IN THE COUNTY COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2012-CC-007430

DIVISION: CC-N

MARSH SOUND ASSOCIATION, INC.

v.

JULES MARVIN SIDLE, and SUSAN HARRIET SIDLE, husband and wife

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ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE having come to be heard on June 4, 2013, and the Court having heard the testimony presented, argument of counsel, and after otherwise being fully advised of the premises, hereby finds as is set forth below.

(A) Defendants have made repeated attempts to have a landscaping plan for their home approved by Plaintiff. In response to Defendants' first application, Plaintiff sent a denial letter on January 24, 2011, that invited Defendant's to attend the next Association Board meeting to explain their application. The Minutes of the Association Board show Defendants attended the meeting on February 8, 2011. Defendant annotated the landscaping plan, showing mulch, shrubs and stones, and submitted the plan at the meeting. Plaintiff's tape recordings of the meeting were subsequently erased after Karen Floyd, manager of the Association, wrote the minutes.

(B) Ms. Floyd wrote a denial response, on March 15, 2011, recognizing the Architectural Review Committee and the Board reviewed the plan submitted at the February 8, 2011, meeting. Over 30 days lapsed between the February 8, 2011 meeting and the denial response.

(C) Paragraph 8.4 to the Declaration controls:

"If the A.R.C. does not approve or disapprove any application within 30 days after receipt, the A.R.C.'s approval will be deemed given to all Persons without knowledge of any violation of the Legal Documents."

(D) Hornbook law states that use of the term "if" in the context of a timeframe indicates "the benefits of the rule of strict compliance with an express condition." CALAMARI AND PERILLO'S HORNBOOK ON CONTRACTS § 11.10; Conditions Compared to Time References. "As a rule of thumb, provisions commencing with words such as 'if' . . . create conditions precedent." *Id.*

(E) Black's Law Dictionary defines "approve" as "1. To give formal sanction to; to confirm authoritatively." Black's Law Dictionary (9th ed. 2009). Likewise, "disapprove" is defined as "to pass unfavorable judgment on (something)." *Id.*

(F) Black's Law Dictionary defines "application" as "A request or petition . . ." *Id.*

(G) The Declaration defines the Declaration, supplemental declaration, and the Association Articles and By-Laws as "Legal Documents." The Architectural, Landscaping and Florida-Friendly guidelines are rules or regulation that implement but are not themselves "Legal Documents." The Court "must read the provisions of a contract harmoniously in order to give effect to all of its provisions." *Davis v. Ivey,* 984 So.2d 571, 573 (Fla. 5th DCA 2008), citing *City of Homestead v. Johnson,* 760 So.2d 80, 83 (Fla. 2000). The Court must construe clear and unambiguous contract terms as written. *Kraft v. Mason,* 668 So.2d 679, 685 (Fla. 4th DCA 1996); *See Also Hurt v. Leatherby Ins. Co.,* 380 So.2d 432, 433 (Fla. 1980) (finding that where contractual language is clear and unambiguous, courts cannot indulge in construction or interpretation of its plain meaning). The Florida Supreme Court in *Moore v. Stevens* recognized

that covenants restricting use of land are strictly construed. 106 So. 901 (Fla. 1925). Further, "substantial ambiguity or doubt must be resolved against persons seeking to enforce them." *Id.*

(H) The key issue presented is whether or not the plan Defendant submitted on February 8, 2011, was an application. The common usage of the word application, in addition to the legal definition found in Black's Law Dictionary recognizes an application as a request or petition. Defendants submitted the new plan with annotations to seek Plaintiff's approval. Plaintiff's Declaration, the controlling legal document, set out the obligations of both parties in this case. Plaintiff has not shown that it notified Defendant, through any communication within the 30 day period set by paragraph 8.4, that Defendants' plan was approved or disapproved.

(I) Ms. Floyd sent two letters, a month apart. Each letter stated that Plaintiff denied Defendants submitted plan. The Declaration, had "deemed" the February 8, 2011, submission approved by the plain terms of paragraph 8.4 before Ms. Floyd sent either letter. The fact that Ms. Floyd actually sent letters denying the submitted plan evidences that Plaintiff knew how to deny; Plaintiff just failed to deny the submission within 30 days, as required by paragraph 8.4.

(J) Virtually uniform precedent nationwide holds that failure to respond within the time an association has under its operative documents necessitates default approval. Texas Courts have often applied default approval language. *Indian Beach Property Owners Assn. v. Linden,* 222 S.W.3d 682 (Tex Ct. App. 1st) (holding that failure to deny or approve resubmitted fence application within 45 days constituted default approval under operative Architectural Control Committee documents, even though the committee chose not to treat it as a reapplication); *Buckner v. Lakes of Somerset Homeowners Association,* 133 S.W.3d 294 (Tex. Ct. App. 2004). Other jurisdictions hold the same. *See, Anderson v. Buonforte,* 617 S.E.2d 750 (Ct. App. S.C. 2005) (failure by building official designated by covenants to inspect within 30 days to do so

continues default approval); *Garden Quarter I Assn. v. Thoren,* 394 N.E.2d 878 (Ill. App. 2d Dist. 1979) (25 day deemed approval); *Aurora Shores Homeowners Assn. v. Hardy,* 525 N.E.2d 26 (Ohio Ct. App. 9th Dist. 1987) ("The failure to file suit to enjoin construction within the time provided [by the Architectural Control Committee language of covenants] is tantamount to approval"); *Bellon v. Acosta,* 10 So.2d 1165 (Fla. 3rd DCA 2009) (holding as matter of law that seller is entitled to retain deposit under contract requiring buyer to notify seller regarding financing commitment within 20 days or else forfeit that deposit).

(K) The Court is sympathetic to Plaintiff's desire to maintain aesthetic quality throughout the neighborhood; however, Defendants' resubmission of the site plan, as annotated, on February 8, 2011, to Karen Floyd at Plaintiff's board meeting, commenced the 30-day review period under paragraph 8.4 of the Declaration. The 30th day was March 10. Ms. Floyd's March 15, 2011, denial came too late. The lapse of 30 days constituted a default approval of the annotated, resubmitted site plan as of March 11, 2011, pursuant to paragraph 8.4.

IT IS THEREFORE ORDERED AND ADJUDGED that

Judgment shall be for Defendants, and Plaintiff shall go without day. Each party shall be responsible for their own fees and costs.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 31st day of July 2013.

COUNTY JUDGE GARY FLOWER

Copies Furnished To: Counsel on Record