MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN
ATTORNEYS-AT-LAW WWW.MARSHALLDENNEHEY.COM
A PROFESSIONAL CORPORATION
425 Eagle Rock Avenue, Suite 302, Roseland, NJ 07068
(973) 618-4100 Fax (973) 618-0685
Justin F. Johnson, Resident Managing Attorney

Direct Dial: (973) 618-4118
Email: hbmankoff@mdwcg.com

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June 28, 2017

Howard B. Mankoff, Esq. – NJ Attorney ID# 021971981

VIA NJ LAWYER SERVICE
Honorable Robert J. Brennan, J.S.C.
Morris County Superior Court – **Chancery Division**
Washington & Court Streets
Morristown, N.J. 07963

RE: Purzycki v. Lake Parsippany Property Owners Association, Inc., et als
Docket No.: MRS-C-2-17
Our File No.: 21256.01511-HBM

Dear Judge Brennan:

Enclosed is defendants Lake Parsipanny Property Owners Association, Inc. and Board of Directors':

- Brief in opposition to Plaintiffs' Motion for Summary Judgment which is currently returnable before Your Honor on Friday, July 7, 2017; and
- Certification of Counsel with Exhibit-A

With reference to the above matter.

Respectfully submitted,

Howard B. Mankoff

Howard B. Mankoff

HBM:ssierra
Enclosures
cc: Brian Rader, Esq. – Via Electronic Mail / Via Regular Mail
Eileen Born, Esq. – Via Electronic Mail / Via Regular Mail

21256.01511-HBM
MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
Howard B. Mankoff, Esq. – NJ Attorney ID# 021971981
425 Eagle Rock Avenue, Suite 302
Roseland, NJ 07068
☎973-618-4100 🖷973-618-0685
hbmankoff@mdwcg.com
ATTORNEYS FOR DEFENDANTS - Lake Parsippany Property Owners Association, Inc. and Board of Directors

MARY PURZYCKI, KENNETH PURZYCKI, DHIREN PATEL, RITA DESAI, DANIEL DESAI, RASHMIN PATEL, WILLIAM MARTIN, BARBARA SEAMAN, SABINA VERMONT, MADELINE KEYWORTH, ELAINE GAVALYAS, ANTHONY LONGO, DIPAK PATEL, SUNIL PATEL AND JIUISHA PATEL PLAINTIFFS v. LAKE PARSIPPANY PROPERTY OWNERS ASSOCIATION, INC. AND BOARD OF DIRECTORS DEFENDANTS	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-C-2-17 CIVIL ACTION

DEFENDANTS, LAKE PARSIPPANY PROPERTY OWNERS ASSOCIATION, INC. AND BOARD OF DIRECTORS BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Howard B. Mankoff, Esq.
On the Brief and of Counsel

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RESPONSES TO PLAINTIFFS' STATEMENT OF FACTS

1. Admitted
2. Admitted.
3. Admitted.
4. Denied. The rights of the property owners and members of the Association are not distinct. The indenture makes clear that both are entitled to use and enjoyment of the lake.
5. Admitted in part. It is denied that the indenture distinguishes the rights of the members of the Association and the property owners in regard to the use and enjoyment of the lake.
6. Admitted.
7. Denied. The fact that certain property owners chose not to join the Association does not mean that those property owners were denied the use and enjoyment of the lake.
8. Admitted.
9. Denied. No property owner has ever been denied the use and enjoyment of the lake. The budget projection does not project a "possibility that the LPPOA may be unable to support the lake..." The budget projection is that assuming there are no changes in the current budgetary trends, the Association will not have the necessary funds to maintain the lake.
10. Admitted.
11. Admitted.
12. Admitted in part and denied in part. It is admitted that members of the LPPOA have the use and enjoyment of the lake, as do third party non property owners and organizations. It is denied that property owners, who chose not to join the LPPOA are deprived of the use and enjoyment of the lake.

13. Denied.

PRELIMINARY STATEMENT

Thirteen property owners in a lake front real estate development of approximately 2100 property owners seek to deprive the Lake Parsippany Property Owners Association (LPPOA) of the funds necessary to maintain the lake for the benefit of the property owners. Should the plaintiffs succeed, the LLPOA will not be able to maintain the lake, which will mean that none of the property owners can use the lake for swimming, recreation, boating and related activities. The result will be either that no one will be able to use the lake, or a public entity, such as a municipality, county or state, will take over the maintenance of the lake, which means it will become the burden of the taxpayers. The case law we cite in the body of the brief makes it clear that this violates public policy and should not be countenanced by the court.

The premise of the plaintiffs' motion, that they cannot be assessed the cost of maintaining the lake, because they voluntarily choose not to pay the cost of membership in the Association, is flawed and contrary to the case law. The plaintiffs do not lose the benefit of the easement because they choose not to exercise it. The LLPOA may impose reasonable conditions on the exercise of the easement, such as membership in the Association, without depriving the easement holder of the use of the easement. The defendants believe that discovery will reveal that the plaintiffs' predecessor in title exercised the easement rights, which are the subject of this suit.

The plaintiffs, contrary to the case law, seek to benefit by the easement, without the burden of paying for it. The plaintiffs' argument, that if they choose not to pay to join the LPPOA, they derive no benefit from the lake, ignores the value to their property by being on or near the lake. At this early stage

of the litigation, before the plaintiffs have been deposed, and before expert reports have been exchanged[1], the court does not have sufficient information to determine whether and to what extent the plaintiffs benefit from the lake regardless of whether they join the Association.

LEGAL ARGUMENT

I. Membership In The Association, As A Condition Of Using The Lake, Does Not Deprive The Plaintiffs Of The Use Of The Easement.

It is well-established in New Jersey that every purchaser of land takes title to subject to the defects, reservations and exceptions referred to in the deed by which he acquired title or that which may be ascertained by reference to his chain of title as appearing on record. Mitchell v. D'Olier, 68 N.J.L. 375 (1902). Subsequent purchasers of real property will be charged with a notice of recorded instruments, if discoverable by a reasonable search of the chain of title. Island Venture Associates v. N.J. Department of Environmental Protection, 179 N.J. 485 (2004). Recordation of a homeowners association's declaration of covenants is contemplated pursuant to N.J.S.A. 46:26-1 which permits the recordation of "all instruments affecting title to real estate."

An investigation of the deeds in the Lake Parsipanny community from the developer to the original purchasers indicate that properties in the Lake Parsippany community have an easement to the common properties of Lake Parsippany, including the lake itself. The rights given to all property owners in Lake Parsippany for the use of the lake and common properties would be considered easements. Plaintiffs acknowledge that these original deeds did generally provide that the property owners would have the right to use the lake and other common properties.

[1] The defendants note that the plaintiffs could have filed this motion as part of the order to show cause. Nothing has changed since then, *i.e.*, the plaintiffs present no evidence or arguments not available when they filed for the order to show cause.

There are two cases which control the rights of a voluntary lake association to assess a fee on all property owners in a community: Island Improvement Association of Upper Greenwood Lake v. Ford, 155 N.J. Super 571 (App. Div. 1978) and Lake Lookover Property Owners Association v. Olsen, 348 N.J. Super 53, 54 (App. Div. 2002). In addition, there are several other unreported cases which have made similar findings.

The theory of a "fair share" assessment was developed in cases which determined that a property which holds an easement to another property bore responsibility for the maintenance of that easement. In the case of Island Improvement Association of Upper Greenwood Lake v. Ford, *supra*, a non-profit voluntary lake association was organized to raise funds to maintain the roads in a privately developed residential area of Upper Greenwood Lake. They brought a class-action suit against all owners of residential property in the area to compel these owners to contribute to the road maintenance costs. In that matter, it was clear that the title to the roads were held by the private lake association and that the deeds to the individual property owners contained an express easement for the use of the roads, but did not contain an express contractual obligation on the part of the owners to maintain the roads. The Appellate Division held that the individual owners of the residential property who were granted an easement to use the roads were obligated to contribute the repair and maintenance of those roads. The Court provided an analysis under easement theory and determined that "with the benefit ought to come the burden" and therefore held that holders of easements are obligated to contribute their fair share of maintenance of that easement.

This theory was affirmed in a later case, Lake Lookover Property Owners Association v. Olsen, *supra*. In the Lake Lookover matter, the property owners association sought contribution by way of assessment from all individual property owners to pay for the repair cost of Lake Lookover's dam. The Appellate Division held that the association had the authority to assess the property owners for the costs

of repairs and further held that the property owners could not avoid liability for contributions to the cost of the repair of the dam by surrendering their easement rights to the use of the lake. The Court specifically noted that present easement holders and their predecessors in title have enjoyed the benefit of a lake community easement since the creation in the 1920's. This was the case even though many of them had chosen not exercise the easement by joining the association. The Court noted the wear and tear suffered by the dam over the course of years and the requirement for substantial rehabilitation. It stated that under the rule of the Island Improvement case "one who enjoys the benefit of the easement must share in the burden." Id at 66.

The Lake Lookover Court also noted that the private lake association generally supervised use of the lake and attended to the routine repairs and other matters that required attention throughout the life of the lake community and accordingly found no merit in the claim that the association had adopted an improper role and assumed duties, rights and obligations it had no right to assume. Id at 68. Neither of these cases limited the assessment specifically to the current problem (i.e. the roads or the dam).

Lake Parsippany's easement assessment follows the model set by Upper Greenwood Property Owners Association, which continues to implement a "fair share" assessment in the community based on the 1975 Appellate Division in their favor. Properties that hold an easement to the lake and common areas are responsible for paying their fair share of certain expenses including insurance, dam maintenance, leaf control, cost of security patrol and miscellaneous administrative costs. Upper Greenwood Lake Association received confirmation in the 1988 unpublished decision of the Superior Court of New Jersey that all easement holders of improved and unimproved properties are subject to contribute their fair share for the repair and maintenance costs of the easement to use Upper Greenwood Lake. Upper Greenwood Lake implements a procedure whereby a proposed budget of easement costs is presented at a public

meeting and voted upon and then divided by the numbers of improved and unimproved properties. The property owners who wish to become a member of the Upper Greenwood Lake Property Owners Association pay an additional fee for full association privileges.

Like most lake associations, LPPOA is a traditional homeowners association. In Highland Lakes Country Club and Community Association v. Franzino, 186 N.J. 99 (2006, citing Wendell A. Smith et al, New Jersey Condominium and Community Association Law, 5 (Gann Law Books, 2005), the Court described a homeowner's association development as follows:

> The defined space which is to be exclusive to a particular owner is located on a separate and sub-divided lot and the legal title to the individual lots and improvements on each rest exclusively in the owner, of such lot. Open space, recreation and other common facilities are located on other lots, title to which is vested in a non-profit homeowners association which holds title for the benefit of its members.

Furthermore, although many common interest communities have both commonly held property and mandatory membership associations, the existence of either is sufficient to constitute the property bound by the servitude requiring payment to the common interest community. Restatement of Law (3rd) of Property: Servitudes. Restatement of Law (3rd) of Property: Servitudes, Section 6.2 identifies and defines a common interest community as "a development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by non-use or withdrawal (emphasis added)." Section 6.5 states that except for when limited by statute or declaration, a common interest community has the power to raise funds reasonably necessary to carry out its function by levying assessments against the individually owned property in the community and charging fees for service or for use of the common property. Further, the assessment may be allocated among the individually owned properties on any reasonable basis and are secured by a lien against the individually

owned properties. The fees for services must be reasonably related to the cost of providing the service or providing and maintaining the common property or the value of the use or service.

Even in cases of where the formation documents of the community did not require membership in the homeowners association, the Courts have acknowledged that the homeowners association or property owners association does have the authority to own and maintain the lake, to manage the repairs of the lake's dam, and to subsequently assess property owners for the cost of those repairs.

In the Lake Lookover case, as in the case at bar, the Defendants attempted to portray the association as "nothing more than a beach social club," an image that the Appellate Division rejected. The Appellate Division held that the association generally supervised the use of the lake and attended to the routine repairs and other matter that required attention throughout the life of the Lake Lookover community.

Furthermore, the Appellate Division held that the association had consistently maintained the lake, which was the center of the community. The Appellate Division acknowledged that the community was created by the original developers of the lake, the builders of the dam, and that the homes built on the lots laud out by the original developer of the lake and the surrounding were there because of the lake.

It is undisputed that the Plaintiffs each have an easement to the common properties of Lake Parsippany and may exercise that easement at any time subject to the rules and regulations of LPPOA, which require the payment of a membership fee to exercise their easement rights. It is further clear that easement holders who elect to become members of LPPOA are nevertheless subject to an easement assessment by virtue of the standards expressed in the Island Improvement and Lake Lookover cases.

II. The LPPOA Has A Right To Collect Dues, And As Part Of That Right, May Impose A Lien On Plaintiff's Property.

Lake Parsippany is a common interest community. A common interest community "is one in which the individual properties are burdened by a servitude requiring that the property owner either contribute to the support of common property or pay dues or assessments to a property owners association." See Restatement of Law (3rd) Property (Servitudes) Section 6.2 and 6.5. The power to assess "will be implied if not expressly granted by declaration or by statute." *Id.* Section 6.5, (b). In Lake Lookover Property Owners Association v. Olsen, *supra*. at 65, relying upon Island Improvement Association v. Ford, *supra*. at 575, the court held that "With the benefit of an easement ought to come the burden absent agreement to the contrary." The New Jersey Supreme Court in Highland Lakes Country Club v. Franzino, 186 N.J. 99 confirmed that common interest communities such as the defendant in this case have a right to "an equitable lien which constitutes a special right that is a combination of a legally cognizable debt and binding agreement to subject property to the payment of that claim."

Judge Hansbury in an unpublished decision, (Visconti v. Lake Wallkill Community attached to counsel's certification as Exhibit A) dealt with this precise issue. Judge Hansbury's decision, while not binding, is persuasive. At page 13 of His Honor's decision, Judge Hansbury ruled "With membership, comes the obligation to pay fees and assessments. As those with fiduciary responsibility for management of this community, they (the association) are the ones with the decision making power." At page 14 of his decision, Judge Hansbury noted as follows: "Lake front communities must be self sustaining. Lake maintenance in some cases involves dam repairs required by the New Jersey Department of Environmental Protection; not the case here. Maintenance of roads, water systems, club houses and recreational facilities requires the imposition of fees and assessments" (emphasis added). Judge Hansbury

goes on to discuss what the defendants in this case have been arguing from the beginning. At page 14, His Honor states:

> Significant public policy issues arise if the nature of the community falters. Failing to be self supporting at some point would require the municipality to take over the community at probably significant costs and substantial alteration through the community itself. It falls to the best efforts of the Board of Directors to take steps necessary to make certain sufficient funds are raised to maintain the community to which they are responsible. N.J.S.A. 15A:7 grants the authority to establish the nature of membership. Here, the Board could establish a fee for owners who chose not to be members but wish to use the roads only, for example, and those who do wish to be members. The Board also has the right, as here, to set one fee and grant automatic membership. As fiduciary, this Board had the authority to change the nature of membership as it did. It also had the right to suspend privileges upon non-payment and impose a lien to make certain that past due monies were known to buyers and collected at closing." (emphasis added). ...The Restatement affirms that even if membership is voluntary, the obligation to pay fees and assessment in such a community is appropriate. The Restatement also confirms that the obligation to make payment can be implied as well as expressed.

At page 16 of his opinion, Judge Hansbury cites to Section 7. 5 of the 3rd Restatement, which states that: under the rules stated in this section, the power to raise funds sufficiently necessary to carry out the functions of the common interest community will be implied if not expressly granted by the declaration or by statute."

Judge Hansbury opinion, and the authorities cited therein, are persuasive support for the proposition that the Association, in order to carry out its functions, must have the authority to impose liens in order to collect the money necessary to maintain the lake.

III. The Defendant Is Entitled To An Award Of Counsel Fees For Collecting The Assessment.

The award of counsel fees is discretionary. R. 4:42-9(a)(2). Ultimately, the judge must determine who is to bear the cost of litigation.

The case law above makes it clear that the defendant is entitled to impose the cost of maintaining the easement, which is the use and enjoyment of the lake. Plaintiffs' position, that the Association is not entitled to an award of counsel fees when it must litigate in order to collect the easement fee, would subvert, to a great extent, the purpose of collecting the easement fee. In other words, if the Association cannot collect counsel fees when it is forced to litigate in order to collect the easement fee, it will be deprived of the revenue needed to maintain the easement. This is simply illogical and would allow the plaintiffs to subvert the court's ruling. For this reason, the court must find that the defendant can impose or collect counsel fees if forced to litigate in order to collect the easement fee.

IV. In Order To Proceed With A Declaratory Judgment Action, Plaintiffs Must Join All Property Owners In Lake Parsippany.

The Uniform Declaratory Judgment Law ("UDJL"), N.J.S.A. 2A:16-50 to -62 provides that "(w)hen declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the action." N.J.S.A. 2A:16-56. Further, "no declaratory judgment shall prejudice the rights of persons not parties to the proceeding." N.J.S.A. 2A:16-57. Declaratory relief in this matter is inappropriate because not all persons having or claiming an interest affected by the complaint of the Plaintiffs were made parties to this action.

Plaintiffs acknowledge all property owners in Lake Parsipanny have the identical easement to the common properties. Pursuant to statute and case law. it is the obligation of those seeking declaratory relief to join all persons having or claiming any interest that would be affected by the declarations. Tal v.

Franklin Mut. Ins. Co., 172 N.J. Super. 112 (App. Div. 1980), cert. denied. 85 N.J. 103 (1980). Here, plaintiffs bear the burden of joining all parties whose interests were affected by the declaratory judgment sought.

In Garnick v. Serewitch, 39 N.J. Super. 486 (Ch. Div. 1956), the Court held that where a plaintiff landowner sought a declaratory judgment construing a building restriction imposed on his lot by a restrictive covenant contained in a conveyance in his chain of title as part of a neighborhood scheme, all the owners of parcels of land and mortgages of such land within neighborhood scheme had an interest in such action and became necessary parties. The Court held it was the "the basic right of a party in interest to be accorded his day in court and to avoid the possibility of the vexations of a multiplicity of suits." Id. at 500. In addressing the expense of joinder of all parties in interest by the party seeking declaratory judgment, the Court found as follows:

> It is no answer to state that his interest might be protected by a defendant who has a similar interest, nor that the plaintiff may more cheaply obtain justice by the nonjoinder of some admittedly interested parties. We should not permit the desire to make a remedy available at reduced costs to eradicate the basic concept that all parties whose rights are to be affected must be before the court before an adjudication can be obtained, and that issues should be laid to rest if at all possible in one suit. We are more concerned with substantial justice and the end of litigation than bargain basement costs...
> It is, therefore, here held that under the very language of the statute and general equity principles, all of the owners and mortgagees in the tract are proper and necessary parties.

In this matter, not all persons whose rights or interests are affected by these declarations have been made parties to this action. Property Owners who are not a party to this action will not had an opportunity to be heard, while rights that affect them have been litigated, and must be joined by the plaintiffs in order to proceed.

V. Summary Judgment Must Be Denied Because Discovery Is Incomplete.

Significant factual disputes preclude the granting of summary judgment. At this point, no depositions have been taken and document discovery is incomplete. The defendants reasonably believe that depositions of the plaintiffs will reveal that their predecessors and title exercised the privileges of the easement, which is the subject of this suit. This would show that the current plaintiffs are not deprived of the benefits of the easement.

When discovery on material issues is not complete, the party opposing a summary judgment motion must be given the opportunity to take discovery before disposition of the motion. *e.g.*, Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001). See also Mohamed v. Iglesia Evangelica, 425 N.J. Super 489, 499-500 (App. Div. 2012) (summary judgment in favor of church in sidewalk fall case was premature absent discovery regarding whether church had engaged in commercial activity on its premises).

Because discovery is incomplete and the discovery relates to critical issues, summary judgment should be denied.

CONCLUSION

Summary judgment should be denied for the reasons stated above.

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
Counsel for Defendants
Lake Parsippany Property Owners Association, Inc. and Board of Directors

BY: _____
HOWARD B. MANKOFF, ESQ.

Dated: June 28, 2017

21256.01511-HBM
MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
Howard B. Mankoff, Esq. – NJ Attorney ID# 021971981
425 Eagle Rock Avenue, Suite 302
Roseland, NJ 07068
☎973-618-4100 🖷973-618-0685
hbmankoff@mdwcg.com
ATTORNEYS FOR DEFENDANTS - Lake Parsippany Property Owners Association, Inc. and Board of Directors

MARY PURZYCKI, KENNETH PURZYCKI, DHIREN PATEL, RITA DESAI, DANIEL DESAI, RASHMIN PATEL, WILLIAM MARTIN, BARBARA SEAMAN, SABINA VERMONT, MADELINE KEYWORTH, ELAINE GAVALYAS, ANTHONY LONGO, DIPAK PATEL, SUNIL PATEL AND JIUISHA PATEL PLAINTIFFS v. LAKE PARSIPPANY PROPERTY OWNERS ASSOCIATION, INC. AND BOARD OF DIRECTORS DEFENDANTS	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-C-2-17 CIVIL ACTION **CERTIFICATION OF COUNSEL**

I, Howard B. Mankoff, Esq., being of full age, do hereby certify as follows:

1. I am a shareholder in the firm of Marshall, Dennehey, Warner, Coleman & Goggin, counsel for the defendants, and in this capacity, I am familiar with the facts of this matter.

2. I submit this certification in opposition to the plaintiffs' motion for summary judgment.

3. Attached as **Exhibit A** is a true and complete copy of the Trial Court Decision in Visconti v. Lake Wallkill Community, Superior Court of New Jersey, Chancery Division: General Equity, Docket No.: SSX-C-23-14. Pursuant to R. 1:36-3, I certify that I am not aware of any contrary unpublished opinions.

All of the above statements made by me are true. I am are that if any of the foregoing are willfully

false, I am subject to punishment.

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
Counsel for Defendants
Lake Parsippany Property Owners Association, Inc.
and Board of Directors

BY: _____
HOWARD B. MANKOFF, ESQ.

Dated: June 28, 2017

EXHIBIT - A

FILED

MAR 28 2016

STEPHAN C. HANSBURY, J.S.C.

PREPARED BY THE COURT:

VICTORINE G. VISCONTI, Individually and as Executrix of the Estate of MICHAEL P. VISCONTI, Deceased; MICHAEL C. VISCONTI; PATRICK J. VISCONTI; and LAURA VISCONTI,

Plaintiffs,

vs.

LAKE WALLKILL COMMUNITY, a Corporation of the State of New Jersey,

Defendant

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: GENERAL EQUITY
PART-SUSSEX COUNTY
Docket No. SSX-C-23-14

Civil Action

ORDER OF JUDGMENT

THIS MATTER having come before the Court for trial commencing January 11, 2016; plaintiffs being represented by Stephen J. McGee, Esq.; defendant being represented by Julie B. Dorfman, Esq. of the law firm of Marshall, Dennehey, Warner, Coleman & Goggin, and by Eileen Borne, Esq. of the law firm of Dolan and Dolan, P.A.; and the Court having considered the testimony and evidence submitted; and for good cause shown;

IT IS on this 28th day of March, 2016;

ORDERED that judgment be, and hereby is, entered in favor of defendant, **LAKE WALLKILL COMMUNITY, INC.** against plaintiffs, **VICTORINE G. VISCONTI** in the amount of $15,656.55 as of January 7, 2016 and **PATRICK J.**

VISCONTI and **LAURA E. VISCONTI** in the amount of $14,871.55 as of January 7, 2016, representing the full amount of defendant's lien; and it is further

ORDERED that judgment be, and hereby is, entered in favor of defendant **LAKE WALLKILL COMMUNITY, INC**. against plaintiff, **MICHAEL C. VISCONTI** in the amount of $ 7,627.55, representing the amount due from date of purchase on November 30, 2010 as of January 7, 2016.

The Court has served a copy of the within order be served upon counsel of record in this action.

STEPHAN C. HANSBURY, P.J., Ch.

STATEMENT OF REASONS ATTACHED

MICHAEL P. VISCONTI, et als. v. LAKE WALLKILL COMMUNITY, INC., etc.
Docket No. SSX-C-23-14

STATEMENT OF REASONS

This is yet another in a long line of cases involving a dispute between a common interest community and some of its residents as to whether the resident has an obligation to pay association dues and, if so, to what extent. The plaintiffs are five members of the same family owning three separate properties within the defendant community.

Michael P. Visconti and Victorine G. Visconti first purchased property in the Lake Wallkill Community on December 15, 1989, 24 Wallkill Drive. On October 25, 1991, they sold the property to their son, Patrick J. Visconti, and his future wife, Laura E. Padilla. Patrick J. Visconti and Laura E. Visconti continue to own that property. Michael C. Visconti purchased his property, 29 Wallkill Drive from his brother, Peter, on November 30, 2010. Peter is the son of Michael P. Visconti and Victorine G. Visconti. In 1997, Michael P. Visconti and Victorine G. Visconti purchased another property, 30 Wallkill Drive, within the Lake Wallkill Community.

On January 22, 1990, Michael P. Visconti and Victorine G. Visconti applied for membership in Lake Wallkill Community, Inc. In making that application, they agreed to abide by the by-laws of the community, to adhere to all regulations for the conduct of the members which were in effect and also any and all rules and regulations or restrictions which may be

in the future be placed on them by reason of membership in Lake Wallkill Community, Inc. They further agreed to abide by the restrictions provided for in the deed to their property. They also agreed to pay to Lake Wallkill Community, Inc. any outstanding assessments and dues now owing and further agreed that all indebtedness to the Community shall be a lien upon the property.

On August 30, 1991, defendants Patrick J. Visconti and Laura E. Visconti completed the same application and made the same representations. Finally, on August 8, 1997, Michael P. Visconti and Victorine G. Visconti submitted another application accepting the same terms and conditions and making the same representations. The second application was due to their purchase of the second property some years after selling the first property to their son.

Victorine G. Visconti testified that she and her husband appeared at the General Meeting of July 5, 2002. On that date, they presented their oral resignation from the association when they purchased 30 Wallkill Drive. The minutes do not reflect the resignation. No written resignation was ever submitted.

Patrick J. Visconti appeared at the July 11, 2003 General Meeting. The minutes of that meeting reflect that he commented about some violations of rules as he perceived them. He also testified that he resigned on that date.

Again, there was no written resignation, nor did the minutes reflect the resignation.

Michael C. Visconti, the son, purchased his property on November 30, 2010. He did not apply for membership, nor did he appear at any meeting according to his testimony.

Shortly after the resignations of both families, they terminated paying association dues. Bills continued to go to the parties, as well as correspondence urging payment. The four parties often returned any letter from Lake Wallkill and specifically rejected the demand for payment.

On June 10, 2014, counsel for defendant corresponded with Patrick J. Visconti and Laura E. Visconti indicating that the total amount of unpaid dues was $14,843.40. An opportunity to dispute this amount was provided and warning that a lien would be filed within 30 days was expressed in that correspondence. A second letter, on June 25, 2014, increasing the time to dispute the lien from 10 days to 30 days was forwarded to Mr. and Mrs. Patrick J. Visconti. On September 15, 2014, almost 90 days later, the lien was filed with a copy to Mr. and Mrs. Patrick J. Visconti.

The same course of action took place as to Michael P. Visconti and Victorine G. Visconti. (It is noted that Michael P. Visconti passed away during the course of this litigation.)

On June 10, 2014, counsel for defendant corresponded with Michael C. Visconti indicating the total amount due of past dues and assessment of

$15,628.40. Ten (10) days was provided to dispute it, but that was expanded to 30 days in the letter of June 25, 2014. Notice was given that a lien would be filed within 30 days of receipt if the matter remained unresolved. On September 15, 2014, counsel filed a lien as to Michael C. Visconti.

On June 10, 2014, counsel also wrote to Michael P. Visconti and Victorine G. Visconti indicating dues and assessments due in the amount of $15,628.40. That letter was followed by a letter of June 25, 2014 which provided 30 days within which to dispute the amount and that a lien would be filed 30 days thereafter if it remain unresolved. On September 15, 2014, the issue remained unresolved and so the lien was filed. The five Viscontis filed this litigation shortly thereafter.

The Complaint in this matter was filed on October 22, 2014, initially in the Law Division. Count One sought a declaratory judgment declaring the lien had been improperly filed, a determination that there were no restrictive covenants requiring plaintiffs to be members and that there was no restrictive covenant obligating them to pay fees. Claims for damages, compensatory and punitive, and attorneys' fees were also sought. Count Two was an allegation of slander of title seeking the same relief.

Upon defendant's motion, the matter was transferred to Chancery Division. On September 25, 2015, an Amended Complaint was filed adding Count Three, an assertion that the New Jersey Civil Rights Act was violated.

Shortly thereafter, separate counsel filed an Answer to Count One and another counsel an Answer to the other Counts, Affirmative Defenses and Counterclaim. The Counterclaim sought judgment determining that defendant was authorized to assess plaintiffs' properties in accordance with the by-laws, rules and regulations. Relief sought also included compelling the plaintiff to pay the assessments and allowing defendant to pursue all remedies at law as permitted. Count Two sought a declaration that plaintiffs had breached the membership agreement. Count Three asserted a claim for trespass. It asserted that defendants were using roads owned by the plaintiffs over which defendants had no authority to travel since they were not members of the association.

On October 23, 2015, the Court dismissed Count Two of the plaintiffs' Complaint for reasons stated on the record. On September 22, 2015, the Court dismissed defendant's Count Two of the Counterclaim, trespass. Finally, on December 21, 2015, the Court granted partial summary judgment to defendant in dismissing plaintiffs' claims for punitive damages and attorneys' fees for the reasons stated on the record then.

The concept of the Lake Wallkill Community was born in 1929 when two individuals, Seckler and Shepperd, decided to develop the subject property. The plan included single family residential homes, a clubhouse, private roads, the lake and various amenities. The first property was sold in 1930. The property now owned by Patrick J. Visconti and Laura E. Visconti

was conveyed from Lake Wallkill, Inc. in 1935. The property owned by Michael C. Visconti was first conveyed in 1933. Finally, the property currently owned by Victorine G. Visconti and the late Michael P. Visconti was deeded in 1930. It is clear from the various deeds that this was intended to be a common interest community. A common interest community "is one in which the individual properties are burdened by a servitude requiring that the property owner either contribute to the support of common property or pay dues or assessments to a property owners' association." See Restatement of the Law (Third) Property (Servitudes) § 6.2 and 6.5. The power to assess "will be implied if not expressly granted by the declaration or by statute." Ibid. § 6.5 Comment (b).

Each of the deeds contained elements of land use planning. Nothing could be constructed without the initial approval of Lake Wallkill, Inc. The deeds provided for certain setback requirements, restrictive fencing, prohibited business, prohibited power boats on the Lake, limited docks and setbacks from the Lake and required septic tanks. The deeds also included the following language: "The parties of the second part (Purchasers) shall have no expense for the upkeep of Lake Wallkill. Said expense to be borne by Lake Wallkill Club who shall control all rights and privileges of said lake and said lake is to be used only by members and guests of said Club." The above restrictions expired by the terms of the deed on January 1, 1950. The

Lake Wallkill Development was depicted on a map which was filed with the County Clerk in July of 1929.

In 1938, a Certificate of Incorporation creating the Lake Wallkill Club was recorded on December 30, 1938. The certificate provided that four trustees, two of whom were the original owners, would basically manage the Lake Wallkill Community. They were required to formulate rules and regulations for the use of the property enumerated, to perpetuate the standard and tone of the community and to provide and maintain adequate systems of administration, etc. They were to advance the goals of good fellowship among members, health, welfare, morals, pleasure, recreation, indoor and outdoor sports and entertainment and to provide suitable trophies and prizes for contestants. In 1975, the name of Lake Wallkill Club was changed to Lake Wallkill Community, Inc. The certificate of amendment was adopted pursuant to N.J.S.A. 15:1.[1] This statute regulates non-profit corporations such as defendant.

On August 23, 1940, Lake Wallkill, Inc., the initial developer, transferred title to its holdings in the Lake Wallkill area to the Lake Wallkill Club. Included within that deed is the following provision: "The property covered by this deed is conveyed for the use and enjoyment of the members of Lake Wallkill Club, its successors, and those who may be permitted by said Club to enjoy and use the said property with the understanding that

[1] N.J.S.A. 15:1-1, *et seq.* was repealed in 1983 and replaced by N.J.S.A. 15A:16-2.

none of said property is to be sold, transferred or mortgaged without the unanimous consent of all property owners of the property at Lake Wallkill as set forth in the aforesaid maps."

Presented as D-32 were the undated By-Laws represented to be the oldest version which could be located. Those by-laws made clear that membership in the Lake Wallkill Community was voluntary. To become a member, one must apply and "shall have been approved by the Executive Committee upon the recommendation of the Membership Committee." It also provided that annual fees would be assessed against the members for the purpose of operating the corporation. The by-laws also provided: "Such fees shall remain due and payable notwithstanding the suspension of a member and all delinquent fees shall be paid prior to reinstatement of membership privileges after suspension." It also stated: "All such fees shall be liens upon the property of each member until paid." Amendment to the by-laws was made in 1984, but the above provisions of the oldest by-laws remained unchanged.

The by-laws were again amended in December of 2000, effective February 1, 2001. These by-laws eliminated voluntary membership and made all property owners members of the defendant. "Membership is automatically granted and the obligation to pay dues and assessments are effective upon legal conveyance of title to a property." The by-laws were

again revised in July of 2014. The provisions which require membership if you are an owner of the property, however continued.

The Court notes that the process by which by-laws were amended and signed covenants obtained was the subject of prior litigation. On March 9, 2001, then Chancery Judge MacKenzie found in favor of Lake Wallkill Community, Inc. holding that the process and the covenants were in accordance with N.J.S.A. 15A:3-1 *et seq.* and the governing documents.[2]

On March 22, 2014, the Management Committee of Lake Wallkill Community adopted a resolution determining that all property owners must pay appropriate assessments and authorizing its attorney to pursue collection of any delinquent property owner. That resolution authorized the filing of liens in the event of non-payment. As represented by the subsequent correspondence from counsel to defendant, thirty days' notice was given to dispute any amounts. The liens in the particular cases here were filed ninety days after the final delinquency notice from counsel.

As early as 1997, Community President Michael T. Curry, corresponded with Lake Wallkill property owners raising the issue of the goal of universal payment. The letter indicates that the original developers did not make dues a requirement for purchasing property. The letter raises the issue of the voluntary acceptance of this proposition by virtue of proposed Declaration of Covenants to be signed by each owner. The letter further

[2] Alazraki, et al. v. Lake Wallkill Community, Inc., et al., SSX-C-33-98.

made five arguments as to why all residents of Lake Wallkill should be dues-paying members of the Lake Wallkill Community, Inc.

Included in the evidence submitted by the defendant (D-29), is a copy of the reference to Declaration of Covenants Affecting Lands at Lake Wallkill. It confirms that the roads within the community are still privately owned, as is the water system. It confirms the presence and maintenance obligations of the lake club house and recreational areas. It acknowledges that the initial development did not require membership in the community. It confirms automatic membership and an immediate obligation to pay dues and assessments. It confirms that claims may be placed on a subject property if assessments and dues go unpaid. Defendant introduced an undated photograph depicting a sign at the entrance to the community which is no longer present. That sign states: "FACILIITES OF THIS LAKE ARE LIMITED TO CLUB MEMBERS. PURCHASE OF PROPERTY DOES NOT INCLUDE CLUB MEMBERSHIP." Signed Lake Wallkill Club, Inc. The present sign states: "YOU ARE NOW ENTERING LAKE WALLKILL, A CLUB MEMBERSHP COMMUNITY, PRIVATE ROADS, PRIVATE LAKE, PRIVATE PROPERTY, MEMBERS ONLY NO TRESPASSING." No precise testimony was provided as to when the former sign was removed and the new one was placed. There was testimony by the current President that from what he could tell, the old sign was removed in the 1970's and the current sign put in its place.

Although each case between a resident of a common interest community and the community itself is actually distinguishable, the principle issues remain the same. The initial developers in many cases did not contemplate the mandatory payment of dues and assessments. Although speculation, the timing of this development, 1929 to 1934, fell right in the heart of the Depression. Telling prospective purchasers that if they buy into the community they will have to pay dues and assessments could have been a very difficult marketing task and, therefore, intentionally avoided. Litigation of this nature exists throughout the country, well beyond the borders of New Jersey. In the mater sub judice, no one could reside within the community without using resources owned by the defendant for which the defendant must pay. The roads remain privately owned. The evidence presented confirms that the water service to the Community is privately owned. Even the plaintiffs acknowledge that to some extent, they should be charged for a modest amount to use the roads. The facts of this case also are that much of the recreational programming is self-funded and is not a cost of the association.

Many of the "lake" cases rely upon the theory of equitable servitude which will be discussed hereafter. However, there is an additional element which is present in many of these cases and is certainly present in this one.

Condominium developments have proliferated in recent years. In 1969, the New Jersey Legislature adopted the Condominium Act. The issues

raised in this case for this common interest community were resolved early as to condominiums with this legislation; the right to assess, the right to impose liens and collect counsel fees. Horizontal property rights were established in 1963 regulating apartments. (N.J.S.A. 46:8A-1, *et seq.*) Legislation regarding the management of mobile home parks was adopted before 1973 and was replaced by N.J.S.A. 46:8C-1 in 1974. Cooperatives were regulated by N.J.S.A. 46:8D since 1987. It must also be remembered that zoning itself was in its infancy in 1929. Lake communities have not benefited from such unifying legislation

In 1927, the New Jersey Constitution was amended to expressly authorize zoning. The legislature enacted the First Zoning Enabling and Planning Acts in 1928 and 1930.[3] When defendant was created, it was not guided by modern land use regulations.

As stated, given the facts of this case, all residents of the community require the use of resources belonging to the defendant and, therefore, all residents must pay something. Should the decision of what to pay and how much rest with each individual resident or with those charged by statute, by-laws and rules and regulations with the responsibility of managing the extensive community and its resources?

[3] New Jersey Zoning and Land Use Administration by William Cox and Stuart Koenig, Page 1.

It is clear that the Board of Directors made the decision in the late 1990's that membership would no longer be voluntary and that it would be mandatory. With membership, comes the obligation to pay fees and assessments. As those with the fiduciary responsibility for the management of this community, they are the ones with the decision-making power. It must also be noted that a majority of the residents of the community supported the conversion from voluntary membership to mandatory membership.

Directors of non-profit groups are in a fiduciary relationship with that corporation. See Valle v. North Jersey Automobile Club, 141 N.J. Super. 568, 583 (App. Div. 1976).

Corporations, including non-profits, have the power to act as provided by the enabling statute and their own governing documents. They also have powers implicit "in the charter" to the extent necessary "to serve the general end in view." (See Leeds v. Harrison, 9 N.J. 202, 211-212 (1952).

The 2000 by-laws required it and the 1997 correspondence explained why it is necessary. N.J.S.A. 15A:3-1(a)(12) specifically grants the non-profit corporations the authority to "levy dues and assessments on its members in accordance with the certificate of incorporation or by-laws which may provide for reasonable regulations for enforcement and collection thereof, and for different dues and assessments for different classes of members." The statute and by-laws adopted by the defendant clearly give

to the Board of Directors the right to make a decision whether all members of the community will have to pay the same amount, or if different classes of membership can be created with different dues structures. Here, the decision was made that all people who own property become members of the community and pay the same amount. As noted in Maul v. Kirkman, 270 N.J. Super. 596, at 613, (App. Div. 1994): "The business judgment rule protects a Board of Directors from being questioned or second-guessed on conduct of corporate affairs except in instances of fraud, self-dealing or unconscionable conduct." The Board, therefore, was acting within its authority in its judgment as to the best interests of the community and, therefore, its actions are appropriate. The Court previously dismissed plaintiffs' claims for punitive damages and counsel fees. This analysis further reinforces that decision.

Lake communities must be self-sustaining. Lake maintenance in some cases involves dam repairs required by the New Jersey Department of Environmental Protection; not the case here. Maintenance of roads, water systems, club houses and recreational facilities requires the imposition of fees and assessments. The Board of Directors have a fiduciary duty to maintain the community and its private status. Significant public policy issues arise if the nature of the community falters. Failing to be self-supporting at some point would require the municipality to take over the community at probably significant costs and substantial alteration to the

community itself. It falls to the best efforts of the Board of Directors to take steps necessary to make certain sufficient funds are raised to maintain the community to which they are responsible. N.J.S.A. 15A:7 grants the authority to establish the nature of membership. Here, the Board could establish a fee for owners who chose not to be members but wish to use the roads only, for example, and those who do wish to be members. The Board also has the right, as here, to set one fee and grant automatic membership. That decision is the Board's. As fiduciary, this Board had the authority to change the nature of membership as it did. It also had the right to suspend privileges upon non-payment and impose a lien to make certain that past due monies were known to buyers and collected at closing.

The Restatement of the Law (Third) Property, (Servitudes), Section 6.2, Comment b, provides yet further support for the Board's decision to compel payment of the same fees and assessments by all residents of the community. The defendant is clearly a common interest community. The Restatement affirms that even if membership is voluntary, the obligation to pay fees and assessments in such a community is appropriate. The Restatement also confirms that the obligation to make payment can be implied as well as expressed. Clearly, from the very beginning of this development, all purchasers were on notice that this was a private community. Even the initial sign makes it clear that this was a private community. Even the most modest inquiry would reveal that the roads were

private and not municipally owned. Section 7.5 of the Third Restatement goes on to say in Section B of the Comment: "Under the rules stated in this Section, the power to raise funds reasonably necessary to carry out the functions of the common interest community will be implied if not expressly granted by the declaration or by statute. Common interest communities play an increasingly important role in American housing." The Restatement goes on further in Section B of Illustrations to confirm that the right to impose a lien may also be implied.

Physical inspection of the property may be sufficient notice of even an equitable easement. Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 598 (Ch. Div. 1959).

Lake Lookover Property Owners' Association v. Olsen, 348 N.J. Super. 53, at 65 (App. Div. 2002), relying upon Island Improvement Asso. v. Ford, 155 N.J. Super. 571, at 575 (App. Div. 1978) states: "With the benefit of an easement ought to come the burden absent agreement to the contrary."

The Supreme Court in Highland Lakes Country Club v. Franzino, 186 N.J. 99 again confirmed that communities such as defendant have a right to "An equitable lien which constitutes a special right that is a combination of a legally cognizable debt and binding agreement to subject property to the payment of that claim." (App. 111)

Recently, the Appeals Court in Massachusetts wrestled with similar issues in Sullivan v. O'Connor, 81 Mass. App. Ct. 200 (Appeals Court of

Massachusetts 2012. In that case, the plaintiff objected to a decision which compelled him to pay assessments in a common interest community imposed on the legal theory of equitable services. The plaintiffs' deed did not contain any language that required membership or payment of assessments. The Court concluded that the plaintiffs had sufficient notice of the nature of the community. The Court noted, at 210: "The distinctive feature of a common interest community is the obligation that binds the owners of individual lots or units to contribute to the support of common property or of other facilities, or to support the activities of an association." Then, further: "We conclude the Sullivans had an implied obligation to render semi-annual assessments to the association." In furtherance of the Third Restatement, the Court went on to hold that the right to levy assessments would be implied if not expressly granted by the declaration of assessments for upkeep of lake, even though the developer who created the lake failed to impose maintenance obligations in deeds or create homeowners' associations." (at 210). Finally, the Court noted that the deed restriction had expired in 1979 "but their obligations to pay their dues to the association have not." Plaintiff argued in our case that the restrictions creating the common interest community expired in 1950. Clearly, the Board of Directors was in charge of defendant and continued to adopt by-laws and rules and regulations before 1950 to the present.

In this case, four of the five plaintiffs requested membership in the association which was granted. These applications were made in 1990, 1991 and 1997, prior to the date that the defendant determined to make membership mandatory. Their "resignations" as each testified came after membership was made mandatory. By executing these agreements, Michael P. Visconti and Victorine G. Visconti and Patrick C. Visconti and Laura E. Visconti agreed to abide by the by-laws of the community, to adhere to the regulations and to pay all outstanding assessments and dues and even permitted any indebtedness to become a lien on the property.

Plaintiffs took the position that they had resigned from the community in 2002 and 2003, well after the adoption of the by-laws compelling mandatory membership. The Court notes initially that resignation in 2002 and 2003 was no longer an option. Mandatory membership was then properly in place. As noted in Lake Shawnee Club, Inc. v. Akhtar, 2010 N.J. Super. unpublished Lexis 1574 (App. Div. 2010), relying upon the Third Restatement of Property Servitudes Section 7.4, one cannot abandon an equitable servitude.

The Court finds there is no evidence of their resignations in any event. Supposedly, each of the four stood up at a meeting and announced "I resign." It is not referenced in the minutes; the minutes were published to which no objection was made and no written confirmation of resignation was ever made. The Court, therefore, finds that as a matter of fact, the four

individuals did not resign. Further, as a matter of law, they were prohibited from resigning. The obligation to honor the lien and pay the assessments due as to these four is, therefore, clear.

Michael C. Visconti purchased his property in 2010 from his brother, Peter Visconti, who had purchased the property in 1998. Michael testified that he never inquired as to any by-laws or documents relating to the management of the association. By 2010, dues payment had been mandatory for more than ten years. The sign at the entrance clearly made it known to him that this was a private community. He testified he would never have acquired the property if he had known there was an annual assessment. One cannot hide his head in the sand and then cry foul play when the head is removed from the sand. Michael was clearly on notice to inquire. The assessments as to Michael's property, 29 Wallkill Drive, commenced January 1, 2003. He did not take title to the property until November 30, 2010. At that time, no liens had been placed on the property. Defendant has failed to establish that Michael had any notice of any unsatisfied liens and, therefore, judgment is entered as to him for only those charges commencing November 30, 2010. The Court makes no comment about defendant's right to seek payment from Peter Visconti for amounts prior to that time as that is not within the confines of this litigation.

For all of the reasons cited above, the Court concludes that as to each of the three parcels, an equitable lien is placed upon the property which

permits defendant to file a lien for unpaid assessments. Further, N.J.S.A. 15A-1 *et seq.* in concert with the by-laws and rules and regulations, grant to the defendant the right to impose assessments on all of the properties within the community and to file liens in furtherance of same if they remain unpaid after reasonable notice to dispute and cure as was provided in this case.

In Paulinskill Lake Assoc., Inc. V. Emmich, 165 N.J. Super. 43 (App. Div. 1978), the Appellate Division upheld the Association's right to enforce the covenants that required membership by all homeowners and obligated payment of dues and assessments. The Opinion, at 45, refers to a 1971 action of the Association requiring membership and payment of fees and assessments. The Association and the development of this common interest community was incorporated in 1932 as noted on their Association website. This Opinion would appear to accept an action to impose these obligations after many years of operation.

Here, the evidence is clear that the Board was fully informed and acted in good faith and in the honest belief that its actions were in the best interests of the Lake Wallkill Community, Inc. See In Re: PSE&G Shareholders Litigation, 315 N.J. Super 323, 327-328 (Ch. Div. 1998) *aff'd* 173 N.J. 258 (2001)

Finally, plaintiffs took the position that the initial covenant indicated no individual owner should have expense for the upkeep of Lake Wallkill, that expense being borne by the Lake Wallkill Club. This decision is consistent

with that restriction. The obligation for the expense for upkeep of Lake Wallkill is not grounded in an individual deed or an individual purchaser. It is grounded upon the fact that all property owners must become members of the Lake Wallkill Community, Inc. (formerly known as Lake Wallkill Club) as a result of the equitable servitude.

Judgment, therefore, is entered for defendant against Victorine G. Visconti, Patrick J. Visconti and Laura E. Visconti for the full amount of the lien placed. Judgment is entered against Michael C. Visconti, the son, for the amounts due from his date of purchase.

STEPHAN C. HANSBURY, P.J., Ch.