

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

HEBA EL ATTAR, ET AL.,	:	
	:	
Plaintiffs-Appellants,	:	No. 111695
	:	
v.	:	
	:	
MARINE TOWERS EAST CONDOMINIUM OWNERS' ASSOCIATION, INC., ET AL.,	:	
	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED, VACATED, AND REMANDED
RELEASED AND JOURNALIZED: July 27, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-16-873728

Appearances:

Ott & Associates, Co., LPA, Steven M. Ott, Christina
Pochemsaniy, and Rebecca M. Black, *for appellants.*

Reminger Co., L.P.A., Holly Marie Wilson, Andrew J.
Dorman, Katie Lynn Zorc, and Brianna M. Prislipsky, *for
appellees.*

MARY EILEEN KILBANE, J.:

{¶ 1} Plaintiffs-appellants Heba El Attar, Kevin McDowell, Claudia
Gruchalla, Robert Monahan, Dennis Grabowski, and Dolores Mlachak (collectively,

“Owners”) appeal from the trial court’s judgment denying their motion for partial summary judgment, the trial court’s judgment denying their motion for judgment notwithstanding the verdict, and the jury verdict in favor of defendants-appellees Marine Towers East Condominium Owners’ Association, Inc. (“the Association”) and various individual members of the Marine Towers East Board of Directors. For the reasons that follow, we reverse, vacate, and remand.

Factual and Procedural History

{¶ 2} Marine Towers East is a 15-story building located on Edgewater Drive in Lakewood, Ohio comprised of 136 condominium units. It was built in 1963 and the units were converted to condominiums in 1971; the Association was created shortly thereafter. The Association is comprised of individuals and entities who own condominiums in the building, and it is governed by a declaration and bylaws. In the winter of 2015, the heating, ventilation, and cooling (“HVAC”) system at Marine Towers East sustained unexpected damage from a burst pipe that rendered the system unable to heat and cool some units. Marine Towers East temporarily restored heat to the affected units by providing space heaters that required the installation of a dedicated electrical line. This project cost approximately \$200,000 and was paid for entirely by a special assessment imposed on all unit owners. The Association and its board subsequently learned that it would cost more than \$4 million to replace the HVAC system for the building. The Association gave notice to its unit owners that they would have to pay a special assessment to cover the cost of the repair.

{¶ 3} This case was initiated on December 29, 2016, when the Owners filed a complaint and motion for preliminary and permanent injunction against the Association and various individual members of the Marine Towers East 2015 Board of Directors. The complaint sought a declaration from the trial court of the duty to pay the assessment and further claimed that the Association was liable for breach of contract and breach of fiduciary duty for failing to establish and maintain a reserve fund as required by the terms of the Association's governing documents and R.C. Chapter 5311 of the Revised Code. The Owners also sought injunctive relief to prevent the Association from collecting special assessments and a declaratory judgment relating to reserve funds. The Association answered the complaint, and on April 28, 2017, filed a motion for judgment on the pleadings. The Association argued that its governing documents did not require it to establish a reserve fund and that the statutory duty to establish a reserve fund had been waived by a majority of the owners who voted on an annual basis to pay for the extraordinary expenses by way of special assessment. On May 26, 2017, the Owners filed a brief in opposition to the Association's motion for judgment on the pleadings.

{¶ 4} On July 27, 2017, the trial court held a hearing on the Association's motion for judgment on the pleadings and subsequently granted the motion, stating in a journal entry:

Pursuant to Civ.R. 12(C), dismissal based on judgment on the pleadings is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that

would entitle him to relief. *Hignite v. Glick, Layman & Assocs.*, 8th Dist. Cuyahoga No. 95782, 2011-Ohio-1698, p. 9. The court finds that the plaintiffs herein can prove no set of facts in support of their claim that would entitle them to relief. Accordingly, plaintiffs' complaint is dismissed in its entirety.

{¶ 5} On August 16, 2017, the Owners appealed the trial court's decision.

This court reversed the decision of the trial court and remanded the case, stating:

We find as a matter of law that the Association's governing documents required it to "build up and maintain a reasonable reserve" to pay for extraordinary expenditures that are not included in the Association's annual budget. We also find that because the Association's governing documents provided for a reserve fund, R.C. 5311.081(A), which applies only in the event an association's declarations or bylaws are silent on the issue, is inapplicable. The court therefore erred by granting judgment on the pleadings and dismissing the owners' complaint.

Heba El Attar v. Marine Towers E. Condominium Owners' Assn., 8th Dist. Cuyahoga No. 106140, 2018-Ohio-3274, ¶ 16 ("*Marine Towers East I*").

{¶ 6} Following the remand, on November 18, 2020, the Owners filed a motion for partial summary judgment. On June 28, 2021, the trial court denied this motion.

{¶ 7} The case proceeded to a jury trial on August 9, 2021. On August 17, 2021, the case was submitted to the jury for deliberations. The same day, the jury returned a verdict for the Association.

{¶ 8} On August 23, 2021, the Owners filed a motion for judgment notwithstanding the verdict. Approximately nine months later, on May 25, 2022, the trial court denied this motion.

{¶ 9} On June 6, 2022, the Owners filed a timely notice of appeal. The Owners raise the following four assignments of error:

I. The trial court erred in denying Owners' motion for partial summary judgment.

II. The trial court abused its discretion by not applying the law-of-the-case doctrine.

III. The trial court abused its discretion by failing to apply the law-of-the-case in its jury instructions.

IV. The trial court erred by permitting Appellees to excuse their breach by applying the law of contractual waiver in its jury instructions.

Legal Analysis

I. Summary Judgment

{¶ 10} The Owners' first assignment of error challenges the trial court's denial of their motion for partial summary judgment with respect to Counts 1, 2, 3, and 4 of their amended complaint. We review a trial court's summary judgment decision de novo, applying the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C).

{¶ 11} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate the absence of a genuine issue of material fact and entitlement to summary judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the

moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party must then point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. If the nonmoving party fails to meet this burden, summary judgment is appropriate. *Id.*

{¶ 12} Here, the Owners moved for summary judgment on their declaratory-judgment claim, their breach-of-contract claim, their breach-of-fiduciary-duty claim, and their claim for injunctive relief.

{¶ 13} We begin with the declaratory-judgment claim. With respect to their declaratory-judgment claim, the Owners sought declaratory judgment as to the requirement that the Association build up and maintain a reserve fund. Specifically, the Owners’ motion for summary judgment sought a declaration that “the Board must adopt a budget for reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments.” The Owners sought to avoid relitigating issues that this court had decided in *Marine Towers East I*.

{¶ 14} Our review of the record, including *Marine Towers East I*, makes clear that there are no genuine issues of material fact as to the declaratory-judgment claim. Indeed, while the Association disputes the contours of the legal conclusions this court reached in the first appeal, it does not point to a genuine issue of material fact that would preclude summary judgment on the Owners’ declaratory-judgment claim. *Marine Towers East I* clearly held that the Association is required to build

up and maintain a reasonable reserve to pay for extraordinary expenditures that are not included in its annual budget. Therefore, the Owners were entitled to summary judgment on their declaratory-judgment claim. The trial court erred when it denied summary judgment as to the declaratory-judgment claim.

{¶ 15} We turn now to the claims for breach of contract, breach of fiduciary duty, and injunctive relief. In support of their motion for summary judgment for each of these claims, the Owners assert that the Association failed to maintain a reserve account in accordance with the bylaws. This, according to the Owners, amounted to a breach of contract and a breach of fiduciary duty and entitled the Owners to injunctive relief. Our review of the record reveals genuine issues of material fact with respect to whether the Association did, in fact, comply with the reserve requirement in the bylaws. While the Owners point to numerous instances in the record showing that the Association did not build up and maintain a reserve account in accordance with its bylaws, the record also contains testimony from numerous witnesses that the way in which the Association managed its finances satisfied the reserve requirement. Our review of the record also reveals that the Association's argument on this issue has evolved over the course of this case. In the first appeal, the Association "concede[d] that it did not establish the reserve, but maintains that it was not required to do so." *Marine Towers East I* at ¶ 10.¹ On

¹ The Association maintains that it did not concede that it did not establish a reserve, but rather that it did not abide by the 10% reserve requirement in R.C. 5311.081(A)(1). Our review of the record reveals that at the time of the first appeal, the Association maintained that it was not required to establish a reserve. Following this court's conclusion that it was

remand following *Marine Towers East I*, during the jury trial, and in the instant appeal, the Association acknowledges that it was legally required to build up and maintain a reserve, but argues that it satisfied this requirement and that its budget complied with the bylaws.

{¶ 16} Moreover, the Association argues that there was a genuine issue of material fact with respect to another element of the Owners’ breach-of-contract claim — whether the Owners performed their contractual obligations. “To prove a breach of contract, a plaintiff must prove the existence and terms of a contract, the plaintiff’s performance of the contract, the defendant’s breach of the contract, and damages or loss to the plaintiff.” *Broadway Concrete Invests., L.L.C. v. Masonry Contracting Corp.*, 2022-Ohio-530, 185 N.E.3d 612, ¶ 44 (8th Dist.), quoting *Delta Fuels, Inc. v. Ohio DOT*, 2015-Ohio-5545, 57 N.E.3d 220, ¶ 39 (10th Dist.). The Association points to various deposition testimony that several of the Owners have refused to pay special assessments or increased maintenance fees for the duration of this case, and, therefore, have not performed their contractual obligations.

{¶ 17} In light of the existence of a genuine issue of material fact as to the remaining claims, the trial court did not err in denying the Owners’ motion for summary judgment with respect to the breach-of-contract, breach-of-fiduciary-duty, and injunctive-relief claims.

required to do so, the Association argued at the trial court that it satisfied the reserve requirement, just not to the satisfaction of the Owners.

{¶ 18} The first assignment of error is sustained in part and overruled in part. The trial court's denial of the Owners' motion for summary judgment as to their declaratory-judgment claim is reversed. The trial court's denial of the Owners' motion for summary judgment as to their breach-of-contract, breach-of-fiduciary-duty, and injunctive-relief claims is affirmed.

II. Law of the Case

{¶ 19} In their second assignment of error, the Owners argue that the trial court abused its discretion by not applying the law-of-the-case doctrine. Specifically, the Owners argue that the trial court disregarded this court's mandate in the first appeal when it ignored three specific holdings in *Marine Towers East I*: (1) the Association has a legal obligation to maintain a reserve account; (2) the Association's attempt to waive this obligation was improper; and (3) the Association is bound by Ohio law to comply with its own bylaws.

{¶ 20} In their third assignment of error, the Owners argue that the trial court abused its discretion by failing to apply the law of the case in the jury instructions. Because both the second and third assignments of error involve the law of the case, we will address them together.

{¶ 21} In response to the Owners' arguments that trial court failed to apply the law of the case, the Association argues that the first appeal was a review of the trial court's Civ.R. 12(C) dismissal, and as such took place before the parties had engaged in any discovery or presented any evidence. The Association asserts that the holding of *Marine Towers East I* provides that the bylaws require it to "build up

and maintain a reasonable reserve to pay for extraordinary expenditures not included in the Association's annual budget" and further, that R.C. 5311.081 is inapplicable to the Association.

{¶ 22} The law-of-the-case doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984), citing *Gohman v. St. Bernard*, 111 Ohio St. 726, 730, 146 N.E. 291 (1924). The purpose of the doctrine is "to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, 109 N.E.3d 1194, ¶ 14, quoting *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15.

{¶ 23} Describing the doctrine, the Ohio Supreme Court has stated:

Although the law-of-the-case doctrine generally is a rule of practice rather than a binding rule of substantive law, we have also explained that the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals. The doctrine therefore functions to compel trial courts to follow the mandates of reviewing courts and absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.

Giancola at ¶ 15.

{¶ 24} The purpose of jury instructions is to properly guide the jury in performing its task by delineating the issues and by providing the law of the case

and necessary procedural instructions. *7471 Tyler Blvd., LLC v. Titan Asphalt & Paving, Inc.*, 2020-Ohio-5304, 162 N.E.3d 851, ¶ 96 (11th Dist.), citing *Robb v. Lincoln Publishing (Ohio)*, 114 Ohio App.3d 595, 623, 683 N.E.2d 823 (12th Dist.1996), and *Sweet v. Clare-Mar Camp, Inc.*, 38 Ohio App.3d 6, 11, 526 N.E.2d 74 (8th Dist.1987). Requested jury instructions should be given if they are correct statements of law. *Farkas v. Ramage*, 8th Dist. Cuyahoga No. 77295, 2000 Ohio App. LEXIS 4481, 13 (Sept. 28, 2000), citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991). We review a trial court's decision on jury instructions for an abuse of discretion. *Haddad v. Maalouf-Masek*, 2022-Ohio-4085, 200 N.E.3d 1276, ¶ 33 (8th Dist.), citing *State v. Daniel*, 2016-Ohio-5231, 57 N.E.3d 1203, ¶ 30 (8th Dist.), citing *State v. Leonard*, 8th Dist. Cuyahoga No. 98626, 2013-Ohio-1446, ¶ 33. An abuse of discretion occurs when a trial court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35. Further, any error in a charge to the jury in a civil case is generally not grounds for reversal unless the instruction is calculated to mislead the jury to the prejudice of the party seeking reversal. *Kingston v. Austin Dev. Co.*, 8th Dist. Cuyahoga No. 72034, 1998 Ohio App. LEXIS 383, 6 (Feb. 5, 1998), citing *Laverick v. Children's Hosp. Med. Ctr., Inc.*, 43 Ohio App.3d 201, 540 N.E.2d 305 (9th Dist.1988).

{¶ 25} We begin our analysis with a brief discussion of what this court held in *Marine Towers East I*. As both parties agree, *Marine Towers East I*

unequivocally held that “the Association’s governing documents required it to ‘build up and maintain a reasonable reserve’ to pay for extraordinary expenditures that are not included in the Association’s annual budget.” *Marine Towers East I* at ¶ 16. Further, *Marine Towers East I* clarified that “reserve[,]” as used in the Association’s bylaws, “is more than just an item of the budget and is a collection of money separate and apart from money allocated to pay for routine services and expenditures.” *Id.* at ¶ 11. *Marine Towers East I* also clarified that the Association’s bylaws “specifically state that the reserve fund is to be used for ‘extraordinary expenditures’; that is, expenses *not included in the annual budget estimate*.” (Emphasis sic). *Id.* at ¶ 12. Finally, *Marine Towers East I* held that the Association’s bylaws do not permit the Association or Board to waive the reserve requirement, and that to do so, the Association would have had to amend its bylaws to permit such waiver. *Id.* at ¶ 14.

{¶ 26} The first appeal reviewed the trial court’s decision on the Association’s Civ.R. 12(C) motion for judgment on the pleadings. Civ.R. 12(C) motions test the legal basis for the claims asserted in a complaint, and therefore, determination of a motion for judgment on the pleadings is restricted solely to the allegations in the complaint and answer, as well as any material attached as exhibits to those pleadings. *Edwards v. Kelley*, 2021-Ohio-2933, 178 N.E.3d 55, ¶ 7 (8th Dist.), citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996), and *State ex rel. Montgomery v. Purchase Plus Buyer’s Group, Inc.*, 10th Dist. Franklin No. 01AP-1073, 2002-Ohio-2014. As such, the first

opinion made legal determinations based on the pleadings and without the benefit of the evidence presented to the jury and in the record in the instant appeal.

{¶ 27} The Association is, therefore, correct that *Marine Towers East I* did not make any factual determinations as to whether its financial management constituted a breach of contract or breach of fiduciary duty. *Marine Towers East I* did, however, define the obligations of the parties under the declaration. These obligations — specifically, that the Association is required to build up and maintain a reserve fund separate from its regular budget and that it cannot waive this requirement without amending its bylaws — were a critical aspect of the case that the trial court was obligated to apply on remand and throughout the jury trial. Further, with respect to the waiver issue, to the extent that the Association’s argument is centered on the apparent hypocrisy of the Owners, some of whom previously voted to “waive” the reserve requirement, we acknowledge that this argument was presented in the first appeal and rejected by *Marine Towers East I*. *Marine Towers East I* unequivocally held that the reserve requirement could not be waived unless the Association amends its bylaws, and we will not disturb this holding in the instant appeal.

{¶ 28} Our review of the record reveals that the law of the case was not accurately reflected at trial, and specifically in the jury instructions. The only reference to the law of the case came when the trial court included the following when it charged the jury:

The Association's governing documents required it to build up and maintain a reasonable reserve to pay for extraordinary expenditures that are not included in the Association's annual budget.

The instructions contained no reference to *Marine Towers East I*'s rejection of the Association's arguments that the reserve requirement simply refers to "money" and not to a separate fund or account. Nor did the instructions contain any reference to *Marine Towers East I*'s rejection of the Association's argument that it was permitted to waive the reserve requirement. Based on our review of the record and jury instructions in their entirety, we find that the trial court's selective application of the law of the case in the proceedings below, including in its instructions to the jury, constituted an abuse of discretion. We therefore vacate the verdict in favor of the Association and remand the case for a new trial in which the trial court applies the law of the case in its entirety as outlined in *Marine Towers East I* and the instant opinion.

{¶ 29} The second and third assignments of error are sustained.

III. Common Law Waiver

{¶ 30} In their fourth assignment of error, the Owners assert that the trial court erred by permitting the Association to excuse their breach of contract by applying the law of contractual waiver in its jury instructions. Specifically, the Owners challenge the following jury instruction:

Before you can find for the plaintiffs, you must find by the greater weight of the evidence that:

A, the Association breached the contract;

B, the plaintiffs were not in material breach of the contract and/or substantially performed their obligations under the contract;

C, the plaintiffs suffered damage as a result of the Association's breach.

The court went on to define "material breach" as a breach that violates a term essential to the purposes of the contract, and "substantial performance" as the absence of a breach that violates a term essential to the purpose of the contract.

{¶ 31} The Owners argue that the trial court properly sustained their objection to the Association's assertion of the common law defense of waiver at trial, but that the court negated this by providing the above instruction to the jury. In support of its argument, the Owners argue that the Ohio Condominium Act and the 1978 amendments thereto created relationships, rights, and remedies that did not exist at common law. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos.*, 67 Ohio St.3d 274, 283, 617 N.E.2d 1075 (1993). According to the Owners, *Belvedere* supports their argument that contractual waiver is not applicable to this case.

{¶ 32} While the Owners challenge the aforementioned jury instruction on "contractual waiver," we note that the instruction is merely a recitation of the elements of a breach-of-contract claim. Further, while we acknowledge that the Ohio Condominium Act governs the relationship between the Owners and the Association in this case, that does not discharge the Owners of their obligation to satisfy all of the elements of their breach-of-contract claim. "Condominium declarations and bylaws are contracts between the association and the purchaser and are subject to the traditional rules of contract interpretation." *Wood v.*

Cashelmara Condominium Unit Owners Assn., 8th Dist. Cuyahoga No. 110696, 2022-Ohio-1496, ¶ 31, quoting *Marine Towers East I* at ¶ 9, quoting *Grand Arcade, Ltd. v. Grand Arcade Condominium Owners' Assn.*, 8th Dist. Cuyahoga No. 104890, 2017-Ohio-2760.

{¶ 33} Because the jury instruction merely explained the essential elements of the Owners' breach-of-contract claim, the court did not abuse its discretion in instructing the jury regarding the Owners' performance under the contract. Therefore, the Owners' fourth assignment of error is overruled.

{¶ 34} Judgment reversed, vacated, and remanded for a new trial in accordance with this opinion.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

ANITA LASTER MAYS, A.J., and
MICHAEL JOHN RYAN, J., CONCUR