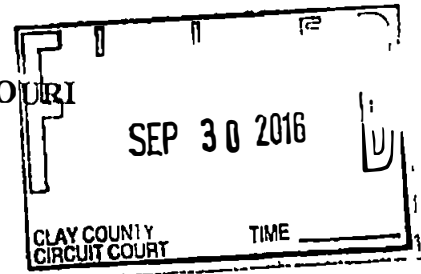


IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
ASSOCIATE CIRCUIT DIVISION



Gallatin Plaza Homes Association, Inc.,
Plaintiff,

v.

AB and HB,
Defendants.

Case No.: [REDACTED]
Division No.: 9

JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 2, 2016 the Plaintiff, Gallatin Plaza Homes Association, Inc , appeared by its President CW and by attorney BM. The Defendants, AB and HB appear solely by their attorney JT. The parties announced ready for trial, evidence was adduced and the Court took the matter under advisement Now having considered all the evidence and the written argument of counsel for the parties, the Court does find and order as follows

FINDINGS OF FACT

1 Plaintiff filed its petition against the Defendants jointly on September 16, 2015 therein alleging that Defendants breached Plaintiff's home owners association covenants by failing to pay dues or assessments and seeking to recover the balance thereof from the Defendants plus interest accrued and Plaintiff's attorney's fees incurred thereof

2 Defendants filed an answer to Plaintiff's petition on October 28, 2015 raising certain affirmative defenses and on September 2, 2016, with leave of Court, Defendant filed an amended answer adding an affirmative defense asserting the statute of limitations

3 Paragraph 5 of Plaintiff's petition alleges that the Defendants are the owners of three properties within the Gallatin Plaza, a subdivision in Liberty, Clay County which Plaintiff

identified as [REDACTED] St , Lot 25, [REDACTED] St , Lot 7, and [REDACTED] St , Lot 3 (hereinafter collectively referred to as 'the properties')

4 The Defendants original and amended answer did not admit or deny the allegations property ownership contained in paragraph 5 of Plaintiff's petition Prior to trial, Plaintiff made no objection, motion for default, partial default, or for partial summary judgment, or motion for more definite statement, to address this failure to respond to paragraph no 5

5 Gallatin Plaza is a subdivision of land within Clay County, Missouri (hereinafter the "Subdivision")

6 On September 1, 1983, Declarations of Covenants and Restrictions (hereinafter the "Covenants") were filed with the Clay County Recorder of deeds which set forth covenants and restrictions applicable to land owners within the Subdivision and which further acknowledged the creation of the Gallatin Plaza Homes Association, Inc (hereinafter "the HOA") as authorized to enforce the covenants and restrictions and empowered to modify the Covenants

7 The Covenants expressly state that the covenants and restrictions applicable to the Subdivision "shall run with the real property and be binding upon all parties having any right, title or interest in the described properties or any part thereof, their successors and assigns and shall inure to the benefit of each owner thereof "

8 Plaintiff is the HOA for the Subdivision and has the authority to enforce the HOA Covenants against property owners whose land is subject to said HOA Covenants which includes the power to charge annual assessments or fees to the land owners in the Subdivision

9 The Covenants received in evidence do not describe or identify properties within the Subdivision and a subdivision map was not received in evidence

10 There is no evidence Defendants signed the HOA covenants

11 No deeds were admitted into evidence showing that Defendants possessed title to (or where the owners of) the properties identified in Plaintiff's Petition, to wit [REDACTED] St., [REDACTED] and [REDACTED] St

12 No deeds were admitted into evidence showing the legal descriptions of the properties identified as [REDACTED] St, [REDACTED] and [REDACTED] St, thus there was no direct evidence that the properties constituted land within the Plaintiff's Subdivision and there was no evidence that the Covenants herein were referenced within the Properties' deeds

13 CW testified that he was the president of the HOA and that he believed that the Properties were within the Subdivision and Defendants were the owners

14 The HOA's annual assessments Plaintiff sought to collect in this case were monies accrued on December 31 each year for the years 2007 through 2015

15 HOA records in evidence included a 3 separate May 12, 2008 Ballots signed by Defendant AB wherein the documents each state "Comes now the owner of the property commonly known as" [REDACTED] St, [REDACTED] St, and [REDACTED] St There is also an unsigned page of minutes from a May 11, 2015 board meeting wherein AB's name is listed as one of the "Members Present"

16 From 2011 through 2015, the HOA president issued written and electronic correspondence to both the Defendants attempting to collect \$21, 81750 in accrued assessments purportedly for the properties

17 At trial, Defendants' attorney did not stipulate that Defendants owned title to the Properties nor did Defendants stipulate that the Covenants were valid or binding upon Defendants

18 Defendants' attorney objected at trial to Plaintiff's attempt to submit unauthenticated real estate deeds and HOA declarations of covenants into evidence, therefore, the Court finds that Defendants contested the Plaintiff's claim that Defendants held title to properties located in the Subdivision or owed assessments under the Covenants

19 No evidence was received that Defendants signed a writing expressly agreeing to the Covenants or agreeing pay dues or assessments under the Covenants

CONCLUSIONS OF LAW

20 A restrictive covenant is a private contractual obligation *Brentmoor Place Residents Ass'n v Warren*, 816 S W 2d 7, 11 (Mo App E D 1991) A home owners association's restrictions or covenants are similar to a contract to which each home owner becomes a party when acquiring [real] property in the subdivision *Kauffman v Roling*, 851 S W 2d 789, 792 (Mo App W D 1993) A party "acquires" real property by taking "title" to the same The burden is on the Plaintiff to prove a cause action to recover upon the breach of a home owner association's covenant ¹ Plaintiff therefore must prove (1) that its HOA restrictions or covenants were in force for the Subdivision, (2) that the Properties at issue were land "in the subdivision", and (3) that Defendants acquired "title" to the subject real property and thus agreed to, or became parties to, the covenants Plaintiff's Petition did not include a claim for any equitable remedy and Petitioner made no motion to amend its Petition after trial to include such a claim, therefore, the Court analyzes the evidence solely under Plaintiff's breach of covenant (or contract based) claim

¹ See e.g. *Toothaker v Pleasant*, 288 S W 38 (Mo 1926) When a plaintiff sought specific performance of a real covenant, the Court held that the burden is on Plaintiff to prove or establish that the covenant was imposed upon defendant's land for the benefit of the land owned by the plaintiff

Statute of Limitations

21 As a preliminary matter, the Court addresses the statute of limitations defense Actions brought upon “any writing for the payment of money ” and actions brought on “any covenant or warranty contained in a deed of conveyance of land” shall be brought within 10 years in accordance with Sec 516 110(1) and (2) RSMo See *McLaughlin v Neiger*, 286 S W 2d 380, 382-384 (Mo App E D 1956) (Held 10 year statute of limitation applied to claims to enforce a real covenant for an easement) The Petition herein is an action at law to recover monies due upon an alleged breach of a real covenant stated in written HOA declarations All monies sought accrued on or after December 31, 2017, thus Plaintiff’s petition is timely filed

HOA Declarations, Covenants and Restrictions

22 The HOA Declarations contained covenants and restrictions with regard to the assessment and collection of HOA dues were duly established by substantial competence evidence in the form of an authenticated copy of the Covenants duly recorded with the Clay County Recorder of Deeds

Title or Ownership of the Properties

23 There is insufficient credible evidence to prove that Defendants are or were the owners of the properties known as [REDACTED] St , [REDACTED] and [REDACTED] St As noted above, it is essential that Plaintiff prove that the defendants by taking title to the property agreed to the Covenant to pay dues or assessments, in the manner of a contract The only evidence of Defendants’ purported ownership interest in the properties was in C W’s oral testimony “It has long been the law of this state that evidence of title cannot be established by parol evidence ” *Kingsley v US* , 569 S W 2d 241, 242 (Mo App E D 1978), citing *Gee v Sherman*

293 S W 789 (1927) and *Clark v McAtee*, 127 S W 37 (1910) C W's testimony is insufficient to prove title

24 The Court finds that the HOA minutes, ballots and correspondence are insufficient to prove AB had title to the properties during the time periods alleged in the petition. See *Kingsley, supra*, at 242. While there is evidence that AB signed Ballots in 2008 stating that he "owned" the Properties at that time, such evidence and his service on the HOA board alone remain insufficient to overcome the lack of record of legal descriptions that the property wherein the subdivision and do not convince the Court that his name was the name on the title of the properties. Without a deed establishing title in AB's individual name, there is insufficient competent evidence to prove that he personally acquired title to property within in the Subdivision and thus became a party to the HOA restrictions or covenants in the manner of a contract. See *Kauffman v Roling, supra*, 85 1 S W 2d 789, at 792.

25 Defendants' failure to deny paragraph no. 5 of Plaintiff's petition does not constitute an admission of Defendants' ownership of the properties nor does it establish they were in the Gallatin Plaza subdivision. Rule 55.09 states in pertinent part that "[s]pecific averments in a pleading to which no responsive pleading is required shall be taken as denied." Rule 55.09 V A M R. The pleading procedure in this action is further governed under Section 517.031.2 which states in pertinent part that

Affirmative defenses, counterclaims, and cross claims shall be filed in writing not later than the return date and time of the summons unless leave to file the same at a later date is granted by the court. No other responsive pleading need be filed. If no responsive pleading is filed, the statements made in the petition, affirmative defenses, counter claims, or cross claims shall be considered denied.

The statutory language requires only that affirmative defenses, counter and cross claims be in writing. The language noting that “[i]f no responsive pleading is filed” does not on its face state that a “waiver” of the automatic denial occurs simply by filing an answer. Rather, the reasonable interpretation of this statute is whether an answer is filed or not, if a party fails to specifically plead an answer to all or part of a petition, the lack of answer is to be treated as a denial. Notwithstanding this interpretation, even if Defendants’ failure to deny paragraph no 5 were an admission under Rule 55.09, such an admission does not automatically take effect for the purposes of trial. Missouri courts have repeatedly held that “the failure to file an Answer is effective as an admission only if the plaintiff has objected to such failure” although the filing of an Answer is mandatory, this requirement is waived unless the opposing party requests enforcement of the mandate by timely and proper action. *Pulaski Bank v C W Holdings, LLC*, 226, 488 S W 3d 221 (Mo App E D 2016) (emphasis added), citing *Blaise v Ratliff*, 672 S W2d 683, 688 (Mo App E D 1984) (Where defendant failed to file answer and Plaintiff proceeded trial without moving for default, Plaintiff waived mandatory filing of answer and failure did not constitute an admission.) Plaintiff raised Defendants’ failure to answer paragraph no 5 for the first time during trial when it offered the answer as evidence or argument that ownership of title was admitted. Plaintiff took no pre-trial action such as moving for an interlocutory default, or a partial summary judgment, and the Court declines to treat the nonresponse to paragraph no 5 as an admission.

Location of the Properties in the Subdivision

26 There is insufficient credible evidence establishing that the Properties identified as [REDACTED] St, [REDACTED] and [REDACTED] St constituted land within the Gallatin Plaza Subdivision or within the HOA’s power to enforce Covenants. There were no deeds or recorded

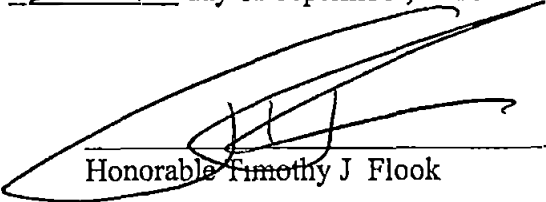
legal descriptions of the Properties or the Subdivision by either address or lot numbers in evidence, thus there is no direct evidence these properties were part of Subdivision or subject to the Covenants While there were HOA business records that AB was on the board at some point and voted in 2008, this evidence is not substantial or sufficient enough to support a finding that the Properties were actually in the Subdivision Similarly, the HOA president's opinion that the properties were part of the subdivision did not constitute competent or substantial evidence to support such a finding Plaintiff failed to meet the burden of proof

27 As the evidence is insufficient to establish Defendants' liability under the HOA Covenants, the question of the amount of assessments due and/or whether Plaintiff's are entitled to attorney's fees or interest thereof is moot

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED The Court finds in favor of the Defendants as to all Plaintiff's claim Judgment is entered in favor of defendants AB and HB and against Plaintiff Costs are assessed against Plaintiff

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated at Liberty, Missouri this 30th day of September, 2016



Honorable Timothy J Flook