STATE OF MICHIGAN

COURT OF APPEALS

WALNUT BROOK DEVELOPMENT COMPANY, Plaintiff-Appellant, v VICTOR DEFLORIO, MARY JO DEFLORIO, and PNC BANK, Defendants-Appellees.	UNPUBLISHED October 9, 2014 No. 314554 Oakland Circuit Court LC No. 2011-120036-CH

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Plaintiff, Walnut Brook Development Company, appeals as of right the trial court order denying its motion for summary disposition and granting summary disposition in favor of defendants, Victor DeFlorio (Victor), Mary Jo DeFlorio, and PNC Bank (PNC). We reverse and remand for entry of summary disposition in favor of plaintiff.

I. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"A deed is a contract, and the proper interpretation of the language in a deed is therefore reviewed de novo on appeal[.]" *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009) (quotation marks and citation omitted).

> In interpreting a contract, this Court's obligation is to determine the intent of the parties. This Court must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent. If the contractual language is unambiguous, courts must interpret and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. [*In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007) (quotation marks and citation omitted).]

B. SUCCESSOR

Plaintiff first argues that, as the successor of Rochester Hills Real Estate Development Corporation (RHREDC), it held the right of first refusal to purchase Unit 37, an undeveloped unit of the Walnut Brook Estates condominium project that PNC sold to Victor in December 2009. We agree.

Article II, § 16, Paragraph D of the Condominium Bylaws grants to "the Developer" a right of first refusal concerning unimproved lots in the condominium project. It states: "Until such time as an occupancy permit has been issued with respect to a residence on a Unit, the Developer shall have a right of first refusal to purchase any Unit on the same terms and conditions as the Unit owner is offering to any other prospective purchaser." Article XVIII of the Bylaws provide that words used in that document shall have the same meaning as set forth in the Amended Master Deed to which the Bylaws were attached as an exhibit. Article III, § 11 of the Amended Master Deed defines the word "Developer" as follows:

> **Section 11. Developer.** "Developer" means Rochester Hills Real Estate Development Corporation, a Michigan corporation, which is the successor to the original developer of Walnut Brook Estates, which has made and executed this Restated and Amended Master Deed, and its successors *and* assigns. *Both* successors *and* assigns shall always be deemed to be included within the term "Developer" whenever, however and wherever such terms are used in the Condominium Documents. The term "Developer" does not, however, include "Successor Developer" as defined in Section 125 of the Act. [Emphasis added.]

Thus, under the Bylaws and the Amended Master Deed, the right of first refusal was held by the "Developer," which was RHREDC and its successors and assigns. The term "successors" is not defined in the Amended Master Deed or the Bylaws. A dictionary may be consulted to ascertain the plain and ordinary meaning of a term that is not defined in a contract. *In re Kostin*, 278 Mich App 47, 54; 748 NW2d 583 (2008). A "successor" is "a person or thing that succeeds or follows" or "a person who succeeds another in an office, position, or the like." *Random House Webster's College Dictionary* (2001). "Succeed" is defined in relevant part as "to follow or replace another by descent, election, etc.," "to come next after something else in an order or series," "to come after and take the place of, as in an office," and "to come next after in an order or series, or in the course of events; follow." *Random House Webster's College Dictionary* (2001).

Plaintiff presented evidence that it is a successor of RHREDC, as plaintiff followed or replaced RHREDC in its Developer role at the condominium project. RHREDC experienced major financial difficulties in 2005 and 2006, and transferred all of its assets to plaintiff in a bill of sale executed on October 31, 2006. Plaintiff's vice-president and general manager submitted an affidavit stating:

> From and after June 30, 2006, [plaintiff] has acted as the successor to RHREDC as developer of the Condominium project and has exercised all rights which formerly belonged to RHREDC under the condominium documents. Since June 30, 2006 and October 31, 2006, [plaintiff] has dealt with the condominium association for the Walnut Brook Estates condominium as the successor developer to RHREDC and has exercised all rights reserved to the developer under the condominium documents. Neither the condominium association nor any owners of property within the condominium project (except for Defendant Victor DeFlorio in May of 2011) has ever questioned [plaintiff's] status as successor developer to RHREDC.

On August 7, 2007, plaintiff recorded an affidavit of interest in the undeveloped lots in the condominium project, including Unit 37, referencing the right of first refusal and giving constructive notice that it held the right of first refusal. Taken together, these facts support the conclusion that plaintiff followed or replaced RHREDC as the Developer of the condominium project. Defendants presented no evidence to dispute that plaintiff had replaced or followed RHREDC in this role. Plaintiff was entitled to summary disposition because, given that it was a successor of RHREDC, it held the right of first refusal as the Developer.

PNC, however, relies on caselaw from other jurisdictions to argue that plaintiff was not a successor of RHREDC because plaintiff did not assume RHREDC's liabilities. Defendants also note that plaintiff did not formally merge with RHREDC or acquire its stock. However, decisions from other jurisdictions are not binding, although they may be considered persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). Moreover, while a legal term of art should be interpreted in accordance with common law understandings and case law explanations, *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 357 n 9; 596 NW2d 190 (1999), defendants offer no argument establishing that the word "successor" is a legal term of art. Furthermore, even if "successor" is a legal term of art, PNC's reliance on foreign authorities is misplaced, as Michigan case law does not support the conclusion that the assumption of a predecessor's liabilities is a prerequisite to being deemed a successor. A corporation that acquires assets but not liabilities has been characterized as a "successor" in Michigan case law. See *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999) (explaining that where an acquisition is accomplished by a merger, with stocks serving as consideration, the successor generally assumes its predecessor's liabilities, but that "where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities" unless an exception applies). Because successor status in Michigan case law does not hinge on an assumption of the predecessor's liabilities, defendants' argument that

plaintiff could not be RHREDC's successor because it did not assume RHREDC's liabilities lacks merit.[1]

C. TERMINATION

Plaintiff also contends that the right of first refusal did not terminate when the first occupancy permit for any real estate in the condominium project was issued. Rather, plaintiff asserts that the right of first refusal applies to a real estate unit in the condominium project until a certificate of occupancy is issued with respect to that unit. In other words, plaintiff argues that the right of first refusal exists for each unimproved unit in the project until an occupancy certificate is issued for that particular unit. We agree.

Article II, § 16, Paragraph D of the Bylaws grants to "the Developer" a right of first refusal concerning unimproved lots in the condominium project:

> **D. Right of First Refusal.** *Until such time as an occupancy permit has been issued with respect to a residence on a Unit, the Developer shall have a right of first refusal to purchase any Unit on the same terms and conditions as the Unit owner is offering to any other prospective purchaser.* Prior to selling a Unit, the Unit Owner shall provide the Developer with written notice of the proposed sale, including all terms and conditions thereof. The Developer shall have fifteen (15) days thereafter to notify the Unit Owner in writing as to whether or not it intends to exercise its right of first refusal. If it fails or declines to exercise its right of first refusal, the Unit Owner may proceed to sell the Unit on the same terms and conditions as were stated in the notice. Any change in the terms and conditions of a proposed sale shall require that the Unit Owner give new notice to the Developer of the proposed sale. In any event, *any purchaser shall acquire the Unit subject to the Developer's right of first refusal with respect to any future sale.* If the Developer indicates its intention to exercise its right of first refusal, the Unit Owner shall promptly provide the Developer with an appropriate title insurance commitment in the amount of the proposed purchase price for the Unit, confirming that the Unit Owner can grant the Developer good and marketable title. Closing shall occur within thirty (30) days of the date the Developer and the Unit Owner receive a satisfactory title commitment. [Emphasis added.]

This right of first refusal provision unambiguously creates a right of first refusal with respect to each undeveloped unit in the condominium project until an occupancy permit is issued for a residence on the unit. The right of first refusal provision states that the Developer has a right of first refusal to purchase "any [u]nit" until "an occupancy permit has been issued with respect to a residence on a [u]nit." In other words, once an occupancy permit is issued for a unit, the right of first refusal expires for that unit. There is no language stating that the right of first refusal expires for *every* unit when an occupancy permit is issued for *any* unit in the entire

[1] We need not address plaintiff's argument regarding assignment, as our analysis *supra* is dispositive.

condominium project. See *In re Smith Trust (Smith I)*, 274 Mich App 283, 285; 731 NW2d 810 (2007) (unambiguous contractual language must be enforced as written).

Moreover, the right of first refusal provision states that the purchaser of an undeveloped unit "acquire[s] the [u]nit subject to the Developer's right of first refusal with respect to any future sale." This language reflects that the right of first refusal was not meant to expire for every unimproved unit early in the condominium project, as the right continues to exist for more than one sale of an undeveloped unit. It would have made little sense to provide a right of first refusal for *future* sales of unimproved lots if that right was set to expire when the first home in the *entire* condominium complex was built and occupied. See *Henderson*, 460 Mich at 356-357 (this Court interprets contractual language as a whole, and gives words meaning within the context in which they are used).

We also agree with plaintiff that the right of first refusal does not terminate at the conclusion of the Sales and Development Period, a factual finding underpinning the trial court's covenant running with the land analysis. In relevant part, Article XXI of the Bylaws provides:

> . . . Any rights and powers reserved or granted to the Developer or its successors shall terminate, if not sooner assigned to the Association, at the conclusion of the Sales and Development Period as defined in Article III of the Master Deed. The immediately preceding sentence dealing with the termination of certain rights and powers granted or reserved to the Developer is intended to apply insofar as the Developer is concerned, only to the Developer's rights to approve and control the administration of the Condominium and shall not, under any circumstances, be construed to apply to or cause the termination of architectural review rights set forth in Article II, Section 2 hereof or any real property rights granted or reserved to the Developer or its successors and assigns in the Master Deed or elsewhere (including, but not limited to, access easements, utility easements and all other easements created and reserved in such documents which shall not be terminable in any manner hereunder and which shall be governed only in accordance with the terms of their creation or reservation and not hereby).

Thus, architectural review rights and real property rights are not terminated at the end of the Sales and Development Period. However, the right of first refusal does not fall into either of those categories, as it is not an architectural review right, nor is it a property right because it does not create an interest in land and is regarded as contractual, not a real property, right. *Randolph v Reisig*, 272 Mich App 331, 338-339; 727 NW2d 388 (2006). However, Article XXI further states that termination of rights applies *only* to the "Developer's rights to approve and control the administration of the Condominium[.]" Thus, the right of first refusal terminates at the end of the Sales and Development Period only if such a right constitutes a right to approve and control the administration of the Condominium.

The Amended Master Deed and the Bylaws do not define the term "administration." This Court may consult a dictionary to ascertain the plain and ordinary meaning of the term. *In re Kostin*, 278 Mich App at 54. "Administration" means "the management and direction of a government, business, institution, or the like." *Random House Webster's College Dictionary*

(2001). A right of first refusal is a contractual option to purchase property if the owner decides to sell to a different buyer. *Randolph*, 272 Mich App at 339. A contractual option to purchase property is not a right to manage and direct a business or institution. Therefore, the Developer's right of first refusal is not a right to approve and control the administration of the Condominium. Thus, the right of first refusal right does not terminate when the Sales and Development Period ends.

Moreover, even if the right of first refusal did terminate at the end of the Sales and Development Period, the record does not establish whether the Sales and Development Period has ended. Article III, § 15 of the Amended Master Deed defines "Sales and Development Period" as follows:

> "Sales and Development Period", for the purposes of the Condominium Documents and the rights reserved to Developer thereunder, shall be deemed to continue for so long as Developer continues to own any Unit in the Project, for so long as the Developer is entitled to add land to the Project as provided in Article VI hereof or so long as the Developer retains architectural review as provided in Article II, Section 2 of the Bylaws, whichever is longer.

It is uncontested that plaintiff does not own any unit in the project and is not entitled to add land to the project. However, the parties dispute whether plaintiff retains architectural review. PNC argues that architectural control was turned over to an Architectural Control Committee before the 2006 bill of sale conveying RHREDC's assets to plaintiff. PNC notes that ¶ 6.e of a June 30, 2006 agreement between plaintiff's owner and RHREDC, called the modified Investor and Creditor Payment Agreement (ICPA), references an Architectural Control Committee, which PNC argues is proof that architectural control had been turned over to the Condominium Association. That provision of the modified ICPA states, in relevant part:

> e. Continuing Obligations. The Debtor Parties will, subsequent to the execution of this Agreement, use their best efforts to assist [plaintiff] and [plaintiff's owner] as reasonably necessary to carry out the terms of this Agreement, including without limitation, cooperation with the Architectural Control Committee (as defined under the Subdivision Plan). . . .

The record is undeveloped regarding the nature and extent of the Architectural Control Committee's authority, including whether it is exclusive. The reference to this entity in the modified ICPA fails to demonstrate that plaintiff has lost architectural review rights. Article II, § 2 of the Bylaws grants extensive architectural authority to the Developer with respect to buildings, structures, and improvements in the condominium project, and the record does not establish that plaintiff has been divested of this authority. Accordingly, there is no basis to conclude from the available evidence that plaintiff has lost architectural review, a necessary condition to a finding that the Sales and Development Period has ended.

D. RELIEF

Plaintiff also contends that it had a cause of action against defendants, and is entitled to specific performance of its right of first refusal as well as damages.

We agree with plaintiff that it is entitled to the remedy of specific performance. "Land is presumed to have a unique and peculiar value, and contracts involving the sale of land are generally subject to specific performance." *In re Smith Trust (Smith II)*, 480 Mich 19, 26; 745 NW2d 754 (2008); see also *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 112; 77 NW2d 384 (1956) (upholding specific performance of an option contract where the land was sold to persons who were not parties to the agreement that created the option, but who had notice of the option); *Brenner v Duncan*, 318 Mich 1, 4-6; 27 NW2d 320 (1947) (holding that the plaintiffs were entitled to specific performance of a right of first refusal where the owner sold the land to a third party without giving the plaintiffs notice and an opportunity to exercise the option).

The condominium documents required the seller—PNC—rather than the purchasers—the DeFlorios—to provide notice to plaintiff of the proposed sale. However, plaintiff argues that Victor had actual knowledge of the right of first refusal, in addition to constructive notice. At the time of the December 2009 sale of Unit 37 to Victor, the DeFlorios had constructive notice of the right of first refusal by virtue of the recorded Amended Master Deed and appended Bylaws that created the right of first refusal, and the 1997, 2004, and 2007 recorded documents referencing the right of first refusal in connection with Unit 37. Victor also had actual notice of the right of first refusal because his real estate agent told him about it. Therefore, we agree that in light of Victor's actual and constructive notice of the right of first refusal, the remedy of specific performance is appropriate. *Associated Truck Lines, Inc*, 346 Mich at 112-113; *Brenner*, 318 Mich at 4-6.

However, plaintiff fails to cite authority establishing entitlement to damages, nor does it set forth an argument explaining precisely what damages it seeks to recover from the DeFlorios. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003)(citations omitted). Plaintiff's complaint stated that it would suffer money damages "[i]n the event that specific performance is not granted to [p]laintiff with respect to its right to purchase the [p]roperty pursuant to the right of first refusal[.]" Hence, it appears that plaintiff's damages claim against the DeFlorios was essentially an alternative form of relief requested in the event that specific performance was not ordered. Because specific performance is the appropriate remedy, plaintiff's contingent claim for damages against the DeFlorios is rejected.

Finally, plaintiff argues that it is entitled to relief against PNC for selling Unit 37 to Victor. Plaintiff specifically contends that it is entitled to damages in the form of attorney fees incurred when suing the DeFlorios for specific performance. "Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Plaintiff appears to invoke the common-law exception that attorney fees may be awarded if the requesting party was forced to incur fees because of the other party's unreasonable conduct in the course of the litigation. See *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Under this exception, "the attorney fees awarded must have been incurred because of misconduct." *Reed*, 265 Mich App at 165. Yet, there is no evidence that PNC engaged in misconduct in the course of the litigation. Plaintiff references

PNC's sale of Unit 37 to Victor when PNC had constructive notice of the right of first refusal, but this sale did not constitute misconduct during the course of the litigation. Plaintiff has not established an entitlement to attorney fees against PNC.[2]

However, we are not convinced that PNC is entitled to summary disposition. As discussed *supra*, plaintiff is entitled to specific performance of the right of first refusal. Although PNC contends that there is no remedy to be had against it because Victor now owns the property, plaintiff's complaint requested that the trial court order the DeFlorios to convey the property to plaintiff *or* that PNC convey the property to plaintiff following invalidation of the deed from PNC to Victor. The parties on appeal do not address the appropriate method of specific performance in the circumstances of this case. Accordingly, the trial court on remand shall determine the appropriate method by which to enforce the right of first refusal.

II. CONCLUSION

Because the contract language provided plaintiff with the right of first refusal, it was entitled to summary disposition and specific performance. We have reviewed all remaining claims in the parties' briefs and find them to be without merit. We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[2] Plaintiff cites *Larson v Van Horn*, 110 Mich App 369, 383-384; 313 NW2d 288 (1981), which held that attorney fees may be awarded against a party who engaged in intentional wrongdoing that caused the requesting party to prosecute or defend an action against a third person. Again, there is no evidence that PNC engaged in intentional wrongdoing in this case.