



MORTON
VALIHURA
& ZERBATO

EFiled: Aug 20 2021 03:47PM EDT
Transaction ID 66867287
Case No. 2020-0989-SG



Michael P. Morton, Esquire (DE) (PA)
Robert J. Valihura, Jr., Esquire (DE)
David C. Zerbato, Esquire (DE) (PA) (MD)
Jillian M. Pratt, Esquire (DE) (PA) (NJ)
Caren L. Sydnor, Esquire (DE) (PA) (NJ)
Christopher J. Kephart, Esquire (PA)

DELAWARE CERTIFIED PARALEGAL
Sherry Thomas Lyons, DCP
Marcella E. Manis, DCP
Ellen Sebastiani, DCP
Jessica B. Golden, DCP

August 20, 2021

VIA FILE & SERVEXPRESS
AND HAND DELIVERY

The Honorable Sam Glasscock III
Court of Chancery - Sussex County
Court of Chancery Courthouse
34 The Circle
Georgetown, DE 19947

Re: *Nancy Green v. Carl M. Freeman Communities, L.L.C.*
C.A. No. 2020-0989-SG

Dear Vice Chancellor Glasscock:

Enclosed are two copies of the Opening Brief in Support of Plaintiff's Cross-Motion for Summary Judgment that was filed with the Court today. Reply Briefs will be submitted on or before September 13, 2021, with argument at the convenience of the Court following the submission of those Briefs.

Should the Court have any questions, Counsel are available at the Court's convenience.

Greenville Professional Center • 3704 Kennett Pike, Suite 200 • Greenville, DE 19807
Telephone: 302-426-1313 • Fax: 302-426-1300 • Web: www.mvzllc.com

DOVER OFFICE • 1675 S. State Street, Suite E • Dover, DE 19901
LEWES OFFICE • 17527 Nassau Commons Boulevard, Suite 107 • Lewes, DE 19958

The Honorable Sam Glasscock III
August 20, 2021
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Respectfully,

/s/ Robert J. Valihura, Jr.

Robert J. Valihura, Jr., Esquire
DE State Bar ID No. 2638

Words: 61

RJV/es
Enclosure

cc: Mark F. Dunkle, Esquire (w/enc.) (via File & ServeXpress)



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situating,)
)
Plaintiff,)

v.)

C.A. No. 2020-0989-SG

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Defendant.)

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Counterclaim Plaintiff,)

v.)

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situating,)
)
Counterclaim Defendant.)

**OPENING BRIEF IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR
SUMMARY JUDGEMENT**

MORTON, VALIHURA & ZERBATO, LLC
Robert J. Valihura, Jr., Esquire
State Bar ID Number 2638
3704 Kennett Pike, Suite 200
Greenville, DE 19807
302-426-1313
Attorney for Plaintiff, Nancy Green

Dated: August 20, 2021

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Plaintiff and Counterclaim Defendant, Nancy Green (“Plaintiff”), by her undersigned counsel, hereby submits this Opening Brief in support of her Cross-Motion for Summary Judgment on the Counterclaim of Defendant and Counterclaim Plaintiff, Carl M. Freeman Communities L.L.C. (“Defendant”).

INTRODUCTION

The matter before the Court is the resolution of a request by the Defendant to shift its fees under the discretionary fee provision found in the Delaware Uniform Common Interest Ownership Act (“DUCIOA”). Specifically, Defendant contends, through the pressing of its Counterclaim following trial of this matter, that it is entitled to offload on to this homeowner Plaintiff what it asserts is now more than \$200,000.00 of its fees incurred in this action because it alleges she asserted a claim “challenging the validity” of the community’s declaration, the Community Charter for Bayside (the “Charter”), and that she failed, as the Charter required, to have engaged in the alternative dispute resolution mechanisms provided for under the Charter prior to instituting this litigation. Plaintiff, of course, alleged nothing of the sort, and did nothing other than, as a champion of the community, stand up for the separate and distinct rights she believed she and the other homeowners had, not under the community’s Charter, but rather were conferred upon common interest community homeowners throughout the State by DUCIOA.

The Court will find that no genuine issue of material fact exists, and that this Plaintiff is entitled to judgment as a matter of law on the claim Defendant asserts under 25 *Del. C.* § 81-417. Indeed, the Court will find that, as is required for Defendant to sustain a claim under Section 81-417, Plaintiff did not breach the Charter; and that, under any circumstances, Defendant cannot show that this matter is an appropriate case for a discretionary shifting of fees from Defendant to Plaintiff. As a result, no award of fees is available to Defendant, and Plaintiff is entitled to summary judgment on the Counterclaim.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff brought this action, based solely on a claim of violation of the provisions of DUCIOA, on November 16, 2020 seeking to compel Defendant to call and hold a very prompt meeting of members of the Bayside Community Association, Inc. (the “Association”) for the purposes of electing independent unit owner/member directors to the Board of Directors of the Association such that those unit owner representatives would comprise a majority of the Board (the “Original Complaint”).
D.I. No. 1.

On December 4, 2020, Defendant filed a motion to dismiss for failure to state a claim. D.I. No. 6. Plaintiff filed her Amended Class Action Complaint (the “Complaint”) on January 26, 2021, again seeking a resolution of her statutory claims under DUCIOA, and after the Defendant refused to enter into a Status Quo

Stipulation to maintain the status quo pending the final resolution of this matter, Plaintiff filed her Motion for a Status Quo Order on February 3, 2021. JA0001¹; D.I. No. 12.

Following briefing by the parties, Plaintiff's Motion for a Status Quo Order was denied by the Court on February 16, 2021. D.I. No. 14. The Court, however, bi-furcated Plaintiff's damages claim, and directed that the matter would be set down for a prompt trial on the primary issue in the matter: Plaintiff's statutory violation claims, and the Defendant's defenses thereto, and the parties and the Court scheduled this matter for a trial on the papers to take place on May 4, 2021. *Id.*

Defendant filed its Answer and Counterclaim on March 4, 2021 (D.I. No. 17), and Plaintiff filed her Answer to that Counterclaim on March 24, 2021. (D.I. No. 24).

The May 4, 2021 trial on the record was held, and it was based solely on the statutory claims made in the Complaint, the claim that DUCIOA mandated the turnover of control of the Board of the Association to the homeowner members of the Association. Following that trial, the Court issued a Memorandum Opinion on May 19, 2021 concluding that the master planned community carveout found in 25

¹ Plaintiff and Defendant submitted a Joint Appendix to the Court in support of their respective Pre-Trial Briefs. The Joint Appendix is referenced herein as "JA __," and the Memorandum Opinion is cited as "D.I. No. 39, pp."

Del. C. § 81-303 applies to Defendant thereby relieving Defendant from the requirement to turn over board control subject to the express terms found in Section 81-303(c). D.I. No. 39, p.14.

The Memorandum Opinion (the “Opinion”) ordered the parties to submit an appropriate form of order consistent with the holding of the Opinion. D.I. No. 39, p.14.

Following a dispute between the parties on the form of such Final Order, the Court held a post-trial conference wherein the Court determined that the Court would decide the issue of the resolution of the Defendant’s Counterclaim on the papers. Exhibit A hereto, p. 10. The Court requested that the parties work through the discovery matters and ask the Court to intervene, if necessary. *Id.*, p. 11.

The parties were able to obviate Defendant’s request for additional discovery by agreeing to a Joint Stipulation of Certain Facts (cited herein as “JSF ¶ ,” attached hereto as Exhibit B) and the parties agreed to present cross-motions for summary judgment on Defendant’s Counterclaim.

This is Plaintiff’s Opening Brief in Support of Plaintiff’s Motion for Summary Judgment.

STATEMENT OF FACTS

A. The Parties

Plaintiff, Nancy Green, is a resident of Bayside, a common interest ownership community governed by DUCIOA, and she, along with her husband, Gordon Green, own 31454 Forsythia Drive, Selbyville, Delaware. JA0002, ¶ 1; JA0372.

The Declarant/Defendant, Carl M. Freeman Communities, LLC is a Delaware limited liability company. JA0002, ¶ 2. The Declarant is the “declarant” for Bayside as that term is used in DUCIOA. *Id.*; 25 *Del. C.* § 81-103(16).

B. Background

The Court is well familiar with the facts which underlie the allegations made by Plaintiff against Defendant in this action (the “Action”). Plaintiff contends that pursuant to DUCIOA, Defendant was statutorily required to turnover control of the Bayside Board of Directors to the homeowners because more than 75% of the buildable lots in Bayside have already been conveyed. The basis for Plaintiff’s statutory violation claim is found in 25 *Del. C.* § 81-303(c). JA0017, ¶¶ 39-44.

In advance of the filing of this Action, Plaintiff retained counsel who wrote to a representative of the Defendant on September 10, 2020, concerning not the obligations the Defendant had under the Charter, but rather the obligations imposed upon the Defendant by DUCIOA, and requested that the Defendant, in accordance with that statutory mandate, direct that its appointees to the Board call a meeting to

elect a Board on which a majority would be independent Bayside homeowners. JA1041-043. The letter, made part of the trial record in this case, confirms that the claim being asserted on behalf of the Plaintiff arose under DUCIOA, and not any governing document of Bayside. *Id.*

Defendant denied the request made in counsel's letter. JA0004, ¶¶ 7,8.

During the next two months, prior to filing of Plaintiff's action, Plaintiff, through her counsel, made numerous attempts to achieve a resolution of her statutory violation claim against Defendant. JSF, ¶ 9. Not once, did Defendant or its representatives assert that Plaintiff's statutory claim under DUCIOA was a "Claim" under the Charter that was required to be mediated pursuant to Section 20.1 of that Charter. The reason was obvious: Plaintiff's claim arose not under the Charter, but rather from the law binding on declarants for common interest communities, DUCIOA. JA0017, ¶¶ 39-44.

Thus, if Defendant thought there was a claim, challenge or assertion relating to the validity of any provision of the Charter, it certainly said nothing to Plaintiff or her counsel that would have alerted the Plaintiff that it, at that time, believed so.

Ultimately, the attempts to resolve this matter pre-litigation were not successful and on November 16, 2020, Plaintiff brought this action. D.I. No. 1.

C. The DUCIOA Statutory Violation Claims

The Original Complaint did not state or assert a contract claim. D.I. No. 1. Plaintiff's original Complaint did not state or assert a claim for a breach of the Charter, or of any other document compromising the governing documents at Bayside. *Id.* Plaintiff's original Complaint did not state or assert a claim that would have constituted a "Claim" under Section 20.1 of the Charter, such as by asserting a challenge to the validity of anything under or pursuant to any provision of the Charter. *Id.*

Rather, Plaintiff's Original Complaint asserted only statutory violation claims against the Defendant. Specifically, the original Complaint asserted:

- A claim for a Declaratory Judgment that "the Developer is violating 25 *Del. C.* §81-303 in not requiring its appointees to the Board of the Association to call and hold a meeting of its members of the Association for the purposes of electing member/Owner directors to the Board of Directors of the Association such that they would comprise a majority of the Board." D.I. No. 1, ¶38.
- A claim for an "Order under 25 *Del. C.* §81-303(c) ordering the Developer to direct its appointed and controlled directors to call and hold a very prompt meeting of the members of the Association for the purposes of electing independent owner/member directors to the Board of Directors of the Association such that those homeowner representatives will comprise a majority of the Board." D.I. No. 1, ¶39. (Collectively with ¶38, the "Statutory Violation Claims").
- A claim for attorneys' fees under 25 *Del. C.* § 81-417 for Defendant's violation of DUCIOA. D.I. No. 1, ¶46.

Following the filing of the Original Complaint, the parties, through their counsel, began discussions anew on resolving the matter. Exhibit C hereto. At no time during that period did the Defendant assert that the matter needed to be mediated pursuant to the Charter, or that Section 20.1 of the Charter applied requiring certain alternative dispute resolution processes (“ADR”) take place. The record is devoid of any evidence that Defendant made such a claim because no such claim was made.

While discussions concerning the potential resolution of the action were taking place, Defendant, to put it on the record, filed a Motion to Dismiss the action. D.I. No. 6. Most significantly, that Motion to Dismiss did not seek to dismiss the matter for failure to comply with Section 20.1 of the Charter, or seek a stay of the matter while compliance with such Section was completed. The Motion says nothing about the fact that Defendant believed that, prior to the institution of this litigation, Plaintiff was obligated to have undertaken pre-litigation ADR processes required by Section 20.1 of the Charter.

Following the breakdown of discussions following the resolution of this matter, Plaintiff filed the Complaint. That Complaint contained the identical Statutory Violation Claims included in the original Complaint (JA0017, ¶¶ 43-44), and a new claim for damages under 25 *Del. C.* § 81-417 for the Defendant’s violation of DUCIOA. JA0019, ¶¶ 57-58. Again, no claim was made that Defendant had

violated the Charter, and such Complaint certainly did not include any claim that arose under the Charter or the governing documents of Bayside. *See* JA0001-35.

Following the resolution of the Motion for a Status Quo Order on February 16, 2021, the Court bi-furcated Plaintiff's damages claim, and directed that the matter would be set down for a prompt trial on the primary issue in the matter: Plaintiff's Statutory Violation Claims, and the Defendant's defenses thereto. D.I. No. 14. A trial on the papers was scheduled for May 4, 2021. *Id.*

The Plaintiff thereafter pursued and litigated only the Statutory Violation Claims. Discovery was focused not on any alleged breach of contract claims, or claims arising out of the Charter or a challenge to provisions of the Charter, but rather solely on the Statutory Violation Claims.

Notwithstanding the lack of any evidence that something more was being asserted other than were the Statutory Violation Claims, the first time that Defendant asserted that somehow Section 20.1 of the Charter applied, or that this Plaintiff had some duty or obligation under that provision, was in the Counterclaim filed on March 4, 2021. D.I. No. 17. There, flying directly in the face of the fact that the Statutory Violation Claims say absolutely nothing about the Charter, Defendant alleges that:

“Plaintiff's Complaint asserts a “claim, grievance, or dispute arising out of or relating to: (1) the interpretation, application, or enforcement” of Section 3.1 of the Charter, challenging the validity of that Section's establishment of the termination of the Founder's Control Period as being, under Section 3.1(a)

“when 90% of the total number of Units permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Persons other than builders holding title for purposes of construction and resale:” and under Section 3.1(b) “December 31, 2024” ; together a “Claim” under Section 20.1 of the Charter.”

D.I. No. 17, ¶ 3.

According to Defendant, therefore, because it asserts that there is a “Claim,” and Plaintiff failed to undertake the “mandatory pre-litigation alternative dispute resolution requirements” in Section 20.1 for such a Claim, there is a violation of the Charter, for which DUCIOA allows for the shifting of fees. D.I. No. 17, ¶5.

Thus, incredibly even though nowhere in the Complaint or the Original Complaint are Sections 3.1(a) and (b) of the Charter asserted, mentioned or even, as Defendant alleges, challenged, Defendant contends that Plaintiff was “challenging the validity” of that Section (the “Section 3 Validity Challenge Claim”).

Defendant’s Counterclaim is nothing other than a blatant and self-serving litigation effort created to transmogrify Plaintiff’s Statutory Violation Claims into a contractual challenge to shoehorn it into a claim to assert a fee shifting claim against Plaintiff. Yet, as the Court can discern from the undisputed facts before it, no such contract claim was made, and no such claim was asserted in any pleading filed by this Plaintiff in this action. In fact, Plaintiff did not and need not have made such assertion or challenge, as she was asserting an independent and superior right, a right she possessed no place other than under Delaware law. *See 25 Del. C.* §81-303.

Plaintiff's Pretrial Brief was focused only on her Statutory Violation Claims, and responses to Defendant's defenses thereto, and did not raise, assert or argue any claim arising out of the Charter, the governing documents or a challenge to the validity of Section 3 of the Charter. D.I. No. 33. At argument, Plaintiff neither sought nor asked the Court to consider anything other than relief based upon her Statutory Violation Claims, and certainly did not ask the Court, as the Court is well aware, to opine on the validity of Section 3 of the Charter or of any other provision of the Charter or the governing documents of Bayside. D.I. No. 37.

Finally, in recognition by this Court that no challenge to Section 3 of the Charter had been made or claims relating to the validity of any provisions of the Charter had been asserted, this Court, following the consideration of the parties' submissions, decided the matter based not on upon whether Plaintiff had sought a contract validity challenge claim, but rather decided it based on what Plaintiff had pled: Whether the Complaint asserted a violation of a statute, **a statute which both parties asserted governed the outcome of the dispute: Section 81-303**. D.I. No. 39, p.13.

In short, there is not one iota of evidence that Plaintiff asserted or mentioned, Section 3 of the Charter during the course of the litigation, or asserted a Section 3 Validity Challenge Claim at any point in the action.

QUESTIONS PRESENTED

1. Are the Statutory Violation Claims a “Claim” under Section 20.1 of Charter?

2. Assuming that Plaintiff’s Action can somehow be considered, after-the-fact, to have been a disguised “Claim” under Section 20.1 of the Charter, is Defendant entitled to a discretionary award of its fees under 25 *Del. C.* § 81-417 for Plaintiff’s failing to meet the ADR requirements of Section 20.1 prior to the filing of this Action?

ARGUMENT

I. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE DEFENDANT CANNOT SUBSTANTIATE ITS CLAIM UNDER 25 DEL. C. § 81-417.

A party will prevail on a motion for summary judgment “where the record reflects that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . [and] [w]here [as here] the parties have not argued that there is an issue of fact material to the disposition of either motion, the Court shall deem the cross-motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.” *Kuhns v. Hiler*, 2014 Del. Ch. LEXIS 47, at *43-48 (Del. Ch. Mar. 31, 2014).

A. Plaintiff Did Not Violate The Terms Of The Charter, Nor Is This An Appropriate Case For Fee Shifting.

The award of reasonable attorney’s fees and costs under 25 Del. C. § 81-417 is “discretionary.” *Bragdon v. Bayshore Prop. Owners Assoc.*, 251 A.3d 661, 684 (Del. Ch. 2021) (“*Bragdon*”); 25 Del. C. § 81-417 (a). In order for this Court to consider whether to exercise such discretion, the moving party must show that “a declarant or any other person subject to [the DUCIOA] fails to comply with any of its provisions or any provision of the declaration or bylaws...” *Id.* If a person is “adversely affected by the failure to comply,” the Court can consider exercising such discretion, in an “appropriate case.” *Bragdon*, 251 A.3d at 681-82. Consequently,

Defendant must show, based on undisputed facts, that: (i) Plaintiff violated or breached the Charter or DUCIOA; (ii) Defendant was adversely affected by the purported failure to comply or breach; **and** (iii) the Court determines this is an appropriate case to shift Defendant's expenses to Plaintiff. *Id.* at 677, 681.

As the undisputed facts demonstrate, Plaintiff did not breach the terms of the Charter, and further, the Court will find that this is not an appropriate case to shift fees because Plaintiff did not act unreasonably at any point in this litigation with respect to the claims she sought to champion on behalf of the homeowners she sought to represent in this Action.

B. Plaintiff Was Not Required To Have Her Statutory Claims Adjudicated In An Alternative Dispute Resolution Forum.

The primary question the Court must answer in this Section 81-417 fee shifting request is whether or not Plaintiff breached Section 20.1 of the Charter by filing this suit without first submitting Plaintiff's allegations to the ADR procedures prescribed in the Charter. *See Bragdon*, 251 A.3d at 677-680.

Defendant alleges that Plaintiff was obligated under the terms of Section 20.1 of the Charter to follow "mandatory pre-litigation alternative dispute resolution requirements" prior to bringing her suit. D.I. No. 17, ¶ 5. However, Plaintiff did not breach Section 20.1 of the Charter because Plaintiff was not obligated to participate in some form of ADR as is prescribed in Section 20.2 before filing the Complaint.

It is indisputable, and not disputed by any party, that the Charter provides for pre-litigation alternative dispute resolution procedures prior to the institution of litigation only “with respect to a Claim...”²

When considering and interpreting this Charter, which is a contract between the parties (*Council of Ass’n of Unit Owners of Pelican Cove Condo. v. Yeilding*, 2019 Del. Ch. LEXIS 201, at *12 (Del. Ch. June 3, 2019)), this Court will apply traditional contract interpretation rules. *Council of the Dorset Condo. Apts.*, 801

² As set forth in the Charter, Section 20.1 states:

“20.1. Agreement to Encourage Resolution of Disputes Without Litigation

- (a) ***Bound Parties.*** . . . Accordingly, each Bound Party agrees not to file suit in any court with respect to a Claim described in subsection (b), unless and until it has first submitted such Claim to the alternative dispute resolution procedures set forth in Section 20.2 in a good faith effort to resolve such Claim.
- (b) ***Claims.*** As used in this chapter, the term “Claim” shall refer to any claim, grievance, or dispute arising out of or relating to:
- i. The interpretation, application, or enforcement of the Governing Documents;
 - ii. The rights, obligations, and duties of any Bound Party under the Governing Documents; or
 - iii. The design or construction of Improvements within the Community, other than” JA0958.

A.2d 1, 5 (Del. 2002). Where language in a declaration, here the Charter, is “clear and unambiguous, this Court will accord that language its ordinary meaning.” *Id.*

Here, there need not be and cannot be any divining of the intent of the meaning of the Charter, as that document is clear and unambiguous. Only a “Claim” is required to be submitted to the ADR requirements in 20.2 of the Charter. Charter, Section 20.1. Here, a Claim is a specifically defined term and includes only:

“any claim, grievance or dispute arising out of or relating to (i) the interpretation, application, or enforcement of the Governing Documents; (ii) the rights, obligations, and duties of any Bound Party under the Governing Documents; or (iii) the design or construction of Improvements within the Community....”

JA0958.

The term “Governing Documents” is itself not subject to any reasonable dispute, and is clear and unambiguous, as it is also a defined term within the Charter and its definition includes the Charter itself, **and does not include Delaware law.** Charter, Section 2.1.³

³ Chapter 2 of the Charter provides:

“Governing Documents

...

2.1. Scope and Applicability

“The Community has been established and is administered pursuant to various documents that have a legal and binding effect on all owners and occupants of property within the Community, as well as on anyone else who may now or in the future have an interest in any portion of the property comprising the Community . .

When the terms of a contract, as they do here, “establish the parties’ common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language” the terms themselves are controlling. *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997) (Emphasis added). Here, the ordinary plain meaning of the terms of this contract are controlling, and definitively demonstrate that Plaintiff had no “Claim” which was required to be submitted to ADR.

Section 20.1, by its unambiguous terms, only applies when the basis for a “Claim” between parties subject to the Charter sets forth a grievance or dispute about either (i) the interpretation, application, or enforcement of the Charter (or the other governing documents of the community), **or** (ii) the rights, obligations, and duties of this Defendant “under” those governing documents, including the Charter. Plaintiff’s Complaint does neither. JA0958.

The undisputed facts are that Plaintiff asked this Court in her Complaint to declare that the “Developer **is violating 25 Del. C. §81-303** in not requiring its appointees to the Board of the Association to call and hold a meeting of its members of the Association for the purposes of electing member/Owner directors to the Board

. . . Such documents, referred to in this Charter as the “**Governing Documents**,” include this Charter and the other documents described in Table 2.1, as they may be amended.” JA0896.

of Directors of the Association such that they would comprise a majority of the Board,” and that it issue an “**Order under 25 Del. C. §81-303(c)** ordering the Developer to direct its appointed and controlled directors to call and hold a very prompt meeting of the members of the Association for the purposes of electing independent owner/member directors to the Board of Directors of the Association such that those homeowner representatives will comprise a majority of the Board.” JA0017, ¶¶ 43, 44 (emphasis added).

These Statutory Violation Claims were the same claims made in Plaintiff’s pre-litigation demand, were the claims made in the Original Complaint, are the same claims litigated right through trial of the summary proceedings in this matter and are the identical claims which were ultimately considered and decided by this Court in its Memorandum Opinion. *See supra*, pp. 5-11.

Furthermore, at no time during the litigation did Plaintiff present, assert or demand resolution of a claim under the Charter, and certainly Plaintiff did not present or ask the Court to consider any claim, grievance or dispute arising out of or relating to (i) the interpretation, application, or enforcement of the Charter or (ii) the rights, obligations, and duties of the Defendant under the Charter. Quite simply, there has been no Section 20.1 “Claim” asserted, and certainly there has been no claim that required Plaintiff to adhere to the pre-litigation alternative dispute resolution procedures required by Section 20.1 of the Charter.

Yet, Defendant boldly asserts in its Counterclaim, in the face of the clear language in the Complaint to the contrary, that Plaintiff challenges Section 3.1 of the Charter by questioning the validity of that Section's establishment of when termination of Defendant's control of the Board occurs.⁴ However, as the Court can readily discern, Plaintiff did not refer to or directly or indirectly challenge the language found in Section 3.1 of the Charter in her Complaint. Instead, Plaintiff believed that Defendant was subject to and bound by the independent and distinct terms and obligations found in 25 *Del. C.* §81-303(c) and asked this Court to confirm that contention. Defendant's fanciful and highly creative recasting of Plaintiff's Complaint is unprecedented and unwarranted, and ignores the reality of what was actually pled, litigated and ultimately decided by this Court. JA0015-016, ¶¶ 34-39

Furthermore, this opportunistic revisionist rewrite of Plaintiff's actual claims is nothing more than a self-serving attempt to create the basis for fee shifting claim where none exists. The Statutory Violation Claims arise solely under 25 *Del. C.*

⁴ As set forth therein, Defendant asserts that "Plaintiff's Complaint asserts a "claim, grievance, or dispute arising out of or relating to: (1) the interpretation, application, or enforcement" of Section 3.1 of the Charter, challenging the validity of that Section's establishment of the termination of the Founder's Control Period as being, under Section 3.1(a) "when 90% of the total number of Units permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Persons other than builders holding title for purposes of construction and resale;" and under Section 3.1(b) "December 31, 2024" ; together a "Claim" under Section 20.1 of the Charter." D.I. No. 17, ¶ 3.

§81-303(c) which Plaintiff believed required independent action by this Defendant and which was compelled by the law, and were not challenges to the “validity” of anything in the Declaration. That there are separate and distinct rights, under the law and under the Charter, cannot be ignored or wishfully whitewashed away as this Defendant would have this Court do.

As Declarant, with its unilateral right to amend, Defendant could have rewritten Section 20.1 of the Charter to cover a dispute “arising under” DUCIOA, and to mandate ADR in such circumstances. 25 *Del. C.* §81-417(b).⁵ It did not. It alone chose to limit a “Claim” to matters arising under the governing documents, including the Charter. It cannot now, when it suits it, creatively assert that Plaintiff’s independently arising DUCIOA violation claim which arises under the statutory law, and not the Charter, is one actually challenging the validity of provisions of the Charter that Plaintiff neither mentioned, nor asserted, nor did not need to mention or assert since the rights Plaintiff sought to vindicate arose not under the Charter, but

⁵ As set forth in Section 81-417(b):

“(b) Parties to a dispute arising **under this chapter**, the declaration, or the bylaws may agree to resolve the dispute by any form of binding or nonbinding alternative dispute resolution....”

25 *Del. C.* §81-417(b)(emphasis added).

under the rights given to the homeowners by Delaware's General Assembly, the rights in DUCIOA.

Therefore, with no actual violation of the Charter to be able to assert or to provide uncontroverted evidence of which exists, Defendant cannot satisfy the first element needed to successfully shift fees pursuant to Section 81-417. That alone dooms Defendant's Counterclaim.

With the record showing that there is no dispute of material fact and the moving party is entitled to judgment as a matter of law, summary judgment on the Counterclaim is therefore appropriate. *Lyondell Chemical Company v. Ryan*, 970 A.2d 235, 241 (Del. 2009); Ct. Ch. R. 56.

C. Defendant is not Entitled to the Discretionary Fee Shifting Under 25 Del. C. §81-417.

Even if the Court should somehow determine that the statutory violation claim allegations found in Plaintiff's Complaint are considered "Claims" as defined in Section 20.1 of the Charter, and Plaintiff therefore breached her obligation under the Charter by failing to first submit her claims to the ADR provisions of the Charter, the Court must still reject the request for a discretionary shifting of the claimed \$200,000.00 in fees Defendant asserts it has incurred in defending this matter.

First and foremost, as this Court has already recognized, the very dispute resolution provisions that Defendant relies upon in its Counterclaim limits the relief that this Court may award and the remedy to which this Defendant is entitled. There,

as the Court has already noted, if the party does not engage in the mandated mediation, “the Claimant shall be deemed to have waived the Claim, and the Respondent shall be relieved of any and all liability to the Claimant (but not third-parties) on account of such Claim.” Charter, Section 20.2 (c); *see also* Exhibit A, pp.7-8.

It is clear that this is the full scope of the relief available to this Defendant. It is specific, exact, and most importantly, it is no less than draconian in scope. It provides for not only a complete loss, a waiver, of the Claim, regardless of merits, but even more, a complete preclusion of all liability, financial and otherwise, that the Defendant might have against the Plaintiff with respect to that Claim. A more complete and exclusive remedy could not be fathomed for simply not engaging in the pre-litigation dispute resolution procedures.⁶

There is, therefore, no further relief/remedy available to this Defendant, and certainly not the relief of fee shifting, when the very contract provision Defendant seeks to assert specifically limits the relief to a waiver of the Claim, and a relieving of the Defendant to any and all liability to the Plaintiff with respect to the Claim.⁷

⁶ As to completeness, it should be noted that the provision further notes that the parties “shall bear its own costs of the mediation, including attorneys fees...” (Charter, Section 20.2 (c)), thus providing further evidence of the completeness of the remedy offered.

⁷ Even if this very clear and unambiguous limitation of relief provision could be considered to be a non-exclusive remedy, which it cannot, the Court is free to

Notwithstanding this contractual limitation of liability that ends the inquiry, even if the Court concludes that it does not, this Court must then determine whether the actual violation of Section 20.1 of the Charter makes this an “appropriate case” for expense shifting under 25 *Del. C.* §81-417. *Bragdon*, 251 A.3d at 673, 681.

To determine whether or not this is an appropriate case for fee shifting, the Court examines whether or not the Plaintiff acted “unreasonably” in the underlying case. *Bragdon*, 251 A.3d at 681. The factors the Court will consider to determine whether or not Plaintiff here acted unreasonably are whether the Plaintiff acted in a “capricious manner and engaged in sharp practices during the resulting lawsuit.” *Id.* Here, neither factor warrants a discretionary award of fees under 25 *Del. C.* §81-417.

The record demonstrates that that Plaintiff acted neither in an arbitrary nor capricious manner, and that she was consistent before litigation in her position that Defendant was subject to the language found in 25 *Del. C.* §81-303 (c). Plaintiff’s Statutory Violation Claims never once waived. Plaintiff was unambiguous from the time she asserted her position, throughout the time leading up to the filing of the

consider it, and the significant breadth of its terms, and conclude that the enormous loss of the rights which the Plaintiff would otherwise be entitled to by having complied with the terms of the ADR provisions in Sections 20.1 and 20.2, certainly provides ample reasons why this Court should refrain from exercising its discretion under 25 *Del. C.* §81-417 in this particular instance.

litigation (and indeed, throughout the trial of this matter). Plaintiff's unwavering message and consistent prelitigation stance was anything but capricious.

Further, Plaintiff had retained competent, well respected litigation counsel, who was well-versed with not only her Statutory Violation Claims, but with representations of common interest communities throughout the State. *See, e.g.*, JA1041. Plaintiff did not simply accept Defendant's original denial of her demand, but she had her counsel made multiple efforts to resolve the matter prior to filing the lawsuit. JSF, ¶ 9.

Moreover, and more importantly, as consistent evidence that Plaintiff acted reasonably with respect to the claim that this Defendant is now asserting, it is important to note that Plaintiff was **never** told, directly or indirectly, prior to the filing of the litigation, that Defendant believed that she was asserting a Section 20.1 Claim. Indeed, the record is devoid of any evidence that she was aware of a "Claim" that was required to be submitted to ADR prior to the filing of her lawsuit.

Yet, what the record does contain, and what the record confirms about her good faith belief about her causes of action not consisting of such a Section 20.1 Claim is that Plaintiff was aware that Section 20 of the Charter existed, that she actually consulted the Charter concerning such provision and that she concluded that such Section was inapplicable to her actual and articulated causes of action set forth in the original Complaint and in the Complaint. JSF, ¶ 16.

On the other hand, what this Plaintiff was aware of regarding this Defendant pre-litigation is that Defendant was changing its legal position. At one point, Defendant claimed that DUCIOA did not apply to it (JA1044), and then later that it actually did apply and that Defendant agreed that a transition of control as provided under DUCIOA was sometime in the offing. JA0011, ¶ 24; JA1046. Indeed, in a letter to the Bayside homeowners, the CEO of Defendant wrote:

As a matter of background: In 2008, Delaware passed a law that stipulated that Homeowner Associations must be turned over to resident control 60 days after conveyance of 75 percent of the homes that may be created to the unit owners other than the Developer. (It is important to note that while this portion of the 2008 law applies to Bayside, other portions do not because the development pre-dates the 2008 law.)

Based upon recent sales we believe that 75 percent of this approved density will be reached by the end of 2021, at which time a majority control of the Board of Directors will be turned over to Resident Members.

JA1045-1047; JA0012-13, ¶ 27 (emphasis added).

Thus, what Plaintiff knew about her claims **from Defendant's own behavior**, and its pre-litigation failure to tell her that it believed that her claim arose under Section 20.1, is not that they were claims, grievances or disputes about the interpretation, application, or enforcement of the Charter, or the rights, obligations, and duties of the Defendant under the governing documents, including the Charter, but rather they were claims that would be and could be resolved by an application of the statutory law that Defendant now admitted was applicable to it.

Thus, after several month of negotiations with Defendant, it was apparent to Plaintiff that Defendant was not going to cede control of the Board pursuant to her theory under Section 81-303(c), thus forcing Plaintiff to engage in litigation to seek the desired relief. D.I. No. 1. Accordingly, the record is replete with undisputed and undisputable facts that Plaintiff's pre-litigation position and behavior was anything but arbitrary or capricious, and certainly not to any level that would warrant the Court's consideration of the exercise of discretion under Section 81-417.

Bolstering all of that is that the further record before the Court, a record the Court experienced itself during several months of litigation, demonstrates that Plaintiff did not engage in any "sharp" practices during litigation, but rather acted efficiently, practically and responsibly throughout.

Rather than move straight to a TRO, or a preliminary injunction request following the filing of her action, Plaintiff again sought to work with Defendant on a possible amicable resolution of the matters in her Complaint. Exhibit C. From November, 2020 to late January, 2021, the parties negotiated on a possible settlement of Plaintiff's claims, which despite the effort, unfortunately failed. Thereafter, there was no frivolous, excessive or burdensome motion practice with the sole motion being Plaintiff's request for a Status Quo Order following the Defendant's own refusal to accept a consensual agreement. D.I. No. 12.

Following this Court's denial of the Status Quo Order, and the setting of the prompt trial, Plaintiff and Defendant, through their seasoned trial counsel, worked professionally, collegially and economically during the discovery process by agreeing to narrow the focus of depositions and limit the scope of the issues to the ones in which the Court was most interested, including the "denominator" that was to be used to calculate the percentage of homes sold. Witnesses were agreed upon and deposed without incident. No discovery disputes were brought to the attention of the Court, and no issues about the process of bringing the matter to trial were brought before the Court to resolve.

The parties collaboratively compiled a 1048-page joint appendix, and agreed on one set of Pre-Trial Briefs. D.I. Nos. 34-36. The parties tried the case on a paper record, and made succinct, efficient and cogent arguments to the Court during that trial in a manner that were helpful and informative to the Court on an area of law that has seen no prior case law interpretation. Thus, rather than vexatious, rancorous or hostile litigation, this case was marked by cooperation and congeniality between two opposing sides having a legitimate difference of opinion on a nuanced area of law and on a question of law which this Court itself recognized there was "no crystal clear answer." Exhibit A, p. 10.

Finally, as to the *bona fides* of the litigation, and of Plaintiff's good faith pursuit of it on behalf of the class of homeowners she sought to represent, this Court

has already commented that “this litigation served a useful purpose as far as clarification of the law,” with this Court going so far as to note that the Court would be “extremely unlikely to say that the plaintiff should have seen the answer coming and, therefore, must have been acting in some kind of bad faith or otherwise in a way that is inimical to the [pursuit] of justice.” Exhibit B, pp. 10-11.

Under the circumstances of this case, with absolutely no pre-litigation warning by this Defendant that Plaintiff’s claim was one which Defendant itself allegedly believed (prior to its litigation attorney being retained) was a claim that Plaintiff should have understood that she was required to have sought ADR under Section 20.1 of the Charter, there is simply no basis to conclude that Plaintiff acted unreasonably, either pre-or post-litigation. With absolutely no facts in dispute, this is simply not an appropriate case for the discretionary award of fees under Section 81-417 of DUCIOA, and Plaintiff is entitled to summary judgment on Defendant’s Counterclaim.⁸

⁸ The absolute irony of this application by Defendant is not lost on Plaintiff. Defendant’s own claim, for a shifting of fees, arises out of a claim based on its belief that there has been a violation of the Charter. D.I. No. 17, ¶¶ 10-16. A discretionary denial of the fee shifting would result in the same effect of the sanctions set forth in that very Charter for its own failure to assert the ADR provisions of Section 20.1 of the Charter before having asserted this claim in the litigation: a waiver, of this claim, and a complete limitation of all liability Plaintiff might have to Defendant with respect to its assertion that fees are owed to this Defendant.

CONCLUSION

Plaintiff was not required to engage Defendant in ADR because the Statutory Violation Claims did not rise to the level of a Claim under the Charter. Notwithstanding that, however, even if the Court could conclude that such Statutory Violation Claims were nothing more than disguised claims under the Charter, then Summary Judgment is still appropriate as the Plaintiff's actions were reasonable, and in light of the Defendant's failure, pre-litigation, to assert that her Statutory Violation Claims were, in reality, Claims under Section 20.1 of the Charter, more than reasonable under the circumstances of this case to deny the discretionary fee shifting that is permitted under *25 Del. C. §81-417*.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant Plaintiff's Motion for Summary Judgment.

MORTON, VALIHURA & ZERBATO, LLC

/s/ Robert J. Valihura, Jr. _____

Robert J. Valihura, Jr., Esquire
State Bar ID Number 2638
3704 Kennett Pike, Suite 200
Greenville, DE 19807
(302) 426-1313
Attorney for Plaintiff, Nancy Green

Words: 6,822

DATE: August 20, 2021

CERTIFICATE OF SERVICE

I, Robert J. Valihura, Jr., Esquire hereby certify that on this 20th day of August, 2021, the undersigned has caused to be served, a true and correct copy of Plaintiff's Opening Brief in Support of Plaintiff's Cross-Motion for Summary Judgment, to the following counsel of record via File & ServeXpress:

Mark F. Dunkle, Esquire
Parkowski, Guerke & Swayze, P.A.
19354C Miller Road
Rehoboth Beach, DE 19971

/s/ Robert J. Valihura, Jr.

Robert J. Valihura, Jr., Esquire (ID No. 2638)



EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY GREEN, Individually and On	:	
Behalf of all Others Similarly	:	
Situated,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2020-0989-SG
CARL M. FREEMAN COMMUNITIES, L.L.C.,	:	
	:	
Defendant.	:	

- - -

Chancery Court Chambers
Court of Chancery Courthouse
34 The Circle
Georgetown, Delaware
Thursday, June 17, 2021
2:00 p.m.

- - -

BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor

- - -

TELEPHONIC STATUS CONFERENCE

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0533

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APPEARANCES:

ROBERT J. VALIHURA, JR., ESQ.
CHRISTOPHER J. KEPHART, ESQ.
Morton, Valihura & Zerbato, LLC
for Plaintiff

MARK F. DUNKLE, ESQ.
Parkowski, Guerke & Swayze, P.A.
for Defendant

- - -

1 THE COURT: Good afternoon, Counsel.
2 This is Sam Glasscock. Who do I have on the line,
3 please.

4 MR. VALIHURA: Good afternoon, Your
5 Honor. Bob Valihura on behalf of the plaintiff. And
6 with me is my associate, Chris Kephart.

7 THE COURT: Welcome both.

8 MR. DUNKLE: Good afternoon, Your
9 Honor. It's Mark Dunkle on behalf of the defendant.

10 THE COURT: Good afternoon,
11 Mr. Dunkle.

12 All right. You're planning, I assume,
13 to pursue your counterclaim. Is that my
14 understanding, Mr. Dunkle?

15 MR. DUNKLE: That's correct, Your
16 Honor. And in the last two hours I've read up on
17 Rule 54 and Your Honor's *Tang* decision and the other
18 cases so I could understand it. And I'm taking
19 Mr. Valihura's letter and submission I guess as a
20 Rule 54(b) motion, which we would oppose.

21 THE COURT: Yeah. Mr. Valihura, I
22 don't understand how this is a partial final judgment.
23 If your client is subject to a counterclaim, it's a
24 counterclaim for contract damages and statutory

1 shifting of fees. I don't understand how there can be
2 a partial final judgment in this case with that still
3 pending. So maybe I'm missing something.

4 MR. VALIHURA: No, Your Honor. The
5 type of claim it is -- and as Your Honor was aware
6 when you severed off everything and said you wanted a
7 trial on the merits of the primary claim -- this is
8 the type of claim that gets, you know, treatment in an
9 expedited way in the Court.

10 And, from my perspective, I believe
11 it's entitled to that kind of treatment -- even though
12 we weren't able to be successful in front of Your
13 Honor -- and that we're entitled to have this matter
14 now heard in front of the Supreme Court.

15 If Your Honor doesn't believe that
16 that's what you intended back when we set this for an
17 expedited trial, then we're perfectly happy to proceed
18 to -- I'm happy to discuss with my client about an
19 interlocutory request from Your Honor. And I don't
20 know whether the client would want to do that or not,
21 Your Honor.

22 Or, if Your Honor truly believes this
23 was not intended to be a matter that should be subject
24 to expedited review by both courts, we would -- if

1 Mr. Dunkle is going to pursue this claim -- which we
2 believe has no merit based upon Your Honor's decision
3 which was rendered under the statute -- we'll move for
4 summary judgment and deal with it in that way.

5 But we think that's going to end up
6 having the Court doing something that maybe --
7 maybe -- if it's reversed on appeal, useless for Your
8 Honor. But our view was Your Honor set this down for
9 an expedited review for a purpose. And if that's not
10 Your Honor's view of the matter, then I accept that.

11 THE COURT: All right, Mr. Valihura.
12 It seemed to me that it needed expedited review and
13 that I was hopeful that I could resolve it one way or
14 another and the rest would wither and die. That
15 hasn't happened. But I don't believe, as I understand
16 our rules and the Supreme Court's rules, that I can
17 call this a partial final judgment.

18 But I do agree with you that this
19 should be very straightforward going forward. I can't
20 imagine that it's not pretty much ready to be teed up,
21 Mr. Dunkle.

22 Why don't we do this as cross-motions
23 for summary judgment? There aren't any facts at
24 issue, are there?

1 MR. DUNKLE: Yes, there would be.
2 Because we had -- our discovery was limited in the
3 original severed claim.

4 And I thought about this before the
5 call. And to make the counterclaim -- you know, our
6 claim is the failure to follow the mandatory ADR and
7 the consequences of that -- I would need to ask those
8 questions of Ms. Green. So I would need to take her
9 deposition to go through the requirements in the order
10 and find out if they were followed and if they
11 weren't, why not. And then also --

12 THE COURT: What's the answer say?
13 Does the answer say she followed the dispute
14 resolution procedures?

15 MR. DUNKLE: I will turn to that, Your
16 Honor.

17 THE COURT: Mr. Valihura, you're not
18 arguing that, are you?

19 MR. VALIHURA: No, Your Honor. I
20 mean, the point here is we didn't have to follow them
21 because this is a statutory claim. And Chapter 20
22 says interpretation, application, or enforcement of
23 the governing documents is one of the things -- or the
24 rights, obligations, duties of any party bound under

1 the governing documents. Doesn't say anything about
2 pursuing statutory claims. I'm mystified by this.

3 And -- but, you know, it appears to
4 be, right here today, that everybody has to file an
5 attorneys' fee claim. And I've seen too many of them
6 in my practice now in the last year and a half, Your
7 Honor. And, frankly, I'll tell you, I'm getting to
8 the point where this is not the practice I had back in
9 the day.

10 MR. DUNKLE: Your Honor, I'd like to
11 explain it and address that.

12 THE COURT: Just a second,
13 Mr. Dunkle -- before you defend yourself, Mr. Dunkle.
14 And, look, I don't think anybody here is acting in bad
15 faith.

16 All I'm saying is this: There's no
17 dispute as to the factual scenario, which is
18 Mr. Valihura's client did not pursue and does not
19 think she had to pursue the alternative dispute
20 resolution. Either that was a breach of contract or
21 it wasn't. If it wasn't a breach of contract, then
22 there's another question, which is: Can you shift
23 attorneys' fees for it? Particularly given the fact
24 that the contract language doesn't address shifting

1 fees and seems to give a complete remedy, which is
2 that the action is void.

3 So, I mean, I understand the claim, I
4 understand the defense. It just needs to be
5 submitted. And I don't quite understand why it would
6 take a deposition since the plaintiff is not
7 suggesting that she followed those. The only --

8 MR. DUNKLE: I can explain, Your
9 Honor.

10 THE COURT: Go ahead.

11 MR. DUNKLE: I don't want to be faced
12 with a futility argument that the plaintiff tried to
13 engage in those discussions and it would be futile or
14 was futile or that they would characterize some
15 correspondence or whatever action that they did before
16 they filed the suit.

17 THE COURT: Excuse me, Mr. Dunkle.
18 Why don't you and Mr. Valihura do this. I am not
19 going to enter, as I've said, a partial final order.

20 If you want to file for interlocutory
21 relief, Mr. Valihura, you're certainly welcome to do
22 that. I'll consider that when it's filed, and the
23 Supreme Court can do what it wants with it.

24 But as far as this issue, Mr. Dunkle,

1 sit down with Mr. Valihura, see if you can't work out
2 a stipulated set of facts so this can get in front of
3 me. If you need to take depositions, I guess you can
4 do that. I hate to see this thing, you know, go on
5 and on and on.

6 It seems to me very straightforward,
7 and somebody's going to have to explain to me what
8 their view of the law is. But I don't think there's
9 going to be any dispute of facts. But if I'm wrong,
10 I'm wrong.

11 If you can't work out a stipulation of
12 facts, then by all means, Mr. Dunkle, we're going to
13 get back together and set forward a rather abbreviated
14 pretrial schedule. Because I'd like to get this teed
15 up and get it over with. And I'm sure you and your
16 clients would too.

17 MR. DUNKLE: Your Honor, we can
18 certainly give that approach the college try. And
19 then I think we could submit it for summary judgment.
20 It does have ramifications, the enforceability of this
21 provision in the charter. So we do want to address it
22 before this thing goes up to the Supreme Court.

23 THE COURT: Yeah. I'm not surprised.
24 And I think the Supreme Court will want it addressed

1 too because that's how appeals generally work. The
2 Court discourages piecemeal appeals. But I will
3 certainly review a request for interlocutory appeal if
4 it's put before me.

5 But let's try to do this in an
6 efficient way if we can, because it seems to me it
7 ought to be pretty much ready to put before me once
8 both sides have thought a little bit about how they
9 want to argue both the contractual claim and the
10 statutory claim.

11 I will say this: To the extent it
12 makes any difference to either of you, given the
13 nature of this statute, I have not looked closely at
14 the fee-shifting provisions, Mr. Dunkle, that you
15 cited in your counterclaim. But this is not a case to
16 me where there's a crystal clear answer and there's
17 some implication of, you know, an improvident suit or,
18 even further, bad faith. So I don't know what the
19 statute requires, and you can argue it to me.

20 But it seems to me that this
21 litigation served a useful purpose as far as
22 clarification of the law. And I am extremely unlikely
23 to say that the plaintiff should have seen the answer
24 coming and, therefore, must have been acting in some

1 kind of bad faith or otherwise in a way that is
2 inimical to the pursuant of justice.

3 So I don't know if that makes any
4 difference to you, but that's certainly where I am
5 today.

6 But why don't we do this: Let's get
7 back together in a week. The two of you can tell me
8 if you've worked out a stipulation. If you have,
9 we'll set a briefing schedule. If you can't, then
10 we'll discuss at that time, Mr. Dunkle, what kind of
11 discovery you need.

12 MR. DUNKLE: Sure, Your Honor. Thank
13 you very much.

14 THE COURT: Thank you.

15 Mr. Valihura?

16 MR. VALIHURA: Thank you very much,
17 Your Honor. I appreciate the insight here today.

18 THE COURT: Okay. Well, I'm going to
19 put you on hold, Counsel. And then you're going to
20 speak to Kim Roach. She'll get you set up for next
21 week.

22 Is there anything else we can
23 profitably do here, Mr. Valihura, from your point of
24 view?

1 MR. VALIHURA: No. I think you gave a
2 very good path forward, Your Honor.

3 THE COURT: Okay. Mr. Dunkle?

4 MR. DUNKLE: No, Your Honor. Thank
5 you for your time today.

6 THE COURT: I appreciate it. Talk to
7 you soon.

8 COUNSEL: Thank you, Your Honor.

9 (Proceedings concluded at 2:11 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify the foregoing pages numbered 3 through 12 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 19th day of August, 2021.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

EXHIBIT B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situated,)
)
Plaintiff,)

v.)

C.A. No. 2020-0989-SG

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Defendant.)

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Counterclaim Plaintiff,)

v.)

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situated,)
)
Counterclaim Defendant.)

JOINT STIPULATION OF CERTAIN FACTS

The parties, through undersigned counsel, do hereby agree and stipulate, to the following facts:

1. Nancy Green (“Plaintiff”) is a homeowner in Bayside.
2. Carl M. Freeman Communities, L.L.C. (“Freeman”) is the Founder of Bayside as defined in the Charter for Bayside (the “Charter”).

3. The Charter is a contract.
4. Plaintiff and Freeman are bound by certain terms of the Charter.
5. Plaintiff and Freeman are bound certain provisions of 25 *Del. C.* § 81-223; § 81-303 and § 81-417(a).
6. Plaintiff's Amended Complaint references the Charter in Paragraphs 5, 6 and 24 of the Amended Complaint.
7. Section 20.1 (a)-(b) of the Charter is set forth in full in Exhibit A attached hereto.
8. The facts giving rise to the causes of action set forth in Plaintiff's Amended Complaint existed prior to the filing of this litigation.
9. Plaintiff's legal counsel sent, in an effort to resolve the matter, emails to counsel for Defendant on September 14, 2020, numerous emails on September 15, 2020, emails on September 30, 2020, October 5, 2020 and October 6, 2020. In addition to the prior listed email communications, on September 10, 2020, Plaintiff's counsel sent a letter to a representative of the Defendant, and Plaintiff's counsel had at least one telephone call with Defendant's counsel in mid-September.
10. Plaintiff did not submit, pursuant to Section 20.1 (a) of the Charter, the causes of action set forth in the original Complaint or the Amended Complaint to an independent agency providing dispute resolution services in Sussex County,

Delaware or to a mediation entity designated by Bayside Community Association, Inc.

11. Plaintiff did not submit a Notice, pursuant to Section 20.1 (a) of the Charter, prior to filing this litigation.
12. 25 *Del. C.* § 81-417 (a) states: “[i]f a declarant or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award court costs and reasonable attorneys’ fees.”
13. The Defendant’s Counterclaim arose out of Plaintiff’s filing of her original Complaint and Amended Complaint and the facts leading to the existence of the causes of action set forth in the Counterclaim existed prior to the filing of its Counterclaim.
14. Defendant did not submit a Notice, pursuant to Section 20.1 (a) of the Charter, prior to the filing of its Counterclaim.
15. Defendant did not submit the causes of action set forth in its Counterclaim to an independent agency providing dispute resolution services in Sussex County, Delaware or to a mediation entity designated by the Association.
16. Plaintiff, prior to the filing of this action, was aware of Section 20 of the Charter, consulted Section 20 and concluded that Section 20 was inapplicable

to the causes of action set forth in the original Complaint and the Amended Complaint.

Morton, Valihura & Zerbato, LLC

/s/ Robert J. Valihura, Jr.
Robert J. Valihura, Jr., Esquire
DE State Bar ID No. 2638
3704 Kennett Pike, Suite 200
Greenville, DE 19807
(302) 426-1313
Attorney for Plaintiff, Nancy Green

Parkowski, Guerke & Swayze, P.A.

/s/ Mark F. Dunkle
Mark F. Dunkle, Esquire
DE State Bar ID No. 2656
19354C Miller Road
Rehoboth Beach, DE 19971
(302) 226-8702
*Attorney for Defendant, Carl M.
Freeman Communities L.C.C.*

Chapter 20

Dispute Resolution and Limitation on Litigation

From time to time, disputes may arise between Owners or between an Owner and the Association, the Founder, or others in the Community. This chapter commits the parties to any such dispute to work together in an attempt to resolve the dispute without litigation in order to facilitate the prompt resolution of such disputes in a manner that respects and builds upon the relationships between the parties. It also requires substantial support of the Association's membership before the Association can engage in certain types of litigation that could result in significant legal and emotional costs to the Community.

20.1. Agreement to Encourage Resolution of Disputes Without Litigation

(a) Bound Parties. The Founder; the Association and its officers, directors, and committee members; all Persons subject to this Charter; and any Person not otherwise subject to this Charter who agrees to submit to this chapter (including without limitation any Private Amenity owner) (collectively, "Bound Parties"), agree that it is in the best interest of all concerned to encourage the amicable resolution of disputes involving the Community without the emotional and financial costs of litigation. Accordingly, each Bound Party agrees not to file suit in any court with respect to a Claim described in subsection (b), unless and until it has first submitted such Claim to the alternative dispute resolution procedures set forth in Section 20.2 in a good faith effort to resolve such Claim.

(b) Claims. As used in this chapter, the term "Claim" shall refer to any claim, grievance, or dispute arising out of or relating to:

- (i) the interpretation, application, or enforcement of the Governing Documents;
- (ii) the rights, obligations, and duties of any Bound Party under the Governing Documents; or

- (iii) the design or construction of Improvements within the Community, other than matters of aesthetic judgment under Chapter 6, which shall not be subject to review and shall not be subject to this chapter.

(c) Exceptions. The following shall not be considered "Claims" unless all parties to the matter otherwise agree to submit the matter to the procedures set forth in Section 20.2:

- (i) any suit by the Association to collect assessments or other amounts due from any Owner;

- (ii) any suit by the Association to obtain a temporary restraining order (or emergency equitable relief) and such ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Association's ability to enforce the provisions of Part Two of this Charter (relating to creation and maintenance of community standards);

- (iii) any suit that does not include the Founder or the Association as a party, if such suit asserts a Claim that would constitute a cause of action independent of the Governing Documents;

- (iv) any dispute that affects the material rights or obligations of a party who is not a Bound Party and has not agreed to submit to the procedures set forth in Section 20.2; and

- (v) any suit as to which any applicable statute of limitations would expire within 180 days of giving the Notice required by Section 20.2(a), unless the party or parties against whom the Claim is made agree to toll, or extend, the Claim's statute of limitations to comply with this chapter.

20.2. Dispute Resolution Procedures

(a) Notice. The Bound Party asserting a Claim ("Claimant") against another Bound Party ("Respondent") shall give written notice ("Notice") by mail or personal delivery to each Respondent and to the Board, stating plainly and concisely:

(i) the nature of the Claim, including the Persons involved and the Respondent's role in the Claim;

(ii) the legal basis of the Claim (i.e., the specific authority out of which the Claim arises);

(iii) the Claimant's proposed resolution or remedy; and

(iv) the Claimant's desire to meet with the Respondent to discuss, in good faith, ways to resolve the Claim.

(b) Negotiation. The Claimant and Respondent shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation. If requested in writing, accompanied by a copy of the Notice, the Board may appoint a representative to assist the parties in negotiating a resolution of the Claim.

(c) Mediation. If the parties have not resolved the Claim through negotiation within 30 days of the date of the Notice (or within such other agreed upon period), the Claimant shall have 30 additional days to submit the Claim to mediation with an entity designated by the Association (if the Association is not a party to the Claim) or to an independent agency providing dispute resolution services in the Sussex County area. Each Bound Party shall present the mediator with a written summary of the Claim.

If the Claimant does not submit the Claim to mediation within such time, or does not appear for and participate in good faith in the mediation when scheduled, the Claimant shall be deemed to

have waived the Claim, and the Respondent shall be relieved of any and all liability to the Claimant (but not third parties) on account of such Claim.

If the parties do not settle the Claim within 30 days after submission of the matter to mediation, or within such time as determined reasonable by the mediator, the mediator shall issue a notice of termination of the mediation proceedings indicating that the parties are at an impasse and the date that mediation was terminated. The Claimant shall thereafter be entitled to file suit or to initiate administrative proceedings on the Claim, as appropriate.

Each Bound Party shall bear its own costs of the mediation, including attorneys fees, and each Party shall pay an equal share of the mediator's fees.

(d) Settlement. Any settlement of the Claim through negotiation or mediation shall be documented in writing and signed by the parties. If any party thereafter fails to abide by the terms of such agreement, then any other party may file suit or initiate administrative proceedings to enforce such agreement without the need to comply again with the procedures set forth in this section. In such event, the party taking action to enforce the agreement or award shall, upon prevailing, be entitled to recover from the non-complying party (or if more than one non-complying party, from all such parties in equal proportions) all costs incurred in enforcing such agreement or award, including, without limitation, attorneys fees and court costs.

20.3. Initiation of Litigation by Association

In addition to compliance with the foregoing alternative dispute resolution procedures, if applicable, the Association shall not initiate any judicial or administrative proceeding unless first approved by a vote of Voting Delegates representing at least 75% of the total votes in the Association, except that no such approval shall be required for actions or proceedings:

EXHIBIT C

Bob Valihura

From: Bob Valihura
Sent: Tuesday, December 15, 2020 12:34 PM
To: Roach, Lisa K (Courts); Mark Dunkle
Cc: Chen, Christine (Courts); Southworth, McKenzie (Courts)
Subject: RE: Green v. Freeman Communities LLC, C.A. No. 0989-SG

Thank you!

Bob



MORION
VALIHURA
& ZERBATO

ROBERT J. VALIHURA, JR.
Partner

GREENVILLE PROFESSIONAL CENTER
3704 KENNETT PIKE, SUITE 200
GREENVILLE, DE 19307

Telephone: (302) 426-1313
Fax: (302) 426-1300
Email: bvalihura@mvzllc.com

From: Roach, Lisa K (Courts) <Lisa.Roach@delaware.gov>
Sent: Tuesday, December 15, 2020 12:04 PM
To: Mark Dunkle <mdunkle@pgslegal.com>; Bob Valihura <bvalihura@mvzllc.com>
Cc: Chen, Christine (Courts) <Christine.Chen@delaware.gov>; Southworth, McKenzie (Courts) <McKenzie.Southworth@delaware.gov>
Subject: RE: Green v. Freeman Communities LLC, C.A. No. 0989-SG

Thank you both and please let me know if you need a call with the Vice Chancellor.

Kim

Kim Roach
Assistant to Vice Chancellor Sam Glasscock III
Court of Chancery – State of Delaware
302-856-5424

From: Mark Dunkle <mdunkle@pgslegal.com>
Sent: Tuesday, December 15, 2020 11:31 AM
To: Bob Valihura <bvalihura@mvzllc.com>
Cc: Roach, Lisa K (Courts) <Lisa.Roach@delaware.gov>; Chen, Christine (Courts) <Christine.Chen@delaware.gov>; Southworth, McKenzie (Courts) <McKenzie.Southworth@delaware.gov>
Subject: Re: Green v. Freeman Communities LLC, C.A. No. 0989-SG

Lisa I am fine with Bobs suggestion.

Mark

Mark F. Dunkle, Esquire
Parkowski, Guerke & Swayze, P.A.
116 West Water Street
P.O. Box 598
Dover, DE 19903-0598
(302) 678-3262 (v)
(302) 678-9415 (f)
mdunkle@pgslegal.com
www.pgslegal.com

On Dec 15, 2020, at 11:30 AM, Bob Valihura <bvalihura@mvzllc.com> wrote:

Dear Ms. Roach:

The parties are actively discussing a possible resolution of the matter. Would it be possible for us to report back to the Court if the matter cannot be resolved, and ask for the telephone call at that time?

Respectfully,

Bob Valihura

<image001.jpg>

From: Roach, Lisa K (Courts) <Lisa.Roach@delaware.gov>
Sent: Tuesday, December 15, 2020 11:28 AM
To: Bob Valihura <bvalihura@mvzllc.com>; mdunkle@pgslegal.com
Cc: Chen, Christine (Courts) <Christine.Chen@delaware.gov>; Southworth, McKenzie (Courts) <McKenzie.Southworth@delaware.gov>
Subject: RE: Green v. Freeman Communities LLC, C.A. No. 0989-SG

Counsel:

The Vice Chancellor would like a call with Counsel regarding the above matter. I can set a call on the below dates:

December 17 at 11:30 a.m.

December 18 after 10:00 a.m.

December 21 after 10:00 a.m.

Please let me know your availability. Thank you.

Kim Roach
Assistant to Vice Chancellor Sam Glasscock III
Court of Chancery – State of Delaware
302-856-5424

EXHIBIT D

To all Bayside residents:

What's Next After Bayside Is Legally Ruled A Master-Planned Community?

“Let us move forward together.”

It has been difficult over the last year to have limited communication with you, the Bayside residents. Now that we can speak directly, post-lawsuit, we want to share and clarify important details with you, including:

- 1. What we have all invested in Bayside to make it what it is**
- 2. How the Bayside Charter keeps our community intact and healthy**
- 3. What happens when the Charter is violated or ignored**
- 4. The ongoing legal process to uphold the Charter**
- 5. How to communicate about specific issues at Bayside**
- 6. What's new and what's coming next at Bayside!**

Living (and investing) in Bayside

Bayside provides opportunities for everyone to find something to do or a place that fits them. Planning this community that delivers the amenities and benefits residents enjoy has taken over 20 years, and the developer's investment of more than \$150 million so far. Going into this project, we knew that delivering a multigenerational experience for residents was essential for the project's success. We also recognize that many of our residents have been with us from the beginning and that all of you have made a significant personal investment in Bayside alongside us. We are in this together. Let us move forward together. The key word here, for us, is community.

Upholding the Integrity of the Charter

As stated in our Charter, “Truly great communities have a physical identity and a pride in that place; the community’s stakeholders have a positive feeling of belonging and accomplishment in its activities.” Words alone can never make a community. It’s up to the people who live and work there to create something special.

The Charter creates a vehicle, a process through which you and other stakeholders can build community at Bayside. “By choosing to live in the community, each resident understands the various components that comprise the community and acknowledges the necessity to respect the diversity of perspective of other residents and owners, the founder, and the builders, and the important role each must play in the Community’s success and the success of Bayside as a whole.”

Living as part of a community is our covenant. This is built into the fabric of Bayside, into the master plan and into all our community documents. Freeman Communities has promised to build out our vision for the Bayside lifestyle and make it all possible. We plan to transition control of the homeowner association to Bayside residents by the end of 2024.

And, as stated in our Charter, the decision to live at Bayside asks something of every resident. In the case of disputes, Bayside residents agree “to work together to resolve the dispute without litigation in order to facilitate the prompt resolution of such disputes in a manner that respects and builds upon the relationships between the parties. It also requires substantial support of the Association’s membership before the Association can engage in certain types of litigation that could result in significant legal and emotional costs to the Community.”

Ignoring the Bayside Charter Rules, Bayside Resident Files Suit and Loses

1. The Bayside Charter exists to protect all Bayside stakeholders.
2. The Bayside Charter is very clear that alternative dispute resolution – mediation – is mandatory. That requirement was ignored when a resident filed suit for control of the association, violating the integrity of the Charter.
3. Over the past 10 months the developer (CMFC) responded with legal action to protect the integrity of the Charter, the HOA and the structures that make life at Bayside what it is.
4. A trial on the resident's lawsuit happened on May 4, 2021.
5. On May 19, 2021, the judge ruled that Bayside is in fact a master-planned community and that the Bayside Charter provides for the transfer of the HOA board of directors by December 31, 2024.
6. Transitioning the HOA Board to homeowner control is a years-long process; we have begun the strategies for a 2024 handover.

What Happened After the May 19 Ruling in Favor of CMFC?

1. The plaintiff lost her case.
2. The plaintiff, by rule, cannot appeal the judge's ruling yet because CMFC, in exercising its legal rights and to protect the integrity of the Charter, filed counter claims against the plaintiff.
3. That case is still active and will be proceeding in court on the counter claims.
4. In violating the Charter, the plaintiff may be responsible for legal costs, which are now over \$200,000.
5. Beyond this monetary damage, it is important to complete this action so that the provisions and integrity of the Charter are upheld, and the collective covenant is restored.

Communication and Contacts

For over 15 years we have enjoyed a cooperative relationship with Bayside residents, and we believe that will continue. It is important for all residents to remember that much of Bayside's day-to-day operations are already managed by a full slate of committees, made up 100% of homeowners, including Website & Communications, Grounds & Operations, Finance & Covenants. One Homeowner Board Member serves on each committee as well. To keep our community running smoothly, we have revised our communication protocols. Please go through the correct channels to ensure a timely response:

1. For issues relating to amenities, including golf, pools and tennis courts, contact Troon GM Sean Gradomski at sgradomski@troon.com

Troon have added 3 new people to their team:

- Head of Food & Beverage – Anthony Cramasta - Anthony.Cramasta@Troon.com
- Executive Chef – Michael Warman – Michael.Warman@troon.com
- Golf Superintendent – Ken Crider - Ken.Crider@Troon.com

2. For issues relating to the HOA, groundworks and landscaping, please contact Michael Bennett of Legum & Norman at mbennett@legumnorman.com

3. For Developer related questions, please contact Jeff Evans at baysidetransition@cmfa.com

4. Bayside Institute – Erika Cook ecook@cmfa.com

5. Membership – Kellie Pitts kpitts@troon.com

What's Next?

Our process to fully complete the vision of the Bayside master-planned community continues to move forward. You can expect to see exciting changes like new pickleball courts in the coming months. We are also moving forward with our proven HOA transition process. We will work to communicate more about this process later in the Fall.

Our revised communication protocols mean we will be providing regular updates on all the Bayside Communication Platforms:

Our websites:

- Live Bayside <https://www.livebayside.com>
- Bayside Transition Website: <https://www.baysidetransition.com>

Facebook pages:

- Bayside Developer and Resident Forum (please join this group if you have not yet signed up) <https://www.facebook.com/groups/470977594017975>
- Live Bayside <https://www.facebook.com/livebayside/>

Via email: baysidetransition@cmfa.com

We have enriching programs available from Bayside Institute, delicious food at Signatures and cocktails from 38 Degrees – and you get to walk home safely! Don't forget, this season's line up at the neighboring Freeman Arts Pavilion is well worth a second look. So much to enjoy! Make the most of this summer.

Live Bayside!

Copyright © 2021 Bayside – Fenwick Island, All rights reserved.

You are a homeowner at Bayside

Our mailing address is:

Bayside – Fenwick Island

31252 Americana Pkwy

Selbyville, DE 19975-4242

[Add us to your address book](#)

Want to change how you receive these emails?

You can [update your preferences](#) or [unsubscribe from this list](#).





IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situated,)
)
Plaintiff,)

v.)

C.A. No. 2020-0989-SG

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Defendant.)

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Counterclaim Plaintiff,)

v.)

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situated,)
)
Counterclaim Defendant.)

PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Court of Chancery Rule 56, Plaintiff, Nancy Green, hereby respectfully requests that this Court grant summary judgment in her favor on the claims set forth in the Counterclaim filed in this matter.

The grounds for this Motion are set forth in the Brief accompanying this Motion.

MORTON, VALIHURA & ZERBATO, LLC

/s/ Robert J. Valihura, Jr.

Robert J. Valihura, Jr., Esquire

DE Bar No. 2638

3704 Kennett Pike, Ste. 200

Greenville, DE 19807

Phone: 302-426-1313

Fax: 302-426-1300

Attorney for Plaintiff, Nancy Green

Date: August 20, 2021

Words: 48

CERTIFICATE OF SERVICE

I, Robert J. Valihura, Jr., Esquire, hereby certify that on this 20th day of August, 2021, the undersigned has caused to be served, a true and correct copy of PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT to the following counsel of record via File & ServeXpress:

Mark F. Dunkle, Esquire
Parkowski, Guerke & Swayze, P.A.
19354C Miller Road
Rehoboth Beach, DE 19971

/s/ Robert J. Valihura, Jr. _____
Robert J. Valihura, Jr., Esquire (ID No. 2638)



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situating,)
)
Plaintiff,)

v.)

C.A. No. 2020-0989-SG

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Defendant.)

CARL M. FREEMAN)
COMMUNITIES L.L.C.,)
)
Counterclaim Plaintiff,)

v.)

NANCY GREEN, Individually and)
On Behalf of all Others Similarly)
Situating,)
)
Counterclaim Defendant.)

[PROPOSED] ORDER

NOW THIS _____ day of _____, 2021, for the reasons stated in
the Briefs in Support of Plaintiff, Nancy Green’s Cross-Motion for Summary
Judgment, IT IS HEREBY ORDERED that the Motion is GRANTED.

Vice Chancellor