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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 ANAKS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

THIS MATTER came before the Court on March 17, 2011, for a hearing on the parties' motions for summary judgment. Anaks Resort Development, Inc. (hereafter, "Anaks"), was represented by Douglas F. Cushnie, Esq. Plaintiffs were represented by Timothy H. Bellas, Esq. Anaks is moving the Court to summarily adjudge that The Anaks Ocean View Hill Saipan (the "Development") is not a common interest community. Plaintiffs filed a cross-motion urging the Court to find that the Development is a common interest community.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Development is located in the Puerto Rico area of Saipan and is a housing complex consisting of multiple residential units which were 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.

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") asserting six causes of action[1] against Anaks including: (1) Count I for Mandatory Turn Over of Common Areas and Management to Homeowners; and (2) Count IX for Mismanagement and/or Failure to Make Proper Disclosures and Establish Reserves. Both of these counts rely upon "common interest community" rules contained in the Restatement (Third) of Property: Servitudes.[2]

Presently before the Court are both parties' motions for summary judgment. Anaks argues that, as a matter of law, the Development is not a common interest community and that the contracts control the relationship between the parties. (Anaks' Mot. at 14-16.) Further, Anaks contends that Plaintiffs are attempting to circumvent their contractual obligations by "dispos[sessing] Anaks from its leasehold interest" in the common area. (Reply at 7.) Conversely, Plaintiffs contend that the Development is a common interest community pursuant to the Restatement. (Pls.' Cross-mot. at 4-10.) The Court had

[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.)

[2] Count I relies on Restatement (Third) of Property: Servitudes §§ 6.2 (defining "common interest community"), 6.4 (enumerating powers of the common interest community), 6.5 (stating that fees for the use of common property must be reasonably related to the maintenance of that property), 6.11 (outlining the association's power to institute, defend or intervene in litigation on behalf of itself or its members in matters affecting the community), and 6.19 (describing a developer's duty to create a home owners association and turn over ownership and control of the common areas to the association or its members). Count IX relies on Restatement (Third) of Property: Servitudes § 6.20 (obligating a developer to "use reasonable care and prudence in managing and maintaining the common property" and to establish "reserves for the maintenance and replacement of common property.").

the benefit of oral argument and reviewed the parties' respective memoranda and exhibits attached thereto.

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

A. Legal Standard

"Summary judgment may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Century Insurance Co. v. Hong Kong Entertainment*, 2009 MP 4 ¶ 14. "A party moving for summary judgment bears the initial and the ultimate burden of establishing its entitlement to summary judgment. . . . If a movant is a defendant, he or she has the [] duty of showing that the undisputed facts establish every element of an asserted affirmative defense." *Furuoka v. Dai Ichi Hotel*, 2002 MP 5 ¶ 22.

> Once the moving party satisfies the initial burden, the non-moving party must respond by establishing that a genuine issue of material fact exists. If the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

Id. ¶ 24. "In making a summary judgment determination, the trial court is required to consider the evidence and inferences most favorable to the party opposing the motion." *Century*, 2009 MP 4 ¶ 14.

Summary judgment may be granted only when the court, after viewing facts and inferences in a light most favorable to the non-moving party, finds as a matter of law that the moving party is entitled to judgment. *Cabrera v. Heirs of De Castro*, 1 NMI 172, 176 (1990); *Rios v. Marianas Pub. Land Corp.*, 3 NMI 512, 518 (1993). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but…must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). "If the evidence set forth by the non-moving party is 'merely colorable…or [was] not significantly probative…summary judgment may be granted.'" *Eurotex, Inc. v. Muna*, 4 NMI 280, 284 (1995) (*citing Anderson*, 477 U.S. at 249-50).

> [T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in

> favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Anderson, 477 U.S. at 248-49. A trial court cannot weigh the evidence and make findings on disputed factual issues on a motion for summary judgment. *Rios v. Marianas Pub. Land Corp.*, 3 NMI 512 (1993).

When considering cross-motions for summary judgment, each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration. *Hickok v. Orange County Community College*, 472 F. Supp. 2d 469 (S.D. N.Y. 2006).

> The filing of cross-motions for summary judgment, with both parties asserting that there are no uncontested issues of material fact, does not vitiate the court's responsibility to determine whether disputed issues of material fact are present, since a summary judgment cannot be granted if a genuine issue as to any material fact exists.

Fair Housing Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (citation omitted).

B. Discussion

1. *Anaks Ocean View Hill Saipan Fits the Restatement Definition of a Common Interest Community.*

The basis for Anaks' motion is that the Development does not constitute a common interest community and one can not be "judicially created" because of the contractual relationship between Anaks and Plaintiffs. (Defs.' Mot. at 2.) Plaintiffs' central contention is that the Restatements contain the controlling law, and under these rules the Development is a common interest community. The Court agrees that the Development does meet the criteria for a common interest community under the Restatement; however, in this case, reliance on these rules requires caution.

Where CNMI law has not addressed an issue of law, the Court applies "the rules of common law, as expressed in the restatements of law . . . [and] as generally understood and applied in the United States . . . ." 7 CMC § 3401; *Ito v. Macro Energy, Inc.*, 4 NMI 46, 55 (1993). According to the

Restatement, a "common interest community" is a "development or neighborhood in which individually owned lots or units are burdened by a servitude" that cannot be avoided by nonuse or withdrawal. Restatement (Third) of Property: Servitudes § 6.2 (2000). These burdens include the payment for use or maintenance of property enjoyed in common. *Id.* Moreover, while "[m]ost common-interest communities have both commonly held property and mandatory membership associations, [] the existence of either is sufficient to constitute the property bound by the servitude requiring payment to a common-interest community." *Id.* at cmt. a.

In this case, it is undisputed that the Homeowners agreed to compulsory membership in the Anaks Homeowners Association and payment of a monthly maintenance fee used to maintain property enjoyed in common. Thus, pursuant to the aforementioned principals, the Development fits the criteria for a common interest community.[3] However, as discussed below, application of the Restatement rules cited by the parties in this case is a dubious proposition.

2. *The Restatement (Third) of Property: Servitudes Does Not Apply in this Matter.*

It is axiomatic that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1866). Said another way, "[t]he obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977). Given the contractual nature of the parties' relationship, the Court finds it erroneous that Plaintiffs base their arguments on rules of law which did not exist at the formation of their agreement.

There is no dispute that the original subleases were entered into in the early 1990's and that subsequent purchasers were bound by these original agreements. The rules of law cited by Plaintiffs were drafted nearly a decade later. Plaintiffs rely heavily on the Restatement (Third) of Property: Servitudes which was published in the year 2000. Restatement (Third) of Property: Servitudes, i-iv (2000). Therefore, the Court will not give weight to this authority, as it did not exist at the time of

[3] The August 29, 2011 order in this matter also recognized that the Development fit the Restatement criteria for "common interest community." *Ada v. Nakamoto*, Civ. No. 08-0029 (NMI Super. Ct. Aug 29, 2011) (Order Granting Plaintiffs' Motion to Dismiss Anaks' Counterclaims at 2-4).

contract formation. The covenants which burden the property at issue were created by contract and contained within the Sublease. Accordingly, general principals of contract construction control the Court's inquiry as to whether the parties intended to create a common interest community and whether there was an intention that the common areas would be owned by either AHA or its members.

3. *Traditional Common Law Doctrines for the Creation and Enforcement of Real Covenants and Equitable Servitudes Were the Controlling Law at the Time the Agreement Was Entered Into and Therefore Will be Used in Construing the Intent of the Parties.*

At the time the Agreement was entered into, traditional common law doctrines for the creation and enforcement of real covenants and equitable servitudes were the applicable law in the Commonwealth.[4] The obligation that the Homeowners pay a monthly maintenance fee for upkeep of common areas is a classic example of an affirmative real covenant. Because real covenants are created within written agreements, the court is to give effect to the original intent of the parties when interpreting the terms therein. *See* Restatement of Property § 531 (1944) (indicating that real covenants be construed in accordance with the intent of the covenanting parties). Moreover, covenants which impose restrictions, such as those found in the Agreement, have generally been enforced as equitable servitudes. *See e.g.*, *Peterson v. Beekmere, Inc.*, 283 A.2d 911, 918 (N.J. Super. Ct. Ch. Div. 1971).

In this case, Anaks included various covenants in the Agreement in order to establish and maintain the character of the Development. By consenting in writing to this Agreement, Plaintiffs have assented to these covenants. Given the contractual nature of this relationship, the parties were free to create any type of home-owner association they desired. The covenants agreed to were clearly intended to govern the Development for a long period of time, and thus the home-owner association created was authorized to amend the covenants as necessary.[5]

The Court need not conduct a lengthy analysis of the covenants under traditional common law doctrines at this time. The only issue before the Court is whether the Development is a common interest community, and if so, whether Anaks has a duty to turn over the common areas to AHA or its members.

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[4] *See* Restatement of Property, Chapters 44-47 (1944) and Restatement (Second) of Property, Chapter 16 (1977).

[5] The AHA Bylaws require the association to allow Anaks to adopt, amend or repeal the Rules and Regulations. (*See* AHA Bylaws ¶ 8.5; *see also* Rules and Regulations ¶¶ 1.2, 3.17.) The Bylaws may be amended by the Homeowners. (*See* AHA Bylaws ¶ 10.1; *see also* Rules and Regulations ¶ 1.2.)

As stated, the Development does fit the Restatement definition of "common interest community." Nevertheless, the rules contained in the Restatement (Third) of Property: Servitudes are inapplicable in construing the intent of the parties because those rules did not exist at the time of formation. Therefore, traditional common law concepts control the Court's analysis of whether the parties intended to create a common interests community and whether they intended that ownership of the common areas was to be turned over to AHA or its members. To accomplish this, the Court must look to the language of the Agreement.

4. *The Clear Terms of the Agreement Do Not Evince an Intent to Create a Common Interest Community or Turn Over Ownership of the Common Areas to AHA or its Members.*

Commonwealth law provides that in construing written instruments the "primary concern in contract interpretation is to determine and give effect to the intentions of the parties as expressed in the instrument . . . and the intent of contracting parties is generally presumed to be encompassed by the plain language of the contract terms." *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ 16 (citations omitted). Thus, "the language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent." *Id.* ¶ 17 (citation omitted). Moreover, "[w]here [a] lease is unambiguous and complete, there is generally no room for interpretation or judicial construction; and the provisions of a lease require no construction unless they are inconsistent, conflicting, or are found to be ambiguous." 51C C.J.S. *Landlord and Tenant* Section 232(1), p. 587. "[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 v. Public Sch. Sys.*, 4 NMI 85, 89 (1994) (citations omitted) (emphasis in original).

Further, 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 writing 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.").

In this case, 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"). These documents pertain to the same transaction because these documents 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.) Therefore, in order to ascertain the parties' intent with regard to the creation of a common interest community and ownership of common areas, the Court will construe the Sublease, AHA Bylaws, as well as the Rules and Regulations as one contract (hereafter "Agreement"). Neither of the parties claim that the Agreement is ambiguous and in a previous order in this case the Court has already determined that the Agreement is not ambiguous[6]. Therefore, the Court's inquiry is limited to the four corners of the Agreement.

The Agreement does not contain the term "common interest community." Nevertheless, the Agreement does mention the term "condominium," which is a type of common interest community. At the time the Agreement was entered into, condominiums were the only type of common interest community expressly recognized under Commonwealth law.[7] Paragraph 3.10 of the Sublease, entitled "No Condominium Created," specifically states that the parties did not intend to create a condominium. (Sublease ¶ 3.10.) Regardless, the Homeowners did agree to compulsory membership in the AHA and the payment of a monthly maintenance fee for upkeep of property and facilities enjoyed in common. (Sublease ¶ 1.12.) Thus, whether or not the parties intended to create a common interest community

[6] *Ada v. Nakamoto*, Civ. No. 08-0029 (NMI Super. Ct. Sept. 02, 2011) (Order Granting in Part Plaintiffs' Motion to Strike and Granting Plaintiffs' Motion for Summary Judgment at 8).

[7] The Commonwealth Uniform Condominuim Act took effect in 1983. *See* 2 CMC § 6101.

depends on how one defines "common interest community." As stated, the terms of the Agreement clearly fall within the definition found in the Restatement (Third) of Property: Servitudes; however, the parties could not have intended these rules to control as they had not yet been drafted. Furthermore, there is no common law definition of "common interest community." Many of the concepts found in the most recent Restatement come from state statutes or a model uniform act, not the common law.[8] Before the enactment of statutes concerning common interest communities, courts used traditional common law doctrine to construe agreements involving property used or enjoyed in common.[9]

Even if a common law common interest community did exist, the clear language of the Agreement controls the parties' intent regarding ownership of the common areas[10]. The Agreement contains a number of paragraphs indicating that the Homeowners had a right to "use" the common areas; however, there is no indication that the Homeowners would "own" these areas. The Agreement provides: "[Homeowners] shall have a right to ***use*** the common areas of the Development during the term of this Agreement. These common areas include, among other, community center, roads, parking spaces, swimming pools, tennis courts and green areas within the Development." (Sublease ¶ 1.12 (emphasis added).) Even more telling is the parties' agreement that Anaks would "at all times manage, operate and control the Common Areas . . . ." (AHA Bylaws ¶ 7.1.) Finally, if there is "any question regarding the ownership of any portion of the Residence or its fixtures and facilities, [Anaks] shall have

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[8] Restatement (Third) of Property: Servitudes § 6.2 Reporter's Notes to Common-interest community, Comment a. cites to *Mount Olympus Prop. Owners Ass'n v. Shpirt*, 69 Cal.Rptr.2d 521 (Cal.Ct.App.1997) (relying on California's Davis-Stirling Common Interest Development Act). The Restatement clarifies this reliance by stating that "[t]he definition of a common-interest community used in this section is broader than that used in California's Davis-Stirling Act, because it includes communities with mandatory membership associations empowered to enforce the servitudes whether or not there is common property." *Id.* Statutory Notes. Further, the rule establishing a duty upon the developer to transfer common property to the association or its members was patterned from sections of the Uniform Common Interest Ownership Act. *Id.* § 6.19 Reporter's Note ("This section is largely patterned after provisions of the Uniform Common Interest Ownership Act.").

[9] *See e.g.*, James L. Winokur, *Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1989 Wis. L. Rev. 1, 3 ("Servitudes often mandate continuing resident financing of owner association common area maintenance, thereby alleviating residents' individual maintenance burdens."); Olin L. Browder, *Running Covenants and Public Policy*, 77 Mich. L. Rev. 12 (1978); Jan Z. Krasnowiecki, *Townhouses with Homes Association: A New Perspective*, 123 U. Pa. L. Rev. 711, 717 (1975) ("Unfortunately, the law that relates to affirmative covenants presents the ordinary mortal one of the most confounding intellectual experiences he can suffer.").

[10] The Agreement defines "common areas" as "roads, parking spaces, walkways, swimming pools, tennis courts, green areas, and all other places made open by [Anaks] for the use of the residents of the Development." (AHA Bylaws ¶ 1.4; *see also* Sublease ¶ 1.12 (including community center).)

the sole rights to determine as to the ownership of such portion in question." (Ex. E ¶ 8 of Sublease.) Given the express language of the Agreement, the Court holds that the parties did not intend to create a common interest community or divest ownership of the common areas to AHA or its members.

In summary, the Development does fit the Restatement (Third) of Property: Servitudes criteria of a "common interest community." Nevertheless, these rules were not drafted when the Agreement was formed and therefore are not considered in construing the intent of the parties in creating a common interest community. The legal theories for Plaintiffs' Counts I and IX are entirely based on rules of law inapplicable to this case and therefore must be dismissed.[11] The common law is controlling in this case. There are no common law common interest communities outside of the contractual agreements containing the real covenants and equitable servitudes which bind the parties. The clear and unambiguous Agreement does not evince intent to create a common interest community or turn over ownership of the common areas to AHA or its members.

IV. CONCLUSION

For the reasons set forth above, Anaks' Motion for Summary Judgment is hereby **GRANTED**. and Plaintiffs' Cross-Motion for Summary Judgment is hereby **DENIED**. It is further **ORDERED** that Counts I and IX of Plaintiffs' First Amended Complaint be **DISMISSED**.

IT IS SO ORDERED this 13th day of Septemb er, 2011.

PERRY B. INOS, Associate Judge

[11] *See supra* note 2 and accompanying text. Moreover the Court recognizes that Anaks urges the Court to find that all the Counts in the Complaint are intertwined with common interest community allegations. However, the Court does not find this to be the case as only Counts I and IX rely on these allegations.