STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WILLIAM CLARK, Individually, and derivatively on behalf of POINTES NORTH INN CONDOMINIUM ASSOCIATION, a Michigan Domestic Nonprofit Corporation,

Plaintiffs,

v

File No. 11-28675-CH
HON. PHILIP E. RODGERS, JR.

POINTES NORTH INN CONDOMINIUM ASSOCIATION, a Michigan Domestic Nonprofit Corporation; POINTES NORTH LLC, a Michigan Limited Liability Company; NORTH POINTES MANAGEMENT COMPANY, INC., a Michigan Domestic Profit Corporation; RALPH A LEINO, RANDY J. LEINO; GAIL T. LEINO; and ROGER BASSE,

Defendants,

and

POINTES NORTH INN CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation; corporation; POINTES NORTH, LLC, a Michigan limited liability company; NORTH POINTES MANAGEMENT COMPANY, INC., a Michigan corporation,

Defendants/Counter-Plaintiffs,

v

WILLIAM CLARK,

Plaintiff/Counter-Defendant.
_____/

Robert M Meisner (P17600)
Kevin M. Hirzel (P70369)
Attorneys for Plaintiffs and
Plaintiff/Counter-Defendant

Erik J. Stone (P29088)
Attorney for Defendants and
Counter-Claim Defendants

Corrine F. Shoop (P38145)
Attorney for Pointes North Inn
Condominium Association

DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION ON DEFENDANTS/COUNTER-PLAINTIFFS' SECOND AMENDED COUNTERCLAIM PURSUANT TO MCR 2.116(C)(8) and (C)(10) AND GRANTING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY DISPOSITION ON COUNTS I, II, III, IV AND IX OF THE FIRST AMENDED COMPLAINT

I. STATEMENT OF FACTS

On June 11, 1987, the developer, Rysberg Development Limited Partnership I ("Rysberg") recorded the Master Deed ("Deed") and Bylaws ("Bylaws") for Pointes North Inn condominium project (the "Inn") with the Grand Traverse County Register of Deeds ("Register of Deeds"). The Subdivision and Site Plan, attached to the Deed and Bylaws, indicates that the Inn consisted of 32 individual units.[1] Units 100 and 200 were assigned a percentage of value of .05%, while the remaining 30 units were assigned a percentage value of 3.3% per unit.[2] The Deed states that "the total value of the project is 100 [and] the percentage of value allocated to each unit may be changed only with the unanimous consent of all of the Co-Owners expressed in an amendment to this Master Deed, duly approved and recorded." The Association, a non-profit corporation composed of the developer and unit Co-Owners, had authorization to amend the Bylaws "by an affirmative vote of not less than two-thirds (2/3) of all Co-Owners in number and in value."[3] The Bylaws further state:

> Any amendment to these Bylaws shall become effective upon the recording of such amendment in the Office of the Register of Deeds in the county where the Condominium is located. Without the prior written approval of at least fifty (50%) per cent of all institutional holders of first mortgage liens on any unit in the Condominium, no amendment to these Bylaws shall become effective which involves any change, direct or indirect [to any provision] that increases or

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[1] The 32 units are numbered: 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 301, 302, 303, 304, 305, 306, 307, 308, 309 and 310.
[2] Deed, Liber 709, Pages 689-690.
[3] Bylaws, Liber 709, Page 713.

> decreases the benefits or obligations, or materially affects the rights of any member of the Association.[4]

Pursuant to the Bylaws, each Co-Owner was entitled to one vote for each Condominium unit owned when voting by number and one vote, the value of which shall equal the total of the percentages allocated to the unit owned by such Co-Owner as set forth in Article V of the Master Deed, when voting by value.[5] Furthermore, the Bylaws state that a Co-Owner may lease his unit provided that written disclosure of such lease transaction is submitted to the Board of Directors of the Association.[6]

Prior to July 26, 1991, Rysberg Development Company constructed 25 additional units, plus certain amenities, adjacent and contiguous to the original 32 units of the Inn.[7] According to an unrecorded First Amendment to Master Deed for Pointes North Inn ("Unrecorded Amendment"), the Developer and the Pointes North Inn Condominium Association agreed that the additional 25 units and associated amenities would be combined with the original 32 units to create one condominium project. The Unrecorded Amendment lists Rysberg Development Limited Partnership I as the developer of the original 32 units and Rysberg Development Company as the developer of the new 25 units.[8] The percentage values for the original 32 units are adjusted in the Unrecorded Amendment so that percentage value for Units 100 and 200 are 0.40% each, instead of 0.05% each, and the remaining units are assigned a percentage value of 1.8% each, instead of 3.3% each. Of the new units, 24 are assigned a percentage value of 1.8% and Unit 411 is assigned a percentage value of 2.0%. Further, the Unrecorded Amendment states:

> That Pointes North Inn Condominium Association, through a duly noticed and adopted resolution has consented to the combination of the original thirty-two (32) units consisting of Pointes North Inn with the new additional twenty-five (25) units and related general and limited common elements, and Pointes North Inn Condominium Association, through its president, has jointed in the execution of this First Amendment to Master Deed to evidence the Consent stated herein.

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[4] *Id.* at 695.
[5] *Id.*
[6] *Id.* at 707.
[7] The 25 units are numbered: 111, 112, 113, 114, 115, 116, 117, 118, 211, 212, 213, 214, 215, 216, 217, 218, 311, 312, 313, 314, 315, 316, 317, 318 and 411.
[8] The Michigan Department of Licensing and Regulatory Affairs indicates that Rysberg Development Company was incorporated on September 24, 1986, by Brian M. Rysberg. Rysberg Development Company was dissolved on September 29, 2008. <http:www.dleg.state.mi.us/bcs_corp/> (accessed February 6, 2012).

The Unrecorded Amendment was signed by Brian M. Rysberg, as president of Rysberg Development Company, and Martin S. Pribak, as president of the Pointes North Inn Condominium Association on behalf of the Association.[9]

On or about November 6, 2004, William Clark purchased Units 309 and 310.[10] Subsequently, in March 2005, Pointes North, LLC ("Pointes North") became the successor developer of the Inn when it purchased 14 of the original 32 condominium units. On January 6, 2006, Ralph Leino, managing member of Pointes North, recorded a First Amendment to Master Deed ("Amendment I") with the Register of Deeds. On January 26, 2006, Leino recorded a Second Amended and Restated Master Deed ("Amendment II") and Second Amended and Restated Bylaws ("Restated Bylaws") with the Register of Deeds.

Amendment I indicates that Rysberg Development Limited Partnership I had constructed an additional 25 units adjacent to the Inn.[11] Amendment I indicates the additional units are to be included with the original 32 units, a total of 57 units, to collectively compose the Inn. As in the Unrecorded Amendment, the Unit Description and Percentage of Value section modifies the percentage values so that Units 100 and 200 are each assigned a percentage value of .40%, Unit 411 is assigned a percentage value of 2% and the remaining units, except Unit 218, are assigned a percentage value of 1.8% each.[12]

Amendment II and the Restated Bylaws introduce North Pointes Management, Inc. as the rental management company for the Inn. The stated purpose for the management company is to carry out all or part of the maintenance and operational duties and obligations of the Association. Amendment II, Article V establishes that every unit, except Units 100 and 200, are assigned a percentage value of 1.8% each. Units 100 and 200 are assigned a percentage value of .05% each.

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[9] Martin S. Pribak's signature was witnessed and attested to by Linda R. West and Susan N. Sanford. Susan N. Sanford also notarized Pribak's signature. Brian M. Rysberg's signature was not witnessed or notarized.

[10] On or about August 1, 2007, Clark purchased Unit 308.

[11] Although the Unrecorded Amendment states that "Rysberg Development Company is the Developer for Units (33) through (57)," Pointes North Amendment I states, "[R]ysberg Development Limited Partnership I, a Michigan limited partnership (hereinafter [shall be] referred to as 'Developer')." When Amendment I subsequently states that "the Developer has constructed an additional twenty-five (25) units adjacent and contiguous to the original thirty-two (32) units" the presumption is that Rysberg Development Limited Partnership I constructed the additional units.

[12] Amendment I does not provide a percentage value for Unit 218. In the Unrecorded Amendment the total of the units' percentage values equals 100%, however, the total of the units' percentage values provided in Amendment I only equals 98.2% which conflicts with the Deed.

In the Restated Bylaws, Article VI places restrictions on Co-Owners' ability to lease Inn units to the general public. In order to lease, the Co-owner must enter into an exclusive leasing agreement with and may only lease through North Points Management.

The Complaint initiating this litigation was filed by the Plaintiff the on July 25, 2011.[13] On November 14, 2011, the Plaintiff filed a Motion for Summary Disposition on the Defendants/Counter-Plaintiffs' Second Amended Counterclaim Pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and a Motion for Partial Summary Disposition on Counts I, II, III, IV and IX of the First Amended Complaint Pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). The Court heard the parties' arguments on the motions for summary disposition at a hearing held December 19, 2011.

The Court has reviewed the documents submitted by the parties and now issues this written decision and order. For the reasons stated herein, both the Plaintiff's Motion for Summary Disposition and Partial Motion for Summary Disposition are granted.

II. STANDARD OF REVIEW

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, tests the legal sufficiency of a claim.[14] Only the legal basis of the complaint is examined.[15] The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied.[16] However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action.[17]

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[13] Subsequently, the Defendants filed their Answer and Counterclaim on September 6, 2011, and a First Amended Answer and First Amended Counterclaim on September 19, 2011. On September 26, 2011, the Plaintiff filed his First Amended Complaint and an Answer to the First Amended Counterclaim. Defendants filed their Answer to the First Amended Complaint and a Second Amended Counterclaim on October 11, 2011, which Plaintiff answered on October 20, 2011.

[14] *Spiek v Dep't of Transp*, 456 Mich 331; 572 NW2d 201 (1998).

[15] *Feyz v Mercy Mem Hosp*, 475 Mich 663; 719 NW2d 1 (2006).

[16] *Mills v White Castle Sys Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

[17] *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[18] Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.[19] The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[20] The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence to establish those disputed facts.[21] Conjecture, speculation, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[22] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[23] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[24] Trial courts are not permitted to assess credibility or to determine facts on a motion for summary disposition.

III. ARGUMENTS AND ANALYSIS

With regard to the First Amended Complaint, the Plaintiff claims the Defendants violated the Michigan Condominium Act and the Michigan Occupational Code and that he is entitled to declaratory relief.[25] With regard to the Second Amended Counter-Claim, the Plaintiff argues he

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[18] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).
[19] *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003).
[20] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).
[21] *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[22] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher, supra* at 420; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).
[23] MCR 2.116(G)(4); *Maiden, supra* at 120.
[24] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[25] The relevant counts of the First Amended Complaint state as follows:

> Count I – Violation of the Michigan Condominium Act, Illegal Enactment and Recording of the First Amended Master Deed
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> Count II – Violation of the Michigan Condominium Act, Illegal Enactment and Recording of the Second Amended Master Deed

is entitled to summary disposition because the alleged leasing restrictions are not enforceable, he has not tortiously interfered with Defendants' contracts and lis pendens does not slander title.[26]

The Defendants maintain that Pointes North Inn was built in two phases.[27] The 32-unit West building was constructed during 'Phase One,' and in 'Phase Two' the 25-unit East building and swimming pool were constructed.[28] Defendants assert that prior to July 26, 1991, a special meeting was called and the Pointes North Inn Condominium Association voted to add the East Building property to the Pointes North Inn Condominium; thus creating one condominium development including both West and East buildings and the swimming pool.[29] The Unrecorded Amendment, which would add 25 units and associated amenities to the Inn, was allegedly properly drafted, signed and notarized, but never recorded with the Register of Deeds.[30] According to the Defendants, with the Association's consent, Amendment I and a recertification of the original survey would effectively 'expand' the condominium project to include all 57 units and the swimming pool. Defendants state that:

> [T]he twenty-five (25) additional units and swimming pool were in fact added by the prior developer Rysberg in 1991 in compliance with all legal requirements and have been part of the condominium since then with the consent and without objection by any co-owner or mortgagee. The co-owners [are] not themselves prohibited from adopting [Amendment I].[31]

Under the provisions of Act 59 of the Public Acts of 1978, the Michigan Condominium Act, as amended, (hereinafter "MCA") a "convertible area" is defined as a unit or portion of the common elements of the condominium project referred to in the condominium documents within which additional condominium units or general or limited common elements may be created.[32]

Count III – Declaratory Relief – First and Second Amendment to the Master Deed
Count IV – Violation of the Michigan Condominium Act - Bylaw Provisions in Violation of MCL 339.2501
Count IX – Violation of the Michigan Occupational Code

[26] The Second Amended Counter-Claim lists the counts as:
Count I – Breach of the Condominium Master Deed and Bylaws
Count II – Injunctive Relief Proscribing Future Violation of the Master Deed and Bylaws
Count III – Slander of Title/Quiet Title
Count IV – Tortious Interference with Contract or Advantageous Business Relationships or Expectancies
Count IV [sic] – Declaratory Relief

[27] Letter, dated September 2, 2005, from Randy J. Leino, president of North Pointes Management, Inc., to members of the Pointes North Inn Association.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Defendants' Answer to First Amendment Complaint, ¶ 55, Pages 19-20.
[32] MCL § 559.105(3).

An "expandable condominium" means a condominium project to which additional land may be added in accordance with MCL § 559.101 *et seq.* If a condominium project contains any convertible area, the master deed shall contain the following:

> (a) A reasonably specific reference to the convertible area within the condominium project.
> (b) A statement of the maximum number of condominium units that may be created within the convertible area.
> (c) A general statement describing what types of condominium units may be created on the convertible area.
> (d) A statement of the extent to which a structure erected on the convertible area will be compatible with structures on other portions of the condominium project.
> (e) A general description of improvements that may be made on the convertible area within the condominium project.
> (f) A description of the developer's reserved right, if any, to create limited common elements within any convertible area, and to designate common elements therein which may subsequently be assigned as limited common elements.
> (g) A time limit of not more than 6 years after initial recording of the master deed, by which the election of this option expires.[33]

Similarly, if a condominium project is an expandable condominium project, the master deed shall contain the following:

> (a) The explicit reservation of an election on the part of the developer or its successors to expand the condominium project.
> (b) A statement of any restrictions on the election in subdivision (a), including, without limitation, a statement as to whether the consent of any co-owners is required, and if so, a statement as to the method whereby the consent is ascertained; or a statement that the limitations do not exist.
> (c) A time limit based on size and nature of the project, of not more than 6 years after the initial recording of the master deed, upon which the election to expand the condominium project expires.
> (d) A description of the land that may be added to the condominium project. The description shall be a legal description by metes and bounds or by reference to subdivided land unless the land to be added can be otherwise specifically described.
> (e) A statement as to whether, if any of the additional land is added to the condominium project, all of it or any particular portion of it must be added, and if not, a statement as to what portions may be added.
> (f) A statement as to whether portions of the additional land may be added to the condominium project at different times, together with appropriate restrictions fixing the boundaries of those portions by legal descriptions setting forth the

[33] MCL § 559.131

metes and bounds of the land and regulating the order in which they may be added to the condominium project. If the order in which portions of the additional land may be added is not restricted, a statement shall be included that the restrictions do not exist.

(g) A statement of the specific restrictions, if any, as to the locations of any improvements that may be made on any portions of the additional land added to the condominium project.

(h) A statement of the maximum number of condominium units that may be created on the additional land. If portions of the additional land may be added to the condominium project and the boundaries of those portions are fixed in accordance with subdivision (f), the master deed shall state the maximum number of condominium units that may be created on each portion added to the condominium project.

(i) With respect to the additional land and the portion or portions of the additional land that may be added to the condominium project, a statement of the maximum percentage of the aggregate land and floor area of all condominium units that may be created on the additional land that may be occupied by condominium units not restricted exclusively to residential use.

(j) A statement of the extent to which any structures erected on any portion of the additional land added to the condominium project are compatible with structures on the land included in the original master deed.

(k) A description of improvements that shall be made on any portion of the additional land added to the condominium project or a statement of any restrictions as to what other improvements may be made on the additional land.

(l) A statement of any restrictions as to the types of condominium units that may be created on the additional land.

(m) A description of the developer's reserved right, if any, to create limited common elements within any portion of the original condominium project or additional land added to the condominium project and to designate common elements which may subsequently be assigned as limited common elements.

(n) A statement as to whether the condominium project shall be expanded by a series of successive amendments to the master deed, each adding additional land to the condominium project as then constituted, or whether a series separate condominium projects shall be created within the additional land area, all or some of which shall then be merged into an expanded condominium project or projects by the ultimate recordation of a consolidating master deed.

(o) A description of the developer's reserved right, if any, to create easements within any portion of the original condominium project for the benefit of land outside the condominium project.[34]

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature.[35] The most reliable indicator of the Legislature's intent is the words in

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[34] MCL § 559.132

[35] *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993).

the statute.[36] Every word should be given meaning and courts should avoid construction that would render any part of the statute surplusage or nugatory.[37] Statutory language should be construed reasonably, keeping in mind the purpose of the act.[38] Nothing will be read into a statute that is not within the manifest intention of the Legislature as gathered from the act itself.[39] If reasonable minds can differ with regard to the meaning of a statute, judicial construction is appropriate.[40] The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute.[41] If the statutory language is unambiguous, no further judicial construction is required or permitted because courts may assume the Legislature intended the meaning it plainly expressed.[42]

It is assumed that when the Legislature uses legal terms of art in a statute, such words and phrases are to be taken in their technical sense because they have definite meaning.[43] Words or phrases which are generally regarded as making a provision mandatory include "shall" and "must."[44] Use of the mandatory term "shall" normally creates a binding obligation on one or multiple parties.[45] The use of the word "may" is generally permissive, meaning the action spoken of is optional or discretionary.[46] Where a document contains both the words "may" and "shall," it is presumed that the Legislature intended to distinguish between them, "shall" being construed as mandatory and "may" as permissive.[47]

The MCA clearly states that if a condominium project contains any convertible area or if a condominium project is an expandable condominium project the master deed shall contain certain language in the form of statements, descriptions, reservations and restrictions.[48] Moreover, in *Paris Meadows, LLC v City of Kentwood*, the court held that:

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[36] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).
[37] *AFSCME v Detroit*, 468 Mich 388, 389-400; 662 NW2d 695 (2003).
[38] *Barr v Mount Brighton Inc*, 215 Mich App 512, 516; 546 NW2d 273 (1996).
[39] *In re Marin*, 198 Mich App 560, 564; 499 NW2d 400 (1993).
[40] *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).
[41] *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).
[42] *People v Morey*, 461 Mich 325, 330; 603 NW2d 240 (1999).
[43] 73 Am Jur 2d, Statutes, §152.
[44] 73 Am Jur 2d, Statutes, § 13.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] MCL § 559.131 and MCL § 559.132

> The plain language of the MCA specially provides for the right of the developer to subsequently develop or otherwise modify property within the condominium project. [However] pursuant to MCL 559.132, if the project is an expandable project, then the master deed must explicitly include this reservation of rights by the developer, any restrictions on this election (such as co-owner consent), a time limit of not more than six years, a description of the land that may be added, the specific methods for expansion, and any limitations on the development. [49]

In this case, the court's interpretation of the statute further indicates that inclusion of reservation and restriction language in the master deed is mandatory and required.

The statutory language of the MCA is unambiguous. The Legislature plainly expressed its intention that convertible or expandable condominium projects require certain language within the master deed. Failure to include such language in the master deed prohibits subsequent conversion or expansion of the condominium project.

The original 32 units of the Inn were constructed entirely on Lots 37 and 38 of Baker's Acres. The Deed designates the area from the east wall of Units 110, 210 and 310 to the eastern most edge of Lot 37 as a general common element of the Inn.[50]

The Unrecorded Amendment and Amendment I both purport to add Lot 36 of Baker's Acres to the condominium project. Of the 25 additional units constructed, the majority were built on Lot 36. However, portions of Units 111, 112, 211, 212, 311, 312 and 411 were partially constructed on Lots 36 and 37.[51] In addition, the swimming pool was also built on both Lots 36 and 37.

Pursuant to MCL § 559.105(3), additional condominium units, general common elements and/or limited common elements may be constructed in the convertible area of a condominium project. The property from the eastern edge of Units 110, 210 and 310 to the eastern most edge of Lot 37 would need to be deemed 'convertible area' in order to properly build portions of the overlap units and swimming pool on Lot 37. The MCA clearly states that when a condominium project contains any convertible area, the master deed shall contain certain statements and descriptions pursuant to MCL § 559.131. However, the Inn's Deed and Bylaws do not discuss

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[49] *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 140; 783 NW2d 133 (2010).
[50] The decks adjoining Units 110, 210 and 310 are considered limited common elements. Furthermore, the Inn encompasses additional areas designated as common elements, however, the area described above is the relevant property to this litigation.
[51] The Units constructed on both Lots 36 and 37 shall be referred to as "Overlap Units."

any of the requirements listed at MCL § 559.131 and the term 'convertible area' is never once used.

An expandable condominium project permits the addition of land to the original project area as designated in the master deed. In order to properly expand a condominium project, the master deed shall contain certain statements and descriptions pursuant to MCL § 559.132. Subsection (b) requires a statement within the master deed as to whether the consent of any co-owners is required to expand, or in the alternative, a statement that the limitation does not exist. This particular subsection of the statute indicates that a developer may create the option to expand the condominium project and may proceed with expansion without the consent of co-owners. Thus, the developer is not prohibited from unilaterally deciding to expand, so long as the appropriate statutory language is included in the master deed. Again, the Inn's Deed and Bylaws do not discuss any of the requirements listed at MCL § 559.132, nor is the concept of expanding the Inn, with or without co-owner approval, ever addressed.

This Court finds that the initial developer, Rysberg Limited Partnership I, failed to comply with the requirements of the MCA by not including the language required in MCL § 559.131 and MCL § 559.132. The developer illegally expanded the condominium project to include Lot 36 and illegally converted property when he built the Overlap Units and swimming pool on Lot 37. In 1987, Rysberg could have reserved his right, within the Deed, to expand and convert the project, however, he failed to include the statutorily required language. Therefore, to establish the mere option to expand and/or convert the project, Rysberg would have needed to amend the Deed to include language pursuant to MCL § 559.131 and MCL § 559.132.

To amend the Deed, 2/3 of the co-owners and mortgagees would need to approve the amendment. Hypothetically, had the amendment been approved, the Deed would have then allowed for expansion and/or conversion, without or without co-owner consent, depending on the language incorporated via the amendment. Amending the Deed to include the language required by the MCA is the only method to properly expand and convert the condominium project. While the Association may have voted to approve the Unrecorded Amendment in 1991, the MCA mandates that each unit co-owner, tenant, or nonco-owner occupant shall comply with the master deed, bylaws, and rules and regulations of the condominium project and MCA itself.[52] The MCA's expansion and conversion requirements were not met prior to the addition of Lot 36, the

[52] MCL § 559.165

Overlap Units and the swimming pool. Therefore, the addition of the Lot, Units and swimming pool were illegal.

In their Answer to the First Amended Complaint, the Defendants declared:

> [T]he twenty-five (25) additional units and swimming pool were in fact added by the prior developer Rysberg in 1991 in compliance with all legal requirements and have been part of the condominium since then with the consent and without objection by any co-owner or mortgagee. The co-owners [are] not themselves prohibited from adopting [Amendment I].[53]

Additionally, with regard to the 1991 Unrecorded Amendment, Defendants stated that, "A special meeting was called and the association voted to add the East Building property to the Pointes North Inn Condominium; thus creating one condominium development including both buildings and the swimming pool."[54] While said 'special meeting' may have occurred and the 1991 Association of Co-Owners may have voted to approve the Unrecorded Amendment, the fact remains that neither the 1991 Association, nor the 2006 Association, can affirm or approve an illegal act. Defendants have acknowledged that Rysberg added the additional units and swimming pool, however, they either mistakenly believe or have fraudulently asserted that this expansion and conversion was done "in compliance with all legal requirements."

Rysberg failed to comply with the statutory requirements of the MCA, therefore, any amendments purporting to add property to or convert property of the condominium project are illegal and invalid. Defendants improperly suggest that the Unrecorded Amendment would have been legally effective and binding had it been recorded. The approval of Amendment I by the 2006 Association does not circumvent Rysberg's original failure to comply with the MCA, regarding expansion and conversion, and does not serve to combine the original 32 units with the of the additional 25 units and amenities to create one condominium project. Even if there was a legal mechanism whereby the Deed could retroactively be reformed to include the required MCA language, subsequent to actual expansion and/or conversion, it would only be applicable until June 4, 1993, and would be unavailable to the 2006 Association.[55]

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[53] *Supra*, at FN 31.
[54] *Supra*, at FN 26.
[55] An election to expand a condominium project expires 6 years after the initial recording of the master deed. MCL § 559.132(c). The election to convert portions of a condominium project expires 6 years after the initial recording of the master deed. MCL § 559.131(g).

Similarly, Amendment II and Restated Bylaws assume the validity of Amendment I. Amendment II and the Restated Bylaws incorporate Amendment I's expansion of the condominium project to include Lot 36 and addition units and amenities. The Legal Description of the condominium property, as amended, is incorrectly stated as "Lots Thirty-Six (36), Thirty-Seven (37), and Thirty-Eight (38), Plat of Baker's Acres."[56] Amendment II and the Restated Bylaws are invalid as they improperly assume the validity of Amendment I.

The Plaintiff correctly argues that Amendments I, II and the Restated Bylaws are illegal, unenforceable and void ab initio. Thus, Plaintiff is entitled to summary disposition on Counts I, II and III of the First Amended Complaint and Counts I, II, III and IV (Declaratory Relief) of the Second Amended Counterclaim.[57] Moreover, in Count IV (Tortious Interference) of the Second Amended Counterclaim, Defendants state that the Association, Successor Developer and Rental Management Company "have contractual and/or business relationships or expectancies *arising as a result of the amendments to the master deed.*"[58] As Amendments I and II have been declared illegal, unenforceable and void ab initio, Plaintiff is also entitled to summary disposition on Count IV.

With regard to Counts IV and IX of the First Amended Complaint, the alleged violations of the Michigan Occupational Code are intrinsically related to Amendment II and the Restated Bylaws which have been deemed invalid. Therefore, the claims addressed in Counts IV and IX are moot.

Count V of the First Amended Complaint requests declaratory relief, pertaining to the Restated Bylaws, as an alternative pleading to Counts I, II and III. The Plaintiff is entitled to summary disposition on Counts I, II and III, therefore, addressing Count V as an alternative is unnecessary.

As to the remaining claims of the First Amended Complaint, Count VI and Count VII pertain to breach of contract and breach of covenants, respectively, by the Association for failing to comply with the Deed and Bylaws. Count VIII asserts that the Association and Leino defamed the Plaintiff via both libel and slander. The Plaintiff claims certain Defendants acted

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[56] Amendment II, Document 2006-00007, Page 2.
[57] The Second Amended Counterclaim appears to be incorrectly numbered, as it lists Count IV as Tortious Interference with Contract or Advantageous Business Relationships or Expectancies and follows with a 'second' Count IV requesting Declaratory Relief.
[58] Second Amended Counterclaim, Page 13 ¶ 68. Emphasis added.

negligently, recklessly, intentionally and/or maliciously in publishing the defamatory statements and that the statements have a tendency to, or did, prejudice the Plaintiff's interest resulting in economic injury, loss of goodwill, harm to his reputation and loss of esteem and standing in the community. Count X pertains to breach of contract by North Pointes Management, Inc. for failing to disclose that North Pointes did not possess a real estate license and for failing to comply with the terms of the rental management agreements signed by the Plaintiff and other Co-Owners. Count XI pertains to breach of fiduciary duties by Defendants Ralph, Randy and Gail Leino, Roger Basse, Pointes North and North Pointes Management, Inc. The Plaintiff claims the Defendants acted in bad faith and with reckless disregard for the rights and interests of the Plaintiff and other Co-Owners. Count XII asserts that Defendants Ralph, Randy and Gail Leino, Pointes North and North Pointes Management, Inc. engaged in civil conspiracy.

Counts VI, VII, VIII, X, XI and XII are not the subject of a motion before the Court and appear to present issues on which reasonable minds could differ. In any event, these Counts remain for resolution at a later date.

Lastly, Count XIII requests declaratory relief pursuant a prescriptive easement for use of the swimming pool and other associated amenities. A prescriptive easement results from use of another's property that is open, notorious, adverse and continuous for a period of 15 years.[59] The requirements for an easement by prescription are similar to those for adverse possession, with the exception of exclusivity.[60] The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement.[61] However, mere permissive use of another's property will not create a prescriptive easement.[62] At this time Count XIII is not before the Court and will be resolved at a later date.

VI. CONCLUSION

For the reasons stated herein, the Plaintiff's Motion for Summary Disposition on Defendants/Counter-Plaintiffs' Second Amended Counterclaim Pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) is granted. The Plaintiff is entitled to summary disposition on the

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[59] *Plymouth Canton Community Crier Inc. v Prose*, 242 Mich App 676; 619 NW2d 725 (2000).
[60] *West Michigan Dock & Market Corp v Lakelands Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).
[61] *Supra*, at FN 60.
[62] *Id.*

Motion for Partial Summary Disposition on Counts I, II, III, IV and IX of the First Amended Complaint Pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). The Court grants summary disposition with regard to Counts I, II and III of the First Amended Counterclaim. Counts IV and IX are moot.

This Decision and Order does not resolve all issues and does not close the case.

IT IS SO ORDERED.

2/17/2012
12:41:01 PM

PHILIP E. RODGERS, JR., CIRCUIT COURT JUDGE, P29082

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge