STATE OF NORTH CAROLINA

NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 1693

THE VILLAGE AT MOTTS LANDING HOMEOWNERS' ASSOCIATION,

Plaintiff,

v.

AFTEW PROPERTIES, LLC; ARNOLD SOBOL; FLORENCE SOBOL; ELLEN SOBOL STEIN; ROBERT WEINBACH; TERRANCE S. ANDO; B AND B MARINE CONSTRUCTION, LLC; PREMIER HOMES AND PROPERTIES LLC; PREMIER HOMES AND COMMUNITIES, LLC; and TMC TAYLOR CONSTRUCTION, INC.,

Defendants.

ORDER AND OPINION ON MOTIONS TO DISMISS

1. The Village at Motts Landing is tucked between the Cape Fear River and the Atlantic Coast in eastern North Carolina. It is a planned community with a mix of private lots, common areas, and resident amenities. In this action, the Village's homeowners' association (the "Association") alleges that construction defects plague both recreational amenities and vital infrastructure, necessitating costly repairs and maintenance. The Association has sued ten defendants. Among them are its former board members Arnold Sobol, Florence Sobol, and Ellen Sobol Stein (the "Sobols"), as well as the community's developer, Aftew Properties, LLC ("Aftew").

2. Two motions to dismiss—one by the Sobols and one by Aftew—are pending. For the following reasons, the Court **DENIES** the Sobols' motion and **GRANTS in part** and **DENIES in part** Aftew's motion.

Reiss & Nutt, PLLC, by W. Cory Reiss and Kyle J. Nutt, for Plaintiff The Village at Motts Landing Homeowners' Association.

Shipman & Wright, L.L.P., by Gary K. Shipman, James T. Moore, and Thomas R. Harvey, for Defendants Aftew Properties, LLC, Arnold Sobol, Florence Sobol, and Ellen Sobol Stein.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier and Norwood P. Blanchard, III, for Defendants Robert Weinbach, Terrance S. Ando, Premier Homes and Properties LLC, and Premier Homes and Communities, LLC.

Cranfill Sumner, LLC, by Rebecca Knudson and Melanie Huffines, for Defendant TMC Taylor Construction, Inc.

No counsel appeared for B and B Marine Construction, LLC.

Conrad, Judge.

I.
BACKGROUND

3. When considering a motion to dismiss, the Court must take the plaintiff's allegations as true. Piecing together the Association's allegations requires more work than usual because no single document contains them all. The Association has amended its complaint three times. The most recent amendment is an abridged version of the complaint that recites the new and modified allegations while leaving out the allegations that the Association intended to carry forward unchanged from earlier amendments. As a result, this background draws from not only the third amended complaint but also the parts of the first amended complaint that remain live. (*See* Am. Compl., ECF No. 4; Third Am. Compl., ECF No. 26.)

4. Aftew filed the declaration for the Village at Motts Landing in 2009.* The declaration reserves to Aftew a temporary period of control over the Association, including the right to appoint the board of directors. Aftew appointed the Sobols to fill three of the five seats. Arnold and Florence are Aftew's principals; Ellen is their daughter. (*See* Am. Compl. ¶¶ 7–11, 26; Aftew Ex. B Art. V, § 1 ["Declaration"], ECF No. 58.)

5. Developer control is common in the early years of a planned community but can be a source of tension once the period of control ends. *See* N.C.G.S. § 47F-3-103(d) ("The declaration may provide for a period of declarant control of the association, during which period a declarant . . . may appoint and remove the officers and members of the executive board."). That is the case here. When Aftew's right to control the Association expired at the end of 2020, members elected a new board, which soon accused Aftew and the Sobols of abusing their control during the previous decade. (*See* Am. Compl. ¶¶ 27, 30.)

6. According to the Association, the common elements are rife with construction defects. Roads and sidewalks have settled and cracked. The stormwater system suffers from sediment issues. And the retaining wall abutting the pickleball courts has bowed. As alleged, Aftew and the Sobols knew about these issues and others but conveyed the common elements to the Association anyway. (*See, e.g.*, Am. Compl. ¶¶ 28, 36, 54, 58, 68, 73, 84.)

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* More declarations—dozens, in fact—followed over the next decade. Because the parties agree that each declaration includes the same key terms, the Court cites only the original declaration.

7. Maintenance and repair costs have devastated the Association's finances. Under the declaration, the Association bears responsibility for maintaining any common element "from the date of completion of its construction or improvement by the Developer" even if it has not "actually been deeded to the Association." This means that the Association's financial burden began during the period of developer control. According to the Association, the Aftew-appointed board of directors met that burden by taking subsidies from Arnold Sobol so that it would not have to impose assessments on residents. Keeping assessments low helped Aftew market lots to prospective buyers but deprived the Association of reserves for future maintenance. The Association must now impose hefty assessments on members to make up the shortfall. (*See* Am. Compl. ¶¶ 31, 32, 37, 39–41; Declaration Art. III, § 6.)

8. Aftew has deeded most of the community's common elements to the Association. There are a few exceptions, including one parcel marked as a recreation area. On that parcel, Aftew granted Cape Fear Public Utility Authority a temporary construction easement in exchange for $30,000. The Association believes that money should have gone to it. (*See* Am. Compl. ¶¶ 44, 45.)

9. Presuit discussions between the parties were unproductive. When the period of developer control ended, the Association's new board asked Aftew and the outgoing board for accounting records, plans and specifications, and contracts for the stormwater system. They refused, and the Association sued. As relevant, the Association has asserted three related claims against the Sobols for breach of fiduciary duties owed as officers and directors during the period of developer control.

In addition, the Association has asserted claims against Aftew for breach of contract, recovery of proceeds related to the easement, negligent construction, breach of the implied warranty of workmanlike construction, and breach of fiduciary duty. The Association has also made a demand for books and records against the Sobols and Aftew. (*See, e.g.*, Am. Compl. ¶¶ 43, 74, 75, 84, 90, 93, 94, 112, 116, 117, 131, 132; Third Am. Compl. ¶¶ 79, 80, 89, 97–99, 142, 143, 167–70.)

10. The Sobols and Aftew have separately moved to dismiss all claims asserted against them, other than the demand for books and records. Both motions are fully briefed, and the Court held a hearing on 13 July 2023. The motions are ripe for determination.

II.
LEGAL STANDARD

11. A motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint." *Isenhour v. Hutto*, 350 N.C. 601, 604 (1999) (citation and quotation marks omitted). Dismissal is proper when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (citation and quotation marks omitted). In deciding the motion, the Court must treat all well-pleaded allegations as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. *See, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019). The Court may also

consider documents, such as contracts, that are the subject of the complaint. *See, e.g.*, *McDonald v. Bank of N.Y. Mellon Tr. Co.*, 259 N.C. App. 582, 586 (2018).

III.
ANALYSIS

12. Because the motions address distinct groups of claims, it makes sense to consider each separately. The Court will begin with the Sobols' motion and then turn to Aftew's.

A. The Sobols' Motion

13. During the hearing, the Association's counsel acknowledged that the three claims asserted against the Sobols are cumulative of one another. The Court therefore treats them as a single claim. In short, the complaint alleges that the Sobols owed fiduciary duties to the Association in their roles as officers and directors and that they breached those duties by favoring Aftew's interests over the Association's. The breaches include the Sobols' alleged failure to maintain records, failure to collect reserve funds, and acceptance of defective common elements conveyed by Aftew.

14. The Sobols contend that the declaration, the Nonprofit Corporation Act, and the Planned Community Act do not impose an express duty on the officers and directors of the Association to budget and collect reserve funds or to supervise the construction of common elements. Even if that is true, though, it is not a basis for dismissal. The Sobols "were still under a statutory mandate to act in good faith and not to engage in any self-dealing." *F-L Legacy Owner, LLC v. Legacy at Jordan Lake Homeowners Ass'n*, 2023 NCBC LEXIS 55, at *11 (N.C. Super. Ct. Apr. 3, 2023) (quoting *Freese v. Smith*, 110 N.C. App. 28, 38 (1993)) (cleaned up).

15. Much like officers and directors of for-profit corporations, the officers and directors of homeowners' associations and other nonprofit corporations owe duties of care and loyalty. This means that an officer or director must discharge her duties in "good faith," exercise the care of an "ordinarily prudent person," and act in a way that she "reasonably believes to be in the best interests of the corporation." N.C.G.S. §§ 55A-8-30(a), 55A-8-42(a). In general, any "transaction with the corporation in which a director of the corporation has a direct or indirect interest" must be fair to the corporation or approved by disinterested directors or members. *Id.* § 55A-8-31(a), (c).

16. Construed liberally, the amended complaint alleges that the Sobols had direct or indirect interests in Aftew; knew that the amenities and infrastructure conveyed by Aftew to the Association were defective; knew that the Association needed a reserve budget to repair and maintain the defective elements; chose not to assess and collect reserves because doing so would have depressed lot prices, lowering Aftew's profits; and tried to conceal their actions by failing to maintain records. (*See* Am. Compl. ¶¶ 7, 9, 10, 39, 84, 90; Third Am. Compl. ¶ 89.) Put another way, the amended complaint alleges that the Sobols intentionally took actions to benefit Aftew—and, thus, themselves—at the Association's expense. These allegations of self-interested actions are adequate to state a claim for breach of fiduciary duty. *See F-L Legacy Owner*, 2023 NCBC LEXIS 55, at *9–15 (denying motion to dismiss claim for breach of fiduciary duty against directors of homeowners' association based on similar allegations).

17. The Sobols invoke the business judgment rule, but that "rule only protects directors for '(1) an advertent business decision (2) made by disinterested directors (3) within the scope of their authority (4) in good faith (5) with reasonable care and (6) not for their own self-interests.' " *Lee v. McDowell*, 2022 NCBC LEXIS 51, at *34 (N.C. Super. Ct. May 26, 2022) (quoting *Robinson on North Corporation Law* § 14.06). As alleged, the Sobols' actions were self-interested—not disinterested—and therefore not shielded by the business judgment rule.

18. The Court denies the Sobols' motion to dismiss.

B. Aftew's Motion

19. Aftew seeks to dismiss all six claims for relief asserted against it.

20. **Breach of Fiduciary Duty.** As alleged in the amended complaint, Aftew breached fiduciary duties that it owed to the Association during the period of developer control from 2009 to 2020. This claim, unlike the claim against the Sobols, is not based on the statutory fiduciary duties owed by officers and directors. It is instead based on the common-law rule that a fiduciary relationship exists when a person places special confidence in a party who "is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014) (citation and quotation marks omitted).

21. Aftew advocates a bright-line rule: as a developer, it did not owe any fiduciary duties to the Association as a matter of law. But our Court of Appeals has held, in the analogous condominium context, that whether a developer owes a fiduciary duty to a homeowners' association "during the period of declarant control

must necessarily be governed by common law principles." *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 500 (2014); *see also* N.C.G.S. § 47F-1-108 ("The principles of law and equity . . . supplement the provisions of" the Planned Community Act.). A developer with the power to control a homeowner's association by appointing and removing board members may be in "a position of dominance" that leaves members "little choice except to rely upon" the developer "to protect their interests during the period of developer control." *Id.* (reversing trial court order granting summary judgment in favor of developer). In that case, a fiduciary relationship may exist under the common law.

22. The Association's allegations are indistinguishable from those at issue in *Trillium Ridge*. As pleaded, Aftew retained total control over the Association due to its power to appoint board members and officers. (*See* Third Am. Compl. ¶ 167.) What's more, the declaration states that "[a]ll the powers and duties of the Board of Directors of the Association may be exercised by the Declarant." (Declaration Art. V, § 1.) This placed Aftew "in a position of dominance over the Association" so that "members of the Association had no choice but to rely on Aftew to protect their interests." (Third Am. Compl. ¶ 168.) Taken as true, these allegations suffice to support the existence of a fiduciary relationship.

23. The case on which Aftew primarily relies does not require a different result. *See Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n*, 255 N.C. App. 236 (2017). There, the Court of Appeals concluded that the plaintiff's allegation of a mere "contractual" relationship with the developer was insufficient to

support the existence of a fiduciary relationship. *Id.* at 251. The opinion does not cite or discuss *Trillium Ridge*. Nor does it suggest that developers are exempt from common-law rules for fiduciary relationships.

24. Accordingly, the Court denies Aftew's motion to dismiss the claim for breach of fiduciary duty.

25. **Breach of Contract.** The Association alleges that Aftew breached the declaration by, among other things, failing to supervise its appointees to the board of directors, hiring unqualified contractors, and constructing and conveying defective amenities and infrastructure. The Association further alleges that Aftew breached the implied covenant of good faith and fair dealing. (*See* Third Am. Compl. ¶ 98.)

26. Aftew does not dispute that the declaration is a valid contract. *See Spring Lake Farm, LLC v. Spring Lake Farm Homeowners Ass'n, Inc.*, 2020 N.C. App. LEXIS 397, at *18 (N.C. Ct. App. May 19, 2020) (unpublished) ("It is well settled that Declarations, as covenants that restrict the use of real property, are contracts."). The basis for its motion is that its alleged acts are not governed by, and therefore could not have breached, the declaration.

27. The Court agrees. At no point does the amended complaint identify which provisions of the declaration were supposedly breached. That is a telling omission. In its response brief, the Association cites two sections: Section 1 of Article V and Section 6 of Article III. Neither supports the claim. The former allows Aftew to appoint board members but does not obligate it to supervise its appointees or to remove them. (*See* Declaration Art. V, § 1.) The latter imposes a duty on *the*

Association to "be responsible for the operation and maintenance of" common elements but does not impose any corresponding duty on Aftew. (Declaration Art. III, § 6.) To be sure, the expectation was that Aftew would develop and convey the common elements; it is the developer after all. But the declaration is not a construction contract and contains no plans or specifications for common elements. The Association offers no textual basis to conclude that either Aftew's failure to supervise the board of directors or its defective construction of common elements breached the declaration.

28. Neither has the Association offered any sound basis to conclude that Aftew's alleged conduct breached the implied covenant of good faith and fair dealing. Although the implied covenant requires a contracting party "to make reasonable efforts to perform his obligations under the agreement," *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746 (1979), it cannot override the contract's express terms or impose new terms outside the parties' bargain, *see Pro-Tech Energy Sols., LLC v. Cooper*, 2015 NCBC LEXIS 76, at *21 (N.C. Super. Ct. July 30, 2015). Moreover, "[a]s a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract, we treat the former claim as part and parcel of the latter," so that the two rise and fall together. *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38–39 (2018) (citation and quotation marks omitted); *see also Kelly v. Nolan*, 2022 NCBC LEXIS 78, at *19–20 (N.C. Super. Ct. July 19, 2022) (granting motion to

dismiss when basis for alleged breach of implied covenant was "identical to the basis" for alleged breach of contract's express terms).

29. The Court grants Aftew's motion to dismiss the claim for breach of contract.

30. **Negligent Construction and Implied Warranty of Workmanlike Construction.** The Association claims that Aftew negligently constructed various common elements, including roads, pickleball courts, and the stormwater system. In a separate claim, the Association also asserts that Aftew breached the implied warranty of workmanlike construction in connection with the pickleball courts.

31. Aftew seeks to dismiss both claims for similar reasons. The claim for negligent construction must be dismissed, Aftew contends, because it did not build the common elements, instead hiring contractors to do so. Likewise, it contends, any implied warranty of workmanlike construction applies only to the contractors who built the common elements.

32. Usually, a plaintiff claiming negligent construction must assert that claim directly against the builder. In some circumstances, though, someone other than the builder may also be liable. Thus, "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson v. Rowland*, 329 N.C. 330, 350 (1991). And "any person responsible for supervising a construction project is subject to being held liable on a negligent construction theory." *Trillium Ridge*, 236 N.C. App. at 489. Comparable rules apply to implied warranties, which usually exist "only within the context of a builder-vendee relationship,"

Crescent Univ. City Venture, LLC v. AP Atl., Inc., 2019 NCBC LEXIS 46, at *122 (N.C. Super. Ct. Aug. 8, 2019), but may extend to others who are "actively involved in the construction," *Burek v. Mancuso*, 2008 N.C. App. LEXIS 369, at *9–10 (N.C. Ct. App. Mar. 4, 2008) (unpublished).

33. Consistent with these precedents, the Association has alleged enough to state a claim for relief. The amended complaint is replete with allegations that Aftew "had a duty to design, construct, supervise the construction of, [and] inspect the construction of" common areas; that it "was negligent . . . in designing, constructing, supervising the construction of, [and] inspecting the construction of" the common areas; and that it failed to adequately supervise their construction. (*E.g.*, Am. Compl. ¶¶ 52, 61, 131, 132; Third Am. Compl. ¶ 143.) These allegations support inferences that Aftew participated in the construction of certain common elements and that it retained the right to supervise its contractors. At the very least, the Association has not pleaded itself out of a claim by alleging that Aftew lacked supervisory authority. Discovery may ultimately support Aftew's argument that it had no duty to supervise or right to control any contractors, but that is a question for summary judgment. At this stage, the Court concludes that the Association's allegations are sufficient.

34. Next, Aftew argues unpersuasively that the economic loss rule bars these claims. The economic loss rule limits "recovery in tort" only "when a contract exists between the parties that defines the standard of conduct" at issue. *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at *47–48 (N.C. Super. Ct. Nov. 3, 2011). The declaration, as Aftew has successfully argued, does not define the

standard of conduct related to construction of the common elements. As a result, the economic loss rule does not bar the negligence and warranty claims. *See USConnect, LLC v. Sprout Retail, Inc.*, 2017 NCBC LEXIS 37, at *14 (N.C. Super. Ct. Apr. 21, 2017) (declining to dismiss claim under economic loss doctrine due to "disputes regarding the application of the contract to the alleged wrongdoing"); *Artistic S. Inc. v. Lund*, 2015 NCBC LEXIS 113, at *33 (N.C. Super. Ct. Dec. 9, 2015) (declining to apply economic loss rule when contractual duties did not exist or had expired).

35. Aftew also points to the statute of repose, which bars any action "brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C.G.S. § 1-50(a)(5)(a). Aftew contends that all improvements that were supposedly defective were substantially complete in 2009, well outside that six-year period. But this argument is premature. As the Court of Appeals has explained, "a plaintiff has no burden at the pleading stage to allege facts showing that its complaint was filed within the applicable statute of repose." *Gaston Cnty. Bd. of Educ. v. Shelco, LLC*, 285 N.C. App. 80, 84 (2022). "A Rule 12(b)(6) dismissal based on the statute of repose would only be appropriate if the complaint otherwise alleges facts *conclusively* showing that it was not filed within the applicable statute of repose." *Id.* Nothing in the amended complaint conclusively shows that the improvements at issue—roads, pickleball courts, and the stormwater system—were substantially complete more than six years before the Association filed this lawsuit.

36. The Court therefore denies Aftew's motion to dismiss the claims for negligent construction and breach of the implied warranty of workmanlike construction.

37. **Demand for Easement Proceeds.** The amended complaint alleges that Aftew gave Cape Fear Public Utility Authority a temporary construction easement on a recreation area in return for $30,000. The Association demands all proceeds from the easement. (*See* Am. Compl. ¶¶ 45, 116.)

38. Dismissal of this claim is proper. The Association admits that it does not own the recreation area. Aftew does. At most, the Association has an expectation that Aftew will convey the recreation area to it in the future. But that expectation does not entitle the Association to proceeds from transactions involving common areas not yet conveyed to it by Aftew.

39. Indeed, the Association points to no valid legal theory—contractual, statutory, or otherwise—to support its demand for proceeds from the easement. It complains, for example, that it is responsible for maintaining the recreation area even though Aftew is the owner. That is true, and arguably, the Association might have had a claim for damages if the easement had driven up maintenance costs (which the amended complaint does not allege). Maintenance obligations alone, though, do not support a claim for proceeds from the easement.

40. The Association also points to statutes that allow homeowners' associations to sell or encumber common elements and then retain the proceeds as an asset. *See* N.C.G.S. § 47F-3-112(a) ("Proceeds of the sale or financing of a common element

(other than a limited common element) shall be an asset of the association."). By their own terms, these statutes apply only to property owned by an association. *See id.* § 47F-1-103(4) (defining "Common elements" to include real estate "owned or leased by the association"). They say nothing about a developer's right to convey or encumber its own property.

41. The Court grants Aftew's motion to dismiss this claim.

IV.
CONCLUSION

42. For these reasons, the Court **DENIES** the Sobols' motion to dismiss.

43. In addition, the Court **GRANTS** Aftew's motion to dismiss the claims for breach of contract and demanding the proceeds from the easement given to Cape Fear Public Utility Authority. In all other respects, the Court **DENIES** Aftew's motion.

44. Finally, the Court notes that it has revised the caption to correct an error in the plaintiff's name. The parties should use this corrected caption going forward.

SO ORDERED, this the 14th day of August, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases