SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
JUDGE

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March 1, 2001

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RE: Barry D. Nichols v. Utility Systems, Inc.
C.A. No. 98C-10-004
Declaratory Judgment/Class Action

Dear Counsel:

This is the Court's decision as to the cross motions for summary judgment.

FACTS

Beachaven is a condominium development on the outskirts of Rehoboth Beach, Delaware. Philben, Inc. ("Philben" or "Developer") was the developer. Beachaven was planned to be built in four phases, consisting of seventy-two (72) units.

On July 11, 1986, Philben entered into an agreement with the defendant, Utility Systems, Inc. ("Utility") for the purpose of facilitating the development of the property by having Utility

provide for sewage collection and treatment for the development. Under their agreement, Utility was to design, install and operate the sewage system and was granted the exclusive right to serve the sewage needs of the community. In return, Philben agreed to ensure that purchasers of the condominium units in the development ("Unit Owners" or "Residents") would be bound to use Utility's services. To ensure this, the agreement required that:

> 7. DEVELOPER shall, in the form of Declarations, Restrictions, Codes of Regulations, or other forms of requirements, adopt and record, in a form approved by UTILITY, provisions which compel all property owners and/or occupants to use the central sewage system and pay the prevailing rates and charges for sanitary sewage services.

The Condominium Declaration and Code of Regulations which were filed to create Beachaven did not include any language setting forth the unit owner responsibilities to Utility, nor are there any other recorded documents concerning the relationship between the unit owners and Utility. The only relationship between Utility and the unit owners is that created in the Philben-Utility agreement.

Philben proceeded with the development of the project through the first three phases, which included fifty-four (54) units. Then, Philben ran into financial trouble. These problems

ultimately resulted in PNC Bank foreclosing upon that portion of the project which was to be the fourth phase and included eighteen (18) units. During the foreclosure process, Utility claimed that it had an equitable covenant arising from the July, 1986 agreement which survived the foreclosure Sheriff's sale. Simply put, Utility wanted to force whomever subsequently owned the property to be required to use Utility for any sewage services. This Court found that Utility's interest in the parcel, whatever that might have been, did not survive the Sheriff's sale. PNC Bank v. Philben, Inc., Del Super., C.A. No. 96L-02-005, Graves, J. (October 1, 1997).

Because of Philben's financial problems and this Court's decision, Utility was denied the opportunity to serve the sewer needs of the parcel where phase four was to be built. Utility was denied the opportunity to provide service to eighteen (18) additional units, and therefore lost the expected cash flow from these units. Finally, due to Philben's problems, Utility did not receive the agreed upon financial consideration from Philben for phase four, even though Utility had constructed a plant with the capacity to serve seventy-two (72) units.

In the meantime, Sussex County extended the West Rehoboth sewer district to Beachaven. This resulted in a change as to the sewage collection and treatment system for the

development. After the West Rehoboth sewage district came on line, Utility was only responsible for the collection of sewage in its lines which were then connected to the county line. The county then became responsible for the treatment of the sewage.

Under the 1986 Philben-Utility sewage agreement, the unit owners would be charged $320.00 per year, which would be billed quarterly. This was the sewage charge. Utility had the right to make adjustments in the sewage charge pursuant to the agreement. When Sussex County took over the treatment portion of the sewage project, the county billed the unit owners directly by quarterly billings for sewage treatment. Because Utility and the county reached an agreement whereby Utility would continue to collect the sewage through its lines, the county did not bill the unit owners a front footage assessment. Utility adjusted its bill to the unit owners to $100.00 annually, which was an equivalent charge had the county provided this collection service through its own lines. Utility notified the unit owners of these changes by correspondence dated January 12, 1996.

The issue which is the subject matter of the present litigation took place by way of correspondence on March 18, 1996, when Utility advised the Beachaven Condominium Council

that it would be increasing the charges. Utility reported that the loss of the final phase of Beachaven adversely impacted Utility. Utility reported that the loss of eighteen (18) units would impact on the cost of developing, installing, operating and maintaining the sewage system. Utility concluded in its March 18 letter that "the funds that were to be provided by the developer and the additional 18 unit owners must alternatively be reimbursed by the existing 54 unit owners through sewage charges for the system." The unit owners opposed the increase associated with the reimbursement claim. This resulted in the present litigation and the cross-motions for summary judgment.

ISSUES

1. Does the Utility-Philben Sewage Agreement permit Utility to be reimbursed from Phases One, Two and Three the economic benefits Utility lost due to the bankruptcy of Philben and the subsequent loss of Phase Four of the condominium project?

2. If the Agreement does not permit Utility to collect for its economic losses discussed above, may Utility nevertheless recover under *quantum meruit* against unit owners?

STANDARD OF REVIEW

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680 (1979). If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. Ebersole v. Lowengrub, Del. Supr., 180 A.2d 467, 470 (1962). In a case involving cross motions for summary judgment, the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions. Browning-Ferris v. Rockford Enterprises, Del. Super., 642 A.2d 820 (1993).

APPLICABLE LAW TO CONTRACT DISPUTE

The Court looks to the language of the agreement as a whole to determine the intention of the parties. The Court views the language from what a reasonable person in the shoes of the parties would have thought the language meant. Contracts are not subjectively ambiguous, but rather ambiguous when subject to more than one reasonable meaning. Kaiser Aluminum Corp.

v. Matheson, Del. Supr., 681 A.2d 392, 395 (1996); E. I. duPont de Nemours & Co. v. Allstate, Del. Supr., 686 A.2d 152, 156 (1996). Extrinsic evidence shall not be used to muddy the intention of an unambiguous agreement, but if the agreement is ambiguous extrinsic evidence may be considered. Eagle Industries v. DeVilbiss Health Care, Del. Supr., 702 A.2d 1228, 1232 (1997).

DISCUSSION

The Philben-Utility Agreement does not clearly set out the responsibilities of the parties who signed it. It does not clearly set out the obligations of those who buy property subject to its provisions. Nor does the agreement make any provisions for the occurrence of the unforeseen event such as the insolvency of the Developer before the completion of the entire project, resulting in less than the intended seventy-two (72) units being built. But I believe the language can be reasonably harmonized.

In paragraph 2, Developer and Utility set out their intentions regarding the payments from Developer to Utility for the sewage system work. Paragraph 2 reads:

> DEVELOPER shall pay monies to UTILITY in the amounts and in the manner specified as set forth in Exhibit "B" for all work involved in the design and installation of the central sewage system as specified in the permit application. In the event that it is necessary to make modifications to the proposed central sewage system in order to obtain permit approval, and such modifications result in additional cost, such additional cost, subject to advance approval, shall be paid by DEVELOPER, or in the event such modifications result in a reduction in cost, the reduction shall be credited to the DEVELOPER.

This paragraph indicates that Developer is responsible for the costs of "all work" for the "design and installation" of the sewage system. The payment plan contained in Exhibit "B" was not known to prospective purchasers because the exhibits were not recorded.

Paragraph 3 establishes the intended relationship between Utility and the eventual purchasers of the property. Paragraph 3 states in pertinent part:

> Those purchasing property from DEVELOPER shall pay to UTILITY upon connection to the central sewage system an Initial Sewage Charge. The Initial Sewage Charge, subject to change after December 31, 1987, shall be $320.00 per annum, to be paid in advance. . . The Sewage Charge shall be determined by UTILITY for the central sewage system and shall include all reasonable amounts for labor, materials, supplies, equipment, utilities, services, fees, charges, taxes, administrative costs, overhead, permit compliance, depreciation, interest charges, reserves, insurance, and all other related costs and expenses, together with profit not to exceed 15 percent of indicated costs and expenses. The Sewage Charge shall take into account all of UTILITY'S cost and expense for the complete design, installation, operation, maintenance, repair, replacement, modification and expansion of the central sewage system which serves the DEVELOPMENT.

The portion of paragraph 3 allowing the sewage charge to "take into account all of Utility's cost and expense for the complete design, installation. . ." seemingly conflicts with "all" of the design and installation being paid for by the Developer pursuant to paragraph 2, but perhaps not.

Utility relies on the language of paragraph 3, which allows the sewage charge to be set taking into consideration Utility's cost, expense, and operation of the design and installation of the sewage system and sewage plan. The unit owners argue that the language in paragraph 3 concerning Utility's cost for the design and installation of the septic system is rendered moot by the language in paragraph 2 whereby Philben agrees to pay for all work involved in the design and installation of the central sewage system. In attempting to reconcile the two paragraphs, I think it is reasonable to conclude that Philben is responsible for all the work involved in the design and installation of the system. "All" was not limited in anyway in paragraph 2. But in paragraph 3 "all" refers to Utility's costs and expense for the complete design and installation. Thus, it only refers to Utility's actual cost and expense, of which there may be none due to paragraph 2. Paragraph 3 states the sewage charge shall "take into account all of Utility's cost and expense for the complete design, installation, operation, maintenance, repair, replacement,

modification, and expansion of the central sewage systems which serves the Developments."

This "take into account" language is basically saying everything involved from start to finish will be considered in the sewage charge. It's general as opposed to the specific requirement of Philben's obligations in Paragraph 2. We do not know what the costs and expenses were going to be, but cost and expense to Utility concerning design and installation should have been nonexistent or minimal based upon the responsibilities of the Developer in paragraph 2 to pay for that work. I also note that Utility's claim is to be reimbursed for what Philben did not pay which would be pursuant to paragraph 2.

Furthermore, paragraph 2 states that the Developer must pay any additional expenses of modifications in getting the sewage system permit, and likewise the Developer would be entitled to credits if there is a reduction in cost. This is reasonable language to use if Philben is responsible for all. It supports this Court's conclusions.

Utility argues that "no provision in the agreement identifies a time frame for Utility to recoup its expenses." Based upon this argument, Utility states that it can now recoup its past expenses that are just now identified due to the failure of the Developer to make its payments

pursuant to the agreement and the failure of phase four to be developed. The agreement is silent as to the recoupment of past expenses. Before one is concerned about the time frame for the recoupment of expenses one must first have the right to recoup or to be reimbursed for expenses. I am not satisfied the agreement gives Utility the right to recover or recoup the monies not paid by the Developer and the monies lost due to phase four not being built.

Nevertheless, Utility's position as to when it can seek recoupment of expenses is unreasonable. Utility and the Developer set the prevailing rate and charge for the sanitation service to be $320.00 per year, to be paid quarterly. While Utility has the right to adjust the sewage charge based upon paragraph 3, a reasonable interpretation of paragraph 3 leads me to conclude that $320.00 is the reasonable starting point and as expenses, overhead, supplies, services, fees, etc. increase then Utility will be able to pass on those cost increases together with a 15% maximum profit. To argue that Utility can somehow hold back on its cost and then be reimbursed years later is not a reasonable real world position. A prospective purchaser of a unit at Beachaven or any other condominium would expect to pay for the services arising during that

person's ownership and not for services arising due to something that occurred years earlier, unless there were some reasonable means putting the prospective owner on notice.

If my harmonizing interpretation is incorrect and the contract is ambiguous and uncertain as to who pays, then I still have difficulty with Utility's position. We are not arguing about what Philben and Utility truly intended as contracting parties but how that contract impacts on the third party unit owners. How does a purchaser get fair notice that he or she would be responsible to pay if Philben does not fulfill its contracted obligation to Utility? I cannot find basis in any of the documents which would allow Utility to be reimbursed for the funds that the Developer did not pay. "Development" was intended to be seventy-two (72) units. Who took the risk in this construction project if less units were built? Utility could have protected itself by setting forth what everyone's responsibilities would be, if fewer then seventy-two (72) units were built. Utility had the opportunity to get language into the condominium declaration and code of regulations creating and governing Beachaven. Thus, there was another opportunity to have language setting forth unit owner obligations. Ultimately, it's hard to foresee disaster in your financial partnerships but without clear language putting buyers on notice there is no basis to

pass these losses onto the unit owners. It is worth repeating that the "DEVELOPMENT" was seventy-two (72) units. That is what Utility contracted with Philben for and that is the number Utility used to look at the economic viability of the deal. Unit owners purchased based on a seventy-two (72) unit condominium project. The resulting loss of units was not due to the unit owners, but rather to Philben's collapse. Utility's position, using a not unrealistic hypothetical, would have even greater losses placed upon eighteen (18) units had Philben gone under after the first phase. I do not construe the Philben-Utility agreement to make the unit owners guarantors assuring economic viability for Utility. Utility must understand that as a party to the agreement I construe provisions which may conflict between Utility and the unit owners against Utility.

QUANTUM MERUIT

Utililty argues that if its contract position fails, then it should be paid by the unit owners under the theory of *quantum meruit*. *Quantum meruit* simply means that a party who receives a benefit should pay the reasonable value of that benefit. It is an implied contract relationship wherein the one who receives the benefit under circumstances where payment was expected, the payment of reasonable value for the benefit should be made. The defense argues that it had to

pay for the system which was necessary for the unit owners to use their property, and, therefore, it would be unfair for the unit owners to get this benefit without full payment to Utility for the benefits received. Utility desires to use *quantum meruit* to go back and recoup the monies it expected to receive from Developer and from the eighteen (18) units had phase four been built as planned.

However, the fifty-four (54) unit owners of Beachaven have not received anything other than what they expected. They did not get any additional benefits due to a design capacity of seventy-two (72) units. The individual unit owners' concern is that there is sufficient capacity to serve their unit and I expect there is little concern as to whether or not there is a twelve inch main or a sixteen inch main that serves them, or whether or not the treatment facility has the capacity to treat more than is necessary for their individual purposes. Finally, I note that they surely received no benefits for purposes of sewer treatment after the county required their units to be connected to the West Rehoboth sewer system because that made Utility's capacity moot. Defendant's *quantum meruit* argument fails.

Plaintiff's motion for summary judgment is granted. Defendant's cross-motion for summary judgment is denied.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

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cc: Prothonotary