IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

JAMES PAVEL AND BONNIE PAVEL, Plaintiffs, v. ESTATES OF JUDITH'S FANCY OWNERS' ASSOCIATION, INC.,[1] Defendant.	))))))))	Case No. SX-17-CV-260 ACTION FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT, MANTATORY INJUNCTION, PUNITIVE DAMAGES

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Estates of Judith's Fancy Owners' Association, Inc. (Association) Motion to Dismiss, filed July 24, 2017; Plaintiffs James and Bonnie Pavel's Response in Opposition to Defendant's Motion to Dismiss (Opposition), filed August 4, 2017; and Defendant's Reply to Opposition to Motion to Dismiss, filed August 24, 2017. Because the Association attached an "unredacted copy of the last filed Restrictive Covenants" to its Motion as Exhibit 1, the Motion was converted to a motion for summary judgment pursuant to V.I. R. Civ. P. 12(d) by Order entered November 15, 2017, wherein the parties were permitted to supplement their responses. Plaintiffs submitted their "Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Now Summary Judgment)" (Supplemental Opposition), filed December 5, 2017, and Defendant filed its Supplemental Submission Re: November 14, 2017 Order on December 22, 2017. For the reasons that follow, Defendant's Motion will be granted and Plaintiffs' Complaint will be dismissed with prejudice.

This controversy arises from Plaintiffs' plans to develop their two adjacent lots, Plots 64 and 65 Estate Judith's Fancy, St. Croix. Complaint, at ¶ 4. Plaintiffs' residence is on Plot 65 and Plot 64 is a vacant lot. *Id.* Plaintiffs desire to build a detached garage on Plot 64 within 20 feet of the boundary line with Plot 65. *Id.* at ¶ 5. Plaintiffs applied for permission from Defendant to do so pursuant to the Estate of Judith's Fancy Amended and Restated Declaration Establishing Restrictive Covenants, as revised February 26, 2014 (Restrictive Covenants), but the Association

[1] Both of Plaintiffs' responsive filings to Defendant's Motion to Dismiss include in the caption seven named individuals, plus "John Does 1-10," listed as defendants. Yet, Plaintiffs' Complaint names only the Association as defendant and includes no reference to the seven named individuals or "John Does 1-10," all of whom are disregarded here.

denied their application because the garage would violate the 20-foot setback provision of the Restricted Covenants.[2] *Id.* at ¶ 6-9. None of these facts is in dispute. Plaintiffs bring suit for declaratory judgment and breach of contract, both causes of action alleging that the Association wrongly interpreted the Restrictive Covenants in denying Plaintiffs' request for a waiver of the 20-foot setback provision. *See id.* at ¶ 11-19.[3]

Legal Standard

In evaluating a motion for summary judgment, the Court must determine whether there exists a genuine dispute of material fact; one that would impact the outcome of the case under applicable law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). Such a dispute is genuine if a reasonable trier of fact could find that particular factual issue in favor of the non-moving party. *Id.* at 391-92. "Summary judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact," and judgment is appropriate as a matter of law. *Id.* at 379-80.

In reviewing the Association's Motion, the Court does not weigh the credibility of the evidence offered - instead, all inferences from the evidence are drawn in favor of the nonmoving party, and any conflicting allegations, if properly supported by the record, are resolved in favor of the nonmovant. *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citing *Williams*, 50 V.I. at 194-95). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin,* 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the non-moving party to introduce some evidence showing the existence of a genuine issue of material fact. *See Perez,* 59 V.I. at 527-28. At this point, "the nonmoving party may not rest on its allegations alone, but must present actual

[2] The "Restrictive Covenants" referenced throughout specifically refers to the copy of the Restrictive Covenants attached to Defendant's Motion as Exhibit 1. The fact that this is a true and correct copy of the Restrictive Covenants binding upon all Judith's Fancy property owners is not in dispute. *See generally* Opposition; *see also* Motion; *see also* Supplemental Opposition.

[3] Plaintiffs also seek punitive damages for "arbitrary and capricious" actions. Complaint ¶ 20. As Plaintiffs' claims in chief are dismissed, their punitive damages claim purportedly arising from the Association's actionable conduct is necessarily likewise dismissed.

evidence, amounting to more than a scintilla, showing a genuine issue for trial." *Id.* at 527. [4]

Discussion

Plaintiffs' Complaint presents two grounds for relief. The first cause of action requests "declaratory judgement interpreting the Section 3, Paragraph 7 of the Restrictive Covenants as recognizing the common-law doctrine of extinguishment of easements," thus estopping the Association from denying Plaintiffs' construction request.[5] Complaint, at ¶ 14. The second cause of action alleges that the Restrictive Covenants applicable to all homeowners in Estate Judith's Fancy constitutes a contract between the parties, and that the Association has breached that contract by denying Plaintiffs' construction request. Specifically, Plaintiffs allege that Defendant has "wrongfully interpreted and enforced the terms of the Restrictive Covenants against the Plaintiffs." Complaint, at ¶ 17.

Count I: Plaintiffs' request for declaratory judgment.

Although Plaintiffs cite no statutory or other authority in seeking declaratory judgment, pursuant to the Virgin Islands Declaratory Judgment Act, 5 V.I.C. §§ 1261-1272, the Superior Court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 5 V.I.C. § 1261. By their Complaint, the specific relief sought by Plaintiffs is an injunction to the effect that "the Defendant are [sic] estopped from denying Plaintiffs' construction approval request." Complaint, at ¶ 14.

The Court has discretion in determining whether to enter a declaratory judgment. *Pate v. Gov't of the V.I.*, 62 V.I. 271, 285 (V.I. Super. Ct. 2015) (citing *Flavo-Rich v. Quinn*, 18 V.I. 530 (D.V.I. 1981)). However, doing so "is permissible only where a justiciable controversy exists." *Bd. of Dirs. of Shibui Condo. Ass'n v. Darian Solutions, LLC*, 2015 V.I. LEXIS 100, *11 (V.I. Super. Ct. Aug. 31, 2015) (citations omitted). To qualify as justiciable, the controversy at issue

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[4] By its November 15, 2017 Order, the Court invited Plaintiffs "to supplement their Opposition to present actual evidence showing the existence of genuine issues of material fact for trial." Plaintiffs' Supplemental Opposition includes no recitation of any facts in dispute, but rather simply summarizes their previous arguments. As such, both parties agree that there are no facts in dispute and the matter is ripe for determination on the law.

[5] Section III. Buildings and Structures; ¶ 7 Waivers of Encroachments provides, in pertinent part: "The Board of Directors is authorized to waive encroachments that occur within the 20 feet set back if a written agreement, signed by the adjacent plot owners impacted by the set back violation, have consented thereto. The agreement presented to the Board must contain language which confirms that it is binding on the agents, successors, and assigns of the respective property owners. If the board agrees with the property owners' agreement, it may approve such waivers with a two-thirds majority vote of the Board of Directors…."

must be "definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[6] *Id.*

Plaintiffs' first prayer for relief requests declaratory judgment interpreting "Section 3, Paragraph 7 of the Restrictive Covenants as recognizing the common-law doctrine of extinguishment of easements" by merger, so that the Association is estopped from denying Plaintiffs' construction request.[7] Complaint, at ¶ 14. Of course, the question of whether the Restrictive Covenants "recognizes" this common-law doctrine is not relevant: the Court is not concerned with interpreting what parties stipulate the law to be, as determination of such an immaterial fact is neither "a real and substantial controversy," nor does it touch the legal relations of the parties.[8] *Shibui*, 2015 V.I. LEXIS 100, at *11.

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[6] The "justiciable controversy" requirement originates in federal jurisprudence reconciling the federal Declaratory Judgment Act (28 U.S.C. § 2201) with the jurisdictional requirement of Article III of the United States Constitution that a court only rule on actual cases and controversies. The United States Supreme Court addressed "doubts about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement," holding "that an appropriate action for declaratory relief can be a case or controversy under Article III," because "the phrase 'case or actual controversy' in the [federal Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-127 (2007) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)) (internal and other citations omitted); *see Pate*, 62 V.I. at 286 n.29 (citing *St. Thomas-St. John Hotel & Tourism Assoc., Inc. v. Gov't of U.S.V.I.*, 218 F.3d 232, 240 (3d Cir. 2000) ("A declaratory judgment may issue only where the constitutional standing requirements of a justiciable controversy are satisfied")). However, since Virgin Islands courts are not established under Article III, it follows that the jurisdiction of a Virgin Islands court to grant declaratory relief is not constrained by the same "justiciable controversy" requirement of Article III. Nevertheless, the Virgin Islands Legislature has expressly provided that the Virgin Islands Declaratory Judgment Act "should be 'harmonize[d], as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.'" *Estate of George v. George*, 50 V.I. 268, 274 (V.I. 2008) (citing 5 V.I.C. § 1272). Because Plaintiffs seek the "specific relief" of judgment enjoining the denial of Plaintiffs' application to the Association to permit the construction of a garage notwithstanding the 20-foot setback requirement of the Restrictive Covenants, the controversy is "definite and concrete… real and substantial" and may be properly adjudicated pursuant to the V.I. Declaratory Judgment Act.

[7] Although, by its terms, Plaintiffs' Complaint seeks only declaratory judgment regarding § 3 ¶ 7 of the Restrictive Covenants, they also assert the right to declaratory relief regarding § 3 ¶ 3. *See* Opposition, at 7 ("Plaintiffs have pled a bona fide good faith argument for declaratory judgment interpreting Section III, paragraph 3 of the Restrictive Covenants as recognizing the doctrine of merger."). Section III, ¶ 3 provides: "Building Lines: No single family dwelling, facility (except driveways/parking areas and/or utility monuments/poles for underground utilities,) or outbuilding shall be constructed within twenty (20) feet of any boundary line. Where two or more adjacent plots are combined within one title and ownership, then the reference to the boundary lines herein shall be to the perimeter or outside boundaries of the combined plots. In the event the construction of such structures as retaining walls, fences, windbreaks, or drainage ditches is deemed desirable, application for relief from the twenty foot limitation may be made to the Board of Directors, which relief shall not be arbitrarily or capriciously withheld." Both sections are addressed herein.

[8] Cases declaring the invalidity of litigating parties' stipulations as to applicable law are legion. *See, e.g., Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006) ("We are required to interpret federal statutes as they are written ... and we are

Concerning their substantive claim, Plaintiffs assert the doctrine of termination by merger as articulated by the Restatement (Third) of Property should apply as the best law for the Virgin Islands, as follows: "A servitude is terminated when all the benefits and burdens come into a single ownership."[9] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 (2000). Plaintiffs argue that by owning adjacent Plots 64 and 65, all benefits and burdens of the 20-foot setback provision between the two plots have come under their sole ownership, resulting in the termination of the setback provision relative to those two plots. Opposition, at 4-5.

Because the Supreme Court of the Virgin Islands has not yet articulated a common law rule for the termination of servitudes by merger, the Court is tasked with performing a *Banks* analysis, so named for *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011). This analysis weighs "three non-dispositive factors" to determine Virgin Islands common law, considering "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014) (quoting *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013)).

Regarding the first factor, no Virgin Islands case has been identified that has considered the question whether a restrictive covenant is terminated where all affected properties have been merged under common ownership. As to the second factor, the majority of courts nationwide have adopted the doctrine of termination of servitudes by merger following the rule articulated in

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not bound by parties' stipulations of law. We are not in the business of deciding cases according to hypothetical legal schemes ....") (citations omitted); W.W.A., Annotation, Stipulations of parties as to the law, 92 A.L.R. 663, 664 (1934) ("It is the general rule that stipulations as to what the law is are of no validity."); 73 Am. Jur. 2d, Stipulations § 4 (2001) ("Parties to an action may not stipulate to legal conclusions to be reached by the court, It [sic] has generally been stated that the resolution of questions of law rests upon the court, uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective.") (footnotes omitted); 83 C.J.S. Stipulations § 28 (2000) ("Generally, the litigants may not stipulate as to what the law is, so as to bind the court.... Stipulations on questions of law will be disregarded, since rulings on questions of law must rest on the judgment of the court without being influenced by stipulations tendered by the parties or counsel . . ..") (footnotes omitted). The Supreme Court of the United States has repeatedly said, "We are not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Con'r*, 308 U.S. 39, 51 (1939). Nor will the Court accept as binding stipulations dictating how they should determine applicable law. Instead, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). To the extent that Plaintiffs' Complaint asserts that the parties have agreed through the Association's adoption of the Restrictive Covenants as to the substance of the applicable controlling law to be applied, such assertion is rejected.

[9] A servitude is, "a charge or burden on an estate for another's benefit... Servitudes include easements, irrevocable licenses, profits, and real covenants." BLACK'S LAW DICTIONARY 1492 (9th ed. 2009).

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5. *See, e.g.*, CAL. CIV. CODE § 811(1) ("A servitude is extinguished… By the vesting of the right to the servitude and the right to the servient tenement in the same person"); *Will v. Gates*, 680 N.E. 2d 1197 (N.Y. 1997) ("when the dominant and servient estates become vested in one person, the easement terminates. At that point, the easement no longer serves a purpose and the owner may freely use the servient estate as its owner.") (citing RESTATEMENT (FIRST) OF PROPERTY § 497); *Doug's Elec. Serv. v. Miller*, 79 Ark. App. 28, 32-33 (2002) ("Arkansas recognizes the doctrine of merger. Merger has been applied in other jurisdictions and is recognized by the Restatement of Property.") (collecting cases); *compare* RESTATEMENT (FIRST) OF PROPERTY § 497 (1944) *with* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 (2000) (both characterizations of the doctrine of termination of servitudes by merger being substantively identical).

Divergent approaches are rare. The only minority approach cited by Plaintiffs is from Pennsylvania, differing only in holding that termination by merger is not automatic, but that its application is effectively suspended. *See Schwoyer v. Smith*, 131 A.2d 385, 387 (Pa. 1957) ("In short, if there is no reason for keeping … [the outstanding interest now acquired], then equity will in the absence of any declaration of [the owner's] intention, destroy it, but if there is any reason for keeping it alive, such as the existence of another encumbrance, equity will not destroy it.") (internal citations omitted). In applying its rule, Pennsylvania conflates the creation of implied easements with its doctrine of termination by merger, only conditionally suspending easements in case of unknown affected third parties rather than terminating them altogether. *See Witt v. Reavis*, 587 P.2d 1005, 1008 (Or. 1978) (Performing an analysis similar to that required by *Banks* and finding, "We see nothing to be gained by adopting the Pennsylvania rule and, instead, follow the Restatement rule that an easement once extinguished is gone forever.").

Considering the third factor, the adoption in a clear majority of jurisdictions weighs heavily in favor of the doctrine of termination of easements by merger as characterized in the Restatement. While the minority position seeks to preserve the rights of potentially affected third parties, it ultimately accomplishes nothing substantively different than the majority. Under the Restatement, a servitude is not terminated by merger unless "all the benefits and burdens come into a single ownership." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 (2000). If a third party still holds a benefit or burden of the servitude in question, the servitude would not be terminated – the third party's rights are therefore still preserved by the application of the majority rule. The Court can contemplate no situation in which it would be necessary to preserve an easement once "all the benefits and burdens come into a single ownership." *Id.* Thus, the Court determines that the doctrine of termination of easements by merger as articulated in RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 (2000) constitutes the best rule for the Virgin Islands.

Application of the rule in the context of homeowner association covenants is addressed in comment c to § 7.5, which reads: "Because merger takes place only when all the benefits and burdens of the servitude come into a single ownership, subdivision covenants and servitudes in other developments with reciprocal servitudes are rarely terminated by merger. Since each lot, unit, or parcel enjoys the benefit of the servitudes imposed on every other property in the development, see § 2.14(a), the occasion for merger can arise only when the entire development is acquired by a single owner." RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 7.5, cmt. c (2000); *cf.* Supplemental Opposition, at 5 n.3 (citing *Pollock v. Ramirez,* 870 P.2d 149 (N.M. Ct. App. 1994) (subsequent transfer of *entire subdivision* to single owner extinguished covenants by merger)); *cf.* 2 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 449 at 765 (Grimes 1980) ("an easement appurtenant to two or more tracts of land is not extinguished by merger of title unless title is acquired to all the property to which the easement is appurtenant").

Courts of the Virgin Islands have long recognized that restrictive covenants affecting a planned subdivision inure to the benefit of all owners within the subdivision. Restrictions that are "part of the overall plan of development, were to inure to the benefit of all of the parcelists in the five estates in question." *Neal v. Grapetree Hotels, Inc.*, 8 V.I. 267, 277 (D.V.I. 1971). "The violation of a restrictive covenant creating a negative easement may be restrained at the suit of one for whose benefit the restriction was established irrespective of whether there is privity of estate or contract between the parties, or whether an action at law is maintainable." *Id.* 8 V.I. at 276. *See also Roach v. West Indies Inv. Co., et al.,* 42 V.I. 238, 243 (D.V.I. App. Div. 2000).

Here, it is undisputed that Judith's Fancy is such a planned subdivision,[10] and Plaintiffs acknowledge that "each lot in the subdivision enjoys the benefit of the servitudes imposed on every other property in the development." Supplemental Opposition, at 7. Because "all the benefits and

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[10] As set forth by statute, "the term 'subdivision' means the division of a parcel of land into 4 or more lots or parcels for the purpose of transfer of ownership or building development, or, if a new street is involved, any division of a parcel of land." 29 V.I.C. § 273.

burdens"[11] of the Restrictive Covenant provisions in issue have not "come into a single ownership," but rather benefit all Judith's Fancy property owners, the doctrine of termination by merger set forth in Restatement § 7.5 is inapplicable. Here, the contested burden is, specifically, the obligation not to build a garage on Plot 64 within 20 feet of the boundary line with adjoining Plot 65. Plaintiffs allege that this burden restricting Plot 64 only benefits themselves as owners of Plot 65, the plot abutting the proposed violation of the 20-foot setback provision, and that they have waived any objection. See Supplemental Opposition, at 7. However, Plaintiffs' argument directly contradicts their acknowledgement, quoted above, and fails to recognize that "uniformity within the residential areas of Estate Judith's Fancy" is a benefit to "all present and future owners of the subdivided plots." Restrictive Covenants, at 1. The Restrictive Covenants recognizing that the terms benefit and burden all Judith's Fancy property owners is consistent with the established common law (*see* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, § 7.5 cmt. c), and therefore Plaintiffs' argument must fail as they may not waive a provision that benefits all subdivision owners.

Plaintiffs argue that "the Restrictive Covenants contemplate extinguishing the set back if the lots are merged," quoting Restrictive Covenant § 3 ¶ 3: "Where two or more adjacent plots are combined within one title and ownership, then the reference to the boundary lines herein shall be to the perimeter or outside boundaries of the combined plots." Supplemental Opposition, at 7.

The quoted provision contemplates that when separate adjoining plots are combined under one title, they combine to become one plot. Conversely, as here, an owner may claim ownership over two separate plots without combining them under a single title. Plaintiffs repeatedly use the term "adjacent" to describe Plots 64 and 65, acknowledging that each of the adjoining plots has maintained its distinct and separate identity, and may be conveyed separately apart from its adjoining part. As such, each plot has not been merged into common title with the other. *See generally* Complaint; Opposition; Supplemental Opposition. Plaintiffs specifically acknowledge that they have declined "combining the Plots into one lot," as suggested by the Association. Complaint, Ex. A.

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[11] "A servitude benefit is the right to use the land of another or the right to receive the performance of an obligation on the part of another. A servitude burden is the obligation not to interfere with another's use of the burdened party's land, or the obligation not to use land in the burdened party's possession in particular ways, or the obligation to render a specified performance to another." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, § 7.5 cmt. a (2000).

As Plots 64 and 65 are not combined, they do not fit the criteria for waiver plainly set forth within Restrictive Covenant § 3, ¶ 3. That provision does not contemplate that the restriction against boundary line encroachment is terminated by merger of title. Rather, it states what is apparent: that if two adjacent plots are combined into a single plot, then there is no longer a property boundary line separating them, and therefore no contiguous boundary from which construction need be set back.

Plaintiffs further argue that they are entitled to a waiver of the 20-foot set back requirement under the Restrictive Covenants, § 3 ¶ 7. Opposition, at 6. This argument fails as well. Paragraph 7 grants the Association authorization "to waive encroachments that occur within the 20 feet set back if a written agreement, signed by the adjacent plot owners impacted by the set back violation, have consented thereto." Restrictive Covenants, at § 3 ¶ 7. Plaintiffs contend that such a waiver "should be automatic where landowners demonstrate to the Board they are the owners of the adjacent plots for which they seek a waiver of the 20-foot set-back running between them." Opposition, at 7.

However, the plain language of the Restrictive Covenants confirms there is no automatic approval where adjacent plot owners agree: "<u>If</u> the Board agrees with the property owners' agreement it <u>may</u> approve such waivers with a two-thirds majority vote of the Board of Directors." Restrictive Covenants, at § 3 ¶ 7 (emphasis added). Instead of contemplating an automatic waiver of the 20-foot setback provision upon adjoining plot owners' agreement as Plaintiffs allege, the quoted language rather grants the Board the discretion, but not the obligation, to do so.

Plaintiffs have not offered "actual evidence" of a "genuine issue for trial" on the First Cause of Action of their Complaint. *Perez,* 59 V.I. at 527. Finding that the Association is entitled to judgment as a matter of law, the Court will grant summary judgment on Defendant's Motion as to Plaintiffs' First Cause of Action.

<u>Count II: Plaintiffs' breach of contract claim.</u>

To succeed on a breach of contract claim, a plaintiff must show four elements: "(1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages." *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 620 (V.I. 2017) (collecting cases). "Ordinarily, when the terms of a contract are unambiguous, the Superior Court treats the issue of the meaning of those terms as a question of law, but if the terms are ambiguous, the issue of the meaning of the terms becomes a question of fact." *United Corp v. Tutu Park, Ltd.*, 55 V.I. 702, 707 (V.I. 2011). "Before making a finding concerning the existence or absence of an ambiguity," the Court must "consider the contract language ... and the extrinsic evidence offered in support of each interpretation. Extrinsic evidence may include ... the conduct of the parties that reflects their understanding of the contract's meaning." *Id.* at 707-08.

Plaintiffs merely allege that the Restrictive Covenants were misinterpreted, yet have failed to "present actual evidence" supporting the alleged ambiguity "amounting to more than a scintilla." *Perez,* 59 V.I. at 527. Given this dearth of extrinsic evidence, the Court finds no ambiguity in the language of the Restrictive Covenants, and interprets the language as a matter of law.

With regard to the first element of Plaintiffs' breach of contract claim, there is no dispute that the parties have an agreement. Plaintiffs argue that "restrictive covenants are contractual in nature and bind the parties in the same manner as any other contract," and Defendant offers nothing in disagreement. Opposition, at 7; *cf. United Corp.*, 55 V.I. at 713 (citing *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 628 S.E.2d 284, 291 (S.C. 2006) ("The word 'covenant' means to enter into a formal agreement, to bind oneself in contract, and to make a stipulation.") (quoting 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 1.1)).

As to the second element, Plaintiffs assert that "the Board has a duty to correctly apply and enforce [the Restrictive Covenants] terms." Opposition, at 8. Again, Defendant offers no alternate interpretation, so the Court will accept Plaintiffs' assertion that the Association has a duty to correctly apply the terms of the Restrictive Covenants.

Regarding the third element, the Court finds as a matter of law that the Association did not breach its duty to correctly apply and enforce the terms of the Restrictive Covenants. In its Motion, the Association contends that "the [Restrictive] Covenants plainly support the actions taken by the Board in denying Plaintiffs' request to build a garage within 15 feet of their property line." Motion, at 8. Plaintiffs in turn assert that Defendant misinterpreted the Restrictive Covenants, "resulting in a misapplication of its terms to the detriment of a party for whom the covenants were made," claiming that such misinterpretation and misapplication constituted "an express breach of the covenants." Opposition, at 8.

The Restrictive Covenants unambiguously state that, "no... outbuilding shall be constructed within twenty (20) feet of any boundary line." Restrictive Covenants, at § 3 ¶ 3. As to the Association's waiver of the terms:

> The Board <u>is authorized</u> to waive encroachments that occur within the 20 feet [sic] set back if a written agreement, signed by the adjacent plot owners impacted by the set back violation, have consented thereto. The agreement presented to the Board must contain language which confirms that it is binding on the agents, successors, and assigns of the respective property owners. <u>If</u> the Board agrees with the property owners' agreement, it <u>may</u> approve such waivers with a two-thirds majority vote of the Board of Directors.

Restrictive Covenants, at § 3 ¶ 7 (emphasis added).

This language clearly contemplates that, while waivers are permissible, they are not mandatory and may be issued at the discretion of the Board of Directors. An unambiguous understanding of this term is evidenced by Plaintiffs' conformance with its conditions - particularly submitting a signed document to the Association including the aforementioned language confirming its binding effect. *See* Complaint, Ex. A. The Restrictive Covenants establish that the Association may grant a waiver, if certain conditions have been fulfilled. Although Plaintiffs here did fulfill those conditions, the Association was under no duty or obligation to grant the waiver Plaintiffs sought. As the Association committed no breach of its duty under the plain language of the Restrictive Covenants, Plaintiff's breach of contract claim necessarily fails. Accordingly, the Motion of the Association is granted as to Plaintiffs' Second Cause of Action, and summary judgment will enter dismissing the same.

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Defendant Estates of Judith's Fancy Owners' Association, Inc.'s converted Motion for Summary Judgment is GRANTED, and Plaintiffs' Complaint is DISMISSED with prejudice in its entirety.

DATED: January 29, 2018.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By: __________
Court Clerk Supervisor 1/30/18