

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CLARKSTON HOLDINGS, LTD.,

Plaintiff,

v

Case No. 14-140715-CZ
Hon. Wendy Potts

AVINGTON PARK CONDOMINIUM
ASSOCIATION, INC.,

Defendant,

v

BETTY ISMAIL,

Third Party Defendant.

OPINION AND ORDER

At a session of Court
Held in Pontiac, Michigan
On

~~MAR 07 2016~~

This case arises out of a dispute over a condominium project located in Independence Township. Clarkston Holdings is the developer of the 37 unit condominium project. Avington Park was established in 2000 and has custom homes on 27 of the units. Clarkston Holdings owns five units and there are five vacant units that are owned by buyers who have not yet constructed homes. The Avington Park Condominium Association is a non-profit corporation organized to administer the affairs of Avington Park Condominium. Avington Park is governed by a set of condominium documents that include a Master Deed and the condominium bylaws. The dispute in this matter is over which expenses constitute “expenses of administration.”

The Association seeks to charge Clarkston Holdings, for certain expenses it alleges are due under the Michigan Condominium Act, MCL 559.101 *et seq.* Clarkston Holdings alleges that it is not required to pay the expenses pursuant to the master deed and condominium bylaws. On or about September 6, 2012, the Association also recorded a lien against Clarkston Holdings in the amount of \$2,468.25. Clarkston Holdings alleges that the Association should not have recorded the lien because Clarkston Holdings did not owe the Association anything at the time the lien was recorded. Clarkston Holdings has consistently objected to the expenses it was charged by the Association.

The present dispute is over expenses that are allegedly properly chargeable to and owed by Clarkston Holdings since March 8, 2012. Clarkston Holdings claims that it is only responsible to pay its proportionate share of the “current expenses of administration actually incurred.” The Association responds that MCL 559.145 requires the payment of expense on units.

“Pursuant to the Condominium Act, the administration of a condominium project is governed by the condominium bylaws. MCL 559.153. Bylaws are attached to the master deed and, along with the other condominium documents, the bylaws dictate the rights and obligations of a co-owner in the condominium. MCL 559.103(9) and (10); *Farms Dev., Inc.*, 251 Mich App 652, 658, 651 NW2d 458 (2002). Accordingly, this Court begins by examining the language of the bylaws. See *Wiggins v City of Burton*, 291 Mich App 532, 551, 805 NW2d 517 (2011). Words are interpreted according to their plain and ordinary meaning. *McCoig Materials, LLC v Galui Constr., Inc.*, 295 Mich App 684, 694, 818 NW2d 410 (2012). Further, this Court avoids interpretations that would render any part of the document surplusage or nugatory, and instead this Court gives effect to every word, phrase, and clause. *Id.* Ultimately, we enforce clear and

unambiguous language as written. *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291, 818 NW2d 460 (2012).” *Tuscany Gove Ass’n v Peraino*, 311 Mich App 389 (2015).

Article VIII of the Association bylaws provides:

All expenses arising from the management, administration and operation of the Association in pursuance of its authorizations and responsibilities as set forth in the Condominium Documents and the Act shall be levied by the Association against the Homesites and the Owners thereof in accordance with the following provisions:

Section 1. Assessments for Common Elements. All costs incurred by the Association in satisfaction of any liability arising within, caused by, or connected with the Common Elements, Common Improvements or the administration of the Condominium Project shall constitute expenditures affecting the administration of the Project, and all sums received as the proceeds of, or pursuant to, any policy of insurance securing the interest of the Owners against liabilities or losses arising within, caused by, or connected with the Common Elements, Common Improvements or the administration of the Condominium Project shall constitute receipts affecting the administration of the Condominium Project, within the meaning of Section 54(4) of the Act. . . .

Section 7. Developer’s Responsibility for Assessments. The Developer of the Condominium, although a member of the Association, shall not be responsible at any time for payment of the regular Association assessments. The Developer, however, shall at all times pay all expenses of maintaining the Homesites that it owns, including the improvements located thereon, together with a proportionate share of all current expenses of administration actually incurred by the Association from time to time, except expenses related to maintenance and use of the Homesites in the Project and of the improvements constructed within or appurtenant to the Homesites that are not owned by the Developer. For purposes of the foregoing sentence, the Developer’s proportionate share of such expenses shall be based upon the ratio of all Homesites owned by the Developer at the time the expense is incurred to the total number of Homesites then in the Project. In no event shall the Developer be responsible for payment of any assessments for deferred maintenance, reserves for replacements, for capital improvements or other special assessments, except with respect to Homesites owned by it on which a completed residential dwelling is located. Any assessments levied by the Association against the Developer for other purposes shall be void without the Developer’s consent. Further, the Developer shall in no event be liable for any assessment levied in whole or in part to purchase any Homesite from the Developer or to finance any litigation or other claims against the Developer, any cost of investigating and preparing such litigation or claim or any similar or related costs. A “completed residential dwelling” shall mean a residential dwelling with respect to which a certificate of occupancy has been issued by the Township.

Article VIII.

Common Elements and Common Improvements are defined in Articles IV and V, respectively, of the Master Deed.

Article IV provides that “[t]he Common Elements of the Project, and the respective responsibilities for maintenance, decoration, repair or replacement thereof, are as follows:

Section 1. General Common Elements. All Common Elements of the Project are General Common Elements. The General Common Elements are:

- A. Land. All land within the Condominium Project not identified as Units or public roadways in Exhibit B to this Master Deed shall be a General Common Element of the Condominium. Such land may be used as parks, open space areas, entranceways, landscaped areas, stormwater detention basins, or other similar uses for the general benefit of the Association and the Owners.
- B. Other. Such other elements of the Project not herein designated as General Common Elements which are not enclosed within the boundaries of a Homesite and which are intended for common use or are necessary to the existence, upkeep and safety of the Project.
- C. Woodland Areas and Open Spaces. All woodland and open space areas protected pursuant to that certain Development Agreement entered into between Developer and the Township dated May 7, 1999, the location of which is shown on Exhibit B.

Section 2. Responsibilities. The respective responsibilities for the maintenance, decoration, repair and replacement of the Common Elements are as follows:

- A. Individual Owner Responsibilities. The responsibility for and the costs of maintenance of the roadway area located between the unit boundary of a homesite and the paved surface of the road adjacent shall be borne by the Owner of the Homesite adjacent to such area. This area shall be landscaped and maintained at all times in accordance with the reasonable aesthetic and maintenance standards prescribed by the Association in the Bylaws and in duly adopted Rules and Regulations. Each Owner is responsible for construction and maintenance of any well or septic system located within his Homesite servicing the residence located thereon.
- B. The costs of maintenance, repair and replacement of all General Common Elements other than roadway yard areas as described in the preceding paragraph shall be borne by the Association. The Association shall not be responsible for performing any routine maintenance, repair or replacement with respect to residences and their appurtenances located within the individual Condominium Units. Notwithstanding anything in the

Condominium Documents to the contrary, the Association shall have the authority and responsibility, at its expense, to operate, maintain, manage, repair and improve the General Common Elements on the Condominium Premises and shall establish a regular and systematic program of maintenance.”

Article V addresses Common Improvements and provides:

“The Common Improvements of the Project, and the respective responsibilities for maintenance, repair or replacement thereof, are as follows:

Section 1. Common Improvements. The Common Improvements are:

- A. Roads. The road-related improvements intended for general use located in the road rights-of-way within the Project, including curbs, pavement, street signs, retaining structures, landscaping, etc.
- B. Storm Water Drainage System. All storm water drainage facilities serving the Project, including without limitation storm water easements, lines, improvements and detention areas, whether located on Common Element areas or within easements on individual Homesites.
- C. Landscaping, Lighting and Sprinkler Systems. Any landscaping, stone walls, lighting, signage, lawn areas and sprinkler systems installed within Common Element areas or roadways.
- D. Parks and Open Space Areas. Any improvements, including trails, landscaping, signage, etc. installed within the Common Element parks and open space areas.
- E. Utilities. Gas, electric, telephone and cable television mains, whether located on Common Element areas or within easements on individual homesites, up to the point of lateral connections for service to individual Homesites.
- F. Other. Other elements of the Condominium located within specified easements which are intended for common use or are necessary to the Project.

Section 2. Responsibilities. The costs of maintenance, repair and replacements of all Common Improvements shall be borne by the Association, subject to any provisions of the Bylaws expressly to the contrary. Some of all of the utility lines and equipment may be owned by the company providing service and such utility lines and equipment shall be Common Improvements only to the extent of the Owners’ interest therein, if any. It is anticipated that the roads in the Project will be dedicated to the public, after which point the Association will no longer be responsible for maintaining the road, although the Association may elect to maintain the roads to the extent it deems appropriate.”

Article V.

Clarkston Holdings claims that the Association has repeatedly invoiced Clarkston Holdings for items that are not expenses of administration and cannot be properly charged to Clarkston Holdings. As such, Clarkston Holdings asserts that the Association wrongfully recorded liens against the Units held by Clarkston Holdings. The Association argues that the amounts due are pursuant to the Michigan Condominium Act. The Michigan Condominium Act provides, in part “[t]he developer shall pay or be responsible to require a residential builder to pay all costs related to the condominium units or common elements while owned by developer and to restore the facilities to habitable status upon termination of use.” MCL 559.145.

The Michigan Condominium Act further provides:

- (1) Except as to the extent that the condominium documents provide otherwise, common expenses associated with the maintenance, repair, renovation, restoration, or replacement of a limited common element shall be specially assessed against the condominium unit to which that limited common element was assigned at the time the expenses were incurred. If the limited common element involved was assigned to more than 1 condominium unit, the expenses shall be specially assessed against each of the condominium units equally so that the total of the special assessments equals the total of the expenses, except to the extent that the condominium documents provide otherwise.
 - (2) To the extent that the condominium documents expressly so provide, any other unusual common expenses benefitting less than all of the condominium units, or any expenses incurred as a result of the conduct of less than all those entitled to occupy the condominium project or by their licensees or invitees, shall be specially assessed against the condominium unit or condominium units involved, in accordance with reasonable provisions as the condominium documents may provide.
 - (3) The amount of all common expenses not specially assessed under subsections (1) and (2) shall be assessed against the condominium units in proportion to the percentages of value or other provisions as may be contained in the master deed for apportionment of expenses of administration.
 - (4) A co-owner shall not be exempt from contributing as provided in this act by nonuse or waiver of the use of any of the common elements or by abandonment of his or her condominium unit.
- MCL 559.169.

Clarkston Holdings alleges that the “expenses of administration” are separate and distinct from expenses that are incurred in connection with “common improvements” and “common elements.” Clarkston Holdings claims that the primary expenses that the Association is seeking to assess Clarkston Holdings are for “common elements” and/or “common improvements.” Plaintiff alleges that expenses of administration are insurance, personal property taxes, legal fees except those in litigation against the developer, fidelity bonds, and accounting services.

Clarkston Holdings argues that the Association relies on MCL 559.145 for its position that it may properly charge for items like landscaping and maintenance. MCL 559.145 provides that “[t]he developer and its duly authorized agents, representatives, and employees, and residential builders who receive an assignment of rights from the developer, may maintain offices, model units, and other facilities on the submitted land. The developer may include provisions in the condominium documents relative to the facilities as may reasonably facilitate development and sale of the project. The developer shall pay or be responsible to require a residential builder to pay all costs related to the condominium units or common elements while owned by developer and to restore the facilities to habitable status upon termination of use. MCL 559.145. Clarkston Holdings refutes the Association’s allegation by claiming that MCL 559.145 only applies to offices and model units because that is what is referenced in the statute title.

MCL 8.4b provides that “The catch line heading of any section of the statutes that follows the act section number shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes.” MCL 8.4b. Catchline headings are not part of a statute.

Cheboygan Sportsman Club v Cheboygan County Prosecuting Attorney, 307 Mich App 71, 89; 858 NW2d 751, 761 (2014). Clarkston Holdings' argument in this regard is unpersuasive.

The Condominium Act, MCL 559.101 *et seq*, provides that the administration of the condominium project shall be governed by the bylaws recorded as part of the master deed, or as provided in the master deed. MCL 559.153. The parties are subject to the master deed and the condominium bylaws. Thus, this Court turns to the rules of contract interpretation. "In interpreting a contract, our obligation is to determine the intent of the contracting parties. *Sobczak v Kotwicki*, 347 Mich. 242, 249; 79 N.W.2d 471 (1956). If the language of the contract is unambiguous, we construe and enforce the contract as written. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich. 558, 570; 596 N.W.2d 915 (1999). Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. *Id.*" *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003).

The language in the master deed and bylaws expressly states certain expenses that can be classified as expenses of administration. The expenses of administration that the Association may properly charge developer for are: insurance (Bylaws Article VII, 1c), personal property taxes (Bylaws Article VIII, 10), legal fees except those in litigation against the Developer (Bylaws Article VIII, 7), fidelity bonds (Bylaws Article XIVC, 1) and accounting services (Bylaws Article XVI, 1).

The bylaws further provide that the Developer shall not be responsible at any time for payment of the regular Association assessments. Article VIII, Section 7. Additionally, Article IV addresses Common Elements. The Court finds that under "Section 2. Responsibilities." the

Association bears the responsibility of the costs of maintenance, repair, and replacement of the General Common Elements.

The expenses related to landscaping are addressed in Article V, Section 1, and Article V, Section 2 addresses who will be liable for the costs of that maintenance. The Court further finds that the costs of maintenance, repair and replacements of common improvements shall be borne by the Association, subject to any provisions of the Bylaws expressly to the contrary. Article V, Section 2. Since there is not a provision of the bylaws expressly to the contrary, the Association is liable for expenses relating to the common improvements.

“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties.” *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). Where the contract language is unambiguous, the Court should effectuate the intent of the parties by applying the plain and ordinary meaning of the contract’s terms. *Grosse Pointe Park, supra* at 197-198.

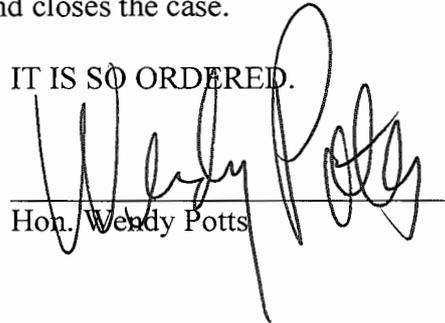
Accordingly, the Court finds that expenses of administration are only those expenses expressly identified in the master deed and bylaws: insurance, personal property taxes, legal fees except those in litigation against the Developer, fidelity bonds, and accounting services. Since the Association recorded its lien as a result of unpaid assessments and not unpaid expenses of administration, the lien is invalid.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated:

MAR 07 2016


Hon. Wendy Potts