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IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NORMA S. ADA, *et al.*, **Plaintiffs,** **v.** **MASAJI NAKAMOTO, *et al.*,** **Defendants.**	**CIVIL ACTION NO. 08-0029 D** **ORDER GRANTING IN PART PLAINTIFFS' MOTION TO STRIKE AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

THIS MATTER came before the Court on March 17, 2011, for a hearing on Plaintiffs' Motion for Summary Judgment Re Maintenance Fees ("Motion") as well as Plaintiffs' Motion to Strike the Declaration of Shuichi Nishimura ("Declaration"). Plaintiffs were represented by Timothy H. Bellas, Esq. Anaks Resort Development, Inc. ("Anaks" or "Defendant"), was represented by Douglas F. Cushnie, Esq. Plaintiffs are moving the Court to summarily adjudge that Anaks breached their agreement by failing to utilize the maintenance fees in accordance with the terms of their agreement.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Anaks Ocean View Hill Saipan (the "Development") is located in the Puerto Rico area of Saipan. The Development is a housing complex consisting of multiple residential units and was constructed by Anaks around 1989. Anaks is a domestic corporation formed under the laws of the Commonwealth of the Northern Mariana Islands ("CNMI"). Initially, Anaks was formed by three

Japanese corporations; however, at the time this lawsuit was filed, Plaintiffs allege that Anaks was wholly owned by Saipan Shangrila Resort, Inc. ("Shangrila").

At its inception, Anaks marketed the sale of individual units of the Development to Japanese consumers. Those who purchased individual units ("Homeowners") also received a sublease to the realty upon which the unit was placed. Each Homeowner entered into a Sublease and Residential Sales Agreement ("Sublease") with Anaks. Pursuant to the Sublease, the Homeowners agreed to, among other things, compulsory membership in Anaks Homeowners Association ("AHA"), and the payment of a monthly fee for the maintenance of common areas.

On May 21, 2010, Plaintiffs filed their First Amended Complaint ("FAC"). Plaintiffs have asserted six causes of action[1] against Anaks including breach of contract for failing to utilize the monthly maintenance fees in accordance with the terms of the Sublease.

Presently before the Court is Plaintiffs' Motion for Summary Judgment. Plaintiffs argue that, as a matter of law, Anaks has breached the terms of the Sublease by using the maintenance fees for expenditures other than the maintenance of common areas. The Court had the benefit of oral argument and reviewed the parties' respective memoranda and exhibits attached thereto, viewing all facts and drawing all reasonable inferences in a light most favorable to the non-moving party. *Waibel v. Farber*, 2006 MP 15 ¶ 22 (citing *Santos v. Santos*, 4 NMI 206, 209 (1994)).

III. MOTION TO STRIKE THE DECLARATION OF SHUICHI NISHIMURA

A. Competency to Testify

Plaintiffs move the Court to strike portions of Anaks' Declaration of Shuichi Nishimura ("Nishimura"). Plaintiffs contend that Nishimura does not have personal knowledge of the events or circumstances which are the subject matter of certain documents and therefore lacks competency to testify as to the matters referred to in the documents. (Reply at 2-4.) . Specifically, in the Declaration, Nishimura states:

[1] The six causes of action against Anaks include Count I for Mandatory Turn Over of Common Areas and Management to Homeowners; Count VI for Breach of Contract (Maintenance Fees); Count VII for Breach of Contract (Power Charges); Count IX for Mismanagement and/or Failure to Make Proper Disclosures and Establish Reserves; Count X for Breach of Implied Covenant of Good Faith and Fair Dealing; and Count XI for Punitive Damages. (FAC ¶¶ 117-138, 171-193, 206-228.)

> 5. That my review of Anaks business records reflects that in December 2001 Anaks Homeowners Association (Chairman, Nobutaka Yamada) submitted an open letter to the management. The letter asked for an explanation for the use of the maintenance fees and other related issues regarding the upkeep of Anaks Ocean View Hill Saipan. The management at the time (Anaks Resort Development, Inc., President Mr. Yoichi Chiba), on January 31, 2003, replied and explained in writing that the fees were essentially a rent for use of the common areas which payments Anaks used to maintain the physical plant, pay personnel and associated Anaks corporate expenses. On June 7, 2003, Anaks Homeowners Association (Mr. Yamada as the chairman) submitted a latter [sic] with an apology for and told the management that any issues were from simple miscomprehensions of relationship between Anaks and AHA. In the letter he stated that AHA understood the explanation, had no further questions and the issue of maintenance fees was not raised again until this lawsuit was filed.

(Decl. of Nishimura ¶ 5.)

Plaintiffs are correct that Nishimura provides no factual support for his allegation that he has personal knowledge of the events or circumstances referred to in these alleged documents. Pursuant to NMI R. Evid. 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The Court recognizes that it may infer that an affiant possesses the requisite personal knowledge to testify by considering the affiant's position or participation in the matters at hand. *See Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990). In this case, Nishimura is the president of Anaks; however, he did not start working for Anaks until 2009. The letters that Nishimura refers to in his Declaration were from a period spanning 2001 through 2003. Anaks fails to provide factual support demonstrating that Nishimura participated in these matters during that time.[2] In fact, a reading of the declaration indicates that Nishimura is merely testifying to his interpretation of what these letters state.

Thus, the Court finds that Nishimura lacks personal knowledge of events and circumstances at Anaks that occurred prior to his employment and strikes paragraph 5 of the Declaration. The other paragraphs of the Declaration may only be used to establish Anaks' policies, procedures as well as events and circumstances since his employment.

[2] If "common sense dictates that if an affiant is an employee of a company, []he has personal knowledge of events and circumstances that occurred at the company within [his] sphere of observation[,]" *Davis v. Valley Hospitality Servs.*, LLC, 372 F. Supp. 2d 641, 653 (M.D. Ga. 2005), common sense must also dictate an affiant not employed by a company would have no personal knowledge of events or circumstances occurring at the company.

B. Commonwealth Rules of Evidence

Additionally, the Court notes that Nishimura attempts to prove the contents of specific documents which are not attached as exhibits to his Declaration. According to NMI R. Evid. 1002, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by law." Commonwealth Rule of Civil Procedure 56(e) requires that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." NMI R. Civ. P. 56(e). Nishimura failed to attach the letters which are referred to in making his assertions. Consequently, the Court strikes paragraph 5 on this additional ground.

IV. MOTION FOR SUMMARY JUDGMENT PURSUANT TO NMI R. Civ. P. 56

A. Legal Standard

Summary Judgment is appropriate where there exist no genuine issues of material fact. NMI R. Civ. P. 56(c). The court shall make this determination by viewing the evidence in a light most favorable to the non-moving party. *Waibel*, 2006 MP 15 ¶ 22. "The burden falls initially on the moving party to demonstrate the absence of a genuine issue of material fact." *Id.* (citing *Eurotex, Inc. v. Muna*, 4 NMI 280, 283 (1995). In this case, Plaintiffs have moved for summary judgment on their claim; therefore, the applicable burden of proof is slightly different than the usual case of a defendant's motion.

> If the crucial issue is one on which the movant will bear the ultimate burden of proof at trial, then the movant can satisfy its summary judgment burden by submitting evidentiary documents that establish all of the elements of the claim or defense. The burden then shifts to the nonmovant to demonstrate that summary judgment is inappropriate.

Resolution Trust Corp. v. Northpark Joint Venture, 958 F.2d 1313, 1322 (5th Cir. 1992).[3] Plaintiffs bear the ultimate burden of proof at trial as to the existence of Anaks' breach of contract. Therefore, Plaintiffs must submit evidence supporting their claim. Thereafter, the burden will shift to Anaks to demonstrate that summary judgment is inappropriate.

[3] "[W]hen interpreting our rules of civil procedure, which are patterned after the federal rules, we will principally look to federal interpretation for guidance." *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 16 (citing *Ishimatu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60).

B. Discussion

The central issue in this motion is the interpretation of Paragraph 1.12 of the Sublease, entitled "Use and Maintenance of the Common Areas" which specifically states in pertinent part:

> Buyer agrees to pay ANAKS 1/131, of all the cost of maintaining, repairing and/or replacing these areas and the electrical generators and the water and sewer lines **including, without limitation**, the costs for construction works, repair and replacement of facilities and equipment and insurance premium covering the said facilities and equipment. The maintenance fee paid by buyer will pay for these costs and the costs of fuel, oil and parts. Payments shall be made on the first day of each calendar month during the term of this Agreement. This maintenance fee is subject to review annually on January 1st and may be raised or lowered a maximum of ten percent (10%) in any one given year based upon the cost of the maintenance to ANAKS. ANAKS shall have the right to subcontract all maintenance work to qualified maintenance companies. The monthly maintenance fee for 1990 shall be three hundred ninety five Dollars ($395.00) per month.

(Sublease ¶ 1.12) (emphasis added). On one hand, Plaintiffs construe the Sublease as requiring the monthly maintenance fee to be used only for maintenance of common areas and facilities. On the other hand, Anaks reads the Sublease to allow the maintenance fees to be expended for general corporate expenses. Thus, the issue becomes whether the agreement between the parties indicate whether the monthly maintenance fees may be used for purposes other than maintaining common areas, facilities and equipment enjoyed by the Homeowners.

In an effort to satisfy their evidentiary burden, Plaintiffs contend: (1) that the Sublease is a contract; (2) the Sublease specifically delineates what costs the maintenance fees may be used to pay, and; (3) that Anaks has been utilizing the monies collected from the maintenance fees for expenses not included in the Sublease. To support their contention that Anaks has breached the Sublease, Plaintiffs submit as evidence, copies of the Ground Lease of the property (Pls.' Ex. 1, 3), Conveyance of the Ground Lease to Anaks (Pls.' Ex. 2), the Sublease (Pls.' Ex. 4), Fee Statements (Pls.' Ex. 5), and a Preliminary Profit and Loss Sheet for Fiscal Year 2010 (Pls.' Ex. 6).

1. Breach of Contract

To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a valid contract; (2) the breach of an obligation imposed under the contract; and (3) damage to the plaintiff resulting from the breach. Restatement (Second) of Contracts §§ 235, 237, 240 (defining a

breach of contract). In this matter, the first element is not in controversy – the parties agree that the Sublease between Anaks and the Homeowners is a valid and enforceable contract. The second and third elements are contested . Plaintiffs contend that breaches of the Sublease have caused them damages. Anaks maintains that it has complied with all of its obligations under the Sublease and therefore Plaintiffs have suffered no damages. As stated above, to resolve this breach of contract claim, the Court must determine what the agreements say and mean.

i. Rules of Contract Construction

Before the Court conducts an analysis of the breach of contract claim, the Court finds it necessary to reiterate certain legal principals that will guide the analysis of the claim. These principals are stated in general terms here and reiterated when necessary in discussing specific areas of contention.

The construction of a contract is a matter of law for the Court. *Riley v. Public Sch. Sys.*, 4 NMI 85, 88 n.5 (1994) ("The construction of a contract is a legal process whereby contract terms are given effect."). Here, none of the parties argue that the Sublease or other documents at issue are ambiguous. Nevertheless, the parties offered extrinsic evidence to support their interpretation of Paragraph 1.12 should the Court find ambiguity. Thus, the Court must first determine whether the Sublease is ambiguous before construing its terms.

a. The Parol Evidence Rule

The parol evidence rule "defines the subject matter of interpretation" by "render[ing] inoperative prior written agreements as well as prior oral agreements." Restatement (Second) of Contracts § 213 cmt. a. "When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract . . . parol [evidence] . . . will not be admitted for the purpose of varying or contradicting those terms." 26 Corbin on Contracts § 573 (1960). Accordingly, the Court must determine whether the Sublease accurately reflects the agreement of the parties.

A contract is not rendered ambiguous merely because the parties disagree as to the meaning of certain terms contained therein.[4] Moreover, the test "is not what the parties to the contract intended it

[4] *See e.g., Puls v. Landmark Cmty. Newspapers, Inc.*, 335 Fed. Appx. 805, 810 (10th Cir. 2009) ("[W]hether 'a written contract is ambiguous is a question of law,' and the fact the parties disagree about the meaning of its terms is not enough

to mean;" rather, "what a reasonable person in the position of the parties would have thought it meant." *Steigler v. Insurance Co. of N. Am.*, 834 A.2d 398, 401 (Del. Super. 1978). "[A]mbiguity arises from contract language if it is either facially inconsistent . . . *or* either disputed relevant extrinsic evidence or contract language itself shows potential *reasonable* differing meanings of the terms . . . ." *Riley*, 4 NMI at 89 (citations omitted) (emphasis in original). If it is determined that the Sublease is an accurate reflection of the parties' agreement, then interpretation is limited to the four corners of the Sublease.

It is an elementary principal of contract construction that a written contract may be comprised of multiple documents and that "in order to ascertain the entire agreement between contracting parties, separate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together." *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 327 (Tex. 1984); *see* Restatement (Second) of Contracts § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."); *see also* 11 Williston on Contracts § 30:26 (4th ed. 1999) at 239 ("Apart from the explicit incorporation by reference of one document into another, the principal that all writings which are part of the same transaction are interpreted together also finds application in the situation where incorporation by reference of another document may be inferred from the context in which the documents in question were executed.").

Here, the Sublease was executed contemporaneously with the "Anaks Ocean View Hill Saipan Rules and Regulations" (hereafter "Rules and Regulations") as well as the "Anaks Ocean View Hill Saipan Bylaws of Homeowners Association" (hereafter "AHA Bylaws"). Both the Rules and Regulations and the AHA Bylaws are incorporated by reference several times throughout the Sublease. (Sublease ¶¶ 1.4, 1.6, 2.5, 3.5.2.1, 3.5.2.1.1.) Furthermore, the Sublease expressly states that use of the premises is limited by the Rules and Regulations as well as AHA Bylaws. (Sublease ¶ 1.4.) All three documents pertain to the same transaction. Therefore, in order to ascertain the parties' intent with regard to the use of the maintenance fee, the Court will construe the Sublease, AHA Bylaws, as well

to establish ambiguity."); *Hampton v. Ford Motor Co.*, 561 F.3d 709, 714 (7th Cir. 2009) (Stating that a contract "is not rendered ambiguous simply because the parties disagree upon its proper construction."); *Norwest Bank Wis., N.A. v. Malachi Corp.*, 245 Fed. Appx. 488, 493 (6th Cir. 2007) ("The terms of a contract will not be considered ambiguous simply because the parties disagree regarding the proper interpretation of the terms.").

as the Rules and Regulations as one contract (hereafter, "Agreement").

Following a meticulous review of the documents provided, the Court determines that the Agreement is not ambiguous. The Agreement clearly defines the rights and obligations of the parties. Accordingly, the Court will not consider extrinsic evidence provided when construing the terms in the Agreement and limit the review to the "four corners" of the Agreement. *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ 17.

b. The Four Corners Rule

The Court must view the Agreement as a whole and interpret it in a manner that "gives a reasonable, lawful, and effective meaning to all the terms." Restatement (Second) of Contracts § 203(a) (1979). This manner of interpretation is preferred over one which "leaves a part unreasonable, unlawful, or of no effect." *Id.* When terms are not defined, "the language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent." *Commonwealth Ports Auth.*, 2007 MP 22 ¶ 17.

"Confining [the] inquiry to the four corners of a contract is the most equitable method of determining the parties' intent." *Id.* Thus, where an agreement is unambiguous, the court need only look "within the four corners of the agreement to see what is actually stated, and not what was allegedly meant." *Id.*; *see* Restatement (Second) of Contracts ch. 9, introductory note (1981) ("Where the parties have adopted a writing as the final expression of all or part of their agreement, interpretation focuses on the writing, and its terms may supercede other manifestations of intention.").

ii. The Unambiguous Agreement Clearly Evince Rights and Obligations of the Parties

Under Paragraph 1.12 of the Sublease, Anaks gives the Homeowners the right to use the common areas for lawful purposes. In exchange for this right, the Homeowners are obligated to pay a maintenance fee to maintain, repair, or replace these areas. The same paragraph gives Anaks the right to collect the maintenance fee in exchange for the obligation to maintain, repair, or replace these areas.

Further, the AHA Bylaws state that "ANAKS shall at all times manage, operate and control the Common Areas and the electric generators, water and sewer lines." (AHA Bylaws § 7.1.) To this end, Anaks and the Board each have the power and duty of "[e]mployment supervision and dismissal of such personnel as may be necessary for the maintenance and operation of the Development." (*Id.* § 7.3.)

According to Plaintiffs, Paragraph 1.12 of the Sublease clearly reflects the parties' understanding that the maintenance fee would pay only for the maintenance, repair and/or replacement, as well as insurance, of the common areas.[5] This understanding confirms Plaintiffs' expectation that the maintenance fee would not be used for Anaks' general corporate expenses. The Court finds that the language in the Agreement is clear and unambiguous and reflects Anaks' obligation to use the maintenance fee to maintain the common areas enjoyed by the Homeowners. The Court need not consider Paragraph 1.12 in isolation, however, because the other sections of the Agreement support this conclusion.

iii. Anaks' Construction of the Agreement is not Supported by its Clear Terms

In support of its contention that the maintenance fees can be used for general corporate expenditures, Anaks relies principally upon a broad interpretation of Paragraph 1.12 of the Sublease as well as various sections of the AHA Bylaws which give Anaks authority to maintain, operate and control the common areas. The parties agree that the provisions at issue are not ambiguous but do disagree as to their meaning.

Anaks construes Paragraph 1.12 of the Sublease to allow the maintenance fees to be used for "management" of the Development, including general corporate expenses. The pertinent section of Paragraph 1.12 states:

> Buyer agrees to pay ANAKS 1/131, of all the cost of maintaining, repairing and/or replacing these areas and the electrical generators and the water and sewer lines **including**, **without limitation**, the costs for construction works, repair and replacement of facilities and equipment and insurance premium covering the said facilities and equipment.

(Sublease ¶ 1.12) (emphasis added). Anaks justifies its broad interpretation of Paragraph 1.12 because it contains the term "including without limitation" in the same sentence delineating specific maintenance expenditures. Anaks argues that this term, when considered with other parts of the Agreement, allows Anaks to properly spend the maintenance fees on an office and support staff in Tokyo, corporate travel expenses, and various corporate professional fees, among others.

[5] For purposes of this Motion, Plaintiffs do not take issue with the maintenance fee funding the salaries of Anaks Saipan staff. While the term "Anaks Saipan staff" is not defined, as used at oral argument, the term most likely refers to employees in Saipan responsible for day-to-day operations of the Development and not corporate officers or executives.

Because the issue here involves interpretation of a general term following specific terms, the Court will employ the doctrine of *ejusdem generis*[6]. Under the doctrine of *ejusdem generis*, where general words follow specific words, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001); *see also Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (explaining that contractual terms are to be "known by their companions"); *see* Restatement (Second) of Contracts § 203(c) (1981).

The general term "including without limitation" does provide that the list in Paragraph 1.12 is nonexclusive. However, the term must be construed in light of the enumerated specific terms. In this instance, all of the specific terms describe common areas or facilities enjoyed by the Homeowners. Moreover, the placement of the general term in the sentence is telling. The general term follows the specific terms "electrical generators" as well as "water and sewer lines," and is preceded by less specific terms such as "construction works," and "repair and replacement of facilities." Therefore, the general term "including without limitation" serves as a transitional term connecting the agreement to "pay for the maintenance, repair and replacement of" specific commonly enjoyed facilities with the less specific "costs for construction works" of those facilities and equipment. In light of these more specific terms, the general term "including without limitation" operates to include costs related to construction, repair, replacement, and insurance of common areas and facilities enjoyed by the Homeowners. Thus, it is not a reasonable interpretation that this general term allows for the maintenance fees to be used for general corporate expenses.

Further, considering this general term in light of the other sections of the Agreement, including those which give Anaks the responsibility to manage and control the common areas, the result is unchanged. Anaks has a leasehold possessory interest in the common areas and an ownership interest in the facilities and equipment enjoyed in common by the Homeowners. Therefore, it is only reasonable that Anaks would manage and control these. Nonetheless, Anaks' corporate interests extend

[6] *Ejusdem generis* is defined as: "Of the same kind, class, or nature. . . . [W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary, p. 517 (6th ed. 1990).

beyond managing and controlling the common areas and facilities of the Development.

Anaks contends that such a construction of the Agreement is "absurd" because Anaks "was created to provide services at a profit to the [Homeowners]." The Court disagrees with this contention. If it had been the intention of the parties that Anaks would treat as "income" the amount collected from the maintenance fees in excess of that which was necessary to maintain the common areas, clear language reasonably susceptible of that interpretation would have been included in the Agreement. For example, the parties could have included a paragraph entitled "Management Fee" wherein they could have agreed that Anaks was to collect an income for managing the Development. However, no such language exists in the Agreement. Moreover, in light of Anaks' more obvious sources of income which include the sale and rental of units owned by the corporation, it is not a reasonable interpretation of the Agreement that Anaks would take corporate income from the maintenance fees described in Paragraph 1.12 of the Sublease.

In summary, the Court construes the Agreement as a whole to provide that the maintenance fees be used only for the maintenance, repair, replacement, and insurance of areas, facilities and equipment enjoyed in common by the Homeowners. Recognizing that personnel are required to bring about such maintenance, for the purposes of this Order, the salaries of the Saipan staff would also reasonably be included in this fee. Anaks does not dispute that it has been using the maintenance fees for corporate expenses such as travel between Japan and Saipan, as well as to maintain a corporate office in Tokyo. Because Anaks has been using the maintenance fees for general corporate expenses, the Court finds, as a matter of law, that Anaks has breached the terms of their Agreements with the Plaintiffs.

2. Statute of Limitations

Anaks contends that Plaintiffs' breach of contract claim is barred by the statute of limitations. Anaks correctly points out that a breach of contract claim has a six-year statute of limitations. *See* 7 CMC § 2505; *see also Century Ins. Co., Ltd. v. Guerrero*, 2009 MP 16 ¶ 7 ("[A] cause of action based upon a breach of contract . . . must be filed within the six-year time period specified in 7 CMC § 2505."). Anaks urges the Court to find all of Plaintiffs' breach of contract claims time barred because the contracts at issue were entered into around 1990 and their Complaint was not filed until 2008, well outside the limitations period.

The fallacy of Anaks' argument is realized by the fact that the Agreement requires the Homeowners to pay the maintenance fee on a monthly basis. Under the continuing-contract doctrine, where the terms of a contract call for periodic payments during a specified time, a cause of action may arise at the end of each period.[7] Therefore, the Commonwealth's statute of limitations only bars recovery of the breaches accruing more than six years prior to the filing of this suit. Thus, Plaintiffs' claims, as they relate to breaches occurring within the limitations period, are not barred.

3. Estoppel and Waiver

i. Equitable Estoppel

To establish a defense of equitable estoppel, "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." *In re Blankenship*, 3 NMI 209, 214 (1992).

Anaks argues that "Plaintiffs and their predecessors in interest have by their silence and acquiescence in the conduct of the use of the [maintenance] fee over an eighteen year period become estopped to complain at this late date as to its use." (Opp'n at 13.) The Court agrees with Plaintiffs that "[n]one of the elements for estoppel of the Plaintiffs have been established." (Reply at 12.)

Anaks fails to offer any admissible evidence that demonstrates Plaintiffs knew that Anaks had been spending the maintenance fee money on general corporate expenses. Therefore, Anaks cannot show that Plaintiffs intended their conduct to be acted upon or that Anaks had a right to believe that was intended. Further, Anaks utterly fails to state, let alone offer admissible evidence to show, that it was

[7] *See e.g., Teachers Retirement System of Georgia v. Plymel*, 676 S.E.2d 234, 240 (Ga. Ct. App. 2009) ("If the contract is divisible, the statute runs separately as to each payment when it becomes due, and the failure of one part does not void the remainder. If the . . . service, or thing is to be accepted by successive performances, then the contract may properly be held to be severable."); *Sodoro, Daly & Sodoro, P.C. v. Kramer*, 679 N.W.2d 213, 220 (Neb. 2004) ("It is well established that in an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation of the statute of limitations."); *Deason v. United States*, 54 Fed. Cl. 509, 512 (Fed. Cl. 2002) ("This court has long adhered to the view that a suit for compensation due and payable periodically is, by its very nature, a 'continuing claim' which involves multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due.").

ignorant of the true state of facts or that it relied upon Plaintiffs' conduct to its injury. Thus, Anaks' defense of equitable estoppel must fail.

ii. Waiver

"Waiver is a voluntary relinquishment of a known right, with knowledge of its existence and intent to relinquish it. Mere silence does not constitute a waiver unless there is an obligation to speak." *Del Rosario v. Camacho*, 2001 MP 3 ¶ 56. Moreover, waiver "is generally a question of fact, and becomes a question of law only when the undisputed facts could reasonably compel only one inference." *Id.*

The only argument Anaks makes for this defense is found in a single sentence in which Anaks states that the Anaks Homeowners Association had at one time raised the issue of Anaks using the maintenance fees for management expenses and had "received a satisfactory response and the issue was closed." (Opp'n at 13.) In their Reply brief Plaintiffs fail to respond to this argument. The Court is not troubled by this lack of a response because it is apparent that it is directly correlated to Plaintiffs' lengthy argument that Anaks' Declaration of Nakamoto be stricken for want of competency.

As stated above, paragraph 5 of Nishimura's Declaration has been stricken and will not be considered as admissible evidence and Anaks offers no other evidence to support their argument that Plaintiffs waived their right to bring suit for breach of contract. Accordingly, Anaks' waiver defense must fail.

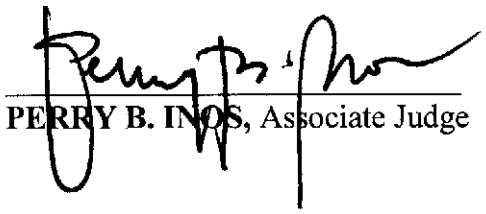
4. Joinder of Other Homeowners

Finally, Anaks argues that Plaintiffs' requested relief: (1) "will effectively close down the Development and eliminate the services provided to the overwhelming majority of owners []" and (2) "[i]f the court considers this to be anywhere close to being a rational request, it would appear that joinder of all other [Homeowners] is the appropriate course of action." (Opp'n at 14.) The Court recognizes that joinder of additional parties may be necessary at a future point in time. However, for the purposes of this Order, the issue is Anaks' liability to the named Plaintiffs.

V. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Strike the Declaration of Shuichi Nishimura is hereby **GRANTED IN PART**. Additionally, Plaintiffs' Motion for Summary Judgment Re Maintenance Fees is hereby **GRANTED**.

IT IS SO ORDERED this 2nd day of September, 2011.



PERRY B. INOS, Associate Judge