



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 OPENING BRIEF

Dated: May 23, 2013
Wilmington, Delaware

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NATURE OF PROCEEDINGS

On March 3, 2010, The Reserves Management, LLC f/k/a The Reserves Management Corporation (“Appellant”), plaintiff-below/appellant, filed four two-count complaints (the “Complaints”)¹ in the Superior Court for Sussex County (the “Trial Court”) against R.T. Properties, LLC (“RT Properties”) and, respectively, each of its wholly-owned subsidiaries Mountain Range, LLC a/k/a Mountain Rance, LLC, Fountain, LLC, Waterscape, LLC and Wind Chop, LLC (the “Subsidiary Appellees,” and together with RT Properties, “Appellees”), seeking personal liability against Appellees and the exercise of a lien on property securing such debt. After motions to dismissed were denied, Appellees filed answers to the Complaint (the “Answers”).² On February 17, 2011, the Trial Court entered an order consolidating the four cases for procedural purposes under C.A. No. S10C-09-020.³

At the outset of the case, Appellant filed a motion for summary judgment,⁴ which the parties briefed. After a hearing, the Trial Court denied Appellant’s motion for summary judgment⁵ and discovery ensued. After discovery concluded, the parties filed cross-motions for summary judgment, along with applicable supporting and

¹ A-10, *et seq.* The Complaints are substantially identical in form, and the only significant differences among them are the identity of the Subsidiary Appellees and the amounts sought. Some of the Subsidiary Appellees own different numbers of lots than the others, so the assessment amounts applicable to each may be different.

² A-207, *et seq.*

³ A-219.

⁴ A-221.

⁵ A-433.

opposing briefs.⁶ On April 25, 2012, the Trial Court filed a letter indicating the need for further information,⁷ which the parties supplied in the form of supplemental briefs on June 7, 2012.⁸ A hearing on the cross-motions was held on June 4, 2012.⁹

The Trial Court announced its rulings on the cross-motions for summary judgment at a hearing on February 27, 2013, whereupon most of the issues raised by the parties were decided from the bench without oral argument.¹⁰ The sole issue remaining after the hearing was decided by a letter from the Trial Court filed later that same day.¹¹ The foregoing rulings are subject to Appellant's notice of appeal.

⁶ A-893, *et seq.*

⁷ A-1075.

⁸ A-1080.

⁹ A-1260.

¹⁰ A copy of the Judicial Action Form evidencing the Trial Court's ruling, along with a copy of the transcript of the 2/27/2013 hearing explaining the rationale for its rulings, is attached hereto as **Exhibit A** in accordance with Rule 14(b)(vii). It also appears at A-1381 and A-1330, respectively.

¹¹ A copy of this letter order is attached hereto as **Exhibit B** in accordance with Rule 14(b)(vii) and also appears at A-1372.

SUMMARY OF ARGUMENT

1. The Trial Court incorrectly denied Appellant's motion for summary judgment, because the material facts applicable to the Complaint were not in dispute and judgment is appropriate in Appellant's favor as a matter of law.

2. The Trial Court improperly relied upon an unrecorded, open-ended contract between RT Properties and a non-party to justify denial of the relief sought by Appellant in the Complaint.

3. The Trial Court improperly interpreted the terms of such contract to create an unlimited, permanently binding forbearance agreement upon Appellant.

4. In determining the cross-motions for summary judgment, the Trial Court improperly relied upon facts supporting Appellees' position that were not derived from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits of the parties.

5. To the extent that the correct resolution of the parties' disputes requires a finding of intention of the parties, the Trial Court improperly resolved the matter on summary judgment instead of scheduling the matter for trial.

6. The Trial Court incorrectly denied Plaintiff the right to enforce an assessment for Sewer Connection Fees against Appellees.

STATEMENT OF FACTS

I. Applicable Facts.

Beginning on or about June 23, 2005, RT Properties took title to 17 unimproved lots (the “Properties”) in a real property subdivision in Sussex County, Delaware known as The Reserves Resort, Spa and Country Club (the “Community”).¹² The Properties are subject to properly recorded restrictive covenants and restrictions, which bind each owner of the Properties, the first of which were recorded among the records of the Recorder of Deeds for Sussex County on August 13, 2001 (the “Original Covenants”),¹³ and the first amendment to the Original Covenants which was recorded among the records of the Recorder of Deeds for Sussex County on May 23, 2008¹⁴ (the “Amended Covenants,” and as the Amendment amends the Original Covenants, the “Restrictive Covenants”).

After RT Properties purchased the 17 lots, it allegedly created a Plan of Division on November 11, 2005 and conveyed title of various of the Properties to each of the Subsidiary Appellees.¹⁵ The owner of RT Properties is Thomas Tranovich, who is also the owner of the Subsidiary Appellees.¹⁶ By Appellees’ own

¹² A-794.

¹³ A-794. The text of the Original Covenants begins at A-229.

¹⁴ A-794. The text of the Amended Covenants begins at A-261.

¹⁵ A-992.

¹⁶ A-991.

admission, “[t]itle in the properties was conveyed to the Subsidiary Appellees for the purpose of limiting personal liability.”¹⁷

Pursuant to the Restrictive Covenants, RT Properties is obligated to pay certain assessments (each an “Assessment,” and collectively, the “Assessments”) in connection with each of the Properties.¹⁸ The Restrictive Covenants provide that the owner of any property subject to the Assessments is personally obligated for the payment of the Assessments, and the obligation to pay the Assessments also becomes a lien on the property.¹⁹ Appellant, as manager of the Community, is responsible for fixing the amount of the Assessments, collecting the Assessments, and applying the monies to accomplish certain goals established by the Restrictive Covenants.²⁰

The Restrictive Covenants provide that in the event that any Assessment becomes or is deemed delinquent, the entire Assessment shall be deemed delinquent. Furthermore, the Restrictive Covenants provide that in addition to the principal amount of the Assessment, Plaintiff is entitled to recover interest (pre-judgment and post-judgment), cost of collection, and attorneys’ fees (collectively with the Assessments, the “Assessment Obligations”).²¹

RT Properties did not pay any of the Assessment Obligations at the time it took title to the Properties, and Assessment Liens therefore became affixed to the

¹⁷ A-992.

¹⁸ A-794.

¹⁹ A-794.

²⁰ A-794.

²¹ A-795.

Properties to secure those obligations.²² Appellees are delinquent in paying the Assessments on each of the Properties, the total amount of which due and owing is \$44,889.64 per Property plus pre-filing and post-filing interest, cost of collection, and attorneys' fees.²³

II. Distractors.

In seeking summary judgment and opposing Appellant's motion, Appellees relied upon a series of immaterial facts in an attempt to confuse and distract the Trial Court from the real issue in this case. Specifically, on or about April 13, 2005, RT Properties and two entities called The Reserves Resort, Spa & Country Club LLC (formerly known as Reserves Development Corp.) ("RRSCC") and Reserves Development, LLC ("RDLLC") entered into an Agreement of Purchase and Sale of Real Property (the "Sale Contract"), pursuant to which RT Properties ultimately took title to the Properties.²⁴ Appellees relied upon the Sale Contract to justify their non-payment of their Assessment Obligations.

The existence of, and covenants made in, the Sale Contract are not material to the claims stated in the complaints in these cases for numerous reasons, including but not limited to the following:

- The Sale Contract contains no provision prohibiting or limiting Appellant from declaring assessments upon RT Properties or imposing liens to secure such assessments against the Properties;

²² A-795.

²³ A-795. A calculation of this amount appears at A-803.

²⁴ A-795. A copy of the Sale Contract appears at A-530, *et seq.*

- Appellant was not a party to the Sale Contract;
- None of the Subsidiary Appellees was a party to, or has any right to assert RT Properties' rights or defenses under, the Sale Contract;
- The Sale Contract was never recorded with the Recorder of Deeds;
- RT Properties breached the Sale Contract prior to Appellant's filing of each of the complaints herein; and
- To the extent that the Sale Contract affects Appellees' interests in real property located in the State of Delaware, it will not necessarily vest or fail to vest within the applicable period under the Rule Against Perpetuities.

There was one key fact in dispute between the parties at the summary judgment stage, which Appellant contends was immaterial but the Trial Court appears to have found dispositive. According to Mr. Tranovich's affidavit in support of Appellees' motion, he "received permission from Abraham Kotroki [sic] to transfer the title to the related entities."²⁵ Appellant introduced evidence refuting Mr. Tranovich's statement,²⁶ but even if it were true, Mr. Korotki's alleged permission to transfer the Properties to the Subsidiary Appellees was not relevant to the outcome of the case. There is no provision in the Restrictive Covenants that allows Appellant (or anyone on Appellant's behalf) to "waive" assessments, there was no written instrument of waiver signed by Appellant as required under the Sale Contract, and RT Properties breached the Sale Contract that it now seeks to use as a shield. But even if, as the Trial Court found, it was possible for such a waiver to exist, there was a genuine

²⁵ A-992.

²⁶ A-1097.

dispute of material fact²⁷ about whether it did, and the Trial Court should not have resolved that dispute on summary judgment.

²⁷ Appellant's affidavit expressly denied this intention. A-1097.

ARGUMENT

I. THE SALE CONTRACT DOES NOT CONTAIN OR CONSTITUTE A BASIS TO DENY THE RELIEF SOUGHT IN THE COMPLAINTS.

A. QUESTION PRESENTED.²⁸

Did the Trial Court err in denying Appellant's claim against Appellee (and enforcement of the lien created thereby) for Assessments because of the alleged covenants in the Sale Contract?

B. SCOPE OF REVIEW.

The Trial Court rendered its decision on this issue on the parties' cross-motions for summary judgment. In determining whether to grant a party summary judgment, the Trial Court was required 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."²⁹ Summary judgment is governed by Rule 56, which provides, in relevant part, that "judgment shall be rendered forthwith if 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." Facts must be controverted, if at all, by these forms of evidence, and affidavits must be on personal knowledge. Rule 56(e). "When a motion for summary judgment is made and

²⁸ Pursuant to Rule 14(b)(vi), Appellant notes that issues relating to the impact of the Sale Contract were presented to the Trial Court in Appellant's Opening Brief, beginning at p. 14 thereof. See A-909, *et seq.*

²⁹ *Estate of Rae v. Murphy*, 956 A.2d 1266, 1269-70 (Del. 2008) (citation omitted).

supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."³⁰

Summary judgment is properly employed for the enforcement of unambiguous contracts.³¹ Summary judgment is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact; rather, a determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law.³²

The scope of review on appeal of a decision on summary judgment is *de novo* consideration, pursuant to which this Court may review the entire record, including the pleadings and any issues such pleadings may raise, affidavits and other evidence in the record, as well as the Trial Court's order and opinion.³³

³⁰ *Id.*

³¹ *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998).

³² *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991).

³³ *Pike Creek Chiropractic Ctr. v. Robinson*, 637 A.2d 418 (Del. 1994) (cited in Delaware Appellate Handbook ¶ 6-iv (2nd ed. 1996)).

C. MERITS OF ARGUMENT.

1. Assessments Generally.

Before considering the unique defenses asserted by Appellees, the relief requested in the Complaints are justified under the venerable case of *Henlopen Acres, Inc. v. Potter*,³⁴ in which the Court confronted a more complex set of assessment liens and related procedures and upheld the right of a management corporation to enforce them in accordance with restrictive covenants very similar to the Restrictive Covenants in this case. Restrictive covenants are treated as a contract between and among the owners of the lots in the community.³⁵ The “contract” in this instance is as straightforward as can be: The owner has taken title to the property subject to the agreement to pay assessments as and when they become due. “A covenant for assessment of maintenance costs is considered as running with the land and it may be enforced as an equitable servitude.”³⁶

As noted above, the Restrictive Covenants provide, among other things, that the owner of a lot in the Community is personally obligated for payment of the Assessments. The Restrictive Covenants also contain a provision accelerating the obligation of any property owner that fails to pay Assessment installments when due.

³⁴ 127 A.2d 476 (Del. Ch. 1956).

³⁵ See generally *Henlopen*, 127 A.2d at 481.

³⁶ *Atkinson v. B.E.T., Inc.*, 1984 WL 159375, *3 (Del. Ch.) (attached hereto as **Exhibit C**) (citing *Henlopen*).

The facts show that when RT Properties took title to the Properties from RRSCC, its liability for the Assessments sprang immediately into existence under the Restrictive Covenants. Even if Appellant did not take immediate steps to recover them, there is no evidence in the record indicating that the amounts were not immediately owed, or that Assessment Liens did not immediately arise to secure their repayment. Thus, when the Properties were deeded to the Subsidiary Appellees, RT Properties remained personally liable for the Assessment Obligations that had arisen up to the time of the transfer, and the Properties remained subject to Assessment Liens to secure those obligations.

Therefore, the Trial Court should have entered judgment against Appellees on all of the Assessments sought in the Complaint. The Restrictive Covenants also provide that unpaid Assessment Obligations will constitute liens on each of the Properties to secure them. Under *Henlopen*, this provision is enforceable to create such a lien, and Appellee furnished no authority for any position that this provision is somehow ineffective.³⁷

2. The Sale Contract.

The Trial Court was persuaded by Appellees' arguments concerning the intention behind the Sale Contract, but the Sale Contract is not material to the issues raised in the Complaints for a number of reasons.

³⁷ *Henlopen*, 127 A.2d at 480.

(A) The Sale Contract contains no provision prohibiting or limiting Plaintiff from declaring assessments upon RT Properties or imposing liens to secure such assessments against the Properties.

Appellees rely upon ¶ 10 of the Sale Contract, which obligates RT Properties to make certain disclosures to third parties to whom RT Properties would later transfer the Properties. Appellees want to make their position seem obvious by referring to it as “the plain language” of the Sale Contract, which they interpret as: “in order to have the assessments considered payable, RT Properties must transfer the lots to ‘a third party’ and a certificate of occupancy must be issued.”³⁸

Appellees cannot create an ambiguity by deriving their position from “plain language” that does not exist. Conspicuously absent from this paragraph—or anywhere else in the entire Sale Contract—is any mention of an obligation to forgive or indefinitely delay Appellant’s imposition of Assessments in accordance with the Covenants. Similarly, there is no provision that purports to release or prevent the imposition of any Assessment Lien. The Original Covenants, which RT Properties admitted in this contract that it had received, were in effect at the time and provided for the imposition of Assessments. Appellees can try to contort the language in ways that make this seem like the intention, but the contract is not ambiguous and the four corners of the document contain no provision supporting their position. The only

³⁸ A-317.

contractual obligations in this paragraph require RT Properties to make certain disclosures and procure certain obligations from third-party transferees.

A lot owner's obligation to pay Assessments exists "whether or not it shall be expressly established in [the deed] or other transfer document."³⁹ Nothing in the Sale Contract or any other document introduced by Appellees have contained any sort of waiver or enforceable agreement to forbear. "When the language is clear and unequivocal, a party will be bound by its clear meaning."⁴⁰ Appellees are sophisticated business people that employed professionals to assist them in determining their rights and obligations under the Covenants and the Sale Contract. If a waiver or deferment of the obligation to pay Assessments had been intended, the contract would have contained an express provision to that effect. It did not.

Appellant does not deny that it accommodated RT Properties by not immediately collecting the Assessment Obligations due under the Restrictive Covenants. But no good deed goes unpunished, so Appellees argued—and persuaded the Trial Court—that this informal accommodation was in actuality an enforceable, essentially permanent forbearance that literally barred recovery for as long as Appellees chose not to pay them.⁴¹ The Trial Court appeared to see no reason that the

³⁹ Original Covenants, Article VII, § 1. (A-237).

⁴⁰ *Abb Flakt Inc. v. National Union Fire Ins. Co.*, 731 A.2d 811, 816 (Del. 1999) (citations omitted).

⁴¹ If the Trial Court's holdings are upheld in this appeal, the conditions in the Sale Contract terminating the so-called forbearance would presumably be the sale of a finished lot to a homebuyer and the issuance of a certificate of occupancy. These conditions are exclusively within Appellees' control, and they therefore have the unfettered ability to control—forever—the date when they choose for the lot to begin contributing its fair share to the Community.

language of Paragraph 10 of the Sale Contract would contain provisions requiring notice of assessments to the purchaser of finished lots unless there would be forbearance until that time. What it overlooked was that Appellant, as a courtesy, temporarily did not sue to recover the Assessments against RT Properties.

The Trial Court also embarked on an analysis of the law in Delaware on waiver.⁴² The parties did not brief this issue, nor were facts properly presented (by affidavit or otherwise) to prove or refute the standards discussed by the Trial Court. The standards discussed by the Trial Court correctly included a “voluntary and intentional relinquishment of a known right[,]” “knowledge of all material facts[,]” “an intent to waive, together with a willingness to refrain from enforcing those [] rights[,]” and “[t]he facts relied upon to prove waiver must be unequivocal.”⁴³ Aside from the improper application of the evidence under Rule 56 discussed *infra*, there was no waiver or estoppel here. Appellant conceded at various points that it deferred enforcement of the Assessment Obligations to give RT Properties an opportunity to build and sell houses, but the four corners of the Sale Contract do not contain an irrevocable agreement to forbear from, waive, or be estopped from enforcing Assessment Obligations against RT Properties or any related third party. Even if the Trial Court had found enough ambiguity in the Sale Contract to justify reviewing parol evidence, there is not a shred of evidence—in the record or otherwise—to

⁴² Hearing transcript, 2/27/2013 at 22:8 (A-1351).

⁴³ Hearing transcript, 2/27/2013 at 22:13 (A-1351).

suggest such a waiver. This is particularly important because the Restrictive Covenants, which govern the imposition of the Assessment Obligations, contain no provision for Appellant to waive these obligations.

The Trial Court also ignored a number of provisions in the Sale Contract expressly prohibiting a waiver, estoppel, or other implied modification:

- The Sale Contract explicitly states that it is an integrated contract;⁴⁴
- The integration clause contains an exception showing that the parties knew how to except transaction from integration;⁴⁵
- “No claim of waiver, modification, consent, or acquiescence with respect to any of the provisions of this Agreement shall be made against either party, except on the basis of a subsequent written instrument”⁴⁶
- The above-described “subsequent written instrument” must be executed “by or on behalf of such party.”⁴⁷

In short, the Trial Court was not justified in finding sufficient facts to warrant any enforceable waiver, estoppel, or implied further agreements to forbear from enforcing the Assessment Obligations against RT Properties.

The Trial Court also overlooked the critical importance of the Assessment Liens. The Assessment Obligations arose immediately upon RT Properties’ acquisition of the lots, and the liens remained attached until the obligations were paid.

⁴⁴ Sale Contract ¶ 11(c) (“This Agreement is the entire agreement between the parties hereto with respect to the subject matter hereof, and supersedes all prior agreements between the parties with respect thereto”) (A-535).

⁴⁵ Sale Contract ¶ 11(c) (“however, it does not supersede the parties’ separate contract regarding the Ventnor Property, or any ancillary tax free exchange agreements that they may enter to implement the contemplated tax free exchange(s)”) (A-535).

⁴⁶ Sale Contract ¶ 11(c) (A-535).

⁴⁷ Sale Contract ¶ 11(c) (A-535).

The Assessments were not “deferred.” They simply remained as liens. There was no basis for the Trial Court to conclude that if they were not paid when RT Properties first took title, the Sale Contract should be construed to require that they were the subject of a permanent, unassailable forbearance.

(B) Appellant was not a party to the Sale Contract.

It is Appellant’s obligation to recover Assessments for the Community’s benefit. If RT Properties had intended to enforce the Sale Contract against Appellant, RT Properties should have insisted that Appellant become a party to that agreement. The fact that Appellant and RDLLC may be controlled by the same individual does not alter the outcome.

The Trial Court’s decision suggested, if not outright concluded, that Appellant, RRSCC, and RDLLC are the same person. As explained in great detail in the affidavit supporting Appellant’s supplemental brief,⁴⁸ however, these entities were created and operated for dramatically different purposes. Appellant is a management company, while RDLLC and RRSCC are together a developer. The Trial Court essentially ignored the boundaries between corporate entities and held Appellant to the alleged obligations of RDLLC under the Sale Contract. It did so without any evidence justifying a piercing of the corporate veil, other than the fact that Appellant

⁴⁸ See affidavit ¶ 13 (A-1096).

and RDLLC were owned by the same person and that Appellant “knew what was going on.”⁴⁹

At least two other cases involving this same Community have turned on the fact that, absent the extraordinary showings necessary to pierce the corporate veil, corporate boundaries are respected.⁵⁰ Appellant was not a party to the Sale Contract; it was the entity appointed under the Restrictive Covenants to enforce the Assessment Obligations. RT Properties was able to insist that Appellant be a party to the Sale Contract before signing and did not. It was therefore improper for the Trial Court to charge Appellant with any alleged forbearance under the Sale Contract.

If permitted to stand, the Trial Court’s decision would essentially rob the Community’s management company of the resources needed to perform the services

⁴⁹ Hearing transcript 2/27/13, at 19:16 (A-1348). The Trial Court also reached this fact-intensive conclusion on summary judgment, an error discussed *infra*.

⁵⁰ In the first case, *Reserves Development Corporation v. Esham*, C.A. No. 07C-12-123 PLA (Del. Super., 2009), 11/10/2009 opinion (a copy of which is attached hereto as **Exhibit D**), at 15. This holding applied even though the entity was completely owned by the individual, and even the fact that the entity may have been created in order to shield the individual from such liability did not change the rule. That rule should be applied with equal force in the instant case. Despite that the Assessment Obligations under the Restrictive Covenants were not imposed upon the lot owner’s principal, the Superior Court for New Castle County found in that case that the principal had a separate contractual undertaking—in his own individual name—to pay those assessments.

In the second case, in which all of the parties to this appeal were also parties, the Honorable Richard F. Stokes of the Superior Court for Sussex County was called upon to determine whether Mr. Korotki would be personally liable for the alleged breach of a contract by RRSCC. In dismissing the complaint against him personally, Judge Stokes held: “Korotki is the sole officer and director of [RRSCC]. He is the sole officer and director of [Appellant]. He co-signed the Agreement in his capacity of President of [RRSCC]. There is no evidence that in either certificate of formation Korotki accepted personal liability for either entity’s debts. Nor did he assume personal liability under the Agreement with [RT Properties]. Korotki is therefore shielded from liability for the debts of both [RRSCC] and [Appellant], . . . respectively.” *Reserves Dev. Corp. v. R.T. Properties, L.L.C.*, C.A. 07C-11-034-RFS (DE. Super., 2007) (9/22/2011 mem. op.) at 8-9 (reprinted at A-812).

required under the Restrictive Covenants. Every dollar in Assessments that Appellant does not collect becomes an obligation of the other lot owners. The Trial Court's conclusion to deprive the Community of Appellees' obligation to pay their fair share into the Community seems punitive, especially in light of the fact that Appellant did not execute the agreement. Therefore, the decision should be reversed.

(C) None of the Subsidiary Appellees was a party to, or has any right to assert RT Properties' rights or defenses under, the Sale Contract.

The Sale Contract contains express terms specifically excluding the enforcement of rights by third parties. Paragraph 11(j) of the Sale Contract provides simply: "Nothing in this Agreement shall be construed as giving any person, firm, corporation, or other entity, other than the parties hereto, their successors and permitted assigns, any right, remedy or claim under or in respect of this Agreement or any provision thereof."⁵¹ Thus, even if RT Properties had any defense to claims arising under the Complaint as a result of the execution of the Sale Contract, the Subsidiary Appellees are not entitled to enforce them. The Trial Court did not address this issue in any meaningful way and seemed persuaded—without making specific factual findings—that because the Subsidiary Appellees were wholly-owned affiliates of RT Properties, they should be entitled to the same rights that RT Properties has. On the same authorities described *supra*, there is no basis simply to disregard the corporate boundaries among affiliates merely because they have common ownership.

⁵¹ A-536.

RT Properties may have created the Subsidiary Appellees in order to “limit liability,” but it should not be permitted to ignore the corporate boundaries between itself and its subsidiaries merely because that was its purpose in creating them.

The Trial Court also ignored the plain language of the Sale Contract, which provided: “Nothing in this Agreement shall be construed as giving any person, firm, corporation, or other entity, other than the parties hereto, their successors and permitted assigns, any right, remedy or claim under or in respect of this Agreement or any provision hereof.”⁵² There is no evidence in the record to indicate either that the Subsidiary Appellees are “successors” of RT Properties⁵³ or that RT Properties ever purported to assign its rights under the Sale Contract to them (much less whether such assignment would be “permitted”). Therefore, there is no basis for the Subsidiary Appellees to shield themselves from liability under the Complaints or their property from the Assessment Liens.

(D) RT Properties breached the Sale Contract prior to Appellant’s filing of each of the complaints herein.

Appellees’ reliance upon the Sale Contract is also misplaced because RT Properties has already breached the contract. The agreement contains numerous representations concerning RT Properties’ intentions with respect to development of

⁵² Sale Contract ¶ 11(j) (A-536).

⁵³ In fact, the only evidence introduced by Appellees concerning the relationship between RT Properties and the Subsidiary Appellees is a statement from Mr. Tranovich’s affidavit that the Subsidiary Appellees were created “for the purpose of limiting liability,” (A-992), suggesting that the Subsidiary Appellees were created specifically *not* to be successors of RT Properties.

the Properties, as well as an agreement not to transfer the Properties without Appellant's consent, later discovered to be, or were later proven to be, false.⁵⁴

One instance of breach is RT Properties obligation under the Sale Contract to pay sewer assessments. As noted by Judge Stokes in a separate case between these parties,⁵⁵ RT Properties was responsible for this obligation. On summary judgment, Appellant produced evidence that this obligation was not paid,⁵⁶ and nothing in Appellees' affidavits or otherwise suggested otherwise.

Also, the Sale Contract contained clear and conspicuous language requiring RT Properties to develop the Properties:

Purchaser is acquiring the Property in order to construct homes thereon for sale to the general public. Seller is relying on Purchaser to construct such homes using its expertise in such matters. Purchaser agrees that it shall not sell any lots to the general public on which a single family home has not been constructed, and the Deeds to the Real Property shall so reflect. Ownership and/or control of the Purchaser shall not be transferred without Seller's consent, which will not be unreasonably withheld⁵⁷

Yet, as early as June 2007, Appellees made representations to their lender indicating that Appellees no longer intended to develop the Properties but instead intended to liquidate them undeveloped.⁵⁸ Appellees later told their lender that they intended to sue Appellant's principal with the intention of "forc[ing] the owner to . . . buy out the

⁵⁴ A-800.

⁵⁵ A-798. The text of Judge Stokes opinion appears beginning at A-805.

⁵⁶ A-795.

⁵⁷ Sale Contract ¶ 3(c) (A-531).

⁵⁸ Korotki Affidavit, ¶ 20 (A-800) and Exh. A-3 thereto (A-833, *et seq.*).

Borrower's interest."⁵⁹ This repudiation constitutes a clear breach by RT Properties of its obligations under the contract. RT Properties has no right to rely upon the continuing existence of this agreement in defense of the claims made against it in the Complaint.

(E) The Sale Contract was never recorded with the Recorder of Deeds.

Regardless of whether the Sale Contract affected RT Properties' *in personam* obligation to pay Assessments, there is nothing in the agreement that might affect the provisions of the Covenants imposing Assessment Liens on the Properties. Even if the Sale Contract could otherwise be interpreted to provide for a forbearance as the Trial Court found, it would not be effective against the Assessment Liens because it was never made of record with the Recorder of Deeds for Sussex County.⁶⁰

The Trial Court did not properly apply property law to the Sale Contract. Delaware is considered a "pure race" state, which means that the first instrument to be recorded will be senior to subsequently recorded instruments affecting the same property regardless of whether the holder of the subsequent interest had notice of the prior instrument.⁶¹ The Delaware legislature decided to require recordation of an instrument and, unlike some other jurisdictions, to ignore whether other record title holders have notice of the alleged transaction. The Assessment Liens are liens created

⁵⁹ Korotki Affidavit, ¶ 20 (A-800) and Exh. A-4 thereto (A-837, *et seq.*).

⁶⁰ Korotki Affidavit, ¶ 21 (A-801). Nothing in Appellees' affidavits contradicted this fact.

⁶¹ See 25 *Del. C.* § 153.

by the Restrictive Covenants, which are recorded with the land records. The Sale Contract had no impact upon any Assessment Liens arising before the Sale Contract was recorded. This is especially important because the party to the Sale Contract—RDLLC—was not Appellant.

Appellees complained in their briefs on summary judgment that the Sale Contract itself contains a provision prohibiting recordation and that it would be unfair to treat it as not affecting their rights to the real property. There was nothing requiring RT Properties to execute the Sale Contract containing this provision. It is not inconceivable why RDLLC may have required it: to prevent RT Properties from converting a merely contractual provision into a title-bound instrument governing the underlying real property—which is exactly what Appellees sought to do.

(F) To the extent that the Sale Contract affects Defendants’ interests in real property located in the State of Delaware, it will not necessarily vest or fail to vest within the applicable period under the Rule Against Perpetuities.

Similarly, this Court of Delaware has held that the Rule Against Perpetuities remains alive and well in this state.⁶² Although the formula for applying the Rule Against Perpetuities is contorted, it effectively invalidates interests in real estate that have no outer limit in time.

⁶² *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991) (“no interest is good unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest”) (citing J. GRAY, THE RULE AGAINST PERPETUITIES, § 201 (4th ed. 1942)).

To the extent that Appellees argue that any aspect of the Sale Contract affects the rights of Appellant and Appellees in the Properties, nothing in the agreement purports to limit the period of time by which such rights must be exercised. For example, the date by which a certificate of occupancy might be issued in connection with any of the Properties may neither occur nor fail to occur within 21 years after all relevant lives in being have expired. Any so-called waiver or deferment of the enforceability of the Assessment Liens under the Sale Contract is therefore void under the Rule Against Perpetuities.

Even though the Rule Against Perpetuities is enforced mechanically, its underlying purpose is served by invalidating any alleged waiver in the Sale Contract. As described above, the conditions giving rise to the Trial Court's deferment of the enforcement of Assessment Liens fall exclusively within the control of Appellees, who are clearly motivated to stretch that obligation into perpetuity. The burden therefore falls disproportionately on the rest of the Community to meet these expenses.

The Trial Court recognized the importance of finality, but merely guessed how it might end without a stalemate.⁶³ It correctly acknowledged that any stalemate would be broken once it was determined that RT Properties breached the Sale Contract.⁶⁴ The Trial Court did not seem to believe that this was the correct

⁶³ Hearing transcript, 2/27/2013 at 27:7 (A-1356).

⁶⁴ Hearing transcript, 2/27/2013 at 27:18 (A-1356).

proceeding in which to determine that RT Properties did indeed breach that agreement, however, and there is no reason for it to have deferred that determination to another day or another court.

II. THE TRIAL COURT DID NOT CORRECTLY APPLY THE STANDARD FOR SUMMARY JUDGMENT.

A. QUESTION PRESENTED.⁶⁵

Did the Trial Court err in applying the correct standards for summary judgment in denying Appellant's motion and/or in granting Appellees' motion?

B. SCOPE OF REVIEW.

The Trial Court rendered its decision on this issue on the parties' cross-motions for summary judgment, and the same scope of review described above at p. 9 hereof, *supra*, applies.

C. MERITS OF ARGUMENT.

The Trial Court did not correctly apply the standards for summary judgment in resolving the parties' cross-motions for summary judgment. The Trial Court's errors took three distinct forms.

⁶⁵ Pursuant to Rule 14(b)(vi), Appellant notes that the correct application of Rule 56 in this case was preserved by Appellant at the hearing on cross-motions for summary judgment. See Hearing transcript, 6/14/2012 at 2:23-3:23 (A-1262 to A-1263). The issue concerning the Trial Court's need to rule upon Appellant's objection to Mr. Korotki's deposition testimony was preserved in Appellant's reply brief, beginning at A-1065.

1. The Trial Court erred in considering facts outside of the record established by the limited types of evidence provided for in Superior Court Civil Rule 56.

In support of its motion for summary judgment and in opposition to Appellees' cross-motion, Appellant supplied to the Court several affidavits, including but not limited to an affidavit attached to each of the Complaints;⁶⁶ an Affidavit Of Abraham Korotki, Manager, In Support Of Plaintiff's Motion For Summary Judgment;⁶⁷ an Affidavit Of Abraham Korotki In Support Of Plaintiff's Motion For Summary Judgment And In Support Of Plaintiff's Answering Brief In Opposition To Defendants' Motion For Summary Judgment;⁶⁸ and a Supplemental Affidavit Of Abraham Korotki In Support Of Plaintiff's Motion For Summary Judgment And In Opposition To Defendants' Motion For Summary Judgment.⁶⁹ These affidavits, collectively, establish the validity of the Assessment Obligations and Assessment Liens, explain the corporate boundaries between Appellant and the other entities owned by Mr. Korotki, and provide sufficient evidentiary to reach the conclusions that Appellant urged in its summary judgment motion and refute the conclusions urged by Appellees.

Appellees, on the other hand, supported their motion with only one 6-paragraph affidavit from Appellees' principal furnishing virtually no facts relating

⁶⁶ A-26, *et seq.*; A-47, *et seq.*; A-67, *et seq.*; and A-87, *et seq.*

⁶⁷ A-224 *et seq.*

⁶⁸ A-792, *et seq.*

⁶⁹ A-1093, *et seq.*

to the issues in dispute in the summary judgment motion⁷⁰ and what purports to be an affidavit from the County Administrator for Sussex County “confirming certain procedures” for the issuance of a certificate of occupancy in the County.⁷¹

Rule 56 provides that to the extent that on summary judgment, the trial court is supposed to consider “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” The Trial Court overlooked Appellees’ failure to support their arguments with facts evidenced by affidavits or other documents required under Rule 56. For instance, the Trial Court found:

- That the transfer of Properties from RT Properties to the Subsidiary Appellees was made in accordance with a plan of division.⁷²
- “Reserves Development, LLC, did not construct the infrastructure that it was required to do under the contract within nine months of the execution of the contract”⁷³
- Appellant did not issue any lot assessments to the defendants for over four years.⁷⁴

⁷⁰ A-991, *et seq.*

⁷¹ A-1042, *et seq.* Appellees purport to use this affidavit in lieu of explaining the legal basis for obtaining a certificate of occupancy in Sussex County, but it does not provide any facts relating to this case.

⁷² Hearing Transcript, 2/27/2013, at 8:16 (A-1337). The alleged plan of division instrument was never authenticated by Appellees in any affidavit or elsewhere.

⁷³ Hearing Transcript, 2/27/2013, at 9:16 (A-1338). The Trial Court pointed out that in another case between these parties, Judge Stokes “discussed at length” this issue.

⁷⁴ Hearing Transcript, 2/27/2013, at 10:1 (A-1339).

- “The plaintiff acted in accordance with the agreement, doing nothing for years and not issuing assessments against the defendants until Mr. Korotki, who controlled all The Reserves entities, decided that the defendants were not going to build homes.”⁷⁵
- “[A]t settlement on the 17 lots, no assessments were collected for The Reserves Management, LLC, which certainly knew at the time of settlement that they didn't get any assessments.”⁷⁶
- “This money [i.e., the Assessments] was not collected at settlement because, once again, that was not the arrangement among the parties. If the plaintiff had issued the assessments at that time or, probably, any time soon thereafter, certainly, it would have prompted a vigorous dispute between the parties, if not litigation.”⁷⁷
- “the plaintiff never sent an invoice for the assessments to the defendants until Mr. Korotki determined that R.T. Properties was never going to build homes on the 17 lots.”⁷⁸
- “The defendants did not know that The Reserves Management was going to assess dues, regardless of the contract provisions”⁷⁹
- “the defendants certainly relied on the fact that Appellant did not collect dues at settlement and for a number of years thereafter.”⁸⁰
- “R.T. Properties went to settlement on these lots under a certain set of facts as it understood them, and it and the other defendants made costly arrangements in order to build homes on the 17 lots.”⁸¹

The cumulative effect of the foregoing is that the Trial Court made numerous findings of law with respect to issues of waiver, estoppel, interpretation of contract,

⁷⁵ Hearing Transcript, 2/27/2013, at 15:20 (A-1344).

⁷⁶ Hearing Transcript, 2/27/2013, at 16:7 (A-1345).

⁷⁷ Hearing Transcript, 2/27/2013, at 20:8 (A-1349).

⁷⁸ Hearing Transcript, 2/27/2013, at 20:16 (A-1349).

⁷⁹ Hearing Transcript, 2/27/2013, at 24:19 (A-1353).

⁸⁰ Hearing Transcript, 2/27/2013, at 24:22 (A-1353).

⁸¹ Hearing Transcript, 2/27/2013, at 25:3 (A-1354).

alter ego law, and the respective intentions of the parties executing the Sale Contract on the basis of unsupported facts.

Requiring parties seeking judgment under Rule 56 to rely upon certain classes of documents is not merely a meaningless technical exercise. The Advisory Committee Notes on Rule 56 of the Federal Rules—which contains identical language to the Superior Court Rule herein—indicates that “[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the *proof* in order to see whether there is a genuine need for trial.”⁸² The reference to “proof,” along with the prohibition against mere denials unsupported by materials of evidentiary quality, indicates the rulemakers’ intention that a party seeking to demonstrate a genuine dispute of material fact must rely upon sworn statements and admissions of the other parties. In this case, Appellees relied mostly upon allegations of counsel concerning facts not appearing in the record.

What in fact the Trial Court should have done was examine the affidavits, determine that disputed fact in this case⁸³ was not “material” as required under Superior Court Rule 56 because the four corners of the Sale Contract are not ambiguous, and entered summary judgment in Appellant’s favor.

⁸² Citing 6 MOORE’S FEDERAL PRACTICE 2069 (2nd ed. 1953).

⁸³ The only fact disputed according to the competing affidavits in this case is whether the parties intended that any alleged forbearance from enforcing the Assessment Obligations was an informal one, terminable at Appellant’s pleasure because there was no contractual agreement to forbear, or whether they intended forbearance to be enforceable *ad infinitum*. It is also possible that the parties did not have a common intention.

2. In the alternative, the Trial Court erred in resolving disputed facts in the context of summary judgment.

Even if this Court determines that the Trial Court was justified in excusing Appellees from having to support their factual allegations with “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” all of the foundations laid by the Trial Court for resolving both cross-motions in Appellees’ favor were based upon disputed facts. Therefore, if it were so persuaded, the Trial Court should have denied both cross-motions and conducted a trial.

Specifically, as more fully discussed above, the Trial Court’s findings were grounded upon determinations of (i) the parties’ intentions with respect to waiver and/or estoppel; (ii) the relationship among Appellant and the Reserves executors to the Sale Contract; (iii) the relationship among RT Properties and the Subsidiary Appellees; and (iv) the enforceability of the Sale Contract in light of arguments by both parties that the other had breached it. In the event that the Trial Court could not construe from the *actual evidence* that these facts should have been resolved in Appellant’s favor due to Appellees failing to support their argument by affidavit or otherwise, then the Trial Court should have sent this matter to trial.

3. The Trial Court erred in accepting and applying Mr. Korotki's deposition testimony without considering Appellant's objection thereto.

The only evidence offered by Appellees besides the Tranovich Affidavit was certain deposition testimony of Abraham P. Korotki regarding his intention with respect to forbearance from recovering Assessments against RT Properties. But Appellees omitted an objection to the line of questioning that Plaintiff interposed:

Q. And the sales contract, if it makes any provisions in relations to the timing of the assessments, do you believe that that applies or does not apply?

MR. HILLER: Hold on, Abe. I am just going to put a general objection here to the extent we are testifying as to what documents say or don't say and how they interact between each other, the documents speak for themselves and the witness can't testify as to the legal conclusions that you are asking him to. So, when you ask him to testify as to his belief, he can certainly testify as to his belief, but the plaintiff in this case reserves all rights.

The deposition questions continuously referred to whether or not the deponent had agreed to a “forbearance” in the Sale Contract, but the deponent—who is merely an agent testifying on Appellant’s behalf—is not an expert on forbearance contracts and was not called to opine on the legal impact of the language in the agreement. In other words, Appellees attempted to use Mr. Korotki’s fact testimony exactly in the manner that Appellant’s counsel stated in his objection to the question: seeking to replace the unambiguous language of the contract with parol evidence, and seeking to distract the Trial Court’s attention from the legal effect of the contract by needling Plaintiff’s

principal into making statements out of context that Defendants could then label “admissions.”

The Sale Contract dictates the reciprocal agreements of the parties, and it does not contain a provision for forbearance. The Trial Court failed to resolve this evidentiary objection and simply used the testimony in its ruling on cross-motions for summary judgment as if it were uncontroverted. Therefore, the Trial Court’s orders should be reversed.

III. APPELLANT SHOULD HAVE BEEN AWARDED SEWER CONNECTION FEES.

A. QUESTION PRESENTED.⁸⁴

Did the Trial Court err in denying Appellant’s claim for sewer connection fees?

B. SCOPE OF REVIEW.

The Trial Court rendered its decision on this issue on the parties’ cross-motions for summary judgment, and the same scope of review described above at p. 9 hereof, *supra*, applies.

C. MERITS OF ARGUMENT.

After the Trial Court had ruled on most of the issues on summary judgment, it preserved the issue of Appellant’s claim for recovery of sewer connection fees against Appellees under the Restrictive Covenants. The imposition of a sewer

⁸⁴ Pursuant to Rule 14(b)(vi), Appellant notes that this question was presented to the Trial Court in Appellant’s brief beginning at A-904 and at the 2/27/2013 hearing, beginning at A-1357.

connection fee assessment is governed by Article 7, § 1(6) of the Restrictive Covenants in accordance with the Amendment. Pursuant to this covenant, an assessment in the amount of \$4,007.00 is made against the owner of a lot in the Community to cover such lot owner's share of fees owed to Sussex County.⁸⁵

Sewer connection fees differ from the other Assessments because (i) RT Properties' liability for them is expressly preserved under the Sale Contract in addition to under the Restrictive Covenants, (ii) to the extent that Mr. Korotki's deposition testimony concerning the scope of any alleged forbearance under the Sale Contract is given any weight after Appellant's objection, the sewer connection fee was not listed among the Assessments subject to deferment, and (iii) RT Properties was already adjudicated responsible for them in another case. In a separate civil action between RT Properties and RRSCC in the Superior Court for Sussex County, the Honorable Richard Stokes found that RT Properties was responsible for the sewer connection fees under the Sale Contract.⁸⁶

In a separate letter opinion, 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. This finding should be reversed as being clearly erroneous. If Appellant had been a third-party management company or homeowner's association

⁸⁵ A-797.

⁸⁶ A-797. The opinion in which Judge Stokes made this finding is reprinted at A-805, *et seq.* and the specific finding appears at A-820.

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 unreasonable.

Moreover, as cited in Appellant's supplemental brief in support of summary judgment, the right to amend the Restrictive Covenants and impose the amendments upon existing lot owners was approved by this Court in other litigation. In a case styled as *Reserves Development, LLC vs. Crystal Properties, LLC*, C.A. 05C-11-011, the court considered various damages sought for the defendant's failure to comply with a contract to develop certain lots in the Community. In asserting offsets to damages asserted by the plaintiffs, the defendants argued that the Covenants in existence at the time of the breach provided for a central water source system, which the Declarant did not implement because it was too expensive. Judge Stokes found this argument to have merit because: "I find that Mr. Korotki found that system to be too expensive, but *had the power to* but never changed the recorded deed restrictions. The recorded deed restrictions were not amended to provide for an alternative source."⁸⁷ That finding was upheld by this Court.⁸⁸

Moreover, the Trial Court's finding of the reasonableness of the amendment was improper on summary judgment, both because it was not supported by "the

⁸⁷ See Richard F. Stokes, J., January 3, 2008 hearing transcript, 7:1-5 (reprinted at A-1133) (emphasis added).

⁸⁸ *Reserves Development v. Crystal Properties*, 986 A.2d 362, 367-68 (Del. 2009).

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” and also because it is a genuine issue of materially disputed fact—to the extent that Appellees can produce any evidence to show its unreasonableness.

Finally, as the Trial Court indicated in its letter opinion, Judge Stokes had expressly declared that RT Properties was responsible for the sewer connection fee but no money judgment was entered. In the interests of justice and to expedite this matter, the Trial Court should have entered judgment in Appellant’s favor on this issue.

CONCLUSION

For the foregoing reasons, 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: May 23, 2013
Wilmington, Delaware

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