# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

KURATLE CONTRACTING, INC.,	)	
a Delaware Corporation	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12C-03-079 MJB
	)	
LINDEN GREEN CONDOMINIUM,	)	
ASSOCIATION, a Delaware	)	
Corporation	)	
-	)	
Defendant.	)	

Submitted: October 31, 2013 Decided: November 19, 2013

Upon Plaintiff Kuratle's First Motion for Partial Summary Judgment, **GRANTED.**Upon Defendant Linden Green's Motion for Partial Summary Judgment, **DENIED.**Upon Plaintiff Kuratle's Second Motion for Partial Summary Judgment, **GRANTED**.

## **OPINION**

Thomas C. Marconi, Esq., Losco & Marconi, P.A., Attorney for Plaintiff

Michael F. Duggan, Esq., and Marc Spotsato, Esq., Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., *Attorneys for Defendant* 

BRADY, J.

#### **I. Introduction**

Before this Court is (1) a Motion for Partial Summary Judgment brought by Kurtale Contracting, Inc. ("Kuratle"), which was filed on September 17, 2013;<sup>1</sup> (2) a Motion for Partial Summary Judgment brought by Linden Green Condominium Association ("Linden Green"), which was filed on October 15, 2013;<sup>2</sup> and (3) a second Motion for Partial Summary Judgment brought by Kuratle, which was filed on October 15, 2013.<sup>3</sup>

Kuratle's first Motion for Partial Summary Judgment contends that the undisputed facts support this Court finding that Linden Green breached a valid, enforceable contract it had with Kuratle ("2010 Agreement"). Linden Green's Motion for Partial Summary Judgment contends that (a) the 2010 Agreement is unenforceable because the provision defining the contract's term is indefinite, and (b) even if the 2010 Agreement was enforceable, it was properly terminated by Linden Green. Kuratle's second Motion for Partial Summary Judgment asserts that Linden Green is barred from pursuing its counterclaim for any conduct that occurred prior to April 13, 2009, citing a three-year statute of limitations.

The Court heard oral argument relating to Kuratle's first Motion for Partial Summary Judgment on October 10, 2013 and reserved judgment. On October 31, 2013, the Court heard oral argument relating to Kuratle's second Motion for Partial Summary Judgment and Linden Green's Motion for Partial Summary Judgment. The Court, again, reserved judgment. This is the Court's decision on all three motions. Kuratle's first Motion for Partial Summary Judgment is **GRANTED**; Linden Green's Motion for Partial Summary Judgment is **DENIED**; and Kuratle's second Motion for Partial Summary Judgment is **GRANTED**.

<sup>&</sup>lt;sup>1</sup> Pl.'s Op. Br. in Support of its Mot. for Partial Summ. J. (Sept. 17, 2013) (hereinafter "Pl.'s First Mot. for Part. Summ. J.").

<sup>&</sup>lt;sup>2</sup> Def.'s Mot. for Partial Summ. J. (Oct. 15, 2013) (hereinafter "Def.'s Mot. for Part. Summ. J.").

<sup>&</sup>lt;sup>3</sup> Mot. for Partial Summ. J. and to Exclude Expert Testimony (Oct. 15, 2013) (hereinafter "Pl.'s Second Mot. for Part. Summ. J.").

#### II. FACTS

#### A. Main Parties

Kuratle, the plaintiff in this matter, is a Delaware corporation that is engaged in the business of, inter alia, general contracting and managing, as well as maintaining, real property for condominium complexes. Kuratle is owned and operated by Henry and DruAnne Kuratle (individually "Henry" and "DruAnne," collectively "the Kuratles"). Linden Green, the defendant, is a non-profit Delaware corporation that manages the business and affairs of the Linden Green Condominiums, which are located in Wilmington, Delaware. Linden Green adopted, and adheres to, the Linden Green Code of Regulations ("Code"). Although not expressly a party, the Linden Green Condominium Council ("Council") is responsible for handling the business and affairs of Linden Green, applying the Code. The members of the Council are elected by a majority vote of Linden Green's Unit Owners. At all relevant times, Ronald R. Jones ("Jones") was the President of the Council; Barbara Murphy ("Murphy") was the Vice President of the Council; Ollive Shepherd ("Shepherd") was the Secretary of the Council; and Ben Zoufan ("Zoufan") served as the Acting Treasure of the Council. According to Jones, although Zoufan was a Council member, because he was not elected, he was not a voting member at all relevant times.

## **B.** Relevant Code Requirements

Pursuant to the Code, "no agreement . . . shall be binding upon the Council unless [1] entered into on its behalf by the Council and [2] signed by two officers or by one officer and by one assistant officer or by one officer and any other person designated for such purpose by the Council." Thus, the Code requires the Council, itself, to approve entering into the proposed agreement. The Code states, absent a vote of Unit Owners, "the Council shall act only at a duly

<sup>&</sup>lt;sup>4</sup>Pl.'s First Mot. for Part. Summ. J. Tab 7 at 9-10.

constituted meeting thereof." The Code identifies three forms of Council meetings at which the Council can act, (1) Organizational Meetings, (2) Regular Meetings, and (3) Special Meetings. Pursuant to the Code, an Organizational Meeting is held after the election of new Council members at the annual meeting of Unit Owners, and its purpose is to elect officers from newly elected Council members. Regular Meetings and Special Meetings require written notice to be given to all members of the Council, unless notice is waived.

The Code further provides that the action of the Council must be based on "the act of a majority of the members at the meeting at which a quorum is present at the time any vote is taken." A quorum is defined by the Code as a "majority of the members of the council." The members of the Council can attend a Council meeting telephonically or through video-conference, providing "all persons participating in the meeting can hear each other."

### C. 2002, 2007, and 2010 Agreements

In November of 2002, Kuratle and Linden Green entered into a written agreement ("2002 Agreement"), in which Linden Green employed Kuratle "to manage the maintenance, operations, landscaping, snow removal and finances of [Linden Green]." The term provision of the 2002 Agreement provides that Linden Green employed Kuratle for a period of "one (5) year [sic] beginning on December 01, 2002 and terminating on December 31, 2007." Both parties agree that the 2002 Agreement was validly binding and that all parties performed in accordance with the agreement without incident until October 2007. In October 2007, the parties entered into a second contract ("2007 Agreement"), which is very similar to the 2002 Agreement, with minor changes in, for example, pricing. The 2007 Agreement was executed by two officers of the Council, and the agreement became effective January 1, 2008, and included an annual self-

<sup>&</sup>lt;sup>5</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. A.

<sup>°</sup>Id.

renewing contract running through December 1, 2012. Specifically, Paragraph C of the 2007 Agreement, relating to the agreements term, provides:

- 1. The Board hereby appoints and employs [Kuratle] to manage [Linden Green] for a period of one (5) year [sic] beginning on, January 01, 2008 and terminating on December 31, 20132.<sup>7</sup>
- 2. This Agreement shall be annually renewable by the parties for a period not to exceed five (5) years.
- 3. The Agreement and any renewal thereof shall be terminable by either party with cause and without payment of any termination fee upon sixty (60) days written notice.
- 4. [Linden Green] may terminate this Agreement in the event [Kuratle] is determined by [Linden Green] to be in default of this Agreement and [Kuratle] fails to cure the default as provided herein. In the event of a default [Linden Green] shall notify [Kuratle] in writing of the default and [Kuratle] shall have thirty (30) days to cure the default. In the event [Kuratle] fails to cure the default within the said thirty (30) days, [Linden Green] may terminate this Agreement. Termination shall be effective immediately upon receipt by [Kuratle] of written notice by [Linden Green]. <sup>8</sup>

According to Linden Green, "[a]pproximately two years into the 2007 Agreement, certain residents and [Council] members began to have issues with how Kuratle was performing its duties. Specifically, there was a great deal of dissatisfaction with snow removal during the . . . winter of 2009-2010, in which residents complained it was more than three weeks before the parking lot was cleared and made safe."

According to Kuratle, in May 2010, Jones began thinking about extending the 2007 Agreement prior to its December 31, 2012 expiration. Shepherd was in accord with Jones' desire to keep Kuratle retained with Linden Green. Shepherd testified that she discussed the idea of renewing the 2007 Agreement with Jones and other Council members on an "on-going basis."

<sup>&</sup>lt;sup>7</sup> The date printed in typeface in Paragraph C states, "December 31, 2013". However, the parties struck out the "3" and replaced it with "2," indicating a termination date of December 31, 2012, which is consistent with the agreement's five-year term. Together with this alteration appears the following initials: "S.O.," "HK," and "BLM." Defs.' Resp. to Pl.'s Mot. for Part. Summ. J. Ex. D.

<sup>&</sup>lt;sup>9</sup> Def.'s Resp. to Pl's Mot. for Partial Summ. J., at 2-3 (Oct. 4, 2013) (hereinafter "Def.'s Resp. to Pl's First Mot. for Part. Summ. J.").

In approximately the first week of September 2010, Jones asked DruAnne, on behalf of Kuratle, to draft a new contract, the 2010 Agreement. Around the same time, and again at Jones' request, DruAnne sent a copy of the 2010 Agreement to Shepherd at her home in Galveston, Texas. Jones claims to have "thoroughly reviewed" the 2010 Agreement and then "had discussions with other officers of the Council" about the agreement. According to an affidavit submitted by Jones, in his view, the 2010 Agreement is "virtually identical" to the 2002 and 2007 Agreements "except for term and minor pricing changes." Notes taken at a Council meeting held on September 14, 2010, which are initialed by Jones and Shepherd, evidence discussion about entering into an agreement with Kuratle going out to 2017. The provision defining the 2010 Agreement's term, which is very similar to that of the 2007 Agreement, provides as follows:

- 1. The Board hereby appoints and employs [Kuratle] to manage [Linden Green] for a period of one (7) year [sic] beginning on, January 1, 2010 and terminating on December 31, 2017.
- 2. This Agreement shall be annually renewable by the parties for a period not to exceed five (7) [sic] years.
- 3. The Agreement and any renewal thereof shall be terminable by either party with cause and without payment of any termination fee upon sixty (60) days written notice.
- 4. [Linden Green] may terminate this Agreement in the event [Kuratle] is determined by [Linden Green] to be in default of this Agreement and [Kuratle] fails to cure the default as provided herein. In the event of a default [Linden Green] shall notify [Kuratle] in writing of the default and [Kuratle] shall have thirty (30) days to cure the default. In the event [Kuratle] fails to cure the default within the said thirty (30) days, [Linden Green] may terminate this Agreement. Termination shall be effective immediately upon receipt by [Kuratle] of written notice by [Linden Green].

DruAnne testified that the term of the 2010 Agreement was for seven years and the word "one" typed before the numeral "(7)" is a typographical error. DruAnne also testified that the

<sup>&</sup>lt;sup>10</sup> Pl.'s First Mot. for Part. Summ. J. Tab 3, Ex. 1 ("Renew Management [and] Grass & Snow Contract for 5 yrs to 2017".).

seven-year term was to commence on January 1, 2010 and end on December 31, 2017. However, DruAnne's testimony is contradicted by Shepherd, who explained that she "believe[d]" that the 2010 Agreement would "run from January 1 of 2013 . . . because the [2007 Agreement] ended December 31<sup>st</sup>, 2012." <sup>11</sup>

On September 21, 2010, Shepherd sent an e-mail to Kuratle stating that she approved the 2010 Agreement. Shepherd also sent a letter to Jones from her home in Texas, informing Jones that she had given her son, Alan Thurn ("Thurn"), permission to sign the 2010 Agreement on her behalf as Secretary of the Council, because she could not be personally present to sign the agreement. Later that same day, the Council held its "regular" Tuesday evening meeting at its on-site office. Although, according to Shepherd, written notice of the meeting was not provided or waived. Jones and Henry attended the meeting in person. Shepherd "attended" the meeting via video-conference from her home in Texas, as she contends she has done on two or three previous occasions. Shepherd testified that, because of poor connectivity, "she could see people move to the end of the table but [she] couldn't hear what they were saying." <sup>12</sup> Kuratle contends that Jones signed the 2010 Agreement at the September 21 meeting. However, Jones testified that he does not recall attending the meeting and that he signed the 2010 Agreement at a bank in front of a notary, without any other Council members being present. No party disputes that Thurn signed on behalf of Shepherd at the September 21 meeting, writing "Olive Shepherd 9-21-10." Additionally, no party disputes that the 2010 Agreement was signed by Henry and DruAnne on behalf of Kuratle on September 24, 2010, three days after the Tuesday night meeting.

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<sup>&</sup>lt;sup>11</sup> Pl.'s First Motion for Part. Summ. J. Tab 3 at 16.

<sup>&</sup>lt;sup>12</sup>Def.'s Resp. to Pl's First Mot. for Part. Summ. J., at 8 (quoting Defendant's Exhibit J at 107-108).

### D. Linden Green Advised Kuratle the 2010 Agreement is Unenforceable

On December 12, 2011, over a year after the 2010 Agreement was executed, Linden Green sent a letter to Kuratle contending that the Council had submitted the 2010 Agreement to any attorney who advised the Council that the agreement was "invalid and unenforceable." Linden Green's letter further advised Kuratle that it was continuing to operate under the 2007 Agreement, and that the attorney also found "some problems" with the 2007 Agreement that prompted the Council to propose an "Addendum." The Addendum sought to appoint a consultant for the Council to oversee various aspects of Kuratle's performance that the Council viewed as deficient. Linden Green requested Kuratle to "sign the Addendum and keep a copy for your records." The Addendum advised Kuratle that its failure to sign the Addendum would be considered a default, which could result in Linden Green terminating the 2007 Agreement.

In response to the December 12 letter from Linden Green, on December 29, 2011, former counsel for Kuratle, Thomas B. Ferry, Esq. ("Ferry"), wrote to Linden Green, stating that he had reviewed the 2010 Agreement and concluded that it was valid and enforceable. Ferry further explained that "[t]he modification provision contained in paragraph F-4 [of the 2010 Agreement] . . . says that any modification must be in writing . . . and sign[ed] by both parties to the contract." Paragraph F-4 of the 2007<sup>16</sup> and 2010<sup>17</sup> Agreements, which relates to modifying the agreement, provides:

This Agreement shall constitute the entire Agreement between the parties and no variance or modification hereof shall be valid and enforceable except as set forth in writing and as approved and executed in the same manner as this Agreement.

<sup>&</sup>lt;sup>13</sup> Pl.'s First Mot. for Part. Summ. J. at 4-5 (quoting Pl.'s Tab 1, Exhibit E).

<sup>14</sup> *Id*.

<sup>&</sup>lt;sup>15</sup> Id.

<sup>&</sup>lt;sup>16</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. B at 5.

<sup>&</sup>lt;sup>17</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. C at 5.

Ferry's December 29 letter continued by explaining that Linden Green's proposed Addendum was not acceptable to Kuratle,<sup>18</sup> and advised that "Kuratle expects to fully comply with its obligations under the 2010 contract . . . and it fully expects Linden Green to do so [as well]." <sup>19</sup>

### E. Linden Green Terminates Business Relationship & Kuratle Files Suit

Linden Green thereafter, by letter dated January 16, 2012, declared Kuratle to be in default of the 2007 Agreement for failing to execute the Addendum within thirty days and advised Kuratle that it was terminating their business relationship. Kuratle filed suit against Linden Green on March 7, 2012, asserting Linden Green breached the 2010 and 2007 Agreements. Although Kuratle asserts that Linden Green breached the valid and enforceable 2010 Agreement, Kuratle asserts in the alternative that, in the event the Court determines the 2010 Agreement to be invalid, Linden Green breached the 2007 Agreement by terminating the parties' business relationship prematurely. Linden Green filed an answer, affirmative defenses, and a counterclaim to Kuratle's Complaint on April 13, 2012. Linden Green's counterclaim asserts that Kuratle acted tortuously and committed breach of contract by mismanaging Linden Green and failing to perform under the 2002 and 2007 Agreements in various ways, including failing to properly maintain Linden Green's books and records, resulting in Linden Green overpaying certain bills.

## F. October 31 Oral Argument

On October 31, 2013, the Court heard oral argument from the parties regarding, *inter alia*, Linden Green's Motion for Partial Summary Judgment and Kuratle's Second Motion for Partial Summary Judgment. During oral argument, both parties advised the Court that representatives from Linden Green had the sole responsibility for signing all checks, which were

<sup>19</sup> *Id*.

<sup>&</sup>lt;sup>18</sup> Pl.'s First Mot. for Part. Summ. J. at 5 (citing Pl.'s Tab 1, Exhibit G).

prepared by Kuratle. Additionally, it became apparent that Linden Green's books and records, which were maintained by Kuratle, were always kept onsite at Linden Green, allowing Linden Green unfettered access.

## **III. Parties' Contentions**

#### A. Kuratle's First Motion for Partial Summary Judgment

Kuratle's first Motion for Partial Summary Judgment requests this Court to conclude there is no genuine issue of material fact that precludes this Court from finding that (1) the 2010 Agreement is binding on Linden Green and (2) Linden Green's termination of the parties' business relationship for failing to agree to the Addendum was a breach of the 2010 Agreement.

#### i. Kuratle

## a. Validity of 2010 Agreement

Kuratle argues that the 2010 Agreement is valid because it was entered into by the Council and signed by two officers of the Council as required by the Code. Kuratle contends there is no dispute that Jones and Shepherd were both officers of the Council on September 21, 2010. Further, Kuratle argues that it is undisputed that Jones signed the 2010 Agreement personally, and Shepherd delegated Thurn, her son, both orally and in writing, the "ministerial act of writing her signature on the 2010 [A]greement so as to signify her formal approval thereof as Secretary of the Council." Kuratle contends that Delaware law clearly permits corporate officers, such as Shepherd, to delegate ministerial acts to non-officers. As a consequence, Kuratle contends, "[t]he ministerial act of physically writing Ms. Shepherd's signature on the document due to her absence from Delaware was properly delegated." In addition to arguing that Thurn had the authority to sign on behalf of Shepherd, Kuratle argues alternatively that "it has been held that a corporation cannot use its own failure to follow the requisite formalities

<sup>&</sup>lt;sup>20</sup> Kuratle Mot. for Part. Sum. J. at 7 (citing Bigmar, Inc., Section 225 Litigation, 2010 WL 550469 (Del. Ch. 2002)).

before entering into a contract as a basis to nullify the contract with a third party."<sup>21</sup> Therefore, Kuratle contends any failure by Linden Green to follow its own internal procedures is not a basis to find the 2010 Agreement invalid and unenforceable.

# b. Alleged Breach of 2010 Agreement

Kuratle contends that Linden Green's refusal to recognize the validity of the 2010 Agreement and Linden Green's unilateral termination of its business relationship with Kuratle "was a blatant breach of the 2010 Agreement as a matter of law justifying summary judgment in favor of Kuratle."

#### ii. Linden Green

### a. Execution of 2010 Agreement by Linden Green's Officers

Linden Green contends there is a material issue of fact regarding whether the document signed by Jones and Thurn was the same document, or even the document Kuratle propounds as the 2010 Agreement. Linden Green takes issue with Kuratle's assertion in its first Motion for Partial Summary Judgment, where Kuratle asserts that Jones and Shepherd, via her son, both executed the 2010 Agreement at the September 21 meeting. Linden Green argues the record contradicts Kuratle's claim, because Jones testified that he signed the document "purporting to be the 2010 Agreement" at a bank in front of a notary, with no Council members present. Linden Green contends that, because Jones gave the 2010 Agreement to Kuratle, who had it for a day or so, the agreement was left "for an undisclosed period of time during which . . . Kuratle could have changed material terms." Further, Linden Green points out that, although Henry, an officer and shareholder of Kuratle, "was reported to be present at [the] September 21, 2010 meeting, there is no indication why he did not sign the document at the meeting."

<sup>&</sup>lt;sup>21</sup> Id. at 8 (citing Carriage Realty P'ship v. All-Tech Auto Automotive, Inc., 2001 WL 152630 (Del. Ch. 2001)).

### b. Approval of 2010 Agreement by Council

Linden Green asserts that Kuratle conflates two separate inquires when it contends that the 2010 Agreement was "entered into by the Council and signed by two officers of the Council as required by the Code." As stated above, the Code provides that "no agreement . . . shall be binding upon the Council unless [1] entered into on its behalf by the Council and [2] signed by two officers or by one officer and by one assistant officer or by one officer and any other person designated for such purpose by the Council." Additionally, the Code states, absent a vote of Unit Owners, "the Council shall act only at a duly constituted meeting thereof." Linden Green contends that the September 21 meeting at which the 2010 Agreement was allegedly executed was not any of the three forms of Council meetings identified above, *i.e.*, (1) Organizational Meeting, (2) Regular Meeting, and (3) Special Meeting, and there is no evidence that there was a vote of the Unit Owners.

Linden Green also asserts that "there is an issue of fact as to whether the required quorum was present for the Council to transact business." Linden Green asserts the Code is clear that a quorum is defined as a "majority of the members of the council." Linden Green contends there is a material issue of fact regarding whether there was a quorum at the September 21 meeting, because there is a dispute whether two parties present at the meeting, Zoufan and Patricia Caldwell ("Patricia"), should be considered as part of the quorum. Linden Green contends it is unclear whether Zoufan was a voting member and whether Patricia was a member at large. Moreover, Linden Green points out that, according to Kuratle's own admission, only Jones and Shepherd attended the September 21 meeting. Therefore, Linden Green argues, "this would only constitute a majority of a three-person board, which has not been established." Further, Linden Green contends there is also a material issue of fact regarding whether Shepherd

can properly be considered present at the meeting, because she testified that at points during the meeting, which she attended through video conference, "she could see people move to the end of the table but [she] couldn't hear what they were saying." Because the Code unambiguously requires all persons participating through telephone or similar communications to be able to hear each other, Linden Green contends Shepherd cannot be properly considered to have attended the September 21 meeting.

#### c. Termination of 2007 and/or 2010 Agreement

Linden Green asserts that, assuming the 2010 Agreement is valid and enforceable, it properly terminated the contract. The relevant language of the 2010 Agreement, Paragraph C-4, provides:

LGCA may terminate this Agreement in the event the Agent is determined by LGCA to be in default under this Agreement and the Agent fails to cure the default as provided herein. In the event of a default LGCA shall notify the Agent in writing of the default and the Agent shall have thirty (30) days to cure the default. In the event the Agent fails to cure the default within said thirty (30) days, LGCA may terminate this Agreement. Termination shall be effective immediately upon receipt by Agent of written notification by LGCA.<sup>22</sup>

Initially stating that Delaware adheres to the "objective" theory of contracts, Linden Green then contends that the above-cited provision is clear and unambiguous, and therefore this Court should look to the provision's plain meaning. Linden Green contends that it is undisputed that the December 12, 2011, letter notified Kuratle of Linden Green's determination that Kuratle was in default, and the letter further outlined how Kuratle could cure the default, *i.e.*, by assenting to the proposed Addendum. Linden Green contends that the Addendum makes clear that failure by Kuratle to execute the Addendum within thirty days could result in Linden Green terminating the 2007 Agreement. Linden Green then asserts that, although the December 12, 2011 letter references the 2007 Agreement, not the 2010, it still serves the purpose of notifying

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<sup>&</sup>lt;sup>22</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. C at 4.

Kuratle that Linden Green viewed them as being in default. Linden Green asserts that the default provisions in the 2007 and 2010 Agreements are identical, and all that is required under both agreements is that Kuratle be put on notice of the default.

#### B. Linen Green's Motion for Partial Summary Judgment

#### i. Linden Green

Linden Green moves for partial summary judgment contending: (1) the 2010 Agreement is invalid because the term provision, relating to the agreement's duration, is vague and indefinite; and (2) assuming the 2010 Agreement was valid, it properly terminated the 2010 Agreement in accordance with the agreement's express terms.

### a. Indefinite/Vague Duration

Linden Green asserts that "[i]t is impossible, with a straightforward reading of the 2010 Agreement, to determine the duration of the contract." Paragraph C of the 2010 Agreement, the term provision, states: "The Board hereby appoints and employs [Kuratle] to manage [Linden Green] for a period of one (7) year [sic] beginning on January 1, 2010 and terminating on December 31, 2017." Linden Green points out that, in addition to the term stating "(7)" as well as "one," the defined term—i.e., January 1, 2010 to December 31, 2017—is an eight-year term, not seven. Linden Green argues the scope provision is fatally indefinite and vague. Additionally, Linden Green argues that the renewal provision, which provides that the 2010 Agreement "shall be renewable by the parties for a period not to exceed five (7) [sic] years," is also unclear. Finally, Linden Green contends that there is contradictory evidence on the record regarding when the 2010 Agreement was to become operative, citing the fact that in September 2010, when the 2010 Agreement was executed, the parties were already operating under the 2007 Agreement, which by its terms did not expire until December 31, 2012. Linden Green contends that the 2010

Agreement purports to start retroactively on January 1, 2010 and does not address how the parties should treat the remainder of the 2007 Agreement's term. As a result, Linden Green contends that "[t]here clearly is no agreement by the parties as to when the 2010 Agreement was to begin."

#### b. Termination of 2010 Agreement by Linden Green

Although it contends that the 2010 Agreement was invalid as a matter of law (for the duration being indefinite), Linden Green asserts that the 2010 Agreement unambiguously provided it with the right to terminate the agreement, which it contends it exercised. The pertinent provision of the 2010 Agreement provides:

[Linden Green] may terminate this Agreement in the event that [Kuratle] is determined by [Linden Green] to be in default of this Agreement and [Kuratle] fails to cure the default as provided herein. In the event of a default [Linden Green] shall notify [Kuratle] in writing of the default and [Kuratle] shall have thirty (30) days to cure the default. In the event [Kuratle] fails to cure the default within thirty (30) days, [Linden Green] may terminate this Agreement. Termination shall be effective immediately upon receipt by [Kuratle] of written notification by [Linden Green]. 23

Although Linden Green's January 16, 2012, letter to Kuratle referenced the 2007 Agreement as being terminated, Linden Green asserts that "[i]t is undisputed that the language of the 2007 Agreement regarding termination . . . is identical to the language in the 2010 Agreement," and therefore the letter to Kuratle "still serves the purpose of notifying Kuratle that Linden Green viewed them as being in default." Because Kuratle failed to execute the Addendum within thirty days—thereby curing the default Linden Green identified—Linden Green asserts the 2010 Agreement was effectively terminated.

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<sup>&</sup>lt;sup>23</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. C at 4.

#### i. Kuratle

### a. Indefinite/Vague Duration

In opposition to Linden Green's assertion that the 2010 Agreement's term provision is fatally indefinite, although Kuratle agrees that "material provision[s] of an agreement must be present in order for the agreement to be enforceable," Kuratle disagrees that the intended duration of the 2010 Agreement cannot be ascertained. To this end, Kuratle asserts that the 2010 Agreement "quite clearly" states that the term of the agreement commences on January 1, 2010, and ends on December 31, 2017. Moreover, Kuratle cites testimony from DruAnne, who prepared the 2010 Agreement pursuant to instructions from Jones. DruAnne testified at her deposition that the term of the 2010 Agreement was for seven years and the word "one" typed before the numeral "(7)" is a typographical error. DruAnne also testified that the seven-year term was to commence on January 1, 2010 and end on December 31, 2017. Euratle contends that there is no evidence in the record to refute DruAnne's testimony.

Finally, although Shepherd was unaware why the 2010 Agreement was retroactive, she testified that the 2010 Agreement was for a seven-year term. Based on the above testimony, Kuratle contends that "even if there is an ambiguity in the [2010 Agreement] due to the typographical error, the extrinsic evidence on the record in this case shows that the parties signing the 2010 Agreement intended a 7 year-term beginning in 'January 01, 2010' and ending in 'December 31, 2017.'"

#### b. Termination of 2010 Agreement by Linden Green

Kuratle contends that Linden Green is also incorrect in contending that it properly terminated the parties' business relationship in January 2010 regardless of whether the 2010 or 2007 Agreement was operative. Kuratle contends that the mere fact that the termination

<sup>&</sup>lt;sup>24</sup> The Court notes that this period represents eight years, not seven.

provision in both agreements is the same does not mean that the termination of the 2007 Agreement automatically terminates the 2010 Agreement. Additionally, Kuratle asserts it was never in default. Kuratle contends that the default alleged by Linden Green was Kuratle's failure to agree to the Addendum to the 2007 Agreement, which Kuratle "deemed to be unacceptable." Kuratle contends that it had no obligation under the 2007 Agreement, or otherwise, to agree to the Addendum, especially because the Addendum was not supported by additional consideration. Kuratle points out that Paragraph F of the 2007 Agreement, titled "General Provisions," requires that any modification to the 2007 Agreement be in writing and signed by the parties. Kuratle asserts that "[t]here is nothing in the law or in either the 2007 or the 2010 Agreement[s] that allows either party to unilaterally declare a default because the other party refuses to agree to a change to the existing agreement."

## C. Kuratle's Second Motion for Partial Summary Judgment

#### i. Kuratle

In its second Motion for Partial Summary Judgment, Kuratle contends that Linden Green "is barred from pursuing its counterclaim as to any matter which occurred prior to April 13, 2009," because Linden Green did not file its counterclaim until April 13, 2012. Kuratle contends there is no basis to toll the applicable statute of limitations, which provides for a three-year period during which suit can be filed.

#### ii. Linden Green

Linden Green agrees with Kuratle that a three-year statute of limitations governs its counterclaim. Additionally, Linden Green concedes that its breach-of-contract claim can only extend back three years, accepting that there is no basis to toll the limitations period. However, regarding its tort-based claims relating to Kuratle's alleged mismanagement, Linden Green

contends that the statute of limitations should be tolled under the time-of-discovery rule. Linden Green contends that the time-of-discovery rule is applicable in the case *sub judice* because, it argues, "[t]here were no observable or objective factors to alert [Linden Green] to the injury and [Linden Green] was blamelessly ignorant." Linden Green asserts that it had no way of knowing how poorly the books and records were being maintained, because Kuratle exclusively controlled the management of Linden Green and it took a forensic audit to uncover the extent of the Kuratle's mismanagement.

#### IV. STANDARD OF REVIEW

This Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>25</sup> A motion for summary judgment, however, should not be granted when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.<sup>26</sup> A dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>27</sup> Thus, the issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."<sup>28</sup>

Although the party moving for summary judgment initially bears the burden of demonstrating that the undisputed facts support his legal claims, once the movant makes this showing, the burden "shifts to the non-moving party to demonstrate that there are material issues

<sup>&</sup>lt;sup>25</sup>Super. Ct. Civ. R. 56(c).

<sup>&</sup>lt;sup>26</sup>Bernal v. Feliciano, 2013 WL 1871756, at \*2 (Del. Super. Ct. May 1, 2013) (citing Ebersole v. Lowengrub, 180 A.2d 467, 468 (Del. 1962)).

<sup>&</sup>lt;sup>27</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243 (1986).

 $<sup>^{28}</sup>Id.$ 

<sup>&</sup>lt;sup>29</sup> Hughes ex rel. Hughes v. Christina Sch. Dist., 2008 WL 73710, at \*2 (Del. Super. Ct. Jan. 7, 2008) (citing Storm v. NSL Rockland Place, LLC, 898 A.2d 874, 879-80 (Del. Super. Ct. 2005)).

of fact for resolution by the ultimate fact-finder."<sup>30</sup> When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. <sup>31</sup> Finally, the standard of review is not affected by cross-motions for summary judgment.

#### V. DISCUSSION

#### A. Kuratle's First Motion for Partial Summary Judgment

Kuratle's first Motion for Partial Summary Judgment contends that (1) the 2010 Agreement was valid and enforceable, and (2) Linden Green's termination of the parties' business relationship for failing to agree to the Addendum was a breach of the 2010 Agreement.

Linden Green asserts there are genuine issues of material fact regarding whether Linden Green followed its internal rules and procedures, which are provided by the Code, when entering into the 2010 Agreement.<sup>32</sup> In addition to arguing that the 2010 Agreement is invalid, Linden Green also contends there is a material issue of fact regarding whether Jones and Shepherd, through Thurn, "signed the same document, or even signed the document being propounded by [Kuratle] as the 2010 Agreement."<sup>33</sup>

### i. 2010 Agreement Was Valid and Enforceable

#### a. Linden Green's Failure to Follow Internal Procedures

Linden Green's assertion that failing to follow its own internal procedures permits this Court to find the 2010 Agreement invalid and unenforceable is misplaced. If this Court were to hold that a contract is invalid and unenforceable, merely because one party failed to follow its own self-created procedures, could create injustice. The party who failed to follow its own

 $<sup>^{30}</sup>Id$ 

<sup>&</sup>lt;sup>31</sup>Joseph v. Jamesway Corp., 1997 WL 524126, at \*1 (Del. Super. Ct. July 9, 1997) (citing Billops v. Magness Const. Co., 391 A.2d 196, 197 (Del. Super. Ct. 1978)).

<sup>&</sup>lt;sup>32</sup> Linden Green asserts the following material issues of fact preclude this Court granting partial summary judgment: (1) whether there was a quorum at the September 21, 2010 meeting; (2) whether Jones was in attendance at the September 21 meeting; and (3) whether Shepherd can be considered present at the September 21 meeting.

<sup>&</sup>lt;sup>33</sup> Def.'s Resp. to Pl's First. Mot. for Part. Summ. J. at 10.

procedures could wait until the contract was no longer beneficial to it, and then come to the Court with evidence of that deficiency and ask to have the contract held invalid. The other party to the contract is blameless, but, under Linden Green's approach, would be left with an unenforceable agreement.

The Court of Chancery was presented with a similar argument in *Carriage Realty Partnership v. All-Tech Auto Automotive, Inc.*<sup>34</sup> In *Carriage Realty*, the defendant and plaintiff entered into a sale-leaseback agreement that the defendant argued was "invalid under the premise that [the defendant's principal] lacked corporate authority to bind the company, because he 'signed the [Sale-Leaseback] Agreement without a corporate resolution or any meeting [or] vote.'"<sup>35</sup> The Court stated, "[t]his curious argument essentially asserts that [the principal's] own failure to follow the requisite formalities before entering into the Sale-Leaseback provides him with an *ultra vires* argument to nullify the transaction."<sup>36</sup> The Court rejected this "curious argument," citing the fact that the defendant's principal was the sole director and shareholder of the corporation, and thus "at the very least, he had the apparent authority to bind that entity under the Sale-Leaseback."<sup>37</sup> The Court went on to state,

[I]t was not [the plaintiff's] responsibility to ensure that the two individuals holding themselves out as [acting on behalf of the defendant-corporation] had the authority to enter into the Sale-Leaseback transaction. To the extent [the defendant] has a claim against [its principal] for acting outside the scope of his authority, it is free to bring it.<sup>38</sup>

Although Linden Green has a more robust board of directors and unit-holder composition than the company at issue in *Carriage Realty*, the Court of Chancery's reasoning is nonetheless applicable to the case *sub judice*. It was not Kuratle's responsibility to ensure that Linden Green,

<sup>&</sup>lt;sup>34</sup> 2001 WL 1526301 (Nov. 27, 2001).

<sup>&</sup>lt;sup>35</sup> *Id.* at \*6 (citation omitted).

<sup>&</sup>lt;sup>36</sup> *Id*.

 $<sup>^{37}</sup>$  *Id.* at 7.

<sup>&</sup>lt;sup>38</sup> *Id*.

through its representatives, had the authority to enter into the 2010 Agreement. To the extent that Linden Green's agents exceeded their authority, Linden Green is free to take recourse against them. However, Linden Green's failure to follow its own internal procedures is not a proper basis for this Court to find the 2010 Agreement invalid.

# b. There's No Genuine Issue that Linden Green Signed the 2010 Agreement Propounded by Kuratle

Finally, Linden Green asserts there is a material issue of fact regarding whether Jones and Shepherd, through Thurn, signed the same document or even signed the document Kuratle contends is the 2010 Agreement. To support its contention, Linden Green relies on testimony from Shepherd, who stated that she did not understand the 2010 Agreement to be retroactive (which contradicts the 2010 Agreement's express language), and Jones who, through his affidavit, stated that the 2010 Agreement is "virtually identical" to the 2002 and 2007 Agreements "except for term and minor pricing changes." Linden Green contends that Jones' testimony is contradicted by the fact that the 2010 Agreement, in addition to increasing pricing and changing the length of the agreement, also eliminates the requirement that Kuratle or any of its contractors performing services for Linden Green carry insurance. Linden Green contends this evidence supports this Court concluding that a genuine issue of fact exists regarding whether the 2010 Agreement offered by Kuratle is the same agreement that was executed on behalf of Linden Green.

The fact that Shepherd's understanding differs from Kuratle's is not an adequate reason for this Court to conclude there is a genuine issue of fact regarding whether Kuratle is now offering a different agreement, which it claims is the 2010 Agreement, than the one presented to Linden Green. Further, the fact that Jones considers, in his subjective view, the 2010 Agreement to be "virtually identical" to the 2002 and 2007 Agreements does not support Linden Green's

assertion that Kuratle is offering into evidence a different contract than that presented to, and signed on behalf of, Linden Green. Linden Green was provided with the 2010 Agreement prior to executing the agreement on September 21, 2010. Importantly, DruAnne, at Jones' request, sent the Council's Secretary, Shepherd, a copy of the 2010 Agreement to her home in Texas before the agreement was executed. Jones also reviewed a copy of the 2010 Agreement prior to signing on behalf of Linden Green. Thus, Linden Green was clearly presented with the 2010 Agreement it executed and is in a good position to offer into evidence any copy of the 2010 Agreement that differs from that propounded by Kuratle. Linden Green has failed to present a copy of the 2010 Agreement that supports its assertion that there is reason to believe that Kuratle is now propounding a different agreement than that executed on behalf of Linden Green. Even when viewing the facts in the light most favorable to Linden Green, the Court concludes that Linden Green has failed to demonstrate that there is a genuine issue of material fact regarding whether the 2010 Agreement propounded by Kuratle is the same agreement that was presented to Linden Green and signed by Jones and Thurn.

For the reasons stated above in Part (V)(A)(i), Kuratle's first Motion for Partial Summary Judgment is **GRANTED** to the extent it asserts that the 2010 Agreement was valid and enforceable. However, as discussed below, there remains a genuine issue of material fact regarding whether the 2010 Agreement was to be retroactively operative.

#### ii. Termination of 2010 Agreement by Linden Green

Linden Green asserts that the 2010 Agreement unambiguously provided it with the right to terminate, citing Paragraph C-4. Paragraph C-4 of the 2010 Agreement, which mirrors Paragraph C-4 of the 2007 Agreement, provides:

[Linden Green] may terminate this Agreement in the event that [Kuratle] is determined by [Linden Green] to be in default of this Agreement and [Kuratle]

fails to cure the default as provided herein. In the event of a default [Linden Green] shall notify [Kuratle] in writing of the default and [Kuratle] shall have thirty (30) days to cure the default. In the event [Kuratle] fails to cure the default within thirty (30) days, [Linden Green] may terminate this Agreement. Termination shall be effective immediately upon receipt by [Kuratle] of written notification by [Linden Green]. <sup>39</sup>

This Court cannot agree with Linden Green's contention that it properly terminated the 2010 Agreement. First, Linden Green's letter referenced the 2007 Agreement as being terminated, not the 2010 Agreement. Linden Green cannot necessarily terminate one agreement by citing another, regardless of whether both agreements have identical termination provisions. Second, and more importantly, Linden Green's interpretation of termination provision found in the 2007 and 2010 Agreements is inconsistent with the agreements' no-oral modification clause. 40

Further, Linden Green asserts that Kuratle was in default for failing to agree to the Addendum, which would have modified the 2007 Agreement by requiring a Council-appointed consultant to oversee Kuratle's work. However, the 2007 Agreement states that any modification must be in writing and signed by the parties. The modification provision does not, by its express terms, permit either party to unilaterally modify the agreement. Linden Green asserts that it has the sole authority to determine whether Kuratle is in default, citing the following language: "[Linden Green] may terminate this Agreement in the event [Kuratle] is determined by [Linden Green] to be in default." However, this language does not address whether Linden Green's default determination must be made objectively or subjectively. Put differently, the language does not state that Linden Green's subjective belief, without more, is

<sup>&</sup>lt;sup>39</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. C at 4.

<sup>&</sup>lt;sup>40</sup> *Id.* at 5 ("This Agreement shall constitute the entire Agreement between the parties and no variance or modification hereof shall be valid and enforceable except as set forth in writing and as approved and executed in the same manner as this Agreement.").

<sup>&</sup>lt;sup>41</sup>There is a gap in the agreement. Accordingly, in determining the proper construction, this Court considers the implied covenant of good faith and fair dealing. *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010).

sufficient to deem Kuratle in default. Further, Linden Green has failed offer any extrinsic evidence that would assist the Court in finding Linden Green's subjective determination was sufficient.

The agreement's failure to specify the manner by which Linden Green should exercise its judgment, regarding whether its default determination should be made objectively or subjectively, implicates the implied covenant of good faith and fair dealing. As stated by the Delaware Supreme Court in *Dunlap v. State Farm and Casualty Company*, the implied covenant is "best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions.'" The Court further explained, "[I]n its most general terms, the implied covenant requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."

In *Gilbert v. El Paso Co.*, the Delaware Court of Chancery, which was later affirmed by the Delaware Supreme Court, explained that "if one party is given discretion in determining whether [a] condition [in the contract] has in fact occurred[,] that party must use good faith in making that determination."<sup>44</sup> Although, in *Gilbert* specific conditions were specified, the 2007 and 2010 Agreements do not reference any objective trigger that warrants Linden Green declaring Kuratle to be in default. Assuming, *arguendo*, that Linden Green's subjective belief is sufficient, the implied covenant of good faith and fair dealing mandates that Linden Green "must use good faith in making that determination."<sup>45</sup>

<sup>&</sup>lt;sup>42</sup> Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 441 (Del. 2005) (quoting E.I. DuPont Nemours & Co., 679 A.2d 436, 443 (Del. 1996)).

<sup>&</sup>lt;sup>43</sup> *Id.* at 442 (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

<sup>44</sup> Gilbert v. El Paso Co., 490 A.2d. 1050, 1055 (Del. Ch. 1984), aff'd, 575 A.2d 1131 (Del. 1990).

<sup>45</sup> Id

Pursuant to Paragraph C-4 of both the 2007 and 2010 Agreements, Linden Green was required to (1) notify Kuratle in writing of any default, (2) specifically identify Kuratle's conduct that constituted a default, and (3) provide Kuratle with thirty days to cure the identified default. Even viewing the facts in the light most favorable to Linden Green, the record is devoid of any evidence that Linden Green put Kuratle on notice regarding what aspect(s) of its work Linden Green viewed as deficient. Had Linden Green done so, given Kuratle the requisite time to cure those deficiencies, and then terminated the contract, the various factual disputes that might arise, such as whether a deficiency occurred or if it was cured, would be for a jury to decide, and summary judgment would not be appropriate.

Rather, Linden Green simply advised Kuratle that it would be in default if it failed to execute the Addendum. The Addendum would have undeniably modified the parties' contractual agreement by requiring a Council-appointed consultant to oversee Kuratle's work. The agreement, however, required any modification to be in writing and signed by both parties. It is undisputed that Kuratle did not find the Addendum acceptable, and refused to modify the parties' agreement. Linden Green then declared Kuratle to be in default. The Court cannot conclude that Linden Green's unilateral default determination, and subsequent termination of the parties' business relationship, was proper. If this Court were to accept Linden Green's interpretation and argument, Linden Green would be free, at any time and without limitation, to force Kuratle to modify the agreement without putting Kuratle on notice regarding any deficiency. Such an interpretation is in direct conflict with the 2007 and 2010 Agreements' express provisions. 46

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<sup>&</sup>lt;sup>46</sup> Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. C at 4 (termination provision that requires Linden Green to identify the reason for Kuratle being in default); Pl.'s First Mot. for Part. Summ. J. Tab 1, Ex. C at 5 (no-oral modification provision that requires both parties to agree in writing).

For the reasons stated above in Part (V)(A)(ii), Kuratle's first Motion for Partial Summary Judgment is **GRANTED** to the extent it asserts that Linden Green breached the 2010 Agreement when it terminated its business relationship with Kuratle for the reasons stated in its January 16, 2012 letter.

#### B. Linden Green's Motion for Partial Summary Judgment

In moving for partial summary judgment, Linden Green makes two distinct arguments. First, Linden Green asserts that the 2010 Agreement is invalid and unenforceable as a matter of law because the term provision, which defines the agreement's duration, is fatally indefinite. Second, Linden Green argues, assuming the 2010 Agreement was valid, it properly terminated the agreement in accordance with the agreement's terms.

#### i. Indefinite Duration

It is well established in Delaware that "[t]he material terms of a contract will be deemed fatally vague or indefinite if they fail to provide a reasonable standard for determining whether a breach has occurred and the appropriate remedy." A contract is ambiguous when it is susceptible to different, reasonable interpretations. When the agreement is vague, or ambiguous, the Court will consider extrinsic evidence in an attempt to determine the parties' reasonable expectations at the time of the contract.<sup>48</sup>

In the case *sub judice*, the 2010 Agreement's duration provision is ambiguous, because it is susceptible to the following three different, but reasonable, interpretations: (1) the parties intended the term to run from January 1, 2010 to December 31, 2017 (which is what the term provision explicitly states); (2) the parties intended the term to run from January 1, 2010 to

<sup>&</sup>lt;sup>47</sup> Heritage Homes of De La Warr, Inc. v. Alexander, 2005 WL 2173992, at \*2 (Del. Ch. Sept. 1, 2005).

<sup>&</sup>lt;sup>48</sup> E.I. duPont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1061 (Del. 1997).

December 31, 2016 (which reflects the "(7)" year term); and (3) the parties intended the term to run from January 1, 2010 to January 1, 2011 (which reflects the "one . . . year" reference).

Although the term provision is susceptible to different, reasonable interpretations, it does not follow, necessarily, that that the provision is so indefinite as to render the 2010 Agreement invalid and unenforceable. Rather, this Court must determine whether, when considering extrinsic evidence, the "parties' reasonable expectations at the time of the contract" can be discerned.49

In the present case, the following extrinsic evidence has been offered regarding the 2010 Agreement's intended duration: (1) DruAnne testified at her deposition that the term of the 2010 Agreement was for seven years and the word "one" typed before the number "(7)" is a typographical error; (2) DruAnne also testified that the seven-year term was to commence on January 1, 2010 and end on December 31, 2017; and (3) Shepherd testified that the 2010 Agreement was to be operative for a seven-year term. Thus, based on testimony from parties on each side of the 2010 Agreement, there is a consensus that the agreement was to be operative for seven years, not eight or one. As a result, the Court concludes, given this consensus, a reasonable party could discern that the contracting parties' intention was for the 2010 Agreement to have a seven-year term. Finally, the Court notes that the 2002 and 2007 Agreements, which Linden Green agrees were enforceable, both have similar inconsistencies, i.e., the 2002 Agreement provides that Linden Green employed Kuratle for a period of "one (5) year [sic] beginning on December 01, 2002 and terminating on December 31, 2007," and the 2007

<sup>&</sup>lt;sup>49</sup> E.I. duPont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1061 (Del. 1997).

Agreement provides that Kuratle was employed "for a period of one (5) year [sic] beginning on, January 01, 2008 and terminating on December 31, 20132."<sup>50</sup>

The remaining issue raised by Linden Green regarding the term provision relates to the date on which the 2010 Agreement was to become effective. One the one hand, DruAnne testified that the 2010 Agreement was to start retroactively, and the dates in the 2010 Agreement so reflect. However, Shepherd did not understand the 2010 Agreement to be retroactive. Thus, there is not a consensus regarding retroactivity. Such a conflict is not fatal to the agreement's validity, as parties frequently offer inconsistent, extrinsic evidence to support conflicting contractual interpretations. When conflicting extrinsic evidence is offered, the fact-finder makes factual determinations, evaluating what extrinsic evidence is most credible. Therefore, the jury in this case should evaluate the conflicting testimony regarding retroactivity to determine at what point the contracting parties intended the 2010 Agreement to become operative.

## ii. Termination of 2010 Agreement by Linden Green

For the reasons stated above, in Part (V)(A)(ii), Linden Green breached the 2010 Agreement when it terminated the parties' business relationship based on Kuratle's refusal to agree to, and execute, the Addendum. Therefore, Linden Green's Motion for Partial Summary Judgment is **DENIED**.

<sup>50</sup> 

<sup>&</sup>lt;sup>50</sup> As stated above, the date printed in typeface in Paragraph C states, "December 31, 2013". However, the parties struck out the "3" and replaced it with "2," indicating a termination date of December 31, 2012, which is consistent with the agreement's five-year term. Together with this alteration appears the following initials: "S.O.," "HK," and "BLM." Defs.' Resp. to Pl.'s Mot. for Part. Summ. J. Ex. D.

<sup>&</sup>lt;sup>51</sup> Delor v. ATX Telecommunications Servs., Ltd., 1996 WL 355334, at \*3 (E.D. Pa. June 25, 1996) aff'd sub nom. Delor v. ATX Telecomm. Servs., 124 F.3d 186 (3d Cir. 1997) ("The court determines the existence of ambiguity as a matter of law, but if the court deems the contract to be ambiguous, the fact finder resolves conflicting extrinsic evidence to determine the parties' intent."); see also Taylor v. Jones, 2002 WL 31926612, at \*3 (Del. Ch. Dec. 17, 2002) (explaining that the fact-finder will consider "conflicting extrinsic evidence").

<sup>&</sup>lt;sup>52</sup> GMG Capital Invest., LLC v. Athenian Venture Partners I, L.P., 36 A.3d 776, 783 (Del. 2012) ("[W]here reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence. In those cases, summary judgment is improper.").
<sup>53</sup> Id.

### C. Kuratle's Second Motion for Partial Summary Judgment

Linden Green's counterclaim asserts that Kuratle mismanaged Linden Green and failed to perform under the 2002 and 2007 Agreements in various ways, including, *inter alia*, by failing to properly maintain Linden Green's books and records. Kuratle contends that Linden Green "is barred from pursuing its counterclaim as to any matter which occurred prior to April 13, 2009," because Linden Green did not file its counterclaim until April 13, 2012 and there is no basis to toll the limitations period.

As stated above, the parties agree that a three-year statute of limitations governs Linden Green's counterclaim against Kuratle, specifically 10 *Del. C.* § 8106.<sup>54</sup> Additionally, the parties agree that the three-year statute of limitations should not be tolled when applied to Linden Green's breach-of-contract claim, and therefore any breach of contract that occurred prior to April 13, 2009 is time barred. However, the parties dispute whether the statute of limitations should be tolled when applied to Linden Green's tort-based claim that Kuratle mismanaged Linden Green's books and records. Linden Green contends that the limitations period should be tolled under the time-of-discovery rule.

Under the time-of-discovery rule, the statute of limitations does not begin to run until a party knows or has reason to know that he has been injured.<sup>55</sup> Delaware case law establishes the only two requirements for application of the time-of-discovery rule are (1) an "inherently unknowable" injury and (2) a "blamelessly ignorant" plaintiff.<sup>56</sup> The party asserting that the

<sup>&</sup>lt;sup>54</sup> Section 8106 provides, in pertinent part:

<sup>... [</sup>N]o action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action . . .

<sup>10</sup> Del. C. § 8106

<sup>&</sup>lt;sup>55</sup> Morton v. Sky Nails, 884 A.2d 480, 481 (Del. 2005).

<sup>&</sup>lt;sup>56</sup>*Id*. at 482.

time-of-discovery rule applies to toll the limitations period—here, Linden Green—bears the burden of pleading specific facts to demonstrate that tolling is warranted.<sup>57</sup>

The Court concludes that Linden Green has failed to satisfy its burden of pleading adequate facts to support an application of the time-of-discovery rule. Linden Green alleges it was harmed by Kuratle's mismanagement of its books and records. However, this injury was not inherently unknowable, because Linden Green was free to inspect its own books and records at any point. At all times, Linden Green's books and records were kept on site, which enabled Linden Green to review Kuratle's work product. Additionally, despite the fact that Kuratle was retained to manage the property, Linden Green had a responsibility to ensure that the books and records relating to the Linden Green Condominiums were properly kept and maintained, as the Council and its officers were responsible for overseeing the maintenance and operations of the condominiums. Finally, although Linden Green complains that it paid duplicative bills because of Kuratle's mismanagement, Kuratle was without authority to sign any checks. Rather, Linden Green was the only party with authority. Therefore, Linden Green, itself, was in a good position to discover Kuratle's mismanagement, including the alleged duplicative bills. For the same reasons, Linden Green cannot properly be considered "blamelessly ignorant."

For the reasons stated above in Part (V)(C), Kuratle's Second Motion for Partial Summary Judgment is **GRANTED**.

<sup>&</sup>lt;sup>57</sup> In re Dean Witter P'ship Litig., 1998 WL 442456, at \*6 (Del. Ch. July 17, 1998) aff'd. 725 A.2d 441 (Del. 1999) ("As the party asserting that tolling applies, plaintiffs bear the burden of pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled.").

# VI. CONCLUSION

For the reasons stated above, Kuratle's first Motion for Partial Summary Judgment is **GRANTED**; Linden Green's Motion for Partial Summary Judgment is **DENIED**; and Kuratle's second Motion for Partial Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

<u>/s/</u>

M. Jane Brady
Superior Court Judge