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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0404**

The Bluffs on Sans Pierre Townhomes and Villas Association,
Plaintiff,

vs.

Wooddale Builders, Inc.,
Respondent,

Laukka-Jarvis, Inc.,
Appellant,

and

Laukka-Jarvis, Inc.,
Third Party Plaintiff,

vs.

Glacial Ridge, Inc., et al.,
Third Party Defendants.

**Filed September 24, 2018
Affirmed in part, reversed in part, and remanded
Stauber, Judge***

Hennepin County District Court
File No. 27-CV-16-10812

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

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Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant challenges the district court's grant of summary judgment ordering appellant to indemnify respondent for attorney fees incurred in defending an action brought against both parties by a homeowners' association. We affirm the district court's indemnification decision, but reverse the award of attorney fees attributable solely to respondent's cross-motion against appellant, and remand for an award limited to those attorney fees respondent incurred in defending against the underlying action.

FACTS

The Bluffs on Sans Pierre Townhomes and Villas Association (the Bluffs) is a common interest community (CIC), as that term is defined under the Minnesota Common Interest Ownership Act (MCIOA), Minn. Stat. §§ 515B.101 to 515B.4-118 (2016 and Supp. 2017). The property on which the Bluffs is built was platted in February 2007, and purchased by appellant Laukka-Jarvis, Inc. (Laukka-Jarvis), a developer, in March 2007. On the same day, Laukka-Jarvis transferred the platted lots to respondent Wooddale Builders, Inc. (Wooddale). Wooddale recorded a declaration creating the Bluffs on March 27, 2007, naming itself as the "declarant," or creator, of the CIC. *See* Minn. Stat. § 515B.1-103(15) (Supp. 2017). In turn, Wooddale transferred the unit lots, but not the common

elements, back to Laukka-Jarvis in declarations of special declarant rights in 2007 and 2008.

Laukka-Jarvis owned the land and acted as developer for the Bluffs, planning and contracting for development of the common elements. In this capacity, Laukka-Jarvis retained architects, engineers, and subcontractors to build and install in the Bluffs a private roadway comprised of pavers. Wooddale, for its part, designed and constructed the individual townhomes and villas. Wooddale marketed the vacant lots through real estate agents; when it had a contract to construct a unit, Laukka-Jarvis would transfer the lot to Wooddale through a declaration of special declarant rights. Wooddale did not work on the common elements of the development and had no responsibility for design or construction of the paved roadway.

During the course of the development, Laukka-Jarvis and Wooddale transferred special declarant rights to each other depending on the phase of construction, but these transfers did not include the common elements and were limited to the unit lots. In December 2007 and January 2008, Laukka-Jarvis had special declarant rights for all 59 unit lots of the development; the ratio changed as Wooddale built and sold units. Each of the special declarant transfers contained a clause that stated:

Neither of the Parties shall be liable for any obligations or liabilities with respect to [the Bluffs] arising out of the other Party's acts or omissions. Each Party shall hold harmless, indemnify and defend the other Party from and against all claims and liabilities arising out of the acts or omissions of such Party.

In 2015, the Bluffs homeowners' association sued Wooddale and Laukka-Jarvis, alleging that the pavers in the private roadway "exhibited extensive breakdown and crumbling." Wooddale tendered defense to Laukka-Jarvis, which denied the tender request. Wooddale and Laukka-Jarvis filed cross-claims against each other, and Laukka-Jarvis brought third-party actions against Glacial Ridge, Inc. (Glacial Ridge), and Borgert Products, Inc. (Borgert), the installer and the manufacturer of the pavers. All parties except the Bluffs moved for summary judgment. The district court denied summary judgment to Laukka-Jarvis, Glacial Ridge, and Borgert, but granted summary judgment to Wooddale on its claim of indemnity against Laukka-Jarvis.

In November 2017, a jury issued a special verdict in favor of Laukka-Jarvis, Wooddale, and the third-party defendants. Wooddale requested attorney fees based on the earlier indemnification decision, and the district court entered judgment against Laukka-Jarvis in the amount of \$68,259.53. On appeal, Laukka-Jarvis challenges the summary judgment granting indemnification and the amount of attorney fees awarded.

DECISION

I.

We review the district court's grant of summary judgment de novo, to determine whether there are genuine issues of material fact that preclude summary judgment and whether a party is entitled to judgment as a matter of law. *Valspar Refinishing, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). Evidence is viewed in the light most favorable to the nonmoving party. *Id.* Laukka-Jarvis does not challenge the material facts.

The district court concluded that the paragraph governing liabilities and obligations under the multiple transfers of special declarant rights between the parties required Laukka-Jarvis to indemnify Wooddale for claims arising out of defects in the Bluff's common elements. But Laukka-Jarvis argues that there was no explicit contractual agreement governing construction or development of the common elements and that the provision cited by the district court governed only transfers of individual lots and cannot be invoked for liabilities arising out of the common elements. In addition, Laukka-Jarvis argues that Wooddale, as the development's declarant, has the "sole obligation for . . . implied warranties regarding the common-elements roadway."

A "declaration" is the instrument by which a declarant creates a CIC. Minn. Stat. § 515B.1-103(16) (Supp. 2017). The MCIOA defines "declarant" as "any person who has executed a declaration" to create a CIC, Minn. Stat. § 515B.1-103(15)(i)(A), and includes "any person who reserves, or succeeds under section 515B.3-104 to any special declarant rights." Minn. Stat. § 515B.1-103(15)(i)(B). Wooddale was the declarant for the bluffs, and Laukka-Jarvis was a declarant to the extent of the special declarant rights granted to it. "Special declarant rights" are defined in two different statutory subsections, depending on when the CIC was created. Minn. Stat. § 515B.1-103 (33a)-(33b) (Supp. 2017). The Bluffs was created before 2010 and, therefore, Minn. Stat. § 515B.1-103(33a) applies:

"Special declarant rights" means rights reserved in the declaration for the benefit of a declarant to:

(i) complete improvements indicated on the CIC plat, planned by the declarant consistent with the disclosure statement or authorized by the municipality in which the CIC is located;

- (ii) add additional real estate to a common interest community;
- (iii) subdivide or combine units, or convert units into common elements, limited common elements, or units;
- (iv) maintain sales offices, management offices, signs advertising the common interest community, and models;
- (v) use easements through the common elements for the purpose of making improvements within the common interest community or any additional real estate;
- (vi) create a master association and provide for the exercise of authority by the master association over the common interest community or its unit owners;
- (vii) merge or consolidate a common interest community with another common interest community of the same form of ownership; or
- (viii) appoint or remove any officer or director of the association, or the master association where applicable, during any period of declarant control.

Wooddale transferred special declarant rights to Laukka-Jarvis to (1) complete units or other platted improvements or make alterations to the units and the common elements; (2) relocate boundaries; (3) operate a sales office; (4) erect for-sale signs; (5) use easements over the common elements or in the units in order to exercise its declarant rights; and (6) require its signature before the governing documents could be amended. Each transfer of special declarant rights between the parties stated that the special declarant rights “shall be in addition to, and not in limitation of, any rights, privileges or obligations that [Laukka-Jarvis] has or acquires by reason of its status as an Owner or by law.” The transfer is not specific to common areas and says it applies to the “Subject Units, but not . . . to other parts of the CIC.” According to the various transfers, the parties’ liabilities and obligations were to be determined under Minn. Stat. § 515B.3-104 (2016).

Section 515B.3-104 provides that a transferor (a) is not relieved of liabilities and obligations that arose before the transfer; (b) remains liable if the transferee is an affiliate; (c) is not relieved of liabilities for retained special declarant rights if the transferee is not an affiliate; and (d) has no liability for the acts of an unaffiliated successor declarant, if the transferor retains no special declarant rights. Minn. Stat. § 515B.3-104(b).

Because Wooddale made a limited transfer of special declarant rights that does not specifically include the common elements, Wooddale remained liable for warranties and obligations to the CIC for problems arising out of the common elements. See Minn. Stat. § 515B.4-113(b) (“A declarant impliedly warrants that a unit and the common elements of a CIC are suitable for ordinary use and that improvements will be free from defective materials . . . and constructed . . . in a workmanlike manner”).

But the parties also contracted that “[n]either of the Parties shall be liable for any obligations or liabilities with respect to the CIC arising out of the other Party’s acts or omissions” and agreed to “hold harmless, indemnify and defend the other Party from and against all claims and liabilities arising out of the acts or omissions of such Party.” The MCIOA does not limit the right of declarants and their successors to contract for indemnification among themselves. This court acknowledged this principle in *650 N. Main Ass’n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 487 (Minn. App. 2016), review denied (Minn. Nov. 23, 2016), explaining that the MCIOA places responsibility for construction defects on the declarant so that a CIC association can sue one party, and, if “the declarant itself did not perform any construction work, the declarant may seek indemnification or contribution from the parties who performed the unsatisfactory work.”

“[P]arties [to a contract] are generally free to allocate rights, duties, and risks.” *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 545 (Minn. 2014). Further, “parties are free to contract to whatever terms they agree, provided that those terms are not prohibited by law.” *Persigehl v. Ridgebrook Inv. Ltd. P’ship*, 858 N.W.2d 824, 832 (Minn. App. 2015). Section 515B.3-104 “strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant’s rights.” Unif. Common Interest Ownership Act, § 3-104 cmt. 2 (Unif. Law Comm’n 1982). “The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the community, while relieving a declarant who transfers all or part of his special declarant rights . . . to a successor over whom he has no control.” *Id.* Thus, this section protects those who purchase a unit in a CIC by assigning liability to a named person or entity. But it does not prohibit indemnification between declarants and their successors, something that could be important in a project for which declarant responsibility is subject to multiple transfers and each declarant retains defined responsibilities for different aspects of the CIC.

A contract is construed as a whole and a reviewing court attempts to harmonize all contractual clauses. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). A court will avoid an interpretation of a contract that would render a provision meaningless. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990). In doing so, a court may not give legal force to one provision by ignoring another provision but must

attempt to harmonize all provisions if possible. *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001).

The indemnity language in the transfer of special declarant rights is not necessary; the statute sets out in detail the assignment of liability between a declarant and a successor declarant as to the CIC. But the language can be reconciled to give effect to the entire provision: each party would be liable to unit owners as set forth in the statute, but the parties would indemnify each other for claims and liabilities arising out of their own acts or omissions. Laukka-Jarvis owned the underlying property, and the transfer documents note that it specifically retained its ownership rights. Laukka-Jarvis contracted with Wooddale to build the individual units, but it hired the architects, engineers, and subcontractors to build the disputed roadway. The language of the indemnity clauses is sufficiently broad to contractually require Laukka-Jarvis to indemnify Wooddale for its acts or omissions “with respect to the CIC.” The district court’s decision to award summary judgment on this basis was not erroneous.

II.

Laukka-Jarvis challenges the district court’s award of \$68,259.53 in attorney fees, costs, and disbursements, which includes not only the attorney fees Wooddale incurred in defending against the homeowners’ association lawsuit, but also fees attributable to its cross-claim for indemnity against Laukka-Jarvis. This is a matter of contract interpretation.

We review the district court’s interpretation of contractual provisions *de novo*, as a question of law. *Nat’l City Bank v. Engler*, 777 N.W.2d 762, 765 (Minn. App. 2010),

review denied (Minn. Apr. 20, 2010). The amount of the district court’s award of attorney fees is reviewed for an abuse of discretion. *650 N. Main Ass’n*, 885 N.W.2d at 494.

A party who indemnifies another may be responsible for attorney fees incurred by the indemnitee in defending against an action. *Seifert v. Regents of Univ. of Minn.*, 505 N.W.2d 83, 86 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993). The extent of the duty to pay attorney fees is governed by the basis for and timing of the request for indemnification. *Id.* at 86-87. Timely tender of defense is a condition precedent to the obligation to indemnify. *Diebold, Inc. v. Roadway Express, Inc.*, 538 N.W.2d 150, 151 (Minn. App. 1995). The district court may not award fees incurred before tender of defense. *Id.* Wooddale tendered defense to Laukka-Jarvis shortly after the complaint was issued.

In *Seifert*, the indemnitor had agreed to indemnify the indemnitee “against all claims, damages, losses and expenses including attorney’s fees arising out of or resulting from” a claim of bodily injury caused by the indemnitor’s negligence. 505 N.W.2d. at 85. This court concluded that this clause required the indemnitor to cover the attorney fees incurred in defense of the cause of action, but not those incurred by the indemnitee in pursuing its right to attorney fees. *Id.* at 86-87.

The indemnity clause here requires both parties to “hold harmless, indemnify and defend the other Party from and against all claims and liabilities arising out of the acts or omissions of such Party.” This is specific enough to cover attorney fees incurred in defending the underlying action. But in *Diebold*, this court concluded that attorney fees incurred in order to establish the right to indemnification are not recoverable without an

explicit provision. 538 N.W.2d at 152. This court has also approved an award of attorney fees incurred in enforcing an indemnity claim. *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 242 (Minn. App. 1996), *review denied* (Minn. Mar. 18, 1997). But here the scope of the indemnification agreement was quite broad and included language such as “fullest extent permitted by law,” “all such claims” including those for which the indemnitee may or could be claimed to be liable, and “legal fees and disbursements paid or incurred to enforce the provisions” of the indemnification agreement. *Id.* at 240. The indemnification provisions between Laukka-Jarvis and Wooddale lack the breadth of those in *Van Vickle* and do not support an award of fees incurred in pursuing indemnification. Therefore, the district court abused its discretion by including Wooddale’s fees for its summary judgment motion.

Because the district court’s award of fees included both those incurred in seeking indemnification and in defending the underlying action, we reverse the award of attorney fees and remand to the district court to determine the amount of fees attributable to defense of the underlying action and to limit its award to those fees.

Affirmed in part, reversed in part, and remanded.