EFiled: Jul 02 2013 02:22PM EDT
Filing ID 53099460
Case Number 164,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE RESERVES MANAGEMENT CORPORATION, n/k/a RESERVES MANAGEMENT, LLC, Plaintiff, v. R.T. PROPERTIES, LLC, MOUNTAIN RANGE, LLC a/k/a MOUNTAIN RANCE, LLC, FOUNTAIN, LLC, WATERSCAPE, LLC and WIND CHOP, LLC, Defendants.	No. 164, 2013 Court Below: Superior Court of the State of Delaware in and for Sussex County C.A. No. S10C-09-020 ESB, including but not limited to jointly administered case numbers S10C-09-021, S10C-09-022 and S10C-09-023

APPELLANT'S REPLY BRIEF

Dated: July 2, 2013
Wilmington, Delaware

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Appellant files this reply brief in the above-captioned appeal. The failure to address any particular point made by Appellees in their answering brief does not constitute an acquiescence to the arguments made therein but simply means that Appellant relies on its argument in its opening brief on that issue.[1]

[1] All capitalized terms not otherwise defined herein shall have the respective meanings set forth in the Opening Brief.

ARGUMENT

I. APPELLEES DO NOT ADDRESS ANY OF THE ISSUES RAISED IN APPELLANT'S OPENING BRIEF CONCERNING THE FALLACY OF FORBEARANCE.

A. Appellees Fail To Address That the Sale Contract Does Not Provide for Forbearance.

Appellee's answering brief is replete with references to its view that it is "clear" that the Sale Contract provides for Appellant's forbearance from enforcing Assessments against Appellee. Appellee states, without support, that the "plain language" of the contract contains such a provision.[2] Conspicuously absent from its analysis, however, is any quoted language from the Sale Contract stating that Appellant (or anyone else) agreed to forbear.

Appellee quotes the language of paragraph 10 of the Sale Contract[3] and devotes several pages in its brief to challenging whether Appellees' lots were "sold" and whether a certificate of occupancy was issued.[4] This, of course, completely ignores the fact that there is nothing in the language of the contract or

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[2] Answering Brief, at 11.

[3] "Purchaser [RT Properties] acknowledges that at the time a Lot is sold by Purchaser to a third party and a certificate of occupancy is issued, the third party purchaser shall become liable for" the Assessments. (A-535).

[4] Appellees emphatically note that Appellant "failed to set forth any evidence that a single Certificate of Occupancy has been issued for *any* of the 17 lots at issue . . . ." Answering Brief, at 11 (emphasis in original). What Appellees conveniently ignore is that the issuance of a certificate of occupancy is a condition solely within their own control. Thus, even if they had been right about the existence of a conditional forbearance, the alleged condition upon which they rely is illusory insofar as they can simply choose not to fulfill it. This was confirmed by Mr. Korotki's deposition testimony, cited by Appellees ("you have to build a house first before any of these other things apply") (B-221).

outside the contract providing for forbearance from enforcing the Assessments against RT Properties, much less any rights granted to the Subsidiary Appellees or obligations imposed upon Appellant. The quoted language states that future buyers must be told that they "shall become liable" for the Assessments, which is completely consistent with the analysis of the Assessments Liens included in Appellant's Opening Brief without requiring any sort of forbearance to be applicable. The quoted language is devoid of any statement that RT Properties is not presently liable for Assessments or that Appellant (or anyone else) is somehow prohibited, restricted, or limited from enforcing them.

Appellees also do not respond to the argument that RT Properties is a sophisticated business enterprise and had equal bargaining power when the Sale Contract was drafted. It could have refused to sign the Sale Contract unless it contained explicit provisions to govern the countless inferences that it now asks the Court to make, such as the existence, scope, duration, and conditions of an alleged forbearance.

Also missing from Appellees' answer is any challenge to the Assessment Liens, which form much of the foundation of the enforcement of the Assessment Obligations and which render many of Appellees' arguments inapplicable. As previously noted, the Assessment Liens attach at the time an assessment first comes due and remains attached until the assessment is satisfied. These are *in rem*

obligations attached to the real property interests themselves, separate and apart from the *in personam* obligations of Appellees to pay them. They are created by the Restrictive Covenants, which were duly recorded and in effect at the time the Sale Contract was executed. Appellees disagree about the impact of the Amended Covenants, but they do not argue with the existence of the Assessment Liens in the Original Covenants, nor in the authorities cited by Appellant to support the enforceability of covenant-created assessment liens.

Finally, Appellees completely disregard the flaws in the Trial Court's use of the deposition testimony of Abraham P. Korotki. Despite that the questions giving rise to the testimony were objected to and never resolved, despite that Mr. Korotki was deposed as a fact witness and not an expert, and that Appellant argued these defects in its opening brief, Appellees felt no inhibition from relying upon that testimony as if they did not exist.

Appellees' mischaracterization of Mr. Korotki's deposition testimony is not merely an evidentiary defect. Contrary to what Appellees insinuate, Mr. Korotki did not testify that the Sale Contract has an enforceable forbearance provision pursuant to which RT Properties should be permitted to escape liability for the Assessment Obligations on summary judgment. Appellees correctly quoted him as providing that his decision not to make Appellant immediately pursue the Assessments was an "accommodation" but incorrectly quoted that he "unilaterally

ended" it.[5] Appellees seized upon the literal term "forbearance" as it is used in finance transactions, when there is nothing in the record—much less the actual Sale Contract—to suggest that this was intended to be more than a non-binding accommodation.

There are two possible findings that the Trial Court could have made. Either the Trial Court could have—and in this case, should have—found that the four corners of the Sale Contract contain no forbearance provision and granted summary judgment in Appellant's favor; or, the Trial Court could have found an ambiguity in the plain language of the contract, requiring a weighing of the factual evidence on the intention of the parties, and denied the cross-motions for summary judgment so that a trial could occur. It was not appropriate to rely upon the record presented by Appellees and conclude as a matter of law that the Sale Contract was intended to contain a forbearance provision. This was reversible error.

B. Appellees Improperly Address the Trial Court's Improper Imputation of RRSCC and RDLLC's Agreement Upon Appellant.

In its Opening Brief, Appellant argued, among other things, that Appellant was not a party to the Sale Contract and should not be bound by any alleged forbearance that the Trial Court otherwise found extant in that agreement. In addressing these points, Appellees relied exclusively upon the Trial Court's finding, augmented by a personal attack on Mr. Korotki, but they skirt the point

[5] Answering Brief, at 13.

made by Appellant in its Opening Brief: Appellant, RRSCC, RDLLC, and Mr. Korotki are *not* the same person, and even if the Trial Court had been asked in a counterclaim for a determination that they were the same person, there was an insufficient record for the Trial Court to do so on any basis, much less on summary judgment.

There are two additional points that this Court should not overlook. First, Appellees' focus upon whether or not Mr. Korotki "knew what was going on" is misplaced. What Mr. Korotki knows is not relevant to what an entity has (or in this case, has not) agreed to in writing. There is no dispute that Mr. Korotki owns and manages each of the three entities, and Appellant is not asking that he be deemed "unaware" of the conduct of the other two entities. But the Sale Contract was a party between the other two entities and RT Properties. To adopt the Trial Court's finding would be essentially to conclude that every entity is bound to the agreements of every other entity owned or controlled by the same principal: this flies in the face of settled corporate law in Delaware, and there was no basis for the Trial Court to reach this conclusion in this case. Even if such a basis otherwise did exist, summary judgment was not the proper tool to pierce the corporate veil because that is such a fact-specific determination.

Second, as the Court is aware, RRSCC and Mr. Korotki are presently debtors under bankruptcy protection in the United States Bankruptcy Court for the

District of Delaware. In that proceeding, Appellees have joined in a motion to convert the case to a case under Chapter 7 of the United States Bankruptcy Code. Although that motion is contested, if Appellees prevail and the case is converted, then a trustee will be appointed to administer the assets of the bankruptcy estates of RRSCC and Mr. Korotki. By joining in that motion, Appellees have undercut their own argument in this litigation that the interests of RRSCC should be imputed to Appellant. As Appellant has stated multiple times in this litigation, exculpating Appellees' liability for the Assessment Obligations does not harm Mr. Korotki or RRSCC. It harms Appellant, and by extension, the other lot owners in the Community. It is senseless to impose RRSCC and RDLLC's obligations under the Sale Contract upon Appellant under these circumstances.

II. BREACH OF THE SALE CONTRACT.

Appellees assert that Appellant should not be permitted to rely upon a "self-serving affidavit" to justify summary judgment in its favor.[6] Self-serving or not, Mr. Korotki's affidavit is the only evidence upon which the Trial Court could rely in reaching a determination of whether RT Properties breached the Sale Contract on summary judgment. If the Trial Court did not believe the evidence presented on this point or believed that a material fact remained in dispute, then the Trial Court

[6] Answering Brief, at 15.

should have denied the cross-motions for summary judgment and held a trial on this matter.

Appellant should point out that Appellant's affidavit is anything but self-serving. The Sale Contract requires RT Properties to build homes on the lots, and Mr. Korotki did not rely upon his own opinion of RT Properties' intention when he executed his affidavit. Rather, he produced admissions made by RT Properties to a third-party lender, memorialized in writing, whereby RT Properties hoped to induce the lender to extend financing upon Mr. Tranovich's representation that RT Properties did *not* intend to build homes and hoped to recoup its losses by litigation against Mr. Korotki.[7]

Ironically, if Appellees desired to create a genuine dispute of material fact concerning their intention to build homes, they could have introduced their own "self-serving affidavit" to this effect. This should have resulted in the denial of cross-motions for summary judgment.

In short, any argument that the Sale Contract had a forbearance provision should have required a showing that the Sale Contract remains in full force and effect. RT Properties breached the Sale Contract, and it was reversible error for the

[7] *See* A-800, A-835 ("Borrower is planning to sell the lots rather than build and market"); A-838 ("The Borrower plans to institute litigation to recoup damages and force the owner to sell the project to an outside source and buy out the Borrower's interest").

Trial Court not to enter summary judgment on this issue in Appellant's favor, or to deny the cross motions.

III. RECORDATION OF THE SALE CONTRACT.

Appellees can complain about the fairness of their failure to record the Sale Contract, but the fact remains that RT Properties *signed* the contract containing a provision prohibiting it from being recorded. If RT Properties was unwilling to become party to a contract that, by its terms, was not going to affect their title to the lots, it should not have signed the Sale Agreement. If RT Properties did not understand the consequences of signing a contract with that provision, it should have asked what those consequences were and made an informed decision.

Appellees' response to this argument in its answering brief is a series of insulting mischaracterizations of the impact of its decision to sign an agreement containing a no-recordation clause. Appellees do not contest any of the facts or authorities in the opening brief, and the Trial Court's decision should be reversed.

IV. THE SALE CONTRACT IS VOID AS AGAINST THE RULE AGAINST PERPETUITIES.

In response to Appellant's position that any protection from Assessments is void as against the Rule Against Perpetuities, Appellees assert two positions. First, they make the untenable contention that the Rule Against Perpetuities does not

apply because "Appellant attempts to create some sort of property interest where one simply does not exist."[8] Appellees do not offer any alternative explanation of their view of what a lien is, nor do they explain how a recorded covenant creating the lien is anything *but* a property interest.

Appellees' second position, that the condition will vest within the 21-year period under the rule, is similarly unavailing. The Rule Against Perpetuities does not work on loose speculations about what will probably happen. Appellees may believe that they will either build homes or breach the contract in 21 years, but they have shown no determination to begin that process and there is nothing to force them to do so. Absent a contractual provision limiting the duration of any alleged "forbearance" to a period within 21 years of a life in being, such forbearance is unenforceable under the Rule Against Perpetuities.

V. THE SUBSIDIARY APPELLEES ARE NOT ENTITLED TO ANY PROTECTION UNDER THE SALE CONTRACT.

Most of Appellees' points concerning the enforceability of the Sale Contract are not responsive to Appellant's arguments in the opening brief. The only point on this issue made by Appellees that may require a response is the last point, suggesting that because RT Properties was made a party to the instant litigation, it

[8] Answering Brief, at 21.

may assert defenses that, somehow, may automatically extend to the Subsidiary Appellees. This position is meritless for two reasons.

First, as owners of the lots, each of the Subsidiary Appellees remains liable for ongoing Annual Assessments. They do not appear to contest this point, other than to interpose an argument about forbearance.

Second, Appellees again pretend that the Assessment Obligations are not secured by the Assessment Liens. There is no basis offered by Appellees in the Sale Contract, in the Restrictive Covenants, or otherwise for the Subsidiary Appellees to assert personal, contractual defenses to liens secured by their properties.

VI. THE TRIAL COURT ERRED IN REACHING SUMMARY JUDGMENT.

Appellees' attempts to defend the improper record relied upon by the Trial Court are misleading and should not be rewarded. Appellees tell the Court that "Appellant never once objected to the authenticity of the record—thereby waiving any appellate rights on this document—or expressed any concern over the document until this appeal[,]"[9] which is both false and a misstatement of the application of Superior Court Rule 56. Quickly dispensing with Appellees' assertion that Appellant never objected, Appellant notes that this objection was

[9] Answering Brief, at 26-27.

argued below at the hearing before the Trial Court on the cross-motions for summary judgment:

> MR. HILLER: . . . because we're dealing with the summary judgment situation, I just need to put on the record that the Court is supposed to be considering the evidentiary materials. There were some answers to interrogatories and the deposition transcript, and the parties did submit affidavits, but the only affidavit evidence submitted by the defendants in this case was a very short affidavit executed by Mr. Tranovich. And although it does provide evidence on certain points, there are a lot of arguments that are made by the defendants that I do not think are compelled by the evidence that was submitted to support them. I won't go into what they are, but, of course, the plaintiff would request that the Court only consider matters of evidence in determining summary judgment.
>
> I understand that the Court probably intends to make a ruling or probably has an idea how the Court will be ruling today, but at least for purposes of our record, should the matter go up on appeal, we want to reiterate that the matter that the Court should be considering should only be matters of evidence.[10]

More importantly, there is nothing in Rule 56 that speaks to authenticity, and there is nothing in that Rule 56 that authorizes a party to rely upon facts outside the record—a record built only on specific types of evidence—so long as the other party does not contest their authenticity.

Appellees also incorrectly assert that the Trial Court was justified in not relying upon the affidavits supporting Appellant's summary judgment motion because it was somehow a "Sham Affidavit." The Trial Court did not make this finding and was not asked to make this finding. Appellees did not ask the Trial

[10] A-1262 to A-1263.

Court to make this finding and are barred from making this argument on appeal. Moreover, Mr. Korotki's affidavits were not merely statements of law and did not contradict his deposition testimony, contrary to Appellees' insinuation.[11] Appellees realize that they did not make a proper record, and they should not be able to justify it on appeal with new, novel arguments.

VII. THE SEWER CONNECTION FEES WERE IMPROPERLY DENIED.

The Trial Court found that the sewer connection fee obligation was invalid as to Appellees because that obligation was created in the Amended Covenants and it was allegedly unreasonable to add such an obligation in an amended covenant.

Appellees grossly mischaracterize the Trial Court's finding by saying "the Trial Court concluded that the Amended Declaration had no validity as to Appellees . . . ."[12] But aside from that attempt to mislead the direction of the Trial Court's decision, Appellees do not address Appellant's assertion that the Trial Court's denial should be reversed as being clearly erroneous. If Appellant had been a third-party management company or homeowner's association acting in accordance with the Restrictive Covenants, Appellant finds it difficult to believe that the Community would be left unable to make special assessments to cover costs necessary for maintenance because a provision authorizing that was

[11] It also bears repeating that the questions giving rise to Mr. Korotki's deposition testimony referenced above were subject to unresolved objections.
[12] Answering Brief, at 32.

unreasonable. Certainly the "reasonableness" *vel non* of the provision adding a sewer assessment fee in the Amended Covenants was not the subject of any evidence adduced by Appellees, nor did they make that argument in the court below. In fact, should the reasonableness of that provision have been raised as an issue, it would have become the subject of a genuine dispute of material fact, justifying the denial of cross-motions for summary judgment. Appellees do not address this point made in the opening brief.

Appellees also ignore the authorities cited by Appellant in its opening brief concerning this Court's previous holdings approving the right to amend the Restrictive Covenants and impose the amendments upon existing lot owners in other litigation. The Trial Court's denial of summary judgment in favor of Appellant and entry of summary judgment in favor of Appellees on this point should thus be reversed.

CONCLUSION

For the foregoing reasons and the reasons in the opening brief, the rulings of the Trial Court identified in the Notice of Appeal should be reversed and the matter remanded to the Trial Court for a trial on the merits consistent with the arguments herein.

Dated: July 2, 2013
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