NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

THE CARLYLE CONDOMINIUM ASSOCIATION	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SPRUCE STREET PROPERTIES, LTD AND DAVID BISHOFF	:	No. 1327 WDA 2022
Appellants	:	

Appeal from the Judgment Entered October 7, 2022
In the Court of Common Pleas of Allegheny County Civil Division at
No(s): GD-14-14988

SPRUCE STREET PROPERTIES, LTD D/B/A/ PITTSBURGH SPRUCE STREET PROPERTIES	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CARLYLE CONDOMINIUM ASSOCIATION AND SEBRING & ASSOCIATES	:	No. 1349 WDA 2022
APPEAL OF: SPRUCE STREET PROPERTIES, LTD AND DAVID BISHOFF	:	

Appeal from the Judgment Entered November 14, 2022
In the Court of Common Pleas of Allegheny County Civil Division at
No(s): GD-15-000925

BEFORE: BOWES, J., OLSON, J., and KING, J.

MEMORANDUM BY BOWES, J.: **FILED: January 23, 2024**

Spruce Street Properties, Ltd. ("Spruce Street") and David Bishoff appeal from the orders entered on October 7, 2022, as to GD-14-14988 ("2014 Lawsuit"), and November 14, 2022, as to GD-15-000925 ("2015 Lawsuit").[1] We affirm in part and vacate in part these orders. Specifically, we vacate the award of compound interest and the award for attorneys' fees, and remand for further proceedings in accordance with this memorandum regarding attorneys' fees, but affirm in all other respects.

This case centers around the Carlyle Condominium ("the Carlyle"), which is a 61-unit condominium located in downtown Pittsburgh in the historic Union Bank Building, at Fourth Avenue and Wood Street. In May 2009, Mr. Bishoff, "acting as a managing member of Duquesne Properties, LLC, and a limited partner of Spruce Street, executed a Declaration of Condominium for the Carlyle (["the Declaration"]), on behalf of Spruce Street[.]" Trial Court Opinion, 1/4/23, at 2. The trial court set forth the ensuing development of the Carlyle thusly:

> On or about June 10, 2009, [Spruce Street] recorded the Declaration, which identified [it] as the owner of the Carlyle's single commercial unit and the Carlyle's building exterior. [Spruce Street] also formed the Carlyle Condominium Association (["the]Association" . . .) and an executive board to govern the Association. However, [Spruce Street] and Mr. Bishoff . . . controlled the executive board from May 29, 2009, until June 12, 2014, when the unit owners gained control of the Association and executive board pursuant to the Declaration and the Pennsylvania Uniform Condominium Act (["the Act]").

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[1] This Court consolidated the appeals.

> [Of relevance to the instant appeal, o]n or about August 24, 2014, the Association initiated the [2014] Lawsuit against [Spruce Street], Mr. Bishoff, and other related entities.

Id. at 2-3 (cleaned up).

Specifically, the Association alleged the following claims against Spruce Street:

- Count I: Breach of contract for failing to deposit reserve funds for the building exterior;

- Count II: Breach of contract for failing to pay the proper condominium assessments;

- Count III: Breach of fiduciary duty for failing to assess fines, penalties, and interest on late and unpaid condominium assessments;

- Count IV: Breach of contract for failing to complete construction and/or for defective construction;

- Count V: Breach of warranty;

- Count VI: Request for declaratory judgment and specific performance based upon a violation of Article 9.1(a) of the Declaration;

- Count VII: Request for declaratory judgment and permanent injunctive relief based upon a violation of Article 2.7(a) of the Declaration;

- Count VIII: Request for declaratory judgment, special relief, and specific performance based upon a violation of Article 5.2 of the Declaration; and

- Count IX: Request for declaratory judgment and specific performance based upon violations of the Act.

In response, Spruce Street and Mr. Bishoff initiated the 2015 Lawsuit against the Association.[2] Of relevance to the instant appeal, the counterclaims included allegations, which we restate as follows:

- Counterclaim I: Request for declaratory judgment regarding retroactive reassessment and application of late fees and interest;

- Counterclaim II: Request for permanent injunction enjoining the Association from specific conduct regarding assessments;

- Counterclaim IV: Request for declaratory judgment regarding the Association's special assessment;

- Counterclaim VIII: Conversion; and

- Counterclaim IX: Demand for accounting.[3]

After disposing of summary judgment motions that are not at issue here, the court held a jury trial on the remaining counts at both dockets on April 27, 2022. On May 9, 2022, the jury returned a verdict in favor of the Association and against Spruce Street at counts I and II, awarding the Association $500 and $123,000, respectively. The jury also returned a verdict in favor of the

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[2] The docket for the 2015 Lawsuit included a notation that it was consolidated at the 2014 Lawsuit. Additionally, the trial court consolidated the two suits for discovery, they proceeded together at trial, and most documents were filed only on the docket for the 2014 Lawsuit. Notably, the trial court referred to all claims raised by Spruce Street, whether counterclaims in the 2014 Lawsuit or claims raised in the 2015 Lawsuit, as "counterclaims." We will use the same terminology as the trial court within this memorandum for ease of reference.

[3] This counterclaim was cross-listed as counterclaim III in the 2014 Lawsuit, and was disposed of at that docket, as detailed *infra*.

Association and against Mr. Bishoff at count III, awarding the Association $348,000. As for Spruce Street's counterclaims, the jury found in favor of Spruce Street and against the Association at counterclaim VIII, awarding Spruce Street $50,000.

The Association filed a petition for attorneys' fees and a motion to mold the verdict to account for pre- and post-judgment interest. Spruce Street, for its part, filed a motion for post-trial relief. The court heard the motions and still-outstanding declaratory judgment claims. Ultimately, the court granted the Association's motions to mold and for attorneys' fees in the amount of $1,336,172, and denied Spruce Street's post-trial motion. Spruce Street filed a motion for reconsideration of this order.

Meanwhile, on September 8, 2022, the trial court entered judgment on the equity claims. In the 2014 Lawsuit, the court found in favor of Spruce Street on its counterclaim demanding an accounting, and in favor of the Association as to its request for declaratory judgment based upon violations of the Act. The court denied the Association's request for specific performance on that claim. As for the 2015 Lawsuit, the court found in favor of the Association as to counterclaims I, II, and IV. Additionally, the court struck several provisions from the Declaration, including language from Article 16.1(d), discussed at length *infra*. In response, Spruce Street filed a motion for post-trial relief.

On September 30, 2022, the trial court entered three orders. It denied Spruce Street's motion for post-trial relief in the 2015 Lawsuit, denied Spruce Street's motion for reconsideration as to the 2014 Lawsuit, and granted the Association's request to amend its award of attorneys' fees to $1,374,493.50 based upon additional fees and costs incurred related to this litigation. After the jury verdicts were reduced to judgment, Spruce Street timely filed a notice of appeal to this Court as to the 2014 Lawsuit. The September 30, 2022 order was not entered on the 2015 Lawsuit docket until October 31, 2022, with notice pursuant to Pa.R.C.P. 236 given on November 14, 2022.[4] That same day, Spruce Street filed a notice of appeal as to the 2015 Lawsuit. Both Spruce Street and the trial court complied with Pa.R.A.P. 1925.

Spruce Street presents the following issues for our consideration:

1327 WDA 2022 (2014 Lawsuit)

1. Did the trial court abuse its discretion in granting the Association's petition for attorneys' fees, costs, and expenses in its entirety without deducting **any** fees, costs, and/or expenses that should not have been shifted to Spruce Street and [Mr.] Bishoff?

2. Did the trial court commit an error of law or abuse its discretion in awarding prejudgment interest on Count I (Failure to Deposit Building Exterior Reserve Funds) and Count III (Breach of Fiduciary Duty) of the Amended Complaint, which were unliquidated, statutory, and tort claims with undefined payment due dates?

3. Did the trial court commit an error of law or abuse its discretion when compounding interest on Count II (Failure to Pay

[4] Rule 236 concerns the prothonotary's duty to issue written notice of entry of judgments.

Condominium Assessments) and Count III (Breach of Fiduciary Duty) of the Amended Complaint?

4. Did the trial court err by failing to enter judgment notwithstanding the verdict ["JNOV"] on Count I (Failure to Deposit Building Exterior Reserve Funds) of the Amended Complaint because the Association failed to support its claim with expert testimony?

5. Did the trial court err by denying Spruce Street's second motion for post-trial relief asserting that Article 16.1(d) of the Declaration complied with the Condominium Act and should not have been stricken?

1349 WDA 2022 (2015 Lawsuit)

1. Did the trial court abuse its discretion in granting the Association's petition for attorneys' fees, costs, and expenses in its entirety without deducting any fees, costs, and/or expenses that should not have been shifted to Spruce Street?

2. Did the trial court err or abuse its discretion in refusing to terminate the February 26, 2015 consent order?

Spruce Street's brief at 8-9 (emphasis in original).

Attorneys' Fees

We begin with Spruce Street's claims that the trial court erred in granting the Association's request for attorneys' fees without deduction. We first set forth the relevant legal principles. It is well-settled that we review a trial court's determination of attorneys' fees for a palpable abuse of discretion. ***See Thunberg v. Strause***, 682 A.2d 295, 299 (Pa. 1996). "If the record supports a trial court's finding of fact that a litigant violated the conduct provisions of the relevant statute providing for the award of attorney's fees, such award should not be disturbed on appeal." ***Id***. (cleaned up).

To calculate attorneys' fees, Pennsylvania courts utilize the "lodestar approach," which has been explained thusly:

> The method begins with the number of hours reasonably expended multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of the lawyer's services. The party seeking attorneys' fees bears the initial burden of demonstrating the reasonableness of the fees by submitting evidence supporting the hours worked and the rates claimed. The party challenging the fee request bears the burden of proving that the fee request is unreasonable, and if it meets that burden, the lodestar amount may be adjusted at the court's discretion.

Richards v. Ameriprise Fin., Inc., 217 A.3d 854, 866 n.14 (Pa.Super. 2019). The following framework has helped courts determine the reasonableness of a request for attorneys' fees for decades:

> What is a fair and reasonable fee is sometimes a delicate, and at times a difficult question. The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

In re LaRocca's Tr. Est., 246 A.2d 337, 339 (Pa. 1968) (cleaned up).

Critically, this Court has explained that it expects trial courts, in determining the reasonableness of requested attorneys' fees, to "thoroughly scrutinize the specific line items that are challenged, generally evaluate the reasonableness of the expenditure of time for the services listed in the fee

petition, make adjustments when they are warranted, and explain its reasons for the award." ***Richards***, ***supra*** at 872. We have determined that "broad-brush approach[es]" to fashioning attorneys' fees awards hinder "our ability to perform proper appellate review." ***Id***.

By way of background, the Association sought $1,336,172 in attorneys' fees pursuant to §§ 3315(a) and 3311(a)(3) of the Act, as well as the Carlyle's Bylaws. ***See*** Post-Trial Motion, 5/19/22, at 2. Spruce Street objected, claiming in part that any fees related to the claims the Association lost should be excluded, and that the Association should instead receive $398,100.75 in attorneys' fees. ***See*** Response in Opposition, 8/5/22, at unnumbered 1-2.

Looking at the bases for the requested attorneys' fees, the bylaws provide in pertinent part that "[i]n any proceedings arising out of any alleged default by a Unit Owner under the Declaration, these Bylaws, the Rules and regulations or the Act, the Association shall be entitled to recover the **reasonable** costs and expenses of the Association, including attorney's fees." Bylaws at Article VI, § 6.1(b) (emphasis added). Likewise, the relevant Act provisions also permit the recovery of **reasonable** attorneys' fees.[5]

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[5] Specifically, the referenced subsections set forth the following with respect to attorneys' fees:

> (3) If the tort or breach of contract occurred during any period of declarant control ([§] 3303(c)), the declarant is liable to the association for all unreimbursed losses suffered by the association as a result of that tort or breach of contract, including costs and

(Footnote Continued Next Page)

> **reasonable attorney's fees**. If a claim for a tort or breach of contract is made after the period of declarant control, the association shall have no right against the declarant under this paragraph unless the association shall have given the declarant:
>
> > (i) notice of the existence of such a claim promptly after the date on which one or more members of the executive board who are not designees of the declarant learns of the existence of such a claim; and
> >
> > (ii) an opportunity to defend against such claim on behalf of the association but at the declarant's expense.

68 Pa.C.S. § 3311(a)(3) (emphasis added). Section 3315(a) further provides:

> **(a) General rule.--**The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate. A judicial or other sale of the unit in execution of a common element lien or any other lien shall not affect the lien of a mortgage thereon, except the mortgage for which the sale is being held, if the mortgage is or shall be prior to all other liens upon the same property except those liens identified in 42 Pa.C.S. § 8152(a) (relating to judicial sale as affecting lien of mortgage) and liens for condominium assessments created under this section. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to section 3302(a)(10), (11) and (12) (relating to powers of unit owners' association) and **reasonable costs and expenses of the association, including legal fees**, incurred in connection with collection of any sums due the association by the unit owner or enforcement of the provisions of the declaration, bylaws, rules or regulations against the unit owner are enforceable as assessments under this section. If an assessment is payable in installments and one or more installments is not paid when due, the entire outstanding balance of the assessment becomes effective as a lien from the due date of the delinquent installment.

68 Pa.C.S. § 3315(a) (emphasis added).

The court held a hearing on the Association's request for attorneys' fees on August 10-11, 2022. The Association presented invoices, as well as the expert opinion of Kenneth J. Yarski, II, Esquire, regarding legal rates and billing practices. He deemed the rates of the Associations' lawyers appropriate and the total request reasonable given the complexity of the case.

Spruce Street presented its own calculation of what it considered reasonable attorneys' fees,[6] as well as testimony from Arthur H. Stroyd, Jr., Esquire, as an expert in the matter of fee petitions. Attorney Stroyd opined that the fees requested by the Association should be reduced for the following reasons: (1) only fees associated with violations of the Act were reimbursable, (2) the Association switched law firms twice during the pendency of the cases, resulting in redundancies in legal coverage; and (3) the Association's attorneys did not efficiently manage their trial practice, for example, by using a lawyer, billing at a lawyer's rate, as their trial technician. Indeed, he went so far as to opine that Spruce Street's counter-calculation of $398,000 in attorneys' fees was "overly generous[.]" N.T. Post-Trial Motion Hearing, 8/10-11/22, at 33.

By order dated August 12, 2022, the trial court awarded the Association its full request for attorneys' fees. Spruce Street filed a motion for reconsideration because it averred that the trial court did not undertake any

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[6] This included a color-coded spreadsheet outlining its challenges to specific line items.

effort to limit the amount of fees that were not reimbursable. The court denied the motion and, instead, increased the attorneys' fees award by over $35,000, based upon additional invoices submitted, for a total of $1,374,493.50.

There is no dispute that the Association is entitled to attorneys' fees. Rather, Spruce Street contests the court's calculation, or lack thereof, as to what constituted reasonable attorneys' fees in this case. As summarized by Spruce Street:

> the trial court was required to make some apportionment in its award of counsel fees and expenses to the Association that recognizes a substantial portion of the fees and expenses charged by the Association should not be awarded because it did not prevail on the [construction defect and breach of warranty] claims that had the highest value and required the most effort, not to mention the time spent losing on Spruce Street's counterclaim. Instead, the trial court gave the Association every single penny it asked for in counsel fees and expenses.

Spruce Street's brief at 31.

The trial court candidly stated in its opinion to this Court that it was "not required to, and will not, partake in a line-by-line analysis of legal invoices in explaining how it arrived at its decision." Trial Court Opinion, 1/4/23, at 15 (citing ***Twp. Of Millcreek v. Angela Cres Tr. Of June 25, 1998***, 142 A.3d 948, 962 (Pa.Cmwlth. 2016)). Instead, based upon the duration of the case, the extensive pre-trial process, and two-week jury trial, the court determined that the Association was entitled to the full amount of attorneys' fees requested. ***See*** Trial Court Opinion, 1/4/23, at 18.

We observe that the trial court's reliance on this statement within ***Millcreek*** is misplaced, as we have explicitly held:

> our expectation that a trial court assessing the reasonableness of attorney fees will thoroughly scrutinize the specific line items that are challenged, generally evaluate the reasonableness of the expenditure of time for the services listed in the fee petition, make adjustments when they are warranted, and explain its reasons for the award.

Richards, ***supra*** at 872; ***accord Millcreek***, ***supra*** at 962 (concluding that a trial court's analysis is sufficient where it presents "in clear terms. . . how it arrived at a reasonable attorney fee award).[7]

The trial court's wholesale adoption of the Associations' request for attorneys' fees would itself evidence a lack of thorough scrutinization on the part of the trial court, in contravention of its duties in determining reasonable attorneys' fees. ***See Richards***, ***supra*** at 872. However, the trial court not only failed to perform this duty, it unequivocally refused. Such derogation of the duty imposed by our jurisprudence is impermissible and constitutes a palpable abuse of discretion. Surely, a thorough examination of the challenged line items in this complex case may be what the trial court considers a thankless burden. Nonetheless, that task is its responsibility. A trial court may not simply choose one of two competing numbers in determining the award of attorneys' fees. It must instead determine the

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[7] Additionally, we note that our sister court's holdings bear only persuasive value in this Court.

reasonableness of the attorneys' fees, making adjustments as necessary, and meticulously analyze the challenged line items. ***See id***.

Based on the foregoing, we vacate the trial court's award of attorneys' fees and remand for entry of a new award, determined by the court after "thoroughly scrutiniz[ing] the specific line items that are challenged, generally evaluat[ing] the reasonableness of the expenditure of time for the services listed in the fee petition, mak[ing] adjustments when they are warranted, and explain[ing] its reasons for the award." ***Id***. In short, the trial court shall fulfill its obligation of ascertaining the reasonable attorneys' fees.[8]

Pre-Judgment Interest

We next address Spruce Street's challenges to the awards of pre-judgment interest as to counts I and III, which were breach of contract for failing to deposit reserve funds for the building exterior and breach of fiduciary duty for failing to assess fines, penalties, and interest on late and unpaid assessments, respectively. ***See*** Spruce Street's brief at 44-51. We review an award of pre-judgment interest for an abuse of discretion. ***See Cresci Const. Servs, Inc. v. Martin***, 64 A.3d 254, 258 (Pa.Super. 2013).

> When a court comes to a conclusion through the exercise of its discretion, there is a heavy burden to show that this discretion

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[8] We note that the parties devote much real estate in their briefs to whether specific line items of attorneys' fees were reasonable. In light of our deferential standard of review, we will not review the individual challenges levied by Spruce Street on appeal, but instead remand to the trial court to conduct in the first instance an assessment of reasonable attorneys' fees in light of Spruce Street's challenges.

> has been abused. It is not sufficient to persuade the appellate court that it might have reached a different conclusion, it is necessary to show an actual abuse of the discretionary power. An abuse of discretion will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. Absent an abuse of that discretion, we will not disturb the ruling of the trial court.

Linde v. Linde, 220 A.3d 1119, 1150 (Pa.Super. 2019) (cleaned up).

The Restatement (Second) of Contracts governs pre-judgment interest in the following manner:

> (1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.
>
> (2) In any other case, such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

Restatement (Second) of Contracts § 354 (1981); ***see also Cresci***, ***supra*** at 259 (noting that Pennsylvania follows the Restatement (Second) of Contracts § 354).

In sum, the first subsection outlines when a party is entitled to pre-judgment interest as a matter of law, and the second subsection concerns the discretionary allowance of pre-judgment interest. Therefore, "before awarding pre[-]judgment interest, the court must identify the nature of the breach." ***Cresci***, ***supra*** at 259.

This Court has identified four situations where a party is entitled to pre-judgment interest as a matter of right: (1) "the contract was to pay . . . a monetary amount defined in the contract;" (2) the contract was to "render a performance for. . . a monetary amount defined in the contract;" (3) the contract was to "render a performance for a monetary amount that can be calculated from standards set forth in the contract; or" (4) the contract was to "render a performance for a monetary amount calculated from the established market prices." ***Id***. at 264–65 (cleaned up). Saliently, the amount in dispute must be set forth explicitly in the contract or readily capable of ascertainment, pursuant to the terms of the contract, at the time of breach, "as a prerequisite for pre[-]judgment interest" as of right. ***Id***. at 265 (cleaned up).

Outside of these four limited circumstances, a trial court may, within its discretion, award pre-judgment interest as an equitable remedy. ***See Linde***, ***supra*** at 1150; ***Cresci***, ***supra*** at 265. In that regard, the Restatement provides further explanation of § 354(2) in the comments:

> *d*. *Discretionary in other cases.* Damages for breach of contract include not only the value of the promised performance but also compensation for consequential loss. The amount to be awarded for such loss is often very difficult to estimate in advance of trial and cannot be determined by the party in breach with sufficient certainty to enable him to make a proper tender. In such cases, the award of interest is left to judicial discretion, under the rule stated in Subsection (2), in the light of all the circumstances, including any deficiencies in the performance of the injured party and any unreasonableness in the demands made by him.

Restatement (Second) of Contracts § 354, *Comment d.* (1981).

This Court has interpreted § 354(2) as permitting discretionary awards of pre-judgment interest, when it is not otherwise a matter of right, in order to ensure that "the plaintiff has been fully compensated." ***Cresci***, ***supra*** at 264.

> Such damages are designated not interest as such but rather compensation for delay in the nature of interest, and are measured by the legal rate of interest. The test for determining whether the plaintiff has been fully compensated has been variously stated, by the cases (depends upon all the circumstances of the case), the U.C.C. (reasonable expense incident to the delay or other breach), and the Restatements (as justice requires). The differences in these statements, however, are in our judgment stylistic only, not substantive.

Id. (cleaned up). Indeed, we have held that "[t]he fairest way for a court is to decide questions pertaining to interest according to a plain and simple consideration of justice and fair dealing." ***Linde***, ***supra*** at 1150 (cleaned up). This comports with "[t]he basic premise underlying the award of pre[-] judgment interest to a party[, which] centers on the fact that the breaching party has deprived the injured party of using interest accrued on money which was rightfully due and owing to the injured party." ***Widmer Eng'g, Inc. v. Dufalla***, 837 A.2d 459, 469 (Pa.Super. 2003).

With respect to the building exterior reserve funds, the Declaration "did not provide for a specific reserve amount or timeframe for deposits[.]" Trial Court Opinion, 1/4/23, at 19. As for count III, the breach of fiduciary duty, the Declaration was likewise silent. Therefore, we agree with Spruce Street that the Association was not entitled to pre-judgment interest on those awards

as a matter of right.[9] That does not end our inquiry, however, as the court still had discretion to award pre-judgment interest "as justice requires[.]" Restatement (Second) of Contracts § 354(2).

Here, the court determined that pre-judgment interest was appropriate as to count I because "Article 9.1 contemplated that the reserve amount would be at least incorporated into the annual budget[.]" Trial Court Opinion, 1/4/23, at 19. Upon review of the certified record, we discern no abuse of discretion on the trial court's part in awarding pre-judgment interest on this award to ensure that the Association was fully compensated. ***See Cresci***, ***supra*** at 264; ***Widmer***, ***supra*** at 469.

Regarding the breach of fiduciary duty claim, Spruce Street offers a further argument that we should vacate the award of pre-judgment interest because such an equitable remedy is precluded on tort actions where the damages were unliquidated. ***See*** Spruce Street's brief at 49. After review, we conclude that this contention cannot be asserted meritoriously, as our Court has explicitly upheld the equitable remedy of pre-judgment interest in a breach-of-fiduciary-duty tort action. ***See Linde***, ***supra*** at 1148 ("[O]ur courts have consistently held that, in appropriate cases, equitable relief is available to redress the breach of a fiduciary duty." (cleaned up)). Spruce

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[9] The trial court erred insofar as it found the Association was entitled to pre-judgment interest as a matter of right. ***See*** Trial Court Opinion, 1/4/23, at 19.

Street has not convinced us that the action herein is inappropriate for equitable remedies. As a result, the court was not precluded from awarding pre-judgment interest on this claim.

We therefore direct our attention to the court's reasoning for awarding pre-judgment interest on the breach of fiduciary duty award in order to determine whether it abused its discretion in granting the Association's request for pre-judgment interest. In evaluating the request, the trial court found that interest was appropriate because the Declaration provided that "[s]ums assessed by the Executive Board against any Unit Owner shall also bear interest thereon at the rate of fifteen (15%) percent per annum or such other rate as may be determined by the Executive Board from the 60th day following the due date of any such assessment." Trial Court Opinion, 1/4/23, at 21 (quoting Declaration at Article 9.8). Once again, our review reveals no error on the trial court's part in using its discretion to award pre-judgment interest on this award to ensure the full compensation of the Association. ***See Cresci***, ***supra*** at 264; ***Widmer***, ***supra*** at 469.

In sum, Spruce Street's claims challenging the awards of pre-judgment interest garner no relief.

Compound Interest

Spruce Street also challenges the award of compound interest at count II, breach of contract for failing to pay the proper assessments, and count III, breach of fiduciary duty in regard to assessing fines, penalties, and interest

on late and unpaid assessments. ***See*** Spruce Street's brief at 51-53. We consider this issue mindful of the following legal principles. "It is fairly well established that the law in this Commonwealth frowns upon compound interest and as such will only permit compound interest on a debt when the parties have provided for it by agreement or a statute expressly authorizes it." ***Powell v. Ret. Bd. of Allegheny Cnty.***, 246 A.2d 110, 115 (Pa. 1968) (citations omitted). Where no such authority exists, the court must "use simple and not compound interest." ***Id***.

Here, the trial court concluded that because the jury found that Mr. Bishoff had breached his fiduciary duty at count III by holding money belonging to the Association, it was required "to force disgorgement of [Mr. Bishoff's] unjust enrichment by holding interest upon the assessments deemed to be due by the jury in order to force complete restitution." Trial Court Opinion, 1/4/23, at 20-21 (citation omitted). As for count II, the court found that Article 9.8 of the Declaration provided for compound interest on "any owed assessments, interest, and late fees" as they "would become immediately due following 60 days, thus becoming principal." ***Id***. at 21. The court finally concluded that based upon the jury's award, it had applied 15% compounding interest from 2009 to 2014, and the court saw "no reason to cut off the 15% compounding prejudgment [interest] from 2014 to 2022." ***Id***. In short, the court defended its imposition of compound interest as being guided by the Declaration and principles of equity. ***Id***. at 20-21.

Initially, we must reject the trial court's reliance on equity, as our jurisprudence clearly holds that compound interest is only permitted where it has been provided for by agreement or statute. ***See Powell***, ***supra*** at 115. Since no statute authorizes compound interest in this case, we must determine whether the Declaration provided for it. Spruce Street, the trial court, and the Association all point to the same provision in the Declaration to support their positions advocating for either simple or compound interest. Accordingly, the polestar of this claim is whether the relevant language of Article 9.8 of the Declaration contemplates compound or simple interest.

In its entirety, the Article provides as follows:

> 9.8. Interest and Late Charges. All Common Expense Assessments and Special Assessments shall be subject to a reasonable late charge, with the amount to be determined at the discretion of the Executive Board, which late charge will be levied as of the tenth (10th) day following the due date for the payment of any such assessments. Initially, the late charge will equal five percent (5%) of the amount of the late payment. Sums assessed by the Executive Board against any Unit Owner shall also bear interest thereon at the rate of fifteen (15%) percent per annum or such other rate as may be determined by the Executive Board from the 60th day following the due date of any such assessment. If any assessments are past due for more than sixty (60) days, the Executive Board may accelerate all of the assessment payments due from such Unit Owner for that fiscal year of the Association, and the total amount assessed against the Unit Owner for that fiscal year but not yet paid shall become immediately due and payable.

Declaration at Article 9.8.

According to Spruce Street, this provision "provides the Association the ability to accelerate the balance of future assessments **not yet due and**

owing for the fiscal year and to demand prompt payment in full." Spruce Street's brief at 52 (emphasis in original). Contrarily, the Association agrees with the trial court's interpretation that the language providing that the late assessments owed would "become immediately due and payable[,]" meant that they would become part of the principal. ***See*** the Association's brief at 40 (quoting Declaration at Article 9.8).

Stated simply, "interest is compounded when it is added to the principal, the result of which is treated as a new principal for calculating the interest due for the next term." ***Katzeff v. Fazio***, 628 A.2d 425, 430 (Pa.Super. 1993) (citations omitted). Our reading of Article 9.8 does not demonstrate an agreement to compound the interest related to unpaid assessments. While Article 9.8 provides for 15% interest per year on sums assessed by the Executive Board, it does not direct that the interest be added to the principal and a new principal calculated for interest due the following term. Since the plain language of Article 9.8 does not unequivocally authorize compound interest, and the Declaration does not otherwise so provide, the trial court was required to employ simple interest.

Based on the foregoing, we vacate the orders awarding compound interest as to counts II and III.

JNOV

Spruce Street next argues that the trial court erred in not granting its request for JNOV as to count I because the Association did not present an

expert witness to support its claim. ***See*** Spruce Street's brief at 53. Our standard of review for JNOV claims is well-settled:

> We will reverse a trial court's grant or denial of a JNOV only when we find an abuse of discretion or an error of law that controlled the outcome of the case. Further, the standard of review for an appellate court is the same as that for a trial court.
>
> There are two bases upon which a JNOV can be entered; one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that, even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in his favor. Whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
>
> Furthermore, we note:
>
> The proper standard of review for an appellate court when examining the lower court's refusal to grant a JNOV is whether, when reading the record in the light most favorable to the verdict winner and granting that party every favorable inference therefrom, there was sufficient competent evidence to sustain the verdict. Questions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence.

Greco v. Myers Coach Lines, Inc., 199 A.3d 426, 430 (Pa.Super. 2018) (cleaned up).

Presently, there is no dispute that Spruce Street owned the exterior of the building and was required to provide sufficient funds for its maintenance pursuant to the Declaration. The crux of Spruce Street's challenge, rather, is whether the Association established a basis for the jury's award of $500,000

on this claim without presenting an expert witness to testify regarding "the amount and timing of a reserve deposit." Spruce Street's brief at 53.

At trial, the jury was presented with the Declaration, which included the following relevant language regarding the required funds for the maintenance of the building exterior:

> 1.3.2 Terms Defined Herein. The following terms shall be defined as follows:
>
> . . . .
>
> c. **"Building Exterior"** means the Building's exterior, including but not limited to all exterior walls (including but not limited to front walls, side walls, and back walls), elevations, building height, roofs, color, building materials, windows and doors, and all air space above the Building.
>
> . . . .
>
> 2.7 Maintenance Responsibilities
>
> a. General. Maintenance responsibility is divided into responsibility for performance and responsibility for payment. Each Unit Owner is responsible for both performance of and payment for all maintenance, repair and replacement required for his Unit. In general, the Association is responsible for performing and paying for the maintenance, repair and replacement of both the Common Elements and the Limited Common Elements. Except as otherwise specified in the Declaration, the cost of the maintenance, repair and replacement of specific Limited Common Elements is charged as a Limited Expense, and payment responsibility is shared by the Unit Owner or Owners having the right to use such specific Limited Common Element in the same proportion as the respective Percentage Interests of such Units.
>
> . . . .

> c. Commercial Unit. The Declarant, as Owner of the Commercial Unit, in full satisfaction of all such Unit Owner's obligations for the Building Exterior, shall deposit with the Association, an amount as a reserve for the maintenance, repair and replacement of the Building Exterior as defined in Article 1.3.2. (above) (subject to a Deed of Historic Preservation and Conservation Easement in favor of the Pittsburgh History and Landmarks Exhibit (see Exhibit "B")) which is a part of this Unit.
>
> . . . .
>
> 9.14 Reserve for Building Exterior. As set forth in Article 2.7(c), the budget shall include an amount deposited by Declarant as a reserve for the maintenance, repair and replacement of the Building Exterior as defined in Article 1.3.2 (above) (subject to a Deed of Historic Preservation and Conservation Easement in favor of the Pittsburgh History and Landmarks Foundation (see Exhibit "B")).

The Declaration at Articles 1.3.2(c), 2.7(a), (c), and 9.14.

In its Rule 1925(a) opinion, the trial court explained that it rejected Spruce Street's request for JNOV as to this claim because the jury heard testimony from Brenda Sebring, Esquire, about the drafting of the Declaration; expert witness Robert Lewis regarding the Carlyle's condition and repair costs; and expert witness Peter Miller as to reserve calculations. ***See*** Trial Court Opinion, 1/4/23, at 23.

Spruce Street contends that the trial court's response does not address the question of whether expert testimony was required to sustain the Association's burden of establishing the amount of the reserve funds. ***See*** Spruce Street's brief at 53. Regardless, Spruce Street maintains that the evidence presented did not establish "the amount of money Spruce Street

could have, should have, or must have deposited to comply with Article 2.7(c) of the Declaration, and when." ***Id***. at 54. Without such evidence, Spruce Street posits that the trial court should have granted its request for JNOV.

In determining whether the court erred in denying Spruce Street's JNOV request, we consider the pertinent evidence presented at trial. Called by the Association, Attorney Sebring testified about, *inter alia*, writing the Declaration with Spruce Street and the advice she provided regarding the various provisions. In particular, she explained that Spruce Street had desired to own the exterior of the building. Attorney Sebring did not include a set amount for the reserve fund in Article 2.7(c), explaining that was outside the purview of her duties; however, she did clarify to Spruce Street that the amount had to be fair and supported. ***See*** N.T. Jury Trial Volume II, 4/27/22-5/9/22, at 356-57. Indeed, she went so far as to advise Mr. Bishoff that he should calculate the amount based upon the replacement cost and useful life of the components of the exterior of the building. ***Id***. at 357-58. The amount of the reserve fund was meant to be a "concrete amount that would get through the first replacement, and then it recycles because it continues to be fed by contributions at that point from the unit owner because Spruce Street's obligation was limited to a one[-]time contribution that was to be fair and substantiated." ***Id***. at 358-59.

The Association also presented Mr. Lewis, an expert in construction matters. Of note, he explained the deteriorating condition of the roof and the

"horrendous condition" of the windows. ***Id***. at 480, 487. He reviewed historic documents and the current conditions of the exterior of the Carlyle before calculating the cost for repair. ***Id***. at 492. In total, he estimated the cost to remedy all the deficient conditions at the Carlyle, including the exterior of the building, the fire code violations, and the flawed construction, to be approximately $7,700,000. ***Id***. at 495. With specific regard to the exterior, he estimated $6.5 million was required to remedy the problems. ***Id***. at 532. That estimate included $971,040 for "repairing, replacing and remedying the problem with the windows[,]" $994,463 to repair the masonry with the attendant scaffolding cost, and $435,700 to replace the roof. ***Id***. at 547, 550, 557. However, as to the masonry, Spruce Street elicited testimony that it would cost only $247,000 to repair the masonry without the scaffolding, and that Mr. Lewis did not consult a mason to examine the condition of the façade before reaching the above estimate. ***Id***. at 550.

Spruce Street, meanwhile, presented Peter Miller as an expert witness in community association reserve analysis. He explained how a reserve fund operates, how it is funded over a period of time, and the method for calculating the amount of money that should be paid towards the reserve. He did not provide a recommended amount for the building exterior reserve fund in this case, but opined that Mr. Lewis's estimation followed a method different from a reserve calculation because it did not account for remaining economic life of the items to be repaired or replaced. ***Id***. at 659. Finally, the jury had the

benefit of several photographs and drone video footage of the exterior of the Carlyle to consider in its deliberations, as well as testimony from various individuals who had performed repair work on the exterior of the Carlyle.

Reviewing the certified record in light of our standard of review, we glean no error from the trial court's rejection of Spruce Street's JNOV request. Spruce Street has not convinced us that the Association was required to engage a reserve expert in order to sustain its burden as to the reasonable amount for the reserve fund. Rather, we conclude that, when read in the light most favorable to the Association, there was sufficient competent evidence to support the jury's verdict of $500,000 to the Association for Spruce Street's failure to finance the exterior building reserve fund. ***See Greco***, ***supra*** at 430. It was within the discretion of the jury to determine what it deemed to be an appropriate sum for the fund under the terms of the Declaration. Accordingly, Spruce Street is not entitled to relief on this claim.

Striking Language from Article 16.1(d)

In its next issue, Spruce Street contends that the trial court erred in denying its second motion for post-trial relief, which asserted that the court should not have stricken Article 16.1(d) of the Declaration because it complied with the Act. ***See*** Spruce Street's brief at 58. As detailed *supra*, the trial court struck language from Article 16.1(d) of the Declaration when it decided the declaratory judgment and other remaining equity claims. Accordingly, our standard of review is narrow, requiring us to "set aside factual conclusions

only where they are not supported by adequate evidence" while affording plenary review "to the trial court's legal conclusions." ***Universal Health Servs., Inc. v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n***, 884 A.2d 889, 892 (Pa.Super. 2005) (cleaned up). Of relevance to the instant issue, the Act dictates that, except as otherwise expressly provided therein, provisions of the Act "may not be varied by agreement and rights conferred by [the Act] may not be waived." 68 Pa.C.S. § 3104.

We set forth the relevant portions of the Declaration and the Act, with the operative language emphasized in bold typeface:

> [N]o amendment shall discriminate against any Unit Owner nor against any Unit or class or group of Units unless the Unit Owners and mortgagees so affected shall consent; no amendment shall change any Unit nor the percentage share in the Common Elements or Limited Common Elements, and any other of its appurtenances nor increase the Unit Owner's share of the common Expenses unless the owner of the Unity concerned and the Eligible Mortgagee with respect thereto shall join in the execution of the amendment and further, except to the extent permitted by applicable law, no amendment shall change any of the provisions governing the following without the approval of holders of Eligible Mortgagees encumbering at least fifty-one percent (51%) of the Units which are encumbered by Eligible Mortgages: (i) voting rights; (ii) increases in monthly assessments that raised the previously assessed monthly amount by more than twenty-five percent (25%), assessment liens, or their priority of assessment liens; (iii) reductions in reserves for maintenance, repair and replacement of the Common Elements; (iv) responsibility for maintenance and repairs; (v) reallocation of interests in Common Elements or Limited Common Elements or rights to their use; (vi) redefinition of any Unit boundary; (vii) convertibility of Units into Common Elements or vice versa; (viii) expansion or contraction of the Property or the addition, or annexation or withdrawal of property to or from the Property; (ix) hazardous or fidelity insurance requirements; (x) imposition of any restrictions on the leasing of Units; (xi) imposition of any restrictions on a Unit

Owner's right to sell or transfer his or her Unit; (xii) restoration or repair of the Property (after damage or partial condemnation) in a manner other than specified in Declaration; or (xiii) any provisions which are for the express benefit of Eligible Mortgagees or eligible insurers or guarantors of Eligible Mortgages on the Units. Notwithstanding the provisions of Article XIII hereof, the Condominium may not be terminated for any reason other than substantial destruction or condemnation of the Condominium Property, without the approval of holders of Eligible Mortgages encumbering at least sixty-seven percent (67%) of the Units which are subject to Eligible Mortgages. No amendment of this Declaration shall make any change that would in any way affect any of the rights, privileges, powers, and options of the Declarant unless the Declarant shall join in the execution of such amendment. Notwithstanding the foregoing, the Declarant reserves the right to change the location, interior design, and arrangement of all Units and to alter the boundaries between Units, to subdivide or convert Units, or portions thereof, into two or more Units, Common Elements, or a combination of Units and Common Elements, as well as to combine Units so long as Declarants own all the Units so changed or altered. **Said changes shall be become** [*sic*] **effective through an amendment which need only be executed by Declarant, or upon application of the Declarant, the Association shall prepare, execute and record an amendment to this Declaration and the Declaration Plans which reflects such change/s or alteration/s.** If more than one Unit is converted, the Percentage Interests of the Units affected shall be duly apportioned. If, in the judgment of the Executive Board, any amendment is necessary to cure any ambiguity or to correct or supplement any provision of the Declaration, or the Plats and Plans which is ineffective or inconsistent with any other provision hereof or thereof or with the Act, or applicable provisions of the Act, or to change correct or supplement anything appearing or failing to appear in the Plat and Plans which is incorrect, defective or similarly inconsistent, or if any such amendment is necessary to conform to the then-current requirements of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation or the Federal Housing Administration with respect to condominium projects, the Executive Board may effect an appropriate corrective amendment without the approval of Unit Owners or the Eligible Mortgagees upon its receipt of an opinion from independent counsel that the proposed amendment is permitted by the terms of this sentence, together with a like opinion from an independent registered

> architect or licensed professional engineer in the case of any such amendment to the Declaration Plans. Each such amendment shall be effective upon the recording thereof in the Department of Real Estate of Allegheny County, or any successor thereto, of an appropriate instrument setting forth the amendment and its adoption, duly executed and acknowledged by the appropriate officer of the Executive Board.

Declaration at Article 16.1(d) (emphasis added). As for the Act:

> **(a) General rule.--**If the declaration expressly so permits, a unit may be subdivided into two or more units or, in the case of a unit owned by a declarant, may be subdivided or converted into two or more units, common elements, or a combination of units and common elements. **Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit**[,] **or upon application of a declarant to convert a unit the association shall prepare, execute and record an amendment to the declaration, including the plats and plans, subdividing or converting that unit.**
>
> **(b) Execution and contents of amendment.--**The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created and reallocate the common element interest, votes in the association and common expense liability formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.
>
> **(c) Conversion of unit of declarant to common elements.--** In the case of a unit owned by a declarant, if a declarant converts all of a unit to common elements, the amendment to the declaration must reallocate among the other units the common element interest, votes in the association and common expense liability formerly allocated to the converted unit on a pro rata basis, inter se.

68 Pa.C.S. § 3215 (emphasis added).

After comparing the language of Article 16.1(d) and § 3215, the trial court held that Article 16.1(d) did not comply with the Act. It explained its holding thusly:

> While Article 16.1(d) of the Declaration and [§] 3215 of the Act may share some language, [Spruce Street] conveniently fail[ed] to mention that [§] 3215 does not provide that the declarant may reserve the right to change the location, interior design, and arrangement of all units, alter the boundaries between units, or combine units by the unilateral execution of an amendment. As such, th[e trial] court appropriately struck the inconsistent language (bolded above) while concurrently making clear that any subdivision, relocation of boundaries, or conversion of units or common elements in the Carlyle must comply with the Condominium Act.

Trial Court Opinion, 1/4/23, at 28-29 (cleaned up).

Upon review, we agree with the reasoning of the trial court. The parties were not permitted to vary § 3215(a) by agreement, and therefore the violative language within Article 16.1(d) of the Declaration was properly stricken. Since we conclude that the trial court did not err in striking this language and denying Spruce Street's request to reconsider its decision to strike, Spruce Street is not entitled to relief on this claim.

Consent Order

Finally, Spruce Street argues that the trial court erred by refusing to terminate a February 2015 consent order. ***See*** Spruce Street's brief at 60.

By way of background, on February 26, 2015, the court entered an order memorializing the parties' consent to, *inter alia*, "allow [Spruce Street] the ability to sell Declarant-owned units without a lien, so long as [Spruce Street]

deposited 150% of the amount set forth in a Certificate of Assessment Status in escrow[.]" Trial Court Opinion, 1/4/23, at 26. The court denied Spruce Street's post-trial request to terminate the consent order because it deemed it incumbent upon the parties to mutually agree to amend the consent order, rather than for the court to unilaterally terminate it. ***See id***. As explained by the court, the funds were to be held:

> "pending further Order of Court so that [the parties] may assert and prove their claims thereto." This language indicates that the amount held in escrow was collected against a potential future verdict, which is now in existence against [Spruce Street]. [Spruce Street] make[s] no argument that the Consent Order was entered by way of fraud, accident, or mistake. Although the circumstances have changed, in that the jury found in favor of the Association regarding the assessment-related claims, equity requires that the Consent Order remain in place absent mutual termination between the parties and that the verdict be offset by the amount held in escrow once the Consent Order is eventually vacated.

Id. (cleaned up).

Spruce Street has separately challenged the Association's calculations for the Certificates of Assessment. In this appeal, however, Spruce Street requests that the consent order be terminated because "any overpayments into court should be refunded to Spruce Street with the balance paid to the Association and credited against the judgment against Spruce Street for past due assessments and/or Bishoff for breach of fiduciary duty." Spruce Street's brief at 61-62. According to Spruce Street, the temporary consent order was superseded by the entry of relief after trial. ***Id***. at 62.

Upon review, we agree with the trial court that it was not up to the court to vacate the consent order. Our Supreme Court has held that a consent order

> is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties—a contract binding the parties thereto to the terms thereof. As a contract, the court, in the absence of fraud, accident or mistake, had neither the power nor the authority to modify or vary the terms set forth.

Lower Frederick Twp. v. Clemmer, 543 A.2d 502, 510 (Pa. 1988) (cleaned up). There was no allegation of fraud, accident, or mistake by Spruce Street, and indeed, Spruce Street has not challenged the consent order itself. Rather, based upon the changed circumstances following trial, Spruce Street sought to end the consent order. Since it is up to Spruce Street and the Association to come to appropriate terms to modify or terminate the consent order, the trial court did not err in denying Spruce Street's unilateral request to terminate the consent order.

Conclusion

Based on the foregoing, we affirm the orders appealed from in all respects, except as to the award of compound interest and attorneys' fees. We vacate the portions of the orders awarding compound interest and attorneys' fees, and remand for a determination by the trial court of the appropriate award of attorneys' fees pursuant to this memorandum.

Orders affirmed in part and vacated in part. Cases remanded with instructions. Jurisdiction relinquished.

Judge King joins this Memorandum.

Judge Olson concurs in the result.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

1/23/2024