STATE OF MICHIGAN

COURT OF APPEALS

LAKESIDE ESTATES CONDOMINIUM PROPERTY OWNERS ASSOCIATION,

Plaintiff-Appellee,

v

SUGAR SPRINGS DEVELOPMENT COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 16, 2021

No. 354451
Gladwin Circuit Court
LC No. 19-010032-CH

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Defendant, Sugar Springs Development Company, appeals by right the trial court order granting partial summary disposition in favor of plaintiff, Lakeside Estates Condominium Property Owners Association. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

This appeal centers around the Condominium Act (the Act), MCL 559.101 *et seq.*, and its application to a condominium project that began in the 1990s. Plaintiff is the condominium association, and defendant is the developer. The Master Deed for the Condominium was recorded in 1994, and construction began in 1998. The Master Deed provided for up to 60 total condominium units. Construction was originally supposed to end within six years, i.e., 2000. However, defendant executed numerous amendments that extended this deadline to as late as 2022. Defendant constructed Buildings 1 to 3, and 5, for a total of 48 units; 12 units were never constructed. In 2019, defendant, took steps to construct the remaining 12 units. Plaintiff challenged defendant's ability to do so, contending that defendant lost its rights to the 12 units and that they had become part of the Condominium by operation of law. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10), and, following oral argument, the trial court partially granted plaintiff's motion and denied defendant's motion. This appeal follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Defendant argues that the trial court erred by granting summary disposition to plaintiff. Challenges to a trial court's decision to grant summary disposition are reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). A motion is properly granted under MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id*. at 415-416. Questions of statutory interpretation, construction, and application are reviewed de novo, *Dextrom*, 287 Mich App at 416, as are due-process issues, *Florence Cement Co v Vettraino*, 292 Mich App 461, 474; 807 NW2d 917 (2011), the interpretation of a contract, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005), and the application of equitable estoppel, *Sylvan Twp v Chelsea*, 313 Mich App 305, 315-316; 882 NW2d 545 (2015).

B. ANALYSIS

The issues in this case are governed by Section 67(3) of the Condominium Act, MCL 559.167(3). That section was amended in both 2002 and 2016. As explained by this Court in *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 697-701; 950 NW2d 502 (2019), the 2016 amendment of MCL 559.167 does not apply retroactively with regard to transfers completed before the amendment's effective date. The 2002 version of MCL 559.167(3) provided:

> Notwithstanding section 33, if the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built" during a period ending 10 years after the date of commencement of construction by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project. If the master deed contains provisions permitting the expansion, contraction, or rights of convertibility of units or common elements in the condominium project, then the time period is 6 years after the date the developer exercised its rights with respect to either expansion, contraction, or rights of convertibility, whichever right was exercised last. The undeveloped portions of the project withdrawn shall also automatically be granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped portions of the project. If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease. In

> such an event, if it becomes necessary to adjust percentages of value as a result of fewer units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95. [MCL 559.167(3), as amended by 2002 PA 283.]

Here, the parties agreed below that the construction on the condominium project began no later than December 31, 1998. Thus, 10 years "after the date of commencement of construction by the developer of the project" was December 31, 2008. At that time, the 2002 version of MCL 559.167(3) was in effect. As recognized by the trial court, under the 2002 amendment, defendant had until December 31, 2008, to withdraw or develop the disputed 12 units—which were not designated as "must be built." Defendant's failure to do so resulted in the undeveloped land remaining part of the project as general common elements. At that point, plaintiff's rights in the property vested by operation of law whereas defendant's rights were extinguished. See MCL 559.167(3), as amended by 2002 PA 283; see also *Cove Creek*, 330 Mich App at 700.

On appeal, defendant argues that application of the 2002 version of MCL 559.167(3) violates its right to due process. However, in *Cove Creek*, this Court held that the 2002 version of the statute did not violate a developer's due-process rights. *Cove Creek*, 330 Mich App at 701-704. Relying on our Supreme Court's opinion in *Kentwood v Sommerdyke Estate*, 458 Mich 642; 581 NW2d 670 (1998), the *Cove Creek* Court explained:

> [T]he [*Kentwood*] Court held that "the state may condition the permanent retention of a property right on performance of reasonable conditions that indicate a present intention to retain the property interest." *[Kentwood*, 458 Mich] at 655-656. The Court concluded that "by treating property that has not been reserved for private use for ten years or longer as dedicated to the public for use as a highway, the Michigan statute is a reasonable exercise of police power." *Id*. at 656. Regarding whether due process was afforded, the Court stated, "[G]enerally, a legislature need only enact and publish a law and afford citizens a reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right." *Id*. at 664.
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> Similarly, MCL 559.167(3), as amended by 2002 PA 283, conditioned the retention of a property right on the performance of reasonable conditions that indicate a present intention to retain that property interest. Within the 10-year period, defendants were required to either develop Units 1 through 14 or withdraw the undeveloped portions from the project. Defendants had sufficient notice of the law and that their property rights would lapse if they did not take action within the 10-year period. Moreover, the requirements of either completing the project or withdrawing the units from the project are reasonable requirements designed to further the legitimate objectives of preventing incomplete projects and providing finality. [*Cove Creek*, 330 Mich App at 703.]

Notwithstanding that *Cove Creek* is directly on point, defendant argues that the due-process analysis in this case should be governed by our Supreme Court's recent decision in *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020) and that, in light of *Rafaeli*, we should disregard *Cove Creek*'s holding that the 2002 version of MCL 559.167(3) does not violate due

process. We remain bound by *Cove Creek*, however. MCR 7.215(J)(1). Moreover, we do not agree with defendant's argument that *Rafaeli* undercut this Court's due-process analysis in *Cove Creek*.

The sole issue in *Rafaeli* was whether the defendants' actions in retaining the surplus proceeds from a tax-foreclosure sale of the plaintiffs' respective properties violated the Takings Clause of the United States and Michigan Constitutions. *Rafaeli*, 505 Mich at 441. The only discussion of due-process principles was in response to the defendants' argument that no unconstitutional taking had occurred because the plaintiffs' had been afforded due process prior to the sale of their properties. *Id*. at 450-451. The Court rejected the defendants' argument, explaining that "[a] a claim of an unconstitutional taking, however, is distinct from a claim of property deprivation without due process of law." *Id*. at 451.

Defendant nevertheless notes that the *Rafaeli* Court recognized that the General Property Tax Act, MCL 211.1a *et seq*., "explicitly states its intent to comply with minimum requirements of due process . . . ." MCL 211.78(2). Defendant directs this Court to the various due-process protections the legislature expressly included in the GPTA, and then notes that similar protections were not afforded under the 2002 version of MCL 559.167(3). Yet, as this Court recognized in *Cove Creek*, our Supreme Court held in *Kentwood* that "[g]enerally, a legislature need only enact and publish a law and afford citizens a reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right." *Cove Creek*, 330 Mich App at 703, quoting *Kentwood*, 458 Mich at 664. The *Kentwood* Court also held that "[n]o specific notice need be given to an impending lapse." *Kentwood*, 458 Mich at 664. Having examined both *Rafaeli* and *Kentwood*, we are persuaded that the *Cove Creek* Court did not err by holding the 2002 version of MCL 559.167(3) did not violate due process because it "conditioned the retention of a property right on the performance of reasonable conditions that would indicate a present intention to retain the property interest." *Cove Creek*, 330 Mich App at 703. As a result, we reject defendant's argument that the trial court erred by applying *Cove Creek* and its argument that the 2002 version of MCL 559.167(3) violated its constitutional right to due process.

Next, defendant argues that the 2002 version of MCL 559.167(3) results in an unconstitutional taking of its property. We disagree. Again, resolution of this issue is squarely governed by this Court's decision in *Cove Creek*. In *Cove Creek*, this Court expressly held that the 2002 version of MCL 559.167 did not amount to an unconstitutional taking of private property because "the necessary state action required to find an unconstitutional taking is not present." *Cove Creek*, 330 Mich App at 704. Specifically, the *Cove Creek* Court held that "it was defendant's failure to act within the 10-year period that caused the lapse of the property right, not any action of the state." *Id*. at 704-705. See also *Kentwood*, 458 Mich at 663 (stating that because "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right[,] there is no 'taking' that requires compensation."). Defendant argues, however, that under *Lingle v Chevron USA, Inc*, 544 US 528, 538; 125 S Ct 2074; 16 L Ed 2d (2005), the legislature's 2002 amendment of MCL 559.167(3) is a per se taking. In *Lingle*, the United States Supreme Court held that a per-se taking occurs "where government requires an owner to suffer a permanent physical invasion of her property, however minor . . .." *Id*. at 538. Yet, as recognized in *Cove Creek*, in this particular case, the legislature did not require defendant to be deprived of its interest in the property. Rather, it was defendant's failure to act within a 10-year period that caused the lapse of the property right. *Cove Creek*, 330 Mich App at 704.

Defendant also suggests that the trial court erred by holding that the Master Deed could not extend the time to complete the project beyond December 2008. We disagree. Condominiums are created by statute, and their establishment is governed by the Act. See, e.g., MCL 559.172(1) ("A condominium project for any property shall be established upon the recording of a master deed that complies with this act."). The Act both creates and defines a condominium project's Master Deed. The Master Deed is defined as "the condominium document recording the condominium project to which are attached as exhibits and incorporated by reference the bylaws for the project and the condominium subdivision plan for the project." MCL 559.108. It "shall" include:

> (a) An accurate legal description of the land involved in the project.
>
> (b) A statement designating the condominium units served by the limited common elements and clearly defining the rights in the limited common elements.
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> (c) A statement showing the total percentage of value for the condominium project and the separate percentages of values assigned to each individual condominium unit identifying the condominium units by the numbers assigned in the condominium subdivision plan.
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> (d) Identification of the local unit of government with which the detailed architectural plans and specifications for the project have been filed.
>
> (e) Any other matter which is appropriate for the project. [MCL 559.108.]

The Act lays out in detail the process for creating a condominium project, revising the project, and the documents required. See, e.g., MCL 559.153, MCL 559.172, and MCL 559.195. The Act describes the property interests for the condominium project. MCL 559.137. As defendant recognizes, the Act also explicitly provides for amendments of the Master Deed:

> The condominium documents may be amended *without the consent of co-owners or mortgagees if the amendment does not materially alter or change the rights of a co-owner or mortgagee and if the condominium documents contain a reservation of the right to amend for that purpose to the developer or the association of co-owners*. An amendment that does not materially change the rights of a co-owner or mortgagee includes, but is not limited to, a modification of the types and sizes of unsold condominium units and their appurtenant limited common elements. [MCL 559.190(1) (emphasis added).]

Defendant essentially contends that its contractual rights were improperly impaired by the Act. In other words, according to defendant, the Act infringes on its right to create and enforce a contract, i.e., the Master Deed and, more specifically, its amendments extending the construction deadline. Defendant cites legal principles governing when the Legislature can infringe upon such general contractual rights. However, defendant ignores the fact that the Master Deed and defendant's so called "contractual rights" were created by the Act itself. Condominiums are *not* products of common law; they are creatures of statute, and the Legislature gave developers any so called "contractual rights" via the Act. Accordingly, the Act controls and determines the extent of the Master Deed and amendments.

Furthermore, as previously explained, *Cove Creek* demonstrates that the 2002 version of the Act applied and automatically converted the undeveloped land for the remaining units into general common elements of the Condominium. This happened due to *explicit* provisions of the Act. See *Cove Creek*, 330 Mich App at 686-687; MCL 559.167(3), as amended by 2002 PA 283. Defendant's contractual rights were not independent contractual rights that were affected by an unrelated statute; rather, condominium developer rights are created, defined, and controlled by the very statute that defendant claims is now infringing upon those rights. MCL 559.167(3), as amended by 2002 PA 283, and *Cove Creek* demonstrate that defendant lost its rights to the undeveloped land long before it decided to construct the additional 12 units in 2019. Furthermore, as the trial court noted, nothing prevented the Master Deed and amendments from being read in harmony with the Act. Defendant could have extended the construction deadlines by designating the units as "must be built." Defendant failed to do so.

Finally, defendant argues that the trial court erred by dismissing its claim for equitable estoppel. We disagree. Equitable estoppel originated with preventing fraud. *Sylvan*, 313 Mich App at 319. In *Sylvan*, this Court explained:

> Where a fact has been asserted, or an admission made, through which an advantage has been derived from another, or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or admission would be a breach of good faith, the law precludes the party from repudiating such representation, or afterwards denying the truth of such admission. [*Id.*]

Defendant contends that there was at least a question of material fact concerning whether plaintiff and the co-owners, through silence and ratification of the Fourth Amendment to the Master Deed, induced defendant to act to its prejudice by continuing to incur costs and expenses in the Condominium with the belief that it could construct the remaining units. This argument is without merit because it requires that plaintiff and the co-owners did something to induce defendant's reliance, or that plaintiff and the co-owners did something to cause defendant to lose its vested property rights. This did not occur. Instead, defendant's vested property rights lapsed by operation of law. Plaintiff and the co-owners did nothing to cause this or to induce defendant. Therefore, defendant cannot prevail on its claim for equitable estoppel.

Affirmed. Plaintiff may tax costs as the prevailing party. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien