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 BRIEF

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JURISDICTIONAL STATEMENT

This appeal lies from an amended judgment entered by the Circuit Court of the City of St. Louis. *See* § 512.020, R.S.Mo. 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

Plaintiff-respondent DeBaliviere Place Association ("DPA") filed two lawsuits against defendant-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 claimed real property assessments. *L.F. 13, 335*. The suits addressed properties owned by Veal that are located at 5621-5623 Delmar (cause number 22054-02475), 5540-48 Delmar and 5560-64 Delmar (cause no. 0722-CC01701), all located in the City of St. Louis (referenced collectively herein as the "Property"). Veal filed answers, affirmative defenses and counterclaims. *L.F. 20, 24, 344*. The Trial Court consolidated the two suits. *L.F. 169*.

DPA filed summary judgment motions on November 20, 2008, to which Veal filed timely responses. *L.F. 29-168, 171-179, 350-508.* On February 23, 2009, the Trial Court issued its Memorandum, Order and Judgment, granting summary judgment to respondent-plaintiff on all claims. *L.F. 181.* Upon consideration of Veal's post-judgment motions, the Trial Court entered its Memorandum, Order and Amended Judgment on June 4, 2009 ("Amended Judgment"). *L.F. 290*.

Veal filed a timely Notice of Appeal. *L.F. 302.* The Missouri Court of Appeals for the Eastern District ("Court of Appeals") reversed the Amended Judgment and remanded the cause 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*. Its boundaries, rights and obligations are established as a designated "Development Area" and set forth in a Declaration of Covenants and Restrictions for DeBaliviere Place ("Declaration"). *L.F. 48-73.* The Declaration contains file stamps indicating it was recorded with the recorder of deeds for the City of St. Louis at Book 138, pp. 532 through 557. *L.F. 48-73;* Appendix to Appellant's Substitute Brief, pp. A-1 through A-8. [1] The Declaration was amended on four occasions (*L.F. 74, 76)*, but none of those amendments are included in the record.

Supplemental Declaration No. 56 ("Supplemental Declaration") was executed in 1986, with file stamps indicating it was recorded with the recorder of deeds for the City of St. Louis at Book 659, Page 1649. *L.F. 74.* The Supplemental Declaration added the Property later acquired by Veal to the designated Development Area. *L.F. 32, 74-80.* Almost all of the property within that area is located south of Delmar Boulevard. *L.F. 71. See also, L.F. 68-70.* Veal's Property is located on the north side of Delmar Boulevard. *L.F. 79-80, 98.*

ODPA was administratively dissolved in 1992 for failure to comply with Missouri corporate filing requirements. *L.F. 31, 92.* It never was never reinstated. *L.F. 92, 94, 181, 183-184.* When ODPA dissolved in 1992, the pertinent statute provided that "[n]o

[1] Hereinafter, the Appendix to Appellant's Substitute Brief shall be referenced as "App".

rescission of forfeiture shall be made after ten years following forfeiture[,]" or, in this case 2002. *§ 335.507.4 R.S.Mo. (1986).* See App., p. A-25.

2. 1997 to 2003

Veal acquired the Property in 1997, by way of a Special Warranty Deed. *L.F. 95.* The conveyance was made subject to a list of "Permitted Encumbrances" attached to the deed. *Id.* There is no reference to the Declaration or the Supplemental Declaration in the list of Permitted Exceptions attached to the conveyance deed, either by document title or by Book and Page number. *L.F. 99-100.* When Veal acquired the Property, DPA did not yet exist and ODPA remained administratively dissolved pursuant to the 1992 action of the State of Missouri. *L.F. 31, 92, 95.* 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.

When he acquired the Property in 1997, Veal was unaware of the Declaration or that the Property was included in the Development Area. *L.F. 107 (Veal Deposition, p. 22).* And he was ignorant of the previous existence of ODPA. *L.F.107, 114-115 (Veal Deposition, pp. 22, 52-53).*

From the time he acquired the Property in 1997 until 2003, he did not receive assessment invoices or communications of any kind from anyone purporting to be acting on behalf of ODPA. *L.F. 107 (Veal Depo., pp. 22-23).* Nor did Veal pay any assessments to the dissolved association from 1997 through 2003 (*L.F. 107; Veal Depo., p. 22),* and the record does not suggest any collection efforts or assessment liens filed during the period from 1997 through 2003.

During the same period, ODPA did not provide any services or benefit to the Property. *L.F. 107-109 (Veal Depo., pp. 24-32)*. 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. *L.F. 107, 111, 121 (Veal Depo., pp. 22, 38-40, 80).*

3. 2003 to 2006

In 2003, a group of three individuals incorporated DPA as a new corporation, using the same name as the original, dissolved association, ODPA. *L.F. 413*. At that time, the new DPA had obtained neither an assignment of rights nor any other conveyance from the original, dissolved association. The record does not suggest that the new corporate entity was approved, authorized or otherwise enabled by property owners within the Development Area. In 2003, Veal received his first invoice for Annual General Assessments from DPA, claiming that assessments were due for the subject Property. *L.F. 107 (Veal Depo., pp. 22-23)*. Those invoices covered not only 2003, but also sought payment for the years from 1998 through 2002. *L.F. 107 (Veal Depo., p. 23)*.

At the time DPA began sending invoices in 2003, ODPA remained administratively dissolved and DPA had not obtained an assignment of its rights or any other such conveyance. But DPA continued to send Veal invoices, demand letters, and threats of litigation from 2003 through 2005. *L.F. 115 (Veal Depo., pp. 54-55).* In February 2005, DPA recorded a "Notice of Lien" against a portion of the Property for claimed "delinquent assessments of the proportionate share of common expenses incurred by the Association for the administration, repair, and maintenance of the common property, plus . . . interest . . . " in the total amount of $25,505.72 (including claimed

interest, attorney's fees and other fees). *L.F. 130-131.* The only type of assessments referenced in the Notice of Lien was Annual General Assessments allegedly unpaid from 1998 through 2004. *L.F. 131; see also L.F. 129, 151.* The 2005 Notice of Lien does not reference or allege any unpaid special assessments. *Id.* DPA claimed in its 2005 Notice of Lien interest in the amount of $1,854.72 that allegedly had accrued before the lien was filed. *L.F. 297.*

DPA filed its first lawsuit on December 8, 2005, in which it sought to collect the amounts referenced in the 2005 Notice of Lien. *L.F. 1, 10 (Cause No. 022054-02475).* Veal's answer, affirmative defenses and counterclaim stated, among other things, that DPA lacked authority to file the 2005 lien or the ensuing lawsuit (*L.F. 21*), that it lacked any power to act on behalf of the dissolved association (*L.F. 22*), and that he never agreed to be part of whatever DPA unilaterally created in 2003 (*L.F. 26-27).* At the times DPA recorded the Notice of Lien and filed its first lawsuit in 2005, it had not obtained any assignment or other authority to act on behalf of the dissolved ODPA. *L.F. 92.*

4. 2006 Assignment Agreement

In 2006, after Veal raised his defenses and counterclaims in response to the 2005 lien and lawsuit, DPA apparently obtained an Assignment Agreement executed by Bruce Mills, who represented that he had been president of the board of directors of the "former" administratively dissolved corporation known as DeBaliviere Place Association. *L.F. 92-94.* Mills had previously made an offer to purchase Veal's property, but the offer was rejected. *L.F. 111 (Veal Deposition, pp. 37-38).* The Assignment Agreement was created in 2006, about 14 years after ODPA was

administratively dissolved (1992) and about 9 years after Veal acquired the Property (1997). *L.F. 31, 92-94.*

The record is silent as to whether the former entity's bylaws were followed in making the assignment, including its quorum or voting requirements, and it does not reflect whether the board of directors of ODPA actually convened and approved the Assignment Agreement 14 years after its dissolution. Nor does thre record indicate that the 2006 Assignment Agreement was filed with the recorder of deeds. But, according to its terms, the Assignment Agreement purports to assign the defunct entity's rights to the new DPA. *L.F. 94.*

None of the original or amended petitions in the underlying suits made any allegation or other reference to the 2006 Assignment Agreement or any other alleged assignment of rights obtained by respondent. *L.F. 10-12 (2005 petition in cause 22054-02475); L.F. 13-17 (2007 amended petition in cause 22054-02475); L.F. 335-343 (2007 petition in cause 0722-CC01701).*

5. 2007 to Present

On May 1, 2007, DPA recorded two documents titled "Notice of Lien" against portions of the Property, claiming unpaid assessments, interest and fees through December 2007. *L.F. 465-468.* On May 22, 2007, DPA filed its second lawsuit (Cause No. 0722-CC01701), seeking to collect the amounts described in its two 2007 liens. *L.F. 330, 335*. The petition in the 2007 case does not mention the Assignment Agreement or allege that respondent was acting pursuant to any rights conveyed pursuant to an Assignment Agreement. *L.F. 335-343.*

6. Declaration and Annual General Assessments

Both the ODPA and DPA claimed to operate according to the provisions and requirements stated in the Declaration. *L.F. 48, 335, 351, 414*. All the assessments that DPA seeks to collect from Veal are predicted on an "Annual General Assessment" established in the Declaration. App., p. A-5; *L.F. 151, 337, 340*. DPA does not claim that any special assessments are due. *Id*. Some of the assessment provisions of the Declaration material to this appeal are:

(1) Revenue from the Annual General Assessment "shall be used exclusively for the fulfillment by the Association of its powers and duties as set forth in Section 2, Article II [of the Declaration]." App., p. A-5 *(Declaration, Art., V, §2a);*

(2) Article II, Section 2 establishes a procedure for adding new properties to the Association from both inside and outside the designated development area. *L.F. 53-54.* As noted above, the Declaration requires that funds generated by the Annual General Assessment be used exclusively for this purpose. App., p. A-1 *(Declaration, Art. II, §2);*

(3) Special assessments may be used to raise funds for other uses, such as "construction, reconstruction, repair, or replacement of a capital improvement upon the Common Areas, ..." or other Association activities, contingent upon a majority vote of the members. App., p. A-7 *(Declaration, Art. V, §3);*

(4) With respect to unpaid assessments, interest does not begin accruing until 30 days after a lien is recorded with the recorder of deeds. *L.F. 60 (Declaration, Art. V, §5);*

(5) The DeBaliviere Place Association board may not file suit to collect unpaid assessments until 90 days after the date a lien is filed with the recorder of deeds, in which case the association may obtain reimbursement of its reasonable attorney's fees. *Id.*

The record does not indicate that any revenue derived from Annual General Assessment fees was used for the purpose of adding new properties to the Development Area. From the year of its incorporation (2003) until DPA filed its lawsuits, it has claimed that it provided "maintenance, insurance and administration" to owners of property within the Development Area. *L.F. 127 (Martin Affidavit, ¶3).* All of its resources have been devoted to providing those services. *L.F. 127 (Martin Affidavit, ¶4); L.F. 152 (Petition, ¶10); L.F. 160-168 (Exhibit X, Respondent's budgets 2003-2008).* This includes, by way of example, spending Annual General Assessment revenue on items such as marketing (*L.F. 160*), flowers (*L.F. 160, 163, 166*), electric service (*L.F. 163*), doggie bags (*L.F. 167*), Christmas wreaths (*L.F. 144*) and at least $10,000.00 in donations to Stella Marris Child Care since 2003 (*L.F. 143, 160, 163, 164, 166*).

7. **Claims and Decisions Below**

DPA filed lawsuits in 2005 and 2007 against Veal to collect the amounts indicated in the three liens, which suits were consolidated in the Trial Court. *L.F. 169*. None of the original or amended petitions in the underlying suits make any reference to an alleged

assignment of rights obtained by DPA. *L.F. 10-12 (2005 petition in cause 22054-02475); L.F. 13-17 (2007 amended petition in cause 22054-02475); L.F. 335-343 (2007 petition in cause 0722-CC01701).* The 2006 Assignment Agreement does not appear in the record until DPA attached it as an exhibit to its summary judgment motions. *L.F. 92.*

Beginning in 2005, Veal filed answers, affirmative defenses and counterclaims asserting, among other things:

(i) the charter of the original DeBaliviere Place Association was forfeited in 1992. *L.F. 26 (¶8), 348 (¶8);*

(ii) the charter of the original DeBaliviere Place Association was never reinstated. *L.F. 27 (¶9), 348 (¶8);*

(iii) at the time Veal purchased the subject property in 1997, "Plaintiff was not a Non-profit Corporation in good standing with the Secretary of State's Office in the State of Missouri." *L.F. 26 (¶3), 347 (¶3);* and

(iv) at the time DPA filed its Articles of Incorporation with the Secretary of State, Veal did not agree to "join the newly formed DeBaliviere Place Association*." L.F. 26-27 (¶¶5, 6, 11), 347-348 (¶¶5, 6, 11).*

Veal's Counterclaim repeated the statements referenced above in its affirmative defenses, with additional and supplemental averments based upon DPA's lack of authority to act as the "association." *L.F. 21, (¶7); L.F. 21 (¶¶11-14); L.F. 22 (¶¶16-20).* The Counterclaim sought a court order and judgment requiring DPA to release the 2005 lien, and to cease its "enforcement activities" initiated pursuant to the Declaration

because "[p]laintiff [DPA] is not the original DeBaliviere Place Association." *L.F. 22 (¶¶A, B).* The Counterclaim was filed in August, 2007. *L.F. 20.*

The Trial Court found that Veal was obligated to pay all Annual General Assessment fees for the Property to respondent, calculated from 1998 through 2007. App., p. A-9; *L.F. 181-190.* Summary judgment was initially granted to DPA in the principal amount of $70,856.00, with interest of $35,004.26, and $13,000.00 for attorney's fees. *L.F. 189-190.* It also dismissed Veal's counterclaim, entered judgment confirming all three liens filed by DPA and ordered that said liens be foreclosed. *L.F. 189.*

Veal filed post-judgment motions seeking, among other things, to reinstate and amend his counterclaim, amend his summary judgment responses, and contesting the Trial Court's damage calculations. *L.F. 193-220.* On June 4, 2009, the Trial Court entered its Memorandum, Order and Amended Judgment, denying all but one ground for relief asserted in Veal's Motion to Modify or Amend the Judgment or in the Alternative for New Trial. App., p. A-19; *L.F. 290.* The Trial Court agreed with Veal's contention that DPA had improperly added interest to its three liens prior to the recording date, contrary to the terms of the Declaration. *L.F. 293.* Consequently, it reduced the interest award from $35,004.26 to $26,238.69. *L.F. 294.* However, the Trial Court did not change or amend its judgment that the same three liens − including the misstated interest amounts − "are hereby confirmed and ordered to be foreclosed" *Id.* As crafted by the Trial Court, its legal reasoning, fact-finding and judgment are combined in its Memorandum, Order and Amended Judgment dated February 23, 2009 (App., p. A-9;

L.F. 181), as modified by its Memorandum, Order and Amended Judgment dated June 4, 2009. App., p. A-19; *L.F. 290*.

The Court of Appeals reversed the Trial Court's decision. It noted that, the original Association failed to rescind its corporate forfeiture within the 10-year period required by former § 355.507.4, R.S.Mo. (1986). It reasoned:

> "the Original Association no longer had any rights to enforce the Declaration's restrictive covenant or any legal ability to assign those rights to the [respondent] Association, we hold that the trial court erred in granting summary judgment to the Association as to its claims seeking judgment for unpaid subdivision assessments. This holding necessarily also disposes of the Association's claims seeking foreclosure of the liens against Veal's properties."

DeBaliviere Place Association v. Veal, 2010 WL 2510390, * 7. (Mo. App. E.D., June 22, 2010) (hereinafter, "Court of Appeals Decision").

The Court of Appeals also stated or held as follows:

(i) Disputed issues of material fact remained regarding DPA's quantum-meruit claim and Veal's counterclaims, so the Trial Court's grant of summary judgment was reversed and remanded for further proceedings on those causes of action;

(ii) the fact that DPA's brief on appeal urged, for the first time, the Court to correct a claimed scrivener's error in the Declaration constituted an additional reason that summary judgment was inappropriate, because "[a] party seeking reformation of a contract due to a scrivener's error bears the burden of establishing with 'clear, cogent and convincing evidence' that a mutual mistake common to

both parties has been made", citing *Ethridge v. Tierone Bank,* 226 S.W.3d 127, 132 (Mo. banc 2007);

(iii) even if the 2006 Assignment Agreement was found valid, "[c]learly, the Association did not have any legal right in 2005 to collect or enforce assessments against Veal's property; thus, its 2005 lien was improperly filed:" and

(iv) it would still find against DPA as to its foreclosure count for failure to comply with the Declaration's requirements regarding foreclosures.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DPA AND ITS JUDGMENT SHOULD BE REVERSED BECAUSE ANY RIGHTS OR OBLIGATIONS ODPA HAD UNDER THE DECLARATION CEASED TO EXIST TEN YEARS AFTER ITS DISSOLUTION, PRIOR TO ANY ATTEMPTED ASSIGNMENT OF ITS RIGHTS, AND DPA THEREFORE LACKED AUTHORITY TO COLLECT ASSESSMENTS OR PROSECUTE THE UNDELRYING SUITS.

II. ALTERNATIVELY, THE TRIAL COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE, EVEN IF THE 2006 ASSIGNMENT WAS VALID, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DPA BECAUSE THE EXCLUSIVE, PERMISSIBLE USE FOR THE ASSESSMENTS AT ISSUE IS TO ADD NEW PROPERTIES TO THE DISSOLVED CORPORATION-ASSOCIATION, WHICH WAS AN UNAUTHORIZED AND UNLAWFUL ACTIVITY IN WINDING DOWN THE DISSOLVED ASSOCIATION-CORPORATION.

§ 355.691 R.S.Mo.

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

Kehrs Mill Trails Associates v. Kingspointe Homeowner's Association, 251 S.W.3d 391 (Mo. App. 2008)

III. ALTERNATIVELY, THE TRIAL COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DPA BECAUSE DPA LACKED AUTHORITY TO IMPOSE LIENS AND COLLECT ASSESSMENTS FOR THE YEARS 1998 UNTIL 2006, BEFORE IT OBTAINED AN ASSIGNMENT OF THE DISSOLVED PREDECESSOR'S INTERESTS.

IV. THE TRIAL COURT ERRED IN SUMMARILY CONFIRMING THE THREE LIENS IMPOSED BY DPA AND ORDERING THAT SAID LIENS BE FORECLOSED BECAUSE THE RECORD DEMONSTRATES THAT DPA LACKED AUTHORITY TO ASSESS OR COLLECT THE AMOUNTS STATED IN THE 2005 LIEN, THE TWO 2007 LIENS WERE FILED PREMATURELY UNDER THE EXPRESS TERMS OF THE DECLARATION, AND THE TRIAL COURT HAD ALREADY FOUND THAT THE INTEREST AMOUNTS STATED IN ALL THREE LIENS WERE INCORRECT.

Declaration of Covenants and Restrictions for DeBaliviere Place, Art. V, § 5.

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

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

V. IN THE EVENT THE TRIAL COURT'S JUDGMENT IS REVERSED ON ANY GROUNDS BY THIS COURT, THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO DPA SHOULD ALSO BE REVERSED AS ERROR BECAUSE DPA WOULD NOT BE ENTITLED TO RECOVER SUCH FEES UNDER THE TERMS OF THE DECLARATION.

Declaration of Covenants and Restrictions for DeBaliviere Place, Art. V, § 5.

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 and all inferences therefrom should be construed in favor of Veal. *Id.* The record is read in the light most favorable to the party against whom summary judgment was granted, and all the facts properly pled by the nonmoving party and all inferences therefrom are assumed as true. *Liberty Mut. Ins. Co. v. Havner, 103 S.W.3d 829, 831-32 (Mo.App.2003).* Reversal of a grant of summary judgment is 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. *Id. at 832; Mo.R.Civ.P. 74.04.* Summary judgment for DPA was appropriate only if DPA established that all of Veal's affirmative defenses failed as a matter of law. *ITT Commercial, supra, 854 S.W.2d at 381; Cohn v. Century Venture Development Partnership, 938 S.W.2d 647, 650 (Mo. App. 1997).* 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.2007).*

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DPA AND ITS JUDGMENT SHOULD BE REVERSED BECAUSE ANY RIGHTS OR OBLIGATIONS ODPA HAD UNDER THE DECLARATION CEASED TO EXIST TEN YEARS AFTER ITS DISSOLUTION, PRIOR TO ANY ATTEMPTED ASSIGNMENT OF ITS RIGHTS, AND DPA THEREFORE LACKED AUTHORITY TO COLLECT ASSESSMENTS OR PROSECUTE THE UNDELRYING SUITS.

It is undisputed that ODPA was administratively dissolved in 1992 and never reinstated. At the time of its 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). Although the ten-year time limit was eliminated in 2000, § 355.871, R.S.Mo., specifically stated that the repeal of former chapter 355 did not affect:

> (1) The operation of the statute or any action taken under it before its repeal;
>
> (2) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal;
>
> (3) Any violation of the statute or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;
>
> (4) Any proceeding, reorganization or dissolution commenced under the statute before its repeal, and the proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not been repealed; . . .

§ 355.871, R.S.Mo.

Therefore, the new provisions of § 355.871, R.S.Mo. did not affect a dissolution that had already occurred (subsection 1). Nor did it affect obligations or liabilities that accrued prior to repeal (subsection 2), or forfeitures that occurred prior to repeal of the

previous statute (subsection 3). 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. The Court of Appeals correctly concluded that, after the 10 years elapsed, the original Association was neither a corporation de jure or de facto because it could not exist pursuant to any statute. "Having failed to apply for a timely rescission of the forfeiture, the Original Association ceased to exist." *Court of Appeals Decision, * 6, citing Beavers v. Recreation Ass'n of Lake Shore Estates, Inc., 130 S.W.3d 702, 712 (Mo. App. 2004)*.

The Assignment Agreement upon which DPA relies as its source of authority to collect assessments and to sue Veal was not executed until 2006, fourteen years after the dissolution date and four years after the statutory deadline to rescind a corporate forfeiture. The Court of Appeals correctly concluded that the original association, being a former corporation lacking any existence, had no ability to act in any corporate capacity in 2006, including execution of the subject assignment. It necessarily follows that DPA lacked any authority to impose or collect assessments from Veal, or to file the underlying suits.

DPA thus failed to rebut the affirmative defense of lack of authority.[2] Summary judgment was appropriate only if DPA established that all of Veal's affirmative defenses failed as a matter of law. *ITT Commercial, supra, 854 S.W.2d at 381; Cohn v. Century Venture Development Partnership,* 938 S.W.2d 647, 650 (Mo. App. 1997). Pursuant to Missouri Supreme Court Rule 55.08, Veal 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." In the two underlying suits, Veal's answers, affirmative defenses and counterclaims asserted that DPA lacked authority to collect assessments and file the underlying suits because, among other things, the original association was dissolved in 1992 and never reinstated. *L.F. 21-22, 26-27, 347-348.*

In the Court of Appeals, DPA complained that Veal's responsive pleadings in the Trial Court did not contest the validity of the Assignment Agreement. It is true that Veal's pleadings in response to the petitions and amended petitions do not specifically address the validity of the 2006 Assignment Agreement, but that is because ***none*** of DPA's petitions or amended petitions contain any mention whatsoever of an alleged

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[2] DPA's Application for Transfer misrepresents the Court of Appeals' decision by casting the issue as "[w]hether the repeal of Chapter 355 extinguished all corporate rights of a not for profit that was administratively dissolved in 1992, including all rights to wind up its affairs?" *Transfer Application, p. 4.* The Court of Appeals Decision simply held that the 10-year time limit for rescinding a corporate forfeiture applied to DPA because its charter was forfeited in 1992. DPA continued to possess the same capability to wind down its affairs that it possessed in 1992.

assignment agreement. *L.F. 10-12 (2005 petition in cause 22054-02475); 13-17 (2007 amended petition in cause 22054-02475); 335-343 (2007 petition in cause 0722-CC01701).*

In fact, DPA's pleadings make no reference to any alleged assignment until the Assignment Agreement was attached as an exhibit to its summary judgment motions. At that time, Veal acknowledged the existence of the assignment document without any concession as to its validity, as the Court of Appeals Decision noted at * 8-9. As part of the summary judgment proceedings, DPA 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.* None of that altered DPA's affirmative obligation to establish its own authority, including the validity of the assignment upon which DPA's claims depended.[3]

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[3] DPA's summary judgment papers below contain multiple characterizations and assertions of the rights of the generic "Association" as provided in the Declaration. Many of those descriptions of the "Association's" powers and duties under the Declaration were admitted, meaning that the statements accurately stated the generic terms of the Declaration The statement cited by DPA was among a series of statements describing 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

In any event, if there is any doubt as to the extent of DPA's admission, the uncertainty must be resolved in the context of this summary judgment adjudication in favor of Veal. *ITT Commercial Supra*, 854 S.W.2d at 376. Once the Assignment Agreement document was revealed as part of the summary judgment pleadings, DPA's duty extended to establishing that it was a valid and effective assignment. Because the 2006 Assignment Agreement upon which DPA depended in order to overcome the affirmative defense of lack of authority was facially invalid, it was not entitled to summary judgment. Hence, the Court of Appeals correctly applied the law and reversed the Trial Court's decision.

Finally, DPA's transfer application filed in this Court attempts to create the misconception that the Court of Appeals Decision will: (i) result in some sort of injustice for property owners; and (ii) cause conflict with the Southern District's decision in *Pioneer Point Homeowners Association, Inc. v. Booth, 179 S.W.3d 397, 398 n. 1 (Mo.App. 2005)*. Those issues are addressed in order hereinafter.

(i) *Property Owners' Interests Are Not Jeopardized*. DPA's transfer application includes the unsupported claim that property owners, "after 33 years of receiving security, community services, insurance, event-planning, improvements, beautification

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legal status (L.F. 30), general obligations of the Association as described in the Declaration (L.F. 31), and the right of the Association to file suit to collect unpaid assessments (L.F. 34). These admissions did not constitute any sort of acknowledgement that DPA was the entity authorized to carry out "Association" duties described in the Declaration.

and maintenance of common areas under the DPA Declaration, no longer have a homeowner's association authorized to collect assessments and to provide such services for their community." In fact, the record contains no indication that the original association did anything whatsoever after it was dissolved in 1992. Nothing in the record supports the contention that the dissolved DeBaliviere Place Association provided any of the laundry list of services referenced in DPA's transfer application. *L.F. 107-109 (Veal Depo., pp. 24-32).* In fact, Veal's unrebutted testimony was that from the time he acquired the Property in 1997 until 2003, he did not receive services, assessment invoices or any other communications from anyone purporting to be acting on behalf of the dissolved DeBaliviere Place Association. *L.F. 107-109 (Veal Depo., pp. 22-32).*

The only record reference to any of the "services" provided by respondent relates to the time after respondent's 2003 incorporation. Examples of the "community services," "event-planning" "improvement" and "beautification" previously provided by respondent are purchasing flowers (*L.F. 160, 163, 166*), doggie bags (*L.F. 167*), Christmas wreaths (*L.F. 144*) and at least $10,000.00 in donations to Stella Marris Child Care since 2003 (*L.F. 143, 160, 163, 164, 166*). If property owners want to continue paying mandatory assessments for these types of services, nothing in the Court of Appeals Decision prevents DPA or anyone else from creating a new, owner-approved association for that purpose.

The Southern District of the Court of Appeals rejected a similar argument in *Valley View Village South Improvement Association, Inc. v. Brock, 272 S.W.3d 927 (Mo.App. 2009),* where an unauthorized successor-association argued that a subdivision

would be left with no homeowners association unless the successor's authority was recognized. *Id. at 930.* In rejecting that argument, the *Valley View* court stated: "[a]lthough 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.* Property owners have the same option here.

DPA's reasoning would create fundamental problems with real estate transactions, in that purchasers could never be certain that a defunct association might resurface and seek retroactive payment of claimed assessments. Veal's situation illustrates the problem that DPA's construct creates. Veal acquired the Property in 1997. Assuming for the sake of argument that Veal wanted to pay assessments for any years between 1997 and 2003, the record reveals that there was nowhere for Veal to make the payments, no one in place to receive them and no legitimate use for the money. If Veal had sold the Property in 2002, a buyer exercising due diligence might have uncovered the previous existence of the dissolved association and determined that the association was no longer functioning, filing liens or collecting assessments. Even after exercising due diligence, that buyer would not know that he could be required to pay years of retroactive assessments after a "new" association surfaced in 2003. There is no indication in the record that the Assignment Agreement was recorded with the recorder of deeds, so the public record

would not put a buyer on notice of the "new" association. Buyers, lenders and title companies would all be subject to claims stemming from retroactive assessments. [4]

(ii) *No Conflict Exists Between the Appellate Districts.* The *Pioneer* court simply assumed its assignment was valid and devoted no analysis to that point. *Pioneer, 179 S.W.3d at 401.* Rather, the *Pioneer* assignment turned on the narrow question of "whether Missouri law allows for an assignment between corporations as to rights and obligations under restrictive covenants despite the fact that the assignor's name expressly appears in the covenant(s)." *Id.* When the Southern District actually addressed the issue, it recognized that, following the expiration of the former 10-year limit for rescinding a corporate forfeiture, a similar association ceased to exist. *Beavers v. Recreation Ass'n of Lake Shore Estates, Inc.,* supra, 130 S.W.3d at 709-712. See also *Valley View Village*, supra, 272 S.W.3d at 930 (decided after *Pioneer*, finding that original homeowners association no longer existed).

DPA's proffered construct is also problematic because it would create fundamental problems with real estate transactions, in that purchasers could never be certain that a defunct association might resurface and seek retroactive payment of claimed assessments. Veal's situation illustrates the soundness of this criticism. Veal acquired the Property in 1997. Assuming for the sake of argument that Veal wanted to

[4] One possible result in this scenario is that title companies might require payment of sufficient funds in escrow to pay any and all possible unpaid assessments in case a defunct association re-emerges.

pay assessments for any years between 1997 and 2003, the record suggests that there was nowhere for Veal to make the payments, no one in place to receive them and no legitimate use for the money. If Veal had sold the Property in 2002, a buyer exercising due diligence might have uncovered the existence of the dissolved association and that the association was no longer functioning, filing liens or collecting assessments. Even after exercising due diligence, that buyer would not know that he could be required to pay years of retroactive assessments after a "new" association surfaced in 2003. Buyers, lenders and title companies would all be subject to claims stemming from retroactive assessments.[5]

II. ALTERNATIVELY, THE TRIAL COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE, EVEN IF THE 2006 ASSIGNMENT WAS VALID, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DPA BECAUSE THE EXCLUSIVE, PERMISSIBLE USE FOR THE ASSESSMENTS AT ISSUE IS TO ADD NEW PROPERTIES TO THE DISSOLVED CORPORATION-ASSOCIATION, WHICH WAS AN UNAUTHORIZED AND UNLAWFUL ACTIVITY IN WINDING DOWN THE DISSOLVED ASSOCIATION-CORPORATION.

In the Court of Appeals, Veal maintained that, even if DPA had obtained a valid assignment of rights, it lacked authority to collect the general assessments referenced in the Declaration. The underpinning of this contention is the Declaration's unambiguous requirement that the sole permissible use for revenue generated by the "annual general

[5] One possible result in this scenario is that title companies might require payment of sufficient funds in escrow to pay any and all possible unpaid assessments in case a defunct association re-emerges.

assessment" is to add new properties to the designated Development Area. App., pp. A-1, A-5; *L.F. 53-54, 58 (Declaration, Art. V, §2a; Art II, §2)*. As argued below, DPA lacked authority to collect those sole-purpose assessments because adding new properties is not a proper "winding down" activity, and the record demonstrates its actual use of the funds violated the terms of the Declaration. Because the Court of Appeals reversed the Trial Court on other grounds, it did not reach this issue.

The Trial Court correctly noted that, after the dissolution of ODPA in 1992, its activities were limited by statute to activities incidental to winding up its affairs. *L.F. 183; §355.711, R.S.Mo.* A corporation that has been administratively dissolved "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.*

The Trial Court held that, because the Annual General Assessment created in the Declaration was automatic, the assessments continued to accrue each year during the wind down period after the original corporation-association's dissolution in 1992. *L.F. 186.* That analysis is flawed because it fails to consider or address the fact that the exclusive, permitted use of the Annual General Assessment proceeds has no relation whatsoever to winding down a dissolved corporation.

According to the Declaration, the exclusive purpose for revenue generated by the association's Annual General Assessment is to add new properties to the designated Development Area. App., pp. A-1, A-5; *L.F. 53-54, 58 (Declaration, Art. V, §2a; Art II, §2)*. Adding new properties manifestly is not "necessary to wind up and liquidate [the dissolved company's] affairs under section 355.691. . . ." *§355.711, R.S.Mo.* A

dissolved corporation continues its corporate existence but it may not carry on any activities except those appropriate to wind up and liquidate its affairs. *§355.691, R.S.Mo.* Those activities include:

> (1) Preserving and protecting its assets and minimizing its liabilities;
>
> (2) Discharging or making provision for discharging its liabilities and obligations;
>
> (3) Disposing of its properties that will not be distributed in kind;
>
> (4) Returning, transferring or conveying assets held by the corporation upon a condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, in accordance with such condition;
>
> (5) Transferring, subject to any contractual or legal requirements, its assets as provided in or authorized by its articles of incorporation or bylaws; . . .
>
> (7) If the corporation is a mutual benefit corporation and no provision has been made in its articles or bylaws for distribution of assets on dissolution, transferring its assets to its members or, if it has no members those persons whom the corporation holds itself out as benefiting or serving; and
>
> (8) Doing every other act necessary to wind up and liquidate its assets and affairs.

§355.691, R.S.Mo.

As the Trial Court noted, Veal could be obligated to pay assessments due to a dissolved corporation only if collection of the assessments were a proper "winding down" activity. *L.F. 183.* "After the dissolution, the former DeBaliviere Place Association had

no right to do anything other than wind up its affairs." *L.F. 186.* But the Trial Court never addressed the question of whether the sole permitted use for the assessment revenue – adding properties – was a permitted aspect of winding down the dissolved corporation's affairs.

The propriety of collecting the assessments cannot be analyzed without addressing the exclusive use allowed for assessment proceeds. Adding new properties would expand the corporation's activities rather than wind them down. This is where the facts differ from those addressed in *Pioneer, supra,* 179 S.W.3d 397. In *Pioneer*, revenue generated by the dissolved association's annual assessment was used for road maintenance, water and sewage services that benefited each property owner. *Id., 179 S.W.3d at 39, n. 1*. Although it is not expressly stated in the opinion, the context of *Pioneer* indicates that the property owner therein received the benefits of the road maintenance, water and sewage services that the assessments covered. Maintaining those essential services certainly qualifies as a necessary activity that a dissolved homeowners association may engage in while it winds up its affairs. *§355.711, R.S.Mo.*

Here, the Declaration's only permitted use for revenue from the subject assessments was unnecessary "Additions to Existing Property". App., p A-1; *L.F. 53*. The dissolution in 1992 prevented ODPA from performing its end of the bargain – adding properties to the Development Area. Nothing in the record indicates that ODPA collected any funds or added any properties at any time after its 1992 dissolution. Given its inability to add new properties to the association, there was no point whatsoever to collect an assessment dedicated solely to pay for the addition of properties.

As DPA has acknowledged, duties and 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). DPA argued in the Trial Court that the "contract shall be read as a whole for interpretation purposes, giving terms their plain ordinary meaning." *L.F. 40; Kehrs Mill,* 251 S.W.3d at 396. On the face of the Declaration as a whole, it is manifest that the defunct association was contractually obligated to use the assessments for a purpose that the dissolved association could not lawfully undertake. The administrative dissolution effectively disabled ODPA's ability to add properties to the Development Area. Because its dissolution rendered it incapable of performing the sole function for which the Annual General Assessment was dedicated under the contract, performance of the contract terms was impossible and no reasonable basis exists to enforce the contract's payment provisions.

It is also apparent from the record that DPA's actual use of the general assessment funds violates and breaches the Declaration's terms. There is no indication in the record that either ODPA or DPA have added any properties to the Development Area from 1992 through the date of the summary judgment motions in this case. Instead of using Annual General Assessment Revenue for its sole, dedicated purpose, it appears from the record that DPA has diverted those funds since 2003 to miscellaneous operational uses for which the Declaration requires owner-approved special assessments.

While revenue generated by the Annual General Assessment is expressly reserved for adding new properties, funds for "construction, reconstruction, repair, or replacement of a capital improvement upon the Common Areas,… or other Association activities"

must be generated by special assessments, according to the requirements established in the Declaration. App., p A-7; *L.F. 59 (Declaration, Art. V, §3).* Special assessments require an affirmative vote of the members. *Id.*

The record demonstrates that DPA is diverting Annual General Assessment revenue to pay for activities that are contractually required to be financed by member-approved special assessments. *See, L.F. 127 (¶¶3-4), 167* (funds are used for "maintenance, insurance and administration"; expenditures grouped in four categories: administrative, landscaping, maintenance/supplies and security). An example is DPA's donation of at least $10,000 over several years to a child care center. *L.F. 143, 160, 163, 164, 166*. Other such expenses include marketing (*L.F. 160*), flowers (*L.F. 160, 163, 166*), electric service (*L.F. 163*), doggie bags (*L.F. 167*) and Christmas wreaths (*L.F. 144*). *See also, L.F. 127 (Martin Affidavit, ¶4), 152 (Petition, ¶10), 160-168 (Exhibit X, Respondent's budgets 2003-2008.*

In the Court of Appeals, DPA appeared to concede the principal points that adding new properties would not be a proper winding down activity and that it has not used annual general assessment revenue for the purpose of adding properties. Instead, it contended that that the improper winding down activity should have been pled as a separate affirmative defense in addition to the lack of authority defense.[6]

[6] In the Court of Appeals, DPA also argued for the first time that the Declaration's limitation on the use of assessment funds is the result of a scrivener's error and should

In the Trial Court, Veal asserted that he was not liable for the Annual General Assessments because DPA lacked authority to collect the assessments. *L.F. 26-27, 157-158 (Affirmative Defenses, ¶¶3-11); L.F. 347-348 (Affirmative Defenses ¶¶3-11).* His Counterclaim also contested DPA's authority to collect assessments and impose liens. *L.F. 20-23 (Counterclaim).* Thus, both Veal's affirmative defenses and the counterclaim clearly pled and asserted that he was not liable for the claimed assessments due to DPA's lack of authority to levy and collect the subject assessments.

Pursuant to Rule 55.08, Veal 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.* Veal's affirmative defenses, along with the Counterclaim's averments, satisfy that standard. In order to obtain summary judgment, DPA 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 (Mo. banc 1993); Cohn v. Century Venture Development Partnership,* 938 S.W.2d 647, 650 (Mo.App. 1997).

In the Trial Court, Veal's authority defense focused on the fact that OPDA's corporate charter had been dissolved. *L.F. 26-27, 157-158 (Affirmative Defenses, ¶¶3-*

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therefore be disregarded. Rather than anticipate another version of that argument, Veal will file a reply if DPA asserts it again.

11); L.F. 347-348 (Affirmative Defenses ¶¶3-11). Although the Trial Court correctly recognized the general proposition that Veal could only be required to pay the Annual General Assessments if collection of those assessments were a proper "winding down activity" (*L.F. 183*), it simply assumed the propriety of this particular assessment.

The Trial Court never addressed the proposition that the exclusive permitted use for the subject assessments under the Declaration is not a proper activity for a corporation that is winding down pursuant to Sections 355.691 and 355.711, R.S.Mo. The two concepts go hand in hand as part of the authority issue. Veal claims that he does not owe the Annual General Assessment because the defunct association lacked authority to collect the assessments during its winding down period. *L.F. 26-27, 157-158 (Affirmative Defenses, ¶¶3-11); L.F. 347-348 (Affirmative Defenses ¶¶3-11).*

DPA appeared to argue below that a dissolved association-corporation possesses authority to collect assessments even if the law prohibits the dissolved corporation from using the money. According to DPA, the dissolved corporation's inability and incapacity to add properties to the Development Area has no bearing on its authority to continue collecting assessments that cannot be used for anything else. Based on this tortured logic, DPA urges the conclusion that its incapacity to use the assessment funds should not be considered by this Court as part of Veal's lack of authority defense.

That argument 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. As the Trial Court noted (and DPA does not dispute), the

dissolved association had authority to collect the Annual General Assessments only if it was a proper winding down activity. *L.F. 183.* DPA also acknowledged 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.*

Although Veal has not located case law directly on point, the principal decision relied upon by DPA specifically notes that the assessment collected by the dissolved association in that case was used to pay for road maintenance, water and sewer. *Pioneer, supra, 179 S.W.3d at 398, n. 1.* The *Pioneer* court noted those uses and based its decision on the authority issue, in part, on the fact that the dissolved association's stated purpose was to operate and maintain 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 purpose and 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 services (water, sewer) that would clearly be appropriate "winding down" expenses. Veal's authority defense and argument employs the same considerations and are properly before this Court.

In addition, the sufficiency of Veal's responsive pleadings in the Trial Court must be evaluated in the context of the allegations that existed at the time. Remarkably, none of DPA's petitions make any reference whatsoever to the 2006 Assignment Agreement that is the cornerstone of both the Trial Court's decision and DPA's arguments in the Court of Appeals. *L.F. 10-12 (2005 petition in cause 22054-02475); L.F. 13-17 (2007*

amended petition in cause 22054-02475); L.F. 335-343 (2007 petition in cause 0722-CC01701). The sum and substance of DPA's petitions in both of the underlying cases was that it was incorporated in 2003 and simply assumed the role of the "association" at that time. *Id.*

Given those allegations, appellant's counsel at the time properly pled affirmative defenses based on lack of authority – the "new" association had no authority to collect any assessments of any type without an assignment, and no assignment was alleged. *See Valley View Village South Improvement Association, Inc. v. Brock,* 272 S.W.3d 927, 930-931 (Mo. App. 2009) ("We cannot create an assignment where none was made, nor can we create a legal obligation where none was agreed to by Appellant"). Based upon the allegations contained in the two underlying petitions, Veal's former counsel correctly pled affirmative defenses of lack of authority. In preparing affirmative defenses, Veal should only be required to address and respond to claims actually asserted in the respective petitions.

As noted above, once Veal asserted the claims and defenses that DPA lacked authority to collect the assessments and to file liens, DPA was required to address and rebut those claims as part of the summary judgment proceeding. *ITT Commercial, supra, 854 S.W.2d at 381*. The Trial Court's decision below turns on the authority issue. The authority issue, was pled, briefed, argued and is properly before this Court, including the question of the dissolved corporation's inability under the law to use the single-purpose assessment funds.

III. ALTERNATIVELY, THE TRIAL COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DPA BECAUSE DPA LACKED AUTHORITY TO IMPOSE LIENS AND COLLECT ASSESSMENTS FOR THE YEARS 1998 UNTIL 2006, BEFORE IT OBTAINED AN ASSIGNMENT OF THE DISSOLVED PREDECESSOR'S INTERESTS.

Even if this Court holds that the original, dissolved DPA possessed capacity to execute an effective assignment of its rights in 2006, the Trial Court's judgment should be reversed because all the actions taken by DPA from the date of its incorporation in 2003 through the date of the Assignment Agreement (June 9, 2006) were taken without benefit of an assignment agreement. DPA therefore lacked authority to take those actions. The Court of Appeals considered this conclusion self-evident with respect to DPA's pre-assignment activities, including its 2005 lien and lawsuit against Veal:

> As an initial observation, the record reveals that when the Association recorded its lien against Veal's property at 5621-5623 Delmar in 2005, the Association had not received assignment of any rights from the Original Association. Clearly, the Association did not have any legal right in 2005 to collect or enforce assessments against Veal's property; thus, its 2005 lien was improperly filed. [footnote omitted]. *Valley View Village S. Improvement Assoc., Inc. v. Brock,* 272 S.W.3d 927, 931 (Mo. App. S.D.2009) (where there was no valid assignment of rights, successor association of dissolved association had no right to enforce assessments through lien). The question then becomes what was the effect of the dissolved Original Association's subsequent Assignment as to the Association's litigation against Veal's properties.

*Court of Appeals Decision, * 6.*

Three individuals incorporated the new "DeBaliviere Place Association" in 2003. There is no indication in the record that property owners within the designated Development Area approved, authorized or provided any form of consent to be governed by the new entity. Any random individual or group could have incorporated as "DeBaliviere Place Association" in 2003. The mere fact that three people incorporated a new entity using the name "DeBaliviere Place Association" did not automatically spawn a right to invoice and collect assessments under the Declaration. During the three-year gap between respondent's incorporation and the Assignment Agreement, DPA improperly usurped the title and privileges of "homeowners association" without benefit of a conveyance or owner approval. The Trial Court's judgment erroneously validated this abuse.

Even though DPA had not yet received any type of assignment from the dissolved association, DPA incorporated and began invoicing and collecting assessments from property owners in 2003. That year, it began sending invoices to Veal for Annual General Assessments dating back to 1998. *L.F. 107.* When Veal did not pay those invoices, DPA filed a Notice of Lien in 2005. *L.F. 130.* All those acts occurred before it claims to have received any assignment or other transfer of any rights whatsoever from ODPA. The Trial Court's judgment notes that an assignment occurred (*L.F. 185-186*), but appears to assume (erroneously) that the assignment was contemporaneous with respondent's incorporation. The Trial Court neither mentions nor analyzes the effect of

the three-year gap period between DPA's incorporation and the date it actually obtained the assignment.

The period from 2003 through June 2006 is similar to the situation addressed in *Valley View Village South Improvement Association, Inc. v. Brock,* 272 S.W.3d 927 (Mo. App. 2009), in which a completely new corporation was formed, using a name similar to the name used by the dissolved association and using the same bylaws. *Valley View, supra, 272 S.W.3d at 930.* However, the new corporation had not received an assignment of rights from the dissolved entity. *Id.* Under that scenario, the new homeowners association-corporation was not a valid successor association. *Id. at 931*. 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.* The court further held that the new association-corporation lacked authority to make and collect assessments without a valid assignment. *Id. See also, Beavers v. Recreation Ass'n of Lake Shore Estates, 130 S.W.2d 702, 717 (Mo.App. 2004) (dissolved corporation lacked authority to act).*

Assuming, for the sake of argument, the instant assignment was enforceable, the following pre-assignment actions of DPA were nonetheless null and void for lack of authority: (i) the February 2005 "Notice of Lien" recorded against Veal's Property in the amount of $25, 505.72 (*L.F. 130, 296-297*); (ii) the 2005 assessment rate increase imposed by DPA (*L.F. 141*); and; (iii) assessment bills and invoices that demand payments to DPA for 1998 through 2005, reflected in the 2005 lien. As described in the *Valley View* decision, DPA lacked authority to make and collect assessments until and

until it received a valid assignment of rights. The Court of Appeals considered this result obvious: "Clearly, the Association did not have any legal right in 2005 to collect or enforce assessments against Veal's property; thus, its 2005 lien was improperly filed." *Court of Appeals Decision, * 6.*

If the Trial Court's judgment is not reversed on the grounds stated in Points I or II of this brief, the judgment nonetheless should be reversed and remanded with instructions to delete and eliminate all judgment damage amounts indicated in the 2005 Notice of Lien and all other amounts that allegedly accrued prior to June 9, 2006.

IV. THE TRIAL COURT ERRED IN SUMMARILY CONFIRMING THE THREE LIENS IMPOSED BY DPA AND ORDERING THAT SAID LIENS BE FORECLOSED BECAUSE THE RECORD DEMONSTRATES THAT DPA LACKED AUTHORITY TO ASSESS OR COLLECT THE AMOUNTS STATED IN THE 2005 LIEN, THE TWO 2007 LIENS WERE FILED PREMATURELY UNDER THE EXPRESS TERMS OF THE DECLARATION, AND THE TRIAL COURT HAD ALREADY FOUND THAT THE INTEREST AMOUNTS STATED IN ALL THREE LIENS WERE INCORRECT.

A. 2005 Notice of Lien

As the Court of Appeals noted, the Trial Court erred in confirming the pre-assignment 2005 lien and ordering it foreclosed because DPA had no authority to file the lien even if the assignment was valid and effective. As described more fully in Point III of this brief, three individuals created the respondent-corporation in 2003 and unilaterally assumed the role and powers of the "association" without benefit of a timely assignment or any approval from the subject property owners. DPA simply filed incorporation forms with the State of Missouri, sent assessment invoices and recorded the 2005 lien before it bothered to obtain an assignment from the original DeBaliviere Place Association. DPA

did not obtain the purported assignment of rights until 2006. *L.F. 92.* Thus, even if the assignment was effective at the time the 2005 Notice of Lien was filed, DPA did not possess any authority whatsoever to file the subject lien.

Pioneer and *Valley View* support Veal's assertion that the 2005 Notice of Lien filed by DPA was ineffective because it had no authority to file it. *Pioneer, Valley View* and the Trial Court's judgment here are all based on the premise that an effective assignment is required before a successor homeowner's association entity may legitimately collect assessments. *See also, Beavers, supra, 130 S.W.2d at 717 (dissolved corporation lacked authority to act).* Although the *Pioneer* assignment occurred during the pendency of the litigation, the assignee therein merely continued collection efforts that had already been initiated by its predecessor. *Pioneer, supra, 179 S.W.3d at 399*. The *Pioneer* assignee did not undertake collection efforts and record liens before it obtained an assignment of the right to do so, nor did it seek to retroactively collect years of unbilled assessments. *Id.*

A valid lien is also a prerequisite to any lawsuit to collect the lien amounts. The Declaration provides that the association may not file suit to collect unpaid assessments until 90 days after the date a lien is filed with the recorder of deeds. *L.F. 60 (Declaration, Art. V, §5).* Conversely, if a lien is invalid, no suit may be filed. For the reasons described herein, DPA's lien was void (i.e., invalid) and the ensuing lawsuit below was barred by the terms of the Declaration.

For those reasons, the Trial Court erred in confirming the 2005 Notice of Lien and ordering it foreclosed. Its decision on that point should be reversed.

B. 2007 Liens

On May 1, 2007, DPA recorded two documents titled "Notice of Lien" against separate portions of the Property, claiming unpaid assessments, interest and fees through December 2007. *L.F. 465-468.* It then filed its second lawsuit (Cause No. 0722-CC01701) on May 22, 2007, seeking to collect the amounts described in the same two 2007 liens. *L.F. 330, 335*. The record therefore demonstrates that DPA filed its lawsuit to collect the amounts reflected in the 2007 liens just twenty-one days after the two liens were recorded. This violated the Declaration's requirement that such lawsuits may not be filed until at least 90 days after a lien is filed with the recorder of deeds. *L.F. 60 (Declaration, Art. V, §5).* Restrictive covenants are typically construed in favor of the property owner. *See e.g., Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc.*, 239 S.W.3d 631, 635 (Mo. App. 2007)*; Lake Saint Louis Community Ass'n v. Ravenwood Properties, Ltd.,* 746 S.W.2d 642, 644 (Mo. App. 1988).

Thus, even if this Court finds that DPA obtained a valid assignment in 2006, it failed to comply with the Declaration's 90 day mandate with respect to the two lien notices it filed in 2007. Because DPA failed to comply with the Declaration's requirements for filing suits to enforce the 2007 liens, 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.

C. Interest Amounts on all Liens

With respect to unpaid assessments, the Declaration provides that interest does not begin accruing until 30 days after a lien is recorded with the recorder of deeds. *L.F. 60*

(Declaration, Art. V, §5). The Trial Court sustained the portion of Veal's post-judgment motions contesting the interest amount awarded in the court's original Memorandum, Order and Judgment. App., p. A-22; *L.F. 293.* The basis of that decision was that all three liens filed by DPA improperly included interest amounts that it attempted to assess prior to recording the liens. App., pp. A-22-A-23; *L.F. 293-294.*

However, even though it specifically found that no interest should have been included in any of the three liens, the Trial Court then "confirmed" those same liens containing the improper interest amounts, attached copies of the liens to its judgment, and ordered that they be foreclosed. App., pp. A-22-A-23; *L.F. 294-295.* That portion of the Trial Court's judgment clearly violates both the terms of the Declaration and its own findings. The portion of the judgment confirming all thee liens and ordering them foreclosed should therefore be reversed.

V. IN THE EVENT THE TRIAL COURT'S JUDGMENT IS REVERSED ON ANY GROUNDS BY THIS COURT, THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO DPA SHOULD ALSO BE REVERSED AS ERROR BECAUSE DPA WOULD NOT BE ENTITLED TO RECOVER SUCH FEES UNDER THE TERMS OF THE DECLARATION.

The Trial Court awarded DPA attorney's fees in the amount of $13,000.00, pursuant to the terms of the Declaration. App., p. A-24; *L.F. 189-190.* Should its judgment be reversed on any ground, the attorney's fee award should also be reversed because such awards are "appropriate" under the terms of the Declaration only if a property owner's assessments are adjudged delinquent, a suit is commenced at least 90 days or more after a lien is filed, and such a suit is necessary or appropriate for the collection of delinquent assessments. *L.F. 60 (Declaration, Art V, §5).* If the judgment

below is reversed for any reason, the attorney's fee award should also be reversed and vacated.

CONCLUSION

For all of the foregoing reasons, the Trial Court's Memorandum, Order and Amended Judgment dated June 4, 2009 should be reversed and this case should be remanded generally to the Trial Court for further proceedings consistent with this Court's opinion and mandate.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Appellant's Substitute Brief was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 10,069 words. The accompanying disk, containing a complete copy of Appellant's Substitute 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 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 November 30, 2010, to:

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