labor Life Ins. Co.*, Sept. Term, 2011, No. 2940 at 14. Accordingly, there was no error in determining IOC's right to issue Parking Licenses fell within the definition of Mortgaged Property as Plaintiffs suggest.

Finally, Plaintiffs complain this Court erred in permitting Judge Fox to rule on the legitimacy of IOC's purported transfer of 91 Parking Licenses to Gior. Again, there was no such error.

First, this Court did not "permit" Judge Fox to rule on the legitimacy of the purported transfer. Rather, this Court merely determined it could not grant Defendants summary judgment regarding the 91 Parking Licenses based on the argument "that if the Parking Licenses are determined by this Court to be Mortgaged Property, then they were within the scope of the Receiver[ship] Orders...and IOC was incapable of creating or transferring such 91 Parking Licenses to Gior." (Defs.' Reply Br. pp. 10-11).

This Court based that conclusion on its determination that "[i]t [wa]s within the jurisdiction of the receivership court to vacate (or even ratify in circumstances it might deem appropriate) the transfer[] that took place in contravention of its order[]." (Order, Aug. 28, 2015, n.1, *quoting In re Domum Locis, LLC*, 2015 WL 4697747 *8 (9th Cir. 2015)). Thereafter, Movants on their own good initiative petitioned Judge Fox to void the transfer of the 91 Parking Licenses from IOC to Gior, which Judge Fox ultimately did. Thus, this Court did not "permit" Judge Fox to rule, Judge Fox, as a judge of equal jurisdiction, properly disposed of a motion before her.

Beyond Plaintiffs' contention that the "[91] Parking Licenses were not part of the "Mortgage Property" subject to the Receiver[ship] Order[,]" which is addressed above, all of Plaintiffs' other contentions in paragraph 5 of its 1925(b) statement are irrelevant in terms of this Court's August 28, 2016 Order disposing of Defendants' Motion for Summary Judgment. (*See* Pls.' 1925(b) Statement ¶ 5). The Court, however, would note Plaintiffs' contention at paragraph 5, subparagraph c is disingenuous.

At subparagraph c, Plaintiffs state by Judge Fox's ruling "Gior, a non-party in the Foreclosure [Actions], was deprived of a jury trial to resolve the genuinely disputed issues of material fact concerning its rights and entitlements to the Parking Licenses, including issues related to the waiver, estoppel, and laches arguments[.]" (Id. at ¶ 5(c)). Again, and while this Court agrees with Judge Fox's disposition, this contention is irrelevant in terms of this Court's August 28, 2016 Order, which denied Defendants' summary judgment regarding the 91 Parking Licenses IOC purportedly granted to Gior. What is disingenuous about Plaintiffs' contention here is that they/Plaintiffs repeatedly consented to or joined in efforts to delay the instant matter in order to give Judge Fox time to rule. Now that they do not like that ruling, they complain Gior was deprived of a jury trial on related issues. If such was truly the case and relevant here, Plaintiffs should have been arguing to have the instant matter moved forward to trial, rather than determined ripe for immediate appeal.

WHEREFORE, for the above-mentioned reasons, this Court's August 28, 2016 Order should be affirmed.

BY THE COURT:

McINERNEY, J.