

SAMOSSET RESORT VILLAGE
CONDOMINIUM ASSOCIATION

Plaintiff

v.

Docket No. BCD-CV-10-57

SAMOROCK,LLC

Defendant

ORDER ON PRELIMINARY INJUNCTION

Plaintiff Samoset Resort Village Condominium Association [“Plaintiff” or “the Association”] has filed a motion for preliminary injunction, asking the court to compel Defendant Samorock, LLC [“Defendant” or “Samorock”] to grant the condominium unit owners who comprise the Plaintiff Association access to a recently installed “zero entry” pool at the Samoset Resort complex.

The court convened an evidentiary hearing on the motion June 13, 2011, at which both parties presented evidence in the form of sworn testimony and exhibits. Based on the Plaintiff’s failure to prove irreparable harm, an essential ingredient of any application for injunctive relief, the court denies Plaintiff’s motion for a preliminary injunction.

Background

Based on the evidence, the court finds the following facts:

Plaintiff Association is made up of owners of the condominium units in Samoset Resort Village Condominiums, a condominium development dating back to the 1980’s. The developer and declarant for condominium purposes was Samoset Resort Investors, which also owned and operated the adjacent Samoset Resort. In the course of developing the condominium project, Samoset Resort Investors made a written guarantee to unit owners that they would always have access to amenities at the Samoset Resort. The guarantee reads as follows:

The undersigned, being owners of Unit # ___ in SAMOSSET RESORT VILLAGE CONDOMINIUMS, their heirs and assigns, are hereby guaranteed the perpetual right to purchase a membership from SAMOSSET RESORT INVESTORS, its successors or assigns, permitting said unit owner the use of all recreational amenities as they currently are or may be in the future in accordance with the same terms, conditions and price as such memberships are currently offered by SAMOSSET RESORT INVESTORS or may be offered in the future by SAMOSSET RESORT INVESTORS.

INVESTORS or may be offered in the future by SAMOSET RESORT INVESTORS.

If SAMOSET RESORT INVESTORS, its successors and assigns, no longer sells memberships to such recreational amenities, SAMOSET RESORT INVESTORS, its successors and assigns, hereby covenant and agree that said recreational amenities as they may exist will always be made available to the undersigned unit owners for a reasonable consideration.

See Plaintiff's Ex. 1.

Defendant Samorock, LLC is the present owner/operator of the Samoset Resort in Rockport, Maine and the successor in interest to Samoset Resort Investors. At all relevant times, the Samoset Resort has included a hotel facility as well as "timeshare units"—apartment-style living spaces owned, not outright, but for specified calendar periods.

Samorock was the property manager for the Association until 2009. Samorock continues to manage the timeshare units. Samorock also managed the rentals for a number of Association units until recently.

About a quarter of the 41 Association units are rented regularly. Unlike Samorock's property management contract, which was with the Association, and covered all of the common areas within the Association, Samorock's unit rental contracts were with the individual unit owners who wished to rent out their units. These contracts provided for Samorock to receive a commission of 32% of the rental income in exchange for handling all aspects of the rentals. To enable renters to use the Samoset Resort facilities, the rental contracts required the Association unit owners to purchase a specified number of memberships in the Samoset Resort Health Club, depending on the number of bedrooms in the Association unit in question.

Around June of 2009, the Samorock employee, Judith Evans, who had handled matters relating to the Association units and the timeshare units left the employ of Samorock, after more than 25 years with Samorock and its predecessor, Samorock Resort Investors. Ms. Evans set up her own agency, Sail Away Maine Realty. The Association terminated its property management contract with Samorock and entered into a contract with Ms. Evans's agency. Likewise, the unit owners who had rented their units through a contract with Samorock switched to Ms. Evan's agency to handle their rentals for the same 32% commission.

In 2009, Samorock built and opened a new amenity at the Samoset Resort—a "zero entry" pool¹. At some point then or thereafter, Samorock began selling "Outdoor Pool" memberships to the zero entry pool separately from the memberships to the Samoset Resort Health Club, which it has sold continuously at all relevant times.

¹ A zero entry pool is a swimming pool that has one or more sloping sides rather than the conventional vertical sides, allowing users to walk gradually into the water.

Samorock developed a fee schedule for Outdoor Pool memberships, as well as for Health Club memberships. *See Defendant's Ex. 2* (2011 membership rates).

At all relevant times, Samorock has made use of the zero entry pool available to the timeshare unit owners. In fact, a fee for use of the zero entry pool is charged to every timeshare unit as part of the property management costs charged by Samorock. As of 2010, Samorock charged the timeshare units a total "recreational fee" of \$180,000, and the fee included a charge for use of the zero entry pool as well as a charge for use of the Health Club. The \$180,000 fee is allocated among the timeshare units based on the size of the unit. Renters of the timeshare units are allowed access to the pool because the timeshare units are rented through Samorock.

The Association has its own swimming pool, but Association unit owners have been interested in being able to have access to the zero entry pool, for themselves as well as their renters and guests. When one Association unit owner, Robert Leibowitz, asked the Samoset Resort general manager, Cornelius Russell, about being able to use the zero entry pool, Mr. Russell told him he was not allowed to use the pool. Association members were denied access to the pool during the 2009 summer season.

In June 2010, the Association met with Mr. Russell to discuss terms under which Association members could use the zero entry pool. The Association president, Jeff Davis, met with Mr. Russell in an effort to resolve the zero entry pool issue. Mr. Davis asked Mr. Russell about renters of Association units being allowed to use the pool, and Mr. Russell told him due to liability and security concerns, Association renters were not allowed to use the pool.

In an effort to address the Association's concerns at least in part, Samorock decided to offer Outdoor Pool memberships to Association unit owners. Mr. Russell drafted a "Dear Unit Owner" letter dated July 15, 2010 and sent it to Ms. Evans. *See Plaintiff's Ex. 6*. The letter reads in part:

As a Unit Owner, you are entitled to purchase an Outdoor Pool membership and are required to pay the same fees as are payable by third parties who purchase an Outdoor Pool membership; provided, however, that temporary guests of a Unit Owner and occupants of the unit other than the Unit Owner(s) are not entitled to purchase an Outdoor Pool membership and are not entitled to use the Outdoor Pool.

Plaintiff's Ex. 6.

It is unclear whether Ms. Evans passed this letter along to the Association. In any event, apparently none of the Association unit owners took advantage of the offer. Instead, the Association takes the position that Samorock has violated the guarantee by not offering Association unit owners as well as their guests and renters access to the pool on terms and conditions at least as favorable as those offered by Samorock to the timeshare unit owners, and their renters and guests.

Samorock opposes the preliminary injunction on a variety of grounds, the most immediately relevant of which is that the Association and its members cannot show irreparable injury because use of the pool is available to them, their guests and their renters in exchange for payment according to Samorock's fee schedule. According to Samorock, the unit members themselves can use the pool by buying a pool membership; their guests can use the pool by paying a daily rate, and their renters can use the pool if the Association member uses Samorock to rent the unit instead of renting it unilaterally or using Ms. Evans' company. Samorock also denies that it has violated the guarantee, but in any case says that the Association should not be granted an injunction because any claimed violation that is proven is compensable in dollar damages.

The Association responds by asserting that timeshare owners receive more favorable treatment in several respects, including treatment of their renters. The Association also asserts that Samorock only recently came up with its policy regarding Association members having to rent their units through Samorock in order for renters to be eligible to use the pool. The Association accuses Samorock of manufacturing the unwritten policy solely for purposes of the evidentiary hearing in order to avoid being enjoined. Samorock admits the policy as to renters is not in writing but denies manufacturing the policy solely for purposes of the injunction hearing.

Analysis

This case is now before the court solely for purposes of the Association's motion for a preliminary injunction. A party seeking preliminary injunctive relief must demonstrate that (1) it will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm that the grant of injunctive relief would inflict on the other party; (3) the party seeking the injunction has a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and (4) the public interest will not be adversely affected by granting the injunction. *See Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Resources*, 2003 ME 140, ¶9, 837 A.2d 129, 132, *citing* *Dep't of Env'tl. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989); *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982).

The Association has shown some likelihood of success, at least for purposes of the motion, in that the evidence suggests that Samorock denied Association unit owners access to the pool at a time when it was offering access to timeshare unit owners and others. As the court interprets it, the guarantee requires Samorock to make access to the pool available to Association unit owners on terms no less favorable than those offered to any other users. Moreover, if the terms and conditions offered to others—such as the timeshare unit owners—allow for access by the guests and renters of the others, then Samorock has to offer Association unit owners terms and conditions no less favorable as to their guests and renters. In this regard, the court does not agree with Samorock that the guarantee necessarily covers access to amenities only by the Association unit owners themselves.

However, the guarantee of no less favorable treatment does not mean identical treatment, or treatment on terms acceptable to the Association unit owners. Thus, Samorock has latitude in how it chooses to fulfill the guarantee. One interesting question is whether Samorock could offer pool access to the Association owners on the

same basis as it does to timeshare unit owners—by requiring all of them to participate. If the guarantees originally were made to individual Association unit owners as opposed to the Association as a whole, that might suggest that Samorock could not condition one unit owner's pool access on every other Association unit owner's participation, but the court leaves open this issue for another day.

The Association has not satisfied the injunctive criterion of irreparable injury. Because the Association unit members, their guests and renters can all gain access to the pool by buying pool memberships, or paying a daily use fee, or arranging the rental through Samorock, the injury they claim to suffer can be compensated through dollar damages.

The law is clear that if a party fails to satisfy any one or more of the four injunction criteria, injunctive relief will be denied. *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Resources*, *supra*, 2003 ME 140 at ¶ 10, 837 A.2d at 132-33, *citing* *Town of Charleston v. Sch. Admin. Dist. No. 68*, 2002 ME 95, ¶¶ 6-7, 798 A.2d 1102, 1104.

Another factor in the court's decision to withhold injunctive relief has to do with the difficulty of framing injunctive relief on the present record. In effect, the Association is asking the court to grant a mandatory injunction compelling Samorock to allow the Association access to the pool in compliance with the guarantee. To issue such an injunction, the court would have to determine the terms and conditions under which Samorock would have to provide access, including what amounts the Association unit members should have to pay to gain access for themselves, their guests and renters. The current record does not afford the court a clear basis for doing so. Therefore, even if irreparable harm were shown, the court might be hard pressed to frame appropriate terms, and might make a discretionary determination to withhold the injunction.

For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction is denied. It should be noted that, in so ruling, the court is relying on Samorock's evidence and representations of counsel that the Association unit owners, their guests and renters can all gain access to the pool by the means outlined above, so this denial is without prejudice to the renewal of the motion if it turns out that access cannot in fact be obtained as indicated by Samorock.

Pursuant to M.R. Civ. P. 79, the Clerk shall incorporate this order by reference in the docket.

Dated 20 June 2011


Justice, Superior Court

Entered on the Docket: 6.21.2011
Copies sent via Mail Electronically