

NO. A10-1108

State of Minnesota
In Court of Appeals

Superior Shores Lakehome Association,

Appellant,

vs.

Jensen-Re Partners, a Minnesota general partnership
and Joseph Re, individually,

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE ISSUES

I. Is Unit 57 a single unit, subject to a single unit's dues?

How Raised Below: Cross-motions for summary judgment (ADD-2.)

District Court Ruling: The district court held that Unit 57 was a single unit, responsible for a single unit's assessment of dues. (ADD-6, 7.)

How Preserved for Appeal: Timely appeal from entry of final judgment granting summary judgment and awarding attorney's fees and costs to Respondents. (ADD-20, 21; A-255, 256.)

Apposite Cases and Statutes:

Chapman Place Ass'n v. Prokasky, 507 N.W.2d 858 (Minn. Ct. App. 1993)

Swanson v. Parkway Estates Townhouse Ass'n, 567 N.W.2d 767 (Minn. Ct. App. 1997)

Minn. Stat. § 515A.2-108

Minn. Stat. § 515A.2-113

Minn. Stat. § 515A.2-115

II. Does the Association have authority to compel Jensen-Re to restore Unit 57 to its original, pre-1994 configuration?

How Raised Below: Cross-motions for summary judgment (ADD-2, 6.)

District Court Ruling: The district court held that the Association had failed to identify any legal basis to compel restoration of Unit 57 to its original layout. (ADD-6.)

How Preserved for Appeal: Timely appeal from entry of final judgment granting summary judgment and awarding attorney's fees and costs to Respondent. (ADD-20, 21; A-255, 256.)

Apposite Cases and Statutes:

Chapman Place Ass'n v. Prokasky, 507 N.W.2d 858 (Minn. Ct. App. 1993)

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Minn. Stat. § 515A.2-113

STATEMENT OF THE CASE

Appellant Superior Shores Lakehome Association (“Association”) commenced this action by Summons and Complaint dated October 6, 2008. The Complaint alleged that Respondent Jensen-Re Partnership¹ owned “two separate living units known as Unit 57A and Unit 57B” and had underpaid Association dues owing for the two units. The Complaint sought recovery of back dues allegedly owed, together with interest and attorney’s fees. Jensen-Re answered, denying liability, and counterclaimed. Jensen-Re’s counterclaim sought a declaratory judgment that Unit 57 is a single unit, responsible for a single unit’s dues. Jensen-Re requested injunctive relief requiring the Association to release the association lien it had recorded against the property and prohibiting the Association from attempting to collect two sets of dues for Unit 57. Further, the counterclaim alleged slander of title arising from the Association’s recording of a lien statement for unpaid dues, and sought attorney’s fees and costs.

The parties brought cross-motions for summary judgment. The district court, the Honorable Kenneth A. Sandvick presiding, denied the Association’s motion and granted Jensen-Re’s motion. In its October 22, 2009 Findings of Fact, Conclusions of Law, and Order, the district court dismissed the Association’s Complaint with prejudice, declared that Unit 57 is a single unit responsible for a single unit’s assessment, enjoined the Association from levying assessments against Unit 57 that exceed the single unit assessment, voided the

¹ Respondent Joseph Re is a partner in Jensen-Re Partnership. For simplicity, Respondents will be referred to hereinafter collectively as “Jensen-Re.”

Association's lien statement, and directed the Association to record a release of the lien statement. The district court also granted Jensen-Re's motion for summary judgment on liability on the slander of title claim and reserved the issue of damages (i.e., attorney's fees) for Jensen-Re's application for fees pursuant to Rule 119 of the General Rules of Practice. Pursuant to the October 22, 2009 Findings, Conclusions, and Order, judgment was entered on October 30, 2009. Ruling on the Rule 119 application, the district court issued its Findings of Fact, Conclusions of Law, and Order on March 30, 2010, awarding Jensen-Re \$20,000 in attorney's fees and \$2,515.63 in costs.

By order dated April 9, 2010, the district court clarified that the October 30, 2009 judgment had not been a final judgment, directed the court administrator to insert the Rule 119 award into the judgment, and ordered the entry of final judgment. Final judgment was entered on April 26, 2010. The Association served and filed its notice of appeal from the judgment on June 24, 2010.

STATEMENT OF THE FACTS

I. UNIT 57.

The property in dispute is Lakehome Unit No. 57, Condominium No. 1, Superior Shores ("Unit 57"). (A-210.) Sometime in the early 1990's, the owners of Unit 57 reconfigured Unit 57. (A-12.) The reconfiguration of Unit 57 created a two bedroom area in the top story and a studio area in the bottom level. (A-44,46, 222.) While Unit 57 was physically divided into two separate living areas, it was never subdivided. Jensen-Re was not

involved with the renovation of Unit 57 or any other aspect of Unit 57 at that time. (A-222.)

Jensen-Re acquired Unit 57 by warranty deed dated December 29, 2006. (A-210). Prior to the conveyance of Unit 57 to Jensen Re, the Association provided Jensen-Re with its "Resale Disclosure Certificate for Unit 57" which represented that Unit 57 was a single unit responsible for assessments for 2007 in the amount of \$440 per month. (A-194.) After Jensen-Re had acquired Unit 57, the Association furnished what it called an "amended" disclosure certificate that indicated that Jensen-Re was responsible for a double assessment for Unit 57 in the amount of \$880 per month. (A-204.) Jensen-Re was aware that the prior owners of Unit 57, as a well as the owners of other two story units, were paying two assessments for their units, but understood those double payments to be gratuitous since there was no obligation in the Declaration, By-Laws, or other recorded agreements requiring them to do so. (A-222.)

There has never been any recorded declaration, covenant, or agreement requiring the owner of Unit 57 to pay two separate assessments for Unit 57. (See A-7, 12.) The Declaration² establishes that Unit 57 is a single unit responsible for 1/46 of the common element allocation, i.e., one single assessment. (A-6, 11.) The By-Laws of the Superior Shores Lakehome Association ("By-Laws) establish that each unit shall be assessed in

² The original Declaration, Declaration for Condition No. 1 Superior Shores, a Condominium dated August 22, 1984, was recorded on August 24, 1984 ("Original Declaration"). (A-92, 207.) The Amendment to Declaration Condominium No. 1 Superior Shores, A Condominium Phase VII dated August 4, 1993, was recorded on November 15, 1993 ("Amended Declaration"). (A-137, 208.) Together the Original Declaration and the Amended Declaration shall be referred to herein as the "Declaration".

accordance with that unit's percentage of the common expenses as allocated by the Declaration. (A-6, 11.) Neither the Declaration nor the By-Laws – together making Unit 57 responsible for dues based on 1/46 of the common element allocation – have been amended. (A-7, 12.)

II. UNIT 57 HAS NOT BEEN SUBDIVIDED.

At pages 4 through 6 of the Appellant's Brief, the Association asserts that Unit 57 was subdivided. The Association fails to provide citations to the record for several of its assertions. For example, without citation to the record, the Association states that "the Boehlands [the previous owners of Unit 57] were given approval by the Board to subdivide Unit 57 into Units 57A and 57B" pursuant to Section 2.6 of the Declarations. (Appellant's Brief, p. 5.) Section 2.6, however, governs both "subdivision" and "alteration" of units. Contrary to the Association's unsupported assertion, Unit 57 was never subdivided. As argued below, Unit 57 was altered, not subdivided as a matter of law.

As a matter of fact, the Association concedes that the Declaration was never amended to change Unit 57's common element allocation. (A-7, 12.) Association minutes from November, 1992 state:

The units who will be getting split as 2 units will need to pay 2 association dues. The concern was expressed of more units splitting. No exterior alterations can be made. This remains an ongoing problem and will be addressed by the Board. *Recommendation was made to include a statement to clarify this in the next amendment.*

(A-241 (emphasis added).) That next amendment, however, the Amended Declaration dated

August, 1993, established that Unit 57 would be responsible for 1/46 of the common element allocation (as described above). (A-137, 208.) Thus, under the Amended Declaration, Unit 57 remained responsible for a single unit's dues.

III. JENSEN-RE'S MANAGEMENT OF UNIT 57.

Jensen-Re knew the prior owners were paying double assessments, but believed those double payments to be gratuitous in the absence of any recorded amendments to the Declaration requiring double assessments. (A-222, 225.) The December 21, 2006 Resale Disclosure Certificate conforms to the documents of record that establish a single unit assessment against Unit 57. (See A-194.) Mr. Re testified: "I knew that the prior owners were paying two sets of dues, and I also knew that the disclosure statement I received was correctly reflecting the by-laws and the association documents." (A-225.)

The Association notes that, at one time, Jensen-Re marketed fractionalized shares of Unit 57 as though Unit 57 paid two sets of dues. Jensen Re produced all the monthly statements for the management of Unit 57. (See A-238.) These monthly statements for the fractionalized owners of Unit 57 show that Jensen-Re collected dues totaling a single set of unit dues. (Aff. Yang, Ex. J; Aff. Re, ¶3.) Explaining the matter, Mr. Re testified:

At the time that I was selling fractional interests in Unit 57, I informed all prospective purchasers via marketing materials that there was what amounted to a double monthly common expense assessment for Unit 57. I did so to advise prospective purchasers that there was a dispute between me and the Association as to how many sets of dues applied against Unit 57. In practice, I have only been charging fractional owners an amount which, in aggregate for the entirety of Unit 57, equals the single assessment allocated to that unit under the Declaration. I have not collected monthly assessments from the fractional

owners, which in aggregate exceed a single monthly assessment.

(A-250-51.)

IV. PROCEEDINGS BELOW.

The Association informed Jensen-Re that it was required to pay two assessments for Unit 57 since it was comprised of two separate living units. (*See* A-2, 12.) Jensen-Re refused to pay the additional assessment. (*Id.*) The Association served and filed its Complaint in this action and also filed an association lien against Unit 57. (A-1, 7, 12.) Jensen-Re counterclaimed, seeking a declaratory and injunctive relief establishing that Unit 57 was a single unit, responsible for a single unit's dues. (A-4-10.) The parties brought cross-motions for summary judgment. (ADD-1.) Despite the fact that its Complaint only claimed assessments for allegedly unpaid dues, the Association argued, in the alternative, "that if the Court finds that Unit 57 is a single unit subject to a single unit's assessment, then the Unit must be restored to its original layout." (ADD-6.)

Ruling on the motions, the district court carefully outlined the undisputed facts, and concluded as a matter of law:

1. Unit 57 has not been "subdivided" within the meaning of the Uniform Condominium Act and the Condominium Declarations.
2. Unit 57 has been "altered" and alterations do not require amendments to the Declarations. The Board gave the previous owners consent to alter Unit 57 and Unit 57 was altered in accordance with the Act and the Declaration. There is no legal basis for the Association to demand

restoration of Unit 57 to its original layout.

3. State law and the covenants recorded against Unit 57 establish that

Jensen Re is required to pay a single assessment for Unit 57.

(ADD-6.) The district court granted summary judgment for Jensen-Re, declaring that Unit 57 is a single unit subject to a single unit's assessment, enjoining the Association from levying more than a single unit's assessment against Unit 57, declaring the Association's lien statement void, and instructing the Association to record a release of the lien statement.

(ADD-7.)

SUMMARY OF THE ARGUMENT

Condominiums are creatures of statute. The Uniform Condominium Act, along with the recorded declaration and by-laws, govern the rights of the association and the condominium unit owners. In this case, the recorded Declaration and By-Laws specify that Unit 57 is a single unit, responsible for 1/46 of the common element allocation (i.e., dues). As a matter of law, Unit 57 was not altered, not subdivided. A subdivision requires the recording of an amendment to the Declaration and the Plat. A unit owner may alter a unit, i.e., make improvements or alterations to a unit, when such improvements and alterations do not affect the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Such alterations do not require an amendment to the declarations.

In no event could the Association legally charge two sets of dues to Unit 57 without a recorded amendment to the Declaration, unanimously agreed to by all the unit owners and

their mortgagees. Even if Unit 57 were subdivided, the sum total of the dues owing for each the new units must still equal the 1/46 of the common element allocation formally allocated to Unit 57.

The Association's arguments to employ equitable theories to undo the statutory scheme and the recorded Declaration are meritless. The Uniform Condominium Act expressly forbids the resort to equity to trump the requirements of the Act.

Finally, the Association has no legal basis to insist that Jensen-Re restore Unit 57 to its original configuration. The Association is not entitled to a remand on that issue to make new arguments it failed to make when it raised the issue before the district court.

ARGUMENT

I. STANDARD OF REVIEW.

The Court of Appeals reviews a grant of summary judgment de novo to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Jensen-Re Partnership v. Superior Shores Lakehome Association*, 681 N.W.2d 42, 44 (Minn. Ct. App. 2004); *Reiling v. City of Eagan*, 664 N.W.2d 403, 407-08 (Minn. Ct. App. 2003).

The Uniform Condominium Act, in conjunction with the declaration and bylaws, governs the rights of the association and unit owners. *Chapman Place Ass'n v. Prokasky*, 507 N.W.2d 858, 863 (Minn. Ct. App. 1993). Statutory construction is a question of law subject to de novo review. *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 53 (Minn. 2005). The

objective of statutory construction is to ascertain and effectuate the intention of the legislature. *Id.*; Minn. Stat. § 645.16. Where the language of the statute is unambiguous, courts must follow the plain language of the statute. *Camacho*, 706 N.W.2d at 54; *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (“The touchstone for statutory interpretation is the plain meaning of a statute’s language.”).

A condominium’s declarations and bylaws are binding contracts between the condominium association and its members. See *Swanson v. Parkway Estates Townhouse Ass’n*, 567 N.W.2d 767, 768 (Minn. Ct. App. 1997); *Chapman Place*, 507 N.W.2d at 863. A court’s primary role in interpreting contracts is to ascertain and give effect to the intention of the parties. *Swanson*, 567 N.W.2d at 768. Construction of a contract presents a question of law, unless an ambiguity exists. *Id.*

II. UNIT 57 IS A SINGLE UNIT, SUBJECT TO ASSESSMENTS FOR A SINGLE UNIT'S SHARE OF THE COMMON ELEMENT ALLOCATION.

A. The Association Must Assess Dues Pursuant To The Recorded Declaration.

Condominiums are creatures of statute, which comprehensively regulates their creation and operation as well as the relationship between condominium owners and the association. Am. Jur. 2d. *Condo* § 3. The Association in this case was created under Minnesota Statutes, Chapter 515A, also known as the Uniform Condominium Act (hereinafter, “UCA” or “the Act”). The Act, along with the Declaration and By-Laws, thus “govern the rights of the association and the condominium unit owners.” *Chapman Place Ass’n, Inc. v. Prokasky*, 507 N.W.2d 858, 863 (Minn. Ct. App. 1993). The Act specifies that

the provisions of §§ 515A.1-101 to 515A.4-117 “may not be waived” unless waiver is expressly provided in the applicable section. Minn. Stat. § 515A.1-104.

Section 515A.2-108 of the Act sets out the rights and requirements relating to allocation of common element interests, votes, and common expense liabilities. That provision directs that the declaration shall allocate a fraction or percentage of the common expenses to each unit. Minn. Stat. § 515A.2-108(a). Significantly, “the common expense liability so allocated may not be altered, except as an amendment to the declaration which is signed by all unit owners and first mortgagees, and which complies with section 515A.2-119.” Minn. Stat. § 515A.2-108(b). The Act does not permit a waiver of this provision. *Id.*; *see also*, Minn. Stat. §515A.1.104. In conformance with the statute, Section 2.8 of the Declaration allocates a percentage of common expenses to each unit. (A-104.) The Amended Declaration revises the percentages allocated to reflect the new units added to the condominium, including Unit 57. (*See* A-143, 145.) The Amended Declaration provides that the allocation for Unit 57 in “Building D” is “1/46” of the total interests, votes and expenses. (*Id.*)

The 1/46 allocation is statutorily binding on the owners and the Association unless it is altered “by an amendment to the declaration” that meets specified standards. Minn. Stat. § 515A.2-108(b). The Declaration itself provides: “This Declaration may be amended only in strict compliance with the Act, including without limitation, Sections 515A.2-108, 515A.2-111 and 515A.2-119 of the Act.” (A-125.) Among those requirements, an amendment altering existing allocations must be signed by all unit owners and first

mortgagees. Minn. Stat. § 515A.2-108(b). Further, every amendment must be recorded and is “effective only when recorded.” Minn. Stat. § 515A.2-119. It is undisputed that there is no document of record that allocates more than 1/46 of the common expenses to Unit 57. Pursuant to Minn. Stat. §515A.2-108 and the express terms of the Declaration, any purported change in the allocation, even if agreed to ‘off the record’ between certain members and certain directors of the Association, thus is ineffective.

The Association alleges that it permitted the reconfiguration of Unit 57 into two separately accessible apartments in exchange for the previous owner’s agreement to pay assessments for two units (57A and 57B). It is undisputed that the Association consented to the reconfiguration of Unit 57 and that the prior owners paid two sets of dues. It is undisputed that Jensen-Re has made no physical alterations to Unit 57. (A-250.) It is axiomatic that, where there is an express contract or covenant, no covenant or term can be implied with respect to the same subject matter. Am. Jur. 2d. *Covenants* § 38; *Schimmelpfennig v. Gaedke*, 27 N.W.2d 416, 420 (1947). Here an express covenant, the Declaration, deals with the issue in this lawsuit – the allocation of common expense liability.

The Act and the Declaration prohibit the Association from changing the express terms of its governing documents through informal deal-making. More significantly, the alleged agreement violated the foregoing statutes that require, for the protection of the rights of *all* unit owners, that the common element allocation be prescribed by the declaration – with all the formalities, checks and balances, and unanimity associated with recorded declaration amendments. Jensen-Re bought Unit 57 as is, in its existing physical condition and

configuration, and with the real estate title, covenants and obligations established by nothing more or less than the documents filed of record. Unrecorded obligations of prior owners are of no effect.

B. Unit 57 Was Altered, Not Subdivided.

The Association argues that the physical re-configuration of Unit 57, coupled with reference to the approval of such re-configuration by the Association board in the meeting minutes, is sufficient to declare that Unit 57 has been “subdivided” within the meaning of the Act and the Declaration. The Association also argues that references in the meeting minutes to agreements by the prior owners of Unit 57 to pay double assessments is enough to bind successor owners of Unit 57 to those agreements. Neither argument is supported by the provisions of the Act or Declaration.

1. Unit 57 was not subdivided.

“Subdivision” is a term of art and under the Act, in this context, it requires an amendment to the condominium declarations and an amendment to the condominium plat showing the additional unit. Minn. Stat. §§ 515A.2-115 and 515A.2-110; *accord* Minn. Stat. §§ 515B.2-112 and 515B.2-118(c).³ And the unit’s new vertical and horizontal boundaries must be recorded in order to establish a subdivision. *Id.* The Association concedes that no

³ Chapter 515A generally applies to events and circumstances occurring before June 1, 1994, and Chapter 515B applies to events and circumstances occurring thereafter. Minn. Stat. § 515B.1-102(b). It is alleged and believed that the reconfiguration of Unit 57 occurred before June 1, 1994. Obviously, Jensen-Re purchased Unit 57 and the Association sued for double assessments after 1994. Because the terms of both Chapters are consistent with respect to the issues joined in this case, and for the convenience of the Court, Jensen-Re provides parallel cites to both Chapters.

such amendments to the Declaration or Plat were ever recorded. To this day, Unit 57 is reflected as a single unit in the Declarations and Plat.

Nor would a subdivision accomplish the Association's objective in this action. Even if Unit 57 had been subdivided, the Association could not lawfully demand a doubling of the dues payment (at least not without a unanimously supported declaration amendment). Minn. Stat. § 515A.2-115(a) (a subdivision only reallocates the common expenses formerly allocated to that unit); *accord* Minn. Stat. §515B.2-112(c)(3). The sum total of the dues remains unchanged in a subdivision. *Id.*

2. The alteration of Unit 57 was authorized by the Declaration and the Act.

A unit owner may make improvements or alterations to a unit when such improvements and alterations do not affect the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Minn. Stat. §515A.2-113(1); *accord* Minn. Stat. § 515B.2-113(a)(1). Such alterations do not require an amendment to the declarations. *See id.* In this case, the Declaration prescribed the procedure for altering a unit. Section 2.5 of the Declaration states that a unit may not be altered unless consent to alter is given by the board pursuant to Section 2.6. Section 2.6 gives the board authority to permit alterations to units. The Association does not dispute that consent was provided by the board to alter Unit 57. Minutes reflect the prior owner's alterations to Unit 57 and the board's consent to such alteration. (*See* A-230, 235.)

3. Absent an amendment to the Declaration, the Association cannot require a subsequent owner to pay a double assessment.

The Association argues, in essence, that it consented to the alteration of Unit 57 in

exchange for a condition that it never, in fact, secured – an assessment agreement binding on subsequent purchasers. In 1998, the Association board voted to require the prior owner, Lynn Boehland, to continue paying double dues, but gave him two votes. (A-232, 236.) Both the double dues and double voting rights violated the Act and the Declaration. The only way to change a unit owner's common expense obligations or voting rights would be with the unanimous consent of all unit owners and their mortgage holders. Minn. Stat. § 515A.2-119(c); *accord* Minn. Stat. § 515B.2-118(a)(3). Thus, the Association could not legally have conditioned consent for the alteration of Unit 57 upon a perpetual obligation to pay “double” assessments. *Compare* Minn. Stat. § 515A.2-115(a) (a subdivision only reallocates the common expenses formerly allocated to that unit); *accord* Minn. Stat. § 515B.2-112(c)(3); *with* Minn. Stat. § 515A.2-119(c) (an increase in the number of units or a change in the common expense liability of a unit *requires* a unanimous written consent of all owners and their mortgagees); *accord* Minn. Stat. § 515B.2-118(a)(3). The former single assessment owing for a subdivided unit must be *allocated* between the two new units – not *multiplied* as the Association claims. *Id.* As a matter of law, the Association could not condition either the alteration or subdivision of a single unit upon an agreement to pay additional assessments. At best, then, the Association conditioned its consent to the alteration of Unit 57 on a private agreement for Mr. Boehland to personally make double payments.

Even if the Boehlands had actually subdivided, the Association could not lawfully have demanded a doubling of the dues payment (at least not without a unanimously supported declaration amendment). *See id.* The sum total of the dues remains unchanged in

a subdivision. *Id.* Regardless, any attempt to enforce that double obligation upon future owners is nothing short of an attempt to circumvent the express requirements of the Act. The Association consented to a permanent physical alteration of Unit 57 some 19 or 20 years ago. In return, it received years and years of double payments (that is, double what was legally mandated) from the prior owners. The Association cannot be heard to complain that a subsequent owner, who has made no alterations, refuses to pay double what is owed under the Act and the Declarations.

In sum, if the Association had wanted to perpetually obligate successors and assigns of Unit 57 to the double assessments it now seeks, it should have recorded an amendment to that effect. That amendment would have required the approval of all unit owners and mortgagees.

III. THE ASSOCIATION MAY NOT USE EQUITABLE THEORIES TO TRUMP THE MANDATES OF THE DECLARATION AND THE UCA.

As a matter of law, the Declaration is a binding contract between the Association and its members. *See Swanson v. Parkway Estates Townhouse Ass'n*, 567 N.W.2d 767, 768 (Minn. Ct. App. 1997). The Association's powers are at all times subject to the provisions of the Declaration. Minn. Stat. § 515A.3-102(a); *accord* Minn. Stat. § 515B.3-102(a). As a matter of undisputed fact, no changes were made to the Declaration to reflect any subdivision of or changes in the monthly assessments for Unit 57. The Association cannot avoid the controlling terms of the Declaration and statutes by premising its claim for double assessments on the equitable theories.

A. Equity Cannot Be Used To Circumvent The Statutory Regime.

It is axiomatic that equity follows the law. *See Wells Fargo Home Mortg. v. Chojnacki*, 668 N.W.2d 1, 5 (Minn. Ct. App. 2003). Equity cannot be used to circumvent statutory requirements and restrictions. *Kingery v. Kingery*, 241 N.W. 583, 584 (Minn. 1932). “[I]t is not for judicial power to thwart legislative purpose.” *Butler Bros. Co. v. Levin*, 207 N.W. 315, 316 (Minn. 1926) (oral agreement to sign mortgage not given effect as estoppel where writing required under statute of frauds). Further, equitable relief must be denied when there is a valid contract. *United States Fire Ins. Co. v. Minnesota State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981); *Cady v. Bush*, 166 N.W.2d 358, 361 (Minn. 1969) (“Courts are not warranted in interfering with the contract rights of parties as evidenced by their writings.”).

The statutes strictly and clearly regulate how common expenses must be allocated. The declaration must allocate the common expenses to each unit. Minn. Stat. § 515A.2-108; *accord* Minn. Stat. § 515B.2-108. Common expenses must be assessed against all the units in accordance with that common expense allocation set forth in the declaration. Minn. Stat. § 515A.3-114; *accord* Minn. Stat. § 515B.3-115(d). Changes to allocations can be made only by *amendment* signed by all owners and first mortgagees and recorded in the county records or, in the case of a unit subdivision, by *amendment* signed by the owner of the subdivided unit, approved by the association, and recorded in the county records. Minn. Stat. §§ 515A.2-108 and 515A.2-115; *accord* Minn. Stat. §§ 515B.2-108 and 515B.2-112(c)(1). An amendment is effective only when recorded. Minn. Stat. § 515A.2-119(b);

accord Minn. Stat. § 515B.2-118; *see also* Declaration, Article XIII (A-127) (providing that adjustments to allocations become effective upon the later of the date stated in the amendment or the date on which the amendment is recorded). In short, the statutes prohibit any change in the allocation of common expenses to Unit 57 without a recorded amendment signed by the owner of Unit 57.

The law expressly prohibits any agreements purporting to vary these statutory requirements: “Except as expressly provided in sections 515A.1-101 to 515A.4-117, provisions of sections 515A.1-101 to 515A.4-117 *may not be varied by agreement*, and rights conferred by sections 515A.1-101 to 515A.4-117 *may not be waived*.” Minn. Stat. § 515A.1-104 (emphasis added); *accord* Minn. Stat. § 515B.1-104. Consistent with the Act, the Declaration itself provides that the Declaration must be amended in strict accordance with the Act. (A-125). Further, the Legislature has expressly provided that principles of law or equity *may not* be used to undermine the requirements of the Act:

The principles of law and equity . . . *supplement* the provisions of sections 515A.1-101 to 515A.4-117, *except to the extent inconsistent with 515A.1-101 to 515A.4-117*. Documents required by sections 515A.1-101 to 515A.4-117 to be recorded *shall* in the case of registered land *be filed*.

Minn. Stat. § 515A.1-108 (emphasis added); *see, accord*, Minn. Stat. § 515B.1-108 (“The principles of law and equity . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter.”).

Therefore, this case thus must be decided on the terms of the Declaration and the applicable statutes. Those terms may not be varied or defeated by resort to equity. The Declaration is a valid agreement that governs the procedure for subdividing units and the

method of allocating common expenses among the unit owners. *See* Minn. Stat. §§ 515A.2-108 and 515B.2-112. The Declaration was previously amended for the purpose of effecting reallocation. (*See, e.g.,* A-137.) However, the essential, undisputed fact is that the Association did not procure an amendment to establish the reallocation it seeks to enforce here.⁴

In sum, the Declaration and the statutes establish the rights of the parties. The law prohibits a resort to equity to establish obligations that are inconsistent with the Declaration.

B. The Association's Equitable Theories Are Meritless.

The Association's motion below was premised on three equitable theories: unjust enrichment, equitable estoppel, and waiver. For the first time on appeal, the Association argues a new, fourth equitable theory: reformation.⁵ In addition to the reasons presented above, these theories are meritless for the following reasons.

1. Unjust Enrichment.

The unjust enrichment claim fails because there is an express contract in place that controls the subject matter at issue. An action for unjust enrichment is effectively an action on a quasi-contractual agreement implied by law. *Hommerding v. Peterson*, 376 N.W.2d 456, 459 (Minn. App 1985). Where there is an express contract on the subject matter at

⁴ One with unclean hands cannot seek equity. *Peterson v. Holiday Recreation Indus., Inc.*, 726 N.W.2d 499, 505 (Minn. Ct. App. 2007). The Association, as the governing authority for the condominium, has no claim in equity to be 'protected' from its own failure to act in accordance with its own Declaration and state law.

⁵ The Association's reformation argument is the subject of Jensen-Re's motion to strike.

issue, a contract cannot be implied by law with respect to the same issue. *United States Fire Insurance Company v. Minnesota State Zoological Board*, 307 N.W.2d 490, 497 (Minn. 1981). The Declaration is an express contract that controls the subject matter at issue. The Declaration requires a single monthly assessment for Unit 57.

Further, “[c]laims of unjust enrichment do not lie simply because one party benefits from the efforts or obligations of others,” but instead lies where the party was enriched in the sense that the term “unjustly” could mean “illegally or unlawfully”. *Hellelgrave v. Harrison*, 435 N.W.2d 861, 864 (Minn. Ct. App. 1989). In addition, the Association did not produce any facts that Jensen-Re did anything illegal or unlawful in the purchase of Unit 57. Jensen-Re purchased Unit 57 “as is” and did not make or request any changes to Unit 57. (A-250.)

Moreover, it is the Association that has been acting illegally. Even if a subdivision had occurred, it would be illegal and unlawful to *double* the Unit 57 assessment. If there had been a subdivision, the only change to Unit 57’s allocation permitted under statutes would be a reallocation of the common expense liability “formerly allocated” to Unit 57. Minn. Stat. §515A.2-115(a); accord Minn. Stat. § 515B.2.112(c). In other words, if subdivided to create two units, each new unit would be allocated portions of the 1/46 interest “formerly allocated” to Unit 57 (e.g., 1/92 interest for Unit 57A and 1/92 for Unit 57B); the combined allocation for both units must remain 1/46. Such a reallocation could be done without the consent of all unit owners only because it would not affect any other unit allocations. By contrast, doubling the Unit 57 allocation, as the Association claims it did, would necessarily alter the allocation for every other unit in the condominium (i.e., from the 1/46 allocation the

Declaration prescribes to something else). That cannot be done without unanimous consent of the owners and their mortgagees. *See* Minn. Stat. §§ 515A.2-108 and 515B.2-112.

Finally, as factual matter, the Association is simply wrong when it alleges that Jensen Re is collecting two assessments from the fractional interest owners of Unit 57 but is paying only one assessment to the Association. It is true that a flyer promoting the sale of the fractional interests stated the amount of monthly assessments reflecting the Association's claimed double assessments; however, Jensen Re has never in fact charged or collected from owners of fractional interests in Unit 57 a monthly charge for assessments totaling more than the single assessment. (A-250, 251).

2. Equitable Estoppel.

The Association failed to produce evidence to satisfy the elements of its equitable estoppel affirmative defense. "Generally, for equitable estoppel to apply, the plaintiff must demonstrate that the defendant, through his language or conduct, induced the plaintiff to rely, in good faith, on this language or conduct to his injury, detriment or prejudice." *Semler Const., Inc. v. City of Hanover*, 667 N.W.2d 457, 466 (Minn. Ct. App. 2003). "A party seeking to invoke the doctrine of equitable estoppel has the burden of proving three elements: (1) that promises or inducements were made; (2) that it reasonably relied upon the promises; and (3) that it will be harmed if estoppel is not applied." *Hydra Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990).

Fatal to its argument, the Association has produced no evidence of promises, express or implied, from Jensen-Re. Jensen-Re purchased Unit 57 from the prior owners. The

Association played no part in the purchase except to fulfill its statutory duty to disclose the amount of assessments (a disclosure that reflected dues for a single (not double) unit). Jensen-Re maintained from the time it acquired Unit 57 that it was responsible for only a single dues assessment. Jensen-Re never paid double dues and, in response, the Association commenced this action. The Association has produced no evidence that Jensen Re's words, acts, or "silence" induced it to do anything to its detriment.

3. Waiver.

Waiver is the intentional relinquishment of a known right. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009). Both knowledge and intent are essential elements of waiver. *Id.*; *Engstrom v. Farmers & Bankers Life Ins. Co.*, 41 N.W.2d 422, 423 (Minn. 1950). The Association's waiver argument is essentially a reformulation of its arguments relating to unjust enrichment and equitable estoppel. The substance of the argument, again, is that, because Jensen-Re knew the prior owners were paying two assessments when it purchased the unit, Jensen-Re should pay two assessments. The Association produced no evidence that Jensen-Re *intended* to relinquish its right to right to pay a single 1/46 assessment.

4. Reformation.

The Association's new equitable theory, reformation, should not be considered because the Association raises it for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). If the Court elects to consider the argument, it will be immediately apparent that the argument is frivolous. The first essential element of a claim for reformation

is a valid agreement between the parties expressing their real intentions. *Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn. 1977). Under the Act, the “parties” to a *valid* agreement to change the common expense allocation from 1/46 to anything else must be *all* the unit owners and *all* their first mortgagees. *See* Minn. Stat. § 515A.2-108(b). The Association produced no evidence of such an agreement. The Court need not waste its time on this frivolous argument.

IV. THERE IS NO LEGAL BASIS TO REQUIRE JENSEN-RE TO RESTORE UNIT 57 TO ITS ORIGINAL CONFIGURATION.

The Association consented to a permanent physical alteration of Unit 57 almost 20 years ago. In return, it received years and years of double payments (that is, double what was legally mandated) from the prior owners. The Association cannot be heard to complain that a subsequent owner, who has made no alterations, refuses to pay double what is owed under the Declarations. As Jensen-Re demonstrated above, the UCA expressly permits alteration of units without an amendment to the Declaration. *See* Minn. Stat. § 515A.2-113. The Association authorized that alteration conditioned, at best, upon a personal obligation from the prior owners to make double payments. The Association chose not to follow the legal requirements necessary to affect the title to Unit 57, i.e., to make that agreement binding on future owners. *See* Minn. Stat. § 515A.2-108(b).

The district court correctly held that the Association had failed to establish any basis to require Jensen-Re, who made no changes to the unit, to reconfigure the unit to its original layout from early 1990’s. The Association made its cross-motion of summary judgment on

the undisputed facts and raised the arguments it deemed fit to support that motion. The Association, however, failed to supply the district court with any persuasive authority for its position. The district court therefore rejected the Association's demand for restoration of Unit 57. The Association is not entitled to a remand to permit it to reargue the same issue before the district court.

CONCLUSION

Respondents respectfully request that this Court affirm the district court's findings of fact, conclusions of law, and order granting Respondents' summary judgment motion and denying Appellant's summary judgment motion.

Respectfully submitted this 23rd day of August, 2010.

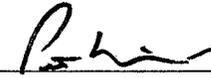
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. Pro. 132.01, subs. 1 and 3, and contains 6,397 words and was prepared using *Microsoft Word* Version 5.1.

Dated this 23rd day of August, 2010



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