IRMA SANCHEZ, Plaintiff-Appellant,

v.

THE VILLAGES ASSOCIATION, Defendant-Respondent.

No. A-0147-12T3.

Superior Court of New Jersey, Appellate Division.

Argued March 4, 2013.
Decided March 20, 2013.

Scott A. Telson argued the cause for appellant (Lombardi & Lombardi, P.A., attorneys; Mr. Telson, on the brief).

Lori Brown Sternback argued the cause for respondent (**Methfessel** & **Werbel**, attorneys; Mr. Sternback and Kyle E. Vellutato, on the brief).

Before Judges Parrillo and Sabatino.

NOT FOR PUBLICATION

PER CURIAM.

The pivotal legal issue in this slip-and-fall case concerns which party bears the burden of proving (or, alternatively, of disproving) that a condominium association duly adopted, by a two-thirds vote of unit owners as required by N.J.S.A. 2A:62A-14, a bylaw that restricts its premises liability in accordance with N.J.S.A. 2A:62A-13 to instances of willful, wanton, or grossly negligent conduct.

We hold that where, as here, the bylaw amendment recites that it was approved by the necessary two-thirds vote, and contains on its face other indicia of regularity, plaintiff bears the burden of establishing the provision's invalidity. Because that evidential burden was not met here, and because plaintiff concedes that her claims of ordinary negligence do not satisfy the heightened liability standard of N.J.S.A. 2A:62A-13, we affirm the trial court's grant of summary judgment to the association.

I.

Plaintiff Irma Sanchez is a unit owner residing at the Villages condominium complex in Howell Township. The complex is managed by the Villages Association ("defendant" or "the association"). While taking out her trash on the evening of July 9, 2009, plaintiff tripped on the sidewalk near her unit and was injured. The sidewalk is undisputedly located in a common area of the complex. Plaintiff contends that the association was negligent in allowing broken concrete to be present on the sidewalk, thereby creating a dangerous condition. While receiving ongoing treatment for her injuries, plaintiff brought a negligence action against the association.

Following discovery, the association moved for summary judgment. It argued that, as a matter of law, plaintiff's claims of ordinary negligence are precluded by N.J.S.A. 2A:62A-13, which provides:

> a. Where the bylaws of a qualified common interest community specifically so provide, the association shall not be liable in any civil action brought by or on behalf of a unit owner to respond in damages as a result of bodily injury to the unit owner occurring on the premises of the qualified common interest community.
>
> b. Nothing in this act shall be deemed to grant immunity to any association causing bodily injury to the unit owner on the premises of the qualified common interest community by its willful, wanton or grossly negligent act of commission or omission. [Emphasis added.]

This statutory provision allows a condominium association to restrict, through a duly adopted bylaw, its premises liability to unit

owners for bodily injury. After the adoption of such a bylaw, the unit owners can only recover tort damages for bodily injury from the association where "willful, wanton or grossly negligent act[s] of commission or omission" are proven.[1] Ibid.

Plaintiff concedes that she cannot prove in this case actions or inactions by defendant more severe than ordinary negligence. She therefore is unable to surmount the higher standard of willful, wanton, or grossly negligent conduct. She argues, however, that the record is inadequate to establish that the association properly adopted a bylaw to create such partial immunity from suit. In particular, plaintiff cites to N.J.S.A. 2A:62A-14, which provides:

> a. No bylaws shall be amended in accordance with section 2 of this act [N.J.S.A. 2A:62A-13] unless the amendment is approved by the owners of at least 2/3 of the units held by unit owners other than the developer in the qualified common interest community.
>
> b. Bylaws adopted in accordance with section 2 of this act shall apply to actions for injuries sustained on or after the operative date of the bylaws. [Emphasis added.]

More specifically, plaintiff questions whether the association did, in fact, approve a bylaw[2] adopting the restrictive liability standard of N.J.S.A. 2A:62A-13 by a two-thirds vote required under N.J.S.A. 2A:62A-14. Among other things, she questions how many members were present for such a vote, what the vote tally was, and who took or recorded the vote.

In support of its motion for summary judgment, the association presented the trial court with a forty-two-page document dated July 15, 1998, entitled the "Fifth Amendment to the By-Laws of the Villages Association, Inc." ("the fifth amendment"). That document contains a set of comprehensive bylaws. The bylaws address such diverse subjects as the management of the association, the membership and voting rights of the unit owners, meetings and voting procedures, the functions of the board of trustees, fiscal management, maintenance charges, officers, compensation, and other topics.

The first page of the fifth amendment contains several general recitals, including the following:

> WHEREAS, the unit owners of the condominium have approved a Fifth Amendment to the By-Laws of the Association, which shall amend and restate the By-Laws, by a two-thirds (67%) vote or greater, as required in the Governing Documents in order to adopt an Amended and Restated set of By-Laws[.]
>
> [Emphasis added.]

In the top right hand corner of the first page appears a notation, indicating that the document was "[p]repared by" R. Bruce Freeman, Esq., with a signature above that attorney's typed name.

In addition, the fifth amendment's final page contains the following declaration, reiterating that the bylaws had been properly adopted:

> These Amended and Restated By-Laws for The Villages Association, Inc. were adopted as of July 15, 1998,[3] pursuant to a vote of the membership of the Association in compliance with provisions governing amendments in prior recorded By-Laws.

Two signatures appear below this declaration. On the right side, the document reads:

THE VILLAGES ASSOCIATION, INC. BY: _____ , President

with a legible signature that reads "Betty Hanlon." On the left side appears:

ATTEST: _____ , Secretary

This signature line also was executed, although the signator's handwriting is not entirely legible.[4]

Article IX of the fifth amendment, titled "IMMUNITY FROM LIABILITY," reads as follows:[5]

> 9.01. The Association shall not be liable in any civil action brought by or on behalf of a unit owner to respond in damages as a result of bodily injury to the unit owner occurring on the Condominium property.

> 9.02. Notwithstanding the foregoing, this immunity shall not apply if bodily injury to a unit owner is caused by willful, wanton or grossly negligent acts or omissions of the Association.
>
> 9.03. This immunity is intended to apply to the full extent authorized by N.J.S.A. 2A:62A-12 et seq.
>
> [Emphasis added.]

The fifth amendment was supplied to the motion judge as an attachment to a supporting certification from defense counsel. Her certification included a customary representation that "[t]he attachments annexed to this defendant's Motion for Summary Judgment are true, accurate, and authentic."[6]

Plaintiff contends that the liability restrictions in Article IX of the association's bylaws are inoperative because the association did not furnish separate proof to the court substantiating that those provisions were actually approved by the required two-thirds vote of the unit owners. Plaintiff argues that the fifth amendment on its face provides insufficient assurance that such a two-thirds vote was ever secured. Plaintiff also points out that another section of the fifth amendment, Article XII, which relates to "Amendments," states:

> Subject to the restrictions in Section 7.07 of Article VII [relative to notices of annual community expenses] hereof, these By-Laws, or any of them, may be altered or repealed, or new By-Laws may be made, at any meeting of the Association duly held for such purpose, and previous to which written notice to Unit Owners of the exact language of the amendment or of the repeal shall have been sent, a quorum being present, by an affirmative vote of 51% or greater in number and in interest of the votes entitled to be cast in person, by proxy or mail ballot.
>
> [Emphasis added.]

Plaintiff argues that the language in Article XII underscored above creates an ambiguity as to whether the liability restrictions in Article IX were adopted by only a majority vote, rather than by a two-thirds vote, of the unit owners.

The motion judge rejected plaintiff's challenge to the validity of the bylaw's liability restrictions, essentially for two reasons. First, the judge concluded that the bylaws, and specifically the provision in Article IX, were "properly enacted." The judge noted in his written statement of reasons that he "relie[d] on the certification of counsel"[7] in reaching that conclusion. Second, the judge ruled that plaintiff was estopped from contesting the validity of the bylaws, because she had lived in the complex for seventeen years and thereby was on "constructive notice" of the bylaws' contents.

II.

On appeal, plaintiff argues that the trial court erred in placing the burden upon her to establish the invalidity of Article IX of the association's bylaws. She maintains that the onus should be placed instead upon the association to furnish independent proof that a two-thirds vote of approval was achieved. Plaintiff further argues that it is unfair to estop her from challenging the validity of the bylaws simply because she has been a unit owner for many years.

The New Jersey Condominium Act, N.J.S.A. 46:8B-1 to-38, requires condominium associations in this state to adopt certain bylaws to govern, among other things, their administration and operation, the procedural rights and obligations of members, and the duties and powers of their governing boards. See N.J.S.A. 46:8B-13. The statute defines bylaws as "the governing regulations adopted under this act for administration and management of the property." N.J.S.A. 46:8B-3(c). In order for the bylaws to be effective, they must be adopted by the board of trustees or the membership, and initially recorded with the master deed in the office of the county clerk or registrar in the county in which the condominium is located. See N.J.S.A. 46:8B-8, 46:8B-9(i), and 46:8B-13.

Although the bylaws for the association specify in Article 3.08 that the voting in elections of trustees must be conducted by written ballot, voting on other questions by the unit owners under Article 3.07 "need not be taken by ballot, unless (i) the chairperson of the meeting determines a ballot to be advisable, or (ii) a majority of the votes present at the [unit owners'] meeting determine that the vote on the question submitted shall be taken by ballot." See also Smith, Estis & Li, N.J. Condominium & Condominium Association Law 163 (2013) (recommending model voting provisions to the same effect).

We recognize that the fifth amendment, which was presented to the motion judge as an attachment to counsel's certification, is

a hearsay document.[8] However, the document manifestly has the characteristics of an admissible business record pursuant to the hearsay exception under N.J.R.E. 803(c)(6). In addition, the evidential admissibility of the fifth amendment is supported by the certification of defense counsel, who vouched for the document's authenticity as an officer of the court. See N.J.R.E. 901 (allowing authenticity to be established by direct or circumstantial proof, so long as the method is "sufficient to support a finding that the [item] is what its proponent claims"), see also R.P.C. 3.3 (requiring counsel to be candid to the tribunal). Thus, we need not hinge our analysis upon issues of hearsay or authenticity.

We turn to the key question presented here: whether plaintiff, who questions whether the bylaw was actually adopted by a two-thirds vote, has the burden of establishing the bylaw's invalidity or, conversely, whether the association has the burden of showing its validity with proof beyond the face of the fifth amendment itself. Here, the motion judge implicitly assigned that evidential burden to plaintiff. We agree with that allocation of evidential responsibility.

Courts have recognized that "[a] legal presumption exists that a corporation exercises its powers according to law, that its bylaws are valid, and that `the burden of over-throwing them is upon the party who asserts their invalidity.'" Superior Bedding Co. v. Serta Assocs., Inc., 353 F. Supp. 1143, 1149 (N.D. Ill. 1972) (quoting McKee & Co. v. First Nat'l Bank of San Diego, 265 F. Supp. 1, 4 (S.D. Cal. 1967)); see also Adams v. Christie's, Inc., 880 A.2d 774, 783 (R.I. 2005) (affirming the trial court's application of this "well-recognized presumption").

The bylaws of a condominium association, as a nonprofit entity, logically should be accorded the same presumption of validity. Such a presumption is consistent with the hearsay exception for business[9] records, which allows such records that satisfy the exception to be admitted into evidence "unless the sources of information or the method, purpose or circumstance of preparation indicate that it is not trustworthy." N.J.R.E. 803(c)(6). The challenger to the business record has the burden of producing such evidence of untrustworthiness to undermine its reliability. Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 18 (App. Div. 1996).

Judicial recognition of such a presumption of validity[10] advances sound purposes, particularly where, as here, the bylaw at issue appears within a comprehensive instrument that has substantial indicia of its bona fides on its face. Businesses, non-commercial entities, and government agencies all routinely create formal documents that are relied upon for many years thereafter, in both public and private transactions and relationships. If the law were to presume that all such formal documents were presumptively invalid, a difficult and costly burden would be placed upon organizations that generate and rely upon those documents to locate witnesses and other independent proofs that can attest to their validity. As time passes, the ability to marshall such validating proofs becomes increasingly difficult, since the persons who were involved in the creation of the records may relocate, become ill, or die.[11] In anticipation of the need to rely upon such formal organizational documents in the future, corporate and association bylaws and other similar documents frequently contain recitals that expressly indicate their inherent reliability, at least on their face.

Such is the case here. The fifth amendment expressly recites on its first page that it was duly adopted by a two-thirds vote of the unit owners. That recitation is essentially repeated, albeit without the two-thirds reference, on the document's final page. It bears the unrefuted apparent signature of the attorney who prepared it, as well as the unrefuted apparent signatures of the association's then-president and then-secretary. There has been no counterproof reflecting that those three signatures were fraudulent. Nor is there counterproof that the recital on the first page respecting the two-thirds vote was untrue. The attorney who prepared the bylaws had a professional obligation to be truthful. See R.P.C. 3.4(b) (declaring it unethical for an attorney to "falsify evidence"). By analogy, if that same attorney had signed pleadings in litigation, his signature would be deemed an attestation that the factual assertions contained within those pleadings have evidentiary support or are likely to have such support. See R. 1:4-8(a). We discern no reason to expect less candor and good faith from a transactional attorney who prepares a bylaw or similar instrument.

To be sure, the attorney who signed the first page of the fifth amendment did not expressly certify that the bylaws had been duly adopted by the required votes of the unit owners. Even so, at the very least, his signature as the document's preparer conveys some indicia of regularity. The same can be said of the signatures of the association president and of the attesting secretary. See Merriam-Webster's Collegiate Dictionary 80 (11th ed. 2012) (defining the term "attest" to mean, among other things, "to affirm to be true or genuine" and "to authenticate by signing as a witness"); see also Black's Law Dictionary 124 (7th ed. 1999) (defining "attest" to mean "to bear witness" or "to affirm to be true or genuine; to authenticate by signing as a witness").

For these reasons, we conclude that the burden of establishing Article IX's invalidity was properly imposed upon plaintiff in this

case. There are multiple and sufficient facial indications that the bylaw was duly enacted, most significantly the express recitation on the first page that the bylaws were adopted by a two-thirds vote. We reject plaintiff's contention that the separate reference to a majority vote in Article XII concerning the process for adopting future amendments overcomes the declaration on the first page of the fifth amendment that it was itself enacted by a two-thirds vote.

In sum, plaintiff's claim that Article IX may have been passed by less than a two-thirds vote is unsupported and speculative. There being no genuine issue of material fact as to the validity of the bylaw, summary judgment was appropriate. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

That said, we appreciate that the presumption of validity we have recognized in this opinion can be surmounted by a challenger with appropriate proofs of irregularity.[12] For that reason, we do not subscribe to the motion judge's separate conclusion that plaintiff was estopped from contesting the bylaw because of her silence during her then-thirteen years as a unit owner. The doctrine of estoppel is one of equity. See Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85-88 (2012). It would be unfair for the law to interpose an insurmountable barrier to challengers of a bylaw's genesis and enforceability. Although plaintiff received as a unit owner the indirect benefit of the bylaw's insulation of the association from certain liabilities for many years, she would have had little or no incentive to question the votes underlying the bylaw until her 2009 accident.

Rather than finding that this plaintiff unit owner is completely estopped from contesting the bylaw, we instead recognize her right to present a challenge, but with the important caveat that the presumption of the bylaw's validity should logically become more difficult to overcome with the passage of time. Reliance on such documents naturally increases as time goes by, and expectations of their validity become more settled. Even so, the passage of seventeen years during plaintiff's residency does not, per se, bar her challenge. Instead, it simply makes her undertaking to invalidate such a long-existent bylaw more formidable. Cf., e.g., N.J.R.E. 803(c)(16) (providing a hearsay exception for "ancient documents" that are more than thirty years old). As we have noted, plaintiff did not meet her burden here to invalidate this bylaw provision, which dates back nearly fifteen years.

Because the association's bylaw adopting the liability restrictions of N.J.S.A. 2A:62A-13 has not been proven by plaintiff to be invalid, summary judgment dismissing her complaint against the association for simple negligence was correctly granted.

Affirmed.

[1] There are no reported cases applying this provision, which was enacted by the Legislature in 1989.

[2] Although some of the documents in the record hyphenate the term "by-law," we generally use the non-hyphenated term as it appears in the statute.

[3] The date of July 15, 1998 is handwritten.

[4] It appears that the individual's first name is "Alfred."

[5] The record does not reveal whether these provisions were adopted by the association for the first time in the July 1998 fifth amendment, or whether they originated in an earlier version of the bylaws. Based upon our legal analysis, the precise timing is inconsequential, because, in either event, the provision restricting liability was adopted long before plaintiff's July 9, 2009 accident. See N.J.S.A. 2A:62A-14(b) (applying the partial immunity "to actions for injuries sustained on or after the operative date of the bylaws").

[6] The association does not contend that its defense counsel in this personal injury litigation has personal knowledge of the contents of those attachments, or about the particular circumstances of their creation. See R. 1:6-6 (requiring motion affidavits to be made on personal knowledge); N.J.R.E. 602 (requiring non-expert witnesses to testify on personal knowledge).

[7] It is not clear whether the judge was relying upon defense counsel's motion certification attaching the fifth amendment, or whether he was instead referring to the uncertified "Prepared By" signature of attorney Freedman appearing on the first page of the fifth amendment.

[8] We note that plaintiff has not objected to the fifth amendment on hearsay grounds. Nor has plaintiff objected to the authenticity of the fifth amendment and claimed that it is a fictitious document. Plaintiff's challenge instead goes to the sufficiency of the votes of unit owners to approve the bylaws.

[9] Our evidence rules construe the term "business" to encompass non-commercial entities. See N.J.R.E. 801(d) (defining "business" to include "every kind of business, institution, association, profession, occupation and calling, whether or not conducted for profit"); Div. of Youth & Fam. Servs. v. J.T., 354 N.J. Super. 407, 414 (App. Div. 2002), certif. denied, 175 N.J. 432 (2003).

[10] We do not refer to a presumption of the bylaw's substantive validity. Cf. Mulligan v. Panther Valley Property Owners Ass'n., 337 N.J. Super.

293, 299-303 (App. Div. 2001) (declining to adopt a presumption of substantive validity to a condominium association's bylaw amendments, recognizing that the plaintiff's challenge in that case did not involve "the manner in which they were adopted, e.g., compliance with procedural requirements").

[11] We recognize that evidence that could potentially bear upon the document's validity often will be in the possession of the corporation or association, rather than the challenger. Even so, the challenger can pursue discovery to obtain that sort of evidence, if it exists. At oral argument before us, counsel represented that no such discovery process occurred in this case.

[12] Our opinion should not be read to discourage associations from maintaining records of the votes for each bylaw amendment. We simply address which party bears the evidential burden when the bylaw's genesis is called into question.