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DISTRICT III

November 22, 2022

To:

Hon. James M. Isaacson
Circuit Court Judge
Electronic Notice

Karen Hepfler
Clerk of Circuit Court
Chippewa County Courthouse
Electronic Notice

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Andrew M. Lorenz
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Evan M. Mayer
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Matthew S. Mayer
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1037-FT Heartland Contractors of WI, Inc. v. Willow Creek Master Homeowner's Association, Inc. (L. C. No. 2021CV231)

Before Stark, P.J., Hruz and Gill, JJ.

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).

Heartland Contractors of WI, Inc., appeals from a declaratory judgment interpreting the Third Amendment to the Willow Creek Declaration of Easements, Conditions, Covenants and Restrictions. Pursuant to this court's order of July 12, 2022, and a presubmission conference, the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17(1) (2019-20).[1] Upon review of those memoranda and the record, we affirm the judgment of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On July 14, 2008, Westwood Land Company, LLC, recorded a Declaration of Easements, Conditions, Covenants and Restrictions ("the Declaration") with the Chippewa County Register of Deeds. The Declaration, which listed Westwood as the "Developer," concerned a planned development that would include both housing units and shared common property. The Declaration incorporated the Willow Creek Master Homeowner's Association, Inc., ("the HOA") as the master association for the development.

Section A-4)B)1) of the Declaration empowers the HOA to levy assessments against each lot in the development, stating:

> The Master Association shall levy periodic general assessments ("General Assessments") against each Lot for the purpose of maintaining a fund from which Common Expenses may be paid. General Assessments shall be due in advance on an annual basis, or in such other manner as the Master Association may set forth in the Bylaws. Payments of the annual General Assessments shall be made within fifteen days of the date due as determined by the Master Association. Any General Assessment not paid when due shall bear interest at a rate of ten percent (10%) until paid and, together with interest, collection costs and reasonable attorneys' fees, shall constitute a lien on the Lot on which it is assessed.

(Formatting altered.) At the time the Declaration was recorded, Westwood owned all of the real estate that was subject to the Declaration. Section A-4)H) of the Declaration states, in pertinent part: "Under no circumstances shall the Developer have any liability for any Master Association expense after the date the Developer turns over control to the Master Association pursuant to Section C-8 below." Section C-8 of the Declaration, in turn, sets forth the procedure by which the developer may turn over control of the development to the HOA.

A Second Amendment to the Declaration was recorded on August 10, 2018. As relevant here, the Second Amendment named Heartland, Westwood's successor in interest, as the developer.

A Third Amendment to the Declaration was subsequently recorded on February 13, 2020. As part of the Third Amendment, Lot 25 of the development was reconfigured as Outlot 1 and Lots 1 through 15, and these lots were reclassified as "Willow Creek Townhomes." Among other things, the Third Amendment sought to "clarify apportionment of expenses for the Willow Creek Townhomes." As such, the Third Amendment states that Section A-4)B)1) of the Declaration "is hereby amended in its entirety as follows:"

> The Master Association shall levy periodic general assessments ("General Assessments") against each Lot for the purpose of maintaining a fund from which Common Expenses may be paid. *Notwithstanding anything herein to the contrary*, the General Assessments for lots 1 – 15, inclusive, of Willow Creek Townhomes … (each a "Townhome Lot" and collectively, the "Townhome Lots") may be equitably adjusted, whether increased or decreased, for the Common Expenses solely associated with Outlot 1 of Willow Creek Townhomes … of which the Owner of each Townhome Home Lot has a one-fifteenth (1/15th) interest ….

(Formatting altered; emphasis added.)

On August 7, 2020, Heartland turned over control of the development to the HOA. Since that time, the HOA has levied assessments against Heartland for the five lots that Heartland owns in Outlot 1 of Willow Creek Townhomes. The HOA has not levied assessments against Heartland for the other lots that Heartland owns in the development. Heartland began paying the assessments in August 2020, but it disputed the HOA's right to collect the assessments. In September 2021, Heartland filed the instant lawsuit seeking a declaratory judgment that it "has no obligation to pay the fees demanded by" the HOA.

Following briefing by the parties, the circuit court issued a written decision concluding that under the unambiguous language of the Third Amendment, Heartland is required to pay assessments for the lots that it owns in Outlot 1 of Willow Creek Townhomes. The court subsequently entered a judgment declaring that Heartland and its successors are "responsible for payment of maintenance fees and dues for each and every lot they own in the defined 'Outlot 1' as created by the Third Amendment." Heartland now appeals.

The decision whether to grant a declaratory judgment is committed to the circuit court's discretion. *See* ***Praefke v. Sentry Ins. Co.***, 2005 WI App 50, ¶5, 279 Wis. 2d 325, 694 N.W.2d 442 (2004). "When the exercise of discretion depends upon a question of law, however, we review the question independently." ***Id.*** In this case, the parties agree that the Declaration and the Third Amendment are contracts and that standard rules of contract interpretation therefore apply. The interpretation of a contract presents a question of law for our independent review. ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586.

As noted above, Section A-4)H) of the Declaration states, in relevant part: "Under no circumstances shall the Developer have any liability for any Master Association expense after the date the Developer turns over control to the Master Association pursuant to Section C-8 below." It is undisputed that Heartland turned over control of the development to the HOA on August 7, 2020. It is further undisputed that, had the language of the Declaration not been amended, Section A-4)H) would have prohibited the HOA from levying any assessments against Heartland after that date.

The Third Amendment, however, modified Section A-4)B)1) of the Declaration to state that assessments may be levied against the lots in Outlot 1, "[n]otwithstanding anything herein to

the contrary." Heartland does not dispute that, standing alone, the Third Amendment would allow the HOA to levy assessments against each of Heartland's five lots in Outlot 1. Heartland instead argues that even though the Third Amendment allows the HOA to levy assessments against those lots, permitting such assessments would conflict with the "blanket prohibition" in Section A-4)H) of the Declaration. Heartland contends that Section A-4)H), rather than the contradictory language in the Third Amendment, is controlling and should therefore be given effect.

We reject Heartland's argument for two reasons. First, as the circuit court aptly noted, the plain meaning of the word "notwithstanding" is "in spite of." *See Notwithstanding*, WEBSTER'S THIRD NEW INT'L DICTIONARY (unabr. 1993).[2] The relevant language from the Third Amendment therefore permits the HOA to levy assessments against Heartland's lots in Outlot 1 "[in spite of] anything herein to the contrary." Thus, in spite of any language to the contrary in the Declaration, including the language in Section A-4)H), the Third Amendment unambiguously allows the HOA to levy assessments against Heartland's lots in Outlot 1. Stated differently, the Third Amendment's language permitting the assessments against Heartland's lots in Outlot 1 "takes precedence over" and "negates" the contrary language in Section A-4)H). *See* ***W. Alton Jones Found. v. Chevron U.S.A. Inc.***, 725 F. Supp. 712, 730 (S.D.N.Y. 1989) (stating that the term "notwithstanding" "means 'take[s] precedence over' and thus negates any contrary provision" (citation omitted)).

[2] "When determining the ordinarily understood meaning of a word or phrase, it is appropriate to look to definitions in a recognized dictionary." ***Just v. Land Reclamation, Ltd.***, 155 Wis. 2d 737, 745, 456 N.W.2d 570 (1990).

Second, we agree with the HOA that Heartland's reliance on a provision from the original Declaration to negate the language of the subsequent amendment is flawed. The fact that parties have entered into a contract "does not eliminate their continuing right under the law to contract with each other." ***Lakeshore Com. Fin. Corp. v. Drobac***, 107 Wis. 2d 445, 458, 319 N.W.2d 839 (1982). When a contract is modified, "the effect of the modification may be the creation of a new contract," which "consists of not only the new terms agreed upon, but also as many of the terms of the original contract *which were not abrogated by the modification*." ***Estreen v. Bluhm***, 79 Wis. 2d 142, 152, 255 N.W.2d 473 (1977) (emphasis added). Here, the plain language of the Third Amendment unambiguously abrogates Section A-4)H) of the Declaration by providing that, in spite of any language in the Declaration to the contrary, the HOA may levy assessments against Heartland's lots in Outlot 1. Heartland's continued reliance on Section A-4)H) to argue that it cannot be liable for assessments under any circumstances is therefore misplaced.

Upon the foregoing,

IT IS ORDERED that the judgment is affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals