(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss.

CASE NO. 06 MISC 334126 (CWT)

CLAIRE AMBROSINI, VINCENT AMBROSINI, JOSE COTTON, MARINE COTTON, LAURA MAE COX, GEORGE B. DEPRADINE, FRANK L. MERCULGLIANO, DIANE SMITH and RUSSELL SMITH,

Plaintiffs

v.

MAUREEN CAWLEY, CYNTHIA LAIDLAW, THOMAS LOUCAS, MELISSA SCHER, and ROGER E. TACKEFF, as they are Trustees of the CLARENDON-WARREN CONDOMINIUM TRUST, KEVIN AHERN, BCT REALTY LLC, MICHAEL BEAN, CARLOS BHOLA, VICKI J. BROWN, JOHN CUNNEY, JR., BEATRICE FISHER, FRANKLIN GALINA, JONATHAN HIRSCH, SCOTT JONES, MICHAEL L. KAPLAN, CAROLINE C. KASPARIAN, JOHN KILROY, CYNTHIA LAIDLAW, THOMAS LAIDLAW, MARK LERNER, JEFF LEUPOLD, WILLIAM LIM, Trustee of the WILLIAM LIM TRUST, LORI LOTURCO, CAROLYN LOUCAS, THOMAS LOUCAS, JEFFREY J. MYLER, SCOTT POKRYWA, JON PRUNIER, SUSAN REIGEL, MELISSA SCHER, SHAWN T. TUMPNEY, SUSAN VAN DAM and STANLEY ZHOU, Unit Owners;

and)
)
ABND AMRO MORTGAGE GROUP, INC.,)
BANK OF AMERICA, NA, BOSTON FEDERAL)
SAVINGS BANK, CHEVY CHASE BANK,)
CITIZENS BANK OF MASSACHUSETTS,)
EMIGRANT MORTGAGE CO., INC., FIRST)
TRADE UNION BANK, JP MORGAN CHASE)
& CO., MASSACHUSETTS HOUSING)
FINANCE AGENCY, MELLON TRUST OF)
NEW ENGLAND, OLD KENT MORTGAGE)
CO., SHERWOOD MORTGAGE GROUP, INC.,)
SUMMIT MORTGAGE, LLC, STATE STREET)
BANK AND TRUST CO., TD BANKNORTH,)
INC., and WASHINGTON MUTUAL BANK, FA,)
Mortgagees and Lien Holders,)
)
Defendants)
)

DECISION

This action was commenced on December 6, 2006 by Plaintiffs Claire Ambrosini, Vincent Ambrosini, Jose Cotton, Marine Cotton, Laura Cox, George Depradine, Frank Mercugliano, Diane Smith, and Russell Smith (collectively, "Plaintiffs"), all of whom are Affordable Unit Owners residing in the Clarendon/Warren Condominium (the "Condominium") located at 78 Warren Avenue in Boston, Massachusetts. The action was precipitated by the imposition on the unit owners of significant special assessments for renovations to the roofs and roof decks of the two buildings which comprise the Condominium, the use of which only the owners of the market-rate units enjoy pursuant to deeded easements.[1] Plaintiffs contend that the

[1]It appears that a contractor hired to replace or repair the roof was required to remove roof-decks in order to get at the shingles. In so doing, he noted that some of the roof-decks were rotted out and replaced them as well. The owners of affordable units ask why they should be required to pay for the roof-deck repairs or replacement when they are not allowed to use them.

assessments are disproportionately, if not solely, for the benefit of the market rate units, and that relative square footage is not a proper measure of calculating each unit's undivided percentage interest in the common areas when the resale price of certain units is *restricted* by the terms of their deeds.

Plaintiffs' amended complaint, filed January 17, 2007, seeks a declaratory judgment pursuant to G.L. c. 231A that the Condominium developer erred in establishing the respective undivided percentage interests in the common areas and facilities for each unit, and further prays that the court enter an order directing the Trustees to reform the Condominium Master Deed such that the undivided percentage interests in common areas and facilities for each unit reflects the fair value of all units *as of the date of the Master Deed* rather than reflecting the proportion which the square footage of each unit bears to the whole, as is currently the case. Named by Plaintiffs as Defendants in the action are the Trustees of the Clarendon/Warren Condominium Trust (the "Trust"), all owners of unrestricted units in the Condominium (the "Unit Owners"), and various mortgagees and lien holders (collectively, the "Defendants").

By way of background, in 1987, the Boston Redevelopment Authority ("BRA") conveyed to the 4-18 Clarendon Street, 72 Warren Avenue Limited Partnership ("the Limited Partnership") two parcels of property located at the intersection of Clarendon Street and Warren Avenue in Boston. The Condominium consists of two buildings, four commercial units, and 26 residential units. One building, located at 4-16 Clarendon Street, is known as the "Townhouse," while the building at 70-80 Warren Avenue is known as the "Firehouse." Under the deed in connection with this conveyance, a Covenant for Affordable Housing (the "Covenant") required the Limited Partnership to provide ten "affordable units" to be occupied by individuals meeting certain

income requirements, among other qualifications. The Plaintiffs in this matter purchased, or are current owners of, seven of the ten affordable units. The owners of the other three affordable units are named as defendants.

The Master Deed fixed the interest in common areas and facilities conveyed with each unit at a percentage equal to the ratio of the interior area of each unit, measured in square feet, to the area as a whole. The maximum allowable resale price for each Affordable Unit is based on the original sale price fixed when the Condominium was created and the current resale price, a figure determined by the BRA upon application of a unit owner wishing to sell their Affordable Unit. Plaintiffs seek to amend the Master Deed to adjust the percentage value of each unit to reflect the lesser fair value of the Affordable Units, an action which would decrease the monthly condominium fees they are now required to pay.

The case came to be further heard upon Defendant Condominium Trust's filing of a Motion to Dismiss on March 6, 2007. In support thereof, the Trust contended that Plaintiffs' claims were time-barred by the six-year statute of limitations pursuant to G.L. c. 260, § 2 and that the court lacked jurisdiction over the amended complaint because it sought to recover primarily monetary damages. The Trust further asserted that Plaintiffs lacked standing to challenge their condominium fees because they had failed to pay said fees under protest. The Trust argued that Plaintiffs must bring suit against every unit owner that has ever held an interest in the Condominium since its inception because, they claim, a judgment cannot be collected solely against the Trust or the current unit owners. Absent such joinder, Defendants contended that the action should be dismissed for failure to join indispensable parties pursuant to Mass. R. Civ. P.

19(a). Finally, the Trust argued that the complaint should be dismissed for failure to effectuate proper service of process.

Shortly thereafter, on March 20, 2007, Defendant Unit Owners also filed a Motion to Dismiss, asserting essentially the same grounds for dismissal as those raised by the Trust. Defendant Mellon Trust of New England, NA ("Mellon"), the holder of a mortgage from Defendant Jonathan Hirsch on Unit 202 of the Condominium, filed a Motion to Dismiss on April 13, 2007, adopting and incorporating by reference the arguments asserted by both the Trust and the Unit Owners in their previously filed Motions to Dismiss.

On April 24, 2007, Plaintiffs filed an Opposition to Defendants' Motion to Dismiss. In their opposition, Plaintiffs contended that this action falls within the ambit of G.L. c. 260, § 21, which confers a twenty (20) year statute of limitations, and was therefore not time-barred, as asserted by the Defendants. Plaintiffs also asserted that the court, in granting equitable relief, has the inherent power to award monetary damages in order to make the Plaintiffs whole. In response to Defendants' argument that the action cannot be maintained because of Plaintiffs' failure to join all persons who ever owned units in the Condominium, Plaintiffs countered that the assessment costs are chargeable only to current unit owners, just as current owners may not seek contributions for assessments from past owners. They contended that recovery of condominium fees does not depend on their having been paid under protest, as argued by Defendants, but urged the court to read Blood v. Edgar's Inc., 36 Mass. App. Ct. 402 (1994) as standing for the proposition that fees and assessments may not be withheld *pendent lite*. Finally, Plaintiffs asserted that all necessary parties to the action were timely served. The motions and

memoranda in opposition thereto were fully argued by counsel and taken under advisement on May 16, 2007.

On July 3, 2008, this Court issued an Order Denying Defendants' Motion to Dismiss, ruling that plaintiffs' claims are not time-barred, that the Land Court has jurisdiction over plaintiffs' for monetary damages provided it has underlying subject matter jurisdiction, that plaintiffs have standing to challenge payment of the assessed condominium fees even though the fees may not have been paid "under protest", and that the action need not be dismissed for plaintiffs' alleged failure to name indispensable parties. Defendants' motion seeking reconsideration of the July 3, 2008 was denied by the Court by order dated September 3, 2008.

On October 29, 2009, Plaintiffs moved for summary judgment with supporting memorandum and an affidavit from one of their attorneys, Ethan S. Klepetar. Defendants' opposition and cross motion for summary judgment were filed on December 23, 2009, along with supporting memoranda and an appendix. Also filed was Defendants' motion to strike the affidavit of Ethan S. Klepetar. Defendant BNY Mellon, National Association, filed an opposition to Plaintiff's motion for summary judgment and its own cross-motion on December 31, 2009. Defendant Unit Owners filed their opposition and cross-motion on January 5, 2010.

On February 9, 2010, the motions and cross-motions, along with the motion to strike the Klepetar affidavit, were fully argued and taken under advisement. Following issuance of the decision by the Supreme Judicial Court on May 14, 2010 in the case of Stephen J. Scully, Trustee, et al vs. Kathleen Tillery, Trustee, et al, 456 Mass. 758 (2010), also having to do with condominium fees and related matters, additional memoranda and correspondence were received from counsel for all parties in the present case. They have been considered in this Decision.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitled the moving party to judgment as a matter of law. See Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Cmty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). Although there are disputes as to the interpretation of law as it relates to specific facts, the Court finds that the following facts are not in dispute and that the case is ripe for summary judgment.

Based on the record as assembled by the parties pursuant to Mass. R. Civ. P. 56 and submitted to the Court, I find the following facts are not in dispute and justify entry of Judgment in favor of Defendants:

1. The Boston Redevelopment Authority ("BRA") granted to the 4-18 Clarendon Street, 72 Warren Avenue Limited Partnership ("the Developer") certain parcels of land and the two buildings thereon ("the Premises") by deed dated March 23, 1987 and recorded at the Suffolk County Registry of Deeds in Book 13568, Page 258 ("the Deed"). [2]

2. More than a year later, the Developer created a condominium on the Premises by Master Deed dated April 8, 1988 and recorded on May 19, 1988 in Book 14705, Page 281.

3. The Master Deed includes a Covenant of Affordable Housing ("the Covenant") which provides guidelines for affordable housing units, including approximate square footage,

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[2]Unless otherwise indicated, all references to recorded deeds or other documents refer to instruments recorded at this Registry of Deeds.

maximum price, and maximum resale price. The original purchase prices of the affordable units were significantly lower than the original purchase prices of the unrestricted units.

4. Under the terms of the Covenant, the affordable units may only be occupied by those who qualify by income, with priority given to those who had been displaced by the Urban Renewal Project in the South End of Boston and then to those who were or had been residents in the South End at any time during the previous ten years.

5. The Covenant also sets a maximum sale price for the affordable units, which can be increased by five per cent per annum or in accordance with the increase in the cost of living as determined by the Consumer Price Index.

6. The agreements, covenants and restrictions in the Covenant run for a period of thirty years from the date of the Master Deed (April 8, 1988) unless the BRA records a notice of restriction before the expiration of thirty years, in which case the agreements, covenants and restrictions shall continue for twenty years from the date of recording of such notice.

7. The restrictions on the affordable units will expire on April 8, 2018. If the BRA allows expiration, the affordable units are no longer subject to the Covenant and may then be sold for market rate.

8. The Condominium building contains twenty-six residential units and four commercial units. Of the twenty-six residential units, ten are deemed to be "Affordable Units".

9. Seven of the nine Plaintiffs are the original purchasers of five of the affordable units.

10. The Defendants named in this Complaint are: the Trustees of the Clarendon/Warren condominium, the remaining residential unit owners, [3] and the banks or financial institutions holding mortgages on the various residential units.

11. The Master Deed assigned each residential unit a certain undivided percentage interest in the common areas and facilities of the Condominium. The percentage interest is approximately equivalent to the ratio of the interior area of each unit to the whole of the area. [4]

12. The Master Deed states that "[t]he percentage of interest of the respective units in the common Areas and Facilities have been determined upon the basis of the approximate relation which the fair value of each unit on the date hereof bears to the aggregate fair value of all the units on this date."

13. The Condominium Fee Disclosure Statement states that the developer determined each unit's percentage interests on the basis of relative floor area and features.

14. The Covenant identified and set the purchase price for each affordable unit. By September 1, 1988, each of the Affordable Units had been sold to the original purchasers. The original sales price for each affordable unit was identical to the price listed in the Covenant.

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[3]The owners of three affordable units are also Defendants in this action.

[4]Plaintiffs claim the percentage interest is <u>equal</u> to the ratio of the interior area of each unit to the area of the whole. Defendants deny this claim, and contend that the percentage interests are *based on a variety of factors*. They submit a table to support this contention which states that there is, on average, a 0.22% difference between the percentage given to each unit in the Master Deed and the percent interest based on square footage. In other words, Defendants contend that the percent interest assigned in the Master Deed is not equal to the percent interest based on square footage, and on the average there is a 0.22% difference. While this number seems small, most of the units have a percent interest between two and four percent.

15. Frank Mercugliano, one of the Affordable Unit owners, contacted the BRA in 1995 regarding the special assessments. At least three of the other Affordable Unit owners had to take out second mortgages to pay their shares of a special assessment. The BRA amended the Covenant at that time so as to allow a one percent increase in the maximum resale price. [5]

16. Beginning some time in or around 1997, the Plaintiffs were in contact with various state and local agencies seeking ways to adjust the maximum resale price of their units upward and to change the percentage interests assigned to their units. Mr. Mercugliano notified Janet Carlson, Esquire, a BRA employee, that he believed that some of the affordable units were not equal in value to the market units and that the percentage interest assigned to the affordable units violated G. L. c. 183A, § 5(a).

17. After being contacted by Mr. Mercugliano, Katie Lee, an affordable housing portfolio manager at the BRA but not an attorney, wrote an email stating *her opinion* that the percentage interests for the affordable unit owners should be decreased and should be less for an affordable unit than for a market rate unit. She suggest that they contact an attorney.

18. Following receipt of that email, Mr. Mercugliano and other Affordable Unit owners contacted legal counsel and filed the predecessor of the present action. That action was later dismissed due, in part, to a potential conflict of interest involving the attorneys representing plaintiffs on a "pro bono" basis. That law firm, it turned out, in addition to representing some of

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Plaintiffs contend the purpose of this increase was to allow the Affordable Unit owners to take out loans to help pay the large special assessments arising out of the repair and replacement of the roof and roof-decks. Defendants disagree, contending that this increase was effected to allow the Affordable Unit owners to recoup the special assessments they had already paid.

the owners of affordable units, also represented some of the banks holding mortgages on various units in the condominium. The current action was filed later.

Defendants' Motion to Strike the Affidavit of Ethan Klepetar

As a preliminary matter, the Court denies Defendants' motion to strike the affidavit of Ethan S. Klepetar. While Defendants raise valid points supporting their motion, the Affidavit offers no opinion or submissions of fact. It merely includes simple arithmetic done by Mr. Klepetar, one of Plaintiffs' attorneys. He is not testifying as an expert witness, is not an owner of a unit in the condominium, and is offering fact testimony, not expert testimony. He is not offering an opinion on the value of the units. Rather, he is merely using the original sale price for each unit which the Court understands is not necessarily the "fair value" of the unit. The Court accepts the affidavit for what it is, a series of calculations done to support Plaintiffs' argument. Defendants offer no information to indicate that any of the figures are incorrect except to point out that his study is incomplete because, among other reasons, it does not include figures regarding the value of the *commercial* units.

Defendants' have also moved to strike certain documents submitted by the Plaintiffs with their motion for summary judgment on grounds they were not verified. This motion is denied because Attorney Klepetar subsequently submitted an affidavit attesting to the accuracy and veracity of the documents submitted. Finally, Defendants have moved to strike Plaintiffs' reply brief in support of their motion for summary judgment because it was filed only *eight* days prior to the hearing instead of the ten days required by Land Court Rule 4. This motion, too, is denied because the Court finds, *in the vernacular*, that there was "no harm and no foul." All parties

knew what the issues were before the motions were argued and had adequate time to prepare and reply to them.

DISCUSSION

Plaintiffs filed the present action seeking a ruling as to whether the schedule of undivided percentage interests in the condominium common areas set forth in the Condominium Master Deed, as a matter of law, accords with the fair value of the Affordable Units relative to that of the Unrestricted Units, as is required by G. L. c. 183A, § 5(a), and, if it does not, what remedies are appropriate. Plaintiffs contend that the practice of determining "value" by computing the square footage of the unit does not comply with the statute. Citing Podell v. Lahn, 38 Mass. App. Ct. 688 (1955), they argue that many factors *besides floor area* influence the "fair value" of a condominium unit, such factors including better location, superior amenities, and *exclusive* access to certain amenities. See also Tosney v. Chelmsford Village Condominium Assn., 397 Mass. 683, 687 (1991). It is also true that Developers are afforded some discretion in determining and assigning "value" and "fair value" to units. In Re Northwood Properties, LLC, 509 F. 3d 15, 24 (1st Cir. 2007). The Court notes, for example, that an Affordable Unit containing 601 square feet of area was sold to an original purchaser in 1988 for $40,000 while a market rate unit possessing the same square footage was sold that same year for $162,000.

Defendants disagree with Plaintiffs' conclusions as to "value" and with their claim, as set forth or at least implied in the Klepetar affidavit, that the stated consideration in each deed equates to fair market value for the purpose of setting the percentage interest under G. L. c. 183A, § 5(a). Citing Foxboro Associates v. Board of Assessors of Foxborough, 385 Mass. 679, 682 (1982), they aver that deeds, in and of themselves, are not competent evidence of value and

that the purpose of stating consideration in a deed is simply to aid in the collection of excise taxes. Bressel v. Jolicoeur, 34 Mass. App. Ct. 205 (1993). They note also that much of the information concerning deed considerations submitted by Plaintiffs refer to time periods long after the date of the Master Deed, and that prices which are established artificially and temporarily, as they contend is the case in this litigation, "should not be regarded "as equivalent to market value, which is regulated by the natural laws of supply and demand." Suburban Land Co., Inc. v. Inhabitants of Arlington, 219 Mass. 539, 541 (1914).

Selling prices established by the BRA through the Covenant for Affordable Housing do not represent *market value*. Such limits are, in fact, both temporary and artificial. They are limited in time and, by their very nature, preclude the notion of a free and open market.. In fact, those purchasing affordable units signed disclosure statements that they were purchasing their units *at a discount* from the appraised value of the unit. As noted above, substantially the same unit as was sold at market value for $162,000 was purchased by an affordable owner for $60,000. Clearly, Plaintiffs' contention that value is based solely on stated deed consideration is incorrect. It also bears noting that Plaintiffs submitted no expert testimony as to the value of the units. This is especially important because some of the values suggested by Plaintiffs are claimed to be as of 1995 and 1997, several years after the date of the Master Deed which they seek to reform. Expert testimony is necessary to extrapolate value from one date until a date several years later. Plaintiffs submitted no such testimony other than the aforementioned affidavit of Ethan Klepetar.

Is this Action time-Barred ?

Defendants claim this action, seeking reformation of a Master Deed executed in 1988, is time-barred by G. L. c. 260, § 2 which provides for a six-year statute of limitations for "actions

of contract". They argue that the statute begins to run when the Master Deed was signed in 1988. By contrast, Plaintiffs contend that their claims are governed by G. L. c. 260, § 21, which provides for a twenty-year statute of limitations in actions for the recovery of land.

In determining which statute of limitations governs Plaintiffs' claims, the court is guided by Beaconsfield Towne House Condominium Trust v. Zussman, 401 Mass. 480 (1988), in which the court ruled that a claim concerning a leasehold interest in common area parking spaces to persons who were not members of the condominium trust, alleged to be in violation of G. L. c. 183A, § 5(c), was subject to the twenty years statute of limitations provided by G. L. c. 260, § 21, rather than the six- year limitation set forth in G. L. c 260, § 2. Specifically, the court stated that "an action under G. L. c. 183A, § 5, governing condominium common areas, solely concerns land. It therefore falls within the ambit of G. L. c. 260, § 21, conferring a twenty-year time limit on actions for recovery of land." Beaconsfield, 401 Mass. at 485. Defendants' reliance of CBK Brook Ltd. Partnership v. Berlin, 12 LCR 137 (2004) is misplaced because that action was clearly an action of contract. By contrast, the instant action concerns the condominium owners' proportional interest in the subject premises and clearly relate to interest in real property. Accordingly, the twenty-year statute of limitations applies and Plaintiffs' action is not time-barred.

Are Plaintiffs' Claims Barred by the Doctrines of Laches or Equitable Estoppel ?

Laches is defined as an "unjustified, unreasonable, and prejudicial delay in raising a claim." Srebnick v. Lo-Law Transit Mgmt., Inc., 29 Mass. App. Ct. 45, 49 (1990). Defendants argue that Plaintiffs knew, or should have known, about their potential claims since at least 1988, the date of the Master Deed, but that they waited until 1995 or 1996 to take action to assert them.

This delay, they contend, was unreasonable and was prejudicial to the owners of market rate units in the condominium and to the Condominium Trust. The Affordable Unit owners, during that period, continued to use the condominium common areas, enjoyed the benefit of the shared expenses and did not object to the payment of monthly condominium fees or special assessments. In addition, at least one of the Affordable Unit owners participated in condominium trust meetings and used and took advantage of common utilities and amenities available to unit owners. He was not restricted from using any of the common areas or facilities.

Defendants contend also that Plaintiffs should be precluded from obtaining the relief they seek under the doctrine of *equitable estoppel*. This doctrine is defined as "[t[he effect of voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct". Blacks Law Dictionary (Abridged Sixth Edition), 1991. Simply stated, those who purchased their units in 1988 knew the benefits and obligations they were receiving and undertaking. They purchased their units for amounts far less than that of the comparable market units, and knew that one of the "disadvantages" of purchasing their units for far less than the market value was that they would not be able to later sell their units for market value until the price-limitation set out in the deed and Covenant expired. If Plaintiffs are successful in this action, they will have accepted the benefits of the bargain while shedding some of the obligations and restrictions which were also part and parcel of the same transaction. I find that it would not be equitable to allow this to happen.

There was evidence introduced to demonstrate that these issues were discussed in the negotiations between the BRA and Roger E. Tackeff, a former partner of the developer/declarant

of the Condominium, and that Mr. Tackeff, in turn, discussed the matter with original affordable unit owners, explaining to them the reason for assigning the values as was done. The original owners agreed to be bound by the terms of the Master Deed and received disclosure statements spelling everything out. It is simply too late for them to back out now.

Another issue to be considered is what would happen to the debts incurred by the condominium trust in the running of the condominium. If the values of the affordable units are amended, it could be argued that they have been paying too much over the years and that they should be reimbursed for the "overpayment". One might ask, "by whom ?". The present market value owners could be assessed additional amounts to make up the difference, or anyone who ever owned a unit in the condominium could be billed. Either way, it is not logical. The original affordable owners agreed to be assessed in a particular way. It would be unfair and uncalled for to change the assignment of value, either retroactively or prospectively, at this time.

As noted supra, the Supreme Judicial Court recently decided the case of Stephen J. Scully, Trustee, et al v. Kathleen Tillery, Trustee et al, 456 Mass. 758 (2010), a case having some similarity to the present action in that it arises out of a dispute concerning different fees assessed to unit owners in the same condominium. Several of the parties to this action have weighed in as to the effect, if any, of Scully upon the instant case. Defendants contend that Scully and other cases such as Queler v. Skowron, 438 Mass. 304 (2002), stand for the proposition that G. L. c. 183A is an "enabling statute" which, while setting certain requirements which must be met in the establishment of a condominium, nevertheless allows involved parties to agree to their own terms. See also Tosney v. Chelmsford Village Condominium Ass'n, 397 Mass, 683 (1986).

In Scully, the owners of units in one Phase of the condominium brought the action because their assigned values were considerably different than those of the owners in another Phase. The Land Court ruled that such a situation was allowable because the owners had agreed to it, albeit under unsatisfactory circumstances. As stated by the Supreme Judicial Court in Scully, G. L. c 183A § 5(a) defines the property rights of individual condominium owners *vis-a-vis* one another but § 5A does not have a public policy purpose.

Plaintiffs disagree with Defendants' interpretation of the Scully decision, arguing that the facts in the case at bar differ than those in Scully in that Plaintiffs herein never agreed to the values assigned to their units, and further contending that the BRA was not authorized to "agree" on their behalf. They contend, in short, that the condominium was created before they purchased their units and they were therefore not asked to agree. This Court does not accept Plaintiffs' argument. The fact is that the original owners of the Affordable Units knew when they purchased their units the values which had been assigned to them. Such information was contained in the Master Deed and Covenant. The purchasers were also provided with Disclosure Statements at the time of purchase. It is difficult to see how they can object at this time, given the fact that the Master Deed was executed and recorded in 1988, more twenty years ago.

For all the above reasons, Judgment is to enter in favor of the Defendants and dismissing the complaint. Plaintiffs' Motion for Summary Judgment is **DENIED.**

Charles W. Trombly, Jr.
Justice

Dated: October 7, 2010

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss. CASE NO. 06 MISC 334126 (CWT)

CLAIRE AMBROSINI, VINCENT AMBROSINI, JOSE COTTON, MARINE COTTON, LAURA MAE COX, GEORGE B. DEPRADINE, FRANK L. MERCULGLIANO, DIANE SMITH and RUSSELL SMITH,

Plaintiffs

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and

ABND AMRO MORTGAGE GROUP, INC.,

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Defendants

JUDGMENT[1]

This action was commenced on December 6, 2006 by Plaintiffs Claire Ambrosini, Vincent Ambrosini, Jose Cotton, Marine Cotton, Laura Cox, George Depradine, Frank Mercugliano, Diane Smith, and Russell Smith (collectively, "Plaintiffs"), all of whom are Affordable Unit Owners residing in the Clarendon/Warren Condominium (the "Condominium") located at 78 Warren Avenue in Boston, Massachusetts. The action was precipitated by the imposition on the unit owners of significant special assessments for renovations to the roofs and roof decks of the two buildings which comprise the Condominium, the use of which only the owners of the market-rate units enjoy pursuant to deed restrictions. Plaintiffs contend that the assessments are disproportionately, if not solely, for the benefit of the market-rate units, and that relative square footage is not a proper measure of calculating each unit's undivided percentage interest in the common areas when the resale price of certain units is *restricted* by the terms of their deeds.

Plaintiffs filed an Amended Complaint on January 17, 2007 seeking a declaratory judgment pursuant to G. L. c. 231A that the Condominium developer erred in establishing the respective undivided percentage interests in the common area and facilities for each unit, and further praying that the Court enter an order directing the Trustees to reform the Condominium Master Deed such that the undivided percentage interests in the common areas and facilities for each unit reflects the fair value of all units as of the date of the Master Deed rather than reflecting the proportion which the square footage of each unit bears to the whole, as is currently the case. Named as Defendants were the Trustees of the Condominium Trust, all owners of unrestricted units, and mortgagees and lien holders (collectively, the "Defendants").

[1]Unless otherwise indicated, all terms used in this Judgment carry the same definition as employed in the Decision.

The case came to be heard on Motions to Dismiss filed by several of the Defendants contending that the action was time barred, that the Court lacked jurisdiction because Plaintiffs were seeking money damages, that the Plaintiffs lacked standing because they had failed to pay their fees under protest, and that they had failed to name and serve former owners who, in the opinion of the Defendants, were indispensable parties. On July 3, 2008, the Court entered an Order Denying Defendants' Motion to Dismiss. Defendants' Motion for Reconsideration was denied in an Order dated September 3, 2008.

On October 29, 2009, Plaintiffs moved for summary judgment, along with supporting affidavits and memoranda. Oppositions to Plaintiffs' motion and cross-motions were filed by several of the Defendants. The motions and cross-motions were fully briefed and argued before the Court and taken under advisement on February 9, 2010. Supplemental memoranda were filed by the parties following the Decision of the Supreme Judicial Court on May of this year in the case of Scully, Trustee v. Tillery, Trustee, 456 Mass. 758 (2010). A Decision has entered today. In accordance with that Decision, it is

ORDERED, ADJUDGED and DECLARED that the Master Deed of the Condominium is valid and enforceable in accordance with its terms and those set forth in the Covenant. It is further

ORDERED, ADJUDGED and DECLARED that the Declaration of Trust is valid and enforceable in accordance with its terms. It is further

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED** and Defendants' Motions for Summary Judgment are **ALLOWED**.

CWT

By the Court (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Dated: October 7, 2010