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**DISTRICT II**

September 20, 2017

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2016AP2121

Meadow Creek Association Inc. v. Menard, Inc.  
(L.C. # 2014CV1621)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Meadow Creek Association Inc. (Association) appeals from an order granting summary judgment to Menard, Inc., and denying the Association's motion to strike and motion for summary judgment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).<sup>1</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

We affirm the order of the circuit court and adopt it as our decision. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) (court of appeals may adopt circuit court opinion).

This case arises out of the management of Meadow Creek Shopping Center, and specifically, a dispute over the apportionment of property taxes between 2007 and 2012. In Meadow Creek, each store owns its building and a plot of land. The Association exists to coordinate construction and maintenance of common areas, including payment of property taxes on those common areas. Menard claims that the Association breached the contract governing the parties' relationship by overcharging for property taxes during those years. The circuit court agreed, finding a breach pursuant to the terms of the contract, and also found that the Association's account stated defense did not apply to the facts of this case as a matter of law. We agree.

We review a grant of summary judgment de novo, independently applying the same methodology as the circuit court. *See Estate of Sheppard v. Schleis*, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. There is no need to repeat the well-known methodology: the controlling principle is that summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See id.*; WIS. STAT. § 802.08(2).

The interpretation of a contract is an issue of law which we review de novo. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Where the terms of a contract are plain and unambiguous, we will interpret it as it stands. *Id.* Summary judgment is proper when the terms of a contract are unambiguous and the intent of the parties is clear. *See Energy Complexes, Inc. v. Eau Claire Cty.*, 152 Wis. 2d 453, 466-67, 449 N.W.2d 35 (1989).

A circuit court has broad discretion in making evidentiary rulings, including whether an affidavit submitted in support of summary judgment meets the requirements that it is made on personal knowledge and sets forth such evidentiary facts as would be admissible in evidence. *See Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We review such rulings “only to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion.” *Glassey v. Continental Ins. Co.*, 176 Wis. 2d 587, 608, 500 N.W.2d 295 (1993).

Here, each of the plaintiff-appellant’s contentions was carefully and thoroughly addressed by the circuit court. We find no erroneous exercise of discretion in the circuit court’s evidentiary decisions made in denying the plaintiff-appellant’s motion to strike. Our independent review of the summary judgment record, including issues of contract interpretation, breach of contract, account stated, and admission of affidavits, reveals no error of law.<sup>2</sup> Accordingly, we hereby adopt and incorporate as our decision the circuit court decision entered July 6, 2016.<sup>3</sup>

We further conclude that Menard is entitled to attorneys’ fees and costs incurred in this appeal based on the contractual “prevailing party” provision in the Declaration of Covenants, Conditions, Easements and Restrictions, Section 13.3. *See Estate of Kriefall v. Sizzler USA*

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<sup>2</sup> Because adoption of the circuit court’s decision is dispositive, we need not address Menard’s alternative arguments supporting the circuit court’s rulings.

<sup>3</sup> To the extent we have not addressed any other or new argument raised by the Association on appeal, the argument is deemed rejected. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (“The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.”); *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

*Franchise, Inc.*, 2012 WI 70, ¶72, 342 Wis. 2d 29, 816 N.W.2d 853 (While the “American Rule provides that parties to litigation typically are responsible for their own attorney fees,” an exception exists “where the parties contract for the award of attorney fees.”). Accordingly, we remand with directions to the circuit court to determine reasonable attorneys’ fees and costs to be awarded to Menard pursuant to the contract.

IT IS ORDERED that the order of the circuit court is summarily affirmed and the cause remanded with directions pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*