

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**PATRICK HENRY ESTATES
HOMEOWNERS ASSOCIATION, INC.,
A West Virginia corporation,
Plaintiff,**

v.

**Civil Action No. 3:08-CV-175
(BAILEY)**

**DR. GERALD MILLER,
Defendant.**

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO
DEFENDANT'S COUNTERCLAIMS**

Comes now the Plaintiff, and moves for partial summary judgment as to the the Defendant's Counterclaim against the Plaintiff Association. Three claims are set forth in Dr. Gerald Miller's Counterclaim: 1) Interference with business relationship, 2) Breach of Contract and 3) a related claim for Breach of Fiduciary Duty. The first claim is that the Association interfered with Miller's ability to gain Planning Commission approval for an apartment complex to be located outside the Patrick Henry Estates subdivision ("the subdivision"), but using streets within the subdivision, and thereby interfered with a business opportunity and economic advantage. Secondly, Miller claims that the Association failed to pay him to maintain the streets and common areas. The third claim is to the effect that the Association's failure to pay Miller for the maintenance of the streets constitutes a breach of the Association's duty to use the money for said purpose.

The Association respectfully submits that all three claims appear to be susceptible to resolution by summary judgement. The Association is immune from suit under the first cause in that its protected activity in petitioning the Jefferson County Planning Commission falls under the *First Amendment*. The Second and Third Causes of Action derive from the Declaration, a

contractual document governing the parties. The breach of contract issue would appear to be purely one of law, as none of the material facts are in dispute. The Declaration requires that Miller dedicate and convey the common areas to the Association no later than January 1, 1987, and that he maintain the common areas until they are dedicated and deeded to the Association. It is undisputed that he neither maintained the common areas nor did he dedicate and convey them

to the Association. Dr. Miller claims that his failure to maintain said common areas was a function of the Association's refusal to pay him to do so. It is undisputed that the Association did not pay collected assessments to Dr. Miller and this the issue is one of law. If the Association did not breach the contract as set forth in the Declaration, then it did not breach a fiduciary duty in failing to pay the assessments to Dr. Miller as alleged in the Third Cause of Action.

Therefore, for these reasons and those more fully set forth in the Memorandum of Authority filed herewith, summary judgment should be granted against Dr. Miller on his Counterclaim against the Association.

PATRICK HENRY ESTATES HOMEOWNERS
ASSOCIATION, INC., Plaintiff
By Counsel

/s/ Braun A. Hamstead, Esquire
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CERTIFICATE OF SERVICE

I, Braun A. Hamstead, counsel for the Plaintiff, Patrick Henry Estates Homeowners Association, Inc., in this action, do hereby certify that I have served a true copy of the attached

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT and a

MEMORANDUM OF AUTHORITY in support of said motion upon the below listed counsel

of record to their respective addresses by United States Mail, first class, postage prepaid this 29th day of September, 2010, and by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following parties:

Nathan Cochran, Esquire
Law Offices of Richard G. Gay
33 Congress Street
Berkeley Springs, WV 25411

/s/ Braun A. Hamstead, Esquire

Braun A. Hamstead