

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of June, 2018.

Pammalla S. Uplinger, Appellant,

against Record No. 170871
 Circuit Court No. CL15004346

Alexandria Overlook Condominium Council
of Co-owners, et al., Appellees.

Upon an appeal from a judgment
rendered by the Circuit Court of the City of
Alexandria.

Appellant Pammalla S. Uplinger challenges the circuit court’s grant of a demurrer filed by appellees Alexandria Overlook Condominium Council of Co-Owners (“AOCC”) and LeClairRyan, a professional corporation, to Uplinger’s three-count amended complaint. Uplinger also challenges the circuit court’s grant of appellees’ motion for sanctions against her on grounds that this lawsuit was “baseless” and filed for an “improper purpose.” Because we conclude that the amended complaint states a cause of action in Count 1, but not in Counts 2 and 3, we reverse the circuit court’s judgment as to Count 1 and the award of sanctions, and remand the case for further proceedings.

“A demurrer tests the legal sufficiency of a [complaint],’ ensuring that the factual allegations set forth in the pleading are sufficient to state a cause of action.” *La Bella Dona Skin Care, Inc. v. Belle Femme Enters.*, 294 Va. 243, 255, 805 S.E.2d 399, 405 (2017) (quoting *Harris v. Kreutzer*, 271 Va. 188, 195-96, 624 S.E.2d 24, 28 (2006)). “Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts. Because the decision whether to grant a demurrer involves issues of law, we review the circuit court’s judgment de

novo.” *Coutlakis v. CSX Transp., Inc.*, 293 Va. 212, 216, 796 S.E.2d 556, 559 (2017) (citations and quotation marks omitted).

According to her amended complaint, Uplinger has been at all times relevant hereto a unit owner in what is known as the “Alexandria Overlook” residential condominium development located in the City of Alexandria. Alexandria Overlook’s “Master Deed” and “Deed of Amendment to Condominium Bylaws” (“Amended Bylaws”) are the controlling condominium instruments, which are attached to and incorporated into the amended complaint as Exhibits A and C, respectively. These instruments identify Uplinger and the other condominium unit owners collectively as the “Co-Owners” of Alexandria Overlook.¹ Pursuant to the terms of the Amended Bylaws, the Co-Owners comprise the membership of AOCC, which is Alexandria Overlook’s governing condominium association. The Amended Bylaws also provide for a Board of Directors (the “Board”), elected by AOCC’s members, for the administration of AOCC.

Uplinger’s claims against AOCC in Count 1 (breach of contract) and Count 2 (breach of fiduciary duty) and against LeClairRyan in Count 3 (aiding and abetting a breach of fiduciary duty) stem from the alleged decision of the Board, with the assistance of LeClairRyan as its legal counsel, in December 2013, to incorporate AOCC into a non-stock corporation without the Co-Owners’ approval. Prior to its subsequent incorporation by the Board, AOCC was an unincorporated, non-profit association.

¹ The Master Deed indicates that Alexander Overlook is comprised of 80 condominium units.

On appellees' demurrer, the circuit court dismissed with prejudice all three counts of the amended complaint, finding "no basis" for them, and awarded appellees \$7,500 in attorney's fees on their motion for sanctions against Uplinger.

Count 1

In Count 1, Uplinger claims that the incorporation of AOCC by the Board without the Co-Owners' approval "usurped the voting rights of the Co-Owners" and constituted a breach of contract by AOCC. Accordingly, she requests an order dissolving AOCC's corporate status.

On appeal, Uplinger argues that the amended complaint sets forth sufficient allegations to support such a cause of action with its various references to key provisions from the Master Deed and Amended Bylaws, along with the Virginia Condominium Act. She argues that those provisions necessitate the Co-Owners' approval, through a vote to amend Alexandria Overlook's Bylaws, to effect a change in AOCC's status from an unincorporated association to a non-stock corporation. Thus, she asserts, the circuit court erred in granting appellees' demurrer to Count 1 of the amended complaint.

Appellees argue that the basis for Uplinger's breach of contract claim under Count 1 is limited to an erroneous allegation in paragraph 71 of the amended complaint that AOCC breached paragraph 15 of the Master Deed by the Board's unilateral decision to incorporate AOCC.² Appellees are correct in their assertion that the "horizontal property regime" addressed in paragraph 15 of the Master Deed, and the requirement therein for a unanimous vote by the Co-

² Paragraph 15 of the Master Deed provides as follows: "That the horizontal property regime hereby established shall not be revoked, or the Property removed therefrom or any of the provisions herein amended unless all of the mortgagees under all of the mortgages covering the [condominium units] and all of the co-owners agree to such revocation, or amendment, or removal of the Property from the regime by duly recorded instruments."

Owners for the regime's revocation, is unrelated to any decision or procedure to incorporate AOCC under the condominium instruments. The term "horizontal property regime" is included in that paragraph in reference to the form of property ownership established by the Master Deed in 1973, i.e., condominium ownership, under the Virginia Horizontal Property Act, Code § 55-79.1 et seq., which was subsequently superseded by the Virginia Condominium Act, Code § 55-79.39 et seq., in 1974. The Virginia Condominium Act was then expressly incorporated into the Amended Bylaws in 2002. In short, under the governing condominium instruments, the procedure required for the revocation of the prescribed structure of property ownership of Alexandria Overlook has no connection to the procedure required for changing AOCC's legal status as a condominium association.

Appellees, however, read the amended complaint too narrowly, as did the circuit court, as to the sufficiency of Uplinger's allegations of a breach of contract in Count 1. While Uplinger, in proceeding pro se before the circuit court, did rely significantly upon paragraph 15 of the Master Deed for support of this claim, the amended complaint nevertheless sets forth other provisions from the Master Deed and the Amended Bylaws, as well as the Virginia Condominium Act, that provide a basis for Uplinger's breach of contract action. More specifically, Uplinger alleges in Count 1, *inter alia*, the following:

- "12. The eighth numbered paragraph of the Master Deed states that ' . . . the administration of ALEXANDRIA OVERLOOK . . . shall be in accordance with the provisions of this Deed and with the provisions of the By-laws which are made part of this Deed and are attached hereto'"
- "17. Alexandria Overlook's Amended Bylaws define [AOCC] as 'the unincorporated, nonprofit association of all the Co-Owners owning Condominium Units in [Alexandria Overlook].'"
- "19. Article III of the Amended Bylaws authorize the Board to 'from time to time adopt rules and regulations deem [sic] necessary for the benefit and enjoyment of

[Alexandria Overlook]; provided, however, that such rules and regulations shall not be in conflict with the Condominium Act or the condominium instruments.”

- “22. Article III of the Amended Bylaws gives the Board ‘all of the powers and [sic] duties necessary for the administration of the affairs of [AOCC]’ and authorizes ‘all such acts and things as are not by the Condominium Act or the condominium instruments required to be exercised and done by the Co-Owners.’”
- “26. Alexandria Overlook’s Amended Bylaws may not be modified except as provided in Section 55-79.71 of the Condominium Act.”
- “27. Section 55-79.71(B) of the Condominium Act establishes that in a residential condominium with individual unit owners ‘the condominium instruments shall be amended only by agreement of unit owners of units to which two-thirds of the votes in the unit owners’ association appertain, or such larger majority as the condominium instruments may specify”

We conclude that, with these allegations, Uplinger has stated a cause of action for breach of contract based on the Board’s unilateral decision to incorporate AOCC. “The power exercised by [a condominium association] is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners.” *Unit Owners Assoc. v. Gillman*, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982). According to the Amended Bylaws, AOCC was established as an unincorporated, nonprofit association.³ This was the formation of AOCC that the Co-Owners then agreed to, for the self-governance of Alexandria Overlook, when each of them purchased their individual units. In turn, the Co-Owners, under the express terms of Article III of the Amended Bylaws, invested the Board with the limited authority to “administ[er] the affairs” of AOCC.

³ The Virginia Condominium Act provides that “[t]he unit owners’ association may be incorporated,” but does not require it. Code § 55-79.73.

The Board exceeded its authority when, according to the present allegations, it proceeded unilaterally to incorporate AOCC, fundamentally changing AOCC's legal status from an unincorporated association to a non-stock corporation. If true, as Uplinger has alleged, this would have, among other things, subjected AOCC to an additional detailed statutory scheme in the form of the Virginia Nonstock Corporation Act, Code § 13.1-801 et seq. This Act would have placed numerous requirements upon AOCC as a non-stock corporation pertaining to, *inter alia*, fees, membership, officers, directors, meetings, indemnification, sale of assets and recordkeeping, that are separate and apart from the requirements imposed by the Virginia Condominium Act. Therefore, the alleged decision by the Board to incorporate AOCC cannot reasonably be viewed under the terms of Article III of the Amended Bylaws as merely an administrative act that was "necessary for the administration of the affairs of [AOCC]." Indeed, it appears that, at the time the Board decided to incorporate AOCC, AOCC had been functioning as an unincorporated association for over 40 years. Only through an amendment to the Bylaws could AOCC's incorporation be properly effected, and that requires the agreement of the Co-Owners by at least a two-thirds vote, pursuant to Code § 55-79.71(B) of the Virginia Condominium Act. The circuit court therefore erred in granting appellees' demurrer to Count 1 of the amended complaint.

Count 2

Uplinger claims in Count 2 of the amended complaint that AOCC is *liable to her* for breach of fiduciary duty *based on the Board's actions* to incorporate AOCC. She there alleges that in taking this action, the "Board breached its fiduciary duty to the Co-Owners" in various ways, including the use of "funds from assessments paid by the Co-Owners to obtain Articles [of Incorporation] that would expand [the Board members'] own rights and powers within the new

corporation,” while also “establishing enhanced indemnification protections and benefits for [AOCC’s] officers and directors.” The threshold problem with this claim is that the named defendant, AOCC, was the victim of the alleged breach of fiduciary duty, not the perpetrator of it, which was the Board. Uplinger has cited no authority that would make AOCC vicariously liable to an individual Co-Owner for such an alleged breach of fiduciary duty by the Board. Thus, the circuit court did not err in dismissing Count 2 of the amended complaint on appellees’ demurrer.

Count 3

Uplinger claims in Count 3 of the amended complaint that LeClairRyan is liable to her for “aid[ing] and abet[ing] [AOCC’s] breach of fiduciary duty” when LaClairRyan provided legal counsel to the Board in regard to the decision to incorporate AOCC and then “acted to obtain incorporated status for [AOCC] as its incorporator and received payment for its improper act that consummated the breach.” Assuming without deciding that we would recognize such a cause of action in Virginia, just as we assumed without deciding the same in *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 659-60, 604 S.E.2d 403, 411-12 (2004),⁴ Uplinger’s claim here fails as a matter of law because she fails to state a valid claim for breach of fiduciary duty upon which her aiding and abetting claim is predicated. Thus, the circuit court did not err in dismissing Count 3 of the amended complaint on Appellees’ demurrer.

⁴ See generally Kent Sinclair, *Sinclair on Virginia Remedies* § 8-1[B], at 8-3 (5th ed. 2016) (addressing *Halifax’s* analysis of aiding and abetting breach of fiduciary claim).

Sanctions

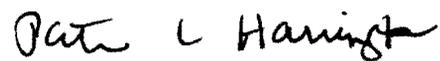
Finally, because we conclude that Uplinger states a cause of action in Count 1 of the amended complaint for breach of contract, we will reverse the circuit court's award of sanctions against her and remand this matter for the court's reconsideration.

For these reasons, we reverse and vacate the circuit court's final order to the extent it granted appellees' demurrer to Count 1 of the amended complaint and awarded sanctions against Uplinger, and remand the case for further proceedings.

This order shall be certified to the Circuit Court of the City of Alexandria.

A Copy,

Teste:

A handwritten signature in black ink that reads "Pate L. Haring". The signature is written in a cursive, somewhat stylized font.

Clerk