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Case Number 164,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE RESERVES MANAGEMENT CORPORATION, n/k/a RESERVES MANAGEMENT, LLC, Plaintiff Below / Appellant, v. R.T. PROPERTIES, LLC., MOUNTAIN RANGE, LLC a/k/a MOUNTAIN RANCE, LLC, FOUNTAIN, LLC, WATERSCAPE, LLC, AND WIND CHOP, LLC, Defendants Below / Appellees.	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

APPELLEES' ANSWERING BRIEF

Respectfully submitted,
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Dated: June 20, 2013

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NATURE OF PROCEEDINGS

This action was brought by the Reserves Management Corporation n/k/a Reserves Management, LLC. ("**Appellant**") against R.T. Properties, LLC, Wind Chop, LLC, Fountain, LLC, Waterscape, LLC, and Mountain Range, LLC relating to the Reserves Resort, Spa and County Club, a residential community in Ocean View, Delaware. Appellant filed four separate actions on September 17, 2010. Each action included R.T. Properties, L.L.C. ("**RT Properties**") as a defendant along with one of the following entities: Mountain Range LLC a/k/a Mountain Rance, LLC ("**Mountain Range**"), Fountain, LLC ("**Fountain**"), Waterscape, LLC ("**Waterscape**") and Wind Chop, LLC ("**Wind Chop**")(collectively the "**Subsidiary Appellees**" and together with RT Properties "A**ppellees**"). Appellant filed this lawsuit on September 17, 2010.[1] Appellant seeks payment of assessments it believes are due from Appellees.

All four actions were later consolidated by the Trial Court on February 17, 2011. Following the Order of Consolidation,[2] Appellant filed a motion for summary judgment, which was denied. After Appellant's motion was denied, Appellees engaged in discovery.[3] At the conclusion of discovery, all parties filed motions for summary judgment. On April 25, 2012, the Trial Court filed a letter

[1] *See* Appellant's Four Separate Complaints, attached as B-0001 – B0020.
[2] Lexis Transaction Number 36010487.
[3] Notably Appellant did not take any discovery.

requesting the parties to address seventeen (17) specific questions in supplemental briefing. The Court heard oral argument on the cross motions for summary judgment on June 14, 2012.

The Trial Court granted Appellees' Motion for Summary Judgment by an oral ruling on February 27, 2013, on all issues, except for one.[4] The lone remaining issue was found in Appellees' favor later the same day in a letter from the Trial Court.[5]

Appellant file a Notice of Appeal of the Trial Court's decision to grant summary judgment as to all claims in favor of Appellees on April 15, 2013. Appellant's Opening Brief was filed on May 23, 2013. This is Appellees' Answering Brief on Appeal.

[4] A copy of the transcript from the Trial Court's February 27, 2013 hearing is attached at B-0021 – B0062 (hereinafter "Trial Court's Opinion at __").
[5] A copy of the Trial Court's letter dated February 27, 2013 is attached at B0063 – B0065.

SUMMARY OF ARGUMENT

1. Denied. The Trial Court correctly granted Appellees' Motion for Summary Judgment, because there were no genuine disputes of material facts, and the Trial Court found "ample" evidence to support Appellees' argument.

2. Denied. The Trial Court correctly held that the negotiated Sales Agreement contained a forbearance of all assessments that warranted a dismissal of Appellant's claims as the assessments were not due under the plain language of the Sales Agreement.

3. Denied. The Trial Court correctly held that the plain language of the Sales Agreement created a forbearance of any assessments until Appellees sold the lots to a third party and a Certificate of Occupancy had been issued.

4. Denied. The Trial Court properly considered all documents, testimony, pleadings, discovery responses, prior judicial rulings and affidavits filed in granting summary judgment in favor of Appellees.

5. Denied. The Trial Court properly found in Appellees' favor in finding that there was no genuine dispute of any material fact as the language of the Sales Agreement was clear, and, in the alternative, the Trial Court's decision was further supported by the clear intent of the parties.

6. Denied. Appellant's claim for sewer connection fees was properly denied as a result of the Trial Court's ruling that the Amended Declaration was invalid.

STATEMENT OF THE FACTS

In April 2005, RT Properties entered into a contract to purchase seventeen (17) fully developed building lots in a community named "The Reserves Resort, Spa and Country Club" (the "**Community**") being developed by Reserves Development Corporation, Reserves Development, LLC, and Abraham Korotki (collectively, "**Reserves**").[6] All seventeen (17) lots are in Phase III of the Community.[7] Appellant is the management company who is tasked with enforcing the Restrictive Covenants, collecting home owners' association dues, and maintaining the common areas of the Community.[8]

The purchase between Reserves Development Corporation and RT Properties is memorialized by the "Agreement of Purchase and Sale of Real Estate" (the "**Sales Agreement**").[9] The Sales Agreement dictated the timing of when certain assessments were due. In the bargained for Sales Agreement, the assessments became due when the lots were sold to a third party and a certificate of occupancy was issued.[10] To be certain, Paragraph 10 of the Sales Agreement reads in relevant part:

> Purchaser 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 (i) a

[6] Defendant RT Properties purchased lot numbers 113 to 129.
[7] A copy of the Site Development Plan is attached at B-0066
[8] See the Original Declaration, attached at B-0067 – B0097, at B-0068.
[9] A copy of the Sales Agreement is attached at B-0098 – B-0108.
[10] B-0103.

> contribution of $5,000 to the homeowner's association for the Reserves, (ii) a $5,000 payment to The Reserves Maintenance Corporation towards the cost of construction the clubhouse and recreation facilities, and (ii) all home owners associates due from that time forward…"[11]

Shortly after RT Properties purchased the 17 lots, it conducted a Plan of Division on November 11, 2005 and conveyed title of the lots to Wind Chop, Fountain, Waterscape and Mountain Range for nominal consideration.[12] The owner of RT Properties was Thomas Tranovich, who was also the owner of Wind Chop, Fountain, Waterscape and Mountain Range.[13] Mr. Tranovich received permission from Abraham Kotroki to transfer the title to the related entities.[14] Title in the properties was conveyed to the Subsidiary Appellees for the purpose of limiting personal liability.[15] It was understood between Reserves and Appellees that time was of the essence and that Appellees could expect to have their lots ready for construction within nine months of the April 13, 2005 Sales Agreement.[16]

Prior to RT Properties purchasing the 17 lots, a Declaration of Restrictions of The Reserves Resort Spa and Country Club (the "**Declaration**") had been filed

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[11] B-0103. (emphasis added).
[12] A copy of the Plan of Division is attached at B-0109 – B-0115. As the Plan of Division indicates, the related entities had the same ownership and were all funded from RT Properties. Similar to the Trial Court's ruling in this case, Judge Stokes similarly found in another matter that the Plan of Division was done to limit RT Properties' liability. *See Reserves Development LLC v. RT Properties et. al.*, 2011 WL 4639817, *1 (Del. Super.)(attached at B-0116)
[13] See Affidavit of Thomas Tranovich, attached at B-0128.
[14] *Id.*
[15] *Reserves Development LLC*, 2011 WL 4639817, *1 (Del. Super.)(B-0117).
[16] *Id.* at *4 (B-0120 – B-0121).

with the Recorder of Deeds.[17] The Reserves amended the Declaration and filed it with the Recorder of Deeds on May 23, 2008 (the "**Amended Declaration**").[18] More than three years had passed since Appellees purchased the properties from Reserves and Mr. Korotki, when the Amended Declaration was recorded that established substantial new assessments and dramatically increased assessments that, previously, had not existed in the Declaration, including almost tripling the annual assessment for the maintenance of a desolate development.[19]

Despite the Sales Agreement stating that the assessments would be due when RT Properties sold the lots to third parties and a certificate of occupancy was issued, Appellant now seeks assessments in the amount of $5,000 for an Initial Assessment, $5,000 for a Capital Assessment; $4,007 sewer assessment; a first-year annual assessment of $4,571, and delinquent annual assessments in the amount of $4,571 per year since the Defendants took title in 2005.[20] In total, Appellant's four complaints sought at total of $851,716.86 at the beginning of the case.[21] The first invoice sent to Appellees for any of the assessments was not sent until August 24, 2009, or more than four years after the 17 lots were purchased.[22] As recently as November 15, 2011, the Development is a barren area where

[17] The Declaration was filed on August 13, 2001.
[18] A copy of the Amended Declaration is attached at B-0130.
[19] *See* Sales Agreement stating the annual assessment was $1,700 (B-0103).
[20] Affidavit of Abraham Korotki at B-0140.
[21] *See* Appellant's four complaints at B-0001 – B0020.
[22] A copy of the August 24, 2009 invoice is attached at B-0148.

Appellant cannot set forth in good faith that the owners of all 179 lot owners have received any services that would equate to $4,571 per year per lot.[23]

Appellant's effort to collect such egregious amounts was found to be impractical by the Trial Court, and the Trial Court correctly held that the Sales Agreement plainly delayed the timing of when assessments would be due from Appellees, and the contract language was further supported by the Appellant's sole and managing member – who is an attorney – testimony that the Sales Agreement contained a forbearance of the assessments.[24] Notably, it was Appellant's 30(b)(6) representative, Mr. Kortoki – the de facto head of all things involving the Community – who first classified the provision as a forbearance.[25]

Based upon the well reasoned opinions of the Trial Court and as set forth in the following pages, the Trial Court's February 27, 2013, decision should be upheld.

[23] *See* Photographs taken March 7, 2008 attached at B-0149 – B-0150. *See also* Photographs taken November 15, 2011 attached at B-0151 B-0152. The photographs at B-0149 – B-0150 are from the approximate same location and perspective at B-0151 – B-0152, just several years earlier. The photographs were taken in the near Lot # 27 at the beginning of Phase III. See B-0066 showing where Lot # 27 is within the neighborhood. *See* Photographs of Lot #117 taken on November 15, 2011 showing Lot #117, attached at B-0153 – B-0154.

[24] See deposition testimony of Abraham Korotki, attached at B-0155, at B-0175 – B-0176.

[25] *Id.*

I. THE SALES AGREEMENT PROVIDED FOR A FORBEARANCE OF ALL ASSESSMENTS DUE FROM APPELLEES

A. QUESTION PRESENTED

Did the Trial Court err in concluding that the Sales Agreement contained a forbearance that none of the assessments were payable by Appellees until a certificate of occupancy was issued and the properties were sold to a third party?

B. SCOPE OF REVIEW

The Delaware Supreme Court's standard of review on appeal from a grant of summary judgment is *de novo*.[26] The trial court was required to determine whether the plaintiff on the summary judgment record proffered evidence from which any rational trier of fact could infer that the plaintiff had proven the elements of a *prima facie* case.[27]

C. MERITS OF ARGUMENT

1. The Sales Agreement Provided For A Forbearance of All Assessments

The Trial Court correctly held that the Sales Agreement was clear in it providing a forbearance of the assessments until a certificate of occupancy was issued by Sussex County and the property was sold to a third party. As neither

[26] *Pike Creek Chiro. Ctr., P.A. v. David Robinson, D.C.*, 637 A.2d 418, 420 (Del. 1994).
[27] *Cerberus International, LTD v. Apollo Management L.P.*, 794 A.2d 1141, 1149 (Del. 2002); *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

preconditions were satisfied,[28] the Trial Court correctly granted summary judgment in favor of Appellees.

Interpretation of contractual language is purely a question of law for the Court to decide on summary judgment.[29] Clear and unambiguous contract language must be given its usual and customary meaning.[30] Contractual language is not ambiguous simply because parties disagree as to its terms, but rather ambiguity exists only where the language is reasonably susceptible to differing interpretations.[31]

The Sales Agreement clearly sets forth when fees may be assessed.[32] The Sales Agreement conveying the properties to R.T. Properties from The Reserves Development Corporation clearly states:

> Seller has provided a copy of the Declaration of Covenants and Restrictions to Purchaser [R.T. Properties], which Purchaser shall copy and provide to each of its homebuyers. Purchaser [R.T. 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 (i) a contribution of $5,000 to the homeowner's association for the Reserves, (ii) a $5,000 payment to The Reserves Maintenance Corporation towards the cost of

[28] While not relevant to the analysis the inability to meet the two preconditions was through no fault of Appellees.
[29] *Global Energy Finance LLC v. Peabody Energy Corporation*, 2010 WL 4056164 at *17 (Del. Super.)(B-0255) (quoting *Rhone-Poulenc Basic Chem. Co. v. Am. Mot. Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).
[30] *Global Energy*, at *17 (B-0271)(citing *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. 1973)).
[31] *Id*. (citing *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1060 (Del. 1997)).
[32] *See Sales Agreement at B-0103*.

> construction the clubhouse and recreation facilities, and (iii) all homeowners association dues from that time forward (which are currently $1,700 per annum (subject to change in accordance with the bylaws, and are not prorated but are paid in full by the first homebuyer(s) at the time of their closing.[33]

Based upon the plain language of the Sales Agreement, in order to have the assessments considered payable, RT Properties must sell the lots to "a third party" and a certificate of occupancy must be issued.[34] Under the Plan of Division, the lots were not "sold" to any entity; thus, Appellant cannot prove as a matter of law that the first condition under the forbearance was met. Agreeing with Appellees' analysis, Judge Stokes ruled in a case involving many of the same parties, involving the same Community, that RT Properties' owner merely conveyed title to the subsidiary lots to minimize personal liability.[35] Judge Bradley agreed with both Appellees and Judge Stokes as to the purpose of the Plan of Division; thus, Appellant cannot establish the first condition precedent, i.e. that RT Properties sold the properties to a third party.[36]

Furthermore, Appellant cannot met its burden as to the second condition, because it has failed to set forth any evidence that a single Certificate of Occupancy has been issued for *any* of the 17 lots at issue; thus, this condition precedent cannot be refuted by Appellant. In fact, no Certificate of Occupancy

[33] Sales Agreement at B-0103 (emphasis added).
[34] *Id.*
[35] *Reserves*, 2011 WL 4639817 at *1 (B-0117).
[36] *See* Trial Court's Opinion at B-0045 – B-0046.

could have been issued to *any* of Appellees' seventeen (17) lots at any time relevant hereto.[37]

Should this Court conclude that the plain language of the Sales Agreement is not clear, this court must look at the intent of the parties and parol evidence.[38] Should this Court find that there is any ambiguity among the parties' intent, as the drafter of the contract, ambiguities in a contract should be construed against Appellant.[39] Such a secondary analysis was performed by the Trial Court after first concluding that there was a forbearance in the Sales Agreement.

The clear intent of the Sales Agreement, as testified to by Appellant, was to delay the assessments to Appellees and make the ultimate homeowner liable for the fees. Appellant's 30(b)(6) representative was Mr. Korotki, who's testimony binds the company.[40] Mr. Korotki is in the knowledgeable position of being involved in many capacities in these transactions, as he is the owner of the Reserves and is the Reserve Management Corporation's sole and managing member. Mr. Korotki even acknowledged that there was a forbearance in the sales contract. Mr. Korotki was asked:

> Q: And the sales contract, if it makes any provisions in relations to the timing of the assessments, do you believe

[37] *See* Affidavit of David Baker, attached at B-0289. While Appellant takes issue with Mr. Baker's affidavit, it never sought to depose Mr. Baker.
[38] *Judge v. Rago*, 570 A.2d 253, 257 (Del. 1990).
[39] *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003).
[40] *Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 623 A.2d 1099, 1112-13 (Del. Super. 1991)(citations omitted).

that that applies or does not apply?
A: It does apply as long as there is a good faith basis for it.
Q: And what do you mean by a "good faith basis for it"?
A: Well, in – in this particular case, there was a forbearance of the assessments to take place upon the construction of single family homes on these lots. Those didn't occur. They are not going to occur. There is no intent to have them occur. So the forbearance terminated.[41]

Mr. Korotki continued to testify that the forbearance was an "accommodation" that he unilaterally ended.[42] In point of fact, Mr. Korotki acknowledged that the very point of the forbearance was to "help the builder – to help the builder defray those immediate costs of the assessments."[43] Mr. Korotki's testimony is consistent with Appellees' understanding of the forbearance in the Sales Agreement.[44] It was only after Appellant unilaterally decided to re-write the Sales Agreement in May 2009, more than four (4) years after Appellees purchased the properties, that an invoice for any assessment was provided to Appellees.

Under the plain language of the Sales Agreement, both sides memorialized an intent in writing for there to be a delay of when the assessments were due. Instead of upholding the parties' intent, Appellant unilaterally decided to change the terms of the bargained for contract to terms more favorable to it. As the plain language of the Sales Agreement should control, summary judgment must be

[41] Mr. Korotki's deposition at B-0175 – B-0176.
[42] *Id.* at B-0176.
[43] *Id.* at B-0177.
[44] *See* Mr. Tranovich's Affidavit at B-0128 ¶4.

granted in Defendants' favor as to all claims.

2. The Trial Court Correctly Concluded Mr. Korotki Could Not Discharge His Personal Knowledge to Unscrupulously Avoid Bargained For Contractual Obligations.

Mr. Korotki is not only Appellant's sole and managing member, but he is Reserves' sole and managing member. Yet, despite the obvious knowledge that Mr. Korotki possesses as to all things relating to both entities, Appellant contends that he should be able to discharge his knowledge from one entity when negotiating a contract for another entity. To be certain, as the Trial Court correctly held, there was no dispute of any material fact that, "the plaintiff certainly knew what was going on" and that Mr. Korotki's "actions cannot be ignored."[45]

Dubious conduct should not be rewarded. While it is true the Appellant and Reserves are two separate legal entities, they are in fact artificial entities that can only act through its sole and managing member, Mr. Korotki. Mr. Korotki's knowledge is imputed to each and every Reserves entity that the owns and operates, because of his position as the head of each of the Reserves entities.[46] Delaware Courts have consistently held that an officer or director's knowledge is imputed to the corporation when they are acting on the corporation's behalf.[47] A

[45] *See* Trial Court's Opinion at B-0039 and B-0042.
[46] *See B.A.S.S. Group, LLC v. Coastal Supply Co., Inc.*, 2009 WL 1743730, 7 (Del. Ch.)(B-0291); *Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654, 674 n. 3 (Del. Ch.); *Carlson v. Hallinan*, 925 A.2d 506, 542 (Del. Ch. 2006); *Williams v. White Oak Builders*, 2006 WL 1668348, *6 (Del. Ch.)(B-0304).
[47] *B.A.S.S.*, 2009 WL 1743730 at B-0297.

business entity should not be permitted, under Delaware law, to negotiate a contract and then have a separate, but related entity with the exact same single managing member, destroy the very bargained for transaction that had just been negotiated. Fortunately, the Trial Court correctly concluded that Delaware law does not permit such conduct. Indeed, "the reality is that the plaintiff, just as if it had signed the sales contract itself, was a part of the agreement to transfer the assessment obligations to the homebuyers."[48]

3. Appellant's Breach of Contract Claim Is Without Merit.

Appellant argues that RT Properties breached the Sales Agreement thereby justifying an end to the forbearance, because Appellant alleges it was never Appellees' intention to build homes on the subject lots and RT Properties transferred the lots to the Subsidiary Defendants.[49] Such statements are without merit and are only based upon Appellant's own self-serving affidavit. Appellant's argument only further supports Appellees' argument that a forbearance did in fact exist, as Appellant seeks to justify its unreasonable re-writing of a contract (four years after it was originally executed) on an after-the-fact legal fiction.

Appellant's argument that Appellees lacked the intent to build on the seventeen lots is readily disputed; however, such a dispute of fact is not *material* to Appellee's motion for summary judgment, and this red herring argument can only

[48] *See* Trial Court's Opinion at B-0039.
[49] *See* Appellant's Opening Brief at pgs. 20-22, attached at B-0342 – B-0344.

be offered by the Appellant in effort to try and cloud an otherwise clear record. Appellant's argument only comes into play if Mr. Korotki had the unilateral power to amend a bargained for agreement, which he clearly does not..

Notwithstanding the aforementioned, Appellant's argument that Appellees never intended to build on the lots is not only a fiction, but cannot possibly be used as justification for Appellant's unilateral determination to eliminate the forbearance. The only document submitted in support of its position is Mr. Korotki's own sham affidavit, which lacks any foundation for his assertion and is based upon inadmissible hearsay.[50] Relying upon bank records received in other litigation, Mr. Korotki states "The agreement contains numerous representations concerning RT Properties' intentions with respect to development of the Properties, as well as an agreement not to transfer the Properties without Appellant's consent, which I later discovered to be, or were later proved to be, false."[51] Appellant cannot rely upon the bank records that it obtained through other litigation as such documents were not in Appellant's possession when it unilaterally, and without notice, decided to cancel the forbearance. Such documents, even if standing for the proposition as asserted, could not have formed a basis for Appellant's unilateral attempt to rewrite the contract. While Appellant

[50] For purposes of summary judgment, the court must look only to admissible evidence. *Humm v. Aetna Cas. and Sur. Co.*, 656 A.2d 712, 717 (Del. 1995)(citations omitted).
[51] *See* Paragraph 19 of Mr. Korotki's affidavit, which is provided in Appellant's Appendix at A-800.

did not send any invoice for the assessments until August 24, 2009, the bank records that supposedly justified a termination of the forbearance were not even provided to Appellant until Reserves received the documents in response to a subpoena on or about October 27, 2010 that was served upon Sovereign Bank.[52] In fact, evidencing its intent to fully develop the seventeen lots, Appellees obtained $7,000,000 in construction loans and incurred over $50,000 in closing fees relating to the lending fees. Certainly, such significant steps taken clearly demonstrate an intent to build.

Appellant's vague breach of contract claims do not provide any factual basis for its position that Appellees breached the Sales Agreement, which justified a unilateral termination of the Sales Agreement's forbearance, nor has Appellant made any attempt to develop its breach of contract theory in this case. As such, the Trial Court was correct in refusing to find a breach of contract occurred and that plain language of the Sales Agreement controlled.

4. The Issue of Waiver Was Properly Before the Court Based Upon Appellant's Own Supplement Submission

Appellant's charge of error that the Trial Court improperly discussed waiver and estoppel arguments in its ruling is without merit. In point of fact, the issue of estoppel and waiver were raised and addressed by Appellant in response to a

[52] *See* Letter from Reserves' counsel providing records received from Sovereign Bank and the records custodian's certification. Attached as Appendix B-0427.

specific inquiry form the Court and responded to in Appellant's supplemental position. To suggest that Appellant did not have an opportunity to discuss this issue is a falsehood.

Indeed, Appellant discussed the potential estoppel and waiver arguments in trying to respond to the Court's inquiry on whether Appellant was estopped from seeking the assessment, because Mr. Korotki, as the head of all things Reserves, was estopped from denying the consequences of the Sales Agreement. In point of fact, in responding to the Court's inquiry, Appellant discussed the inaction of Appellant and the consequences of the same.[53]

Even if this Court were to find in favor of Appellant's argument that waiver was not briefed, Appellant fails to cite to a single case that suggests that the Court's *sua sponte* action is improper. Moreover, the discussion on waiver was not even material to the Court's decision. The discussion of waiver was only after the Court had already concluded that the plain language of the Sales Agreement controlled, and if there was any ambiguity in the language of the Sales Agreement, that there was ample evidence – parol evidence – to find in favor of the Appellees argument.[54] Furthermore, the Trial Court concluded that the Appellant was estopped from seeking the assessments – a decision that Appellant has not taken any issue on appeal with – moots the discussion on waiver. As such, Appellant's

[53] *See* Appellant's Supplemental Submission at pg. 9 (B-0438).
[54] *See* Trial Court's Opinion at B-0041 – B-0042.

argument as to the Court's error in discussing waiver should be determine to be incorrect, or at most, irrelevant on appeal.

5. The Sales Agreement Could Not Be Recorded

Flying in the face of fairness, Appellant contends that Appellees cannot rely upon the Sales Agreement, because it was not recorded by any party. Appellant's argument is again another example of the "gotcha" litigation that has been exemplified by Mr. Korotki and his entities in all of the cases stemming from the Reserves Development.

Indeed, Reserves is owned by Mr. Kotorki and Appellant's sole and managing member is Mr. Korotki. The Sales Agreement setting forth the terms the parties were to adhere to specifically states that "Neither this Agreement nor any memorandum or indication hereof shall be recorded, and violation hereof by or on behalf of Purchaser shall entitle Seller to cancel and terminate this Agreement unilaterally and absolutely by recording a notice, signed only by Seller, reflecting such cancellation and termination."[55] When the validity of the assessments were contested, Appellant, acting as the Reserves Development's management company, contends that the very same Sales Agreement carries no weight in this case, because it was never recorded. To summarize, Appellant's affiliate company (with the same lone controlling shareholder) drafted the Sales Agreement

[55]*See Sales* Agreement at Paragraph 11(m)(attached at B-0105.

precluding Defendants from recording the Sales Agreement, then unilaterally prepares the Amended Declaration dramatically altering the assessments, and then Appellant contends the Sales Agreement cannot apply because it was never recorded. Such a position is inequitable, flies in the face of justice, and is unconscionable. Thus, the Trial Court was correct in applying the contractual provisions of the bargained for transaction controlled.

6. The Trial Court Properly Concluded that the Sales Agreement Did Not Violate the Rule Against Perpetuities

Contrary to Appellant's argument, the Rule Against Perpetuities cannot be used in this matter to invalidate a properly bargained for transaction between sophisticated entities. As the Trial Court held, the Rule Against Perpetuities does not determine the outcome of this matter.

The Rule Against Perpetuities is a long standing component of Delaware common law.[56] The Rule Against Perpetuities holds that "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."[57] At its heart, the purpose of the rule was ground upon the strong public policy against restricting the "alienability of land and interests in land."[58] The rule is not concerned "with the duration of an interest in land, but

[56] *Stuart Kingston, Inc. v. D.M. Robinson*, 596 A.2d 1378, 1383 (Del. 1991)
[57] *Id.* (citing J. Gray, *The Rule Against Perpetuities*, § 201 (4th Ed. 1942).
[58] *Id.* (citing *Kingston v. Home Life Ins. Co. of America.*, 101 A. 898, 901 (Del. Ch. 1917).

rather the time of vesting of that interest."[59] In projecting the prospect of the property interest vesting, "it is not enough that the future interests may, or even that it will in all probability, vest within the limits; it must necessarily so vest."[60]

a. The Rule Against Perpetuities Does Not Apply

In a classic example of bootstrapping, Appellant attempts to classify an inchoate property interest into a vested future interest; stated another way, Appellant attempts to create some sort of property interest where one simply does not exist. Any ability to have a lien attach to the Appellees' property solely exists when an assessment has not been paid, but it does not attach until that time.[61] It is axiomatic that Appellant cannot have a property interest in Appellees' land where there is no overdue assessment. Indeed, the Sales Agreement's valid forbearance delayed any assessments from being due until the land was sold to a third-party and a certificate of occupancy was issued.[62] Appellant argues that since a certificate of occupancy may not be issued for more than 21 years, its vested property right is impaired and the rule against perpetuities is triggered violating the forbearance.[63] However, absent any assessment being due, there is no vested interest. The rule against perpetuities analysis must begin with a finding that there

[59] *Heritage Homes of De La Warr, Inc. v. Alexander*, 2005 WL 2173992, *2 (Del. Ch.)(B-0484)
[60] *Id.*
[61] See Declaration at B-0078 at Section 6.
[62] *See* Sales Agreement at B-0103 at ¶10.
[63] *See* Appellant's Opening Brief at pg. 24.

is a valid property interest.[64] Appellant cannot successfully bootstrap its argument to invoke the rule against perpetuities where the property interest simply is not there.

b. Alternatively, Should The Rule Against Perpetuities Be Applied In This Case, The Property Interests Will Vest Within 21 Years.

In the event that the Rule Against Perpetuities is applied in this case, the Trial Court correctly held that the forbearance provision in the Sales Agreement will vest within 21 years. Implicit within Appellant's own Opening Brief is the admission that this issue will have an ultimate resolution, within 21 years from the date of the Sales Agreement.

As the Trial Court noted, Reserves had a contractual obligation to complete the infrastructure for the area where Appellee's properties were located within the Community.[65] Moreover, the Trial Court noted that Appellees have a good faith duty to build homes on its 17 lots, and that at some point, Appellees will either have to build the homes or be in a breach of contract. Indeed, the Trial Court concluded that "[a]t some point in time, this arrangement will come to a conclusion because one or both parties have either satisfied their obligations or not satisfied their obligations.[66] Even more indicative that the terms and obligations under the

[64] *See Heritage Homes of De La War*, 2005 WL 2173992 at *2 (stating that "no *interest* is good unless it must vest …")(citations omitted)(B-0484).
[65] *See* Trial Court's Opinion at B-0047.
[66] *Id*.

Sales Agreement will be timely completed is the "Time is of the Essence" provision in the Sales Agreement, which obligates the parties to perform under the contract as quickly as possible.[67]

It appears that Appellant's issue with the Trial Court's decision is simply that it did not decide the ultimate conclusion that Appellant desires, i.e. whether there was a breach of the Sales Agreement and what damages and/or remedies are to be awarded. Such grounds for an appeal should not prove successful. The Trial Court correctly applied the rule against perpetuities.

7. The Trial Court Did Not Err In Not Elaborating On Whether The Subsidiary Appellants Were A Party To The Contract

Plaintiff contends that the subsidiary Appellees were not parties to the Sales Agreement; thus they cannot seek any rights or defense under the Sales Agreement. Such an argument is in effort to cloud the record, while at the same time is irrelevant under Appellant's theory of recovery.

Appellant contends that the Subsidiary Appellees were not named in the Sales Agreement; thus, they cannot assert any rights and obligation. As Mr. Tranovich stated in his affidavit, the original purchase was supposed to be in the names of the subsidiary Appellants, but it was only due to an error by the real

[67] *See Sale Agreement* at (B-0105) pg. 8 stating: "Time is of the essence in the performance of each of the duties and obligations of the parties hereunder and the satisfaction of each of the conditions precedent set forth herein."

estate attorney handling the transaction that the original Sales Agreement was not put in the names of the subsidiary Appellants.

Even assuming Appellant's argument is correct and the Trial Court erred in not discussing this issue – notably the Trial Court did not find this factual significant as it held the Sales Agreement had a forbearance of all assessments under the properties were sold to a third party and a certificate of occupancy had been issued – such a finding does not alter the outcome. Under Appellant's argument, it was RT Properties who was responsible for payment of assessment, and the assessment was a personal obligation of RT Properties. Appellant named RT Properties in each and every case asserting that RT Properties was responsible for the full amount. Thus, if RT Properties is responsible for the one time assessments, it is able to seek the full defenses and benefit of the forbearance as negotiated and memorialized in the Sales Agreement.

II. THE TRIAL COURT PROPERLY APPLIED THE STANDARD FOR SUMMARY JUDGMENT

A. QUESTION PRESENTED

Did the Trial Court apply the proper standards for summary judgment in granting Appellee's motion for summary judgment?

Issue preservation pursuant to Supreme Court Rule 8 refers to the preservation of issues by the Appellant, not the Appellees.[68]

B. SCOPE OF REVIEW

The standard and scope of review is set forth in Section I(b).

C. MERITS OF ARGUMENT

1. Standard for Summary Judgment

A moving party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[69] When considering a motion for summary judgment, the Court views the facts, and any inferences drawn from those facts, in a light most favorable to the nonmoving party.[70] The Court's decision must be based upon the record, including all pleadings, affidavits, depositions, admissions, and answers to discovery, not

[68] *See Danby v. Osteopathic Hosp. Ass'n of Del.*, 104 A.2d 903, 907-08 (Del. 1954).
[69] Super. Ct. Civ. R. 56(c); *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 280 (Del. 2006).
[70] *Windom*, 903 A.2d at 280.

potential evidence.[71] Summary Judgment may be granted only when no material issues of fact exist, and the moving part bears the burden of establishing the non-existence of material issues of fact.[72] Once the moving party meets its burden, then the burden shifts to the nonmoving party to establish the existence of material issues of fact.[73] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[74]

2. The Trial Court Properly Relied Upon All Evidence Presented To It For Consideration

The Trial Court correctly granted Appellees' Motion for Summary Judgment basing its decision upon the plain language of the Sales Agreement, the Restrictive Covenants, sworn deposition testimony, an affidavit from the County Administrator from Sussex County, and the affidavit of Tom Tranovich. As the Trial Court's decision based its findings only upon evidence properly before it, the Trial Court's decision must be affirmed.

Appellant take such issue with the Court relying upon a Plan of Division that was provided by Appellees from the very outset of this case in its Motion to Dismiss.[75] The document is a business record, which has been produced in this, as well as other litigation, involving many of the same parties. Appellant never once

[71] *Palmer v. Moffat*, 2004 WL 397051, 3 (Del. Super.)(citing *Rochester v. Katalan*, 320 A.2d 704 (Del. 1974))(B-0490).
[72] *Moore v. Sizemore*, 405 A.2d. 679, 680 (Del. 1979).
[73] *Id.* at 681.
[74] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[75] Appellant's Opening Brief at pg. 27.

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. Further attempting to cloud the record with irrelevant objections, Appellant takes issue with the Affidavit from the Sussex County Administrator who supplied an affidavit indicating that no Certificate of Occupancy had been granted, and in fact, "Sussex County could not have issued a Certificate of Occupancy at any time for any of the 17 properties" owned by Appellees.[76] Again, Appellant never sought to depose Mr. Baker or explore the basis for his sworn statements.

Ironically, Appellant contends that the Trial Court committed legal error by not accepting Mr. Korotki's affidavit and supplemental affidavits in support of Appellant's Motion for Summary Judgment.[77] Mr. Korotki's affidavit is nothing more than a Sham Affidavit that's sole purpose was to defeat an otherwise proper Motion for Summary Judgment. This Court has previously opined that Sham Affidavits have no place in Delaware litigation when deciding a motion for summary judgment. At "the core of the [Sham Affidavit] doctrine is that where a witness *at a deposition* has previously responded to *unambiguous questions* with *clear answers* that negate the existence of a genuine issue of material fact, that witness cannot thereafter create a fact issue by submitting an affidavit which

[76] See Affidavit of David Baker, at paragraph 5 (B-0289).
[77] Appellant's Opening Brief at pg. 26.

contradicts the earlier deposition testimony, without an *adequate explanation.* "[78] The sole purpose of Mr. Korotki's affidavit was to blur his otherwise clear deposition testimony.

3. Appellant Has Not Demonstrated Any Disputes of A Material Fact That Precluding Summary Judgment

Appellant is quick to argue that it disagrees with the Trial Court's decision, because the Trial Court resolved disputed facts in favor of Appellee's Motion for Summary Judgment. Appellant misapprehends the standard that is required of a trial court at summary judgment.

A trial court is tasks to review the evidence presented to it to determine whether there is any dispute of any material facts.[79] Even when there are disputed facts, summary judgment is warranted if the undisputed facts and the non-movant's version of the disputed facts entitle the moving party to judgment as a matter of law.[80]

As a matter of law, the Trial Court concluded that the plain language of the contract supported a finding in favor of Appellees in that the Sales Contract provided a forbearance of any assessments until two conditions precedent had been met. Thus, Mr. Korotki's deposition testimony is irrelevant under the plain

[78] *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003)(emphasis added).
[79] *Moore*, 405 A.2d. at 680.
[80] *Palmer v. Moffat*, 2004 WL 397051 at * 2 (citing *Borish v. Graham*, 655 A.2d 831 (Del. Super. 1994))(B-0492).

language of the Sales Agreement. Even if this Court were to find that the Sales Agreement leant itself to an alternative interpretation – which it clearly does not – the Trial Court's usage of Mr. Korotki's own deposition testimony is parol evidence that supports a finding in favor of Appellees. Mr. Korotki's own deposition testimony verifies Appellees' understanding of the bargained for transaction and the terms of the contract. Mr. Korotki was asked:

> 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?
> A: It does apply as long as there is a good faith basis for it.
> Q: And what do you mean by a "good faith basis for it"?
> A: Well, in – in this particular case, there was a forbearance of the assessments to take place upon the construction of single family homes on these lots. Those didn't occur. They are not going to occur. There is no intent to have them occur. So the forbearance terminated.[81]

Appellant wishes to un-ring a bell it simply cannot. Contrary to Appellant's argument, it was Mr. Korotki – an attorney – who first classified the agreement as a forbearance of assessments. Quite simply, Mr. Korotki volunteered his own interpretation of the contract, which was consistent with that of Mr. Tranvoich.[82] It is perplexing that Appellant seeks this Court to find that the plain language of the Sales Agreement is to be interpreted contrary to Appellant's own understanding and interpretation of the contract. While Appellant contends that Appellees'

[81] Mr. Korotki's deposition at pgs. B-0175 – B-0176.
[82] See Tranovich Affidavit at B-0128 – B-0129.

reliance on Mr. Korotki's own sworn deposition testimony was meant to "distract the Trial Court's attention from the legal effect of the contract",[83] a party's sworn testimony against its own interest should never be interpreted as a distraction.

The Trial Court properly ruled that the Sales Agreement was clear based upon the plain language, and used Mr. Korotki's testimony only as an example of the "ample evidence to support the [Appellees'] argument that there was an agreement much broader in scope than just the sales contract …"[84] As the Trial Court properly utilized Mr. Korotki's sworn deposition testimony, the Trial Court's February 27, 2013 decision must be affirmed.

[83] Appellant's Opening Brief at pg. 31.
[84] Trial Court's Opinion at B-0038.

III. THE TRIAL COURT PROPERLY CONCLUDED THAT THE SEWER ASSESSMENT FEES ASSESSMENT SHOULD BE DISMISSED.

A. QUESTION PRESENTED

Was the Trial Court correct in finding that the Sewer Assessment fees could not be awarded as a matter of law.

B. SCOPE OF REVIEW

The standard and scope of review is set forth in Section I(b).

C. MERITS OF ARGUMENT

The Trial Court correctly held Appellant could not recover sewer assessment fees in this case after finding that the Amended Declaration was invalid. With the Amended Declaration being found invalid, the this Court should find that the Appellant has no basis in which to seek the sewer connection fee.

Appellant's sole basis for the award of Sewer Fees at the time of the oral ruling was that the Amended Declaration provided for Appellant to collect the sewer connection fees.[85] After entertaining oral argument on this issue, the Trial Court advise it would re-read Judge Stokes decision and render a decision.[86]

Later the same day, the Trial Court issued a brief letter opinion on Appellant's right to collect the sewer connection fee. As Appellant's sole position was that the Sewer Connection Fees were a proper assessment under the Amended

[85] See Trial Court's Opinion at B-0054.
[86] See Trial Court's Opinion at B-0060.

Declaration, which he found to be invalid, the sewer connection fees were denied.[87] The Trial Court correctly concluded that since the sewer connection fee assessment became due through the Appellant only through the Amended Declaration, because the fees only came "into existence after the [Appellees] acquired the 17 lots and is unreasonable."[88] Where a developer seeks to enforce amended restrictions upon non-consenting owners, the amendments must be reasonable.[89] Further explaining its rationale, the Trial Court concluded that the Original Declaration did not provide for any sewer connection fees; thus, there was no basis to seek the fees in this case.**[90]**

As the Trial Court concluded that the Amended Declaration had no validity as to Appellees, it was proper for the Trial Court to dismiss this claim.[91] As a result of Amended Declaration being found invalid, the Trial Court correctly concluded that the sewer assessment fees that were being sought under the Amended Declaration were invalid, and the decision must be affirmed.

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[87] *See* Letter Opinion dated February 27, 2013 at B-0064 – B-0065.
[88] *Id.*
[89] *Reserves Mgmt. Corp. v. 30 Lots, LLC.*, 2012 WL 2367469, *4 (Del. Super.)(B-0498)
[90] *See* Letter Opinion dated February 27, 2013 at B-0063 – B-0064.
[91] Appellees acknowledge that while this Trial Court has found that this Appellant may not seek collection of the fees, Judge Stokes has held that the sewer connection fees must be paid by R.T. Properties or the subsidiary defendants. Thus, granting summary judgment in this case as to the sewer connection fees did not eliminate the need to pay the sewer connection fee, but only confirmed that the sewer connections fees are not yet duea nd are not payable to the Appellant when due.

IV. CONCLUSION

The Trial Court correctly held that the Sales Agreement governing the purchase of the seventeen lots at issue governing Appellant's attempt to recover one-time assessments and annual assessments. The Trial Court correctly held that the plain language of the Sale Agreement provided for a forbearance of all assessments until both a certificate of occupancy was issued and the properties were sold to a third party. As a matter of law, there was no material dispute of fact that a certificate of occupancy could never have been issued for any of the seveteen lots and the properties were never sold to a third party; thus, Appellees were entitled to summary judgment on all of Appellant's claims. Alternatively, the Trial Court was without error in examining parol evidence, such a Mr. Korotki's own sworn testimony, to interpret the language of the contract and to determine the parties intend, which further necessitated a finding in favor of Appellees.

For the foregoing reasons, the ruling of the Trial Court should be affirmed, and the Appellant's case should be dismissed with prejudice.

Respectfully submitted,

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