STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

COVE CREEK CONDOMINIUM ASSOCIATION,

Plaintiff/Counter-Defendant,

Case No. 16-155706-CH
Hon. Phyllis C. McMillen

v

VISTAL LAND & HOME DEVELOPMENT, L.L.C., et al.,

Defendants/Counter-Plaintiffs.
_____/

OPINION AND ORDER
At a session of Court
Held in Pontiac, Michigan
On

FEB 10 2017

I. FACTS AND PROCEEDINGS

This matter is before the Court on Defendants' motion for summary disposition as to Count I of the First Amended Complaint. Plaintiff filed the instant action seeking declaratory and other relief relating to units 1-14 of the Cove Creek Condominium. In Count I of the First Amended Complaint, Plaintiff alleges Defendants lost the right to construct units 1-14 under MCL 559.167(3) as amended by 2002 PA 283. Defendants move for summary disposition pursuant to MCR 2.116(C)(8) on the ground that the statute upon which the claim is based was repealed and replaced by new language effective September 21, 2016, and therefore the claim fails as a matter of law. Plaintiff opposes the motion and moves for summary disposition in its favor pursuant to MCR 2.116(I)(2).

The Cove Creek Condominium (the "Condominium") was established by the recording of its Master Deed on or about April 21, 1989. Lifestyle Homes, a co-partnership ("Lifestyle"), was the developer of the Condominium. According to the condominium subdivision plan, Exhibit B to the Master Deed, the Condominium was originally to be composed of 31 units. Units 15-31 have been constructed and are currently owned and occupied by non-developer co-owners. Units 1-14 are identified as "need not be built" units on the condominium subdivision plan and construction of these units has never been commenced.

While neither side has provided the date that construction commenced, Plaintiff has produced a warranty deed for a unit dated October 27, 1989, purported to be the first unit sold; therefore construction commenced before that date.

On May 11, 1989, Lifestyle recorded a First Amendment to the Master Deed, changing the developer to Cove Creek Limited Partnership ("Cove Creek, LP"). On May 17, 1989, Lifestyle executed a deed transferring its interest in the Condominium to Cove Creek LP. On September 15, 2004, Cove Creek, LP executed a deed conveying units 1-14 to Vistal Cothery, L.L.C. ("VC, LLC"). On November 6, 2006, VC, LLC executed a deed conveying units 1-14 to VLHD, LLC.

On April 30, 2009, VC, LLC attempted to deed units 1-14 to Americo and Maria Cervi and Kent and Patricia Downey, via a warranty deed. On that date, VC, LLC had no interest to convey, having previously conveyed its interest to VLHD, LLC. On August 21, 2012, Kent Fredrick Downy and Patricia Downey executed a quit claim deed attempting to convey an interest in units 1-14 to Americo and Maria Cervi. On June 2,

2016, Americo and Maria Cervi executed a quit claim deed attempting to convey an interest in units 1-14 to the Maria and Americo Cervi Trust (the "Trust").

Plaintiff filed its complaint in this matter on October 24, 2016. On October 31, 2016, VLHD, LLC executed a quit claim deed conveying all of its "interest" in units 1-14 to the Trust. On or about November 3, 2016, the Trust advised Plaintiff that it "has withdrawn the undeveloped portion (Phase II) of the Cove Creek Condominium from the Condominium", being units 1-14, pursuant to MCL 559.167, as amended by 2016 PA 233. On November 28, 2016, Defendants answered the complaint. On December 9, 2016, Plaintiff filed its First Amended Complaint in order to address the actions of the Defendants that occurred after the filing of the complaint.

II. SUMMARY DISPOSITION STANDARDS

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). The pleadings are comprised of the complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. *Village of Diamondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the non-movant. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to create a cause of action. *York v Fiftieth Dist Court*, 212 Mich App 345, 347; 536 NW2d 891 (1995); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 409; 792 NW2d 686 (2010) (on a (C)(8) motion, the court must accept as true facts alleged in the complaint, but not conclusions). But see *Detroit Int'l Bridge*

Co v Commodities Export Co, 279 Mich App 662, 670; 760 NW2d 565 (2008) (the trial court must also consider "any reasonable inferences or conclusions that can be drawn from the facts"). A court should grant the motion when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

III. ANALYSIS

The Condominium Act states that a condominium development plan shall include building sections showing the existing and proposed structures and improvements including their location on the land. Any proposed structure and improvement shown shall be labeled either "must be built" or "need not be built." MCL 559.166.

Effective May 9, 2002, the Act was amended to state that if the developer has not developed the "need not be built" units within 10 years after the date of commencement of construction, then the developer has the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners. 2002 PA 283. The 2002 amendment provides that "[i]f the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease." *Id.*, Section 67(3). The exact statutory language is as follows:

> Notwithstanding section 33, ***if the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built" during a period ending 10 years after the date of commencement of construction*** by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built".... If the master deed contains provisions permitting the expansion, contraction, or rights of convertibility

> of units or common elements in the condominium project, then the time period is 6 years after the date the developer exercised its rights with respect to either expansion, contraction, or rights of convertibility, whichever right was exercised last.If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, ***those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease***....[MCL 559.167(3), as amended by 2002 PA 283 (emphasis added)].

In 2016, the Act was amended to state that if the developer does not withdraw undeveloped land from the project or convert the units to "must be built" within the 10-year period, the association of co-owners must vote to declare that the undeveloped land shall remain part of the project as general common elements. MCL 559.167(4) ("subsection (4)"). The association must give notice to the developer, and the developer then has 60 days to withdraw the undeveloped land or convert the undeveloped units to "must be built." *Id.* MCL 559.167(3), (4) and (5) now read as follows:

> (3) Notwithstanding section 33, ***for 10 years after the recording of the master deed, the developer, its successors, or assigns may withdraw from the project any undeveloped land or convert the undeveloped condominium units located thereon to "must be built" without the prior consent of any co-owners, mortgagees of condominium units in the project, or any other party having an interest in the project.*** If the master deed confers on the developer expansion, contraction, or convertibility rights with respect to condominium units or common elements in the condominium project, then the time period is 10 years after the recording of the master deed or 6 years after the recording of the amendment to the master deed by which the developer last exercised its expansion, contraction, or convertibility rights, whichever period ends later. Any undeveloped land so withdrawn is automatically granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped land.
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> (4) ***If the developer does not withdraw undeveloped land from the project or convert undeveloped condominium units to "must be built" before expiration of the applicable time period under subsection (3), the association of co-owners, by an affirmative 2/3 majority vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements***

> ***and that all rights to construct condominium units upon that undeveloped land shall cease. When such a declaration is made, the association of co-owners shall provide written notice of the declaration to the developer or any successor developer by first-class mail at its last known address. Within 60 days after receipt of the notice, the developer or any successor developer may withdraw the undeveloped land or convert the undeveloped condominium units to "must be built". However, if the undeveloped land is not withdrawn or the undeveloped condominium units are not converted within 60 days, the association of co-owners may file the notice of the declaration with the register of deeds. The declaration takes effect upon recording by the register of deeds.*** The association of co-owners shall also file notice of the declaration with the local supervisor or assessing officer. In such an event, if it becomes necessary to adjust percentages of value as a result of fewer condominium units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95.3
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> (5) ***A reversion under subsection (4), whether occurring before or after the date of the 2016 amendatory act that added this subsection,4 is not effective unless the election, notice, and recording requirements of subsection (4) have been met.*** [emphasis added].

In the instant motion, Defendants argue that Count I fails as a matter of law because it is based on the 2002 amendment, which was repealed and replaced by the 2016 amendment. This argument fails for several reasons. As set forth above, construction on the complex started before October 27, 1999, the date of the sale of the first unit. As such, the ten-year period during which the developer had the right to withdraw the units expired as of October 27, 1999. Even if the ten-year period did not begin to run until the effective date of the 2002 Amendment, the ten-year period expired on May 9, 2012. Therefore, as of 2012, the undeveloped lands had become a part of the general common elements, and the developer lost all rights to develop those lands. The passage of 2016 PA 610 did not change that fact.

As discussed above, when MCL 559.167 was amended in 2016, the amendment created two new subsections - (4) and (5) - which require affirmative acts on the part of

the association of co-owners before the land becomes part of the general common elements. New subsection (4) states that at the end of the 10-year period, the association of co-owners may declare that the undeveloped land shall remain part of the project and "revert" to general common elements, and all right to construct condominium units on the undeveloped land shall cease. New subsection (4) further requires the association to provide written notice to the developer, triggering the right of the developer to withdraw the undeveloped land, or convert the units to "must be built". If action is not taken by the developer, the association may file the declaration with the Register of Deeds and the land becomes part of the common elements.

New subsection (5) states that a "reversion" under subsection (4), whether occurring before or after the date of the 2016 amendatory act that added this subsection, is not effective unless the election, notice and recording requirements of subsection (4) have been met.

The terms "revert" or "reversion" are used for the first time in the 2016 amendment. The previous language found in the 2002 amendment stated that in the event the land was not withdrawn before the expiration of the time limits, those undeveloped lands "shall remain part of the project as general common elements and all right to construct condominium units on the undeveloped land shall cease", with no mention of the terms "revert" or "reversion". 2002 PA 283, Sec. 67(3). The 2016 amendments for the first time use the term "revert", when the language was changed to state that the undeveloped lands "shall remain part of the project *but shall revert* to general common elements and that all rights to construct condominium units upon that undeveloped land shall cease." 2016 PA 610, Sec 67(4) (emphasis added).

Defendants' argument that a "reversion" under subsection (4) is not effective unless the election, notice and recording requirements of subsection (4) have been met fails in this instance, where there was no "reversion under subsection (4)" at the time the rights to the property vested in Plaintiff. Rights to the property vested in the co-owners association in 2012, years before the enactment of subsection (4). A "reversion" could not have occurred under subsection (4) of MCL 559.167 before the date of the 2016 amendatory act of MCL 559.167, because a "reversion under subsection (4)" did not exist. Plaintiff is asserting rights acquired under MCL 559.167(3), as amended by 2002 PA 283, and not any rights acquired under subsection (4) of MCL 559.167, as amended by 2016 PA 233. Therefore, MCL 559.167(5) is inapplicable if the phrase "A reversion under subsection (4)" is to have any meaning.

Defendants argue that the language of new subsection (5), referring to a reversion "whether occurring before or after the date of the 2016 amendatory act", indicates the legislative intent to eliminate any claim of right to the property by Plaintiff, even if those rights vested prior to the amendment of the act, where the affirmative acts of new subsection (4) have not been taken. The Court does not agree with this interpretation of the statute.

In Michigan, the "[p]lain statutory language must be enforced as written. This includes, without reservation, the Legislature's choice of tense." *City of Holland v Consumers Energy Co*, 308 Mich App 675, 684; 866 NW2d 871, 875 (2015). In Michigan, "[w]e presume that the Legislature intended the common meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature." *Lash v City of Traverse City*, 479 Mich 180, 189; 735 NW2d 628, 634

(2007).

Even if, as argued by Defendants, a "reversion" could occur under 2002 PA 283, Defendants attempt to substitute the word "occurred" for the word "occurring" in interpreting the phrase "whether ***occurring*** before or after the date of the 2016 amendatory act that added this subsection...." However, the term "occurring" is a present participle. Specifically,

> A past participle is a "nonfinite verb form ending usu. in—*ed*" which "may also function adjectivally." Garner, *Garner's Modern American Usage* (3rd ed) (New York: Oxford University Press, 2009), p.909. As a past participle, it has a perfective aspect, which is a "verb aspect that expresses action as complete." *Id.* at 883, 909. Likewise, the past tense signals "an action or even a state that occurred at some previous time." *Id.* at 920. Additionally, the past-perfect tense denotes "an act, state, or condition [that] was completed before another specified past time or past action." *Id.* Therefore, the term "dried" clearly indicates a completed condition.
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> This is in contrast to present participles, which are verb forms "ending in—*ing* and used in verb phrases to signal the progressive aspect." *Id.* at 909. Present participles may also be adjectival. *Id.* The progressive aspect shows "that an action or state—past, present, or future—was, is, or will be unfinished at the time referred to." [*People v Randall*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2015 (Docket No. 318740) at *3, lv den 498 Mich 919; 871 NW2d 168 (2015); see also *Makarka ex rel Makarka v Great Am Ins Co*, 14 P3d 964, 968 (Alas, 2000)[1]]

The use of the term "occurring" means that if the statutory time period was in the process of running, but not yet completed, then 2016 PA 233 is applicable. By way of example, if only 5 years of the 10 year period had accrued before the enactment of 2016 PA 233, the time period would still be *occurring*, and 2016 PA 233 would apply.

[1] "We find nothing ambiguous in this phrasing. 'Occurring' is the present participle of the verb 'to occur,' which means to "come to pass[,] take place [, or] happen.' Thus, the durational restriction in the Great American policy plainly limits coverage to cases in which 'bodily injury,' 'property damage,' or 'losses' 'come to pass,' 'take place,' or 'happen' during the policy period. This language cannot reasonably be read as a reference to negligent acts that predate the occurrence of injury."

However, if more than 10 years had passed, any "reversion" would have already *occurred*, and 2016 PA 233 would not apply. If the legislature had chosen to use the term "having occurred"[2], it would indicate that they intended to include those cases in which the 10 year period had previously expired. The legislature's use of a present participle, instead of the past tense of the word "occur", demonstrates that vested rights acquired under 2002 PA 283 remain intact.

In the present case, the vesting of title in the Plaintiff occurred by operation of law when the 10-year period expired. At that time, there was no requirement that Plaintiff take any action to declare its intent to have the property remain a part of the project as a general common element, or any other affirmative duty created by 2016 PA 610.

A transfer occurs by operation of law when it takes place involuntarily or as the result of no affirmative action on the part of the transferee. *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 110; 825 NW2d 329 (2012), citing *Miller v Clark*, 56 Mich 337, 23 NW 35 (1885).

> *Miller*'s interpretation of when a transfer occurs by "operation of law" is consistent with Black's Law Dictionary's definition of the expression. Black's defines "operation of law" as "[t]he means by which a right or a liability is created for a party *regardless of the party's actual intent.*" Similarly, this Court has long understood the expression to indicate "the manner in which a party acquires rights *without any act of his own.*" Accordingly, there is ample authority for the proposition that a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee. [*Kim*, 493 Mich at 110 (footnotes omitted) (emphasis in original)].

2 Or, as suggested by Plaintiff, "*Rights to construct units that ceased to exist under MCL 559.167(3), as amended by 2002 PA283, are now revived and can only be terminated if the election, notice, and recording requirements of subsection (4) have been met.*"

The concept of vesting by operation of law is also recognized in Michigan's statute of frauds, MCL 566.106. The statute expressly states that a writing is not required where an interest in real property is created by operation of law. MCL 566.106 states:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, *unless by act or operation of law*, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. [emphasis added]

The vesting of property rights by operation of law was recognized in *Gorte v Dep't of Transp*, 202 Mich App 161; 507 NW2d 797 (1993). In *Gorte*, the Court of Appeals analyzed whether a prior version of an adverse possession statute created a vested property right that could not be retroactively abrogated. In that case, the plaintiff filed a complaint for adverse possession against the state on March 3, 1988 claiming that he held title to land via adverse possession from the state. *Id.* at 164. MCL 600.5821, which addresses actions involving state or political subdivisions, had been amended to preclude adverse possession claims against the state and became effective on March 1, 1988. The trial court held that since 1966, plaintiffs and their predecessors had adversely possessed the disputed acreage and plaintiff's adverse possession claim was not barred because it had vested before March 1, 1988. *Id.* In affirming the trial court, the Court of Appeals held:

> ...a statute may not be applied retroactively if it abrogates or impairs vested rights.
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> Defendant argues that, in amending § 5821, the Legislature intended to void not only causes of action accruing after the effective date of the statute, but also causes of action for adverse possession against the state that could have been asserted before March 1, 1988, but were not....We are constrained, however, to follow the rules of statutory construction that dictate that a statute of limitations may not be applied retroactively to

> take away vested rights. We therefore interpret § 5821, as amended, to preclude the running of the period of limitation against the state for purposes of adverse possession after the effective date of the statute. ***We further interpret § 5821 as inapplicable where applying the statute would abrogate or impair vested rights.***
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> Because the statute cannot be applied if it would abrogate or impair a vested right, it is necessary to determine when a claim of title to property by adverse possession vests. Generally, the expiration of a period of limitation vests the rights of the claimant.... Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession....Thus, assuming all other elements have been established, ***one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought***. [*Id.* at 167-69 (emphasis added)].

Gorte makes clear that vested rights cannot be retroactively abrogated.

Plaintiff makes other valid arguments as to why a reading of MCL 559.167 as proposed by the Defendants would render the statute unconstitutional. However, the Court need not address that issue at this time. When a fair construction of legislation permits serious constitutional questions to be avoided, that construction is preferred. *Lichtman v City of Detroit*, 75 Mich App 731, 734; 255 NW2d 750 (1977), citing *Crowell v Benson*, 285 US 22; 52 S Ct 285; 76 L Ed 598 (1932); *Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958); *State Hwy Comm v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974). Simply stated, constitutional issues are to be avoided where a case can be resolved adequately on non-constitutional grounds. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 632; 684 NW2d 800 (2004), overruled on other grounds, *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

Defendants also argue that even under the 2002 amendment, Plaintiff failed to take the necessary steps to ensure that the land became part of the general common elements. The 2002 amendment states that

> [i]f a change [in a condominium project] involves a change in the boundaries of a condominium unit or the addition or elimination of condominium units, a replat of the condominium subdivision plan shall be prepared and recorded assigning a condominium unit number to each condominium unit in the amended project...." [2002 PA 283, Sec. 67(2)].

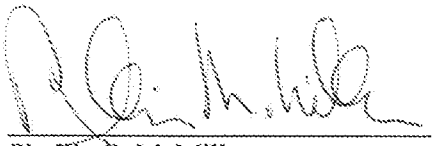
Defendants argue that Plaintiff did not acquire rights to the undeveloped land because it did not prepare and record a replat as required by this language. However, there is nothing in the language to indicate that a replat must be recorded before the reversion can take effect. The reversion language in subsection (3) does not reference subsection (2) at all. The plain language in subsection (3) states that if the developer does not withdraw the undeveloped land within the ten-year period, the land reverts to the general common elements and all rights to build units on that land shall cease. There is nothing in subsection (3) to indicate that the reversion is conditioned on the recording of a replat.

WHEREFORE, IT IS HEREBY ORDERED that Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) is DENIED, because the claim states a valid claim for relief.

IT IS FURTHER ORDERED that Plaintiff's motion for summary disposition pursuant to MCR 2.116(I)(2) is GRANTED. The Court declines to award costs and fees at this time. Plaintiff may bring such a motion if appropriate at the conclusion of the case.

IT IS FURTHER ORDERED that Units 1-14 no longer exist and all land on which Units 1-14 were to be constructed is general common elements. Further, the Maria A. Cervi and Americo Cervi Revocable Living Trust Dated February 12, 2016 does not have the right to withdraw Units 1-14 or the land on which Units 1-14 were to be located from the Condominium, and all rights to construct those units by the Trust no longer exist.

IT IS SO ORDERED.



Phyllis C. McMillen
Circuit Judge