IN THE MISSOURI SUPREME COURT

Number SC91138

DeBALIVIERE PLACE ASSOCIATION,

Respondent,

v.

STEVEN VEAL,

Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
Cause Number 22054-02475
HONORABLE ROBERT H. DIERKER, JR.
DIVISION 18

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

JURISDICTIONAL STATEMENT

This appeal lies from an amended judgment entered by the Circuit Court of the City of St. Louis, Missouri. *See* § 512.020 RSMo. Pursuant to Article V, § 3, of the Missouri Constitution, the Eastern District of the Missouri Court of Appeals had jurisdiction over the appeal of the Trial Court's decision. This Court granted Respondent's Application for Transfer pursuant to Missouri Rule 83.04. Accordingly, this Court now has jurisdiction over this appeal. Mo Const., Art. V, § 10.

STATEMENT OF FACTS

A. Procedural

Respondent DeBaliviere Place Association ("DPA") filed two lawsuits against Appellant Steven Veal ("Veal") in the circuit court of the City of St. Louis ("Trial Court") (cause numbers 22054-02475 and 0722-CC01701) to collect real property assessments. (L.F. 13, 335). The suits addressed some of the properties owned by Veal. Specifically, those located at 5621-5623 Delmar and 5540-48 Delmar and 5560-64 Delmar (hereinafter collectively referred to as the "Property"). All of the properties are located in the City of St. Louis. The Trial Court consolidated the two suits. (L.F. 169).

This matter was submitted to the Trial Court on Plaintiff's Motion for Summary Judgment which was granted on February 2, 2009. Veal filed its Notice of Appeal. (L.F. 302). The Missouri Court of Appeals for the Eastern District ("Court of Appeals") reversed and remanded the Trial Court's judgment for further proceedings. This Court granted DPA's Motion for Transfer on October 26, 2010.

B. Facts

1. 1977 to 1997

The original DeBaliviere Place Association ("ODPA") was incorporated as a not-for-profit corporation in 1977. (L.F. 82-85). The Declaration of Covenants and Restrictions ("Declaration") was promptly recorded with the recorder of deeds for the City of St. Louis at Book 138, Pages 532 through 557 on Oct 20, 1977. (L.F. 48-73). DeBaliviere Place Association was incorporated for the purpose of

> …owning, maintaining, and administering the "common areas" and "limited common areas"…and enforcing the covenants and restrictions herein set forth and collecting and disbursing the assessments and charges . . . and promoting the recreation, health, safety, and welfare of the residents of DeBaliviere Place"

all as set forth in the Declaration. (L.F. 49).

ODPA was unwillingly administratively dissolved in 1992 for failure to comply with Missouri's corporate filing requirements. (L.F. 31, 92).

2. 1997 to 2003

Appellant Veal became the owner of 5621-5623 Delmar ("Property") in 1997, by way of a Special Warranty Deed. (L.F. 95). The Property at all times relevant herein, was and is used as an apartment building with ninety-two (92) units. (L.F. 14, 24). The Property is located within the DeBaliviere Place Association and is subject to the Declaration. (L.F. 32, 171). The Special Warranty Deed clearly references by recorded instrument both the Declaration of Covenants and Supplemental Declaration No. 56, which included Veal's Property, in the list of Permitted Exceptions attached to the conveyance deed. (L.F. 99). Pursuant to the Declaration, all properties within the Association are required to pay assessments, special assessments, costs, interest and attorney's fees for collection of unpaid assessments. (L.F. 57-61; Declaration, Art. V). Also Pursuant to the Declaration, "no Owner may waive or otherwise avoid liability for

assessments". (L.F. 58; Declaration Art. V, Section 1b). Assessments were charged at an annual rate of $46.00 per unit from 1997 through 2005. (L.F 129).

Appellant Veal acknowledges the existence and validity of Association but at no time requested to be removed from the Association. (L.F. 106, 121-122; Veal Deposition, p. 20, 80-81). Veal has not paid any assessments for his Property to the Association from 1997 through present. (L.F. 107; Veal Depo., p. 22). However, Appellant Veal paid assessments to the Association from 2001-2008 without protest for another property owned by him also located within the Association boundaries known as The Kingsbury. (L.F. 35 para. 36, 173 para. 36, 106, 111-112; Veal Deposition 18-20, 38-43).

3. 2003-Present

Because the original DeBaliviere Place Association corporation was administratively dissolved in 1992 for failure to comply with Missouri corporate filing requirements (L.F. 31, 92), a new corporation was established in 2003 ("Association") for the purposes of governance, maintenance, management, administration, and operation of DeBaliviere Place. (L.F. 86, 88). Appellant concedes in the record, "Between 1992 and 2003, the DeBaliviere Place Association, while not a legally recognized entity in Missouri, continued full operations and charged assessments to its residents." (L.F. 176). The current Association corporation is in good standing with the Secretary of State in Missouri. (L.F. 90). As part of its wrapping up of affairs, the Original DeBaliviere Place Association corporation assigned all rights to the current Association. (L.F. 92).

Since incorporation, DPA has spent assessments on insurance, legal services, management, postage, printing, marketing, electricity, socials and meeting spaces, tax preparation and accounting, janitorial, repairs and maintenance, supplies, a dog park, flowers and landscaping, streetlights and security. (L.F. 160-168). However, in his deposition, Veal states that the only reason he hasn't paid is because of lack of services provided to him. (L.F. 35 para. 34; L.F. 173 para. 34; L.F. 112; Veal Deposition 41-44). In February 2005, DPA recorded a "Notice of Lien" against a portion of the Property for assessments owed plus interest. (L.F. 130-131). Appellant admitted that the Association was authorized to foreclose its lien pursuant to Article V of the Declaration. (L.F. 34 para. 27; L.F. 173 para. 34).

On May 1, 2007, Association recorded two more "Notice of Liens" against portions of Appellant Veal's Property, claiming unpaid assessments, interest and fees through December 2007. (L.F. 465-468). Appellant admitted that the Association was authorized to foreclose its lien pursuant to Article V of the Declaration. (L.F. 356, para. 32; L.F. 501, para. 32). Association filed lawsuits in 2005 and 2007 against Appellant Veal to collect the amounts indicated in the three liens, which suits were consolidated in the trial court below. (L.F. 169). The trial court found that Appellant Veal was obligated to pay all unpaid assessment fees for his Property calculated from 1998 through 2007 totaling $70,856.00, together with $26, 238.69 in interest and $13,000 in attorney's fees. (L.F. 290-295).

4. Many of Appellant's Statements of Fact should be stricken.

The following "facts" provided in Appellant's Statement of Facts were either (1) not included in Plaintiff's Statement of Facts in its Motion for Summary Judgment or in Appellant/Defendant's Response to the Summary Judgment; (The "Summary Judgment record"); or (2) contradicted by Veal in his admissions to Plaintiff's Motion for Summary Judgment. Additionally, because Appellant references these facts in his Substitute Brief, Respondent has filed a Motion to Dismiss, which is hereto attached. The facts which are not present in the Summary Judgment record and/or contradicted by Appellant's own admissions are as follows:

A. "Almost all of the property within the designated Development Area is located south of Delmar Boulevard. (*citation omitted*) Appellant Veal's Property is located on the north side of Delmar Boulevard. (*citation omitted*)." (App. Br. pg. 5, para. 2). This is not in Summary Judgment record.

B. "Nothing in the record indicates that the ODPA collected any assessments from any property owner, provided any services or engaged in any type of activity whatsoever from 1992 through 2005." (App. Br. pg. 6, para. 1). This is blatantly contradicted by his admissions in the Statement of Uncontroverted Facts wherein he admitted that the other DeBaliviere Place building he owned – The Kingsbury Apartments – paid assessments to the Association from 2001 through 2008. (*Uncontroverted Material Facts, para. 36; LF 35, 173).*

C. "When he acquired the Property in 1997, Appellant Veal was unaware of the Declaration or that the Property was included in the Development Area (*from Veal's*

deposition only), and he was unaware of the dissolved DeBaliviere Place Association. (*from Veal's deposition only*)". (App. Br. pg. 6, para. 2). Statement is not in the Summary Judgment record.

D. "From the time he acquired the Property in 1997 until 2003, Veal did not receive assessment invoices or communications of any kind from anyone purporting to be acting on behalf of ODPA. (*from Veal's deposition only*)." (App. Br. pg. 6, para. 3). Statement is not in the Summary Judgment record.

E. "Veal did not know that his Property was in the previously designated Development Area until he received an invoice from DPA for assessments in 2003. (*from Veal's deposition only*)." (App. Br. pg. 7, para. 1). Statement is not in the Summary Judgment record.

F. "Nor did Veal pay any property assessments to the dissolved association from 1997 through 2003." (App. Br. pg 7, last para.). This is contradicted by Veal's admission that he paid assessments for his other building, The Kingsbury, during that period. *(LF 35, para 36; LF 173)*. This statement is also not in the Summary Judgment record.

G. "During the same period, the ODPA did not provide any services or benefit to Veal's Property (*from Veal's deposition only*)." (App. Br. pg. 7, para. 1). Statement is not in the Summary Judgment record.

H. "The record does not suggest that the new DeBalieviere Place Association corporate entity was approved, authorized or otherwise enabled by property owners within the Development Area." (App. Br. pg. 7, para. 2). Statement does not have

specific page references to the legal file as required by Rule 84.04 (i) nor is it authenticated by any reference to the record. Statement is not in the Summary Judgment record.

I. "In 2003, Appellant Veal received his first invoice for Annual General Assessments from DPA claiming that assessments were due for the subject Property. (*from Veal deposition only*)." (App. Br. pg. 7, para. 2). Statement is not in the Summary Judgment record.

J. "Nothing in the record indicates that any revenue derived from Annual General Assessment fees was used for the purpose of adding new properties to the Development Area." (App. Br. pg. 12, para. 1). Statement does not have specific page references to the legal file as required by Rule 84.04 (i) nor is it authenticated by any reference to the record. This is also an attempt to assert a new Affirmative Defense which is barred from being brought on appeal. Statement is not in the facts in support of Summary Judgment record.

POINTS RELIED ON

I. THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE THE POWER TO WIND UP ODPA'S AFFAIRS WAS VESTED IN THE FORMER OFFICERS AND DIRECTORS ("TRUSTEES"), NOT THE CORPORATION; THERE IS NO TIME LIMIT FOR WINDING UP THE AFFAIRS; AND ODPA'S ASSIGNMENT WAS A PROPER EXERCISE OF THE TRUSTEES' POWER TO WIND UP ODPA'S AFFAIRS. (RESPONSE TO APPELLANT'S POINT I).

A. The Old RSMo. §355 Controls Because ODPA's Involuntary Forfeiture Occurred Prior To The Repeal Of The Old RSMo. §355.

B. Old §355 Gives The Right To Wind Up To The Former Officers And Directors With No Statute Of Limitation On Their Right To Wind Up The Business.

C. There Is No Statute Of Limitation For The Winding Down Of A Not For Profit Corporation After Involuntary Forfeiture Of Its Charter.

D. In Any Event, Veal Waived Any Challenge To The Assignment.

E. Veal's Argument Regarding The Hypothetical Purchaser Is Irrelevant, Based On Assertions Not Contained In The Summary Judgment Record, Is Contradicted By Veal's Own Testimony And Ignores The Existence Of DPA's Recorded Documents.

II. THE ASSIGNMENT IS VALID AND IS CONSISTENT WITH THE INTENT OF THE DECLARATION TO PROVIDE CONTINUING GOVERNANCE OF THE ASSOCIATION.

III. THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT'S ARGUMENT THAT THE ASSOCIATION COULD NOT COLLECT ASSESSMENTS DURING THE WIND UP PERIOD BECAUSE IT WAS AUTHORIZED TO USE THE FUNDS ONLY TO ADD NEW PROPERTIES IS (A) AN AFFIRMATIVE DEFENSE THAT WAS NOT RAISED UNTIL AFTER THE TRIAL COURT ISSUED THE SUMMARY JUDGMENT; AND (B) IS AN INCORRECT INTERPRETATION OF THE ASSOCIATION'S PERMISSIBLE USES OF THE ASSESSMENTS AS SET FORTH IN THE DECLARATION. (RESPONSE TO APPELLANT'S POINT II).

A. Appellant's Argument Is An Affirmative Defense For Which He Is Barred From Raising For The First Time On Appeal.

B. The Declaration Provides For Many Permissible Uses Of The Assessments And Appellant's Argument To The Contrary Is Based Upon A Typographical Error Which This Court Should Interpret As Having Its Intended Meaning Consistent With The Document As A Whole.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE DPA HAD THE AUTHORITY TO COLLECT ASSESSMENTS FOR THE YEARS PRIOR TO OBTAINING AN ASSIGNMENT OF ODPA'S INTEREST. (RESPONSE TO APPELLANT'S POINT III).

A. Appellant should be Estopped from Claiming the Association Lacked Authority.

B. The *Pioneer Point Homeowners* Case Establishes That An Assignment Of Rights Between Homeowners Associations Allows The Assignor To Enforce Assessments Both Prospectively And Retrospectively.

C. *Beavers* And *Valley View* Do Not Apply To The Facts Of This Case Because DPA Was Clearly The Successor And Assign Of ODPA.

V. APPELLANT'S ARGUMENT THAT THE 2007 LIENS ARE INVALID BECAUSE THE DECLARATION PERMITS THE FILING OF A LAWSUIT 90 DAYS AFTER FILING OF A LIEN IS WITHOUT MERIT BECAUSE: (A) APPELLANT ADMITTED THAT RESPONDENT WAS AUTHORIZED TO FORECLOSE ON THE 2007 LIENS AND APPELLANT RAISES THIS AFFIRMATIVE DEFENSE FOR THE FIRST TIME ON APPEAL; AND (B) THE PROVISION IN THE DECLARATION IS NOT "MANDATORY" AND RELATES TO THE FILING OF THE LAWSUIT AND NOT THE VALIDITY OF THE LIEN. (RESPONSE TO APPELLANT'S POINT IV).

A. The Summary Judgment Record Shows That Appellant Admitted That The Association Was Authorized To Foreclose On The 2007 Liens And Appellant Failed To Plead This Affirmative Defense.

B. This Provision Is Not "Mandatory" And Fails To Invalidate The Liens Because It Only Relates To The Filing Of The Lawsuit.

C. This Court Should Not Reverse the Trial Court's Confirmation of the Liens Merely Because the Interest Rates are Incorrect.

VI. ALTERNATIVELY, THE APPELLATE COURT HAD NO AUTHORITY TO DISMISS PLAINTIFF'S COUNTS I AND III WITHOUT A HEARING OR TRIAL ON THE MERITS BECAUSE THE APPELLATE COURT'S RULING CONSTITUTED A JUDGMENT ON THE MERITS RATHER THAN MERELY REVIEWING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT, AND SHOULD BE REVERSED.

ARGUMENT

Standard of Review Applicable to all Points

This Court's review of summary judgment is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. Banc 1993). The record is read in light most favorable to the party against whom summary judgment was entered, and all the facts properly pled by the nonmoving party and all inferences therefrom are assumed as true. *Id*. Reversal of a grant of summary judgment is only required if either (1) there is a genuine issue as to a material fact, or (2) the trial court erred as a matter of law. *Liberty Mut. Ins. Co. v. Havner*, 103 S.W.3d 829, 832 (Mo. App. W.D. 2003); Mo. R. Civ. P. 74.04. Summary judgment was appropriate if DPA established that all of Veal's affirmative defenses failed as a matter of law. *ITT Commercial*, 854 S.W.2d at 381. Points involving interpretation of a statute are questions of law that are reviewed de novo. *Dodson v. City of Wentzville*, 216 S.W.3d 173, 176 (Mo. App. E.D. 2007).

I. THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE THE POWER TO WIND UP ODPA'S AFFAIRS WAS VESTED IN THE FORMER OFFICERS AND DIRECTORS ("TRUSTEES"), NOT THE CORPORATION; THERE IS NO TIME LIMIT FOR WINDING UP THE AFFAIRS; AND ODPA'S ASSIGNMENT WAS A PROPER EXERCISE OF THE TRUSTEES' POWER TO WIND UP ODPA'S AFFAIRS. (RESPONSE TO APPELLANT'S POINT I).

A. The Old RSMo. §355 Controls Because ODPA's Involuntary Forfeiture Occurred Prior To The Repeal Of The Old RSMo. §355.

It is undisputed that the Original Association was forfeited in 1992 and was never reinstated. Respondent also agrees with Appellant that at the time of ODPA's dissolution, the former RSMo. §355 ("old §355") was the applicable statute regarding the winding up of its affairs. The old §355 provided that "[t]he directors and officers in office when the forfeiture occurs shall be the trustees of the corporation, and have full authority to wind up its affairs…" §355.507.1 RSMo. (1986) (Repealed 1995). Furthermore, the new §355, § 355.871.1(1) RSMo., provides that the repeal of former chapter 355 does not affect: "(2) Any ratification, **right**, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal."

Since the right to wind up was vested in the trustees of the corporation *at the time of forfeiture*, which occurred before the enactment of the new §355, they continue to have that right because the new §355 preserves any right acquired under the old §355 before its repeal.

B. Old §355 Gives The Right To Wind up To The Former Officers And Directors With No Statute Of Limitation On Their Right To Wind Up The Business.

Appellant focuses only on the assertion that the duration of the ODPA's right to rescind its forfeiture was ten years. Respondent agrees that the ODPA was unable to rescind its forfeiture after 10 years. The right to wind up is separate from the right to rescind. The directors and officers, in their capacity as statutory trustees of the forfeited corporation, have the power to wind up the corporate affairs. §355.507.1 RSMo. (1986) (Repealed 1995). Under the old §355, the effect of forfeiture is that the corporation has no power to act in its capacity. §355.507.1 RSMo. (1986) (Repealed 1995).

This is unlike post dissolution powers under the new §355 which provide, "A dissolved corporation continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs…" §355.691.1 RSMo. (2000). New §355 gives the corporation itself continued existence for the purposes of winding up, while old §355 terminates the existence of the corporation and gives the right to wind up exclusively to the trustees.

The failure to keep these entities separate leads Appellant to lead the Court of Appeals to mistakenly conclude, contrary to the clear language of the statute, that since the corporation could no longer rescind, it could not wind up. Appellant incorrectly concludes, "While the original association may have possessed a right to assign its interests in order to wind down its affairs, the duration of that right was 10 years after dissolution" because "[h]aving failed to apply for timely rescission of the forfeiture, the

Original Association ceased to exist." Appellant misses the fact that the corporation is not the authority that performs the act of winding up.[1] The fact that the power of the president, vice president, and treasurer to seek rescission from the Secretary of State had expired had no impact on the officers' and directors' power as trustees of the corporation to wind up the corporate affairs. Accordingly, Appellant's affirmative defense of lack of authority fails as a matter of law.

C. There Is No Statute Of Limitation For The Winding Down Of A Not For Profit Corporation After Involuntary Forfeiture Of Its Charter.

There is no time limitation of any kind placed upon the winding up of not-for-profit corporations forfeited because of lack of compliance. *See* §355.507 RSMo. (1986) (Repealed 1995). The Court in *Pioneer Point* indirectly addressed this issue when it held that an act of winding up, in the context of an assignment of the rights of an involuntarily dissolved homeowner's association, performed more than ten years after dissolution was effective, indicating either a limitless time to wind up or, in the alternative, that winding up after more than 10 years was a reasonable time. *Pioneer Point Homeowners Association, Inc., v. Booth*, 179 S.W.3d 397, 403 (Mo. App. S.D. 2005).

[1] Moreover, the basis of Appellant's logic is flawed because the Original Corporation did not cease to exist when it failed to apply for rescission by the 10 year deadline, it ceased to exist the moment it failed to file its annual report and forfeited its corporate rights. 355.507.1 (Repealed 1995).

The absence of a time limit in the statute and the presence of time limits for the winding up of other corporate dissolutions indicate that the Missouri Legislature intended to give not-for-profit corporations involuntarily forfeited for lack of compliance an unlimited time to wind up. Under the old §355, the legislature placed time limits upon not-for-profit corporations dissolved under circumstances other than involuntary dissolution for failure to comply. §355.320 RSMo. (1986) (Repealed 1995) (upon expiration of the corporation's period of duration or when a court of equity dissolves the corporation leaving the winding up to the trustees, the trustees must wind up the corporate affairs "promptly and expeditiously"). The fact that the Legislature expressly limited the winding up period for these two types of dissolutions, yet omitted any specific time limitations, indicates that the legislature intended no limitation. *See generally, Jantz v. Brewer***,** 30 S.W.3d 915, 918 (Mo. App. S.D. 2000) (the court applies the general rule of statutory interpretation that "the legislature is presumed to have intended what the law states directly, and to act intentionally when it includes language in one section of a statute but omits it from another. A disparate inclusion or exclusion of particular language in another section of the same act is 'powerful evidence' of legislative intent") (internal citations omitted).

Illinois has a similar statutory scheme for winding up the affairs of a company that is involuntarily dissolved. They too provide no specific time limit to accomplish winding up an involuntarily dissolved company. The Illinois courts have held that an involuntarily dissolved corporation was authorized to convey property for an unlimited period of time after its dissolution to wind up its affairs. *See In re Morris*, 171 B.R. 999,

1002, 1006, (S.D. Ill. 1993). As in Missouri, Illinois provides specific time limitations in other parts of its corporate dissolution statutes. For example, Illinois specifically prescribes a period of five years for the winding up of a "voluntarily" dissolved company. 805 Ill. Comp. Stat. §5/12.80; *See In re Segno Communications, Inc.*, 264 B.R. 501, 508. (Bankr. N.D. Ill. 2001).

Similarly, there is no limit placed on the winding up period for Missouri partnerships. The court in *Centerre Bank of Kansas City, Nat. Ass'n v. Angle*, 976 S.W.2d 608, 618 (Mo. App. W.D. 1998) held that the Missouri statutes containing no fixed time limitation allowed for an indefinite period for winding up stating; "While it is unusual for the winding up period to be as long as it was in this case, there is no set period of time within which a winding up must be accomplished." *Centerre Bank*, 976 S.W.2d 608, 618. Furthermore, the court in *Schoeller* found valid the winding up of a partnership which dissolved in 1962 and wound up in 1971, stating, "dissolved partnerships may continue in business for a short, long or indefinite period of time, so long as the rights of creditors are not jeopardized and so long as none of the partners insist on a winding up and final termination of the partnership business." *Schoeller v. Schoeller*, 497 S.W.2d 860, 867-68 (Mo. App.1973).

Appellant's reliance on the Court of Appeals' interpretation of the old §355 when it concluded that there is a ten year statute of limitations for the winding up of ODPA's affairs is misplaced. First, Appellant never raised the issue in the Court of Appeals and thus, neither party was given the opportunity to brief the point. Second, the Appellant and the Court of Appeals wish to write in a ten year statute where clearly none exists.

The statute is clear that the power to wind up ODPA's affairs is held by the trustees, not the corporation, and there is no time limit for winding up the affairs of a not for profit corporation which has been forfeited due to lack of compliance. The assignment by Mr. Mills, as last officer (President) of ODPA, was a proper exercise of his power to wind up ODPA's affairs. The assignment served to provide DPA with the proper authority to act as governing body of the DeBaliviere Place in accordance with the provisions of the Declaration.

D. In Any Event, Veal Waived Any Challenge To The Assignment.

More importantly, Veal waived any challenge to the validity of the assignment. When confronted with the issue in DPA's motion for summary judgment, indeed, Appellant **admitted** to the following statement in Respondent's Statement of Uncontroverted Facts:

> 7. The original Debaliviere Place Association Corporation assigned all rights to the current Debaliviere Place Association Corporation. (L.F.31, ¶7; L.F. 352, ¶7) (copy attached).

Appellant thereby admitted to the assignment. (L.F. 171, ¶7; L.F. 500, ¶7). At no time did Appellant challenge the validity of the assignment (legal or otherwise) in the Trial Court's Summary Judgment proceedings. If Veal had an issue with the Assignment, clearly that was the time to raise it. A copy of DPA's Motion for Summary Judgment, containing its Statement of Uncontroverted Material Facts, and Veal's Responses, is attached hereto.

E. Veal's Argument Regarding The Hypothetical Purchaser Is Irrelevant, Based On Assertions Not Contained In The Summary Judgment Record, Is Contradicted By Veal's Own Testimony And Ignores The Existence Of DPA's Recorded Documents.

Appellant complains, irrelevantly, that the Summary Judgment record fails to establish the many services provided by DPA to the neighborhood. DPA's claim for past due assessments does not require a showing of services provided, nor does it require a showing that Veal received his fair share of the services provided, as he would argue. Assessments are mandatory without regard to the receipt of services. *Lake Arrowhead Property Owners Assn. v. Bagwell*, 100 S.W.3d 840 (Mo.App. W.D. 2003). Appellant's argument is not relevant and is inappropriate. Appellant cites portions of Veal's deposition which were not a part of the Summary Judgment record and such references should be stricken. (See Respondent's Motion to Strike and/or Dismiss). He cites these portions in support of his baseless theory that DPA has provided no services since 1992 and to construct a fictitious argument about someone purchasing property subject to DPA in 2002 and being blindsided by the existence of an Association. Respondent vigorously disagrees with the premise. Veal himself disagreed as well when he testified that he owns another building within the DPA called the "Kingsbury Apartments"; that he's owned it since **2001** and that he has paid assessments for the Kingsbury since 2001. He stated: "We obviously pay them for the Kingsbury because we feel they're providing a service." (L.F. 112, Veal Depo p. 43; L.F. 34, para 32; L.F. 106, Veal Depo p. 19-20). Obviously, someone buying property in 2002 would not be blindsided by the existence of

an Association as Veal himself clearly knew and benefited from it. Appellant's malevolent assertions regarding DPA's efforts to provide valued services to the community are self serving, gratuitous and unprincipled.

Besides, Appellant's fictitious argument fails miserably in every practical way. The slightest due diligence would reveal, or at least put on notice, any potential buyer of property of the Association's right to impose assessments, old and new. A buyer and the title company would know from their due diligence that the Declaration is a matter of record and that it imposes assessments on the owners for the maintenance of the common areas. The Declaration clearly states that all properties within the Association are required to pay assessments, special assessments, cost, and interest and attorney's fees for collection of unpaid assessments. (L.F. 48-80; Declaration, Art. V). Appellant's alleged fears would not arise even if the buyer landed here from another planet, by-passed the title company, paid cash and never spoke with the seller. It is black letter law in Missouri that the buyer is charged with constructive notice of the Declaration and must pay the "dues and assessments…contained in the association's declaration." The covenant to pay runs with the land and obligations each owner to pay assessments. *Lake Arrowhead Property Owners Assn.*, 100 S.W.3d at 844; citing *Chesus v. Watts*, 967 S.W.2d 97, 108 (Mo.App. 1998). Title companies and real estate agents routinely contact the Association officers who in turn referred them to the management companies. The Declaration reveals that the Association is DPA and any inquiry, especially of the seller, would reveal the name of the management company. Appellant's argument has no basis and honestly, makes no sense.

This Court should not allow Appellant to fabricate facts regarding the functioning of DPA and construct a phony argument based on concocted facts to mislead this Court into believing that ruling in Appellants' favor will help protect innocent victims.

II. THE ASSIGNMENT IS VALID AND IS CONSISTENT WITH THE INTENT OF THE DECLARATION TO PROVIDE CONTINUING GOVERNANCE OF THE ASSOCIATION.

Defendant in his first point challenges the validity of the assignment and the authority of DPA to serve the members, collect assessments, and carry out the covenants and restrictions contained in the Declaration. However, Defendant cannot now refute what he admitted in his response to Plaintiff's Motion for Summary Judgment. In its "Statement of Uncontroverted Material Facts," Plaintiff's paragraph 7 stated: "The original DeBaliviere Place Association corporation assigned all rights to the current DeBaliviere Place Association corporation." In its Response, Defendant admits paragraph 7. (L.F. 31, 171). Defendants cannot now argue that such assignment is ineffective or that it carries no authority.

There is no question that the rights granted to the original DeBaliviere Place Association were assignable and that an assignee could exercise those rights. See *Pioneer Point Homeowners Association, Inc. v. Booth*, 179 S.W.3d 397 (Mo.App 2005); see also *Sherwood Estates Homes Ass'n, Inc. v. Schmidt*, 592 S.W.2d 244 (Mo.App. 1979). In Missouri, to decide whether an assignment occurred is a function of the parties' intent. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 633-34 (Mo.App. 2005). "The intent to assign an interest is key." *Id*.

> "[N]o set form of words is necessary to accomplish an assignment, provided that the circumstances show an intent on one side to assign and on the other side to receive." *Id*. at 634. See also *Miller v. Dannie Gilder, Inc.*, 966 S.W.2d 397, 398 (Mo. App. 1998)

Courts look to the purpose of authority granted to homeowner's associations when deciphering proper assignments so as to not render the homeowners disadvantaged. Courts do not want homeowners who have relied on the presence of an association to govern and maintain their property to be left without that governing body due to technical issues during an assignment of rights. Instead, Courts look to what was intended.

In *Pioneer Point Homeowners Association, Inc. v. Booth*, discussed supra, the Court did just that. In *Pioneer Point*, the corporate status of an association (Homeowner Association I) was forfeited by the state of Missouri in 1989 and was not reinstated. In 2001, a second homeowners' association (Homeowner Association II) was incorporated. Sometime thereafter, and while a suit was already pending regarding the challenge to the validity of the governing entity, Homeowner Association I executed an assignment of rights to Homeowner Association II. A homeowner in that case, brought suit to challenge the authority of the successor homeowner's association to exercise rights and enforce restrictions under the subdivision's covenants. The Court held that the Association was the valid governing association.

The Court based its determination on the intent of the developer, as gleaned from the covenant, to vest control of the subdivision in a homeowners' association. *Id*. at 401-403. The Court said, “The clear intent of the developer of the subdivision in this case was that it be maintained, operated and governed by the homeowners themselves.” *Id*. at 402. Citing *Sherwood Estates Homes Ass'n, Inc. v. Schmidt* (noting that the purpose of both the Declaration and the restrictions would have been seriously undermined if the Association was not found to have the same authority as the prior Association).

The Court looked to the overall purpose of the subdivision covenant in support of their decision, noting that if they had come out the other way, no association would be entitled to enforce the subdivision covenant because the original association ceased to exist. *Id*. at 402-03. The court queried, “If the new association were not authorized to act as the association, who could be?” *Id*.

In the present case, the facts are similar. The original association was administratively dissolved. The Association was re-incorporated and the original association assigned its rights and interest to the new Association. Additionally, like *Pioneer Point*, it was clearly the developer’s intent to have an Association govern the property. The DeBaliviere Declaration states,

> Developer has deemed it desirable for the efficient preservation of the values and amenities of DeBaliviere Place to create a corporation to which should be delegated and assigned the powers of owning, maintaining and administering the “Common Areas” and “Limited Common

> Areas" and enforcing the covenants and restrictions herein set forth and collecting and disbursing the assessments and charges hereinafter created and promoting the recreation, health, safety, and welfare of the residents of DeBaliviere Place; (Declaration p. 5; L.F. 49).

It was not only the Developer's intent to give the Association control over the property, but as evidenced by the Declaration, it was also the Developer's intent that the rights would run continually with the property unless proactively terminated, running either with the association, its successors or assigns. The Declaration states,

> The covenants and restrictions of this Declaration shall run with and bind the land for a term of 50 years from the date this Declaration is recorded. Thereafter, the term of this Declaration shall be automatically renewed for consecutive 25 years periods unless the Association terminates this Declaration by executing an appropriate instrument… (Declaration, Art. VIII, Section 2)
>
> "Association" shall mean and refer to DeBaliviere Place Association, a Missouri not-for-profit corporation, **its successors and assigns**. (Declaration, Art I, Section 1)

It was the clear intent of the Developer to have an association control the property unless proactive steps were taken to terminate that authority. The owners within the Association bought into the Association for the benefits it brought to the neighborhood.

Each relied on the continuing services of the Association and an entity that would administer such services. There is no claim by Appellant that there were any affirmative acts that caused the demise of the Association. The only claim is that the original charter with the Secretary of State was forfeited. The original homeowner's association was not proactively terminated as the Declaration specifies, but rather was administratively dissolved for simply failing to comply with Missouri corporate filing. There is no evidence that the property was ever intended to be without a governing Association, rather the evidence shows just the opposite. The Association incorporated in 2003 was intended to serve as the functioning homeowner's association because the prior Association had lapsed, and they intended to have all the rights and duties as the original association.

Appellant purchased the Property that is the subject of this action in 1997 and since membership in the Association is automatic by virtue of ownership, Appellant is accountable for the assessments due from the time he took ownership. The Declaration in this case proposes that an association govern the property and to reverse the Trial Court's judgment in this case would undermine the original, stated intent of the Declaration, which the homeowners relied on when purchasing their homes. Such a reversal would lead to consequences strongly avoided by the Courts in *Pioneer Point* and *Sherwood*; those decisions upheld the developer's original intentions and the validity of successor homeowner associations and their authority. Likewise, this Court should affirm the Trial Court's judgment that the Association in this case had appropriate authority.

III. THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT'S ARGUMENT THAT THE ASSOCIATION COULD NOT COLLECT ASSESSMENTS DURING THE WIND UP PERIOD BECAUSE IT WAS AUTHORIZED TO USE THE FUNDS ONLY TO ADD NEW PROPERTIES IS (A) AN AFFIRMATIVE DEFENSE THAT WAS NOT RAISED UNTIL AFTER THE TRIAL COURT ISSUED THE SUMMARY JUDGMENT; AND (B) IS AN INCORRECT INTERPRETATION OF THE ASSOCIATION'S PERMISSIBLE USES OF THE ASSESSMENTS AS SET FORTH IN THE DECLARATION. (RESPONSE TO APPELLANT'S POINT II).

A. Appellant's Argument Is An Affirmative Defense For Which He Is Barred From Raising For The First Time On Appeal.

The centerpiece of Appellant's argument in his Brief is that part of the assessments awarded in this matter were for a time that the original corporate entity was "winding down" its affairs. Appellant argues mistakenly that the Declaration requires that Respondent only use assessments to add new properties, and adding new properties is an impermissible activity in the winding down of a corporation. Thus, there can be no enforcement of the assessment collection because its use was unlawful. Appellant's argument is (1) rooted in an affirmative defense which Appellant failed to plead and did not raise until after the Trial Court issued the Summary Judgment; and (2) premised on a false interpretation of the Declaration which is briefed in Respondent's next section.

"An affirmative defense is defined as one which 'seeks to defeat or avoid plaintiff's cause of action [and] ... avers that even if the petition is true the plaintiff cannot

prevail because there are additional facts that permit the defendant to avoid legal responsibility.' " *Holdener v. Fieser*, 971 S.W.2d 946, 950 (Mo.App.1998) (citation omitted)

> In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including . . . any other matter constituting an avoidance or affirmative defense.

Missouri Supreme Court Rule 55.08 (emphasis added). Although this defense is not specifically mentioned in Rule 55.08, it is an affirmative defense within the purview of Rule 55.08's mandate. See also Black's Law Dictionary 451 (8th ed. 2004) (affirmative defense defined).

> An affirmative defense contemplates additional facts not included in the allegations necessary to support plaintiff's case and avers that plaintiff's theory of liability, even though sustained by the evidence, does not lead to recovery because the affirmative defense allows the defendant to avoid legal responsibility." *Parker v. Pine*, 617 S.W.2d 536, 542 (Mo.App. 1981).

Here, Appellant's claim is an affirmative defense. The use, permissible or not, of the homeowners' assessments is an additional fact which Appellant must prove, but is not necessary to support Association's claim that Appellant owes past due assessments. Respondent clearly established and Appellant admitted that the assessments were not

paid. (L.F. 33, 172). The argument, as laid out in Appellant's Brief, does not address liability of the debt owed. The defense is being utilized by Appellant not to argue that he does not owe assessments, but rather, to avoid his legal responsibility to pay. There are two separate issues here: the fact that the past due assessments are owed, and whether the use of the assessments is lawful; the latter being an affirmative defense. Appellant avers that even if assessments are owed, he should not have to pay because their use, allegedly, is unlawful. This exemplifies an affirmative defense as defined in *Holdener v. Fieser*, discussed supra.

Rule 55.08 requires that all affirmative defenses be pled in responsive pleadings or be abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo.banc 2002). Failure to plead affirmative defenses will result in their waiver. *Holdener v. Fieser*, 971 S.W.2d at 950. Rule 55.08 also provides that: "A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance."

Appellant specifically raised several affirmative defenses in his answer; however, he failed to raise, with a "short and plain statement," an affirmative defense that the Association could not collect assessments because they were to be used for an impermissible or unlawful use. (L.F. 24-27). Raising a defense that he was not liable for assessments during ODPA's forfeiture hardly complies with Rule 55.08 as a defense that the association could only use assessments for "adding properties." Appellant did not raise this defense in the pleadings, thus he is barred from raising this argument on appeal. For this reason alone, Appellant's point should be rejected.

B. The Declaration Provides For Many Permissible Uses Of The Assessments And Appellant's Argument To The Contrary Is Based Upon A Typographical Error Which This Court Should Interpret As Having Its Intended Meaning Consistent With The Document As A Whole.

Appellant argues that there was no point for the Association to collect assessments because according to the Declaration, the exclusive purpose for the Annual General Assessment is to add new property, which would not be a permissible activity in the winding down of its affairs. Appellant bases this argument on an obvious typographical error in the Declaration.

The trial court correctly noted that after its dissolution in 1992, the original DeBaliviere Place Association's activities were limited to activities incidental to winding up its affairs. (L.F. 183). Appellant argues that there was no point for the Association to collect assessments because according to the Declaration, the exclusive purpose for the Annual General Assessment is to add new property, which would not be a permissible activity in the winding down of its affairs. Appellant bases this argument on an obvious scrivener's error in the Declaration.

The error appears in Declaration, Art. V, Section 2a and states:

> a. Purpose of Assessment. The Annual General Assessment levied by the Association shall be used exclusively for the fulfillment by the Association of its **powers and duties** as set forth in Section 2 of

ARTICLE II hereof. (Declaration, Art. V, Sec. 2a)

(Emphasis added.)

Reading the Declaration as a whole and using common sense, it is clear that "ARTICLE II" in this Section is a typographical error and should have read, "ARTICLE III".

The law on this issue is clear. If something appears to be a typographical error, the court may, by looking at the contract as a whole, interpret the word so it is more logically suited to the agreement. *Roth v. Phillips Petroleum Co.*, 739 S.W.2d 598 (Mo.App. 1987) *citing, Sheetz v. Price,* 136 S.W. 733 (1911). See also, *Unlimited Equipment Lines, Inc. v. Graphic Arts Centre, Inc.*, 889 S.W.2d 926 (Mo.App. 1994) (A contract must be read according to the parties' intent despite clerical errors and omissions). The cardinal rule in the interpretation of a contract in Missouri is to ascertain the intention of the parties and to give effect to that intention. *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo.banc 1973).

Respondent does not request that this Court reform the Declaration, which would be a theory which has not been preserved for appeal, rather Respondent requests this Court interpret the Declaration in a manner consistent with facts and grounds presented to the trial court in Respondent's Motion for Summary Judgment.

In *Roth*, the Court did not **reform** the typographical error; it **interpreted** the error to have the meaning it was clearly meant to have based on looking at the document as a whole. *Roth*, 739 S.W.2d at 600. The court did not rely on extrinsic evidence or any exceptions to the parol evidence rule. *Id*. Looking solely at the document, the court determined there was no ambiguity and the word "lessor" was a mere typographical error

concluding that the word "lessee" should be interpreted in its place. *Id*. Making it even clearer that the court simply interpreted the document and did not reform it, the court in *Roth* specifically denied the reformation request because it was not pled. *Id*.

In *Sheetz v. Price*, 136 S.W. 733 (1911), the Court also used interpretation, rather than reformation, to interpret the word "such" to mean "each" where the provision with the erroneously used word such would essentially nullify that provision. *Roth* and *Sheetz* clearly indicate that the courts may interpret a typographical error in a document without the need for a party to have requested reformation from the trial court.

Looking at the Declaration as a whole, it is clear that Article V's reference to Article II is a typographical error. Section 2 of ARTICLE **III** is the only section that references "powers and duties" which Article II, Section 2a specifically stated was the purpose for which the Annual General Assessment shall be used. This Article **III**, Section 2 states:

> General Powers and Duties of Association, and states:
>
> a. Own, improve, maintain and administer the Common Areas and Limited Common Areas of DeBaliviere Place in the manner described in ARTICLE IV hereof;
>
> b. Enforce the covenants and restrictions herein set forth;
>
> c. Make, or cause to be made, improvements to, and/or maintain, or cause to be maintained, improvements in, any public areas, including but not limited to, streets,

alleys, parks, right-of-way and sidewalks, adjoining any property subject to this Declaration;

d. Provide, or cause to be provided, to or for the benefit of residents of DeBaliviere Place:

(i) security, such as but not limited to, watchmen, guards and/or patrolmen; and

(ii) social services and/or events, such as but not limited to, day care, youth team sponsorship, specialty days or functions;

e. Collect and disburse the assessments and charges herein created for the purposes herein provided; and

f. Take all other actions deemed by it necessary or appropriate to promote the recreation, health, safety and welfare, and enhance the environment, of the residents of DeBaliviere Place.

The foregoing powers and services are not in limitation or denial of any and all other powers and duties provided for in any other Articles of Declaration.

DPA has been providing these duties, including maintaining public areas, providing security, and providing social services, with the funding of the Annual General Assessment since its inception. (For example, see L.F. 160-168).

The drafters would not have specifically enumerated the powers and duties of the Association and provide no means for it to discharge its duties. Further, a duty enumerated in subsection (e) of Article **III**, Section 2 buttresses the fact that the Association is authorized to collect assessments and spend the assessments for the purposes provided therein. Subsection (e) provides that the Association shall:

> e. Collect and disburse the assessments and charges herein created for the purposes herein provided;

It would be absurd for the Indenture to provide that the Association had the duty to collect and disburse assessments for the purposes provided under Section 2 ARTICLE **III** yet also provide that the only purpose that the assessments can be used is for the accumulation of property.

In Contrast, Art. II, Sec. 2 is titled Additions to Existing Property and describes the manner in which new properties would be made subject to the Declaration. It makes no reference to General Assessments nor does it authorize the Association to purchase any property or spend any money. It merely refers to adding properties to be subject to the Declaration – not purchasing such properties. Nowhere in Article II, Section 2 does it refer to powers and duties and nowhere does it refer to the use of collected annual assessments to accumulate property.

It is only plausible that when Art. V, Sec. 2a was written it was meant to reference the General Powers and Duties of Association in Section 2 of Article III, and not Additions to Existing Property in Section 2 of Article II. If the Declaration were applied, accepting the typographical error, it would limit the use of the General Annual

Assessments exclusively to adding new properties instead of maintaining current properties. This leads to an absurdity in the Declaration that contradicts the actual purpose and intent of the Association. (L.F. 48-50).

While the Declaration provides for owner-approved special assessments to pay for the duties listed in Section 2 Article III, it is not only impractical but absurd to argue that it was the intent of the developer that special assessments are the sole method of exercising Article III powers. The Association has used the Annual General Assessment revenue for such items as: donations to a local child care center, flowers, electric service, doggie bags, and Christmas Wreaths. Using this interpretation, the Declaration would require, "approval of the Association…by vote of a majority of the votes of each of the two classes of voting members," to approve the funding of doggie bags and Christmas Wreaths, but no approval at all would be necessary for funding to add (or purchase) new property for the Association. (Decl. Section 3, Article V; Decl. Section 2, Article II), which is an impractical and absurd result.

In *Bullock Co. v. Allen*, the Court faced a similar issue with a typographical error in a contract. In that case, defendants contended plaintiff had not shown compliance with the contract to build a garage because the address for the building site was incorrectly written in the contract. The court noted that after the defendants knowingly received benefits of plaintiffs, defendants could not claim that they elected to rely on the erroneously drafted agreement. *Bullock Co v. Allen*, 493 S.W.2d 5, 7 (Mo. App. 1973). The Court looked to the words and conduct of the parties to ascertain their intent. *Id.* Finding that the garage was built where the parties intended and not at the erroneous

address in the contract, the Court reiterated, "The contract must be read in accord with the parties' intent in spite of a clerical error which would refute that intent." *Id.*

Moreover, the clear intent of the parties to the original contract was to reference Article III. In order to determine the intent of the parties a court will consider the entire contract, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330 (Mo. App 1996). Looking at these factors, it is obvious that the parties intended to reference Article III instead of Article II.

In the present case, Appellant acknowledges that his property, "the Kingsbury" is also a member of the Association and received valued services from DeBaliviere Place Association and that Association dues owed by the Kingsbury were paid from 2001 to 2008. Because Appellant knowingly received benefits under the DeBaliviere Place Association Declaration for "the Kingsbury," Appellant cannot presently claim to rely on the error in the Declaration to avoid paying assessments now for his own properties. Rather, the conduct of accepting the benefits of the Association such as security patrols for "the Kingsbury" in exchange for Annual General Association dues demonstrated the drafters' intent and the parties' acquiescence for the expenditure of the Association dues. (Exhibit I, Veal's Deposition, L.F. 120, 122). Therefore, the parties are deemed in law to have waived any claim that the only purpose DPA can use assessments is for adding new property. *Bullock Co v. Allen*, 493 S.W.2d at 7.

Even more twisted is that Appellant made it clear in the Summary Judgment record that the only reason he didn't pay assessments is because the Association failed to provide sufficient services. (L.F. 35, para 34; L.F. 172; Veal depo pp 41-44 at L. F. 112). Veal stated that he was contesting the assessments because he believed he hadn't received services. Now, for the first time, he claims that the Association had no right to provide services and he won't pay assessments because DPA should not be providing any services. Appellant knows better. He paid assessments for all those years because he received what he believed were valuable services. He knows that the purpose of assessments is to purchase flowers to beautify the area, provide security, social services, daycare and all the other enumerated duties set forth in Article III, Section 2.

It was the obvious intent of the drafters to reference Article III, Section 2 instead of Article II, Section 2, and the outcome under the erroneous reference would produce absurd results. The typographical error should be interpreted as it was intended to be written. Adding new properties is not the exclusive, permissible use of the general annual assessments and the collection of assessments since 1992 was appropriate for the winding up of the affairs of the Association in order to maintain the properties. *Pioneer Point Homeowners Association, Inc. v. Booth*, 179 S.W.3d 397 (Mo. App. 2005). Appellant's argument to the contrary is without merit and this Court should affirm the Trial Court's Judgment.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE DPA HAD THE AUTHORITY TO COLLECT ASSESSMENTS FOR THE YEARS PRIOR TO OBTAINING AN ASSIGNMENT OF ODPA'S INTEREST. (RESPONSE TO APPELLANT'S POINT III).

A. Appellant should be Estopped from Claiming the Association Lacked Authority to Collect Assessments.

Appellant is barred from raising the issue that DPA was unauthorized to collect assessments prior to the date of the assignment. The doctrines of waiver and equitable estoppel consist of three elements: (1) an admission, statement or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon, (2) and action taken by the second party on the faith of such admission, statement or act, and (3) an injury to the second party which would result if the first party is permitted to contradict or repudiate his admission, statement or act. *Shores v. Express Lending Services, Inc.* 998 S.W.2d 122 (Mo. App. E.D. 1999).

All three elements are present here. Appellant claims that the new Association was unauthorized to act between 1998 and 2006, yet he paid assessments for his property known as "the Kingsbury" and accepted services from the Association during that time without dispute. (L.F. 35, para 36). His payments to the Association for his other property signifies his acknowledgement of the Association's authority. He cannot now change his position after all these years to the Association's prejudice.

Thousands of people rely on the status of the community for tax abatements and tax credits, and thousands of owners and tenants look to the Association to maintain

common ground, enforce architectural covenants, and provide other services that otherwise would not be provided by the city of St. Louis. It would be unjust to allow Appellant's claim of the Association's lack of authority while he has admittedly acknowledged their authority for his other property also in the Association. This Court should affirm the judgment of the Trial Court that the Association had the authority to enforce assessments that were payable at any time in accordance with the Declaration, including 1998-2006.

Appellant admitted that the Association was authorized to foreclose its lien pursuant to Article V of the Declaration. (L.F. 34 para. 27; L.F. 173 para. 34). This is further bolstered by the point that Veal's only reason for refusing to pay assessments is because of lack of services provided to him. (L.F. 35 para. 34; L.F. 173 para. 34; L.F. 112; Veal Deposition 41-44) despite the fact that DPA has provided numerous services with the assessments including: insurance, legal services, management, postage, printing, marketing, electricity, socials and meeting spaces, tax preparation and accounting, janitorial, repairs and maintenance, supplies, a dog park, flowers and landscaping, streetlights and security. (L.F. 160-168). Challenging DPA's authority during a time when he clearly recognized its authority simply constitutes a waiver on this point to any such challenge.

B. The *Pioneer Point Homeowners* Case Establishes That An Assignment Of Rights Between Homeowners Associations Allows The Assignor To Enforce Assessments Both Prospectively And Retrospectively.

The original DeBaliviere Place Association was administratively dissolved in 1992 for failing to comply with filing requirements. The new DeBaliviere Place Association was incorporated in 2003. It subsequently received an Assignment Agreement from the dissolved DeBaliviere Association in 2006. Appellant argues that because of the gap between incorporation and assignment, the actions taken by DPA prior to 2006, including attempts to collect past due assessments, are void.

Appellant's argument is contrary to the decision in *Pioneer Point Homeowners Association, Inc. v. Booth*, 179 S.W.3d 397 (Mo.App. 2005), where the Court held that a subsequent homeowners' association had authority to retroactively collect unpaid assessments that were delinquent prior to its assignment of rights from the predecessor corporation. *Id*. at 403.

Pioneer Point had an identical fact pattern to the present case. In fact, the original Association (Homeowner Association I) had its charter forfeited in 1989 and the newly formed Association (Homeowner Association II) was incorporated in 2001. The president of Homeowner Association I issued an assignment to the new entity sometime after it was formed. The Court found, contrary to Appellant's erroneous analysis, Homeowner Association II had authority to retroactively collect unpaid assessments that were delinquent several years prior to receiving its assignment of rights and prior to its corporate existence. *Pioneer Point*, 179 S.W.3d at 403.

In *Pioneer Point*, the Court decided that Homeowner Association II, could enforce the rules and restrictions according to the original Statement of Reservations. *Pioneer Point* at 400. The Court held:

> Because there has been no challenge to the validity of the assignment[2] between Homeowners Association I and II, and because we have found nothing to suggest that such assignments are disfavored in the law, we cannot say that the trial court erroneously applied the law in holding that Homeowners Association II was the appropriate entity to enforce the Statement of Reservations, and has the authority **to make assessments and/or file liens**. *Id*. at 403.

The Court determined that the subsequent association had authority to enforce the liens against the homeowners, including liens for unpaid assessments during the years 1998 and 1999. *Id*. at 399-400. The assignment of rights to the second homeowners association occurred sometime after 2001, three years after those unpaid assessments. *Id*. at 400. *Pioneer Point* held that Homeowners Association II had authority to retroactively collect unpaid assessments that were delinquent several years prior to receiving its assignment of rights.

To do otherwise would bestow an unjust enrichment on the members that are subject to the Declaration. Each member purchases with knowledge of the recorded documents and is required to pay their assessments each year and that this covenant is mandatory and runs with the property they purchased.

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[2] There was also no challenge to the assignment in the instant case as veal admitted to it in the summary judgment record.

C. *Beavers* And *Valley View* Do Not Apply To The Facts Of This Case Because DPA Was Clearly The Successor And Assign Of ODPA.

Appellant asserts that the present case is more closely aligned with *Valley View Village South Improvement Association, Inc. v. Brock*, 272 S.W.3d 927 (Mo.App. 2009), and *Beavers v. Recreation Ass'n of Lake Shore Estates*, 130 S.W.2d 702 (Mo.App. 2004). The *Valley View* Court held that a new association lacked authority to make and collect assessments without a valid assignment and *Beavers* held that a dissolved corporation lacked authority to act as the governing entity. The huge factual disparities between those cases and the present case easily distinguish them.

A striking difference between *Valley View*, *Beavers*, and the present case is the absence of any assignment from the old to the new homeowners' associations. Neither homeowner's association in *Valley View* or *Beavers* received an assignment of rights from the original homeowners' association. The present case, as well as *Pioneer Point*, did include a valid assignment of rights to the successor homeowner's association. *Pioneer Point*, 179 S.W.3d at 399. Appellant tries hard to align this case with *Valley View* by ignoring the clear language in *Pioneer Point.* In fact, the Court in *Valley View* specifically distinguished the facts in its case from the facts in *Pioneer Point* based solely on the existence of a valid assignment. Considering that significant disparity, *Pioneer Point* applies on all fours and *Valley View* simply does not.

Beavers is further differentiated from the present case because there too there was no assignment made that evidences the original developer ever intended that an association govern the subdivision. *Beavers v. Recreation Ass'n of Lake Shore Estates*,

130 S.W.2d at 702. In *Pioneer Point*, and the present case, the original developer specifically provided for a successor homeowner's association and intended that a homeowners' association govern in accordance with the Declaration. (Declaration p. 5; L.F. 49). The Court in *Pioneer Point* made this distinction abundantly clear:

> **However, *Beavers* is also distinct from this case because there, no successor association had been assigned the rights of the forfeited association. *Pioneer Point,* at 401.**

Additionally, the Court in *Valley View* distinguished itself from *Pioneer Point*, and thus the present case, noting there was no continuity between the new homeowner's association and the original property homeowners' association. *Valley View Village South Improvement Association, Inc. v. Brock*, 272 S.W.3d at 930. The Court stated,

> "We are now faced with Pioneer Point, one step removed. Here, we have a completely new corporation, called by a very similar name and following the same bylaws as set forth in the original covenant, **but without any assignment**". *Id*.

In the present case, as well as *Pioneer Point*, both subsequent homeowners' associations had continuity with the original homeowners' association. In the present case, the Declaration provides for the Association to have successors and assigns (Declaration, Art I, Section 1).

The Trial Court properly concluded the Association had authority to collect the unpaid assessments from the time of Appellant's ownership in 1998 despite the

assignment of rights occurring in 2006. In its *Memorandum, Order, and Judgment*, the Trial Court properly disposed of this issue stating,

> … the Court concludes as a matter of law, that the assignment to Plaintiff is sufficient to allow plaintiff to collect any amount up to the sum fixed in the declaration itself as an annual general assessment against defendant's property. This is for the simple reason that the subdivision declaration, a valid covenant running with the land, so provides. No action by plaintiff's predecessor was required to impose such an assessment. In sum, Plaintiff has the right to enforce annual general assessments that were payable at any time in accordance with the subdivision declaration… (Memorandum, Order, and Judgment, L.F. 186-187).

The Trial Court correctly applied the law on this point, and the judgment should be affirmed.

V. APPELLANT'S ARGUMENT THAT THE 2007 LIENS ARE INVALID BECAUSE THE DECLARATION PERMITS THE FILING OF A LAWSUIT 90 DAYS AFTER FILING OF A LIEN IS WITHOUT MERIT BECAUSE: (A) APPELLANT ADMITTED THAT RESPONDENT WAS AUTHORIZED TO FORECLOSE ON THE 2007 LIENS AND APPELLANT RAISES THIS AFFIRMATIVE DEFENSE FOR THE FIRST TIME ON APPEAL; AND (B) THE PROVISION IN THE DECLARATION IS NOT "MANDATORY" AND

RELATES TO THE FILING OF THE LAWSUIT AND NOT THE VALIDITY OF THE LIEN. (RESPONSE TO APPELLANT'S POINT IV).

A. The Summary Judgment Record Shows That Appellant Admitted That The Association Was Authorized To Foreclose On The 2007 Liens And Appellant Failed To Plead This Affirmative Defense.

As part of "Plaintiff's Motion for Summary Judgment" in Cause No. 0722-CC01701, Respondent filed its "Statement of Uncontroverted Material Facts" ("Facts"). Paragraph 32 of Plaintiff's Facts states: "The Association is authorized to foreclose its lien pursuant to Article V of the Declaration." Defendant/Appellant's Response to Plaintiff's Fact was: "Defendant admits." Prior to paragraph 32, Plaintiff set forth the specific liens for which it is referring (Exhs. O and P). (L.F. 356, para. 32; L.F. 501, para. 32).

Appellant now wishes to re-write his Response to Plaintiff's Facts. Appellant should not be permitted to provide an admission regarding Plaintiff's authority to foreclose its liens, and then argue the opposite on appeal.

Similarly, Appellant, at no time, filed or raised the issue of Respondent filing its Petition prematurely. There can be no doubt that such an argument constitutes an affirmative defense. Respondent incorporates its briefing under Section I regarding affirmative defenses and the requirement that a party is required to raise such a defense in their Answer. Appellant failed to even allege such a claim in his "Motion to Modify or Amend the Court's Order and Judgment of February 23, 2009 or in the Alternative for

New Trial." The first time this defense was raised is on this Appeal. Appellant is legally estopped from raising this defense at this time.

B. This Provision Is Not "Mandatory" And Fails To Invalidate The Liens Because It Only Relates To The Filing Of The Lawsuit.

Appellant argues that the Trial Court erred in confirming the 2007 liens because Respondent failed to comply with Article V, Section 5 which states:

> "Whenever any assessment is delinquent for a period of ninety (90) days after the filing and recording thereof as aforementioned, the Board of Directors **may** take any legal steps necessary or appropriate for the collection thereof, including the institution and prosecution of a suit…"

On its face, the provision merely gives permission to the Board to file suit if the owner fails to pay 90 days after the lien is recorded. Contrary to Appellant's interpretation, the provision fails to state that a lawsuit "may not be filed until at least 90 days after a lien is filed…" (App. Br. 42). Appellant has clearly distorted the provision. Appellant's argument begs the issue. He failed to not only pay his assessments ninety (90) days after the lien was filed; he has failed to pay his assessments more than **three years** after the lien was filed. Clearly, he cannot argue that he's been prejudiced.

In any event, the provision absolutely fails to eviscerate the validity of a lien in the event a lawsuit is filed in less than ninety (90) days after the recording of the lien. It may be argued that Appellant could have forced Respondent to dismiss the lawsuit had Appellant asserted such a defense or motion to dismiss. However, as discussed earlier in

this section, no such Affirmative defenses were alleged and no such defenses were made a part of the Motions for Summary Judgment or his post judgment motions. Respondent's failure to wait the ninety (90) days invokes no prejudice upon Appellant, has no affect on the lien, wasn't mandatory and any objection thereto was waived by Appellant.

C. This Court Should Not Reverse the Trial Court's Confirmation of the Liens Merely Because the Interest Rates are Incorrect.

Respondent concedes that the Trial Court confirmed the liens containing improper interest amounts. However, this has no affect on Appellant's liability which is controlled by the Amended Judgment. The Amended Judgment is very clear on the amounts adjudged against Appellant Veal stating: "Plaintiff shall have and recover of said Defendant the sum of $70,856.00 as and for unpaid assessments . . . together with interest in the sum of $26,238.69" (Amended Order and Judgment p. 3).

Subsequent to the Trial Court's entry of its Memorandum, Order and Judgment, granting Plaintiff's Motion for Summary Judgment (L.F. 181), Appellant Veal filed his Motion to Modify or Amend the Court's Order. (L.F. 193). Appellant raised the issue that the Judge's Order and Judgment included interest for a period of time not authorized by the Declaration and requested that the Court amend the Judgment in accordance with the interest authorized by the Declaration. Nowhere does Appellant request the Court to amend the liens, enter an order that the liens be confirmed only to the extent of the Judgment or have the liens deemed invalid because they contained incorrect interest statements. The only relief requested was a modification of the amount of the Judgment.

The Trial Court considered the Motion and entered a reduced Judgment. This was the extent of the relief requested regarding the incorrect interest awarded in the initial Order and Judgment.

Now, Appellant, for the first time, wishes to reverse the Trial Court's Order confirming the three (3) liens because they inadvertently contained statements of interests accrued for a time period that was not authorized by the Declaration. This is absurd. The liens contain amounts for assessments through 2005 and 2007 respectively. The liens are not intended and could not possibly contain an up to date calculation of the amount owed. Thus, the amounts reflected in the liens cannot be the basis for reversing the Trial Court's confirmation of the liens because the amounts reflected in the liens are significantly less than the amounts of the Amended Judgment. The Trial Court amended its Judgment and accounted for the mistaken interest that is indicated on the liens. In light of the Trial Court's Amended Judgment, Respondent would be estopped from executing on the amount reflected in the liens even if the lien amounts were greater than the Judgment which it is not. Respondent is bound by the Amended Judgment.

Appellant failed to request the relief sought herein of the Trial Court. Appellant is raising an objection to the amounts contained in the liens. However, the amounts reflected in the liens are less than the amount of the Judgment. It is common knowledge that liens of this sort are recorded in order to alert any subsequent purchaser or lender that the Association is owed past due assessments against the owner and that such right is a lien upon the property.

VI. ALTERNATIVELY, THE APPELLATE COURT HAD NO AUTHORITY TO DISMISS PLAINTIFF'S COUNTS I AND III WITHOUT A HEARING OR TRIAL ON THE MERITS BECAUSE THE APPELLATE COURT'S RULING CONSTITUTED A JUDGMENT ON THE MERITS RATHER THAN MERELY REVIEWING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT, AND SHOULD BE REVERSED.

This Court erred in stating that "as a matter of law and undisputed fact, the Association had no authority to collect subdivision assessments or to file liens against Veal's property." The Court's finding constituted a judgment on the merits and not just a review of whether summary judgment was appropriate.

A review of a motion for summary judgment is a determination as to whether one party has made a submissable claim; it is *not* a determination on the merits of that claim. *Central Missouri Elec. Co-Op. v. Balke*, 119 S.W.3d 627, 633 (Mo.App. W.D. 2003). The reviewing court's opinion should only establish that appropriateness of a grant of summary judgment, not that certain elements of the case or claim had or had not been met. *Id*. At 638. When reviewing a motion granted by the trial court, it is not the function of the Appellate Court to weigh the allegations, perform credibility analysis, or determine the persuasiveness of the party's positions. *Chochorowshi v. Home Depot USA, Inc.*, 295 S.W.3d 194, 197 (Mo.App. E.D. 2009). Rather, the court should review the motion "almost academically" considering only if the elements of the motion are met based on the evidence submitted to the trial court. *Id*. It is not the function of the appellate court when reviewing the motion to determine the merits or if the parties are

entitled to relief. *Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 853 (Mo.App. E.D. 2008). The court may not "address the merits of the case." *Ryann Spencer Group, Inc. v. Assurance Co. or America*, 275 S.W.3d 284, 287 (Mo.App. E.D. 2008).

Here, the Court of Appeals wrongfully decided that "as a matter of law and undisputed fact" Respondent "had no authority to collect subdivision assessments." The Court was reviewing a grant of summary judgment for Respondent. Appellant never filed a motion for summary judgment in the underlying case. However, rather than simply reviewing if the grant of summary judgment for Respondent was appropriate, the Court essentially found that summary judgment should have been granted for the Appellant. Order, pg. 18. The Court conclusively decided an essential claim in the underlying action by holding that the Association was not entitled to collect assessments. This finding was inappropriate and beyond the Court's authority on an appeal from a grant of summary judgment. *In re Estate of Pittsenberger*, 136 S.W.3d 558, 564 (Mo. App. W.D. 2004).

The court should not have addressed the merits of the claim that the Association had authority to levy assessments; it should only have considered if the elements for summary judgment were met. *Id.*; *Balke*, 119 S.W.3d at 633. Rather if the Court found that summary judgment for the Respondent was inappropriate, it should have simply remanded the claim back to the lower court for a trial on the merits. *Pittsenberger*, 136 S.W.3d at 564. Instead, the Court issued an order stating that "as a matter of law and undisputed fact, the Association had no authority to collect subdivision assessments or to file liens against Veal's property." Order, pg. 8. This not only inappropriately decided

the merits of the underlying case; it also, in effect, issued a grant of summary judgment for Appellant. This holding is beyond the Appellate Court's authority. Thus, the Court should reconsider its June 22, 2010 order.

The Court of Appeals for the Eastern District effectively decided Respondent's claim in the underlying cause of action without the opportunity for a trial on the merits. The Court exceeded its authority by rendering its Opinion in favor of Appellant as though he had filed a motion for judgment when he did not. In fact, Appellant's defense to Respondent's Motion for Summary Judgment was, for the most part, that Respondent had no authority to collect assessments from his Delmar properties, not that Respondent lacked authority to collect assessments at all. Appellant's predominant complaint was that he didn't receive "adequate" services. Respondent was denied the opportunity to present its claim at trial or to defend its authority in response to a properly filed motion by the Appellant. The only issue before this Court was whether the trial court acted properly in granting summary judgment for the Respondent. The issue of Respondent's authority to collect assessments was never properly litigated.

CONCLUSION

This court should affirm the Trial Court's granting of summary judgment for Respondent DPA. The assignment from ODPA to DPA was valid as there is no time limitation for ODPA to wind up its affairs. Appellant cannot assert new affirmative defenses on appeal and claim for the first time that DPA could not spend assessments on services for its members. The General Annual Assessments were used for a permissible purpose pursuant to the Declaration and their collection during the "winding up" of affairs was appropriate. Appellant misinterpreted the Declaration due to an obvious typographical error, as evidenced by the Association's intent and interpretation of the Declaration when read as a whole. Missouri courts hold that a contract must be read in accord with the party's intent in spite of a clerical error. *Bullock Co v. Allen*, 493 S.W.2d at 7. It is clear the Association's intent was to use the Annual General Assessment to fund their "powers and duties" as articulated in Declaration Article III, Section 2.

Additionally, the Association had authority to collect assessments for the years prior to obtaining their assignment of rights, as shown in *Pioneer Point Homeowners Association, Inc. v. Booth*. There was also an intent by the Developer to have an association govern and control the property and an intent by the Association to be that governing body. Therefore the acts of Respondent to collect assessments was proper. In the alternative, Appellant should be estopped from claiming Association lacked authority because he acknowledged and abided by that authority through his property known as "The Kingsbury".

Moreover, the Trial Court properly ordered the 2005 and 2007 liens foreclosed because Appellant admitted that Respondent was authorized to foreclose on the liens and the Trial Court had the authority to confirm the liens. Again, Appellant cannot raise affirmative defenses for the first time on appeal. Finally, objecting to the Trial Court's confirmation of the liens due to the erroneous interest rates is ludicrous. The liens are for less than the Judgment and pose no prejudice to Appellant Veal.

Appellant Veal took ownership of the Property that is plainly included in the homeowners' association membership and which includes both benefits and obligations. Yet, Appellant Veal has never paid assessments for his membership and thus currently owes DeBaliviere Place Association for more than a decade's worth of homeowner's assessments. The Association is entitled to those assessments and Appellant should not be allowed to skirt his debts due to his unconvincing arguments levied against the Association. For all of the foregoing reasons, the trial court's Memorandum, Order and Amended Judgment dated June 4, 2009 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The Undersigned hereby certifies that this Respondent's Substitute Brief was prepared in the format of Microsoft Word using Times New Roman typeface in font size 13. This Brief contains approximately 13,237 words. The accompanying disk, containing a complete copy of Respondent's Substitute Brief, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Respondent are stated herein and the Brief has been signed by the attorney of record.

_____

Ira M. Berkowitz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Respondent's Substitute Brief, along with a copy of the same Brief on a disk, scanned and determined to be virus-free, were served via U.S. Mail and a PDF copy of that Substitute Brief was emailed, on December 30, 2010, to:

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