

STATE OF NORTH CAROLINA  
SWAIN COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS 178

THOMAS M. ANDERSON, PERRY  
POL SINELLI, RICHARD F.  
HUNTER, ANDREA WHEELER and  
GRACE JUBY, as Co-Trustees of the  
Andrew Juby Family Trust,  
THOMAS T. SCHREIBER, and  
FRED R. YATES, in the right of the  
Mystic Lands Property Owners  
Association, Inc., a North Carolina  
Non-Profit Corporation,

Plaintiffs,

v.

MICHAEL BERESNI; LOUIS JOHN  
BROWN; KEVIN BURKE; RAMON  
(RAY) DE LA CABADA; SCOTT  
LYDEN; JIM MOORE; ROBERT  
WUNDERLE; GREG GILROY;  
RANDY MILLS; AMI SHINITZKY;  
MYSTIC LANDS, INC.; and the  
MYSTIC LANDS PROPERTY  
OWNERS ASSOCIATION, INC., a  
nominal party,

Defendants.

**ORDER ON PARTIES' CONSENT  
MOTION TO APPROVE  
SETTLEMENT AND DISMISSAL**

1. **THIS MATTER** comes before the Court on the parties' Consent Motion to Approve Settlement and Dismissal. ("Motion," ECF No. 80.) Pursuant to N.C.G.S. § 55A-7-40(d), the parties seek approval from this Court of the settlement and dismissal of the derivative claims in this action.

2. Plaintiffs, as members of the Mystic Lands Property Owners Association, Inc. (the "Association"), brought a derivative action asserting claims against the current members, and certain former members, of the Board of Directors for the Association (the "Board"). The Association is organized and operates under

North Carolina's Nonprofit Corporation Act and is an owners' association pursuant to N.C.G.S. § 47F-1-103. Plaintiffs also named Mystic Lands, Inc. ("MLI") and Ami Shinitzky ("Shinitzky") as Defendants.

3. The gravamen of Plaintiffs' complaint is their allegation that the Board, on behalf of the Association, did not invoice MLI, as declarant, for lot assessments that Plaintiffs claimed MLI owed to the Association concerning property owned by both MLI and Shinitzky in Mystic Lands.

4. In response to the Complaint, all Defendants asserted various defenses, and the Association asserted crossclaims against MLI. All Defendants further moved to dismiss Plaintiffs' causes of action alleging lack of subject matter jurisdiction and failure to state a claim. Multiple defenses were presented by the Defendants in their pleadings, including lack of Plaintiffs' standing, the business judgment rule, statute of limitations, estoppel and other equitable defenses. MLI further asserted that the language of the applicable covenants exempted MLI from paying assessments during MLI's exercise of declarant control over the appointment of directors. At all times, MLI and Shinitzky have denied owing the Association any sums for assessments related to prior years.

5. On or about 24 January 2023, a settlement between the Board and MLI was reached for a total assigned value of \$400,000.00 with no party admitting liability. The settlement includes MLI's agreement to convey fee simple title to Mystic River Lot 14 in Mystic Lands to the Association, at an appraised value of \$332,000.00, and make a payment of \$68,000.00 to the Association, secured by a deed

of trust in Mystic Forest Lot 34 and payable in installments and consistent with an agreed-upon payment schedule.

6. Consistent with those terms, MLI and the Board executed a settlement agreement.

7. Plaintiffs subsequently presented a proposed resolution of the present action to the parties, whereby all parties to this action would dismiss their claims and release any and all related claims, costs, and fees against one another for acts arising out of and related to the present action.

8. Consistent with those terms and following additional negotiations, the parties have reached a global resolution of this case and finalized the terms of a settlement agreement.

9. Section 55A-7-40(d) of the North Carolina Nonprofit Corporation Act states in pertinent part that:

[A derivative] action shall not be discontinued, dismissed, compromised, or settled without the approval of the court. The court, in its discretion, may direct that notice, by publication or otherwise, shall be given to any directors, members, creditors, and other persons whose interests it determines will be substantially affected by the discontinuance, dismissal, compromise, or settlement.

N.C.G.S. § 55A-7-40(d). Our Supreme Court has held that in determining whether to approve the settlement of a derivative action, “the court is to balance (1) any legitimate corporate claims brought forward in the derivative shareholder suit

against (2) the corporation's best interests." *Alford v. Shaw*, 327 N.C. 526, 540 (1990).<sup>1</sup>

10. On 1 June 2023, the Association notified all of its members of the proposed settlement via letter and electronic mail. Members were given a 24 June 2023 deadline within which to object to the proposed settlement. On 19 June 2023, one member, Larry Harwood, submitted an objection.

11. On 1 September 2023, the parties filed the present Motion, which attached copies of the proposed settlement agreement and release, the notice that was sent to members of the Association, and other pertinent documents, including the above-referenced objection from Mr. Harwood. (ECF No. 80.)

12. The Court has carefully reviewed the Motion and the parties' submissions. A hearing was held on the Motion via Webex on 20 September 2023. Members of the Association were given advance notice of the hearing and instructions on how to participate. At the hearing, counsel provided information to the Court regarding the proposed settlement. Additionally, the Court invited all members of the Association (along with any other interested persons) who were present via WebEx to make any statements they desired regarding the proposed settlement. No persons chose to make such a statement.

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<sup>1</sup> *Shaw* was decided under a prior version of the Business Corporation Act's similar requirement for court approval of derivative claims. See *Alford*, 327 N.C. at 539. This Court has found that the *Shaw* factors are likewise applicable to a court's approval of a settlement involving derivative claims existing outside the context of for-profit corporations. See, e.g., *O'Donnell v. Moore*, 2019 NCBC LEXIS 34, at \*\*6 (N.C. Super. Ct. May 29, 2019) (applying *Shaw* factors in deciding whether to approve settlement of derivative claims brought on behalf of a limited liability company.) The Court finds the *Shaw* factors equally applicable under the similar court approval provisions contained in the Nonprofit Corporation Act.

13. Based on its thorough consideration of the record and the statements made at the 20 September 2023 hearing, the Court finds, in its discretion, that the proposed settlement is in the best interests of the Association and its members and is fair, reasonable, and adequate in all respects.

14. This settlement puts an end to lengthy and protracted litigation between the parties that has affected all members of the Association. This settlement avoids the risks, uncertainty, and significant expense—including the continued accumulation of legal fees—of further litigation. Counsel has represented to the Court that the settlement terms were approved by the members of the Association's board of directors. Moreover, all parties to this lawsuit agreed to this settlement following arm's length negotiations by experienced counsel based on sufficient investigation. The proposed settlement provides for the exchange of valid consideration and attempts to fairly balance the risks and liabilities of the parties to this litigation.

15. The Court observes that the Association is comprised of 134 lots, and only one member has objected to the proposed settlement. The Court has carefully considered the objection received in opposition to the proposed settlement and finds that despite the concerns contained therein, the continued litigation of this case is not in the best interests of the Association or its members.

16. Accordingly, **THE COURT**, having considered the Motion, the applicable law, and the record, **CONCLUDES**, in its discretion, that the Motion should be **GRANTED**.

**THEREFORE, IT IS ORDERED** that the Motion is **GRANTED**, and the parties shall execute and promptly file a notice of dismissal with prejudice as to all claims and crossclaims in this action in accordance with the terms of the settlement agreement and release.

**SO ORDERED**, this the 22nd day of September, 2023.

/s/ Mark A. Davis  
Mark A. Davis  
Special Superior Court Judge  
for Complex Business Cases