Fulbright v. Asheville Arras Residences, LLC, 2025 NCBC Order 90.

STATE OF NORTH CAROLINA

BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CVS002056-100

MICHAEL L. FULBRIGHT and ELAINE L. FULBRIGHT; Bryon A. Dickerson, Trustee and Emilee A. Dickerson, Trustees of the BRYON A. DICKERSON LIVING TRUST dated April 25, 2018; KENNETH R. ELLINGTON; KATHLEEN STERN and DAVID STERN; Suellyn Felker, as Trustee of the SUELLYN FELKER LIVING TRUST dated December 15, 1997; AJAY K. PATEL; Mark Davis and Rebecca Davis, as Co-Trustees of MARK AND REBECCA DAVIS REVOCABLE TRUST dated December 23, 2021; Jeffrey E. Fromson and Belinda W. Fromson, as Trustees of BELINDA W. FROMSON AND JEFFREY E. FROMSON 1995 REVOCABLE TRUST dated July 21, 1995; James M. Covington, as Trustee of JAMES M. COVINGTON FAMILY TRUST UTAD 07/11/2012 AS AMENDED ON 08/01/2018 ("Covington Trust"); and MICHAEL J. RITZMAN and LEE ANN RITZMAN,

Plaintiffs,

v.

ASHEVILLE ARRAS RESIDENCES, LLC, a North Carolina Limited Liability Company; MHG ASHEVILLE TR, LLC, a North Carolina Limited Liability Company; MCKIBBON HOTEL GROUP, INC., a Georgia Corporation; MCKIBBON PLACES, LLC, a North Carolina Limited Liability Company; JOHN MCKIBBON, III; 7 PATTON AVENUE CONDOMINIUM OWNERS ASSOCIATION, INC., a North Carolina non-profit Corporation; and 7 PATTON AVENUE RESIDENTIAL CONDOMINIUM OWNERS ASSOCIATION, INC., a North Carolina non-profit Corporation,

Defendants.

ORDER ON CONSENT MOTION TO APPROVE SETTLEMENT AND DISMISS ALL CLAIMS

1. **THIS MATTER** is before the Court on the parties' Consent Motion to Approve Settlement and Dismiss All Claims (ECF No. 54, "Motion to Approve").

2. This action was brought by a group of residential condominium owners in Asheville, North Carolina, seeking remedies against the named defendants for operational and safety concerns in connection with certain elevators in their building. (Second Am. Compl., ECF No. 29, ¶¶ 23–26.).

3. In their Second Amended Complaint (which is their operative pleading), Plaintiffs have pled several claims for relief. One is a derivative claim asserted by two of the Plaintiffs, Michael L. Fulbright and Elaine L. Fulbright, on behalf of two entities— the 7 Patton Avenue Condominium Owners Association, Inc. ("Master Association") and the 7 Patton Avenue Residential Condominium Owners Association, Inc. ("Residential Association," and, collectively, "the Associations")—pursuant to N.C.G.S. § 55A-7-40.

4. Both the Master Association and the Residential Association are non-profit corporations subject to North Carolina's Nonprofit Corporation Act.

5. In the Motion to Approve, Plaintiffs represent that the parties have reached a settlement of all claims in this case and seek the Court's approval of the dismissal of the above-referenced derivative claim.[1]

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

> [A derivative] action shall not be discontinued, dismissed, compromised,

[1] Although the parties appear to be seeking the Court's approval as to the settlement of *all* claims that have been asserted in this action, court approval is required only for dismissal of the *derivative* claim.

> 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).

7. This Court has previously held that in determining whether to approve the settlement of a derivative action involving a non-profit corporation, "the court is to balance (1) any legitimate corporate claims brought forward in the derivative . . . suit against (2) the corporation's best interests." *Anderson v. Beresni*, 2023 NCBC LEXIS 119, at *3–4 (N.C. Super. Ct. Sept. 22, 2023) (cleaned up).

8. Here, the Court is presently unable to properly make this determination because Plaintiffs have not provided it with sufficient information regarding key issues relevant to the Court's analysis such as (1) the adequacy of the notice that was given to interested persons—and the responses received from those individuals—regarding the proposed settlement; and (2) why the proposed settlement is in the best interests of the Associations.

9. This Court's decision in *Anderson* is instructive. In its order approving the settlement of the derivative claims in that case brought on behalf of a property owners association, the Court found that the "proposed settlement [was] in the best interests of the [non-profit] Association and its members and [was] fair, reasonable, and adequate in all respects." 2023 NCBC LEXIS 119, at *5.

10. The Court was only able to make such a determination because the parties had submitted in connection with their motion for approval specific

information about the notice that had been given to interested persons regarding the proposed settlement and the objections received following the provision of such notice.

> 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.
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> 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.

Anderson, 2023 NCBC LEXIS 119, at *4.

11. Similarly, in *Parameswar v. Choquette*, 2022 NCBC LEXIS 89 (N.C. Super. Ct. Aug. 5, 2022), a case requiring this Court to consider a motion to approve a settlement of derivative claims brought on behalf of a homeowners association, the Court was only able to make the necessary determination under N.C.G.S. § 55A-7-40(d) after the parties had complied with the Court's directive to provide adequate notice of the proposed settlement to all interested persons and subsequently notify the Court of the responses that had been received.

> With these principles in mind, on 27 June 2022 the Court directed the parties via email to (1) provide notice of the proposed settlement to all members of the Association and to any other persons whose interests will be substantially affected by the settlement pursuant to N.C.G.S. § 55A-7-40(d); (2) provide all such persons fourteen days in which to object to the proposed settlement; and (3) upon the expiration of the fourteen-day period, file a motion seeking the Court's approval of the settlement of the derivative claims and detailing the provision of said notice and any objections that were received.
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> On 18 July 2022, in conformity with the Court's directive, counsel for the Association notified the Court that the requisite notice had been given and that responses from four members of the Association had been

> received. These responses were sent by James Leone (who owns two lots), David and Kathryn Crockett (who together own one lot), and Gary Tubbs (who owns one lot). Leone and the Crocketts objected to the proposed settlement, while Tubbs stated that he was not actually objecting but was raising several concerns with respect to the proposed settlement.
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> On 21 July 2022, Plaintiffs filed the present Motion, which contained copies of the notice that was sent to members of the Association along with the above-referenced responses and objections. (ECF No. 90.)

Parameswar, 2022 NCBC LEXIS 89, at *2–3.

12. Here, conversely, key information on this subject is lacking. Although the Motion to Approve states that the proposed settlement has been approved by all the members of the Master Association and by 34 of the 41 members of the Residential Association, it is not clear how the notice was worded, the date or manner in which it was sent, whether any interested persons other than the members of the two Associations were entitled to receive (and actually did receive) the notice, and the length of time recipients of the notice were given to object.

13. Furthermore, although the Motion to Approve represents that no member of either Association has objected, it does not provide explanatory information regarding the apparent refusal by seven members of the Residential Association to vote in favor of the proposed settlement and why such refusal does not constitute an "objection."

14. Moreover, although Plaintiffs represent that over 75% of the members of the Residential Association approved the proposed settlement, they do not explain whether that is the required minimum percentage of members who were required to approve the settlement under the applicable bylaws.

15. Finally, the Motion to Approve contains only a cursory reference to the actual terms of the proposed settlement, the benefits that would accrue to the Associations from those terms, and why the proposed settlement is in the Associations' best interests. Such information is central to the Court's task in deciding whether to approve the proposed settlement and resulting dismissal of the derivative claim.

16. For these reasons, the Court, in the exercise of its discretion, **DENIES** the Motion to Approve without prejudice to Plaintiffs' right to file an amended approval motion that contains all of the information described above that is currently lacking (along with appropriate exhibits).[2]

CONCLUSION

THEREFORE, the Motion to Approve is **DENIED** without prejudice.

SO ORDERED, this the 19th day of November 2025.

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

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[2] In the event that the notice previously provided to members of the Associations (and any other interested persons) did not comport with the standards referenced herein, new notice will have to be given so as to remedy any such deficiencies.