

DISTRICT COURT, ARAPAHOE COUNTY,
COLORADO

7325 S. Potomac Street
Englewood, CO 80112

Plaintiff: HIGHLINE MEADOWS CONDOMINIUM
ASSOCIATION, INC.

Respondents: J AND S INVESTMENTS, LLC d/b/a J
AND S Investments LLC., d/b/a J & S Investment and
JoAnn Reberg

Attorney or Party Without Attorney:

Arthur T. DiMeo, Esq.

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Case Number: 07 CV 2392

Division: Courtroom:

ANSWER

COME NOW Defendants J AND S INVESTMENTS, LLC d/b/a J AND S Investments LLC., d/b/a J & S Investment ("J&S") and JoAnn Reberg ("Reberg"), and Answers the allegations in Plaintiff's Complaint as follows:

I. ANSWER

1. Defendants admit the allegations contained in Paragraphs 1 through 3 of the Complaint.
2. Defendants admit the allegations contained in Paragraph 4 of the Complaint that Defendant JoAnn Reberg may claim an interest in the Property.
3. Defendants admit the allegations contained in Paragraph 5 of the Complaint.
4. No response is necessary to the allegations contained in Paragraph 6 of the Complaint.
5. Defendants admit the allegations contained in Paragraph 7 of the Complaint.
6. Defendants admit the allegations contained in Paragraph 8 of the Complaint.
7. Defendants admit the allegation contained in Paragraph 9 of the Complaint that Plaintiff has levied assessments of \$201.65 in September 2007, but disputes whether such assessments were properly levied according the procedures provided for in the Declarations or the By

Laws of Highline Meadows Condominium Association ("HOA") or that such levy was correctly pro rated.

8. Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint and disputes whether such special assessment was properly levied according the procedures provided for in the Declarations or the By Laws of the HOA or that such levy was correctly pro rated.
9. Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the first clause of Paragraph 11 of the Complaint. Defendants admit the allegation contained in the second clause of Paragraph 11 of the Complaint. Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the last sentence of Paragraph 11 of the Complaint that a special assessment of \$732.75 becomes due and owing as of December 1, 2007 and disputes whether such special assessment was properly levied according the procedures provided for in the Declarations or the By Laws of the HOA or that such levy was correctly pro rated.
10. Defendants admit the allegations contained in Paragraph 12 of the Complaint.
11. All allegations of the Complaint not specifically admitted are denied.

WHEREFORE, Defendants move the Court to dismiss the Complaint with prejudice, to Order release of Plaintiff's lien, to award all costs, fees and other expenses to Defendants, and for other such relief as the Court deems just.

AFFIRMATIVE DEFENSES

12. As an affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason of Ultra Vires in that the Plaintiff corporation was not authorized to perform the acts which are the subject matter of the Complaint, which lack of authority was known by the Plaintiff and therefore those acts are ultra vires, void and without effect.
13. As a further affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason of Breach of By Laws in that the Plaintiff materially breached the By Laws governing the HOA.
14. As a further affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason of Breach of Fiduciary Duty in that Plaintiff breached its fiduciary duties to the Defendants by mismanaging the assessments, budget and funds of the HOA, failing to apply assessments to capital improvements or maintenance and therefore is not entitled to the payment alleged in the Complaint.
15. As a further affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason that Defendants' Performance is Excused because Plaintiff mismanaged the budget of the HOA, failed to apply assessments to capital improvements or

to routine maintenance and therefore is not entitled to the assessment alleged in the Complaint.

16. As a further affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason of Misrepresentations of the Plaintiff in that notice of HOA meetings was not properly given to Defendants, whether quorums were present at meetings, whether assessments were properly applied to capital improvements or to routine maintenance.
17. As a further affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason that Defendants were Justified in failing to pay assessments improperly assessed and misapplied or not applied by HOA to capital improvements or to routine maintenance.
18. As a further affirmative defense, Defendants state that Plaintiff's claims as stated in the Complaint are barred by reason that Defendants will deposit Payment of the amount of the assessments Plaintiff seeks pending a finding by the court that such assessments are valid and will properly applied.

WHEREFORE, having fully responded, Defendants requests that Plaintiff's Complaint be dismissed, that plaintiff take nothing by it, and that defendant be awarded costs and such other and further relief as the Court deems just.

COUNTERCLAIMS

COME NOW Defendants and complain against Plaintiff as follows:

FIRST CLAIM FOR RELIEF

(Demand for Alternative Dispute Resolution C.R.S. § 38-33.3-124 (1))

19. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
20. The General Assembly has expressed a strong desire for associations to adopt procedures to resolve disputes with unit owners through alternative dispute resolution methods such as mediation. See e.g., C.R.S. § 38-33.3-124 (1).
21. The HOA has failed to adopt such alternative dispute resolution (ADR) procedures on or before January 1, 2007. C.R.S. § 38-33.3-124 (1)(b).
22. The HOA has failed to attempt (ADR) prior to filing this action. Defendants believe that ADR could be effective in settling this dispute.

WHEREFORE, Defendants pray the Court to issue an Order requiring the parties to submit this dispute to mediation and that, if a stipulation is reached, it is presented to the Court pursuant to C.R.S. § 38-33.3-124 (2)(b).

SECOND CLAIM FOR RELIEF
(Demand for Accounting and Audit)

23. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
24. The HOA has not applied the assessments to maintenance or capital improvements, including failure to repair the roof, electrical and fences and have otherwise mismanaged the HOA accounts.
25. Upon information and belief, 75 homeowners owe \$92,000.00 in past due assessments.
26. Defendant J&S Investments is entitled to an accounting of association funds and financial statements since it acquired a unit.

WHEREFORE, Defendants pray the Court to issue an Order requiring the Plaintiff to provide a full and complete accounting and to conduct an audit as provided by statute and the Declarations.

THIRD CLAIM FOR RELIEF
(Damages for Breach of Duty to Repair or for a Set Off)

27. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
28. In May 2007, Defendant J&S Investments LLC had a buyer ready, willing and able to buy its unit. J&S would have realized a gross profit of approximately \$17,100.00 had the sale closed.
29. Plaintiff had a duty to Defendants to make to the leaking roof, balcony and other common elements.
30. On or about June 5, 2007 the Buyer terminated the contract to purchase Defendants' unit because the Plaintiff HOA failed in its obligations to make necessary repairs to the leaking roof, balcony and other common elements.
31. Plaintiff's failure caused J&S to lose the sale and a gross profit of approximately \$17,100.00.

WHEREFORE, Defendant J&S prays for damages for lost profits caused by Plaintiff's failure to make roof and other repairs to common elements or alternatively, for a set-off of its lost profits of \$17,100.00 against amounts.

FOURTH CLAIM FOR RELIEF
(Demand for Appointment of a Receiver)

32. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
33. The HOA has not applied the assessments to maintenance or capital improvements, has failure to repair the roof, electrical system and fences and has otherwise mismanaged the HOA accounts.
34. Upon information and belief, 75 homeowners owe \$92,000.00 in past due assessments.
35. Upon information and belief, lack of maintenance caused a slip and fall lawsuit to be filed against the Plaintiff HOA which did not carry sufficient insurance or a sufficient reserve. Plaintiff's negligence caused further special assessments to be levied.
36. The HOA has not done repairs to the common element roof, so that Rainwater and snow melt water are leaking into Defendants' unit causing damage to the interior ceiling.
37. The HOA has not done repairs to the exterior balcony of Defendants' unit allowing it to rot and causing it be declared unusable and unsafe by an inspector.
38. The HOA does not maintain an adequate reserve.
39. Upon information and belief, assessments have not been approved at duly constituted meetings of members or of the Board as provided in the Declarations.

WHEREFORE, Defendants pray for appointment of a receiver to govern HOA accounts and preside over HOA management.

FIFTH CLAIM FOR RELIEF
(Injunction for Failure to Follow HOA Rules of Conduct)

40. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
41. Rules of Conduct recorded at Book 3232 Page 18 *et seq.* require a hearing before the Board for an owner who disputes the assessments.
42. In violation of its own rules, the Plaintiff's Board refused to allow Defendant J&S be heard at a meeting held in July 2007 to dispute assessment levies.

WHEREFORE, Defendants pray for injunction disallowing foreclosure and compelling Plaintiff to allow Defendants a fair hearing on its disputed assessments.

SIXTH CLAIM FOR RELIEF

(Injunction Compelling Maintenance and Repairs and Release of HOA Lien)

43. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
44. The Declarations and By Laws require Plaintiff to apply assessments to the maintenance and repair of common elements, maintain a reserve and purchase insurance.
45. Plaintiff has failed to fulfill its obligations to apply assessments to maintenance and repair of common elements, maintain a reserve and purchase insurance.
46. Plaintiff's failures are causing irreparable harm to Defendants' real property.

WHEREFORE, Defendants pray for injunction compelling Plaintiff to apply assessments to maintenance and repair of common elements, maintain a reserve and purchase insurance and to release its lien.

SEVENTH CLAIM FOR RELIEF

(Recoupment and Set Off for Fees Charged for Documents)

47. Defendants hereby incorporate the preceding paragraphs by reference as if fully set forth.
48. On or about July 3, 2007, Defendant J&S requested to inspect and copy certain HOA records in good faith and for a proper purpose.
49. The Plaintiff charged J&S a fixed fee as stated in its By Laws, but one that, upon information and belief, may have exceed the actual costs of copying in violation of C.R.S. § 38-33.3-317, *et seq.*

WHEREFORE, Defendants pray for a recoupment or set off for the excess fees charged by the HOA to inspect and copy its records.

DEFENDANT DEMANDS A TRIAL BY JURY OF ALL ISSUES

Dated: January 7, 2008.

KATZ LOOK & MOISON, P.C.

/s/ Original Signature on File

By: Arthur DiMco, Esq. Reg. #24171

Attorney for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing pleading entitled "ANSWER" was e-served by LexisNexis™ File & Serve, or sent by United States mail postage prepaid, to the following on this 7th day of January, 2008:

Michael A. Roads, Esq.

Michael A. Roads, P.C.

2460 West 26th Avenue, Suite 20-C

Denver, CO 80211

/s/Original Signature on File

Sabrina D. Cooley