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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1897

Perron's on the Lake, LLC,
Appellant,

vs.

Lakefront Plaza Condominium Association,
Respondent.

Filed April 21, 2014
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Scott County District Court
File No. 70-CV-12-15710

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Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Randall, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Perron's on the Lake, LLC appeals from the district court's grant of respondent Lakefront Plaza Condominium Association's motion for summary judgment, and the district court's denial of appellant's motion for summary judgment. Because there are genuine issues of material fact concerning the meaning of the controlling ambiguous written agreement, we affirm in part, reverse in part, and remand.

FACTS

Respondent administers a common interest community (CIC) formed under the Minnesota Common Interest Ownership Act (MCIOA). *See* Minn. Stat. § 515B.1-101 to 515B.4-118 (2012). The CIC was originally created pursuant to a declaration recorded on July 17, 2003. An Amended and Restated Declaration was recorded on April 24, 2009. The parties agree that the amendment did not change the substantive provisions of the declaration pertinent to this lawsuit. They also agree that respondent changed the way it calculates association dues in January of 2009.[1]

The parties seem to agree that, before January 2009, "respondent calculated association dues by placing each of the association's budget items into one of four categories: solely residential expenses, solely commercial expenses, joint expenses regardless of size, and joint expenses with regard to size." Those categories of expenses were then allocated to unit owners in what appellant claims to have been the correct way.

[1] This lawsuit involves respondent's calculation of association dues. Dues are calculated by allocating the CIC's various expenses among the unit owners. The declaration purports to identify a formula, the output of which is each unit's "association dues."

After January 2009, respondent began using a different method, "simply multiplying the percentage apportioned to each unit on 'Exhibit C' attached to the Declaration by the total budget for that given year." Respondent claims this to be the correct method of calculating dues and apportioning expenses. Each party claims that the unambiguous language of the declaration supports its interpretation.

In its brief, respondent contends that it was incorrectly calculating dues before 2009 and that it is now "properly calculating" dues, consistent with the declaration. At oral argument, respondent's counsel conceded that the percentage of overall operating costs being assessed to each unit owner after January 2009 resulted from some form of "compromise" on how to calculate association dues.

The declaration provides that the CIC consists of 78 residential units and four commercial units. One of the commercial units is a hallway, however, and is not taken into account for purposes of calculating association dues. Appellant operates a restaurant in unit 135, one of the three operational commercial units. Appellant sued respondent for reimbursement of association dues it contends were improperly assessed since January 2009, and for declaratory relief concerning future dues computations.

This dispute centers on the allocation and assessment of "Common Expenses," defined in the declaration as "all expenditures made or liabilities incurred by or on behalf of the Association and incident to its operation, including without limitation allocations to reserves and those items specifically identified as Common Expenses in the Declaration or Bylaws." The declaration directs respondent to calculate responsibility for common expenses as follows:

10.02 Formula for Residential Units. Relative to the Residential Units in the condominium the allocation of fractional or percentage interests in the Common Elements as specified in Exhibit C is calculated for each Unit by dividing the number one by the number 78 which is the total number of Residential Units in the CIC. Each Residential Unit is allocated one vote in Association matters. The percentage allocation of responsibility for Common Expenses is calculated by a two-step process. First expenses which are common to all Residential Units, regardless of size of the respective Unit, such as management services, landscaping, grounds maintenance, rubbish removal, and similar expenses are placed in one category. The percentage allocation of responsibility for Common Expenses in the first category is then calculated by dividing the total of such expenses by the number of 78 which is the number of Residential Units in the CIC. Secondly, there is then created a category of expenses, such as insurance premiums, replacement reserves, electricity, and heating gas, and similar expenses which are related to the size of the respective Residential Unit and are greater for the larger Units than the smaller Units. The percentage allocation of responsibility for the second category of expenses is calculated by dividing the square footage of the Unit into the total square footage of all of the Residential Units and the result is then applied against the total of the expenses in the second category. The results of the foregoing calculations are then combined for each respective unit. For administrative efficiency, a range of maximum and minimum assessments is then established and final calculations are rounded to establish eight (8) levels of assessments. The percentage allocation of responsibility for Common Expenses relative to each respective Residential Unit is set forth on Exhibit C.

10.03 Formula for Commercial Units. There are four (4) Commercial Units which are numbered 110, 132, 134, and 135. Unit No. 110 contains approximately 6,000 square feet which is approximately six times the average square footage of a Residential Unit in the CIC. Accordingly, Unit No. 110 is allocated six votes on Association matters. Unit No. 132 is a corridor which provides access to the Commercial Units from outside the building. It is not intended to be occupied or used for commercial activities except for access and egress. Accordingly, Unit No. 132 has not been allocated a vote in

> Association matters. Unit No. 134 contains approximately 3,300 square feet and has been allocated 3.3 votes in Association matters. Unit No. 135 contains approximately 2,700 square feet and has been allocated 2.7 votes in Association matters. Continuing with the square footage approach, with some rounding, results in a calculation that Unit No. 110 represents approximately 6/90ths of the total square footage in the building and that Unit No. 134 represents approximately 3.3/90ths of said square footage and Unit No. 135 represents approximately 2.7/90ths of said square footage. Unit No. 132 is disregarded in the computation and the fractional interests in the Common Elements for Units 110, 134 and 135 are as stated on Exhibit C. The percentage allocation of responsibility for Common Expenses is calculated by a two-step process. First, expenses which are common to all Commercial Units, regardless of size of the respective Unit, such as management services, landscaping, grounds maintenance, rubbish removal and similar expenses are placed in one category. The percentage allocation of responsibility for Common Expenses in the first category is then calculated by dividing the total of such expenses by the total number of all Commercial Units. Secondly, there is then created a category of expenses, such as insurance premiums, replacement reserves, electricity, and heating gas, and similar expenses which are related to the size of the respective Unit and are greater for the larger Units than the smaller Units. The percentage allocation of responsibility for the second category of expenses is calculated by dividing the square footage of the Unit into the square footage of all the Commercial Units and the result is then applied against the total of the expenses in the second category. The results of the foregoing calculations are then combined for each respective Unit. The percentage allocation of responsibility for Common Expenses relative to each respective Commercial Unit is set forth on Exhibit C.

Exhibit C is attached to the declaration and shows, among other things, the percentage of common expenses currently being assessed to each unit. The percentage of common expenses listed for unit 135 in exhibit C is 3.22%.

The declaration defines "Limited Common Elements" as "Common Elements . . . for the exclusive use of one or more but fewer than all of the Units." Section 9.01 allocates the "exclusive use" of certain limited common elements[2] but is silent regarding the allocation of expenses related to administering the limited common elements. The parties agree that these expenses are currently being placed in the total budget and multiplied by the percentages in exhibit C to determine each unit's responsibility for these expenses.

After discovery, each party moved for summary judgment. Each relied on extrinsic evidence in their respective summary judgment motions. The district court granted respondent's motion for summary judgment and denied appellant's motion for summary judgment, concluding that respondent had been calculating dues properly under the unambiguous language of the declaration. This appeal followed.

D E C I S I O N

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are

[2] This section reads:

> 9.01 Allocation of Limited Common Elements. Certain portions of the Common Elements are allocated for the exclusive use of one or more but fewer than all of the Units. In addition to the Limited Common Elements specified in Section 515B.2-102(d) and (f) of the Act, certain Limited Common Elements, and the Units to which each is allocated, are depicted on the CIC Plat. Among such Limited Common Elements is the Basement Parking Area, which is allocated to the exclusive use of the Residential Units, and the fenced in area housing garbage or trash dumpsters, which is allocated to the exclusive use of the Commercial Units.

genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "Construction of a contract presents a question of law, unless an ambiguity exists." *See Swanson v. Parkway Estates Townhouse Ass'n*, 567 N.W.2d 767, 768 (Minn. App. 1997). We review questions of law de novo. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

An association is governed by, and must comply with, the provisions of its declaration. *Southview Greens Condo. Ass'n v. Finley*, 413 N.W.2d 554, 556-57 (Minn. App. 1987). The declaration "constitute[s] a contract between the association and its individual members." *Swanson*, 567 N.W.2d at 768. If unambiguous, we "ascertain and give effect to the intention of the parties" without resort to extrinsic evidence. *Id.* "Ambiguity exists when the language of a written document is reasonably susceptible to more than one meaning." *Id.* For either party to prevail on the cross-motions for summary judgment, that party must show that there are no genuine issues of material fact and that judgment is appropriate as a matter of law. *Riverview Muir Doran*, 790 N.W.2d at 170.

The district court concluded that sections 10.02 and 10.03, and the attached exhibit C, unambiguously support respondent's method of calculating dues. We are convinced that the language of the declaration does not unambiguously allow judgment in favor of either party.

The language of sections 10.02 and 10.03, without reference to any extrinsic evidence, provides the method for calculating association dues, both for residential and

commercial units. The method involves what is described by both sections as "a two-step process." The first step is to calculate responsibility for expenses that are common to all residential or commercial units, regardless of their size, by dividing those expenses by the number of units (78 for residential, three for commercial). We refer to this as the "first category" of expenses. The second step is to calculate the responsibility for expenses that are related to the size of a residential or commercial unit, with larger units paying more. This is done by taking the square footage of a residential or commercial unit and dividing it by the total square footage of all the residential and commercial units. We refer to this as the "second category" of expenses. The values for each category are then added together to determine the allocation of each unit's responsibility for common expenses.

Relying on the last sentence of sections 10.02 and 10.03, respondent argues that exhibit C reflects the calculations for both categories of common expenses added together. Each section states that "the percentage allocation of responsibility for Common Expenses relative to each respective [Residential or Commercial] Unit is set forth on Exhibit C." Respondent contends that all of the language in these sections preceding the last sentence can be ignored because the last sentence of each section mandates allocating common expenses as reflected on exhibit C. But calculating the percentage of common expenses under the balance of the language in sections 10.02 and 10.03 results in numbers different from the percentages reflected on exhibit C.

The calculations for unit 135 as directed by the language in section 10.03 provide an example of this problem. The allocation for expenses in the first category would be 33.3% (as unit 135 is one of three commercial units). The allocation for expenses in the

second category requires calculating square-footage ratios for the commercial units. The approximate square footage of the three commercial units is set forth in section 10.03: unit 110 has 6,000 square feet; unit 134 has 3,300 square feet, and unit 135 has 2,700 square feet, resulting in a total commercial-unit square footage of 12,000. Based on the plain language of section 10.03, unit 135 would be responsible for 2,700/12,000 or 22.5% of the expenses in this category. Section 10.03 then states that the 33.3% and 22.5% figures should be "combined for each respective Unit." But no combination or average of 33.3% and 22.5% results in the 3.22% listed in exhibit C, and we are unable to replicate the 3.22% reflected on exhibit C for unit 135 using the formula set forth in the lengthy narrative preceding the sentence referring to exhibit C. Therefore, the declaration does not unambiguously support the formula respondent claims is correct, and the district court erred in granting summary judgment in favor of respondent.

Our example above reveals a fundamental problem with the plain language of sections 10.02 and 10.03. There is no mechanism or method for allocating responsibility for common expenses as between residential and commercial units. Applying the plain language of sections 10.02 and 10.03, respondent would collect 1/78th of the total common expenses from each residential unit, and would collect one-third of the total common expenses from each commercial unit in the first category, which would assess 200% of the common expenses in the first category.[3] The parties agreed at oral argument that respondent does not collect dues in excess of expenses and could not properly do so.

[3] Through more involved square-footage calculations, this same double-counting problem exists for common expenses in the second category as well.

They also agree that the intent of the declaration is to assess 100% of the common expenses, not 200%.

Appellant's proposed method of calculating dues would resolve this double-counting problem. Appellant suggests that the total common expenses in the first category should be divided by 81, the sum of the 78 residential units and the three commercial units. Likewise, appellant argues, expenses related to unit size should be calculated by dividing by the total square footage of the CIC, rather than the total square footage of only the residential units or only the commercial units. Appellant adds to this process another step, whereby it separately allocates responsibility for expenses related to the limited common elements. Appellant concedes, with commendable candor, that the formula for which it advocates is not a "two-step" formula (which is the language used in sections 10.02 and 10.03). Appellant's formula would make good sense, but it is a formula nowhere to be found in the plain language of the declaration. *See Swanson*, 567 N.W.2d at 768. Appellant has therefore failed to establish that the declaration unambiguously supports its method of calculating association dues and its motion for summary judgment was properly denied. *See Riverview Muir Doran*, 790 N.W.2d at 170.

The deposition of Dick Houle, one of respondent's directors during time periods relevant to this lawsuit, confirms that the declaration is ambiguous concerning the proper formula for computing dues. Mr. Houle testified that the board and the unit owners met some time before 2009 and came up with an agreement that 13.1% of the common expenses would be allocated to commercial units and the remaining 86.9% of the

common expenses would be allocated to the residential units.[4] Houle also testified that, although the declaration was then amended, the amendment actually made does not reflect the agreement reached by the board and the unit owners. He testified that he believes the interested parties assumed that the language of the amended declaration reflected their amended agreement, but that nobody took the time to confirm that this was so. He also believes that respondent is *not* presently calculating dues in accordance with the language of the declaration. Although this extrinsic evidence cannot be used to determine whether the declaration is ambiguous, *see Swanson*, 567 N.W.2d at 768, it confirms our reading of the declaration as being irreconcilably ambiguous and not susceptible of interpretation without reference to evidence outside the four corners of the declaration.

We also observe an additional and obvious ambiguity in the declaration concerning expenses related to the Limited Common Elements. Section 9.01 of the declaration allocates the "exclusive use" of certain limited common elements in the CIC. The district court held that the plain language of section 9.01 refers only to allocation of the exclusive use, not the allocation of expenses for, these limited common elements. Therefore, the district court held, responsibility for those expenses could also be calculated by reference to the percentages in exhibit C. But as appellant correctly notes, Minnesota Statutes section 515B.3-115(e) governs the allocation of such expenses when

[4] Another former member of the board testified that this agreement was the result of a "compromise" between various board members and unit owners. At oral argument, respondent's counsel referenced that the numbers in exhibit C may have been the result of this "compromise."

the declaration is silent as to their allocation. If the declaration intended a different allocation of these expenses than the statute directs, it did so ambiguously.

In sum, we hold that the declaration is ambiguous concerning the proper method for calculating association dues. Although the district court properly denied appellant's motion for summary judgment, it erred in summarily dismissing appellant's complaint. We affirm the denial of appellant's motion for summary judgment, reverse the grant of respondent's motion for summary judgment, and remand to the district court for further proceedings.

Affirmed in part, reversed in part, and remanded.