IN THE SUPREME COURT OF THE STATE OF DELAWARE

RESERVES MANAGEMENT, LLC, f/k/a THE RESERVES MANAGEMENT CORPORATION,	§	No. 673, 2012
Plaintiff-Below-Appellant/ Cross-Appellee,	§	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	§	No. 10C-03-006 ESB
AMERICAN ACQUISITION PROPERTY I, LLC,	§	
Defendant-Below-Appellee/ Cross-Appellant.	§	

Submitted: December 18, 2013
Decided: February 28, 2014

Before **HOLLAND**, **JACOBS,** and **RIDGELY**, Justices.

O R D E R

On this 28th day of February 2014, it appears to the Court that:

(1) Plaintiff-Below-Appellant/Cross-Appellee, Reserves Management, LLC,[1] formerly known as The Reserves Management Corporation ("Reserves"), appeals from a final judgment in the Superior Court in favor of Defendant-Below-Appellees/Cross-Appellants American Acquisition Property I, LLC ("American"). American cross-appeals from the same final judgment. Each of the claims and cross-claims arises from the interpretation of a real estate development agreement

[1] Counsel for Reserves filed a motion to withdraw on July 17, 2013. The motion was granted by this Court on September 24, 2013.

between the parties. The agreement provided for various assessments to be paid by all lot owners in the development.[2] It is the assessments that form the basis of this appeal.

(2) Reserves raises four claims on appeal. Reserves contends that the trial court erred when it decided that (1) the award of annual assessments should be allocated on a per-lot basis, (2) Reserves had no claim against American for capital assessments, (3) Reserves had no claim against American for first-year assessments, and (4) Reserves' recovery of attorneys' fees was limited to 43% of the total fees incurred by Reserves. American raises two claims on its cross-appeal. American contends that the trial court erred in finding (1) that American was liable for initial assessments, and (2) that American was required to deposit $80,000 into the site improvement escrow account. We find that both Reserves' and American's claims lack merit. Accordingly, we affirm the judgment in all respects.

(3) The Reserves Management Corporation, now known as Reserves Management, LLC, was created by the Reserves Development Corporation in August 2001, under the Declaration of Restrictions of the Reserves Resort Spa and Country Club (the "Declaration"). Abraham Korotki is the sole shareholder of Reserves and acts as director and officer of the company. The Declaration

[2] There are 179 lots in the development. American owns seven of those lots.

consisted of a plan to develop a residential community together with various facilities for recreational uses (the "Reserves Development"). The Reserves Development consists of 179 lots,[3] divided into four separate phases.

(4) In March 2004, Stover Homes, LLC ("Stover") agreed to purchase fifteen undeveloped lots in the Reserves Development. At some point thereafter, Stover breached the agreement and went out of business. In August 2009, American acquired seven lots in Phase 2 of the Reserves Development from Stover pursuant to a deed in lieu of foreclosure.

(5) In addition to describing the purpose and structure of the Reserves Development, the Declaration also subjects lot holders to various restrictive covenants. Specifically, Article VII of the Declaration established a variety of assessments to be paid by every lot holder in the Reserves Development. Under Article VII, Section 1, Reserves and each lot holder agreed to pay the following assessments and charges: "(1) annual assessments or charges; (2) liquidated damage assessments . . . ;" (3) an initial assessment of $5,000 "due upon the conveyance of any Lot or Condominium Unit from the Declarant to a third party purchaser for value to help capitalize the Association . . . ;" and (4) "a maintenance

[3] "Lot" is defined in the Declaration as "any unimproved or improved plot of land intended and subdivided for a detached single family residence" exclusive of the Common Areas. Appellee's Ans. Br. Appendix at B80.

element for individual lots to cover landscaping maintenance and repair."[4] In addition, each assessment—including interest, costs, and reasonable attorneys' fees for the collection thereof—is agreed to be "the personal obligation of the person who was the Owner of such property at the time when the assessment was due. A personal obligation for delinquent assessment shall not pass to the Owner's successor in title (other than as a lien on the land), unless expressly assumed by them."[5] Section 3 of Article VII provided that assessments would be "fixed annually to cover on a prorata basis, the projected annual cost of the Association to properly discharge its maintenance, repair, improvement and other responsibilities and obligations as set forth in this Declaration."[6] The same section further provided that annual assessments "shall be charged or assessed in equal proportions against each lot or Condominium Unit within the Reserves [Development]."[7] Section 4 of Article VII also established an initial assessment of $5,000 "to be paid by the purchaser upon the conveyance of each Lot . . . to a third party purchaser."[8]

(6) In May 2008, before American acquired its seven lots from Stover, Korotki amended the Declaration (the "Amendment"). This amendment changed

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[4] *Id.* at B86–87.
[5] *Id.* at B87.
[6] *Id.*
[7] *Id.*
[8] *Id.* at B88.

the terms of the Declaration in a number of ways. Primarily, the Amendment added assessments that did not exist when Stover purchased its fifteen lots. First, the altered language of Article VII, Section 4, required that the initial assessment be "due upon conveyance of any Lot or Condominium Unit from Declarant to a third party purchaser for value, or such later time as may be agreed by the Declarant in a second writing, to help pay for the construction of the Club House and other recreational amenities."[9] Second, the Amendment created a capital assessment in the amount of $5,000 "due upon the conveyance of any Lot or Condominium Unit from the Declarant to a third party purchaser for value, or such later time as may be agreed upon by the Declarant in a separate writing, to help capitalize the Association."[10] Third, the Amendment added a first year assessment in an amount equal to the full assessment for the year in which a lot holder made settlement. Fourth, the Amendment added Section 9 to the Declaration.

(7) Subsection 9(a) requires any third party buyer who takes title to a lot before site improvements to pay Reserves the lot's pro-rata share of the costs to install improvements until the entire development has been completed. Section 9 also provides that the deposit will be held in an interest bearing account and that the work will be done "in the sole discretion of the Reserves Management Corporation," who retains the ability to make additional assessments against a lot

[9] *Id.* (emphasis added).
[10] *Id.*

for any shortfalls.[11] Subsection 9(b) estimates the per-lot pro rata share of the cost to install and complete the site work to be $80,000, "subject to increase or decrease as determined by The Reserves Management Corporation."[12] Subsection 9(c) makes the deposit a personal obligation of "each Owner who takes title to a Lot or Condominium Unit for which an escrow had not been established by such Owner's grantor."[13] It further states:

> Each deed conveying a Lot without establishing such an escrow account *shall expressly impose such an obligation upon the grantee-Owner*, and shall be signed by the grantee-Owner to accept such personal obligation; otherwise, the grantor of the Lot who fails to establish such an escrow and fails to impose such personal obligation upon the grantee-Owner, shall be and remain personally obligated for such Lot's future pro-rata assessments for such site work as was not performed or completed at the time of conveyance.[14]

At the time it took title to the seven properties from Stover in the Reserves Development, American did not pay any of the assessment obligations.

(8) In March 2010, Reserves filed a two-count complaint against American in the Superior Court for personal liability on a debt and exercise of a lien on property securing that debt. The complaint alleged that American owed Reserves $895,350.72, which included actual assessments ($706,253.31) and other charges ($12,391.20 in interest and $176,633.31 in attorneys' fees). American filed an

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[11] *Id.* at B111.
[12] *Id.* at B112.
[13] *Id.*
[14] *Id.* (emphasis added).

answer to the complaint, denying the allegations, and counterclaiming for declaratory judgment on American's rights and obligations under the Declaration. After partially completing discovery, both sides filed cross-motions for summary judgment. Following a hearing, the trial court decided most of the claims raised by the parties. Specifically, the court resolved the following issues: (1) Liability for the Annual Assessment (Reserves prevailed), (2) Allocation basis for the Annual Assessment (American prevailed), (3) $5,000 Capital Assessment (American prevailed), (4) $5,000 Initial Assessment (Reserves prevailed), (5) $4,561 First-Year Annual Assessment (American prevailed), (6) Site Improvement Assessment (Reserves prevailed), and (7) Allocation basis for the Site Improvement Assessment (American prevailed).

(9) An interim order and judgment was entered by the trial court in February 2012. But decision on the amount of the annual assessments and reasonable attorneys' fees to be awarded to Reserves was reserved. The trial court later rendered a letter decision on the two outstanding issues and instructed the parties to agree on a form of final order. An Order and Final Judgment was entered by the trial court awarding Reserves annual assessments in the amount of $5,653.20 and attorneys' fees in the amount of $38,855.37.[15] This appeal follows.

[15] *The Reserves Mgmt. Corp. v. Am. Acquisition Prop. I, LLC*, C.A. No. 10C-03-006 (Del. Super. Ct. Oct. 10, 2012).

(10) On appeal, Reserves claims that the trial court erred by deciding that annual assessments should be allocated on a per-lot basis, by denying its claim for both capital assessments and first-year assessments, and by reducing its recovery of attorneys' fees to 43% of the total fees incurred. American asserts two cross-claims alleging that the trial court misinterpreted ambiguous provisions of the Declaration and the Amendment. Specifically, American claims that the court erred in finding that it was liable for initial assessments and by finding that it was required to deposit $80,000 into the site improvement escrow account.

(11) Because the trial court partially granted Reserves' and American's cross-motions for summary judgment, the standard of review for each is identical. We review a Superior Court's grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[16]

(12) Reserves first contends that the trial court erred in finding that annual assessments must be allocated on a per-lot basis. In addressing real covenants, the Superior Court has stated:

> Where the language of a covenant is unambiguous, clear, and specific, the rule, similar to that adopted in the construction of statutes, is that no room is left either for interpretation or for

[16] *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010) (quoting *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010)).

> construction. Otherwise, however, the paramount rule for the interpretation of covenants is so to expound them as to give effect to the actual intent of the parties.[17]

Williston on Contracts further provides: "Generally, courts will either give preference to the earlier clause when it conflicts with a later clause, the more important or dominant of two conflicting clauses, or the more specific of two clauses that conflict with one another."[18] As we have explained, "[i]t is well established that a court interpreting any contractual provision . . . must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."[19]

(13) Reserves claims that the trial court misinterpreted the relationship between Section 3 and Section 8 of the Declaration and erroneously calculated annual assessments on a per-lot basis without applying a limiting exemption to certain property owners. In pertinent part, Article VII, Section 3 of the Declaration provides:

> [A]nnual assessments shall be fixed annually to cover on a prorata basis, the projected annual cost of the Association to properly discharge its . . . obligations as set forth in this Declaration or established by the Association's Rules and Regulations. The annual assessment is to be established as of the first of January each year after the first lot is sold, and thereafter periodically adjusted as needs for annual assessments arise, as determined by the Association, and shall be charged or

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[17] *Equitable Trust Co. v. O'Neill*, 420 A.2d 1196, 1200 (Del. Super. Ct. 1980) (citing 21 C.J.S. *Covenants* § 20).
[18] 11 *Williston on Contracts* § 32.15 (4th ed. 2000).
[19] *Elliott Associates, L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998).

> assessed in equal proportions *against each Lot* or Condominium Unit within the Reserves.[20]

Article VII, Section 8 provides:

> The following property subject to this Declaration shall be exempted from assessments, charges and liens created herein:
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> (a) All properties dedicated to and accepted by a government body, agency or authority and devoted to public use;
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> (b) All Common Areas;
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> (c) All Lots of Condominium Units owned by the Declarant until sold to third persons;
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> (d) All Lots Condominium Units owned by the Association.[21]

Both parties stipulated to annual budgets of $42,890.88 for 2009, and $42,727.76 for 2010, 2011, and 2012. Based on these figures, and the fact that there were 179 Lots in the Reserves Development, the trial court calculated the per-lot annual assessment to be $239.61 for 2009, and $238.70 per year for 2010 through 2012.[22]

(14) Reserves argues on appeal that the exempt properties under Section 8 of the Declaration should not have been used in calculating the annual assessments. This interpretation fails. In this case, Article VII, Section 3 appears first in the Declaration and is the more prominent of the two provisions because it applies to

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[20] Appellee's Ans. Br. Appendix at B87 (emphasis added).
[21] *Id.* at B90.
[22] In order to determine annual assessments, the annual budget must be divided by the total number of lots in the Reserves Development. Thus, the trial court used the following calculation: Annual Budget (42,890.88 and 42,727.76) ÷ Total number of lots (179) = 239.61 and 238.70.

all lot holders as opposed to just a few. Although it is clear that exempt properties are not responsible for paying annual assessments, this does not mean that those properties are not included as part of the denominator when calculating the assessments. Under Reserves' interpretation, if only one lot were sold, then that lot holder alone would be solely responsible for all maintenance in the community. Such a result is absurd and could not have been the intent of the parties when drafting the Declaration. Thus, the trial court correctly chose the more reasonable of the two interpretations.

(15) Reserves also argues that the annual assessments are designed to spread the cost of ongoing maintenance to the property owners within the Reserves Development. Because the exempt lots that Reserves owns receive almost no services, Reserves contends that those lots should not be included in calculating the annual assessments. This argument was not made to the court below. Thus, under Supreme Court Rule 8, it need not be considered by this Court on appeal.[23]

(16) Reserves further contends that the trial court improperly applied a retrospective rather than a prospective analysis of American's liability for unpaid annual assessments. But Reserves' stipulation in the trial court clearly sets forth the annual budgets needed to determine the annual assessments. As a result, the

[23] *See* Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").

trial court had no reason to estimate the annual assessments, and properly calculated the assessment based on the joint stipulation.

(17) Finally, Reserves argues that the court incorrectly discounted its right to recover attorneys' fees in calculating the per-lot amount of the annual assessments.[24] Pursuant to Article VII, Sections 1 and 6 of the Declaration, if a lot owner fails to pay an annual assessment, "the entire assessment shall be delinquent, and shall, together with such interest thereon and cost of collection thereof, including reasonable attorney's fees, shall continue as a lien on the Lot."[25]

(18) Reserves argues that the trial court arbitrarily refused to award all of its requested attorneys' fees with no basis for doing so.[26] This argument also lacks merit. The trial court carefully considered how much of the annual assessments consisted of attorneys' fees. Reserves was required to specify what legal services corresponded to each expense, and the trial court made its decision based on the information provided.[27] For the foregoing reasons, Reserves' first claim fails.

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[24] There are two different categories of attorneys' fees at issue in this case. The attorneys' fees addressed in this section refer to the attorneys' fees that were the portion of the annual assessment. The attorneys' fees addressed *infra* focus on attorneys' fees collected at the end of the litigation below to pursue the assessments in total against American.

[25] Appellee's Ans. Br. Appendix at B89.

[26] In 2009, the Total Annual Assessment Expenses were $107,338.41, including $68,499.34 in legal fees. In 2010, the Total Annual Assessment Expenses were $70,313.75, including $27,585.99 in legal fees.

[27] Counsel for Reserves submitted an affidavit detailing the legal work done on its behalf from December 2010 to March 2012.

(19) Reserves' second and third claim on appeal are that the trial court misinterpreted the terms of the Declaration in awarding capital assessments and the first-year assessments. This Court has stated that, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[28] But if the provisions are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity, and we must look beyond the language of the contract to ascertain the parties' intentions.[29]

(20) As to its second claim, Reserves contends that the trial court erred by refusing to award capital assessments under the terms of the Declaration. Pursuant to the Amendment, Article VII, Section 1 of the Declaration was changed from: "(3) an initial assessment in the amount of Five Thousand Dollars ($5,000.00) due upon the conveyance of any Lot . . . from the Declarant to a third party purchaser for value to help capitalize the Association,"[30] to: "(3) A *Capital Assessment* in the amount of Five Thousand Dollars ($5,000.00) due upon the conveyance of any Lot

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[28] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (citing *Rhone-Poulenc v. Am. Motorists Ins.*, 616 A.2d 1192, 1196 (Del. 1992)).
[29] *Id.*
[30] Appellant's Opening Br. Appendix at A102.

. . . from the Declarant to a third party purchaser for value . . . to help capitalize the Association."[31]

(21) Reserves initially argues that the question of whether the capital assessment was a new assessment was not raised by the parties in their pleadings or papers, and the trial court made its decision, *sua sponte*, without any evidence on the issue. Despite Reserves' contention, American properly raised this issue in its briefings to the trial court.[32] Citing the text of the Amendment, American made the same argument, which was subsequently adopted by the court below.

(22) Reserves further argues that the trial court erroneously found that American was not liable for capital assessments because American did not acquire its lots from Reserves. This arguments lack merit. A plain reading of the Amendment shows that the capital assessment is only applicable to a lot conveyed from Reserves to a third-party purchaser. Reserves did not convey any lot in the Reserves Development to American. American received its lots directly from Stover. Accordingly, the trial court correctly found that the capital assessment was inapplicable to American, and Reserves' second claim must fail.

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[31] *Id.* (emphasis added).

[32] *See id.* at A342 ("The Capital Assessment of $5,000.00 per lot is created by the Amendment with the following language . . . ."); *id.* at A396 ("The Amendment created a 'Capital Assessment in the amount of Five Thousand Dollars ($5,000.00) due upon the conveyance of any Lot . . . .'").

(23) In its third claim, Reserves argues that it should have been awarded first-year annual assessments under the plain language of the Declaration. It again contends that this issue was not raised below by either party and thus should not have been decided by the trial court. Like the capital assessments, American addressed the issue of whether First-Year Assessments were new assessments in its briefings to the court below.[33] But Reserves did not respond to this argument. Because Reserves failed to respond, this Court will "adhere to the well settled rule which precludes a party from attacking a judgment on a theory he failed to advance before the trial judge" and refuse to consider Reserves' arguments.[34]

(24) Reserves final claim on appeal is that it should have been awarded the entire amount of its attorneys' fees and costs against American. The trial court is granted broad discretion in awarding attorneys' fees.[35] "Absent a clear abuse of discretion, this Court will not reverse the award."[36] Generally, Delaware follows the American Rule under which each party is obligated to pay its own attorneys' fees regardless of the outcome of the litigation.[37] But where the parties have

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[33] *See id.* at A343 ("'The First Year Annual Assessment' is created by the Amendment with the following language . . . ."); *id.* at A396 ("The Amendment also seeks to impose a 'First Year Annual Assessment in the amount of the full annual assessment levied upon . . . a Lot . . . .'").
[34] *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 679 (Del. 2013) (citing Sup. Ct. R. 8).
[35] *Gray v. Gray*, 503 A.2d 198, 204 (Del. 1986) (citing *Husband B. W. D. v. Wife B. A. D.*, 405 A.2d 123, 125 (Del. 1979)).
[36] *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 544 (Del. 1998).
[37] *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1043–44 (Del. 1996); *see also Johnston*, 720 A.2d at 544 ("[C]ourts . . . have generally followed what is commonly referred to as the

determined the allocation of fees by private contract, departure from the general rule and deference to their agreement is warranted.[38]

(25) In this case, the Declaration provides that if a Lot owner fails to pay an Annual Assessment "the entire assessment shall be deemed delinquent, and shall, together with such interest thereon and cost of collection thereof, *including reasonable attorney's fees*, shall continue as a lien on the Lot."[39] The same section further provides that "in the event a judgment is obtained, such judgment shall include . . . *reasonable attorneys' fees to be fixed by the Court*."[40] Thus, the Declaration effectively precluded the application of the American rule. It also empowered the trial court to limit the shifted fees to an amount that is "reasonable."

(26) In accordance with the terms of the Declaration, the trial court found that it was unreasonable to award Reserves attorneys' fees on claims upon which it did not prevail. Determining the "reasonable" amount of attorneys' fees to be awarded was expressly left to the discretion of the court. Breaking down each claim was merely the trial court's method of making that determination. This

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American Rule. Under the American Rule, absent express statutory language to the contrary, each party is normally obliged to pay only his or her own attorneys' fees, whatever the outcome of the litigation.").

[38] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009); *see also* 10 *Del. C.* § 3912 (authorizing recovery of attorney's fees as part of judgment for prevailing plaintiff or lien holder but only where the note, bond, mortgage, invoice, or other written instrument expressly provides for the payment of such fees).

[39] Appellee's Ans. Br. Appendix at B89.

[40] *Id.* (emphasis added).

cannot be regarded as an abuse of discretion. Accordingly, Reserves' fourth claim is without merit.

(27) On cross-appeal, American first claims that the trial court erred when it found that American was liable for initial assessments. We have stated that "[a] contract is not rendered ambiguous simply because the parties do not agree upon its proper construction."[41] A contract is ambiguous only when the provisions at issue are "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[42] While either party to a contract can enforce its terms in breach thereof, a third party, "who is, in effect, a stranger to the contract, may enforce a contractual promise in his own right and name if the contract has been made for his benefit."[43]

(28) Article VII, Section 1 of the Declaration created "an initial assessment in the amount of Five Thousand Dollars ($5,000.00) due upon the conveyance of any Lot . . . from the Declarant to a third party purchaser for value to help capitalize the Association."[44] Section 4 of the Declaration also stated that the Reserves, as the Declarant, "hereby establishes an initial assessment to be paid by the purchaser upon the conveyance of each Lot . . . from the Declarant . . . to a

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[41] *Rhone-Poulenc Basic Chemicals Co.*, 616 A.2d at 1196.
[42] *Id.*
[43] *Triple C Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629, 633 (Del. 1993) (citing *Wilmington Hous. Auth. v. Fidelity & Deposit Co. of Md.*, 47 A.2d 524, 528 (Del. 1946)).
[44] Appellee's Ans. Br. Appendix at B109.

third party purchaser for value; and the amount of such initial assessment is set at Five Thousand Dollars."[45] The Amendment replaced the language of Article VII, Section 1 with:

> (4) an Initial Assessment in the amount of Five Thousand Dollars ($5,000.00) due upon the conveyance of any Lot . . . from the Declarant to a third party purchaser for value, or such later time as may be agreed by the Declarant in a separate writing, to help pay for the construction of the Club House or other Recreational amenities.[46]

Similarly, the Amendment replaced Article VII, Section 4 with: "[A]n initial assessment to be paid by the purchaser of each Lot . . . upon the conveyance thereof by Declarant, or, *if not paid at that or any other prior time, at the conveyance thereof by such purchaser's grantor*."[47]

(29) American contends that pursuant to both the original Declaration and the Amendment, the initial assessments only apply to lots conveyed to third-party purchasers by Reserves. It further contends the trial court erred by relying on the language of amended Article VII, Section 4 without reconciling it with amended Article VII, Section 1. Specifically, American argues that the trial court should have considered whether the Reserves had agreed in a separate writing to defer payment of the initial assessment. It contends that such a writing exists in the Agreement of Purchase and Sale of Real Property (the "Purchase Agreement")

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[45] *Id.* at B88.
[46] *Id.* at B109 (emphasis added).
[47] *Id.* at B110 (emphasis added).

with Stover. The Purchase Agreement provided that Stover would purchase fifteen lots in the Reserves Development at the price of $1,875,000 and defer all homeowner association dues until the issuance of a certificate of occupancy for any homes built on the lots.[48]

(30) Based on a plain reading of the Amendment, American is responsible for paying the initial assessments. Both the amended Article VII, Sections 1 and 8, provide Reserves with varying options to collect initial assessments. Amended Article VII, Section 1 provides that Reserves may only collect initial assessments from a direct purchaser (Stover) at the time of conveyance, or at some later time as agreed to by the Declarant in a separate writing. Here, the only writing put forth by American to satisfy such a requirement was the Purchase Agreement, which is a contract between Stover and Reserves. American concedes it was not a third-party beneficiary to that contract. Thus, Reserves and American are not in privity of contract, and American's request that this Court read such terms into the Amendment must be denied. Further, Section 4 expands the application of initial assessments to both direct third-party purchasers and to the third-party purchaser's grantors in the event of non-payment by the third-party purchaser. Accordingly,

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[48] Section 4(B)(2) of the Purchase Agreement provides:

> (2) "Association Dues." Purchaser shall pay no homeowners association dues with respect to any Lot that it owns prior to issuance of a certificate of occupancy for any home constructed on such Lot, other than such Lot's share of assessment for outside maintenance work, defined as refurbishment of roads, sidewalks, bridging, pond areas, clubhouse, pool areas, and common areas.

Id. at B127.

American's argument that initial assessments apply only to third party purchasers lacks merit.

(31) Additionally, American argues that the Amendment is now invalid and the initial assessments against it cannot be imposed due to a subsequent decision in a related case. After final judgment in this case, the Superior Court addressed the validity of the Amendment to the Declaration in a similar situation involving Reserves and the Reserves Development.[49] But the later case involved parties who had already owned lots in the Reserves Development before the Amendment was enacted.[50] As against these parties, the court invalidated the Amendment, stating:

> In the original Declaration, Reserves Development reserved a generic right to modify the restrictions. However, the exercise of such a right is not unlimited. Where a developer seeks to enforce an amendment to restrictions against non-consenting owners *who bought their lots before the amendment was effective*, the amendment must be reasonable in light of the original intent of the developer and the lot owners. If it is not reasonable, it is invalid. Reasonableness may be ascertained from the declaration of restrictions and all of the attendant facts and circumstances relevant to the nature of the development.[51]

(32) American contends that this holding is applicable to the facts at bar and urges this Court to invalidate the Amendment on this appeal. This argument fails. Unlike the investors in the related case, American obtained the deeds to its seven lots in the Reserves Development after the Amendment was in effect. American

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[49] *The Reserves Mgmt. Corp. v. 30 Lots, LLC*, 2012 WL 2367469 (Del. Super. Ct. June 22, 2012).
[50] *Id.* at *1–2.
[51] *Id.* at *4 (footnotes omitted) (emphasis added).

was fully aware of its responsibility for initial assessments and cannot use the distinguishable holding to escape liability. The defendant in this case is certainly a sophisticated buyer. The Amendment is unenforceable against those who purchased their lots in Reserves *before the enactment of the Amendment* but not for those who agreed to be bound by the Amendment after its enactment. For the foregoing reasons, American's first cross-claim is without merit.

(33) American next broadly contends that the trial court erred in granting Reserves' claim for site improvement escrow deposits because the escrow provision is impermissibly vague and arbitrary. "A contract which is vague or indefinite in its terms will not be legally binding on the parties."[52] "The material terms of a contract are vague or indefinite if they cannot provide a reasonable standard for determining when a breach has occurred."[53]

(34) Although it is clear that the Amendment was drafted heavily in favor of Reserves,[54] American offers only conclusory allegations of vagueness and arbitrariness. Section 9(c) states: "Each lot conveyed without the establishment of . . . a deposit shall be and remain subject to assessment by [Reserves] for its pro rata share of the cost to perform or complete any and all site work improvements,

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[52] *Heiman, Aber & Goldlust v. Ingram*, 1999 WL 1240904, at *1 (Del. Aug. 18, 1999) (citing *Biasotto v. Spreen*, C.A. No. 96C-04-030-WTQ, Letter Op. at 4 (Del. Super. Ct. July 30, 1997)).
[53] *Id.* (quoting *Biasotto*, Letter Op. at 4).
[54] For example, Section 9 of the Amendment states: "Any questions or disagreements regarding the scope or manner of constructing and completing the site improvements shall be decided and resolved in sole discretion of [Reserves]." Appellee's Ans. Br. Appendix at B112.

as estimated by [Reserves] based on written bids or contracts for such work."[55] Reserves produced documentation of its written estimate for the work charged against American. The estimates had two options and the total of the estimates ranged from $515,567 to $576,667. Accordingly, the per-lot basis for phase 2 would range from $34,371 to $38,444. Based on these figures, American contends that the $80,000 assessment was excessive, arbitrary, and capricious. American contends that even if the Amendment is valid, Reserves' demand for $80,000 per lot from American was unreasonable and violates the Amendment itself.

(35) The escrow provision is not arbitrary or capricious, and Reserves is entitled to the full $80,000 deposit. Korotki testified that the necessary costs to complete the site improvements would exceed $80,000.[56] Even assuming that these costs would not reach $80,000, Reserves would still be entitled to the money. Based on the express terms of the Amendment, it is within the discretion of Reserves to determine the reasonable cost of site improvements as long as that estimate is made in good faith. Site improvements in the Reserves Development are not complete. And as the Lots are developed, new expenses will arise. The Amendment is not drafted so that a Lot owner can simply decline to make a

[55] *Id.*

[56] These costs include a 15% management fee as well as the costs of a construction bond required in the amount of 150% of the total construction costs. (A613.)

deposit until Reserves proves every expense that is owed.[57] Accordingly, the trial court properly held that American understood the agreement and correctly awarded $80,000 per lot because American agreed to be bound by the Amendment when it took possession of its seven Lots.

(36) Finally, American claims that the Amendment is an unconscionable contract of adhesion and thus unenforceable. Under 6 *Del. C.* § 2-302, "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause."[58] Traditionally, a contract will be found unconscionable where "no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other."[59] "It is generally held that the unconscionability test involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other."[60] But mere

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[57] As Reserves pointed out at trial:

> This is supposed to be a single assessment that was supposed to have money put into escrow that the management company can use to develop . . . the site improvements for the phase. And it is not supposed to come back to the Court because we just figured out that we have another $3,000 lot expense. That's another expense, $3,000 per lot.

Appellee's Ans. Br. Appendix at B41.

[58] 6 *Del. C.* § 2-302(1).

[59] *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956 (Del. 1978) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965)).

[60] *Id.* (quoting *J. A. Jones Construction Co. v. City of Dover*, 372 A.2d 540, 552 (Del. Super. Ct. 1977)).

disparity between the bargaining powers of parties to a contract will not support a finding of unconscionability.[61] "A court must find that the party with superior bargaining power used it to take unfair advantage of his weaker counterpart."[62] "For a contract clause to be unconscionable, its terms must be 'so one-sided as to be oppressive.'"[63] But courts are particularly reluctant to find unconscionability in contracts between sophisticated corporations.[64]

(37) The Amendment is not unconscionable. American, a sophisticated real estate portfolio company, has failed to show that Reserves had superior bargaining power. When American received the deed in lieu of foreclosure from Stover, the Amendment had already been enacted. American had every opportunity to view its provisions before accepting the deed. American could have objected to the provisions of the Amendment and refused to take possession of the seven Lots but instead chose not to do so. The Declaration has not been amended since American

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[61] *Id.* at 960.
[62] *Graham v. State Farm Mut. Auto Inc. Co.*, 565 A.2d 908, 912 (Del. 1989).
[63] *Id.* (citing *Tulowitzki*, 396 A.2d at 956).
[64] *See, e.g.*, *Progressive Intern. Corp. v. E.I. DuPont de Nemours & Co.*, 2002 WL 1558382, at *11 (Del. Ch. 2002) ("Courts have been reluctant to apply the doctrine, recognizing among other things that the parties' 'bargaining power will rarely be equal.'" (quoting *Farnsworth on Contracts* § 4.28 (2d ed. 2000))); *see also VGS, Inc. v. Castiel*, 2004 WL 876032, at *6 (Del. Ch. Apr. 22, 2004) (finding that a sophisticated investor's failure to recognize the importance of a contract that was made available during due diligence diminished the plaintiffs' fraud and breach of contract claim); *Debakey Corp. v. Raytheon Serv. Co.*, 2000 WL 1273317, at *26–28 (Del. Ch. Aug. 25, 2000) (finding that a sophisticated party's failure to conduct adequate due diligence or to procure express warranties for facts that it supposedly relied upon in entering a transaction made it impossible to prove justifiable reliance and finding that this behavior indicated that the sophisticated party made a business decision, which the court would not second-guess).

took possession of the Lots. Thus, the only provisions being enforced are those to which American expressly agreed. The fact that the Amendment weighs heavily in favor of Reserves does not amount to unconscionability. For the foregoing reasons, American's second cross-claim is without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice