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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

The summary judgment record in the trial court included twenty-four exhibits attached to respondent's summary judgment motions, A through X. *L.F. 48-168; 374-490.* Respondent objects to inclusion of information taken from those exhibits in the Statement of Facts section of Appellant's Substitute Brief. Those issues are addressed in a separate response to that motion.

Affirmative Defenses and Counterclaims

None of the petitions in the underlying suits make any allegation of an assignment of rights obtained by respondent. *L.F. 10-12 (cause 22054-02475), L.F. 13-17 (amended petition, cause 22054-02475), L.F. 335-343 (cause 0722-CC01701).* Each petition alleged that respondent was "authorized" to file suit pursuant to the terms of the Declaration, without any reference to an assignment of rights. *Id.* In response, Appellant Veal pled multiple affirmative defenses and counterclaims asserting that respondent lacked authority to make assessments or file liens. *L.F. 21-22, 26-27, 347-348.* The first record reference to an assignment occurs in respondent's summary judgment motion. *L.F. 29, 31.*

2006 Assignment Agreement

The assignment agreement referenced in respondent's summary judgment motions was executed in 2006. *L.F. 92.* Respondent provided one statement of uncontroverted fact regarding the assignment: "The original DeBaliviere Place Association assigned all rights to the current DeBaliviere Place Association (respondent)," with a copy of the 2006 Assignment Agreement attached as summary judgment Exhibit G. *L.F. 31 (¶ 7),*

352 (¶ 7). Appellant admitted that statement, including the reference to Exhibit G. *L.F. 171, 500.* Before the assignment document was executed, respondent filed an assessment lien against appellant Veal's property in 2005 and filed suit against Veal. *L.F. 130-131 (lien); L.F. 1, 10.*

Genesis of the New "Association"

Three individuals incorporated respondent in 2003, using the same name as the previous, dissolved corporation-association. *L.F. 87, 413.* Nothing in the record indicates approval of property owners within the Declaration's designated Development Area was obtained at the time of respondent's incorporation in 2003 or thereafter. 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 the dissolved Association. *L.F. 107 (Veal Depo., pp. 22-23).* In 2003, Appellant Veal received his first invoice for Annual General Assessments from respondent, claiming that assessments were due for the years from 1998 through 2002. *L.F. 107 (Veal Depo., pp. 22-23).* Veal did not know that his Property was in the previously designated Development Area until he received the 2003 invoice. *L.F. 107, 111, 121 (Veal Depo., pp. 22, 38-40, 80).*

Respondent's brief takes issue with the assertion that the record does not contain any indication that the former, dissolved Association engaged in any activities from 1992 through 2005. *Respondent's Brief, p. 6.* According to respondent, the original Association must have been active because Veal paid the assessments due for a different property for the years 2001 and 2002. However, it was respondent, not the original

Association, who invoiced Veal for assessments dating back to 1998. *L.F. 107.* From 1997 through 2003, Veal did not receive assessment invoices or any other communications from anyone purporting to be acting on behalf of the dissolved Association, and Veal started receiving invoices from respondent in 2003. *L.F. 107; l.F. 107.* Therefore, the fact that Veal paid assessments that accrued in 2001 and 2002 on one property does not reveal anything regarding what the original association did, if anything, from 1992 through 2005.

Declaration and Supplemental Declaration

The original Declaration designated a "Development Area" subject to its terms. *L.F. 48.* The mechanism for expanding the Development Area was by way of "supplemental declarations." *Id.* In Supplemental Declaration No. 56 ("Supplemental Declaration"), executed in 1986, the previous owner of Appellant Veal's property agreed to be subject to the Declaration. *L.F. 74-75; 400-401.*

The Declaration provides for certain assessments, including:

- Special Assessments – may be used for construction, repairs or replacement of property, equipment, fixtures, and other personal property and/or any other activity within the powers and duties of the Association. *L.F. 59 (Art. V, Section 3).*
- Annual General Assessments – to be used "exclusively" for the purpose of adding properties or common areas pursuant to Article II, Section 2 . *L.F. 58.*

POINTS RELIED ON

I. AFTER EXPIRATION OF THE TEN YEAR RESCISSION PERIOD PRESCRIBED BY § 355.507.4, R.S.MO (1986), THE ORIGINAL DPA COULD NOT LAWFULLY IMPOSE ASSESSMENTS OR LIENS; AND SUCH POWERS COULD NOT BE RESURRECTED BY ANY SUBSEQUENT ASSIGNMENT, ESPECIALLY GIVEN THE FACT THAT NO ASSIGNMENT WAS ALLEGED OR MENTIONED IN ANY OF RESPONDENT'S PETITIONS.

§ 355.507.4 R.S.Mo (1986).

Valley View Village South Improvement Association, Inc. v. Brock, 272 S.W.3d 927 (Mo. App. 2009).

Beavers v. Recreation Ass'n of Lake Shore Estates, 130 S.W.3d 702 (Mo. App. 2004)

Executive Bd. of Missouri Baptist Convention v. Windermere Baptist Conference Center, 280 S.W.3d 678 (Mo. App. 2009).

II. THE FACT THAT THE SUBJECT PROPERTY ASSESSMENTS WERE DEDICATED SOLEY TO A PURPOSE PROHIBITED BY STATUTE IS A COMPONENT OF APPELLANT'S PROPERLY PLEAD AFFIRMATIVE DEFENSE THAT RESPONDENT LACKED AUTHORITY TO COLLECT SAID ASSESSMENTS; AND THE RECORD DOES NOT SUPPORT RESPONDENT'S CLAIM OF SCRIVENER'S ERROR IN THE SUBJECT AGREEMENTS.

§ 355.711 R.S.Mo.

§ 355.691 R.S.Mo.

Pioneer Point Homeowners Association, Inc. v. Booth, 179 S.W.3d 397 (Mo. App. 2005)

Ethridge v. Tierone Bank, 226 S.W.3d 127 (Mo. banc 2007)

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WITH RESPECT TO THE 2005 LIEN AND UNDERLYING SUIT, BOTH OF WHICH WERE FILED BEFORE RESPONDENT OBTAINED ITS ASSIGNMENT OF AUTHORITY IN 2006.

Valley View Village South Improvement Association, Inc. v. Brock, 272 S.W.3d 927 (Mo. App. 2009)

Beavers v. Recreation Ass'n of Lake Shore Estates, 130 S.W.2d 702 (Mo. App. 2004)

Pioneer Point Homeowners Association, Inc. v. Booth, 179 S.W.3d 397 (Mo. App. 2005)

IV. APPELLANT DID NOT WAIVE HIS RIGHTS TO CONTEST RESPONDENT'S AUTHORITY UNDER THE DECLARATION TO FILE LIENS AGAINST APPELLANT'S PROPERTY.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

V. RESPONDENT LACKED AUTHORITY TO FILE THE 2005 LIEN ON BEHALF OF THE "ASSOCIATION"; AND THE 2007 LAWSUIT VIOLATED THE DECLARATION'S REQUIREMENTS REGARDING ENFORCEMENT OF LIENS.

Pioneer Point Homeowners Association, Inc. v. Booth, 179 S.W.3d 397 (Mo. App. 2005)

Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc., 239 S.W.3d 631 (Mo. App. 2007)

Missouri Supreme Court Rule 84.13(c).

ARGUMENT

I. AFTER EXPIRATION OF THE TEN YEAR RESCISSION PERIOD PRESCRIBED BY § 355.507.4, R.S.MO (1986), THE ORIGINAL DPA COULD NOT LAWFULLY IMPOSE ASSESSMENTS OR LIENS; AND SUCH POWERS COULD NOT BE RESURRECTED BY ANY SUBSEQUENT ASSIGNMENT, ESPECIALLY GIVEN THE FACT THAT NO ASSIGNMENT WAS ALLEGED OR MENTIONED IN ANY OF RESPONDENT'S PETITIONS.

A. Once the ten year Rescission Period Prescribed by § 355.507.4, R.S.Mo (1986) Elapsed, the Original DPA Ceased to Exist, Could Not Lawfully Impose Assessments or Liens, and Could Not Resurrect that Authority by Executing an Assignment.

Appellant Veal asserts in his Point I that the 2006 Assignment Agreement is invalid on its face because it was executed fourteen years after the dissolution of the original DeBaliviere Place Association. At the time of dissolution, the pertinent statute for applying to the Secretary of State for rescission of a corporate forfeiture provided that "[n]o rescission shall be made after ten years following forfeiture[.]" § 355.507.4 R.S.Mo (1986). Respondent acknowledges that former § 355.507.4 applies to the dissolution of the original DeBaliviere Place Association, but argues that it retained legal authority to assign all of its rights to a third party after the ten year period elapsed.

Once the former association's charter was forfeited and it failed to timely apply for rescission of the forfeiture, the association "ceased to exist." *Beavers v. Recreation Ass'n of Lake Shore Estates,* 130 S.W.3d 702, 717 (Mo. App. 2004). Such entities have no legal right to make any assessments or to place liens on the property owner. *Id.*; *Valley View Village South Improvement Association, Inc. v. Brock,* 272 S.W.3d 927, 931

(Mo. App. 2009). An administratively dissolved homeowner's association that failed to reinstate its charter within the 10-year period required by former § 355.507.4 R.S.Mo (1986) is neither a corporation *de jure* nor a corporation *de facto*. *Beavers, supra,* 130 S.W.3d at 711-712.

Respondent's contentions elide the core point that, after the ten year reinstatement period elapsed, the original association had no legal right to make any assessments whatsoever or to place liens on any property owner. *Id.; Valley View,* 272 S.W.3d at 931. As the trial court correctly observed, "[i]t is elementary that the plaintiff (respondent) stands in the shoes of its assignor and can acquire no greater rights than the assignor enjoyed." *L.F. 185-186.* The assignor in this case – the original DeBaliviere Place Association – had already forfeited it rights to collect assessments and impose liens once the ten year reinstatement period elapsed. *Beavers, supra,* 130 S.W.3d at 717; *Valley View,* 272 S.W.3d at 931. An assignment would not resurrect rights that the dissolved entity forfeited. Because the original association no longer possessed any legal right to make assessments or to place liens on property owners, an attempted assignment of those rights must necessarily be ineffective. So even if a permanently dissolved corporation somehow retains the right to execute assignments in perpetuity, that right is illusory where there are no rights to assign. The trial court erred in granting summary judgment based on the Assignment Agreement and the judgment should be reversed.

B. Respondent's Petitions did not Plead any Assignment of Rights or Seek any Relief Pursuant to an Assignment, and Appellant Veal Could Not be Required to Rebut or Refute Such Unpled Contentions.

In the first point of its brief, respondent offers the remarkable argument that Appellant Veal did not challenge the validity of the Assignment Agreement in the trial court proceedings. *Respondent's Brief, p. 18.* That assertion is audaciously unfair because none of respondent's petitions or amended petitions in the underlying cases make any mention whatsoever of the alleged Assignment Agreement. *L.F. 10-12, 13-17, 335-343.* There was no reason for Veal to challenge the validity of an assignment that was never pled, mentioned or relied upon in any of the claims asserted in respondent's various petitions. Veal should not be required to oppose, challenge or assert affirmative defenses regarding the effects of an assignment that was never mentioned in respondent's petitions or claims. Nor could Veal "waive" a right to contest the validity of an unpled assignment.

Missouri Rule 74.04(a) allows "a party seeking to recover upon a claim, counterclaim, or cross claim or to obtain declaratory judgment" to move for summary judgment. For obvious reasons, the rule assumes that summary judgment motions will be based upon claims that were actually plead in a petition. Conversely, summary judgment should not be considered for claims not plead in the petition. *Executive Bd. of Missouri Baptist Convention v. Windermere Baptist Conference Center,* 280 S.W.3d 678, 697 (Mo. App. 2009).

The first reference to an assignment agreement in this case appears in one proffered statement of fact in respondent's summary judgment motions: "The original DeBaliviere Place Association assigned all rights to the current DeBaliviere Place Association (respondent)," with a copy of the 2006 Assignment Agreement document attached as summary judgment Exhibit G. *L.F. 31 (¶7), 352 (¶7).* Appellant admitted that statement, including the existence of the document attached as Exhibit G. *L.F. 171, 500.* Appellant Veal's admission of the proffered statement constitutes an admission that the assignment document was executed. The admission does not include any acknowledgement or representation of the validity or legal effect of the document. As noted by the Court of Appeals, Veal did not admit that the assignment was legally valid. *Court of Appeals Decision, p. 11, fn. 6.*

Many of the fact statements proffered by respondent in the trial court described the general rights, duties and privileges of the "Association" according to the terms of the Declaration. This series of statements describes the association's general legal status (L.F. 30, ¶ 1), general obligations (L.F. 31, ¶ 9), and the right of the Association to file suit to collect unpaid assessments (L.F. 34, ¶ 28). Respondent's summary judgment motion consistently referenced the "association" in a general context,[1] and appellant's admissions of those statements were made in that in that context − Appellant Veal admitted the content of the various documents with respect to the "Association", but his

[1] *L.F. 31-34; L.F. 29 (*¶¶ 9, 12, 13, 24, 28).

pleadings consistently asserted that respondent lacked any authority to act as the "Association." Included among these general statements and admissions was respondent's single reference to the 2006 Assignment Agreement. To the extent there is any doubt as to the extent of appellant's admission, the record and all inferences therefrom should be construed in favor of appellant. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

Given that Veal had no prior notice of the alleged Assignment Agreement, no claims were asserted thereunder in respondent's petitions, and Veal had no previous reason to investigate or discover any facts related to the execution of the Assignment Agreement, his admission of the proffered statement cannot reasonably be construed as admission of the agreement's validity. The record lacks sufficient facts to support any determination regarding whether the terms of the original, dissolved Association's by-laws were followed in making the assignment or whether the by-laws stated a procedure for winding down or assignment in the event of dissolution. Dissolution of a corporation does not change quorum or voting requirements for the corporation's board or members. §355.691.2(3), R.S.Mo. The record does not reflect whether the board of directors of the original Association actually convened and approved the Assignment Agreement fourteen years after its dissolution. The record does not contain any information indicating that any required procedures were followed.

The record was not developed on these points because respondent's petitions did not allege an assignment. To the extent any uncertainty exists as to the extent of Veal's admission, the record should be viewed in the light most favorable to him together with

the benefit of all reasonable inferences. *Cardinal Partners, L.L.C. v. Desco Inv. Co.*, 301 S.W.3d 104, 108-109 (Mo. App. 2010).

Appellant Veal asserted affirmative defenses and counterclaims based upon respondent's lack of authority to collect assessments. *L.F. 20-23, 26-27, 157-158, 347-348.* Thus, in order to obtain summary judgment, respondent was obligated to conclusively rebut those defenses and counterclaims. *ITT Commercial, supra*, 854 S.W.2d at 381. Even if respondent would be permitted to seek summary judgment based upon an unpled assignment agreement, respondent's obligation extended, at a minimum, to establishing that a valid and effective assignment existed. Because the record is deficient on essential points that go directly to the authority issue, respondent failed to meet its burden.

II. THE FACT THAT THE SUBJECT PROPERTY ASSESSMENTS WERE DEDICATED SOLEY TO A PURPOSE PROHIBITED BY STATUTE IS A COMPONENT OF APPELLANT'S PROPERLY PLED AFFIRMATIVE DEFENSE THAT RESPONDENT LACKED AUTHORITY TO COLLECT SAID ASSESSMENTS; AND THE RECORD DOES NOT SUPPORT RESPONDENT'S CLAIM OF SCRIVENER'S ERROR IN THE SUBJECT AGREEMENTS.

Appellant Veal's second point asserts that the trial court erred in granting summary judgment because respondent lacked authority to collect assessments dedicated solely to adding new properties and common areas to the association, which would not be a lawful activity in winding up the affairs of the original association-corporation. Respondent's Brief appears to concede the point that adding new properties would not be "necessary to wind up and liquidate [the dissolved company's] affairs under section 355.691. . . ." §355.711 R.S.Mo. Respondent offers two alternative responses: (a) that

the improper winding down activity should have been plead as a separate affirmative defense in addition to the lack of authority defense; or (b) that the limitation on the use of assessment funds in the governing Declaration is a scrivener's error and should therefore be disregarded. Appellant Veal will reply to respondent's two contentions in that order.

A. Appellant Properly Pled Affirmative Defenses and a Counterclaim Based Upon Respondent's Lack of Authority.

In the trial court, Appellant Veal asserted that he was not liable for the Annual General Assessments because respondent lacked authority to collect the assessments. *L.F. 26-27, 157-158 (¶¶ 3-11); L.F. 347-348 (¶¶ 3-11).* Appellant's Counterclaim also contested respondent's authority to collect assessments and impose liens. *L.F. 20-23.* Thus, appellant pled and asserted that appellant was not liable for the claimed assessments on grounds of respondent's lack of authority to levy and collect the subject assessments.

Pursuant to Missouri Supreme Court Rule 55.08, appellant was required to plead affirmative defenses or avoidances in a "short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Claims stated in a counterclaim may also be considered an affirmative defense. *Mo.R.Civ.P. 55.08.* The affirmative defenses, along with the Counterclaim's averments, satisfy that standard. In order to obtain summary judgment, respondent-plaintiff was therefore required to affirmatively establish that those defenses and counterclaims failed as a matter of law. *ITT Commercial, supra*, 854 S.W.2d at 381.

In the trial court, appellant's authority defense focused on the fact that the original Association's corporate charter had been forfeited. *L.F. 26-27, 157-158 (¶¶ 3-11); L.F. 347-348 (¶¶ 3-11).* As found by the trial court, the consequence of the dissolution was that the original Association's activities were limited by statute to activities incidental to winding up its affairs. *L.F. 183; §355.711 R.S.Mo.* A dissolved corporation "may not carry on any activities except those necessary to wind up and liquidate its affairs under section 355.691. . . ." *§355.711 R.S.Mo.*

Although the trial court correctly recognized the general proposition that appellant could only be required to pay the Annual General Assessments if collection of those assessments were a proper "winding down activity" (*L.F. 183*), the trial court simply assumed the propriety of this particular assessment. The trial court never addressed the fact that the exclusive permitted use for the subject assessments is not a proper activity for a corporation that is winding down pursuant to §§ 355.691 and 355.711, R.S.Mo. The two concepts go hand in hand as part of the authority issue. Appellant claims that he does not owe the Annual General Assessment because the defunct Association lacked authority to levy or collect the assessments during its winding down period. *L.F. 26-27, 157-158, 347-348.*

Respondent argues that a dissolved corporation possesses authority to collect assessments even if the law prohibits the dissolved corporation from using the money. According to respondent, the dissolved corporation's inability and incapacity to add properties to the Development Area had no bearing on its authority to continue collecting assessments that could not be used for anything else. Based on this contrived logic,

respondent concludes its predecessor's incapacity to use the assessment funds should not be considered by this Court as part of appellant's lack of authority defense.

Respondent's logic is counter-intuitive. If the dissolved corporation lacked authority to perform the sole permitted function allowed under the Declaration for the particular assessments, then it follows that no authority exists to collect the single-purpose assessments in the first place. Respondent acknowledges that the Declaration, on its face, requires that revenue from the Annual General Assessments must be used "exclusively" for the purpose of adding properties and common areas to the association. *L.F. 53, 58.* As the trial court noted, the dissolved association possessed authority to collect the assessments only if it was a proper winding down activity. *L.F. 183.*

Although appellant could not locate case law directly on point, the principal decision relied upon by respondent notes that the assessment collected by the dissolved association in that case was used to pay for road maintenance, water and sewer. *Pioneer Point Homeowners Association, Inc. v. Booth,* 179 S.W.3d 397, 398 (fn. 1) (Mo. App. 2005). The *Pioneer* court based its decision on the authority issue, in part, on the fact that the dissolved association operated and maintained water and sewer systems. *Id.* at 402. Although the case did not turn on that association's use of the funds, *Pioneer* clearly considered and examined the actual use of that dissolved association's assessment revenue as part of its consideration of the authority issue. *Id.* at 398, 402. The difference in *Pioneer* is that the assessments paid for appropriate "winding down" expenses. Appellant's authority defense and argument employs the same considerations and are properly before this Court.

Based upon the allegations contained in the underlying petitions, appellant's counsel correctly pled affirmative defenses of lack of authority. The trial court's decision turns on the authority issue. The authority issue was plead, briefed, argued and is properly before this Court, including the dissolved corporation's inability under the law to use the single-purpose assessment funds. Contrary to respondent's mischaracterization, appellant maintains that no property owners are liable for any Annual General Assessment payments during the period that the dissolved association was winding down its affairs because the dissolved corporation's activities were limited by statute and said limitation precluded the only possible use for those funds.

Moreover, a party's failure to perform a contract and lack of consideration are not affirmative defenses because respondent-association was required to plead and prove its own performance and consideration. *Rosenthal v. Jordan*, 783 S.W.2d 452, 454-455 (Mo. App. 1990) (performance); *Allison v. Agribank*, 949 S.W. 2d 182, 188 (Mo. App. 1997) (consideration). Respondent acknowledges that obligations created by the Declaration are contractual in nature. *L.F. 40; Kehrs Mill Trails Associates v. Kingspointe Homeowner's Association,* 251 S.W.3d 391, 396 (Mo. App. 2008). The original association failed to perform its contractual obligations because its dissolution rendered it incapable of performing. For the same reason, no consideration existed for any property owner to pay the sole-purpose Annual General Assessment after the original association was dissolved. Appellant did not waive this argument.

B. Respondent's "Developer's Intent" Argument Fails as a Matter of Law.

Respondent's "developer's intent" argument is based on the same rationale that was rejected in *Valley View, supra,* 272 S.W.3d 927. In *Valley View*, individuals formed a new corporation and simply assumed the role of "association," as respondent did here. The new *Valley View* entity sought a ruling confirming its authority for fear that a contrary holding "would leave the subdivision with no homeowners' association even though the original developer intended that there be one." *Id*. at 930. That logic failed in *Valley View* because the mere notion that the original developer envisioned an association does not change the applicable legal standards. Moreover, if property owners want an association, they are free to create one. As stated in *Valley View*:

> Although the current homeowners certainly have the right to create an association of homeowners, they do not have the legal right to bind Appellant with their association decisions absent Appellant's acquiescence.

Id. at 931.

The same reasoning applies here. Veal does not acquiesce.

C. Respondent's Assertion of Scrivener's Error in the Declaration is Contradicted by Terms and Provisions of the Declaration, Supplemental Declaration and Applicable Law.

The Declaration phrase that respondent seeks to re-write due to the alleged scrivener's error states as follows:

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.

L.F. 58 (Article V, Section 2).

Respondent asks this Court to decide that the above-quoted restrictions regarding use of Annual General Assessment funds be altered so that the existing reference therein to "Article II" is changed to "Article III." The effect of such a change would allow respondent to use Annual General Assessment revenue for virtually any purpose.

Respondent's argument does not address the Supplemental Declaration by which Appellant Veal's Property was brought into the Development Area (prior to Veal's acquisition). In executing the Supplemental Declaration, appellant's predecessor-in-interest agreed to be bound by the original Declaration. *L.F. 75.* Respondent offers no facts or argument tending to support the notion that appellant's predecessor intended to be bound by terms other than those expressly stated in the original Declaration. It is telling that the 1986 Supplemental Declaration contains nothing that attempts to correct or clarify any claimed scrivener's errors in the 1977 Declaration. *L.F. 74-75.* There is no reason to think that Appellant Veal's predecessor intended to accept any terms other than those actually stated in the Declaration when he executed the Supplemental Declaration.

In any event, a party seeking reformation due to a scrivener's error has the burden of establishing with clear, cogent and convincing evidence that a mutual mistake common to both parties has been made. *Ethridge v. Tierone Bank,* 226 S.W.3d 127, 132 (Mo. banc 2007). It must be clear that the instrument, due to a scrivener's error, has

done what neither party intended. *Id.; Williams v. United Insurance Company of America,* 618 S.W.2d 229, 231 (Mo. App. 1981). Reformation of a written instrument is an extraordinary remedy and should be granted with great caution and only in clear cases of fraud or mistake. *Ethridge, supra,* 226 S.W.3d at 132.[2]

Neither respondent nor appellant possess any first-hand knowledge regarding what the parties intended with the Declaration or Supplemental Declaration. The record does not contain any evidence from the predecessor entities that executed the Declaration in 1977 or the Supplemental Declaration in 1986. Respondent was not created until 2003, some 26 years after the Declaration was executed. *L.F. 87, 413.* Appellant acquired his property in 1997, about 11 years after the Supplemental Declaration was executed. *L.F. 95.*

Respondent's Brief relies upon cases which mistakes were acknowledged by all parties or contract terms were nonsensical. For example, *United Equipment Lines, Inc. v. Graphic Arts Centre, Inc.,* 889 S.W.2d 926 (Mo. App. 1994), addressed typographical errors in a contract provision that, by the defendant's admission, rendered the subject provision "incomprehensible as written." *Id.,* 889 S.W.2d at 933. The court then proceeded to interpret the incomprehensible provision by correcting the acknowledged typographical errors so as to reflect the intent of the parties. *Id.* Similarly, in *Bullock Co., Inc. v. Allen,* 493 S.W.3d 5 (Mo. App. 1973), it was agreed by the parties that the

[2] Also, reformation cannot be raised for the first time on appeal. *Roth v. Phillips Petroleum Co.,* 739 S.W.2d 598, 600 (Mo. App. 1987).

location for performance of a construction contract was misstated in the contract. *Id.* at 7. *See also, Roth v. Phillips Petroleum Co.,* 739 S.W.2d 598, 600 (Mo. App. 1987) (acknowledged error did not create an ambiguity that would open the door to extrinsic evidence as to the contract terms); *Sheetz v. Price,* 136 S.W. 733, 734 (Mo. App. 1911) (subject term would have rendered contract provision meaningless, and parties agreed to terminate contract in any event).

United Equipment, *Bullock, Roth* and *Sheetz* do not apply to the instant facts because no "mistake" is acknowledged, nor is any such mistake "obvious." Respondent must establish its scrivener's error claim with clear, cogent and convincing evidence that a mutual mistake common to both parties has been made. *Ethridge, supra,* 26 S.W.3d at 132. The material in the record does not satisfy burden.

Respondent's argument is also contradicted by the terms of the Declaration, both in the passage quoted above and in other sections.

(i) "Shall be used exclusively" Limitation

Respondent's argument ignores the effect of the "shall be used exclusively" limitation contained in the same sentence as the alleged scrivener's error in the original Declaration. If, as respondent suggests, the intent was to allow those funds to be used for all Association activities, the authors would not have included the "shall be used exclusively" phrase. By definition, the phrase means that the funds may be used solely for the stated purpose. *State v. Patterson,* 534 S.W.2d 847, 851 (Mo. App. 1976). Respondent's brief does not attempt to explain why the Declaration's drafters would have

included the "shall be used exclusively" limitation if the intent was to allow the association broad authority to donate and spend assessment money.

Using respondent's proffered construction, the Declaration provision would effectively read that the Annual General Assessment "shall be used exclusively for everything." The contradiction is obvious, and the flaws in respondent's interpretation are demonstrated in practice. At times, respondent has literally given away assessment money. *L.F. 143, 160, 163, 164, 166* (*donations totaling $10,000 to a child care center known as Stella Marris)*.

(ii) Declaration's Overall Purpose and Goals

The purpose of the Annual General Assessment provisions must be viewed in the context of the Declaration's original purpose and intent in 1977, as respondent acknowledges. *Respondent's Brief, p. 33.* The original developer intended to own a "substantial" number of parcels in the designated Development Area (*L.F. 48*), and also planned to continue adding properties and common areas to the Development Area after the original association was created. *Id.* [3] Limiting the use of the automatic Annual General Assessment revenue to adding properties and common areas is a logical step in

[3] The intent and plan to add more properties to the Development Area is evidenced throughout the Declaration. *See, e.g., L.F. 50 (Article I, Section 6); L.F. 51 (Article I, Section 11; L.F. 52 (Art. I, Section 19); L.F. 53-54 (Art. II); L.F. 60 (Art. V, Section 4).*

pursuing those expressed pre-approved goals. It is just as logical to require member approval for other types of expenditures.

(iii) The Declaration Provided the Means to Generate Funds for the "Association's" Miscellaneous Uses.

The Declaration specifies assessment types and permitted uses for the revenue. "Special assessments" may be used for virtually anything (includes a catch-all category for "any other activity"). *L.F. 59 (Art. V, Section 3).* Annual General Assessments must be used "exclusively" for the purpose of adding properties pursuant to Article II, Section 2. *L.F. 58 (Art. V, Section 2).*

Despite the clearly delineated link between special assessments and miscellaneous "other" activities, respondent contends that the Declaration drafter's "obvious" intent was to allow the use of Annual General Assessment revenues for the same type of "other" miscellaneous expenses. It is apparent that the intended source of funds for miscellaneous Association activities is the special assessment, not the Annual General Assessment. The governing documents in *Pioneer* took a similar approach – the "automatic" assessments paid for essential services such as water and sewer, while special assessments were required for other operational expenses. *Pioneer, supra,* 179 S.W.3d at 398, n. 1. It is likely that the Declaration's drafters intended and wanted to instill some checks and balances in the assessment and expenditure process. Requiring owner approval for operating expenses and expenditures makes sense, as it did in *Pioneer.*

Special assessments require approval of the property owners, unlike the automatic Annual General Assessments. Respondent dismisses the notion of owner-approved assessments as "impractical." *Respondent's Brief, p. 32.* Despite respondent's protests, owner approval of property assessments is a logical means of providing a measure of accountability and oversight in how Association funds are spent.

The need for oversight is especially apparent in this case. Respondent was created by three individuals, using the same corporate name as the original, defunct association. *L.F. 87.* As the self-appointed incorporators of the new "DeBaliviere Place Association," those people donated assessment revenues to favored charities, paid for social activities, and bought Christmas wreaths, among other things.[4] While it is understandable that respondent's principals enjoy their unchallenged use of assessment funds, respondent will hardly be "deprived of its means to discharge its duties" if owner approval is required for miscellaneous expenses. Respondent will simply be more accountable for its actions.

(iv) The Declaration's Delegation of Powers and Duties is not Limited to Article III.

Respondent's argument that Article III is the association's sole source of "powers and duties" in the Declaration is clearly wrong. The Declaration designates powers and

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[4] *L.F. 160-168;* flowers (*L.F. 160, 163, 166*), doggie bags (*L.F. 167*), Christmas wreaths (*L.F. 144*), $10,000.00 in donations to Stella Marris Child Care since 2003 (*L.F. 143, 160, 163, 164, 166*).

duties in multiple articles of the Declaration, not just Article II or III. For example, Article VI states that the association "shall" regulate external design, appearance and uses of properties within the Development Area. *L.F. 61 (Sections, 1, 2).* This is one of the duties that respondent claims to fulfill with Annual General Assessment revenue. *Respondent's Brief, p. 36*. Other powers and duties established throughout the Declaration, but not in Article III, include the power to perform maintenance and repairs on unkempt properties (*L.F. 63-64, Art. VI, Section 3d*); imposition of property use restrictions (*L.F. 62-63, Art. VI, Section 3*); the power to enforce the Declaration's provisions (*L.F. 66, Art. VIII, Section 4*); exclusive management and control of common areas (*L.F. 55, Art. IV, Section 1*); and the power to mortgage the association's common areas to raise money (*L.F. 56, Art. IV, Section 3d*). Article II is among those article that creates Association powers and duties, expressly stating that the Developer shall have the right to add properties to the Development Area, including properties owned by third parties. *L.F. 53.*

Respondent's scrivener's error argument based upon this erroneous premise must fail.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WITH RESPECT TO THE 2005 LIEN AND UNDERLYING SUIT, BOTH OF WHICH WERE FILED BEFORE RESPONDENT OBTAINED ITS ASSIGNMENT OF AUTHORITY IN 2006.

Point III of Appellant's Brief asserts that, even if the 2006 Assignment Agreement were valid, respondent had no authority to act as the "association" prior to the 2006 assignment. Respondent's Brief does not contest the fact that it took the following actions before it claims any assignment occurred:

(i) Respondent filed the first of the two underlying causes in this appeal (*L.F. 10*);

(ii) Respondent recorded a lien against Appellant Veal's property (*L.F. 130-131*); and

(iii) Respondent sent numerous assessment invoices to appellant demanding assessment payments for 1998 through 2005. *L.F. 107, 115 (Veal Depo., pp. 22-23; 54-55).*

The trial court's judgment does not consider or address the effect of the gap between the date of respondent's incorporation in 2003 and the assignment in 2006. Appellant maintains that respondent possessed no authority whatsoever to act as the "association" prior to the 2006 assignment. *Valley View, supra,* 272 S.W.3d at 930-931. Respondent argues that the 2006 Assignment Agreement retroactively validated all of its pre-assignment actions.

The core legal components applicable to this case are found in three Southern District cases cited by the trial court and the parties, *Pioneer, Valley View, and Beavers, supra.* The common principle in those three cases is that a dissolved association-corporation lacks authority to act except to wind down. *Valley View, supra,* 272 S.W.3d at 931*; Pioneer, supra,* 179 S.W.3d at 403. *Beavers, supra,* 130 S.W.3d at 717. While an assignment may be permitted, simply creating a new corporation with the same name is insufficient to convey rights. *Valley View,* 272 S.W.3d at 928, 931 (applying *Pioneer*). Where, as here, a new corporation is formed using the same name and bylaws as the dissolved corporation-association, but without a valid assignment, the new homeowners' association-corporation is not a valid successor association. *Id.* As stated by the *Valley View* court: "We cannot create an assignment where none was made, nor can we create a legal obligation where none was agreed to by Appellant." *Id.* Applying those principles to the instant case, it is apparent from the *Valley View* decision that when three people created the new "association" in 2003 using the same name as the dissolved entity, it was insufficient to convey or create any authority to the "new" association (respondent) without an assignment of rights.

Respondent attempts to avoid the issue by simply stating that *Pioneer* "determined that the subsequent association had authority to enforce the liens against the homeowners, . . . " *Respondent's Brief, p. 38.* *Pioneer* does not retroactively validate unauthorized acts between the date of respondent's incorporation in 2003 and the 2006 assignment. Pre-assignment liens were also filed in *Pioneer* and the property owner challenged the lien-filer's authority. *Id. at 399.* But in *Pioneer* – perhaps in recognition of the authority

issue – the pre-assignment liens were released while the litigation was pending. *Id.* The successor corporation filed new liens *after* it obtained an assignment from the dissolved corporation and then proceeded with its lawsuit. *Id.* Thus, the liens *Pioneer* ruled upon were post-assignment liens filed after the defective pre-assignment liens were released. In this case, respondent never cured the lien defect. Therefore, *Pioneer* does not stand for the proposition that an assignment acts to retroactively validate liens that were invalid when they were filed. If anything, *Pioneer* demonstrates that respondent's pre-assignment liens were ineffective.

Respondent also attempts to finesse the *Pioneer* decision with respect to the assignee-corporation's authority to collect assessments for past years. The assignee's respective rights in *Pioneer* and this case are different because the assignor's rights in the two instances were different. This is a crucial distinction because an assignee cannot acquire greater rights that the assignor possessed. *See, e.g., Kracman v. Ozark Elec. Co-Op., Inc.,* 816 S.W.2d 688, 690 (Mo. App. 1991). Even a "retroactive" assignment still would not expand the dissolved entity's rights, if any, to collect assessments during the wind down period. As described in Point II of Appellant's Brief and this Reply Brief, the dissolved association here did not have authority to collect assessments whose sole purpose was to pay for activities unrelated to winding down and outside the scope of Section 355.691, R.S.Mo. Nothing in the *Pioneer* decision alters that fact.

Respondent also repeats a cynical argument that was summarily rejected in both the trial court (*L.F. 187, fn. 1)* and the Court of Appeals. Because Veal paid some assessments on a different property years before the underlying litigation commenced,

respondent claims Veal "recognized" respondent's authority and is forever estopped from challenging respondent's authority to collect assessments. In effect, respondent's argument is that "I managed to fool you for awhile, now you're stuck with it." Respondent's Brief recites the elements of estoppel, then concludes that "[a]ll three elements are present here" without explanation. Among other things, respondent must establish that it took an action in reliance upon some act by Appellant Veal, to respondent's detriment. *Respondent's Brief, pp. 35-36, citing Shores v. Express Lending Services, Inc.*, 998 S.W. 122 (Mo. App. 1999). Respondent offers nothing to indicate what action any "second party" took on the faith of any statement or act by appellant.

Respondent also attempts a "sky is falling" appeal, suggesting that "thousands of people" might somehow lose tax abatements and tax credits if appellant prevails. *Respondent's Brief, p. 36.* Respondent goes on to state that an "Association" is needed to enforce architectural standards, and provide other services, implying that those things are somehow threatened if appellant prevails. *Id.* No basis exists in the records for any of these claims. There is no link in the record or otherwise between the availability of tax credits or tax abatement and respondent's authority to impose liens, file lawsuits and collect assessments. And if respondent spends any money to enforce architectural standards, it is well-hidden in its financial documents. *See, e.g., L.F. 167 (budget comparisons for 2006-2007).* Some of the other "services" respondent claims its provides are merely self-perpetuating expenses such as insurance (presumably its own), tax preparation and accounting (also for respondent) and legal services (for respondent). *Respondent's Brief, p. 37.* Others include postage, meetings, socials and flowers. *Id.*

The fact that respondent chooses to trumpet these "services" to justify its existence speaks volumes as to its true utility to the neighborhood.

This Court should summarily reject this argument, as the trial court and Court of Appeals did.

IV. APPELLANT DID NOT WAIVE HIS RIGHTS TO CONTEST RESPONDENT'S AUTHORITY TO FILE LIENS AGAINST APPELLANT'S PROPERTY

Appellant's Point IV maintains that the trial court erred in ordering the 2005 and 2007 liens foreclosed. Respondent contends that appellant all arguments in the trial court by admitting the statement that "[t]he Association is authorized to foreclose its lien pursuant to Article V of the Declaration." *L.F. 172, 501 (¶ 27, ¶ 32); Respondent's Brief, p. 42.*

The proffered statement of fact referenced the powers of the generic "Association" described in the Declaration, not respondent. By admitting that basic fact, appellant did not admit that respondent possessed authority to act on behalf of the "Association," or that respondent had any authority to file any liens on behalf of the Association. In the same pleading, after admitting the general authority of the "Association", appellant specifically denied that respondent possessed any right or authority to collect assessments or foreclose liens on behalf of the Association. *L.F. 173 (¶¶ 3, 4).* Respondent's argument thus depends upon a mischaracterization of the record.

To the extent there is any doubt as to the extent of appellant's admission, the record and all inferences therefrom should be construed in favor of appellant. *ITT Commercial, supra*, 854 S.W.2d at 376. Respondent's waiver argument is without merit.

V. RESPONDENT LACKED AUTHORITY TO FILE THE 2005 LIEN ON BEHALF OF THE "ASSOCIATION"; AND THE 2007 LAWSUIT VIOLATED THE DECLARATION'S REQUIREMENTS REGARDING ENFORCEMENT OF LIENS.

Appellant Veal maintains that the trial court erred in confirming the pre-assignment, 2005 lien and ordering it foreclosed because respondent had no authority to file the lien in the first place. Respondent's answer is that the effect of the *Pioneer* decision is to retroactively validate pre-existing liens. *Respondent's Brief, p. 37.*

As described in Point III of this brief, *Pioneer* in inapplicable the liens actually enforced in *Pioneer* did not pre-date the assignment, as they did here. *Pioneer*, *supra,* 179 S.W.3d at 399. Respondent filed pre-assignment liens without authority and never corrected the problem as the *Pioneer* association did. For the reasons described herein and in Point III of Appellant's Brief and this Reply Brief, respondent's argument fails.

Regarding the 2007 liens and lawsuit, appellant's Point IV asserts that the trial court erred in confirming the liens and ordering that they be foreclosed because respondent failed to comply with Declaration's requirement that the Association must wait until ninety days after a lien is filed with the recorder of deeds before filing suit to collect unpaid assessments. *L.F. 60 (Art. V, §5).* Respondent contends that the

noncompliance argument was not asserted in the trial court and was therefore waived; and that the Declaration's provisions regarding the timing for filing liens and lawsuits is not mandatory.

The Declaration is part of the summary judgment record and forms the basis for respondent's two actions below. *L.F. 48, 374*. In attempting to satisfy its burden on the authority issue, respondent made numerous references to Article V of the Declaration in its summary judgment pleadings. *See, e.g., L.F. 354, 356 (Motion for Summary Judgment, ¶¶ 16, 18, 19, 32, 33).* This included specific reliance upon Article V for its alleged authority. *L.F. 356, 357* ("Association is authorized to impose assessments and special assessments against owners under Article V of the Declaration" (¶ 3)). Thus, Article V was clearly invoked by respondent, including the ninety-day waiting period for filing suit. The fact that appellant's affirmative defenses do not specifically mention Declaration Article V, § 5 is immaterial because it was respondent who relied upon those provisions as a basis for its alleged authority.

Because respondent failed to comply with the Declaration's requirements for filing suits to enforce the 2007 liens, respondent lacked authority to file the 2007 lawsuit and the trial court erred in confirming the liens and ordering that they be foreclosed. That portion of the trial court's judgment should therefore be reversed.

Respondent also argues that Article V's timing provisions are permissive and not mandatory. *Respondent's Brief, pp. 42-43.* The Declaration section is permissive in the sense that it gives the Association the option of filing suit. But the authority to file suit is expressly contingent upon the ninety day waiting period after a lien is recorded. *L.F. 60*

(Art. V, Section 5). Restrictive covenants are construed in favor of the property owner. *Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc.*, 239 S.W.3d 631, 635 (Mo. App. 2007). The Declaration should be construed in appellant's favor and the trial court's decision should be reversed.

CONCLUSION

For all of the foregoing reasons, the trial court's Memorandum, Order and Amended Judgment dated June 4, 2009 should be reversed.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

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

_____
Elkin L. Kistner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Substitute Reply 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 brief was emailed, on January 11, 2011, to:

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