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December 2, 2015

Dear LISECC Members:

Yesterday, we received the first major ruling from the federal judge in the racketeering lawsuit filed by Charles Ortego, Louise Weber, and others against LISECC and some LISECC Board members. The judge rejected Mr. Ortego's and Ms. Weber's claim and ruled that owners of lots within LISE Divisions 1 and 2 **do** have a duty to pay dues to LISECC. Therefore, the judge concluded that "[t]he claims of Edward Lawson, Lee Mundstock, Louise Weber, and Jennifer Dubrow – all of whom own lots in Divisions 1 or 2 of LISE – fail as a matter of law to the extent the claims depend on the assertion that their duty to pay dues expired in or around 1990." The judge has not yet considered the rights and obligations of owners of lots within the other LISE Divisions. The ruling is attached for your reference.

Very truly yours,

SUMMIT LAW GROUP PLLC

Jessica L. Goldman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES E. ORTEGO, *et al.*,

Plaintiff,

v.

LUMMI ISLAND SCENIC ESTATES COMMUNITY CLUB, INC., *et al.*,

Defendant.[1]

No. C14-1840RSL

ORDER GRANTING IN PART MOTION TO DISMISS

This matter comes before the Court on "Defendants' Partial Motion to Dismiss." Dkt. # 19. Plaintiffs allege that a homeowners' association and its directors have defrauded purported members out of more than a million dollars in dues and assessments and used the funds to benefit themselves. Plaintiffs assert claims of breach of fiduciary duty, negligence, intentional infliction of emotional distress, unjust enrichment, conspiracy, and violations of the Racketeer Influenced Corrupt Organizations Act ("RICO") and the Washington Consumer Protection Act ("CPA"). Plaintiffs seek damages, the dissolution of the homeowners' association, and disgorgement. Defendants have filed a very narrow motion to dismiss, arguing that the claims against the Doe defendants (spouses of the individual directors) should be dismissed and that certain plaintiffs lack standing to pursue the unjust enrichment, dissolution, and RICO claims.

[1] Counsel are instructed to utilize this abbreviated form of caption in all future papers and to refrain from listing each and every moving party when filing documents in CM/ECF.

The question for the Court on a motion to dismiss is whether the facts alleged in the complaint sufficiently state a "plausible" ground for relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). All well-pleaded allegations are presumed to be true, with all reasonable inferences drawn in favor of the non-moving party. In re Fitness Holdings Int'l, Inc., 714 F.3d 1141, 1144-45 (9th Cir. 2013). If the complaint fails to state a cognizable legal theory or fails to provide sufficient facts to support a claim, dismissal is appropriate. Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties,[2] the Court finds as follows:

A. Doe Defendants

In their motion, defendants argued that the claims against the Doe defendants, identified as the spouses of director defendants, should be dismissed because the general presumption that the debt was incurred by the marital community has been rebutted by clear and convincing evidence. Dkt. # 19 at 6. Defendants have withdrawn their request for dispositive relief on this ground. Dkt. # 32 at 2.

B. Owners in Divisions 1 and 2

Plaintiffs' claims are based in large part on their interpretation of the nine instruments that created the Lummi Island Scenic Estates subdivision ("LISE") and were recorded between 1959 and 1965.[3] Plaintiffs allege that the instruments created a homeowners' association and corresponding membership obligations that expired twenty-five years after the last plat was recorded in 1965. Plaintiffs assert a number of claims based on the theory that defendants' efforts to collect dues from the members after 1990 were unauthorized and therefore illegal.

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[2] The Court finds that this matter can be decided on the papers submitted. Plaintiffs' request for oral argument is therefore DENIED.

[3] The Court takes judicial notice of the instruments.

The plats for the first two sections of LISE were recorded in 1959 (Division 1) and 1961 (Division 2). Neither plat included the twenty-five year sunset provision that forms the basis of many of the claims asserted in this litigation. Plaintiffs argue that absence of the sunset provision is irrelevant under two alternate theories: (1) all nine plats must be read together to give effect to the drafter's intent to create a unified and uniform subdivision and/or (2) the terms of the later-recorded plats of the subdivision prevail over any conflicting provisions in the earlier plats. None of the cases cited by plaintiffs provides support for these contentions. Although courts may "look to the surrounding circumstances of the original parties to determine the meaning of specific words and terms used in the covenants" (Hollis v. Garwell, Inc., 137 Wn.2d 683, 696 (1999)), documents that were not in existence at the time of the original covenant can hardly be considered evidence of the parties' intent when the earlier documents were drafted and recorded. Nor is there any support for the extraordinary theory that later-filed documents related to a subdivision automatically supplant the terms of the original parties' recorded agreement. If that were the case, individuals who bought property in Divisions 1 and 2 and agreed to be bound by the specified restrictions could be subjected to new and unanticipated obligations simply because later purchasers were willing to accept them. In the absence of any case law sanctioning such an outcome or any reference in the chain of title that would have put the purchasers on notice that their properties were subject to unknown limitations, the Court declines to adopt plaintiffs' "later in time principle." Dkt. # 30 at 20-21.

Applying the context rule articulated in Berg v. Hudesman, 115 Wn.2d 657 (1990), as explained and refined by Hollis, 137 Wn.2d at 693-96, the Court finds that the restrictions and provisions of later-filed plats in the subdivision are not admissible extrinsic evidence because they cannot assist in determining the meaning of the words and terms used in the Division 1 and 2 covenants. As an initial matter, the later-filed documents are not part of the circumstances surrounding the earlier plats: they are temporally distinct and do not shed light on the intent of the parties at the time the plats and deeds were recorded. Admissible extrinsic evidence under

Berg and Hollis does not include:

- Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
- Evidence that would show an intention independent of the instrument; or
- Evidence that would vary, contradict or modify the written word.

Hollis, 137 Wn.2d at 695. Plaintiffs' evidence of later-filed documents that presumably reflect what the developer wished it had included in the original plats violates all of these principles and is not admissible.

For all of the foregoing reasons, defendants' motion to dismiss (Dkt. # 19) is GRANTED in part. The claims of Edward Lawson, Lee Mundstock, Louise Weber, and Jennifer Dubrow – all of whom own lots in Divisions 1 or 2 of LISE – fail as a matter of law to the extent the claims depend on the assertion that their duty to pay dues expired in or around 1990.

Dated this 1st day of December, 2015.

Robert S. Lasnik
United States District Judge