

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PATRICK MATTHEWS BOGART :
and BENJAMIN KURTZ :

Plaintiffs, :

v. :

Case No. 273518-V

CARDEROCK SPRINGS CITIZENS :
ASSOCIATION, INC. :

Defendant. :

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR
ALTERNATIVELY TO SAY

COMES NOW, the Plaintiffs, Patrick Matthews Bogart and Benjamin Kurtz, by and through counsel, VanGrack, Axelson, Williamowsky, Bender & Fishman, P.C. and Samuel D. Williamowsky, and files this Opposition to the Defendant's Motion to Dismiss:

1. That on July 26, 2006 the Plaintiffs filed a Complaint against the Defendant Carderock Spring Citizens Association, Inc.
2. That Plaintiffs, who are homeowners within the subdivision of Carderock Springs and are members of the Defendant Association, had the intention of putting additions on their home. That the Plaintiffs presented their proposal to the Defendant Association's Architectural Review Committee in compliance with the Defendant Association's bylaws, but the plans were not approved.
3. That pursuant to Md. Courts & Jud. Proc. Code Ann. §3-401 through §3-415 Plaintiffs seek a Declaratory Judgment from this Court allowing them to proceed with their home improvements.

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4. That the Defendant Association in its' Motion to Dismiss suggests that the Plaintiff must appeal to the Defendant Association's Board of Directors before seeking a Declaratory Judgment from this Court.
5. That Article II, Section 3 of the Defendant Association's bylaws state that "decisions of the Architectural Review Committee *may* be appealed to the Board of Directors."
6. That upon information and belief the members of the Architectural Review Committee are also members of the Board of Directors and therefore any appeal made by the Plaintiffs will be prejudiced, redundant and futile.
7. That any appeal made by the Plaintiffs to the Board of Directors will be frustrated by the dual roles served by the members of the Architectural Review Committee and the Board of Directors and undermine the reasonable due process suggested by the Defendants.
8. That the restrictive covenants that the Defendant Association is seeking to enforce upon the Plaintiffs' property have been abandoned by members of the Architectural Review Committee and Board of Directors as members of the Committee and Board have made changes and additions to their properties in violation of the alleged covenants.
9. That the Plaintiffs are not required to exhaust any administrative remedies with the Defendant Association and therefore their Complaint is just and appropriate.
10. The attention of the Court is respectfully addressed to the Memorandum of Points and Authorities in Support of the Plaintiffs' Opposition to Defendant's Motion to Dismiss attached hereto and made a part hereof.

WHEREFORE, for the foregoing reasons the Plaintiffs respectfully request this Court deny the Defendant's Motion to Dismiss as an actual controversy exists between the contending parties.

Respectfully submitted,

**VANGRACK, AXELSON, WILLIAMOWSKY,
BENDER & FISHMAN, P.C.**

By:

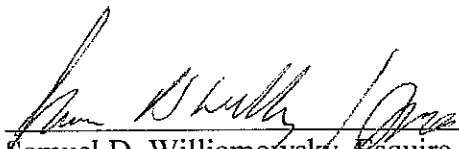


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, via first class, postage prepaid, this 5th day of October 2006 to:

John F. McCabe, Jr.
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Attorney for Defendant



Samuel D. Williamowsky, Esquire

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ORDER

UPON CONSIDERATION Defendant's Motion to Dismiss and the Plaintiffs'

Opposition thereto and for good cause shown, it is this ____ day of _____ 2006

by the Circuit Court of Maryland for Montgomery County hereby;

ORDERED, that the Defendant's Motion to Dismiss is hereby DENIED.

Judge, Circuit Court for Montgomery County

Cc:

Samuel D. Williamowsky
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Attorney for Plaintiffs

John F. McCabe, Jr.
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR
ALTERNATIVELY TO STAY**

COMES NOW, the Plaintiffs, Patrick Matthews Bogart and Benjamin Kurtz, by and through counsel, VanGrack, Axelson, Williamowsky, Bender & Fishman, P.C. and Samuel D. Williamowsky, and files this Memorandum of Point and Authorities in Support of Plaintiffs' Opposition to the Defendant's Motion to Dismiss:

A. Homeowners' Association Administrative Process Not Governed By Statutory Remedy

In the case at bar, Plaintiffs are seeking a declaratory judgment against the Defendant Association with regard to alleged restrictive covenants the Defendant is trying to impose on the Plaintiffs' property. Defendant suggests that the Plaintiffs must exhaust the Association's appeal process before seeking judicial action. However, Maryland courts have held that declaratory relief is only barred "where specific statutory remedy is available." See *Maryland National Capital Park and Planning Commission v. Washington National Arena*, 282 Md. 588, 386 A.2d 1216 (1978) There are no statutory guidelines with regard to the appeal process of a homeowners' association decision and where "neither statutory language nor legislative history

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disclose intent that administrative remedy is exclusive... there is no presumption that the administrative remedy was intended to be exclusive. See *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 706 A.2d 1060 (1998)

Plaintiffs have presented their plans for home improvements to their property and the Defendant Association and its Architectural Review Committee have denied the plans citing alleged restrictive covenants recorded with land. Plaintiffs have brought this matter before this court for a determination that the Defendants are selectively enforcing the restrictive covenants and that they are entitled to proceed with their home improvement plans. There are no Maryland statutes that require that Plaintiffs to pursue this matter through the permissive and not mandatory appeal process designated by the Defendant Association. Therefore, this Court should deny the Defendant's Motion to Dismiss and hear this case on its merits.

B. Exhaustion Of Remedies Would Be Futile

Article II, Section 3 of the Defendant's bylaws state that an Architectural Review Committee shall be charged with the task of reviewing any proposed building plans. In compliance with the bylaws, the Plaintiffs submitted their proposed plans for home improvements to the Architectural Review Committee but were denied. The bylaws also provide that the decisions of the Committee *may* be appealed to the Board of Directors. The Architectural Review Committee is comprised of three members, one of whom is Douglas Soelin, an architect who is also a member of the Board of Directors of the Defendant Association. Upon information and belief other members of the Architectural Review Committee are also members of the Board of Directors. An appeal to the Board of Directors regarding the Architectural Review Committee decision would be fruitless and futile as the decision would be reviewed by the same individuals that initially denied the Plaintiffs' proposed plans.