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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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SOUTHBURY MASTER HOMEOWNERS' ASSOCIATION,	)	Appeal from the Circuit Court of Kendall County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-L-0002
	)	
SOUTHBURY LAND VENTURE, LLLP,	)	Honorable
	)	Robert P. Pilmer,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because the declaration of covenants, conditions, and restrictions defined a “Pod” in a residential development community as being shown on a preliminary plat and finally located on a final plat, which final plat the declaration defined as being recorded with the Kendall County Recorder, plaintiff could not issue assessments against defendant for pods 3 and 8 because those pods were not finally located in a final plat. Thus, we affirmed.

¶ 2 Plaintiff, Southbury Master Homeowners' Association, appeals the trial court's judgment in favor of defendant, Southbury Land Venture, LLLP, after the trial court concluded that defendant was not obligated to pay assessments pursuant to a declaration of covenants, conditions, and restrictions (the declaration). On appeal, plaintiff contends that the trial court

failed to apply the declaration's plain language and that the trial court's interpretation rendered the declaration's "build-out schedule" meaningless. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 Plaintiff is a non-for-profit corporation that has authority to manage the Southbury subdivision. The subdivision is located in Oswego and, pursuant to the declaration, will be developed in phases as single family detached homes, multifamily communities, and an age-targeted community.

¶ 5 The subdivision is divided into nine "pods." Defendant is the legal owner of pods 3 and 8. Pursuant to the "contemplated development buildout schedule," attached to the declaration as exhibit E, pod 3 was going to contain 106 units and pod 8 was going to contain 189 units.

¶ 6 The declaration provided for maintenance assessments for the subdivision. Article 5, section 4 provided:

"The Board shall determine the amount of the assessment against each Assessable Lot (as hereinafter defined in this Section), including any vacant Lot, for each assessment year. The assessment shall be allocated equally against all Assessable Lots in Southbury. \*\*\* Each lot shall begin paying quarterly installments of the annual assessments immediately upon the earlier of (i) conveyance of title to a Lot to the first purchaser of a Dwelling Unit on such Lot or (ii) the initial occupancy of a Dwelling Unit (the first to occur being the "Initial Dwelling Closing"). Each such Lot being deemed an "Assessable Lot." However, if any Pod does not have at least the cumulative number of Initial Dwelling Closings on or before the calendar quarters set forth in the chart, which is attached as Exhibit E \*\*\*, then the Owners of the Pod (excluding those Lots where an Initial Dwelling Closing has occurred) shall be assessed, and shall be jointly and severally liable

for, assessments against the number of Lots equal to the Closing Shortfall, as the Closing Shortfall shall exist during each calendar quarter from time to time. The number of Lots equal to the Closing Shortfall, as it may exist from time to time on a Pod, shall also be deemed part of the Assessable Lots.”

¶ 7 Article I of the declaration provides the following definitions. Section 10:

“ ‘Dwelling Unit’ shall mean and refer to a residential housing unit within the Development Tract designed for and occupied by a single family in a single-family detached dwelling unit, multi-family building, townhouse or other attached dwelling unit.”

Section 11:

“ ‘Final Plat’ shall mean and refer to (i) each final subdivision plat for Pods 1-9 within Southbury \*\*\*. Any and all Final Plats may be attached to this Declaration as Exhibit D-1 after any such Final Plat has been recorded with the Kendall County Recorder.”

Section 12:

“ ‘Lot’ shall mean and refer to any parcel of land under common fee ownership, occupied or intended for occupancy by one dwelling and specifically excluding any Outlots.”

Section 18:

“ ‘Parcel’ shall mean each of the Pods/residential areas currently designated as Nos.1-9 on the Preliminary Plat, and as finally located on the Final Plat for each Pod.”

Section 20:

“ ‘Preliminary Plat’ shall mean that certain preliminary plat prepared by Lannert Group dated December 6, 2002 with the latest filing date of July 31, 2003, a copy of which is attached hereto and incorporated herein as Exhibit D.”

Section 21:

“ ‘Pod’ shall mean one of nine separate areas within the Development Tract and shown on the Preliminary Plat as Pod/residential area 1, 2, 3, 4, 5, 6, 7, 8 (A and B) and 9 (and as finally located on each Final Plat for each Pod), each of which are intended for sale to and development by a single ownership entity that will transfer Lots and Dwelling Units to Third Party Purchasers.”

Finally, article II, section 5, titled “property subject to this declaration,” provides:

“Final Plat. It is anticipated that each Pod will be subject to its own separate, recorded Final Plat. Each Final Plat must be prepared and recorded so that (i) the location of the Common Area, Buffer Yards, and rights of way and (ii) the type of use within the Common Area are in substantial conformance with the Preliminary Plat (except to the extent the Preliminary Platt does not show all, or portions of, Pods 3, 6, and 8).”

¶ 8 On January 17, 2012, plaintiff filed its complaint. As amended, plaintiff’s complaint alleged that defendant owned 295 lots that made up Pods 3 and 8 within the subdivision. Plaintiff alleged that it had levied \$560 per lot to be paid in quarterly installments of \$140. Plaintiff alleged that defendant had failed to pay the assessments beginning in the second quarter of 2011, and as a result, defendant owed \$339,250 in unpaid assessments and late fees, plus attorney fees and costs. Plaintiff alleged that, because defendant failed to pay assessments, defendant breached its contract with plaintiff.

¶ 9 A trial commenced on February 26, 2014. Plaintiff presented a motion *in limine* seeking to bar parole evidence for the purpose of interpreting the terms of the declaration. The trial court initially denied the motion and considered extrinsic evidence. However, at the close of evidence,

plaintiff reintroduced the motion, which the trial court granted after finding the declaration's terms unambiguous.

¶ 10 Following trial, the trial court found that there was no dispute that defendant's property was subject to the declaration and that plaintiff had authority to issue assessments if certain conditions were first met. The trial court found that, pursuant to article 5, section 4 of the declaration, "only those owners of Assessable Lots are obligated to pay assessments." A lot became an "Assessable Lot" when title was conveyed to the first purchaser of a dwelling unit or upon the initial occupancy of a dwelling unit. The trial court found that there "was no evidence that either of these two events occurred in either Pod 3 or Pod 8."

¶ 11 The trial court further found that, pursuant to the "Proposed Build-Out Schedule" contained in exhibit E, "it was contemplated" that 10 units would be built or occupied in Pod 3 by the fourth quarter of 2006, 10 additional units being built for each additional quarter, and the final 6 units being built by the second quarter of 2009. For Pod 8, 10 units were to be built by the third quarter of 2005 and 10 additional units were to be built in the fourth quarter of 2005. Thereafter, 15 units were to be built per quarter through the first quarter of 2008, then 14 units in the second quarter of 2008, and 10 units in each the third and fourth quarters of 2008. If this had occurred, there would be 295 total units.

¶ 12 The trial court rejected the plaintiff's argument that, even though no housing units were constructed in Pods 3 or 8, the "Closing Shortfall" language in the declaration rendered the 295 lots "Assessable Lots" for which defendant was obligated to pay assessments. The trial court considered the definitions contained within the declaration, including the definition of a "Lot." The trial court also considered exhibit D, which contained the preliminary plats and identified the various pods within the subdivision. The trial court noted that the other pods, with the

exception of Pod 6, reflected the locations of streets and individual lots within each pod. The trial court concluded:

“There was no evidence of a [f]inal [p]lat being recorded for Pod 3 or Pod 8. The court takes judicial notice that in the absence of a [f]inal [p]lat of [s]ubdivision, there cannot be individual lots upon which housing units may be constructed, or which may be sold.”

The trial court further concluded that, in order to be an “Assessable Lot” under article 5, section 4 of the declaration, there “must first be a “[l]ot.” The trial court noted that article 1, section 12 of the declaration defined “Lot” as a “parcel of land upon which a dwelling may be constructed.” Therefore, according to the trial court, “in the absence of a [f]inal [p]lat for either Pod 3 or 8, there can be no ‘Lots’ as defined in the [d]eclaration.” The trial court continued:

“It appears from the legal description of the property conveyed to [defendant], Pod 3 is a single parcel of land. Pod 8 is composed of two parcels, presumably 8A and 8B. There was no evidence of the existence of 106 Lots in Pod 3 or 189 Lots in Pod 8.”

The trial court further found that plaintiff’s reliance on the “Closing Shortfall” language in article 5, section 4 of the declaration was misplaced. The trial court emphasized that exhibit E only “contemplate[d] the development of each [p]od, with a proposed build-out schedule for each [p]od.” Citing Article 1, sections 11, 16, 18, and 21 of the declaration, the trial court found that the declaration “clearly provides that there must be a [f]inal [p]lat for each [p]od.” The trial court concluded that, when considering the membership and voting rights provisions contained in the declaration, “there is a clear indication that membership and voting rights are dependent upon the existence of [l]ots, which the court notes again can only be determined once a [f]inal [p]lat is recorded.” The trial court concluded:

“Had a [f]inal [p]lat been recorded for Pods 3, 8A or 8B, clearly delineating individual [l]ots similar to the other [p]ods (except 6) shown on [e]xhibit D, the outcome would be different, even if no dwelling was constructed on any [l]ot and [defendant] owned all of the [l]ots.”

¶ 13 Plaintiff timely appealed the trial court’s order.

¶ 14 II. ANALYSIS

¶ 15 The only issue on appeal is whether the trial court erred as a matter of law when it found that the declaration did not require defendant, as owner of Pods 3 and 8, to pay assessments until the final plats for those pods were recorded. Plaintiff contends that, in reaching its determination, the trial court failed to apply the declaration’s plain language. Specifically, plaintiff refers to language in article 5, section 4, of the declaration regarding the “closing shortfall.” Plaintiff maintains that, pursuant to this provision and the build-out schedule provided in exhibit E, “the owner of an undeveloped property must pay assessments equal to the number of dwellings that it should have developed by the various dates on the build-out schedule.” Plaintiff further argues that, pursuant to the declaration’s plain language, “whether a particular piece of property qualifies as a [‘Lot’] or has a [‘final plat’] recorded is irrelevant.” Finally, plaintiff argues that the trial court’s determination “rendered the declaration’s build-out schedule meaningless.”

¶ 16 “The rules of construction for contracts govern our interpretation of the covenants contained in the declaration.” *Forest Glen Community Homeowners Assoc. v. Bishop*, 321 Ill. App. 3d 298, 303 (2001). As our supreme court has noted, the basic rules of contract interpretation are well settled. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Our primary objective is to give effect to the parties’ intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007).

The best indication of the parties' intent is the contract's language, giving the words used their plain and ordinary meaning. *Id.* at 233. A contract must be construed as a whole, viewing each contractual provision in light of the other provisions; and therefore, the parties' intent cannot be determined by viewing a specific provision in isolation or by looking at detached portions of the contract. *Thompson*, 241 Ill. 2d at 441. A contract is ambiguous if it is reasonably susceptible to more than one meaning; nonetheless, contractual language will not be deemed ambiguous merely because the parties disagree on the meaning. *Forest Glen*, 321 Ill. App 3d at 303. The construction of a contract is a question of law subject to *de novo* review. *Fuller Family Holdings v. Northern Trust Co.*, 371 Ill. App. 3d 605, 620 (2007).

¶ 17 In this case, the declaration's plain language, construed in its entirety, reflects an intent that that a pod would not become subject to the assessment provisions contained in article 5, section 4 until the pod was recorded as a final plat. The declaration defined a "Pod" as being shown on the preliminary plat as pod 1 through 9 "and as finally located on each [f]inal [p]lat for each [p]od." (Emphasis added.) In Illinois, the word "and" is ordinarily conjunctive (*Perkins & Will v. Security Insurance Company of Hartford*, 219 Ill. App. 3d 807 813 (1991)), and "conjunctive" is defined as " 'a grammatical term for particles which serve for joining or connecting together.' " *Tarsitano v. Board of Education of Township High School District 211*, 385 Ill. App. 3d 868, 873 (2008) (quoting Black's Law Dictionary 86 (6th ed. 1990)). Thus, because article 5, section 4 referenced assessments for "pods" in the context of the closing shortfall, and the declaration defined pods as being shown in the preliminary plat in conjunction with being finally located on the final plat, the declaration's plain language reflected a clear intent that a "Pod" would not be assessable pursuant to article 5, section 4 until reflected in a final plat.

¶ 18 Our determination is further supported by the plain language contained in article 2, section 5. The provision specified the property that was subject to the declaration. It provided that it was “anticipated that each [p]od will be subject to its own separate, recorded [f]inal [p]lat” and that “[e]ach [p]lat must be prepared and recorded \*\*\*.” Specifying that “it [was] anticipated” that each pod would be recorded as a final plat is consistent with the definition of “Pod” provided in article 1, section 21, and is further consistent with the intent that a pod would not be subject to the assessments provided in article 5, section 4 until the pod was finally recorded.

¶ 19 Plaintiff’s reliance on *Straub v. Muir-Villas Homeowners Ass’n, Inc.*, 128 So.3d 885 (2013), is misplaced. In *Straub*, the homeowners association governed a sub-community in Florida that was part of a larger community. *Id.* at 886. The homeowners association assessed the residents assessments. *Id.* The property consisted of several plats of land, which each plat being further divided into lots. *Id.* Plat 5, which was at issue, originally consisted of 9 lots. *Id.* A prior owner had purchased 3 ½ of the original 9 lots, and one other owner owned the remaining 5 ½ lots. Those two owners recorded a re-plat of Plat 5, which reconfigured the plat from 9 lots to 4 larger lots. *Id.* at 886-87.

¶ 20 In 2006, the current owner (and party in the lawsuit) and his wife purchased lots 1 through 6, or lots 1 and 2 pursuant to the re-plat. Thereafter, the owner purchased lots 7 and 8, or re-platted lot 3, which made him the owner of lots 1 through 8, or lots 1 through 3 of the re-plat, in Plat 5. *Id.* at 887. The homeowners association brought suit to collect delinquent assessments and the trial court found that the homeowners association was entitled to assess the owner’s property on eight separate lots. *Id.*

¶ 21 On appeal, the owner argued that the declaration authorizing the homeowners association to assess the lots in Plat 5 was ambiguous because it could have referred to the original plat with 9 lots or the re-plat with 4 lots. *Id.* The reviewing court rejected this argument, noting that the declaration specifically referred to the plat referenced in article 2, which contained a validly executed amendment. *Id.* That amendment was recorded in the public records of Palm Beach County, Florida, and included nine lots. Thus, the declaration was never amended again to reflect the re-plat of Plat 5 from 9 lots to 4 lots. *Id.*

¶ 22 Contrary to plaintiff's argument here, we believe that the holding in *Straub* supports our interpretation of the declaration. That is, in *Straub*, the owner would be assessed as Plat 5 containing 9 lots because the declaration was never amended to include the re-plat of Plat 5 to contain 4 lots. Tellingly, the court in *Straub* emphasized that the original amendment to article 2, which the declaration did reference, contained a description of Plat 5 that corresponded to the recorded public records of Palm Beach County. Those public records did not reflect that Plat 5 was re-platted from containing nine lots to four lots. Thus, as we read *Straub*, the homeowners association assessed the owner based on the plat that was recorded with the county. That same rationale applies here, and plaintiff can only issue assessments once there is a final plat which has been recorded with the Kendall County Recorder.

¶ 23 In reaching our determination, we are not persuaded by plaintiff's argument that defendant's failure to pay dues will result in other homeowners having to pay the dues allocated for the lots contemplated in pods 3, 8A, and 8B. Plaintiff appears to be seeking an unjust enrichment remedy based on a quasi-contract. "Quasi-contractual relief is available when one party has benefited from the services of another under circumstances in which, according to the dictates of equity and good conscious, he ought not to retain such benefit." *Barry Mogul &*

*Associates, Inc. v. Terrestris Development Co.*, 267 Ill. App. 3d 743, 750 (1995). Generally, the remedy of unjust enrichment based on a quasi-contract is unavailable when an express contract exists concerning the same subject matter. *C. Szabo Contracting, Inc. v. Lorig Construction Co.*, 2014 IL App (2d) 131328, ¶25.

¶ 24 In *Board of Directors of Carriage Way Property Owners Assoc. v. Western National Bank of Cicero*, 139 Ill. App. 3d 542 (1986), the plaintiff, a residential development of single-family homes and a three-building apartment complex, brought suit against the defendants, owners of certain apartments, for failing to pay assessments pursuant to a declaration between 1978 through 1981 pursuant. *Id.* at 544. The complaint alleged that the plaintiff provided general maintenance, landscaping, and lighting and preservation of a lake, which conferred upon the defendants “a substantial benefit and unjust enrichment.” *Id.* at 544-45. Following a trial, the trial court found that an implied contractual obligation existed between the parties and ordered the defendants to pay the unpaid assessments. *Id.* at 546.

¶ 25 The reviewing court reversed. It initially held that the declaration did not specifically address the assessments at issue, and therefore, the plaintiffs were not precluded from bringing a quasi-contractual theory of relief. *Id.* at 547. With respect to a quasi-contract, the reviewing court opined:

“ [I]t is important to consider the context in which particular services are rendered in determining whether any benefit accruing to the [recipient] would be unjustifiably retained absent the intercession of equitable principles. It is *unjust* enrichment which is to be avoided. (\* \* \*; Restatement of Restitution sec. 1, comment *c* (1937).) The restatement articulates this fundamental aspect of the doctrine:

“*c. Unjust retention of benefit.* Even where a person has received a benefit from

another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.” ’ ’ (Emphasis in original.) *Id.* (quoting *Rutledge v. Housing Authority of the City of East Saint Louis*, 88 Ill. App. 3d 1064, 1069 (1980)).

The court concluded that, while the defendants may have received the benefit of maintenance to the common areas, “[t]his is not of itself sufficient \*\*\* to require the defendants to pay for the maintenance.” *Id.* at 548. The court emphasized that the defendants advised the plaintiff that they were not legally required to pay the assessment and “[t]hat the plaintiff chose to continue to maintain the common areas does not render the defendants unjustly enriched.” *Id.* The court continued that “[a]ny benefit incidentally realized by the defendants through the continued maintenance of the common areas was not a sufficient basis for \*\*\* quasi-contract” and further noted that other jurisdictions had held that when services are performed for the parties’ mutual benefit, “the law will not imply a promise to reimburse.” *Id.*

¶ 26 We find the reasoning in *Western National Bank* instructive here. Even if plaintiff was not precluded from seeking quasi-contractual relief, that plaintiff chose to maintain common areas with assessments paid from other homeowners is insufficient to impose a quasi-contract due to defendant being unjustly enriched. See *id.*

¶ 27 Plaintiff further argues that, if the build-out schedule set forth in exhibit E is “impotent,” defendant “will decide on its own when it wishes to begin paying assessments and how many [a]ssessible [l]ots it will create”; and by delaying in having the final plat for the pods recorded, defendant “will delay the development of the property.” According to plaintiff, “[t]his delay seems to be one of the reasons an enforceable build-out schedule is included.” Plaintiff notes

that, by providing specific timelines, exhibit E and article 5, section 4 provide that builders who fall behind on the schedule must start paying assessments.

¶ 28 We find this argument unavailing. The entities who entered into the declaration were sophisticated parties. If they were concerned about the possibility that builders would delay developing lots and accessible lots on pods, then they could have contractually mandated builders to develop a specific number of lots within a specific timeframe. See *Downs v. Rosenthal Collins Group, L.L.C.*, 2011 IL App (1st) 090970, ¶43 (noting that the plaintiff, a sophisticated party, could have contracted for “countless other terms” to protect himself with respect to obtaining an ownership interest in a company). The parties could have also specified that pod owners were required to have a final plat recorded with Kendall County by a date certain. However, instead of doing either of these options, the declaration merely contains an exhibit titled “contemplated development build[-]out schedule” and further specifies that the build-out schedule was “proposed.” As plaintiff conceded at oral argument, it was unaware of any provision in the declaration requiring a builder to build a set number of residences within a specific timeframe.

¶ 29 In sum, because the declaration unambiguously provided that a pod would not become subject to an assessment until a final plat was recorded, and a final plat was never recorded for pods 3, 8A, and 8B, defendants were not obligated to pay assessments on the lots contemplated in exhibit E.

¶ 30

### III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Kendall County.