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NOTIFY

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss.

SUPERIOR COURT
C. A. No.: 1984CV02125

CONNIE GUTIERREZ,
Plaintiff

v.

BOARD OF MANAGERS OF
FLAGSHIP WHARF CONDOMINIUM,
Defendant

NOTICE SENT
10/15/20
Y.S. & R.
R.J.V.
K.J.
M.E.E.B.
D.D.W.
E.R.A.

(PO)

2020 JUN 15

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT II OF PLAINTIFF'S VERIFIED COMPLAINT AND CROSS MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND II OF PLAINTIFF'S VERIFIED COMPLAINT AND DEFENDANT'S COUNTERCLAIM

CLERK OF COURT
OFFICE
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NOV 20 2020

NOW COMES the Plaintiff, Connie Gutierrez (hereinafter "Plaintiff" or "Ms.

Gutierrez"), in the above-entitled matter and pursuant to Mass. R. Civ. P. 56, hereby opposes the Defendant Board of Managers of Flagship Wharf Condominium's (hereinafter "Defendant" or "the Board") Motion for Summary Judgment on Count II of her Verified Complaint and hereby cross-moves this Honorable Court to enter Summary Judgment in her favor on all counts of Plaintiff's Verified Complaint and further moves this Honorable Court to enter Summary Judgment in her favor on Defendant's counterclaim.

In support of this Opposition and Cross-Motion, the Plaintiff states that there are no genuine issues of material fact on Count I of her Complaint and therefore Plaintiff is entitled to judgment as a matter of law. The Board violated the plain language of Article 10 of the By-Laws of Flagship Wharf Condominium Association and M.G.L. c. 183A, §10(c) by refusing to allow Plaintiff to view any and all records maintained by the Flagship Wharf Condominium

9/28/20 Cross Motions for Summary Judgment
DENIED. See Memorandum of Decision
and Order. Dutton, 2, 3

NOTIFY

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12

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

DOCKET NO. 1984CV2125E

NOTICE SENT
10/5/20
Y.S.+R.
R.J.Y.
K.J.
M.E.E.B.
D.D.M.
E.R.A.

CONNIE GUTIERREZ,

Plaintiff

VS.

**BOARD OF MANAGERS OF
FLAGSHIP WHARF CONDOMINIUM,**

Defendant

(PO)

**MEMORANDUM OF DECISION AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

The plaintiff Connie Gutierrez is the owner of a residential unit at the Flagship Wharf Condominium ("the condominium") in Charlestown, MA. The defendant Board of Managers of Flagship Wharf Condominium ("the Board") is the managing body of the condominium, and in 2019, the plaintiff sought election to a position on the Board through the voting process provided in the condominium By-Laws. In April, 2019, for the first time, the election was conducted through electronic voting. The plaintiff's bid for election to the Board was unsuccessful, and she now challenges the procedure by which voting occurred, contending it violated the condominium By-Laws. The Complaint consists of two counts, the first for declaratory judgment that she is entitled to the voting records for the 2019 election and the second seeking a declaration that the procedure by which the 2019 election was conducted was not in conformity with the By-Laws. Both parties have moved for summary judgment. After hearing on August 25, 2020 and

consideration of the parties' written submissions, the defendant's motion for summary judgment **ALLOWED** and the plaintiff's motion for summary judgment is **DENIED**.

FACTUAL BACKGROUND

In accord with Superior Court Rule 9A(b)(5), the parties have submitted a Joint Statement of Facts that will be summarized herein.

The defendant is the managing body for the Flagship Wharf Condominium ("the Condominium") located in Charlestown, MA. The residential portion of the Board consists of four board members who are elected for staggered two-year terms. The plaintiff, the owner of a residential unit, sought election to the Board in 2019.

The By-Laws for the condominium, at Article 3, § 3.7, provide as follows:

Voting. The Owner or Owners of each Unit, or some person (who need not be an Owner) designated by such Owner or Owners to act as proxy on his, her or their behalf, shall be entitled to cast the votes appurtenant to such Unit at all meetings of Unit Owners. The designation of any such proxy shall be made in writing to the Clerk, and shall be revocable at any time by written notice to the Clerk by the Unit Owner or Owners so designating. Any or all of such Unit Owners may be present at any meeting of the Unit Owners and (there constituting a group acting unanimously), may vote or take any other action in person or by proxy. Each Unit Owner . . . shall be entitled to cast one vote at all meetings of the Unit Owners for each .01 percent . . . of interest in the Common Elements applicable to such Unit. A fiduciary shall be the voting member with respect to any Unit Owner acting in a fiduciary capacity. Any Unit or Units owned by the Board or its designee shall not be entitled to a vote and shall be excluded from the total of common interests when computing the interest of all other Unit Owners for voting purposes.

Prior to 2019, voting occurred by filling out paper ballots and either appearing in person at the annual meeting to vote or by providing one's proxy to another person who attended the meeting in person and cast the vote. In 2019, in either later February or early March, the Board informed the unit owners that voting would take place online. The online voting procedure, explained by letter of the Board dated March 15, 2019, permitted voting in advance of the annual

meeting, personally or by proxy, as well as voting at the meeting, either personally or by proxy. The Board's explanatory correspondence informed residents that they would be able to vote from their cell phones, computers, or tablets either at the annual meeting or prior to the meeting. Residents were instructed to confirm their email addresses in the Building Link, as email addresses would be used to source the data for the election. As to the use of a proxy, residents were instructed to send an email to the property manager Wayne Pollard by March 22, 2019 identifying the proxy and that person's email address.

One week before the April 16, 2019 annual meeting the management company sent each unit owner an email containing a link to an online ballot. For any unit owners without email access the company provided a tablet in the lobby of the condominium and at the annual meeting for use. A unit owner casting a vote would access the link, enter a unique password, and cast votes for up to two candidates, choosing from a list of candidates or writing in the name of the candidate of their choice. Each vote was encrypted, and the unit owner received an online receipt, confirming acceptance of the vote.

Voting at the annual meeting remained an option. Eight tablets were available at the meeting for use in casting a vote. A unit owner choosing to attend the meeting and vote there followed the same procedure as someone voting from home prior to the meeting. A proxy could be designated by delivering a proxy designation to the management company.

On April 9, 2019 the plaintiff requested that the Board amend the By-Laws to include electronic voting policies. The Board did not amend the By-Laws prior to the election, and has not done so since. Election results reveal that of the 149 people who voted, 140 voted before the meeting on April 16, 2019. The remaining 9 voters attended the meeting and cast their votes in person.

The defendant contends that four unit owners provided written designations of general proxy to the management company and those proxies were issued voting credentials to allow them to vote electronically in the unit owner's place. The defendant also maintains that 77.94% of the voting population voted, and the winners of the election were Stephen O'Brien with a combined weighted interest of 42.42% and Mandy Sweeney with a combined weighted interest of 42.06%. Chris Carlisle received a combined weighted interest of 38.96%, and the plaintiff received a combined weighted interest of 30.53%. O'Brien and Sweeney were installed as the newest board members. As to these contentions relating to the election outcome, the plaintiff claims "no way of verifying this information" as prior to the commencement of this action the defendant refused her access to requested election documentation. Upon the commencement of the action, she sought a preliminary injunction compelling the defendant to give her "all documents and records pertaining to the 2019 Election." She relied upon G. L. c. 183, § 10(c) and Article 10 of the By-Laws. The plaintiff's request for a preliminary injunction was denied, and she did not return to the court seeking any additional orders for the production of documents.

STANDARD OF REVIEW

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v.*

Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

“The interpretation of a written contract or lease is a question of law, not of fact.” *Lumber Mut. Ins. Co., v. Zoltek Corp.*, 419 Mass. 704, 707 (1995) (citations omitted). The contract must be construed as a whole, with consideration of the situation of the parties and their purposes. See *Star v. Fordham*, 420 Mass. 178 (1995). “Where the language of a contract is clear and unambiguous, summary judgment is an appropriate vehicle for judicial interpretation because the court may interpret the meaning of the contract as a matter of law without resort to extrinsic evidence or determinations of fact.” *Sullivan v. Southland Life Ins. Co.*, 67 Mass. App. Ct. 439, 440 (2006), citing *Lumber Mut. Ins. Co., v. Zoltek Corp.*, 419 Mass. 704, 707 (1995); *Suffolk Constr. Co., Inc. v. Lanco Scaffolding Co., Inc.*, 47 Mass. App. Ct. 726, 729, 716 N.E.2d 130 (1999).

DISCUSSION

COUNT II

Both parties seek summary judgment as to Count II of the Complaint. Count II seeks a declaratory judgment, declaring the election in April, 2016 void, or in the alternative, that the election was not carried out in accord with the By-Laws of the condominium. I find that the manner in which the election was carried out was in substantial compliance with the terms of the By-Laws, and award judgment in favor of the defendant on Count II of the Complaint.

Under Article 2, Section 2.2 of the By-Laws the Board is granted “the powers and duties necessary for the administration of the Condominium and may do all such acts and things except as by law or by the Master Deed or by these By-Laws may not be delegated to the Board by the

Unit Owners.” The members of the Board are required to do “anything and everything . . . necessary and proper for the sound management of the Condominium and the Property.” (Article 2, Section 2.2 of the By-Laws). The sound management of the condominium most certainly includes the holding of elections for selection of board members to achieve and maintain a board constituted as required in Section 2.1.

Contrary to the contentions of the plaintiff, Article 3, Section 3.7 of the By-Laws of the Flagship Wharf Condominium Association does not mandate paper ballots or prohibit electronic voting. The medium for the voting process is not specified, beyond the entitlement of each unit owner, personally or through a designee, to vote in each annual election. The implementation of electronic voting, while not depriving any unit owner of voting in person at the meeting, gave unit owners the additional option of casting their votes electronically during the week leading up to the annual meeting. The language of Article 3, Section 3.7, when considered in conjunction with the scope of the powers and authority granted the Board in Article 2, Section 2.2, leaves the Board significant latitude in establishing the voting procedure, and I do not find that the Board overstepped its authority in the implementation of electronic voting for the 2019 election.

As to the designation of a proxy for voting or general purposes, Section 3.7 of the By-Laws states that the “designation of any such proxy shall be made in writing to the Clerk, and shall be revocable at any time by written notice to the Clerk by the Unit Owner or Owners so designating.” The plaintiff cites the delivery of proxies electronically to the management company for the condominium as a violation of the by-laws, necessitating remedial measures. The plaintiff has not identified any way in which the property manager’s receipt of the proxies,

rather than the clerk's receipt of them, had any impact on the outcome of the election.¹ Further, despite the use of the word "shall" as to the delivery of proxies to the clerk, I do not find the identity of the recipient of the proxies to be so critical to the process that the designation of the property manager as the recipient should render the election void. See *Sullivan v. Southland Life Ins. Co.*, 67 Mass. App. Ct. 439, 442 (2006) ("The objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language.") Again, the plaintiff has not identified any adverse ramifications from either the collection of proxies by the property manager or inability to revoke a proxy designation. The manner in which the 2019 election was conducted was in substantial compliance with the requirements of the By-Laws, and any deviations from procedures used in prior elections have not been shown to have improperly impacted the outcome of the election.

The plaintiff's motion for summary judgment as to Count II is **DENIED** and the defendant's motion for summary judgment as to Count II is **ALLOWED**.

COUNT I

The plaintiff has not established a blanket entitlement to "all records of the election". The By-Laws, at Article 10, require the managing agent to keep detailed records of the actions of the Board and the managing agent, minutes of meetings of the Board, minutes of meetings of Unit Owners, financial records and books of account of the condominium, the Master Deed, By-Laws, rules and regulations, and floor plans. The plaintiff is entitled to access these records. The list of accessible records does not include, however, ballots and individualized voting

¹ The plaintiff repeatedly stated throughout the Joint Statement of Material Facts that she was unable to comment on certain alleged facts because she did not have the "election documents". The plaintiff's motion for a preliminary injunction, seeking access to all election documents, was denied. Since that denial she has not taken steps to narrow her request or determine what documents she might be entitled to that have not been provided to her. I accept the fact that she has opted to seek summary judgment rather than additional information to mean she does not believe that any additional discovery would serve her claims.

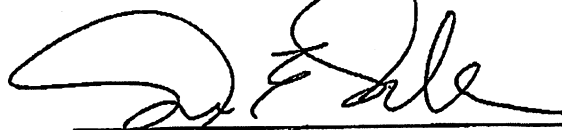
information for unit owners. Nor does G. L. c. 183, § 10(c) include such voting records among those as to which the plaintiff is entitled to access. It is clear from the plaintiff's responses in the Joint Statement of Facts and her memorandum of law that she was provided with some documentation pertinent to the election. It appears the documents she presently seeks are the ballots and proxy designations of her neighbors. The only sources she cites as support for the release of these documents to her are Article 10 of the By-Laws and G. L. c. 183, § 10(c), and these sources do not support her demand for ballots. The plaintiff offers no example of anyone whose vote was not counted, was miscounted, or was in any other way impeded in casting a vote for the candidates of his or her choice in the 2019 election. Although she references pre-election emails between the property manager and the outside company retained to administer the technology for the online voting, again, there is no post-election evidence to indicate the process failed in some way.²

The plaintiff's motion for summary judgment is DENIED and the defendant's motion for summary judgment is ALLOWED.

ORDER

The plaintiff's motion for summary judgment as to Count I and Count II is DENIED and the defendant's motion for summary judgment as to Count I and Count II is ALLOWED.

Date: September 28, 2020





Susan E. Sullivan
Associate Justice of the Superior Court

² The plaintiff's disappointment in the outcome of the election is understandable, but does not support an inference that anything went wrong with the process.

NOTIFY

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<p style="text-align: center;">SUMMARY JUDGMENT MASS. R. CIV. P. 56</p>	<p>Trial Court of Massachusetts The Superior Court </p>
<p>DOCKET NUMBER 1984CV02125</p>	<p>Michael Joseph Donovan, Clerk of Court</p>
<p>CASE NAME Gutierrez, Connie vs. Board of Managers of Flagship Wharf Condominium</p>	<p>COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108</p>
<p>JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Board of Managers of Flagship Wharf Condominium</p>	
<p>JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) Gutierrez, Connie</p>	
<p>This action came before the Court, Hon. Susan E Sullivan, presiding, upon Motion for Summary Judgment of the defendant named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.</p> <p>It is ORDERED and ADJUDGED:</p> <p>The plaintiff's motion for summary judgment as to Count I and Count II is DENIED and the defendant's motion for summary judgment as to Count I and Count II is ALLOWED. See Memorandum of Decision and Order on Cross Motions for Summary Judgment (dated 09/28/2020)</p> <p><i>White sent 10/7/20 EJA MEETB DDM KJ DSH YSR</i></p> <p style="text-align: right;">JUDGMENT ENTERED ON DOCKET <u>Oct 7</u> 20<u>20</u> PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 56(e) AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO- VISIONS OF MASS. R. CIV. P. 77(b) AS FOLLOWS</p>	
<p>DATE JUDGMENT ENTERED 09/30/2020</p>	<p>CLERK OF COURTS / ASST. CLERK X </p>