Before the
Commission on Common Ownership Communities

In the Matter of Robert C. Wear, Owner, 5301 Tuscarawas Way Bethesda, Maryland 20816, Complainant, v. Kenwood House Condominium, Inc., Mary Colley, President, Board of Directors, Respondent.	x x x x x x x x x x x x x x x	Case No. 260-O March 6, 1995

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on January 25, 1995, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

On January 21, 1994, Robert C. Wear, Owner of Unit 407, 95 East Wayne Avenue, Silver Spring, Maryland 20901, a unit in the Kenwood House Condominium (Complainant), filed a complaint with the Office of Common Ownership Communities. The Complainant alleges that the Board of Directors of Kenwood House Condominium (Respondent or Association) improperly assessed costs against him for maintenance repairs to his unit and reconstruction repairs to the unit beneath his (Unit 307), for damage alleged to have been caused by a water leak from his unit due to his failure to maintain bathroom caulking, in the amount of $3,863.39. Complainant further contends that he was not contacted by Respondent prior to repairs being made, that Respondent did not establish the true cause of the damage to Unit 307, that the maintenance repairs to Unit 407 were not an emergency, and that the costs assessed against him were exorbitant.

On behalf of the Respondent, Barbara C. Blake, of the law firm of Kaplan & Kaplan, responded to the Office of Common Ownership Communities by letter dated March 31, 1994. In that letter, Ms Blake contended that the repairs to Unit 307 were of an emergency nature, and recited from Article V, Section 10, of the Kenwood House by-laws which states, "Each Co-Owner shall be responsible for the care, upkeep, protection and maintenance of his Unit.... His responsibility shall include, but shall not be limited to, the

following: the interior surfaces of the walls, floors and ceilings; kitchen and bathroom fixtures, appliances and equipment;...and those parts of the plumbing, lighting, heating and air conditioning systems which are wholly contained within his Unit or which serve only his Unit and no other. Every Co-Owner must perform promptly all maintenance and repair work within his own Unit which, if omitted, would affect the Condominium in its entirety or in a part belonging to other Co-Owners, and every Co-Owner shall be expressly responsible for any damages and liabilities suffered by the Co-Owners or by the Council resulting from or caused by said Co-Owners' failure to maintain or repair as herein provided...."

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e) on September 7, 1994, and the Commission voted that it was a matter within the Commission's jurisdiction; the hearing was scheduled for January 25, 1995. The Office of Common Ownership Communities staff recommended holding a pre-hearing conference in this matter, but it was not possible to schedule such a conference without delaying the date of the hearing. The Panel Chair appointed in this case reviewed the file and, after consultation with the two Commission Panel members, sent a letter to the attorney representing the Respondent, with a copy to the Complainant, informing her that she would be asked to present her case first "as the factual basis for the assessment against Mr. Wear should be established in the record before Mr. Wear is asked to offer his defense."

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings:

1. Robert C. Wear owns Unit 407, 95 East Wayne Avenue, Silver Spring, Maryland, a unit in the Kenwood House Condominium, Inc., which is located directly above Unit 307.

2. Kenwood House is a four-story building constructed as an apartment building in 1958 and converted to condominiums in 1973.

3. By letter dated September 10, 1991, Linda Wells, a principal in Williams & Wells Realty Inc. and the property manager for Kenwood House, notified Mr. Wear that it had recently been reported that the ceiling in Unit 307 "is still damp" and that this "could be a result of something leaking in your unit." This letter was sent by first class mail and was not returned to Williams & Wells. Mr. Wear testified that he had not received this letter.

4. Mr. Wear was contacted in November 1991 by the owner of Unit 307. At that time he looked at the bathroom walls in Unit 307 and observed that they were wet. He went back to his unit and inspected his caulking and grout and did not observe deficiencies.

5. Ms Wells testified that over the next several months the owner of Unit 307 complained to her about a problem with water leaking into her bathroom on a number of occasions. Ms Wells testified that she told the owner of Unit 307 to work it out with Mr. Wear, based on the assumption that the water came from his unit.

7. Ms Wells testified that she did not visit either Unit 307 or Unit 407 at any time between September 1991 and May 1992 to inspect the respective bathrooms.

8. According to Ms Wells, in April 1992 the plaster ceiling in the bathroom in Unit 307 collapsed. Ms Wells also testified that she was told that the bathroom walls were buckling.

9. Ms Wells testified that she tried to reach Mr. Wear prior to contracting for repairs, but was unable to do so.

10. Both Ms Wells and Mr. Wear testified that Ms Wells had a key to Mr. Wear's unit.

11. Ms Wells testified that she contacted Metrotec Inc., a construction firm that had been used on behalf of Kenwood House and had been found to be satisfactory, to make repairs in both Units 307 and 407. She contacted them on an emergency basis because of the situation in Unit 307, in accordance with the procedures established by the Board of Directors for addressing emergencies, which she described as making the necessary repairs and back billing the responsible unit owner.

12. Ms Wells testified that the walls in the bathroom in Unit 307 were papered and that the paper could not be matched so the walls had to be repapered.

13. Ms Wells testified that the work done in Unit 407 was completed before the repairs in Unit 307 were started, though the demolition necessary before the repairs could be made may have begun before the work in Unit 407 was completed. Ms Wells also testified that someone from Metrotec told her that the cause of the damage to Unit 307 was water leaking from Unit 407.

14. Ms Wells testified that there were no further complaints of water leaking in the bathroom in Unit 307 after the completion of the work contracted for in the two bathrooms.

15. Mr. Wear testified that some time in the spring of 1992, two men came to his unit and spent half an hour in his bathroom recaulking. He said that he assumed they were performing routine maintenance. He was not aware of any other work being done in his bathroom.

16. Mr. Wear received an invoice for the work done by Metrotec in Unit 307 and sent a letter to Ms Wells, dated May 29, 1992, objecting to the fact that the work was done without notice to him and that the cost was exorbitant.

17. The record includes an invoice from Metrotec, dated 5/29/92, for work done on Apt. #407, described as "Remove and replace old grout in walls and floor in bathroom. Caulk around bath walls and tub as directed." The invoice is for 12 hours of labor at $34 per hour, and material: grout and caulk at $16. The total amount of the invoice is $424.00.

18. The record includes an invoice from Metrotec, dated 4/30/92, for work done on Apt. #307, described as "Remove deteriorated plaster ceiling in bathroom to the extent necessary to effect repair. Replace defective area of ceiling and skim all. Remove all wallpaper in complete bathroom. Skim all walls in bathroom. Complete and prep for wallpaper. Size all walls to receive wallpaper. Locate and purchase wallpaper and install on bathroom walls." The invoice is for 75 hours of labor at $34 per hour, and material (not described) in the amount of $170.39. There is a large job discount of 5% ($136.00). The total amount of the invoice is $2584.39. There is a note at the end of the invoice reflecting that the repair is due to a leak around tub in Unit 407.

19. Mr. Wear testified that he had sent the Metrotec invoices to his insurance company, but had not filed a claim because he did not believe he was responsible for this expense and he believed the invoices were overpriced.

20. Ms Wells testified that she had contacted Metrotec to get copies of the work tickets for the work under dispute in the two units but they were no longer available. The invoices reflect all work done at a single hourly rate and do not indicate that any specialists, such as plumbers, worked on these jobs.

21. Ms Wells testified that the Association concluded that the water problem in Unit 307 was caused by Mr. Wear's negligence in maintaining the caulking and grout in his unit because someone from Metrotec told her that was the cause and because the complaints of leaking stopped after the repairs were made.

22. The record also includes an exchange of correspondence between Ms Wells and Mr. Wear in July 1992.

23. The next communication between the parties is a letter dated September 15, 1993, from Arthur Guy Kaplan, of Kaplan & Kaplan, to Mr. Wear, informing him that Kaplan & Kaplan represented Kenwood House, enclosing copies of the two Metrotec invoices described above, and telling Mr. Wear that his failure to remit payment in full within two weeks would result in appropriate legal action and that, if he disputes the validity of the debt, or any

portion thereof, he must notify Kaplan & Kaplan of that dispute, in writing, within 30 days of receipt of the letter. The letter indicated further, that if notified of a dispute, Kaplan & Kaplan will provide verification of the debt.

24. By letter dated October 15, 1993, Mr. Wear indicated his disagreement with the conclusion that he was liable for the repairs and the amount of the invoices.

25. Mr. Kaplan sent Mr. Wear a letter captioned "NOTICE OF INTENT TO FILE LIEN", dated December 22, 1993. This letter recited the following charges as the items included in the outstanding balance to be included in the lien: the amounts of the two Metrotec invoices; repair charges re: locksmith for $100; costs for $5; legal collection fees for $750. Mr. Wear was told that if the total ($3863.39) was not paid within 30 days from the date of the letter, Kenwood House intended to file a Statement of Lien against his property in the amount of the underlying obligation ($3,108.39), plus interest, late charges and costs of collection, including attorney fees. Mr. Wear was also informed that he had the right within 30 days of the mailing of this letter to file a Complaint in the Circuit Court for Montgomery County to determine whether probable cause exists for the establishment of the lien.

26. Ms Wells agreed at the public hearing in this matter that the $100 charge for the locksmith had been paid and was not outstanding.

27. By letter dated January 16, 1994, Mr. Wear filed his Complaint with the Office of Common Ownership Communities.

28. By letter dated January 26, 1994, the Office of Common Ownership Communities notified Lester Holtshlag, President, Kenwood House Condominium, that Mr. Wear had filed a Complaint, enclosing a copy, requesting a response to the Complaint within 30 days, and advising that Chapter 10B-9(e) of the Montgomery County Code, 1984, as amended, states:

> (e) When a dispute is filed with the Commission, a community association must not take any action to enforce or implement the association's decision, except filing a civil action under subsection (f), until the process under this Article is completed.

29. By letter dated March 3, 1994, addressed to Mary Colley, President, Kenwood House Condominium, the Office of Common Ownership Communities recited a telephone conversation with Mr. Holtshlag of that date, in which Mr. Holtshlag advised that he was no longer President of Kenwood House, Ms Colley was the current President, and that he had forwarded the Office of Common Ownership Communities January 26 letter to her. Ms Colley was requested to respond to Mr. Wear's complaint within 15 days and the language of

Chapter 10B-9(e) of the Montgomery County Code, 1984, as amended, was repeated. Copies of this letter were sent to Ms Wells and Mr. Kaplan.

30. By letter dated March 14, 1994, to Arthur Guy Kaplan, the Office of Common Ownership Communities, referring to a telephone conversation of March 9, provided Mr. Kaplan with a copy of Mr. Wear's Complaint and copies of Chapter 10B (Commission on Common Ownership Communities) and 2A (Administrative Procedures Act) of the Montgomery County Code, and granted an extension of the time to respond to the Complaint to April 15, 1993.

31. On May 24, 1994, Kaplan & Kaplan caused to be filed with the Clerk of the Circuit Court, Montgomery County, Maryland, a Statement of Lien against unit 407, Kenwood House Condominium in the amount of $3,108.39 plus interest, charges and costs.

Conclusions of Law

The Commission concludes, based on a preponderance of the evidence, including, but not limited to, testimony and documents admitted into evidence, and after full and fair consideration of the evidence of record, that:

1. Hearsay evidence from an unidentified person, therefore of no established expertise, that the cause of the problem in Unit 307 was leaking around the tub in Unit 407, combined with cessation of complaints regarding water in Unit 307 is not an adequate basis to support a conclusion from the evidence offered in this case that the cause of the water problem in Unit 307 was inadequate maintenance in Unit 407 in light of Mr. Wear's testimony.

2. Ms Wells received numerous complaints of the water problem in Unit 307, but never checked the conditions of either unit and never confirmed that Mr. Wear was on notice of the problem and its continuing nature.

3. Mr. Wear, at learning of the water problem in Unit 307, checked the bathroom in Unit 307, and then checked the caulking in his own bathroom and concluded that his caulking was in reasonable condition and that his unit was not the source of the problem. There was no evidence presented that a reasonable person in Mr. Wear's position should have known that failure to repair or replace his caulking or grout would lead to damage in another unit.

4. Ms Wells, an agent of the Association, was on notice of the continuing nature of a problem, which if not addressed, was likely to cause serious damage, and took no steps to analyze what the cause of the problem might be or to see that the problem was addressed by those determined to be responsible. The Association did not present sufficient evidence that Mr. Wear was responsible or negligent.

5. There is insufficient evidence in the record to support the accuracy and reasonableness of the Metrotec invoices. Mr. Wear testified that he was aware only that two workmen were in his unit for about half an hour and that he was unaware of a complete recaulking and regrouting job ever having been done in his bathroom. Ms Wells speculated that Metrotec may have come to the building on one or more occasions and been unable to access Unit 407, but agreed that she had the key to Mr. Wear's unit. It is unclear why Metrotec spent time locating and purchasing wallpaper for the bathroom in Unit 307. Other questions regarding the invoices remain unanswered.

6. Both the Association and Kaplan & Kaplan were on notice that the Montgomery County Code prohibits action to enforce a disputed Association action during the pendency of a case under Chapter 10B. The filing of the Statement of Lien against Mr. Wear's unit is such a prohibited enforcement action.

ORDER

In view of the foregoing, based on the evidence of record, for the reasons set forth above, the Commission finds and orders:

1. Kenwood House Condominium has failed to establish that Mr. Wear is responsible for the damage to the bathroom in Unit 307 or that Mr. Wear's bathroom required recaulking and regrouting, and, thus, the efforts by Kenwood House to assess Mr. Wear for whatever work was done by Metrotec on these units is improper. All efforts to collect the amount of these invoices from Mr. Wear are to cease. In conjunction with this direction, the legal fees and costs incurred in this effort also may not be assessed against Mr. Wear.

2. Kenwood House Condominium is to: 1) proceed immediately with such actions as may be necessary to withdraw the Statement of Lien filed against Mr. Wear's property; 2) provide Mr. Wear with a letter addressed to creditors and credit record information companies stating that the lien was filed in error and that Mr. Wear did not have an outstanding unpaid obligation to the Association with regard to this matter; and 3) take such other actions to assist Mr. Wear to clear any negative references on his credit record caused by the improper filing of the lien as he may reasonably request. This is to be done without charge to Mr. Wear.

The foregoing was concurred in by Panel members Fox, Szajna and Stevens.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Dinah Stevens

Dinah Stevens
Panel Chairwoman
Commission on Common Ownership Communities