

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

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

Plaintiff,

v.

Civil Action No. 3:08-CV-175

DR. GERALD MILLER,

Defendant.

**DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW, Defendant, Dr. Gerald Miller (hereinafter, "Dr. Miller"), by counsel, Richard G. Gay, Esquire, Nathan P. Cochran, Esquire and R. Greg Garretson, Esquire, and hereby moves the Court to render partial summary judgment in this case pursuant to Rule 56 of Federal Rules of Civil Procedure, because no genuine issue as to any material fact exists in this case regarding Plaintiff's (hereinafter "Association") claims pursuant to the Uniform Common Interest Ownership Act, W.Va. Code, § 36B-1-101, et seq., or as to its request for monetary damages specifically contained in Count V, but also throughout its complaint, which are barred by the ten-year limitations period for contracts, West Virginia Code, § 55-2-6, and the two year period for torts on property, West Virginia Code §55-2-12.

I. INTRODUCTION

The Court should grant summary judgment to Dr. Miller regarding all claims raised by the Association against Dr. Miller for alleged violations of the Uniform Common Interest Ownership Act, W.Va. Code, § 36B-1-101, et seq. West Virginia enacted the Uniform Common

Interest Ownership Act, with an effective date of July 1, 1986. The Patrick Henry Estates subdivision was formed in 1981, and the covenants and restrictions complained of by the Association were formalized on October 22, 1981. The Act is simply not applicable to this subdivision.

The Court should grant summary judgment to Dr. Miller regarding all claims for damages specifically contained within Count V of the Complaint, and contained as alternative claims in Counts I and IV. Those claims seek damages and not equitable relief, therefore those claims are actions at law, not equity. The Association's claims for relief are actions at law, not equity, and are therefore barred by the ten-year West Virginia statute of limitations for contract actions, under West Virginia Code, § 55-2-6, or the two-year West Virginia statute of limitations for tort-based personal causes of actions, pursuant to West Virginia Code §55-2-12.

The Court should grant summary judgment to Dr. Miller regarding Count II, which seeks enforcement of a specific provision within the subdivision's covenants requiring Dr. Miller to have transferred the streets and common elements to the Association no later than January 1, 1987. Count II is revealed as a breach of contract action and barred by the ten-year West Virginia statute of limitations for contract actions pursuant to W. Va. Code, § 55-2-6.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

In *Mayne-Harrison v. Dolgencorp, Inc.*, Slip Copy, 2010 WL 3717604 (N.D.W.Va., 2010), this Court stated:

“The moving party is entitled to summary judgment where ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.’ Fed. R. Civ. Pro. 56(c). See *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). A genuine issue exists ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In considering a motion for summary judgment, the court is required to draw all reasonable inferences in favor of the nonmoving party and to view the facts in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. The moving party has the burden to show an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The party opposing summary judgment must then demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. *Anderson*, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. *Id.* at 252." *Id.*

III. STATEMENT OF UNDISPUTED FACTS

1. Defendant/Counter-Plaintiff, Dr. Gerald Miller, is a natural person and a citizen of the State of Maryland, having his residence at 1 Babbette Court, Baltimore, Maryland 21208.
2. Counter-Defendant/Plaintiff Patrick Henry Estates Homeowners Association, Inc., is a citizen of the State of West Virginia and a West Virginia Corporation having its principal place of business in West Virginia.
3. Shendo Limited Partnership was the original developer of Patrick Henry Estates and Dr. Miller was a non-managing partner in Shendo Limited Partnership until December 30, 1986.
4. The final plat for the first section of the subdivision, Section A, was recorded on October 22, 1981 in Plat Book 6, page 13.
5. The Declaration of Road Maintenance Covenants and Restrictions was filed on October 22, 1981 (hereinafter "Declaration").
6. On or about March, 1985, the Association met with James Crawford, Esquire, regarding a possible suit against the developer. See Patrick Henry Estates Homeowners Association's Accounting of all Monies for period ending March 15, 1985 attached as *Exhibit A*.
7. Dr. Miller became the successor developer to Shendo Limited Partnership by deed

dated December 30, 1986, and recorded in the Office of the Clerk of Jefferson County, West Virginia, in Deed Book 613, at Page 71.

8. On or about March 26, 1986, the Association had a meeting at which it discussed:

“...the problems concerning the areas of road and the so-called ‘Playground’ lot, which R.M. Singer still owns. It was decided to try to get in touch with Mr. Singer and ask him about obtaining the deeds for both of these areas. Since the ‘Playground’ lot deed should rightfully be turned over to the Association according to the rights and by-laws of Patrick Henry Estates, this issue should be pursued to the fullest extent...”

See the Minutes of the Association’s Officers Meeting of March 26, 1986 attached as **Exhibit B**.

9. On or about May 20, 1987, the Association had a meeting at which:

“a motion was made and a vote was passed to have Mr. Miller deed over any property that was rightfully our’s prior to any agreements of any kind....”

See Association’s Meeting Minutes of May 20, 1987 attached as **Exhibit C**.

10. On or about April 6, 2000, the Association consulted with another attorney, James P. Campbell, Esquire and received the recommendation from Mr. Campbell to sue Dr. Miller requesting, in relevant part:

“1) A mandatory injunction to immediately repair the roadways, stormwater facilities and other public facilities in Patrick Henry Estates to the level of service described specifically in the Restrictive Covenants... 2. A mandatory injunction directing the developer to convey the ownership of the common elements, of Patrick Henry Estates to the Homeowner’s Association...3. A judgment against the developer for a sum equal to monies expended by the Homeowner’s Association these last years for issues such as road maintenance and repair, snow removal and grass cutting...”

See April 6, 2000 letter to Association’s President Albert Steven from James P. Campbell of Campbell Miller, P.C. attached as **Exhibit D**.

11. As the successor developer, Dr. Miller is the owner of the common areas within the subdivision, consisting of several vacant “playground” lots, the streets within the

Subdivision, and Lot C-1.

12. Article VII, Section 3 of the *Declaration* states:

“The Developer may retain the legal title to the common properties until such time as he has completed improvements thereon but, notwithstanding any provisions herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear if all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987.”

13. Because the subdivision is not finished, and for a variety of significant reasons related to the development of the subdivision, Dr. Miller has not dedicated the common elements within the subdivision to the Association.

14. The Association filed a Complaint for Injunctive and Declaratory Relief against Dr. Miller on or about October 27, 2008; an Amended Complaint for Injunction and Declaratory Relief on or about June 17, 2009; and a Second Amended Complaint for Injunction and Declaratory Relief on September 17, 2010 (herein collectively referred to as the “Complaint”).

IV. ARGUMENT

A. **ALL CAUSES OF ACTION ASSERTED BY THE ASSOCIATION AGAINST DR. MILLER REGARDING ALLEGED VIOLATIONS OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT, § 36B-1-101, ET SEQ. ARE BARRED BECAUSE THE STATUTE IS NOT APPLICABLE.**

The Association alleges in paragraph 3 of its *Complaint* that: “The Subdivision was created as a common interest community on October 22, 1981, and is, therefore, subject to the Uniform Common Interest Ownership Act (W. Va. Code § 36B-1-1, et seq.), hereinafter referred to as the ‘Act,’ pursuant to W. Va. Code § 36B-1-204 of the West Virginia Code.” *Id.* Allegations of alleged violations of the Act are made by the Association against Dr. Miller throughout the Complaint.

However, the effective date of the Act, West Virginia Code § 36B-1-101 to 36B-4-120, was July 1, 1986. And, W. Va. Code §36B-1-204(d) specifically provides, in relevant part:

“The provisions of this chapter... shall apply to all condominiums or common interest communities to the extent such provisions conflict or are inconsistent with the provisions of chapter one hundred fifty-three, acts of the Legislature, one thousand nine hundred sixty-three: Provided, That the provisions of this chapter shall not modify, limit or nullify any rights, duties, or obligations created or existing under any declaration, bylaws or plats or plans of condominiums created in this state before the effective date of this chapter.” *Id.*

In short, if a subdivision is created prior to the effective date of W. Va. Code § 36B-1-101 - § 36B-4-120, and was not created as a common interest community or condominium, then the Act does not change that fact. The subdivision was created in 1981, four years and nine months before the Act was adopted, and cannot be subject to the Act.¹ The Court should grant

¹ Even if the Court deems the Act as a whole to apply in this case, the Act would still not apply to this subdivision because the *Declaration* does not include the required elements necessary to the creation of a common interest community. For example, the *Declaration* does not contain:

- The names of the common interest community and the association and a statement that the common interest community is either a condominium, cooperative or planned community- § 36B-2-105(a)(1);
- The name of every county in which any part of the common interest community is situated-§ 36B-2-105(a)(2);
- A statement of the maximum number of units that the declarant reserves the right to create-§ 36B-2-105(a)(4);
- A description of the boundaries of each unit created by the declaration, including the unit’s identifying number or, in a cooperative, a description, which may be by plats or plans, of each unit created by the declaration, including the unit’s identifying number, its size or number of rooms and its location with a building if it is within a building containing more than one unit- § 36B-2-105(a)(5);
- An allocation to each unit of the allocated interests in the manner described in section 2-107-§ 36B-2-105(a)(11);
- Any restrictions (i) on use, occupancy and alienation of the units, and (ii) on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation or casualty loss to the unit or to the common interest community or on termination of the common interest community-§ 36B-2-105(a)(12);
- The recording data for recorded easements and licenses appurtenant to or included in the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration-§ 36B-2-105(a)(13);

summary judgment to Dr. Miller regarding all allegations of the Association regarding the Uniform Common Interest Ownership Act (§ 36B-1-1, et seq.).

B. THE STATUTE OF LIMITATIONS PRECLUDES THE ASSOCIATION FROM BRINGING COUNT V AND ALL OTHER CLAIMS FOR MONEY AGAINST DR. MILLER.

In Count V, and contained within its requests for relief Count I² and Count IV³, the Association requests monetary damages from Dr. Miller. The amount sought for damages against Dr. Miller in Count V of the Complaint is \$525,000.00 in damages.⁴

Claims for monetary damages are not equitable claims, they are claims at law. Any claims by the Association for monetary damages should be barred by the ten-year statute of limitations for breach of contract, as set forth in detail above, or by the two-year statute of limitations for personal tort actions.

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- An allocation to each unit: (i) In a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association (section 3-115(a)) and a portion of the votes in the association; (ii) In a cooperative, an ownership interest in the association, a fraction or percentage of the common expenses of the association (section 3-115(a)) and a portion of the votes in the association; and (iii) In a planned community, a fraction or percentage of the common expenses of the association (section 3-115(a)) and a portion of the votes in the association-§ 36B-2-107;
 - The formulas used to establish allocations of interests-§ 36B-2-107(b); and
 - Specification to which unit or units each limited common element is allocated- § 36B-2-108(a).

Because the *Declaration* does not include many of the necessary elements for the creation of a common interest community or condominium pursuant to the Act, these failures are sufficient evidence to show that the covenants were not drafted with any intent to create a common interest community or condominium, and therefore the provisions of the Act are not applicable to the subdivision, and cannot be enforced against Dr. Miller.

² Paragraph (b) in Count I states, in relevant part: "In the alternative to the relief requested in the preceding Paragraph "a," award Plaintiff damages in such amount as necessary to allow Plaintiff to affect the necessary repairs to the common elements within the Subdivision..."

³ Paragraph (b) in Count IV states: "Costs and attorney's fees associated with the bringing of this Count IV..."

⁴ The Association alleges that it spent only \$66,957.33 of its own money on "maintenance of the streets," an amount which includes snow removal, sign repair and trimming the verge of the roadways. The estimate produced by the Association for the costs of fully repairing the roadways within the subdivision

W. Va. Code §55-2-12 states, in relevant part: “Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property....” *Id.*

As noted above, the Association filed the Complaint on October 27, 2008. The Association was well aware of any cause of action against Dr. Miller for allegedly failing to maintain the streets within the subdivision no later than April 6, 2000. On that date, the Association met with James P. Campbell, Esquire and received a recommendation from Mr. Campbell to sue Dr. Miller, specifically to request:

“A judgment against the developer for a sum equal to monies expended by the Homeowner’s Association these last years for issues such as road maintenance and repair, snow removal and grass cutting, which obligations clearly belong to the developer prior to the transfer of the ownership of the roads....”

See Exhibit D.

In this case, the Association alleges in Count V the failure of Dr. Miller to maintain the roads and request an exteme and unsupported amount of monetary damages. Count I alleges failure to maintain roads, and Count IV alleges failure to maintain Lot C-1. Whether the Association’s claim for these damages rests in breach of contract or tort, its claim is barred by the applicable ten-year limitations period if breach of contract, or by the applicable two-year limitations period if tort.

C. THE STATUTE OF LIMITATIONS PRECLUDES THE ASSOCIATION FROM BRINGING COUNT II OF THE COMPLAINT

With Count II of its Complaint, what the Association seeks is enforcement of a specific provision of the *Declaration* with a specific date for required performance. The Association

amounts to only \$156,155.00. The balance of the money sought has not been accounted for by the

requests that the Court direct Dr. Miller to “dedicate and deed the common elements within the subdivision to Plaintiff as required by the Covenants”, citing Article VII, Section 3 of the *Declaration* as the grounds for its requested relief. Article VII, Section 3 of the *Declaration* states:

“The Developer may retain the legal title to the common properties until such time as he has completed improvements thereon but, notwithstanding any provision herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear of all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987.” *Id.*

The statute of limitations for a breach of contract action in West Virginia for written contracts is ten years.⁵ West Virginia Code, § 55-2-6 states, in relevant part:

“Every action to recover money, which is founded . . . on any contract...shall be brought within the following number of years next after the right to bring the same shall have accrued,. . . if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be upon any other contract, expressed or implied, within five years” *Id.*

In West Virginia, the limitations period for breach of contract actions begins to run on the date of the breach of contract. In *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 749, 466 S.E.2d 810, 817 (1995), the Court stated that: “We have consistently held that the statute of limitations begins to run when the breach of the contract occurs or when the act breaching the contract becomes known.” *Id.* In *Thomas v. Branch Banking and Trust Company*, 443 F.Supp.2d 806, 809 (N.D.W.Va., 2006) this Court held that: “A claim within the

Association.

⁵ The Court should look to West Virginia law to determine the applicable statute of limitations for the Association’s causes of action. In *Cather v. Seneca-Upshur Petroleum, Inc.*, WL 3271965 (N.D.W.Va., 2010), this Court held that: “As a threshold matter, where jurisdiction is founded on diversity of citizenship, West Virginia law determines when the statute of limitations begins to run.” (Citing *Patrick v. Sharon Steel Corp.*, 549 F.Supp. 1259, 1263 (N.D.W.Va. 1982); *Granahan v. Pearson*, 782 F.2d 30, 31 (4th Cir. 1985)).

scope of § 55-2-6 accrues ‘when the breach of the contract occurs or when the act breaching the contract becomes known.’ *Id.*

The Association asserts that the conveyance of streets should have been accomplished on or before January 1, 1987.⁶ January 1, 1987 is the date of the alleged breach by Dr. Miller.

In any event, the Association was well aware of its cause of action against Dr. Miller no later than May 20, 1987. On May 20, 1987, the Association contemplated demanding that Dr. Miller transfer the properties to it: “A motion was made and a vote was passed to have Mr. Miller deed over any property that was rightfully ours ...”⁷ The Association’s awareness of its causes of action alleged against Dr. Miller can be established for dates even earlier than May 20, 1987. For example, on or about March, 31, 1985, the Association contemplated litigation against Dr. Miller, incurring a charge from James Crawford, Esquire in regards to a consultation about a possible suit against the developer.⁸ On March 26, 1986, the Association’s minutes list as “old business” the fact that:

“There was more discussion of the problems concerning the areas of road and the so-called ‘Playground’ lot, which R. M. Singer still owns, It was decided to try to get in touch with Mr. Singer and ask him about obtaining the deeds for both of these areas. Since the ‘Playground’ lot deed should rightfully be turned over to the Association according to the rights and by-laws of Patrick Henry Estates, this issue should be pursued to the fullest extent...”⁹

In short, the Court should grant summary judgment to Dr. Miller regarding Count II of the complaint because of the Association’s failure to institute a cause of action against Dr. Miller

⁶ In paragraph 12 of its *Complaint*, the Association alleges: “The Developer has failed and refused to dedicate and deed the common elements within the Subdivision to the Association.” And, in paragraph 18 of its *Complaint*, the Association asserts: “The Defendant has failed and refused to convey the common properties within the Subdivision to the Association as is required by the Covenants.” The date required by the *Declaration* is January 1, 1987.

⁷ See *Exhibit C*.

⁸ See *Exhibit A*.

⁹ See *Exhibit B*.

within the ten year limitations period for a breach of contract claim. This suit was filed on October 27, 2008, almost twenty-one years after the date of the breach, January 1, 1987.

V. CONCLUSION

The Court should grant summary judgment to Dr. Miller regarding all allegations by the Association involving West Virginia's Uniform Common Interest Ownership Act (§36B-1-101, et seq.). The act was not applicable until July, 1986, and the Patrick Henry Estates Subdivision was created in 1981.

The Court should grant summary judgment to Dr. Miller as to Count V and the requests for damages portions of Counts I and IV, which are likewise barred by West Virginia's limitations statutes, W. Va. Code §55-2-6 and W. Va. Code §55-2-12.

The Court should grant summary judgment to Dr. Miller as to Count II of the Complaint for a breach of contract action, which is barred by West Virginia's limitations statute, W. Va. Code, § 55-2-6.

VI. REQUEST FOR RELIEF

WHEREFORE, Dr. Miller requests that the Court award judgment to Dr. Miller and order the following:

- a. Summary Judgment to Dr. Miller regarding all allegations of alleged violations of the Uniform Common Interest Ownership Act (W. Va. Code §36B-1-101, et seq.);
- b. Summary Judgment to Dr. Miller as to Count II of the Complaint
- c. Summary Judgment as to Count V of the Complaint and all requests of the Association for money damages;
- d. Declaration by the Court that Dr. Miller owns the roads and common areas within the subdivision until such time as the subdivision is completed.

Respectfully submitted,
Dr. Gerald Miller,
Defendant / Counter-Plaintiff,
By counsel.

/s/ R. Greg Garretson

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v.

**CIVIL ACTION NO. 3:08-CV-175
(BAILEY)**

DR. GERALD MILLER,

Defendant.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, and/or R. Greg Garretson, Esquire, counsel for Defendant, do hereby certify that a true and accurate copy of the foregoing **DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW** and **CERTIFICATE OF SERVICE** has been served upon Braun A. Hamstead, Esquire at Hamstead & Associates, 1802 West King Street, Martinsburg, West Virginia 25401 by United States, first-class mail, postage prepaid, on this 30th day of September, 2010.

/s/ R. Greg Garretson, Esquire
Richard G. Gay, Esquire
Nathan P. Cochran, Esquire
R. Greg Garretson, Esquire