

SUPREME COURT OF VIRGINIA



SUPREME COURT BUILDING
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219
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Granted Appeal Summary

Case

NOLDE BAKERY CONDOMINIUM ASSOCIATION, INC. v. NOLDE BAKERY, LLC, ET AL.

(Record Number 180398)

From

From the Circuit Court of the City of Richmond; G. Rupe, Judge.

Counsel

Henry W. McLaughlin (The Law Office of Henry McLaughlin, P.C.) for appellant.

Alan D. Wingfield, Michael E. Lacy, John C. Lynch, and Daniel T. Berger (Troutman Sanders LLP) for appellees.

Assignments of Error

1. The Circuit Court of the City of Richmond, Virginia (“the trial court”) erred in its Final Order (“the Final order”) entered on December 20, 2017 dismissing with prejudice as time-barred all counts of the amended complaint (“the amended complaint”) of appellant, the Nolde Bakery Condominium Association (“the Nolde Association”), as to that part of the Final Order which ruled as a matter of law against the contention of the Nolde Association that the Claims in Count Two of the amended complaint against appellees (defendants before the trial court) R. Craig Burns (“Burns”), Judy Turner (“Turner”) and Matt Gass (“Gass”) could not be time-barred because those claims included averments that Burns, Turner, and Gass, during the two years before this suit was brought, violated fiduciary duties to the Nolde Association and its members by failing – as the members of the board of the Nolde Association – to levy sufficient assessments to remedy inadequate reserves shown by a study reported to them during those two years. This part of the Final order was error because there was a material dispute of fact as to whether during the two years before this suit was filed these three board members, who were the sole members of the said board (a) were on notice that additional reserves were needed; (b) chose for reasons of self-interest not to levy assessments for such additional reserves, and (c) as a proximate result, the Nolde Association’s members (and therefore the Nolde Association) sustained damages.

2. The trial court erred in the Final Order as to that part of it which dismissed as time-barred Count Five of the amended complaint in which the Nolde Association charged that all of the

appellees (defendants below) conspired to keep the Nolde Association's payment too low to benefit themselves. This ruling by the trial court was in error as to that part of Count Five which averred such conspiracy by all appellees (defendants below) which occurred during the two-year period before the filing of this suit. This part of the Final Order was error because that part of the conspiracy which occurred during the two years before the filing of this suit could not be time-barred and there was a material issue of fact as to whether and to what extent all of the appellees engaged in action during the two years before the filing of this suit to benefit themselves by keeping such assessments too low, thereby proximately damaging Nolde Association and its members at large.

3. The trial court erred in its Final Order as to its dismissal of all of the counts of the amended complaint in ruling against the contention by the Nolde Association that, as to all counts, the statute of limitations was tolled by obstruction pursuant to Va. Code Ann. Section 8.01-229(D) (ii) or by the equitable doctrine of "extraordinary circumstances". The trial court erred in such ruling and in the reliance on such ruling in the Final Order because there was a material factual dispute as to whether appellee Frank T. Gadams ("Gadams") through his control of the board of the Nolde Association, and Turner, Burns, and Gass, acting under such control, and on the basis of the control by all of them of the board, acting out of self-interest, obstructed this lawsuit, or any part of it, from being filed until they relinquished control of the board in November 2014, less than two years before this case was filed. There was also a material factual dispute as to whether Gadams' control constituted "extraordinary circumstances" sufficient to toll the statute of limitations.

4. The trial court erred in its entry of the Final Order as to its dismissal of all of the counts of the amended complaint in ruling against the contention by the Nolde Association that, as to all counts, there was a continuing course of action so that the statute of limitations was tolled as to all such actions. Such ruling and such order were error because there was a material dispute of fact as to whether there was a continuing series of actions taken by the appellees that should be held to have come within a continuing course of action doctrine and because, although this may be a case of first impression in Virginia, this Court should hold that the facts of this case fall within a continuing course of action doctrine like that applied in medical or legal malpractice.