STATE OF MICHIGAN

COURT OF APPEALS

SLG-TC DEVELOPMENT LLC,

Plaintiff-Appellant,

v

PENINSULA BAY RESORT CO-OWNERS ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
June 25, 2020

No. 350010
Grand Traverse Circuit Court
LC No. 2019-034881-CH

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Plaintiff, SLG-TC Development, LLC, appeals by right the trial court's order granting summary disposition, pursuant to MCR 2.116(C)(8), in favor of defendant Peninsula Bay Resort Co-Owner's Association (the Association). This matter arises out of plaintiff's asserted development or ownership rights to a "Proposed Future Building B" in the Peninsula Bay Resort condominium. This appeal only concerns plaintiff's quiet title claim; plaintiff explicitly relinquished any other claims on appeal. Plaintiff (through its original principal) purchased certain conditional development rights from the original developer of the condominium, and the gravamen of this case is whether those conditions have expired, thereby divesting plaintiff of any further interest in "Building B." We affirm.

I. BACKGROUND

The Peninsula Bay Resort Condominium project ("the Project") was originally developed by the Peninsula Bay Resort Condominium, LLC ("the Developer"). The Project's Master Deed was executed on December 29, 2004. The Master Deed was recorded on January 4, 2005. The Master Deed provided that the project consisted of 30 condominium units, but the developer had the option to expand the project to include up to 150 units, which could be added "from time-to-time within a period ending not later than six years after the initial recording of the master deed." Specifically, the developer could increase the number of units in the Project "by the addition of all or any portion of the future development area and the establishment of units on such area" or "by the conversion of all or any part of the common elements designated as 'convertible areas' on the

condominium subdivision plan into additional condominium units and/or limited common elements appurtenant to such units." The Master Deed also provided that the developer's rights were assignable.

Attached to the Master Deed was a condominium subdivision plan. It contained a "survey & floodplain plan" that reflected a "Building 'A' under construction" and an existing building to its west "to be removed." It also included a "site plan" and a "utility plan" that both depicted a "Building A" and a "Proposed Future Building B" to the west, with a pool between the two buildings. Finally, it included six pages of floor and section plans for "Building A." The plans for "Building A" depicted a total of 30 units. There were no plans included for a "Building B."

The Developer apparently encountered financial difficulties, and on July 25, 2007, a receiver was appointed by the Grand Traverse County Circuit Court, Hon. Thomas G. Power, to assume control of the Project. On November 16, 2007, the receiver conveyed the Developer's "construction and establishment" rights to "Proposed Future Building B" to Dr. Sham L. Gupta, for "over a million dollars," subject to some design limitations not relevant to this appeal. On December 11, 2007, a First Amendment to Master Deed was recorded, reciting the receivership and the conveyance to Gupta. The First Amendment explicitly stated that Gupta was not a "successor developer" and had only acquired the original Developer's rights "for the purpose of facilitating 'Developer's' construction and establishment of" up to 25 condominium units within "Proposed Future Building B."

On April 30, 2009, Gupta conveyed his ownership and development interests in the Project to plaintiff, an LLC of which Gupta was the manager. On January 4, 2011, plaintiff recorded a "Second Amendment," which was actually the *third* amendment, to the Master Deed ("the Third Amendment").[1] In the Third Amendment, plaintiff recognized that the six-year limitation on developing additional options provided by the original Master Deed would expire on January 4, 2011,[2] and stated that it was exercising that option to develop 25 additional units. Attached to the Third Amendment was an expansion to the original site plan, now including floor plans for a "Building B." Plaintiff asserts that this Third Amendment "legally created the units in Building B" and made plaintiff the recognized owner of those units. However, no actual construction had taken place.

On March 21, 2011, a Fourth Amendment to the Master Deed was recorded, which only altered how the Condominium bylaws could be changed and seemingly has no relevance to this appeal. Defendant contemporaneously "threatened to file a lawsuit if Plaintiff did not formally deny its 'developer interests' conveyed pursuant to the Receiver and Dr. Gupta." Defendant's then-President, Raymond Bologna, recorded an affidavit explaining that defendant refused to recognize the Third Amendment because defendant had not been made aware of any assignment

[1] We will refer to this document as the "Third Amendment" because there is no dispute that it was, in fact, the third amendment. However, there is some inconsistency in the various documents and by the parties as to referring to this document as the second or third amendment. The true second amendment seemingly has no relevance to this appeal.

[2] This is the same date upon which the Third Amendment was recorded.

of rights. Bologna also averred that plaintiff's rights had expired in any event because no construction of any condominium units had commenced for "Proposed Future Building B" or the "Future Development Area" within the six years specified by the original Master Deed.

On August 15, 2011, both parties jointly executed a Fifth Amendment to Master Deed, which was explicitly intended "to resolve their difference and clarify and formalize [plaintiff]'s rights as set forth in this Amendment." In relevant part, the parties agreed that "physical construction, if any, shall commence with respect to 'Proposed Future Building B' not later than January 4, 2017"; plaintiff agreed that it had no right to withdraw any property from the Project, and defendant otherwise ratified the Third Amendment. The Fifth Amendment was recorded on November 10, 2011.

No construction ensued due to the economic conditions at the time, and Gupta passed away in 2013. Gupta's widow was left as plaintiff's only member, and she sought to sell plaintiff's interest in Building B. In late 2016, a potential purchaser was found, and the purchaser met with defendant, seeking to further amend the Master Deed to extend the deadline for commencing construction. On December 15, 2016, defendant's counsel sent a letter explaining that it "does not have the power to extend" the January 2017 deadline, but "it is willing to recommend to the membership of the Association that the Master Deed be amended to extend the deadline by one year," subject to a number of conditions. Plaintiff contends that some of the conditions were impossible to meet, but that at the time, it nevertheless believed an agreement could be worked out. On December 12, 2017,[3] plaintiff's counsel sent a letter to defendant accepting some of the conditions but refusing others, and expressing the hope that further cooperation was possible. Defendant declined to consider the matter any further.

In relevant part, plaintiff asserted a claim to quiet title to the unbuilt Building B and enjoin defendant from building a pool on the site. Defendant contends that because plaintiff missed the January 4, 2017, deadline to which it had agreed, and defendant was never obligated to extend the deadline, that any developer rights plaintiff held lapsed. Plaintiff argued in response that it still owned the actual real estate underlying Building B and the legally formed condominium units, and there was no legal basis for the real estate or the legal units to revert to defendant's ownership. The trial court held a hearing, at which the parties generally argued consistent with their arguments on appeal. The trial court ruled that plaintiff's actions, in the absence of commencement of physical construction, were insufficient to establish the condominium units, so it granted summary disposition in favor of defendant. This appeal followed.

II. STANDARD OF REVIEW

Actions to quiet title are equitable in nature. MCL 600.2932(5). Ordinarily, this Court would review for clear error the factual findings of a court sitting in equity, and it would review de novo as a question of law whether equitable relief was proper under those facts. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

[3] Thus, *after* the deadline specified in the Fifth Amendment to the Master Deed.

However, this appeal is from a grant of summary disposition. A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. This Court may affirm a grant of summary disposition on grounds that differ from those relied upon by the trial court. *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2005).

The interpretation and application of statutes, rules, and legal doctrines is also reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A condominium master deed is in the nature of a contract, so its interpretation and construction are also reviewed de novo as a matter of law. See *Rossow v Brentwood Farms Devel, Inc*, 251 Mich App 652, 656-659; 651 NW2d 458 (2002); *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009). Because this claim is therefore founded upon a contractual issue, the instruments attached to the complaint are considered part of the "pleading" and should be considered by the reviewing court. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 767 NW2d 633 (2003).

III. ANALYSIS

The gravamen of plaintiff's arguments is that its recordation of the Third Amendment legally created the condominium units in Building B by converting them from common elements, and although it admittedly missed the deadline for construction, the condominium units nevertheless exist and cannot revert back to defendant's ownership as common elements. Therefore, although plaintiff may not have a right to begin construction, defendant does not have a right to make use of the Building B property. Plaintiff aptly describes the resulting situation as a "mess," but concludes that it is now up to the parties to return to negotiations. We disagree.

A. RIGHTS RECEIVED BY GUPTA FROM THE RECEIVER

The parties generally agree that plaintiff's rights, whatever they are, devolve from the conveyance of developer's rights from the Receiver to Gupta. Plaintiff is essentially a subrogee, and therefore has no greater rights than Gupta, who in turn could have received no greater rights than the original Developer; therefore, plaintiff could not by conveyance expand those rights. See *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17, 24-25; 614 NW2d 634 (2000); *Stevens v Royal Oak Twp, Oakland Co*, 342 Mich 105, 107; 68 NW2d 787 (1955). In relevant part, the Receiver's Deed provides as follows:

> [The Receiver] does hereby assign, transfer and convey to Sham L. Gupta . . . certain rights and powers more fully specified below, which are granted to and/or reserved by [the Developer of the Project]. *The rights and powers which are hereby transferred, assigned and conveyed by the Receiver to Gupta are those which are granted to and/or reserved by the "Developer" within the Master Deed, for the purpose of facilitating "Developer's" construction and establishment of condominium units within the areas depicted in the Master Deed as "Proposed Future Building B" and the "Future Development Area" (together with attendant*

> *and associated improvements related to the foregoing).* Any exercise of such rights and powers by Gupta or his successors and assigns shall be subject to the restrictions that (i) no more than 25 condominium units may be established within the area depicted in the Master Deed as "Proposed Future Building B," (ii) no more condominium units may be established within the "Future Development Area" than the number authorized by the Master Deed and pertinent land use approvals by affected government entities, and (iii) any such units and associated common elements shall be constructed of identical architecture and color scheme, and shall be of equal or superior material and construction quality, as the existing "Building A" and associated improvements. Any exercise and implementation by Gupta of such developer rights shall be effected in compliance with the Master Deed and all applicable government approvals, statutes, ordinance [sic] and regulations, which shall encompass by way of example and not limitation, the obligation and expense of establishing sufficient vehicular parking facilities. [(Emphasis added).]

We agree with plaintiff that the Receiver's Deed does not condition plaintiff's rights upon "construction and establishment" of condominium units. Rather, it states that it conveys those powers that were held by the Developer under the Master Deed "for the purpose of . . . construction and establishment of condominium units" in the Building B site. Rather than imposing a condition precedent to the conveyance of developer's rights, the Receiver's Deed imposes a limitation on the scope of the powers it actually and presently conveys. In other words, the Receiver's Deed conveys to Gupta full developer's rights to the Building B site and to nowhere else in the Project, and the conditions imposed on those rights pertain to scope and do not include an "actual construction" requirement.

To illustrate the above conclusion, the Master Deed provides other powers to the Developer, such as making certain modifications to the design of the condominium units or reducing the number of condominium units in the project. The most sensible reading of the Receiver's Deed is that those rights are *not* conveyed, because they have nothing to do with "construction and establishment" of condominium units within the Building B site. Conversely, the Master Deed also provides that expansion of the Project by adding units is not mandatory, and the Developer is not obligated to engage in any such expansion "nor to construct any particular improvements on the added property." Thus, the Receiver's Deed likewise imposes no obligation to convert common elements into additional units "nor to construct particular improvements on any converted unit." It would be inconsistent with the Master Deed to condition developer's rights upon actually constructing anything.

The Receiver also recorded the First Amendment to the Master Deed. The language of the Receiver's Deed is largely mirrored in ¶ 1(a) of the First Amendment. Under ¶ 1(d), the Receiver provided that the First Amendment was to

> Reflect that Gupta is not a "successor developer," as Gupta has hereby acquired only the rights and powers granted to and/or reserved by the "Developer" as specified in Paragraph 1(a) above, and has otherwise acquired title to only one Unit in the Condominium. In the event that Gupta or his successors should construct and establish condominium units within "Proposed Future Building B" or the "Future Development Area," they shall possess the rights, duties, obligations and

> liability of the "Developer" only with respect to those condominium units which they so construct and establish[.]

The First Amendment also specified in ¶ 2 that

> Except as otherwise provided in Paragraph 1 above, the LLC shall retain any and all other developer rights, interests and powers relating to the Condominium, including but not limited to all such rights, interests and powers relating to (i) "Building A" and all Condominium Units situated therein, (ii) all associated limited and general common elements and (iii) all affairs of the Peninsula Bay Resort Condominium Association.

Thus, the First Amendment unambiguously provides and clarifies that plaintiff only held *title* to one condominium unit. More problematic is how to interpret the last sentence of ¶ 1(d).

There is no dispute that the last sentence of ¶ 1(d) imposes a condition. Defendant argues that the sentence makes plaintiff's developer rights to any units in Building B conditional upon first establishing and constructing those units. Plaintiff argues that the sentence merely precludes plaintiff from being considered a developer as to any aspect of the Project other than any units within Building B that are eventually established and constructed. We believe plaintiff's interpretation is the significantly more reasonable. First, as discussed, the language in the Receiver's Deed (mirrored in ¶ 1(a)), especially in light of other language in the Master Deed, seems to specify a purpose rather than a condition precedent. Secondly, ¶ 2 seems to treat the *entirety* of ¶ 1 as an indivisible whole, so the last sentence of ¶ 1(d) should not be read in isolation from ¶ 1(a). Thus, the last sentence of ¶ 1(d) limits the scope of plaintiff's developer rights, not the existence of those rights.

We therefore conclude that nothing in the Receiver's Deed or the First Amendment preconditions plaintiff's developer rights on physically constructing any condominium units. However, that does not resolve this matter. Importantly, no language in the Receiver's Deed appears to convey any fee title. Consistently, the First Amendment conclusively clarifies that that plaintiff only held title—in other words, fee ownership—to a single unit in the Project. The Receiver's Deed conveyed certain developer rights, but as noted, plaintiff could not have received greater rights than those originally held by the Developer. See *Adams*, 463 Mich at 24-25; *Stevens*, 342 Mich at 107. It is therefore necessary to determine what rights the Developer held.

B. RIGHTS HELD BY THE ORIGINAL DEVELOPER

As an initial matter, a condominium project consists only of "units" or "common elements," and nothing else. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 146-147; 783 NW2d 133 (2010). A reservation of a right for a developer to engage in subsequent development does not include any present property right to any units. *Id*. As discussed, the Master Deed provided that the Developer could choose, but was not required, to add units to the Project or convert common areas into additional units in the Project. In other words, the Developer (and plaintiff by conveyance) possessed an *option*, not a present fee ownership interest. An option is a sufficient interest in property to be insurable. See *Crossman v American Ins Co of Newark, NJ*, 198 Mich 304, 311; 164 NW 428 (1917). However, an option is, at most, only a conditional

property right. *Oshtemo Twp, Kalamazoo Co v City of Kalamazoo*, 77 Mich App 33, 37-38; 257 NW2d 260 (1977).

Furthermore, the Master Deed provided a six-year deadline after the recordation of the Master Deed within which to exercise that option, consistent with the requirements of MCL 559.131(g). Even if the Developer (and plaintiff by conveyance) possessed a vested, immediate, fee property right, the retention of that right may be conditioned upon the performance of an affirmative act within a particular time period. See *Cove Creek Condo Ass'n v Vistal Land & Home Devel, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 342372), slip op at pp 11-12. Thus, the Developer, or any successor or assignee of the Developer, was required to exercise its option to expand the Project or convert common elements into more condominium units by January 4, 2011, or it would lose that right forever.[4]

This is significant because plaintiff makes much of its "property rights" and its "million dollars plus" investment. However, that investment unambiguously consisted only of *purchasing an option*, not purchasing any present ownership of any real property. If plaintiff subsequently failed to properly exercise that option (for example, by missing a critical deadline) and thereby became unable to convert its development rights into actual property rights, then it was not "divested" of its investment—rather, it simply mishandled its investment and brought any loss upon itself. If, hypothetically, plaintiff had missed the deadline, plaintiff would not have failed to receive value for its money: it was no more "divested" of its investment than a farmer who, a day before harvest, sets fire to his own field.

Nevertheless, plaintiff did record the Third Amendment within the deadline. To the extent the Third Amendment, by itself, expanded plaintiff's powers, it would have been a nullity. See *Adams*, 463 Mich at 24-25; *Stevens*, 342 Mich at 107. However, defendant "ratified" the Third Amendment to the extent the Third Amendment is not contradicted by the Fifth Amendment. As noted, master deeds are in the nature of contracts. *Rossow*, 251 Mich at 656-659; *Rudell Estate*, 286 Mich App at 402-403. Therefore, to the extent the Third Amendment did exceed plaintiff's powers *and* was not explicitly or implicitly rescinded by the Fifth Amendment, plaintiff may indeed have potentially gained rights beyond those conveyed by the Receiver. Plaintiff may even have gained rights beyond those held by the original Developer. The question becomes whether the Third Amendment, *as modified by the Fifth Amendment*, created in plaintiff any unconditional property rights.

C. RIGHTS UNDER THE THIRD AMENDMENT

To first address the Third Amendment standing alone: the Third Amendment specified that plaintiff was choosing to exercise its option to convert common elements into additional condominium units "pursuant to Section 9 of the original Master Deed . . . and Section 31 of the

[4] Plaintiff correctly observes that the trial court misstated when the deadline expired, but the trial court nevertheless correctly recognized that plaintiff's recordation of the Third Amendment was timely, so any misstatement by the trial court as to the date is harmless.

Act [sic[5]]." Under the original Master Deed, that "increase in the number of units by exercise of the developer's conversion rights will be given effect by an appropriate amendment(a) to the master deed." Consistently, MCL 559.138 provides that "[i]nterests in the common elements shall not be allocated to condominium units to be created within convertible land or within additional land until the master deed is duly amended and an amended condominium subdivision plan depicting the new condominium units is recorded." Pursuant to MCL 559.141(2), a developer is required to promptly record an amendment to the master deed reflecting any such conversion. By recording the Third Amendment, plaintiff appears to have complied with both statutes.

"An expansion, contraction, or conversion of land or space in accordance with this act and the condominium documents shall be deemed to have occurred at the time of recording of an amendment to the master deed embodying all essential elements of the expansion, contraction, or conversion." MCL 559.143. Furthermore, "Upon the establishment of a condominium project each condominium unit, together with and inseparable from its appurtenant share of the common elements, shall be a sole property subject to ownership, mortgaging, taxation, possession, sale, and all types of juridical acts, inter vivos or causa mortis independent of the other condominium units." MCL 559.161. Consequently, it appears that, unless altered or rescinded by the Fifth Amendment, plaintiff's recordation of the Third Amendment successfully and immediately effectuated the conversion of the "Proposed Future Building B" site into legally extant condominium units.

We note, however, that although this seems to support plaintiff's argument, it also poses some concerns. Importantly, each of those condominium units would have been subject to separate taxation. See *Paris Meadows*, 287 Mich App at 147-149. There is no evidence suggesting that plaintiff had been paying taxes on any Building B units since their alleged creation on January 4, 2011. Therefore, the other co-owners would instead have been paying property taxes on their share of the common elements as including the Building B site. Ultimately, we need not consider the potential tax implications, but the lack of evidence that plaintiff has been paying taxes on the supposed Building B condominium units weighs heavily against their existence.

D. EFFECT OF THE FIFTH AMENDMENT

As an initial matter, because the Fifth Amendment explicitly discusses making alterations to the Third Amendment itself, the most reasonable reading of the Fifth Amendment is that its alterations were intended to be retroactive. In relevant part, the Fifth Amendment states as follows:

> 3. Anything in the above-referenced First Amendment to Master Deed and the above-referenced Receiver's Deed notwithstanding:

[5] "Section 31 of the Act," means MCL 559.131. However, MCL 559.131 merely enumerates several matters that must be contained in the Master Deed if a condominium project includes convertible areas. We suspect "Section 31" to be a scrivener's error, and it was supposed to have referred to either Section 38 (MCL 559.138) or Section 41 (MCL 559.141), both of which provide for effectuating the conversion of common elements into additional condominium units by, in relevant part, amendment to the master deed.

a. physical construction, if any, shall commence with respect to "Proposed Future Building B" not later than January 4, 2017. Once commenced, physical construction shall continue diligently until completion. Physical construction of "Proposed Future Building B," including landscaping and parking facilities, shall be substantially complete and an occupancy permit issued not later than the first to occur of eighteen months of [sic] commencement or July 4, 2018.

b. construction of "Proposed Future Building B" and related improvements shall be consistent with the site plan as approved by East Bay Township, if any. No changes may be made to the approved site plan unless such changes shall be approved in writing by the Association, which approval will not be withheld unreasonably.

c. except as to completion of physical construction which has been timely commenced as set forth in Section 3(a), above, SLG-TC shall have no right to construct "Proposed Future Building B" or to extend the time for the exercise of SLG-TC's exercise of [sic] rights under the First Amendment to Master Deed and the Receiver's Deed, beyond January 4, 2017.

4. In consideration of the agreement of the parties, and the clarification and amendment of the Master Deed herein set forth, SLG-TC hereby confirms and agrees that it obtained no rights under Section 67 of the Condominium Act by virtue of the Receiver's Deed recorded December 11, 2007 at Document 2007R-22604 or by virtue of the First Amendment to Master Deed, recorded on December 11, 2007 at Document 2007C-00067. As such, SLG-TC has no right to withdraw any property at any time from the Peninsula Bay Resort Condominium Project.

Defendant "otherwise" ratified the Third Amendment, subject to the other provisions in the Fifth Amendment. The Fifth Amendment also contained a "table of units and percentages" enumerating 25 units in Building B and 30 units in Building A, explicitly replacing the list contained in the Third Amendment.

As discussed, the conversion of common elements into additional condominium units must be effectuated by an "appropriate amendment" to the Master Deed, and it must include a list of the units, MCL 559.138 and MCL 559.141. Nothing in the Master Deed explains what makes an amendment "appropriate." Under MCL 559.138, such an amendment must "contain" a list of units, and under MCL 559.141, the amendment must "describe[] the conversion." Thus, the "table of units and percentages" in the Fifth Amendment is clearly a mandatory prerequisite to the conversion of common elements into condominium units. In light of the other provisions of the Fifth Amendment, however, we do not believe the table is conclusive or sufficient (although it might be sufficient under other circumstances).

We take particular note that the deadline specified in the Fifth Amendment is January 4, 2017, which is precisely six years after the deadline created by the original Master Deed and the recordation date of the Third Amendment. This is significant because the Condominium Act sets forth several six-year limitations on the rights of developers to exercise various options. See MCL 559.131(g); MCL 559.132(c); MCL 559.133(c); MCL 559.167(3). Notwithstanding the fact that plaintiff acquired no rights under MCL 559.167(3), we think it significant that part of that subsection provides:

> If the master deed confers on the developer expansion, contraction, or convertibility rights with respect to condominium units or common elements in the condominium project, then the time period is 10 years after the recording of the master deed *or 6 years after the recording of the amendment to the master deed by which the developer last exercised its expansion, contraction, or convertibility rights*, whichever period ends later. [(Emphasis added).]

That statute refers to withdrawing undeveloped land from the project, so it would not be directly applicable even if plaintiff had not disclaimed any rights under that statute. However, it is almost certainly no coincidence that the January 4, 2017, deadline is precisely "6 years after the recording of the amendment to the master deed by which the developer last exercised its . . . convertibility rights."

Furthermore, the Fifth Amendment specifies that not only would plaintiff lose any right to construct Building B if construction did not commence by the deadline, but plaintiff would also have no right "to extend the time for the exercise of [its] rights" under the First Amendment and the Receiver's Deed. The Fifth Amendment's references to physical construction might, standing alone, imply recognition that the Building B condominium units had been legally created. However, the Fifth Amendment refers to "physical construction, *if any*" and that plaintiff has "*no right*" to construct the building after the January 4, 2017, deadline (emphases added). Taken together, the most reasonable reading of the Fifth Amendment, when also read in light of the various six-year deadlines in the Condominium Act and the lack of evidence that plaintiff paid any taxes on any Building B condominium units, is that the parties created a new deadline for plaintiff to exercise its developer's option and a requirement that plaintiff must do so by commencing physical construction of Building B. Plaintiff's argument to the contrary is, at its core, an argument that "no right" does not actually mean "no right."

Plaintiff argues the above conclusion is impermissible because MCL 565.5 provides, "[n]o covenant shall be implied in any conveyance of real estate, except oil and gas leases, whether such conveyance contain special covenants or not." However, neither that statute nor any of its similarly-worded predecessors have ever been "so literally applied as to defeat the clear intent of the parties as gathered from the context of the instrument." *Cinderella Theatre Co v United Detroit Theatres Corp*, 367 Mich 424, 429-430; 116 NW2d 825 (1962). Thus, obligations may be found in an instrument despite not being explicitly stated in so many words, so long as "the obligations [are] logically and unavoidably ascertained from the express provisions of the parties' agreement." *Carl A Schuberg, Inc, v Kroger Co*, 113 Mich App 310, 315-316; 317 NW2d 606 (1982).

Plaintiff also argues that it is a fundamental principle of law that restrictive covenants are strictly construed against parties seeking to enforce those covenants, and any doubts must be

resolved in favor of free use of the property. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341-342; 591 NW2d 216 (1999). However, "[r]estrictive covenants are to be read as a whole to give effect to the ascertainable intent of the drafter," and the courts are not precluded from deducing from a poorly-phrased clause that a more restrictive interpretation was actually intended. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 505-506; 686 NW2d 770 (2004), overruled in part on other grounds by *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012). We conclude that the precondition of commencing physical construction is a "logical and unavoidable" consequence of reading the Fifth Amendment as a whole and within its entire context, rather than a mere implication.

IV. CONCLUSION

To summarize the path this matter has taken us: (1) neither the Receiver's Deed nor the First Amendment conditioned plaintiff's developer rights upon physical construction of anything; however, (2) plaintiff purchased only an option, not a presently vested property right; which (3) plaintiff ostensibly exercised by recording the Third Amendment; but (4) was retroactively changed by the Fifth Amendment to be conditioned upon the commencement of physical construction by January 4, 2017; and (5) plaintiff admittedly failed to commence construction by that deadline; therefore (6) plaintiff's option expired without being *properly* exercised; so (7) plaintiff's developer rights never ripened into any vested property right and are now barred from doing so. We also note that were plaintiff to prevail, plaintiff might have faced severe tax consequences.

The trial court erred in holding that plaintiff's developer rights were preconditioned by the Receiver's Deed and the First Amendment upon physical construction of any condominium units. Therefore, we disagree with defendant that this appeal was vexatious. Nevertheless, the trial court arrived at the correct result, because the Fifth Amendment retroactively added a physical construction precondition to the Third Amendment, and because plaintiff failed to commence construction by that deadline, its developer rights and the option it purchased expired. We therefore need not address plaintiff's remaining arguments.

Affirmed. Defendant, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan