



# In the Missouri Court of Appeals Eastern District

## DIVISION FOUR

DEBALIVIERE PLACE ASSOCIATION, ) No. ED93306  
)  
Respondent, ) Appeal from the Circuit Court  
) of St. Louis City  
v. ) Case Number: 22054-02475  
)  
STEVEN VEAL, ) Honorable Robert H. Dierker, Jr.  
)  
Appellant. ) Filed: June 22, 2010

### Introduction

Steven Veal (Veal) appeals from the trial court's order granting summary judgment in favor of DeBaliviere Place Association (the Association) in its action to collect subdivision assessments and to foreclose assessment liens, and dismissing Veal's counterclaims for slander of title and declaratory judgment.

We reverse and remand for further proceedings in accordance with this opinion.<sup>1</sup>

### Background

The record viewed in a light most favorable to Veal is as follows. The original DeBaliviere Place Association (the Original Association) was incorporated in 1977, pursuant to the Declaration of Covenants and Restrictions for DeBaliviere Place

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<sup>1</sup> We note that Respondent has filed a motion to dismiss Appellant's appeal or to strike his brief, citing his failure to comply with Rule 84.04. We find this motion unpersuasive in light of Respondent's own violation of this court's rules and failure to comply with appellate-filing deadlines, and we deny the motion.

(Declaration). The Declaration declared the purpose of the Original Association was to maintain and administer the common areas, to enforce the covenants and restrictions of the Declaration, and to collect and disburse assessments created to promote the recreation, health, safety and welfare of the residents of DeBaliviere Place. The duties of the Original Association included improving and maintaining the subject property's common, limited common, and public areas; and providing services such as security, social services, and social events to the residents.

The Declaration further stated that “each Owner (whether or not it shall be so expressed in the Deed to such Owner’s property) is deemed to covenant and agree, to pay to the Association . . . Annual General Assessments . . . [which] shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made.” The Declaration set the annual general assessments at \$48 per living unit in a multi-family structure, commencing on the day the property became subject to the Declaration. Finally, the Declaration established that the assessment “shall become a lien upon the property . . . , whenever, being unpaid thirty (30) days after the date it is due, it shall be so declared by the Board of Directors [of the Association] by instrument in writing, executed, acknowledged and recorded in the office of the Recorder of Deeds”; and that “[w]henver any assessment is delinquent for a period of ninety (90) days after the filing and recording thereof as aforementioned, the Board of Directors [of the Association] may take any legal steps necessary or appropriate for the collection thereof.” A 1986 supplement to the Declaration expanded the land subject to the Declaration to include 5540-5548 Delmar Boulevard, 5560-5564 Delmar Boulevard, and 5621-5623 Delmar Boulevard, in St. Louis, Missouri, three buildings containing 136 rental units.

The Original Association dissolved in 1992. In 1997, Veal purchased 5540-5548 Delmar Boulevard, 5560-5564 Delmar Boulevard, and 5621-5623 Delmar Boulevard. The deeds for these purchases specifically noted that the conveyances were made subject to the “lien of all taxes and assessments for the year of 1997, and all subsequent years.”

In 2003, the current Association formed, using the same name as the Original Association, and sought to enforce the Declaration. That same year, the Association billed Veal for annual general assessments for the period of 1998 through 2003 for each of his 136 units. Veal refused to pay, asserting that he had received no services from the Association during that time period.

In February 2005, the Association recorded a lien against 5621-5623<sup>2</sup> Delmar for delinquent annual assessments of \$48 per unit from 1998-2004, noting assessments for 68 units. The lien claimed a total of \$25,505.72, including charges for lien fees, interest, late fees, and attorneys’ fees, was due as of January 1, 2005. In December 2005, the Association filed a Petition, Cause Number 22054-02475, for a judgment of the amount owing under the lien and for quantum meruit for the value of services rendered. Veal was never served with this Petition.

Subsequently, in June 2006, the Original Association purported to assign to the current Association all of the rights, titles, interests, powers, duties, and obligations as set forth in the Declaration and amending documents. This assignment (Assignment) noted that the Original Association dissolved in 1992, and stated the assignment occurred as part of the winding-up of the Original Association’s affairs.

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<sup>2</sup> The lien listed the property address as 5621 Delmar, but included the proper legal description for 5621-5623 Delmar.

In March 2007, the Association amended its claim to assert that 5621-5623 Delmar was comprised of 92 units, and to request judgment and quantum meruit for unpaid assessments on all 92 units between 1998 and 2007; and to request foreclosure of the lien against 5621-5623 Delmar pursuant to Section 443.005 RSMo et seq.<sup>3</sup> and the Declaration. In this Amended Petition, the Association alleged, among other things, that “the Association is lawfully authorized under the Declaration to levy assessments, and to bring actions to enforce collection of these charges including interest and to collect reasonable attorney’s fees and costs incurred in the enforcement thereof from [Veal] for unpaid assessments.” In its quantum-meruit count, the Association alleged that it had “provided and continues to provide general maintenance to the common elements, insurance, utilities and other services, by which [Veal has] benefited and continues to benefit.” It further alleged that the Association had “a duty under the Declaration to provide the aforesaid services and is unable to terminate said services to particular Owners such as [Veal].” The Association also alleged that Veal had knowingly accepted and continued to accept said services, and that “under the Declaration, [Veal] cannot refuse said services.” In its lien-foreclosure count, the Association alleged that it recorded a notice of lien against Veal’s described property on February 16, 2005, and that the Association was authorized to foreclose its lien as provided in Section 443 and “as provided in Article V of the Declaration.”

Upon being served with the Amended Petition, Veal moved for a more definite statement. In his answer to the Amended Petition, Veal denied, among other things, that: (1) the Association was the community association of DeBaliviere Place organized pursuant to the Declaration; (2) the Association was lawfully authorized under the

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<sup>3</sup> All statutory references are to RSMo 2004, unless otherwise indicated.

Declaration to levy assessments and to bring collection enforcement actions; (3) the Association had provided and continued to provide services to Veal's properties; and (4) the Association was authorized to foreclose its lien. Veal also pleaded as an affirmative defense that he was not liable for assessments during the period of time in which there was no valid association. He asserted that the Original Association had forfeited its charter in 1992 and had never had its charter reinstated; and that the current Association was a new entity separate from the Original Association formed in 2003, and thus was not authorized to levy assessments against him for the years of 1998-2002. Further, Veal had not agreed to join the newly formed Association.

Veal also filed a counterclaim for slander of title and declaratory judgment, raising the same arguments in his allegations common to all counts as he had in his affirmative defense. In his slander-of-title counterclaim, Veal alleged that the Association, knowing that it lacked the authority to do so, filed a lien for assessments against his property on February 16, 2005, including assessment amounts for the years 1998 through 2002. In his counterclaim for declaratory judgment, Veal asked the court to order the Association to file a release of its 2005 lien and to cease enforcement activities; and for other and further relief as the court deemed just and proper.

On May 1, 2007, the Association recorded liens against 5540-5548 Delmar (in the amount of \$11,280, plus \$5,195 in interest, attorney's fees and recording fees) and 5560-5564 Delmar (in the amount of \$9,400, plus \$4,481.04) for delinquent assessments through December 2007. On May 22, 2007, the Association filed a Petition, Cause Number 0722-CC01701 (2007 Petition), requesting foreclosure of the liens against 5540-5548 Delmar and 5560-5564 Delmar; judgment for the amounts of the liens for unpaid

association assessments; and quantum meruit for the reasonable value of services rendered by the Association benefiting Veal's properties.

In his answer to this 2007 Petition, Veal again denied, among other things, that: (1) the Association was the community association of DeBaliviere Place organized pursuant to the Declaration; (2) the Association was lawfully authorized under the Declaration to levy assessments and to bring collection enforcement actions; (3) the Association had provided and continued to provide services to Veal's properties; and (4) the Association was authorized to foreclose its lien. Veal also denied that the parcel was located within the Community and subject to the Declaration. Veal averred that the 2007 Petition failed to state a claim upon which relief could be granted, and raised the same affirmative defense pleaded in Cause Number 054-02475: namely, that he was not liable for assessments levied during the time in which there was no association in good standing.<sup>4</sup> In December 2008, Cause Numbers 054-02475 and 0722-CC01701 were consolidated.

The Association moved for summary judgment on both cases, arguing that it was organized pursuant to the Declaration and that it administered the community. The Association further contended that it was authorized to impose assessments and special assessments, to charge late fees and interest, to recover attorney's fees and costs, and to foreclose liens, under Article V of the Declaration. The Association argued that the duty to pay assessments was "an affirmative covenant that ran with the land, imposing a duty on a party to perform an affirmative act."

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<sup>4</sup> We note that the docket sheet for the 2007 Petition indicates that Veal filed a counterclaim on August 22, 2007; however, this counterclaim is not included in the legal file.

In its Statements of Uncontroverted Material Facts, Association alleged the following. Veal's properties were located within the boundaries of the Association, and thus he was automatically a member of the Association and subject to the Declaration, including the annual assessments. After the Original Association was administratively dissolved, the Association was established. The Original Association had assigned all its rights to the current Association. The Declaration obligated the Association to be "responsible for the exclusive management and control of the Common Areas, the Limited Common Areas and all improvements thereon (together with the fixtures, equipment and other personal property of the Association related thereto), and shall keep the same in good, clean, attractive and sanitary condition, order and repair." The Association used the assessments to provide services, including insurance, legal services, marketing, management, repairs, maintenance, landscaping and security. Veal had not paid assessments for 5621-5623 Delmar (totaling \$83,615.82, including assessments, late fees, interest, and attorney's fees), 5540-5548 Delmar, and 5560-5564 Delmar (totaling \$47,275.38, including assessments, late fees, interest, and attorney's fees) since his ownership began in 1997, and the Association had filed liens against all three properties. Veal had raised as an affirmative defense that he was not liable for assessments during the period following the Original Association's forfeiture, and had stated in a deposition that the only reason he had not paid was because services had not been provided.<sup>5</sup>

In his response, Veal denied that he owed the amount alleged by the Association and stated that he objected to the payment of assessments due to the Association's failure to provide adequate services under the Declaration's bylaws. Veal denied that the

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<sup>5</sup> Specifically, Veal testified that he had received no landscaping or security; rather, when he first purchased the buildings in 1997, he had to provide his own security.

money, collected as assessments, was being allocated as represented in the Association's budget and claimed that the money was not spent on the properties that were the subject of the suits. As to the legal grounds for summary judgment asserted by the Association, Veal argued that the Association did not have the right to make assessments on his property, foreclose liens, or charge late fees, due to its failure to provide services and the Original Association's dissolved corporate standing. He also denied that he had an affirmative covenant due to the Association's failure to provide services and to maintain its corporate standing.

The trial court granted summary judgment to the Association, concluding that the assignment from the Original Association to the Association was valid and authorized the Association to enforce the Declaration. Although the trial court acknowledged that the Original Association had no right to carry on its ordinary business after it was dissolved, the court opined that assigning the Original Association's rights under the Declaration to a successor entity was entirely consistent with Section 355.691.1(5) & (8). The trial court further concluded, as a matter of law, that the assignment to the Association was sufficient to allow it to collect any amount up to the sum fixed in the declaration as an annual general assessment against Veal's property, because the Declaration, being a valid covenant running with the land, so provided.

The trial court disregarded Veal's contentions regarding the allocation of the monies collected as assessments and the lack of services provided to Veal's properties, stating that Veal's contentions were an attempt to raise new defenses and characterizing the issues as unpleaded affirmative defenses. The court further found Veal's counterclaim for declaratory judgment was merely a restatement of his affirmative

defense that the Association lacked authority to enforce the assessments and liens, and held that Veal's slander-of-title claim fell within the resolution of the Association's claim on the merits.

Accordingly, the court ordered judgment against Veal for the amount of \$70,856.00 for back assessments, plus attorney's fees in the amount of \$13,000.00, and interest in the amount of \$35,004.26, and ordered the three liens foreclosed and the properties published for sale. Last, the court dismissed without prejudice the Association's quantum-meruit claim as moot, and dismissed with prejudice Veal's counterclaims for declaratory judgment and slander of title.

Upon Veal's motion to modify or amend the judgment, the court amended the amount of interest awarded in the original judgment, agreeing that it had misconstrued the interest-accrual provision of the Declaration, which provided for interest only after 30 days had passed following the recording of the lien. The court declined to amend its judgment in all other respects. Veal also sought, through counsel and pro se, to file an amended answer, amended counterclaim, and amended response to the Association's motion for summary judgment—all challenging the Association's allocation of assessment and failure to provide services. The court, however, denied the motions to amend, concluding that the "effort to revise the record comes too late" and noting that the late-presented material was available to Veal all through the case and could have been presented in the original response. Veal timely appealed.

Veal asserts four points on appeal: (1) the trial court erred in granting summary judgment because it failed to consider that, according to the Declaration, the exclusive purpose of the annual general assessments was to add new properties to the Association,

which was an impermissible winding-down activity; (2) the trial court erred in granting summary judgment because the Association lacked authority to impose liens and collect assessments from 1998 to 2006, because this period pre-dated the Original Association's assignment of rights to the Association; (3) the trial court erred in summarily confirming the three liens and ordering them foreclosed, in that the Association did not have authority to levy or collect the assessments underlying the 2005 lien, the Association filed the 2007 liens prematurely under the terms of the Declaration, and the interest stated in all three liens was incorrect; and (4) the trial court erred in awarding attorney's fees to the Association because such an award was not appropriate under the Declaration's terms.

#### Standard of Review

Summary judgment is appropriate where the moving party demonstrates a right to judgment as a matter of law based on facts about which there is no genuine issue of material fact. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Our review is essentially de novo. Cardinal Partners, L.L.C. v. Desco Inv. Co., 301 S.W.3d 104, 108-09 (Mo. App. E.D. 2010). When considering an appeal from summary judgment, we view the record in the light most favorable to the party against whom judgment was entered, and we afford the non-movant the benefit of all reasonable inferences from the record. Id.

The movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted; thus, any evidence that presents a genuine dispute as to the material facts defeats the movant's prima facie showing. ITT Commercial Fin. Corp. 854 S.W.2d at 381-82. A genuine issue exists where the record contains competent

materials that evidence two plausible, but contradictory, accounts of the essential facts.

Id.

### Discussion

The Association's Amended Petition included claims for judgment for unpaid subdivision assessments, to foreclose its liens, and for quantum meruit. We find the Association failed to make the required prima facie showing that no genuine issues of material fact existed and that it was entitled to summary judgment as a matter of law, regarding any of these claims, and we reverse. Id. at 376.

We first consider the Association's claims for judgment for unpaid subdivision assessments. The Declaration, recording a list of covenants and restrictions, provided for the levy of assessments, with each assessment constituting a lien against the properties subject to the Declaration. The trial court determined that the Association was entitled to enforce the subdivision assessments and to foreclose on its liens as a matter of law, because the assignment from the Original Association authorized the current Association to enforce the Declaration.<sup>6</sup>

The salient issues presented as to this count include whether the trial court erred in finding, as a matter of law, that the Association was the holder of all the rights, privileges and responsibilities declared in the Declaration, and that the covenants, which

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<sup>6</sup>The Association contends Veal has waived any challenge to the assignment by admitting the existence of the assignment; however, a brief glance at the actual language of Veal's admission shows that while he admitted the Original Association assigned its rights to the current Association, he did not admit that the assignment was legally valid. Moreover, the record lacks sufficient facts to allow a fact-finder to determine whether the terms of the Association's By-Laws were followed in making the assignment. The record does not show even that the By-Laws provided for winding-up procedures or assignment in the event of dissolution; much less whether such procedures were followed. Certainly, several pending questions would prevent the grant of summary judgment as to this issue. Furthermore, although the statutes providing for dissolution of corporations do not provide a fixed period for winding-up, Missouri public policy favors prompt liquidation and distribution of corporate assets; thus, such activities should be performed within a reasonable time. See First Stop Book Shop, Inc. v. Matthews Book Co., Inc., 634 F.2d 396, 397 (8th Cir. 1981); Lynch v. Vincent, 55 F. Supp. 44, 48 (W.D. Mo. 1944).

originally provided that unpaid assessments should be a lien on the land, entitled the Association to take the legal steps necessary or appropriate for the collection of those assessments from Veal and to record liens on his properties as the Association did here.<sup>7</sup>

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.<sup>8</sup> 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.

Under Missouri law, a dissolved corporation continues its existence, but is limited to activities directed towards winding up and liquidating its business; a dissolved corporation may not carry on any new business.<sup>9</sup> Section 355.691; Mesler v. Dir. of Rev., 983 S.W.2d 605, 608 (Mo. App. E.D. 1999). Assigning contractual rights under the Declaration would be an activity consistent with the winding up and liquidating of a

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<sup>7</sup> We note that, in addition to implied authority or the authority granted to condominium homeowner associations under restrictive covenants, Section 448.3-116 also provides statutory authority to valid associations for collecting assessments and levying liens.

<sup>8</sup> The Declaration recited that the original developer had caused the Original Association to be incorporated for the purpose of enforcing its covenants and restrictions, and defined "Association" as DeBaliviere Place Association, "its successors and assigns." Notably, the Association had not acquired a legal interest in DeBaliviere Place in 2005 by assignment, or in accordance with any procedure required by the Declaration or the Original Association's governing by-laws. Our determination that the Association had no legal right to collect or enforce assessments necessarily leads to the conclusion that the trial court erred in determining Veal's slander-of-title claim fell within resolution of the Association's claim on the merits.

<sup>9</sup> Corporations have the duty to maintain their corporate status. See Beavers v. Recreation Ass'n of Lake Shore Estates, Inc., 130 S.W.3d 702, 717 (Mo. App. S.D. 2004).

corporation's affairs. See Shannon v. Mastin, 114 S.W. 1127, 1128 (Mo. App. 1908) (likening dissolved corporation which is being administered in court to deceased individual whose estate is being so administered).

However, when the Original Association was administratively dissolved in 1992, forfeiting its corporate charter, the pertinent statute for applying to the Secretary of State for rescission provided that “[n]o rescission shall be made after ten years following forfeiture[.]” Section 355.507.4 RSMo 1986.<sup>10</sup> Under this section, after its charter was forfeited, a corporation “ipso facto ceased to exist as of the date of forfeiture, but it remained subject to the possibility of a rescission of the forfeiture within the ten-year time period.” Beavers v. Recreation Ass’n of Lake Shore Estates, Inc., 130 S.W.3d 702, 709 (Mo. App. S.D. 2004).

Here, with its administrative dissolution effective as of 1992, the Original Association could have successfully applied for rescission only before the ten-year time period expired in 2002. Id. at 710-11. Accordingly, after 2002, there was no statute under which the Original Association could lawfully exist. See Section 355.871, RSMo 2000 (providing that repeal of former chapter 355 and enactment of new chapter was not to be applied retroactively to operation of statute or any action taken under it before its repeal). From that time forward, the Original Association was neither a corporation de jure or de facto “because the circumstances were such that it could not exist pursuant to any statute.” Id. at 712. Having failed to apply for a timely rescission of the forfeiture, the Original Association ceased to exist. See id. at 717.

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<sup>10</sup> The current version of the statute, Section 355.716, enacted in 1995, places no limit on the winding-up period. Consequently, the applicability of our analysis in this case is very narrow and limited as the current statute no longer contains the 10-year limitation on rescission.

Accordingly, when the Original Association purported to assign its rights and responsibilities to the current Association on June 9, 2006, the Original Association, being a corporation with no existence, de jure or de facto, had no ability to act in any corporate capacity. Moreover, any rights or obligations Veal and the Original Association had under the Declaration ceased to exist. Id. at 716-17 (because original association did not legally exist, there was no longer an association in which homeowners could be members and any obligation homeowners may have had with the association ceased to exist). Consequently, the Original Association was unable to assign its former interest in the Declaration to the current Association.

In its brief, the Association vigorously argues that Pioneer Point Homeowners Ass'n, Inc. v. Booth, 179 S.W.3d 397 (Mo. App. S.D. 2005), is controlling on the issue of its authority to collect assessments on Veal's properties, contending that the Pioneer Point court found that a successor homeowners' association "had authority to retroactively collect unpaid assessments that were delinquent several years prior to receiving its assignment of rights and prior to its corporate existence." We disagree with the Association's analysis. In Pioneer Point, the Southern District expressly stated: "Therefore, the only question before us is 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. at 401. The court made it clear that it was not deciding the cause on the basis of the assignment's validity when it additionally stated: "*Because there has been no challenge to the validity of the assignment between Homeowners Association I and II, and because we have found nothing to suggest that such assignments are disfavored in the law, we cannot say that the*

trial court erroneously applied the law in holding that Homeowners Association II was the appropriate entity to enforce the Statement of Reservations, and has the authority to make assessments and/or file liens.” Id. at 403 (emphasis added). Consequently, Pioneer Point does not affect or aid our determination.

Having determined that 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 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.<sup>11</sup> This holding necessarily also disposes of the Association’s claims seeking foreclosure of the liens against Veal’s properties<sup>12</sup>; however, as the Association’s quantum-meruit claim is not based on its authority to collect assessments, but rather, on its right to recover the reasonable value of services it claims it provided Veal, we must still consider whether the Association established a right to judgment as a matter of law as to its quantum-meruit claim. See ITT Commerical Fin., 854 S.W.2d at 387-88 (appellate court can affirm grant of summary judgment, even on basis not considered by trial court).

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<sup>11</sup> Although our disposition renders Veal’s first point on appeal moot, we note that the Association’s response, in which it urges this Court to reform the Declaration to give effect to the obvious intent of the parties as to the exclusive purpose of the annual general assessments, indicates a reason summary judgment as to the Association’s ability to enforce the Declaration’s covenants would be inappropriate. Even if we had determined that the Assignment was valid, the issue before the trial court primarily concerned interpreting the parties’ respective rights and obligations under the covenants, which required it to determine the parties’ intent as expressed in the plain language of the covenant. Saladin v. Jennings, 111 S.W.3d 435, 441 (Mo. App. E.D. 2003). 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. Ethridge v. Tierone Bank, 226 S.W.3d 127, 132 (Mo. banc 2007).

<sup>12</sup> We note, however, that the record shows the Association would not be authorized under the terms of the Declaration to foreclose on the liens, as the Association did not comply with the Declaration’s provisions for such foreclosure actions; among other things, the Association filed its action before expiration of the 90 days required by the terms of the Declaration. Accordingly, had we determined the Assignment to be valid, we would still find against the Association as to its foreclosure count, because in accepting the Assignment, the Association agreed “to assume, perform, and comply with and be bound by the Declaration ....” A covenant is “simply an agreement between the grantor and grantee which requires the performance or the nonperformance of some specified duty with regard to real property, including an agreement to do or not to do a particular act.” Whispering Valley Lakes Improvement Ass’n v. Franklin County Mercantile Bank, 879 S.W.2d 572, 574 (Mo. App. E.D. 1994).

To be entitled to summary judgment under Rule 74.04, the Association had to establish that (1) there was no genuine dispute as to the material facts on which it relied for summary judgment, and that (2) based on these undisputed facts, the Association was entitled to judgment as a matter of law. Id. at 380. All facts must come into the summary-judgment record in the manner required by Rule 74.04(c) (1) and (2): namely, in the form of a pleading containing separately numbered paragraphs and a response addressed to each of the numbered paragraphs. Cross v. Drury Inns, Inc., 32 S.W.3d 632, 636 (Mo. App. E.D. 2000).

Our review leads us to conclude that the Association did not meet this burden. An essential element of quantum meruit is that the plaintiff provided services to the defendant. Midwest Crane & Rigging, Inc. v. Custom Relocations, Inc., 250 S.W.3d 757, 760 (Mo. App. W.D. 2008) (essential elements of quantum meruit include that plaintiff provided services to defendant, that defendant accepted or acquiesced to those services, that services had reasonable value, and that defendant refused to pay reasonable value of services rendered); Turpin v. Anderson, 957 S.W.2d 421, 427 (Mo. App. W.D. 1997) (plaintiff bears burden of proof in quantum-meruit claim). Although the Association asserted that it provided services to Veal, this is clearly not an undisputed fact, as the Association's own Statement of Facts reveals: "In his deposition, Defendant Veal states that the only reason he hasn't paid is because of lack of services provided." Specifically, Veal asserts in his deposition—which the Association itself injected into the matter by submitting it in support of its motion for summary judgment—that he received no landscaping or security, and in fact he was forced to hire his own security when he first

purchased the building in 1997.<sup>13</sup> Under our standard of review, we construe all inferences in favor of the non-movant. Scott v. Ranch Roy-L, Inc., 182 S.W.3d 627, 636 (Mo. App. E.D. 2005).

Genuine issues must be determined by the trier of fact. Monsanto Co. v. Garst Seed Co., 241 S.W.3d 401, 416 (Mo. App. E.D. 2007). The Association's own evidence presented a genuine dispute of material facts and defeated its prima facie showing for its quantum-meruit claim. ITT Commercial Fin. Corp., 854 S.W.2d at 381-82.

Accordingly, the trial court's grant of summary judgment to the Association cannot be affirmed on the basis of quantum meruit, and its judgment must be reversed and the cause remanded for further proceedings on this claim and Veal's counterclaims.

Because the issue may arise upon remand and affect the parties' ability to litigate the matter fully, we will also address (1) the trial court's determination that Veal's responses to the Association's summary-judgment motions attempted to raise new defenses, and (2) its characterization of Veal's contentions concerning the provision of services and allocation of assessments as unpleaded, and thus uncognizable, affirmative defenses. First, Veal's denial that he received services from the Association was not raised for the first time in response to the Association's summary-judgment motion. Rather, Veal, in his response to the Association's Amended Motion, denied receiving services. Because the issue of services was raised in the initial pleadings, the matter was before the trial court, and the court erred in not determining it.

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<sup>13</sup> We note that, while germane to the quantum-meruit count, this allegation is not necessarily a defense to the payment of assessments. See e.g., Section 448.3-116; Restatement (Third) of Prop.: Servitudes, Vol. II, Section 6.5 cmt. e (2000) (assessment obligation is independent of association's duties to owners; owners are not entitled to withhold assessments to set off against association's default in fulfilling duties).

Second, “[a]n affirmative defense is a defense which avers that even if the petition is true, the plaintiff cannot prevail because there are *additional facts* which permit the defendant to avoid legal responsibility.” World Enterprises, Inc. v. Midcoast Aviation Servs. Inc., 713 S.W.2d 606, 608 (Mo. App. E.D. 1986) (emphasis in the original). Affirmative defenses are asserted by the pleading of additional facts that are not necessary to support a plaintiff’s case but that serve to avoid defendants’ legal responsibility even if the plaintiff’s allegations are supported by the evidence. ITT Commercial Finance, 854 S.W.2d at 383. Here, because an element of the Association’s case was that it provided services, Veal merely had to deny the Association’s facts; he was not required to plead additional facts to avoid legal responsibility. In his response to the Association’s Amended Motion, Veal denied that he received services; these denials served to undermine the Association’s case in chief, and not to avoid a legal responsibility. Thus, the court’s characterization of Veal’s denials as an affirmative defense was erroneous.

As a matter of law and undisputed fact, the Association had no authority to collect subdivision assessments or to file liens against Veal’s property to collect those assessments; therefore, the trial court erred in granting summary judgment on those claims. Accordingly, we enter judgment in favor of Veal on the Association’s claims for unpaid neighborhood assessments (Count I in Cause No. 22054-02475; and Counts I and III in Cause No. 0722-CC01701) and for foreclosure of liens for unpaid assessments (Count III in Cause No. 22054-02475 and Counts II and IV in Cause 0722-CC0701).  
Rule 84.14.

There remain disputed issues of material fact regarding the Association's quantum-meruit claim, and Veal's counterclaims. Consequently, the trial court's grant of summary judgment is reversed and we remand for proceedings on the remaining causes of action.

Conclusion

The judgment is reversed and remanded for further proceedings in accordance with this opinion.

Kurt S. Odenwald, P. J., concurs.  
George W. Draper III, J., concurs.

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Gary M. Gaertner, Jr., Judge