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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0535**

Robert L. Meller, Jr., et al.,
Appellants,

vs.

City Heights Condominium at Center Village, et al.,
Respondents.

**Filed November 30, 2020
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-19-8469

Robert L. Meller, Jr., Golden Valley, Minnesota (for appellants)

Christopher S. Hayhoe, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, MN (for
respondents)

Considered and decided by Florey, Presiding Judge; Segal, Chief Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

This appeal arises from a dispute over the assessment of homeowners' association fees against a storage unit within a residential condominium building. On appeal from summary judgment following removal from conciliation court, appellant owners argue that the district court (1) misinterpreted the condominium declaration to allow assessment for

common expenses against storage units, (2) erred in determining that respondent homeowners' association did not violate its statutory good faith obligation, and (3) erred in granting attorney fees to respondent. We affirm.

FACTS

Brief background and procedural history

On July 16, 2004, Centre Village Properties, LLC, filed a declaration of condominium (the Declaration) to create Common Interest Community Number 624 at the City Heights Condominium at Centre Village (the Condominium). City Heights Condominium at Centre Village Association (the Association) is a Minnesota non-profit corporation created to administratively manage the Condominium. The Condominium is “a common interest community in which (i) portions of the real estate are designated as units, (ii) the remainder of the real estate is designated for common ownership solely by the owners of the units, and (iii) undivided interests in the common elements are vested in the unit owners.” The Declaration delegates to the Association “all powers” described in the Declaration and all powers described in the Minnesota Common Interest Ownership Act (MCIOA), Minn. Stat. § 515B (2018), as it existed and is amended.

The Condominium building is divided into fifty-two residential units and five storage units. In 2004, appellants Robert L. Meller, Jr., and Kristine M. Meller (the Mellers) purchased one of the residential units (Unit 2609) and a storage unit located in the building. The Mellers continue to own both units.

From 2007 to 2019, the Association imposed annual assessments on the Mellers' units on a pro rata basis based upon their share of the ownership of the Condominium. The

Association also imposed special assessments on the Mellers' units for an exterior façade restoration project. The special assessment imposed on the Mellers' storage unit totaled \$3,944.47. In an email to the Association dated April 15, 2019, the Mellers objected to the special assessment imposed on their storage unit, which, like the annual assessments, was calculated according to the pro rata square footage of the storage unit. The Mellers timely paid the annual assessments, but there is no additional evidence in the record that they ever paid any portion of special assessment imposed on their storage unit.¹

The Mellers commenced this action in conciliation court and ultimately removed it to district court, where they filed an amended complaint asserting six causes of action against the Association: (1) violation of governing state statute and declaration and unlawful practice, (2) willful violation of the statutory obligation of good faith, (3) willful and/or negligent violation of fiduciary duty, (4) unjust enrichment, (5) failure of consideration, and (6) negligence. The Mellers claimed that the Association illegally assessed them for common expenses that did not benefit the storage unit, and they requested that the district court award damages for all annual assessments paid on the storage unit between 2007 and 2019 and rescind and revoke all assessments imposed on the storage unit. The Association filed a responsive pleading denying the Mellers' claims and asserting a counterclaim for an award of its attorney fees and costs.

¹ In their proposed order for judgment submitted to the district court on August 14, 2019, the Mellers included language rescinding the special assessment imposed on their storage unit, which appears to indicate that the Mellers had not paid that special assessment at the time of the filing.

The Mellers then filed a motion for partial summary judgment, and the Association filed a motion for summary judgment. The district court granted the Association's motion for summary judgment and denied the Mellers' motion for partial summary judgment. The district court entered judgment in favor of the Association and awarded \$8,475 in attorney fees and \$432 in costs and disbursements to the Association. The Mellers appeal.

D E C I S I O N

On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.*

I. Did the district court misinterpret the Declaration to allow assessment for common expenses against storage units?

Interpretation of an association's governing documents presents a question of law that we review de novo. *See Swanson v. Parkway Estates Townhouse Ass'n*, 567 N.W.2d 767, 768 (Minn. App. 1997). The primary goal of contract interpretation is to determine and enforce the intent of the contracting parties. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). We determine the parties' intent based on the contract's language. *See Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). If the language is unambiguous, we enforce the agreement as written. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010).

In interpreting a contract, we construe it “as a whole,” “attempt to harmonize all [of its] clauses,” and seek to avoid interpretations that render a provision meaningless. See *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn. 1990). Additionally, we “will not construe the terms so as to lead to a harsh and absurd result.” *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). The rules of construction applicable to contracts provide that the term, “shall,” reflects a mandatory imposition. Minn. Stat. § 645.44, subd. 16 (2018); *Travertine Corp. v. Lexington–Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004). By contrast, the contractual use of the term, “may,” signals permissive behavior. Minn. Stat. § 645.44, subd. 15 (2018).

The resolution of this appeal turns on the interpretation of the Declaration, particularly with regard to the meaning and interplay of two provisions in article II, section 7 of the Declaration (Section 7). Article I of the Declaration defines “unit” as follows:

(v) “**Unit**” means a parcel of real estate within a common interest community. This common interest community includes both residential and storage units, the boundaries of which parcels are described in the common interest community’s declaration (i.e., in Section 4 of Article II hereof).

The pertinent provisions of Article II, Section 7, provides:

Allocation of Common Element Interests, Votes and Common Expense Liabilities to Units; Description of Unit Identifiers. The percentage of the undivided interest in the common elements, common expense liabilities, and votes in the Association shall be based on the square footage of each Unit as a fraction of the total square footage of the Condominium. The percentage interest for each Unit, based on this formula is set forth in Exhibit ‘A’, which also gives the Unit identifiers for each Unit. However, certain expenses shall be assessed on a different basis, or against one or fewer than all Units, under the following circumstances:

....

B. Any common expense or portion thereof benefiting fewer than all of the Units may be assessed exclusively against the Units benefited on the basis of (i) equality (ii) square footage of the area being maintained, repaired, or replaced, or (iii) the actual cost incurred with respect to each Unit. (For example, the Board may chose [sic] to allocate expenses relating to the replacement of a window or window component to the Unit which such window serves);

C. The costs of insurance may be assessed in proportion to risk or coverage, and the costs of utilities may be assessed in proportion to usage.

Article VI authorizes annual assessments, which “shall be established and levied by the Board,” and provides that the Board of Directors of the Association (the Board) may, by a majority vote, levy special assessments.

The Declaration’s Exhibit A (Exhibit A) provides the percentage interest for each unit, based on the square footage of each unit as a fraction of the total square footage of the Condominium building. According to Exhibit A, Unit 2609, the Meller’s unit, is a 429-square-foot, habitable living space. It is expressly allocated 1.65900% of the common elements, common expenses, and votes in the Association. The Meller’s storage unit is a 68-square-foot, unfinished interior space, previously used as a supply closet when the building was utilized as a hotel. It is expressly allocated 0.26296% of the common elements, common expenses, and votes in the Association.

The Association assessed fees against the Mellers based upon the first two sentences in Article II, Section 7, which provides for an assessment of annual fees according to an

owner's percentage share of ownership of the Condominium, which included the percentage share of ownership based upon the square footage of the storage unit.

The Mellers argue that the district court misinterpreted Section 7 to allow assessment for common expenses against the Condominium building's storage units. The Mellers' argument centers around their interpretation of the term "shall" in the third sentence of Section 7: "certain expenses *shall* be assessed on a different basis, or against one or fewer than all Units, under the following circumstances" (emphasis added.) Specifically, the Mellers contend that "shall" creates a mandatory exception to the pro rata assessment method based on square footage, requiring the Association to allocate common expenses among units only to the extent such expenses benefit the units.

The Mellers admit that the Declaration authorizes the Board to determine whether certain expenses benefit less than all units. However, they argue that the Board must choose one of the three allocation methods in Subsection B when it observes that a common expense benefits less than all units. The Mellers contend that because certain assessments by the Association against the storage unit did not directly benefit the storage unit, the Association must use one of the allocation methods in Subsection B.

The Association counters that Subsection B permits, but does not require, the Association to allocate assessments based on the benefit to a unit. The Association's argument centers around its interpretation of the word "may" in Subsection B: "Any common expense or portion thereof benefiting fewer than all of the Units *may* be assessed exclusively against the Units benefited" (emphasis added.) The Association contends that the term "may" is permissive and thus explicitly permits the Board to exercise its

discretion in determining whether to do a benefits analysis on a common expense. The Association argues that this interpretation is consistent with both (1) Exhibit A, which allocates common expense liabilities among both residential and storage units based on the square footage of each unit as a fraction of the total square footage of the Condominium building; and (2) the Association's ongoing use of a pro rata assessment method based on square footage since the Association's creation in 2004.

Since it is unlikely that the drafters of the Declaration intended to ignore or render meaningless either the first paragraph of Section 7 or Subsection B, we examine the plain language of the Declaration using the rules of contractual construction for the terms "shall" and "may." Minn. Stat. § 654.44, subds. 15, 16. The first two sentences of Section 7 unambiguously mandate that common expenses be assessed according to each unit's square footage, expressed in Exhibit A as a percentage of the Condominium building's total square footage. The third sentence in Section 7 identifies an "exception to this general mandate, and requires assessment on less than all units" when the circumstances in subsections A through D are met. The permissive "may" in the first sentence of Subsection B is consistent with the permissive language in Subsection B's parenthetical example. The parenthetical example makes clear that "the Board determines whether less than all the units benefit from a Common Expense and determines the method for allocating the expense." Thus, we conclude that the Board only triggers the mandatory "shall" in the initial paragraph of Section 7 when it chooses to impose a differentiated assessment of common expenses.

This interpretation harmonizes the terms "shall" and "may," giving meaning to all provisions in the Declaration. It also considers the Declaration as a whole while avoiding

a harsh or absurd result. The Declaration delegates authority over assessments to the Board, and nothing in the Declaration requires differentiation of common expense assessments based on direct or indirect benefits to particular units. If we interpret the Declaration to prohibit assessment for common expenses against storage units, we would have to ignore express use of permissive language in Subsection B. If we interpret the contract to require differentiation of common expenses based on benefit to units, then the Board would be required to analyze the impact of every expense on each residential and storage unit. This would be a harsh and absurd result.

For these reasons, we hold that the district court properly determined that the Declaration permits the Association to impose pro rata assessments for common expenses against storage units under the Declaration—even where the expenses incurred do not directly benefit the storage unit.

II. Did the district court err in determining that the Association did not violate its statutory good faith obligation?

The Mellers challenge the district court’s determination that the Association did not violate its statutory good faith obligation. “When the district court grants a summary judgment based on its application of statutory language to the undisputed facts of a case, . . . its conclusion is one of law and our review is de novo.” *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). Every contract includes “an implied covenant of good faith and fair dealing requiring that one party not ‘unjustifiably hinder’ the other party’s performance of the contract.” *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (Minn. 1995). To prevail on a claim for breach of the

implied covenant of good faith and fair dealing, a party must establish bad faith by showing the adverse party has an ulterior motive for refusing to perform a contractual duty. *Minnwest Bank Cent. v. Flagship Properties LLC*, 689 N.W.2d 295, 303 (Minn. App. 2004). A party does not act in bad faith if they are merely asserting their rights under the contract. *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998).

Because the Declaration permits the Association to impose assessments for common expenses against the storage units, the Association merely asserted its rights under the Declaration by imposing annual and special assessments against the Mellers' storage unit. Thus, we hold that the district court did not err in determining that the Association did not violate its statutory good faith obligation.

III. Did the district court err in granting Declaration-based attorney fees to the Association?

The Mellers challenge the district court's award of attorney fees. We review the district court's award for an abuse of discretion. *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). In Minnesota, attorney fees generally "are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008). Contract interpretation is a question of law that we review de novo. *See Swanson*, 567 N.W.2d at 768. If the contract's language is unambiguous, we enforce the agreement as written. *Dykes*, 781 N.W.2d at 582. A contract's language is ambiguous only "if it is susceptible to two or more reasonable interpretations." *Id.* Courts

are bound by a statute “as written and may not supply by construction that which the legislature purposefully omits or inadvertently overlooks.” *Asian Women United of Minn. v. Leiendecker*, 789 N.W.2d 688, 693 (Minn. App. 2010) (quotation omitted).

Under Minnesota law, unless prohibited by a declaration,

reasonable attorneys fees and costs incurred by the association in connection with (i) the collection of assessments and, (ii) the enforcement of this chapter, the articles, bylaws, declaration, or rules and regulations, against a unit owner, may be assessed against the unit owner’s unit[.]

Minn. Stat. § 515B.3-115(e)(4) (2018).

Section 7, subsection D (Subsection D) of the Declaration expressly incorporates this statutory right:

Reasonable attorneys fees and costs incurred by the Association in connection with (i) the collection of assessments and, (ii) the enforcement of the Articles, Bylaws, this Declaration, or Rules and Regulations, against an Owner or occupant, or their guests, may be assessed against the Unit Owner’s Unit[.]

The district court determined that the Association was entitled to attorney fees based on Subsection D. The district court interpreted the Declaration as broadly allowing for attorney fees incurred in “connection” with the collection of assessments and enforcement of the Declaration.

The Mellers argue that the Association may only collect attorney fees from an owner under two conditions: (1) the collection of assessments, and (2) the enforcement of the Declaration. The Mellers contend that the conjunctive “and” in Subsection D requires both conditions to be met, and that neither condition was met in this case. The Mellers argue

that there was no collection because the Mellers paid all of the assessments, and there was nothing to collect. Next, the Mellers argue that there was no enforcement of the Declaration because the Mellers obeyed all Declaration provisions, and there was nothing to enforce.

The Mellers further argue that their dispute involves only “interpretation” of the Declaration, which differs from “collection” and “enforcement.” The Mellers rely on *Horodenski v. Lyndale Green Townhome Ass’n, Inc.*, in an attempt to explain this difference. 804 N.W.2d 366 (Minn. App. 2011). In *Horodenski*, the townhome owners sent a letter to the homeowners’ association demanding repairs and reimbursement under a declaration. *Id.* at 369. In the letter, the townhome owners threatened to withhold dues and bring a lawsuit if the repairs and reimbursement were not made. *Id.* After consulting an attorney, the association responded with a letter addressing enforcement of the owners’ unconditional obligation to pay assessments and stating that it was entitled to assess attorney fees against the owners. *Id.* at 369-70.

To distinguish *Horodenski* from this case, the Mellers contend that the townhome owner in *Horodenski* failed to pay dues, triggering the “collection” of assessments and “enforcement” of the Declaration provision on attorney fees. In contrast, the Mellers argue that, because they have paid their dues and obeyed the contract, there is nothing to collect and nothing to enforce. This case, the Mellers argue, involves only “interpretation” of the Declaration, which is not a condition under which the Association may collect attorney fees. We disagree.

Both Minn. Stat. § 515B.3-115(e)(4) and the Declaration permit the recovery of attorney fees incurred “in connection with the collection of assessments” and “enforcement” of the Declaration’s rules and regulations. Throughout this litigation, the Mellers sought damages for annual assessments paid, but they also objected to paying the special assessment imposed on the storage unit. As already explained, there is no evidence in the record that the Mellers ever paid that special assessment. The Association responded by incurring attorney fees to confirm and enforce the Mellers’ obligation to pay past and future assessments. Although the Association may have incurred fees in connection with the interpretation of the Declaration, it also incurred attorney fees in connection with both the collection of assessments and enforcement of the Declaration. We discern no abuse of discretion by the district court in awarding attorney fees to the Association.

Affirmed.