

2007

Lebr Associates, L.L.C., a Utah Limited Liability  
Company, and Centennial Pointe Property Owners  
Association (formed November 29, 2004) v.  
Myriam Onyeabor : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEBR ASSOCIATES, L.L.C., a :  
Utah Limited Liability Company, and : APPELLANT ONYEABOR'S  
CENTENNIAL POINTE PROPERTY : OPENING BRIEF  
OWNERS ASSOCIATION (formed :  
November 29, 2004), :

Plaintiffs-Appellees, : Case No. 20070851-CA

vs.

MYRIAM ONYEABOR,

Defendant - Appellant :

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## PARTIES

The parties to this appeal are Plaintiff LEBR Associates, LLC, Centennial Pointe Property Owners Association, a non-profit Utah Corporation, formed November 29, 2004, Third-party Defendant Bruce Raile, and Defendant, Counterclaimant and Third-Party Plaintiff, Appellant Myriam Onyeabor.

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## JURISDICTION

On October 25, 2007, the Supreme Court transferred this initial appeal filed by Appellant Onyeabor to the Court of Appeals pursuant to Utah Code Ann. § 78A-4-103(2) (j).

## STATEMENT OF THE ISSUES

Issue #1: Based on the facts before the trial court, including Ms Onyeabor's pro se status, was the trial court in error in striking Ms Onyeabor's affidavits and other relevant documents that were crucial to Appellant Onyeabor's case, thereby denying Ms Onyeabor due process?

Issue # 2: In light of the following: a) Appellant Onyeabor's statements that she was unaware of the Restated CC&Rs and the radical changes therein, b) sworn testimonies confirming the claims in her affidavit by Travis Healey, her real estate agent, and Mr. Bob Mills, the real estate agent for the Centennial Pointe, LLC and Mr. Sanborn), c) the recorded deed to Lots ## 4-7 that stated under oath that prior to the filing of the Restated CC&Rs, Centennial Pointe, LLC had already conveyed Lots # 4-7 to another Owner, Paul Bezdijan, and d) Notary Crockett's admission that a significant portion of the document that she purportedly notarized was missing, did the trial court erroneously fail to consider the disputed evidence regarding the existence and validity of the purported signature of Appellant Onyeabor in the Restated CC&Rs?

Issue # 3: Did appellant Onyeabor have a confidential or fiduciary relationship with Declarant Centennial Pointe LLC, the 2000 property association, and Mr. Sanborn, as their agent and President, respectively, when all three failed to disclose to her, her real estate agent, and their own real estate agent, that at the time of recording the Restated CC&Rs, it falsely represented the ownership of a more than the majority of the Lots, and the amendments would be used to radically change her private property interests that were conveyed by warranty deeds?—

Issue #4: Based on the facts before the trial court, including Ms Onyeabor's pro se status, was Appellant Onyeabor's counterclaim against LBER and Mr. Raile, for assault, trespass improperly dismissed with prejudice, thereby denying Ms Onyeabor due process?

Issue # 5: Under either the Original CC&Rs or Restated CC&Rs, does the Appellee 2004 Association have any "legally protectable interest" to justify "exclusive jurisdiction and control" over Lots # 1 and # 2, whereas the filed Plat of the Subdivision, integrated into both CC&Rs, contained no designation of any "common areas," "common elements," or Lots and the entire Plat constitutes private property individually-owned "fee simple?"

Issue #6: Do the deeds to Appellant Onyeabor Onyeabor for Lot #1 and Lot #2 create any easement rights to Lot 1 and lot 2 in Plaintiff LEBR or the 2004 Association when neither of the Plaintiffs nor their predecessor-in-interest had any property interest in Lots 1 and Lot 2 at the time of the conveyance to appellant Ms Onyeabor?

Issue # 7: Does the Appellee 2004 Association have any “legally protectable interest” in making assessments against owners of Lots in the subdivision or in the maintenance of the “common areas” when the filed Plat of the Subdivision contained no designation of any “common areas,” and the so-called “common areas” is private property, or Lots individually-owned “fee simple.”?

Issue # 8: In light of the Restated CC&Rs, the unconventional inclusion of 74 % of the Appellant Onyeabor's Lots #1, and the inclusion of 61 % of Lot # 2, dedicated to the “exclusive jurisdiction and control” of the Appellee 2004 Association, does the failure of the Declarant the Association to amend the Plat to show the easements, make the Association’s efforts to enforce the Restated CC&Rs on Appellant Onyeabor an on-going violation of the criminal code of the City of Salt Lake City, rendering the CC&rs void and unenforceable by a court of law?

Issue # 9: In the light of the fact that the Appellee 2004 Association has the burden of proof to demonstrate it satisfied conditions precedent incorporated in the CC&Rs, did the Appellee 2004 Association show ample “legally protectible interest” sufficient to demonstrate both standing and as it related to the assessments of the Association against appellant Onyeabor either prior to its incorporation, or (b) prior to its substitution as a party in the litigation?

Issue # 10: Is the “intent” of Declarant, Centennial Pointe LLC, relevant to the meaning of the Restated CC&Rs material when the proffered evidence contradicted the unambiguous provisions of the Plat, and Mr. Sanborn clearly superseded the authority to amend for “minor adjustments” as stipulated in the Original CC&R?

Issue # 11: Assuming the validity of the Restated CC&Rs that had two purported Declarants, Centennial Pointe, LLC and appellant Onyeabor, did the trial court commit reversible error when it failed to recognize the significance of the two declarants having conflicting understandings and interpretations of what constituted a “Lot” and “Common Elements” in the Subdivision?

Issue # 12: In light of a) appellant Onyeabor's objection to the Restated CC&Rs as early as 2001, b) the 2000 Property Association’s dissolution, and six of the seven lot owners’ repudiation of the entire Association in 2002, c) and the formation of the Appellee 2004 Association after the filing of the present litigation in 2004, did Appellee 2004 Association satisfy its burden to show that there was no factual dispute that appellant Onyeabor had ratified the restated CC&Rs?

Issue # 13: Did LEBR, Donald Sanborn, Bruce Raile, and Appellee 2004 Association (allegedly assuming the position of the dissolved and repudiated 2000 Association) commit constructive fraud between 2001-2004 by acting on behalf of an Association that did not exist?

Issue # 14: Assuming the validity of the Restated CC&Rs, did the district court erroneously award attorney's fees against Appellant Onyeabor whereas the Appellee 2004 Association lacked standing to pursue its claims under the Restated CC&Rs, the document upon which it relied to claim entitlement to an award of attorney fees?

Issue #15: Based on evidence before the court, were the “votes” or changes made in an “oral agreement,” between the parties, as to the manner in which maintenance was done and the establishment that “owner” has authority on the areas designated as “Lots” on the Plat, which

occurred in 2002 and lasted until weeks prior to Plaintiffs instigating this legal action in October 2004, significant enough that Mr. Raile of LEBR had no authority( purportedly vested in him by a non-existent Association), to arbitrarily forego the “oral agreements” and reinstall the tenets of Restated CC&R in order to facilitate his position in an ongoing dispute over who owns and controls Ms Onyeabor’s Lots 1&2.

Issue # 16: In light of the following: a) the confidential and fiduciary relationships Plaintiffs have with Appellant Onyeabor, b) professional background of Appellant Onyeabor submitted with her affidavit to the trial court, c) the material observations contained in her son Alexander Udeh’s affidavit, and d) lack of justifications for Plaintiffs to harass, threaten and hound Ms Onyeabor for several years on her property under the auspices of a non-existent Association, and e) the lack of any lawful authority of Plaintiffs to bring this action, was Appellant Onyeabor’s counterclaims for intentional infliction of emotional distress improperly dismissed with prejudice and her affidavits stricken, thereby denying her due process?

## DETERMINATIVE LAW

Rule 56 Utah R. Civ.P.

(c) Motion and proceedings thereon.

The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if 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 any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

\* \* \* \* \*

(e) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. ...

Utah Code

§ 10-91-606

A parcel designated as common or community area on plat recorded in compliance with this part may not be separately owned or conveyed independent of the parcels created by the plat.

The ownership interest in a parcel described in subsection (1) shall:

- (a) for purposes of assessment, be divided equally among all parcels created by the plat, unless a different division of interest for assessment purposes is indicated on the plat or an accompanying recorded document; and
- (b) be considered to be included as in the description of each instrument describing a parcel on the plat by its identifying plat number, even if the common or community area interest is not explicitly stated in the instrument

§ 10-9a-803(2):

“Violation of any of the provisions of [Utah Code Ann. § 10-9a] or of any ordinances adopted under the authority of [Utah Code Ann. § 10-9a] is punishable as a class C misdemeanor.”

Salt Lake City Ordinances

SLCCO § 20.24.030 H

The side lines of all easements shall be shown by fine dashed lines. The widths of all easements and sufficient ties thereto to definitely locate the same with respect to the subdivision shall be shown. All easements shall be clearly labeled and identified.

SLCCO § 20.36.020

It shall be unlawful for any person to fail to comply with the provisions of this title, and failure to comply with the provisions of this title shall constitute a class C misdemeanor.

## STATEMENT OF THE CASE

This is an appeal from partial summary judgment granted to Plaintiff LEBR and Appellee 2004 Association pursuant to Rule 54(b) Utah R. Civ. P. The trial court's failed to recognize facts before the court which required (1) either a ruling in favor of, or full trial on, Appellant Onyeabor's counterclaims, and (2) reversal of Plaintiff LEBR's and the Appellee 2004 Association's case because a the evidence relied on establishes their lack of standing, or remand as well as factual disputes regarding the merits of their claims.

## SUMMARY OF ARGUMENTS

The Plaintiffs and Bruce Raile do not have standing to assert a “legally protectable interest” in the Restated CC&Rs because it is void, and is premised a non-existent easement and ownership



of property by “the Association” and LEBR. Undisputed and disputed questions of fact and lack of notice preclude dismissal of Appellant Onyeabor’s counterclaims. Lack of compliance with conditions precedent both as to amendment of the Original CC&Rs and the making and enforcing of assessments establish that the 2004 Association’s claims are not ripe.

## **I. STATEMENT OF FACTS**

### **A. Lay Out of Centennial Pointe Industrial Park Subdivision Plat & Premises**

1. On May 3, 1999, Centennial Pointe LLC filed a Plat map described as “THE SUBDIVISION PLAT OF AMENDED PORTION OF LOT 5, PHASE V, ASSOCIATION INDUSTRIAL PARK” (“Plat”) was recorded in the Salt Lake County Recorder’s Office in Book 99-5P of Plats at Page 117. (Record at 1453-1454; Transcript p 5 l. 25 – p 6 l 5.)

2. The Plat shows there are seven lots in the Centennial Pointe Industrial Park (“Industrial Park”). Lots # 1 and # 2 are owned by Appellant Onyeabor . LEBR, LLC is the owner of Lot # 3, which contains two buildings. Each one of the front three lots have independent entrances.

3. The Plat Map contains no designation of any “common areas,” “common areas and facilities,” “parking stalls,” or “common elements.” The Plat Map contains no designation of any easements in favor of the Appellee 2004 Association across Lots ## 1-2, or any other Lot. The Plat Map contains no designation of any easements in favor of any Owner of a Lot in the subdivision across Lots ## 1-2, or any other Lot

4. No amendment to the Plat has been made since its Original filing in 1998. (Record at 1367; Exhibit #if any 17 to Addendum II.)

5. Notwithstanding the foregoing, in June 2002, Bruce Raile and attorney, Dave Castleton erroneously asserted in a written memorandum given to Appellant Onyeabor that the “Property was developed as a planned unit development and common elements, [and] all the recorded documents and plats reflect that type of arrangement.” (Record at 1230 § 11.) Thus, even though it

was asserted that “ driveways *owned* by the Association you would still need common areas or cross easement agreements. The parking stalls are currently *controlled by the Association*,” (Record at 1229-1232 §14; Exhibit #24 to Addendum II; emphasis added,) no property interest held by the Association was presented to the court as a recorded deed, reserved easement, or any indication on the Plat. Bruce Raile and Dave Castleton casually inform Ms Onyeabor that they “we were making,” certain unspecified changes “back when you purchased your property.” Ms Onyeabor did not buy Property from Bruce Raile and Dave Castleton so Ms Onyeabor had no clue what they were talking about. In 2002, the Association, then extinct, had been repudiated, abandoned, the 2002 changes were in place and the representations by Bruce Raile and Dave Castleton about whatever they did to make the CC&Rs “a workable document,” (Record at 1229-1232 Exhibit # 24 to Addendum II), were faulty and some references reflected the Original CC&Rs. 67% is required to make changes in the CC&Rs, not 100% as the memo reflected. Ms Onyeabor explains how she understood their attitudes and their memo in her affidavit (Record at 2112 §9-14, Exhibit 7B)

“That I referred Mr. Raile constantly to the Plat, which is very clear that there were no easements and that there were nothing but Lots . . . That I had believed that Mr. Raile was simply misrepresenting the April CC&Rs since I was not aware of the August.”

**B. Status of Centennial Pointe Property Owners Association.**

6. Under CC&Rs and Restated CC&Rs, the word “Association” means “Centennial Pointe Property Owners Association, Inc., a Utah non-profit organization.” (Record at 1532, page 1, § 1.1; (Record at 1498, page 8, § 1.1).. The “Association shall be formed and maintained as a Utah nonprofit corporation.” (Record at 1498, page 8, § 6.1; (Record at 1532, page1, § 1.1).

7. On April 21, 2000, Non-Profit Articles of Incorporation for Centennial Property Owners Association, Inc. (“2000 Property Association”) were filed with the State of Utah.

8. Between April and December 2000, the developer, Donald Sanborn was President of the 2000 Property Association. (Record at 1100-1105; Affidavit of Donald Sanborn § 21.)

9. In September 2001 the 2000 Property Association was dissolved by the State of Utah.  
(Record at 2167-2168).

10. On or about February 2002, a meeting of the owners of the Lots was held. Owners of six of the seven Lots (who had been responsible for seventy-five percent (75%) of the assessments,) voted to change the CC&Rs to reflect the following changes

- a) exclusive control of Lots, as depicted on the plat map, by each owner
- b) exclusive maintenance of lots by individual owners only
- c) separation of water and security lights from each other
- d) free and independent use of property by each lot owner
- e) Centennial Pointe Association had no further right to anything on any owner's Lot without the owner's permission
- f) individual owners had no right to anything on any other owner slots without the permission of the lot owner.

The foregoing agreements, among others that were adopted at that time, were abided by the property owners. (Record at 2124-2129; Affidavit of Paul Bezdijan § 13-14.)

11. In response to the May 5, 2002 letter Appellant Onyeabor reaffirming the February 2002 position, (Record at 1371, Exhibit 16, Addendum), acting President Bruce Railie of the now dissolved 2000 Association, forwarded to appellant Onyeabor the “requirements” that were necessary to amend the reported Restated CC&Rs. These included securing approval of the lenders as well as amending the Plat.(Record at 1229-1232 § 11 and § 14.) No explanation was given why these requirements were not followed when the Original CC&Rs were purportedly amended on August 24, 2000.

12. During September 2004, this litigation against appellant Onyeabor was filed on behalf of an undefined and non-existent “Centennial Property Owners Association”.

13. On November 29, 2004, Appellee 2004 Association (“2004 Property Association”) was incorporated.

14. In September 2005, the Property Association was joined as a party.

C. Original and Restated CC&Rs, Declarants, and Owners

15. On April 19, 2000, Centennial Pointe, L.L.C. recorded a Declaration of Covenants,

Conditions and Restrictions of Amended Portion of Lot 5, Phase V, Association Industrial Park (“Original CC&Rs”). (Record at 1532-1568.)

16. On April 24, 2000, Centennial Point, L.L.C. conveyed by Special Warranty Deed to Myriam Onyeabor Lot # 1 in Centennial Pointe. (Record at 2176.) Schedule A to both CC&Rs indicated Lot # 1 was 23,384 Square Feet. The Building Size was 6,050 square feet, or approximately 26% of her Lot. (Record at 1532 , Exhibit 2, Addendum II).

17. Under the Original CC&Rs, “until the Declarant has sold all Lots, Declarant shall have the right unilaterally to amend and supplement this Declaration and the Plat to correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Property” (Record at 1532 , Section XIV § (b)).

18. In June of 2002, then acting President Raile (of a dissolved 2000 Association) and attorney David Castleton assured Appellant Onyeabor that

we [which did not include her] spent a considerable amount of *time back at the time you purchased your property*[April – August 2000] *to make the declaration a workable document.* It is designed to provide a method of maintenance and operation *of the entire property that is in the best interest of all owners.* It is true that you give up some of the flexibility that you would have if you were the owner of your own separate parcel.

(Record at 1229-1232 § 17; emphasis added.) Changing the scope of authority of the Association to provide a “method of maintenance in operation of the entire property” conflicts with the limited, asserted authority of the Declarant to “correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Property” (Record at 1532 , Section XIV § (b)).

19. Notary Crockett stated that on August 3, 2000 Appellant Onyeabor executed the Restated CC&Rs, on page 31; nonetheless, at that time the document was missing page 32, that contained the signature notary blocks for Appellant Onyeabor and Mr. Sanborn, Manager of Centennial Pointe, L.L.C. Page 32 also contains the tax serial numbers for each of the seven Lots in the

Subdivision that was necessary to record the same in the Salt Lake County Recorder's Office<sup>1</sup>

(Record at 1159- Notary Crockett's deposition)

20. Evidence before the trial court indicated that Appellant Onyeabor was unaware of the content of the Restated CC&Rs (Record at 1498)<sup>2</sup> and was objecting to efforts by Mr. Raile to enforce the same as early as 2001, (Record at Affidavit of Paul Bezidian Record at 2124-2129, Exh 8; Mill at 2131-2135 Exh 9; Healey at 2136-2141 ) Both of the realtors involved in the sale of Lot # 2 knew nothing about the Restated CC&Rs;<sup>3</sup> (Id.) neither did Paul Bezidian who purchased four lots in Centennial Pointe prior to Bruce Railie's purchases. (Id.) Significantly, in June of 2002 , Bruce Raile forwarded to Appellant Onyeabor legal advice regarding the Restated CC&Rs that made no claim that

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<sup>1</sup> . Ms Crockett's deposition (Record at 922-1177) ("Counsel: So you decided to notarize it and put your seal on the page where she `actually signed to show that's what you notarized was her signature? Ms Crockett: I don't believe this page was there. Counsel: Okay, you don't remember seeing page 32. Ms Crockett: If I had seen that, I would have notarized that.")

<sup>2</sup> Affidavit of Appellant Onyeabor, November 2005. ("I heard for the first time that the CC&Rs had changed in the fall of 2004 and that I heard it from Mr. Trueblood, an attorney. . . I state categorically, that I was not party in any way, shape or form to the changing of the CC&R on Centennial Point." Record at 1484-1486 § 11Exhibit 7B.

<sup>3</sup> Mr. Travis Healey, (Affidavit of 17<sup>th</sup> December 2005 Record at 2136-2139 ¶¶ 3-9 ("I represented Myriam Onyeabor during the time that she purchased Lot 1 and Lot 2 of Centennial Point Industrial Park from Mr. Sanborn . . . That I don't recall Mr. Sanborn mentioning to me that he was changing the CC&Rs . . . That Myriam Onyeabor had insisted on seeing the CC&Rs prior to purchasing Lot 1. . . That had I been aware of it, I would have alerted Ms Onyeabor immediately. That the CC&Rs had not been an issue during the second signing, Lot 2 because there was nothing to indicate to me that the CC&Rs available at the time was different from the original one that I gave her a few months earlier. . . That Ms Onyeabor called me in late fall of 2004 telling me that she just heard that the CC&R of Centennial Point had been changed back in 2000. . . I was quite surprised.") Mr. Bob Mills, Affidavit of December 13 , 2005. ("Subsequent to the sale of Unit one to Myriam Onyeabor, Mr. Sanborn hired commerce CRG/Robert Mills to represent him and sell the rest of the units. On his behalf, I submitted offers, bids, counteroffers from Travis Healey/Myriam Onyeabor to Mr. Sanborn. . . That [for Lot # 1] I delivered CC&Rs to Mr. Travis Healey for him to deliver to his client Ms Onyeabor. That Myriam Onyeabor called me in early 2005 telling me that she just heard that there were CC&R changes back in 2000. . . That , later, when I contacted Mr. Sanborn to inquire about the CC&Rs being changed, he reminded me that the CC&Rs had been changed at the request of Mr. Raile, before Mr. Raile bought his property, and as a condition to buying his own property from Mr. Sanborn . . . That I didn't know the nature or scope of the change") ((Record at 2131-2135 § )

she had been aware of the same when she acquired Lot # 2. (See Record at 1229-1232 § 17.)

Notwithstanding her signature on the Restated CC&Rs, Plaintiffs' counsel correctly proffered to the trial court (without factual dispute) that "what she says is misrepresented to her is, they didn't tell me about the restated declaration.[CC&Rs.]" (Transcript of May 2, 2007 hearing at p. 37, l. 21-22.)

21. On August 14, 2000, Mr. Sanborn executed the Restated Declaration and had a notarized the same day. The notarization of his signature was done by a different notary than Notary Crockett. (Record at 1498-1530).

22. On August 24, 2000 a Restated Declaration of Covenants, Conditions and Restrictions of Amended Portion of Lot 5, Phase V, Association Industrial Park ("Restated CC&Rs") were recorded. (Record at 1498, Exhibit 3) Appellee Onyeabor was listed as the "Declarant" as to Lot # 1. (Id.) Centennial Point, L.L.C. was listed as the "Declarant" as it related to Lots ## 2-7. (Id.)

23. Mr. Sanborn stated that he "signed the Restated CC&R on behalf of Centennial Point LLC," and that "Centennial Point LLC's intent was that the Restated CC&Rs would benefit and burden each Lot." (Record at 1100-1105, § 18, § 14 ) Overlooked by the trial court was the intent of Appellant Onyeabor regarding Lot # 1 (where she was the Declarant,) as well as the entire Plat.

24. On September 28, 2000, Centennial Point, L.L.C. conveyed by warranty deed to Appellant Onyeabor Lot # 2 in Centennial Pointe. (Record at 2175) Exhibit A to both CC&Rs indicated that Lot # 2 had 15,554 square feet, of which 6,100 compromised the structure of the building, or approximately thirty-nine percent (39%) of the total area of the Lot # 2.

D. Relief Sought From the Court Regarding Lot # 1

25. In Plaintiffs Opening Memorandum for Partial Summary Judgment, Plaintiffs sought a ruling that "[a]lternatively, Plaintiffs request an Order from this Court declaring that Lot 2 is encumbered by the Restated Amended CC&Rs and that Lot 1 is encumbered by the April 2000 CC&Rs." (Record at 881.)

26. The Memorandum in Opposition filed by Appellant Onyeabor stated she was “accepting only their motion to subject Lot 1 to the April 2000 CC&Rs.” (Record at 1337.)

27. The Plaintiffs’ Reply Memorandum provided the following:

Specifically, the April 2000 CC&Rs were recorded prior to Ms. Onyeabor purchasing Lot 1, and therefore, she was on notice of those provisions, as a matter of law. See Plaintiffs’ Memorandum at 13.

The footnote to the foregoing stated:

Alternatively, at a minimum, the Restated Amended CC&Rs burden Ms. Onyeabor’s Lot 2 because the CC&Rs were recorded before Ms. Onyeabor purchased Lot 2, and Lot 1 is burdened by the April 2000 CC&Rs. See Plaintiffs’ Supporting Memorandum at 12 to 13.

(Record at \_\_\_\_\_.)

28. There was no motion filed by any party indicating that the quiet title-declaratory judgment counterclaim of appellant Onyeabor was before the court at the May 2, 2007 oral argument. (Transcript of hearing on May 2, 2007, page 110 – page 113.)

F. Striking Numerous Affidavits and Rulings in Entirety

29. The Court granted the Plaintiffs’ Motions to Strike the first set of Affidavits of Appellant Onyeabor, James Walker, Robert Mills, Travis Healey, Chinedum Alexander Udeh, American Document Examiner’s Expert Report and Exhibits 15-21 to Appellant Onyeabor’s Memorandum in Opposition. (Record at 1337) The Court relied “good cause” and “the reasons set forth” in Plaintiffs’ Motions. (Record at 3185, Pages 1-2.)

30. On October 1, 2007, the trial court filed the written order granting them that motion for Partial Summary Judgment filed by plaintiff LEBR and the 2004 Association. (Record at 2591-2597) The order dismissed Appellant Onyeabor's counterclaims for quiet title, trespass, assault, constructive fraud, and intentional affliction of emotional distress.

31. On January \_\_\_, 2008, the trial court filed the written order amending the October 1, 2007 nunc pro tunc to correct a clerical error in a previous order regarding the award of attorney's fees

and costs. (Record at 3185-3196.)

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW

#### A. Review of Granting Summary Judgment

Under Utah Rule of Civil Procedure 56(c) summary judgment is only appropriate where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Ford v. American Express Fin. Advisors, Inc., 2004 UT 70, P9, 98 P.3d 15 (quoting Utah R. Civ. P. 56(c)) (other quotations and citation omitted). Because "[t]he propriety of a trial court's summary judgment order is a matter of law," Russell v. Lundberg, 2005 UT App 315, P9, 120 P.3d 541, "'we need review only whether the trial court erred in applying the relevant law and whether a material fact was in dispute,'" Ford, 2004 UT 70 at P9 (quoting WebBank v. American Gen. Annuity Serv. Corp., 2002 UT 88, P13, 54 P.3d 1139).<sup>4</sup>

#### B. Review of Admissibility of Evidence Submitted By A Pro Se Litigant

Just as a trial judge's discretion is limited when admitting evidence "has a high potential for unfair prejudice,"<sup>5</sup> the same type of limited discretion is appropriate when striking affidavit evidence submitted by a pro se litigant and in response to a motion for partial or complete summary judgment. The Utah Supreme Court has stated that:

'as a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar.' Nevertheless, ... 'because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.' ... (bracketed language in Original) (quoting Heathman v. Hatch, 13 Utah 2d 266, 268, 372 P.2d 990, 991 (1962)).

Accordingly, this court generally is lenient with pro se litigants. Individuals have a right to represent themselves without being compelled to seek professional assistance. Where they are largely strangers to the legal system, courts are understandably loath to sanction them for a procedural misstep here or there.<sup>6</sup>

However, once a determination is made regarding the admissible nature of the evidence properly

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<sup>4</sup> The Cantamar, L.L.C. v. Champagne, 2006 UT App 321 P 6, 142 P.3d 140.

<sup>5</sup> Murdock v. Springville Mun. Corp. (In re General Determination of the Rights to the Use of All the Water), 1999 UT 39, P27, 982 P.2d.65 (Utah 1999)

<sup>6</sup> Lundahl v. Quinn, 2003 UT 11 PP 3-4, 67 P.3d 1000.



presented to the trial court, a reviewing appellate court views "the facts, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party."<sup>7</sup>

In addition, when granting a motion for summary judgment, a trial judge must consider each element of the claim under the appropriate standard of proof. *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah App. 1994). Accordingly, [<sup>\*\*8</sup>] in evaluating whether summary judgment should be granted, we must take into consideration the eventual standard of proof for each element at trial on the merits. *Robinson v. Intermountain Health Care*, 740 P.2d 262, 264 (Utah App. 1987).<sup>8</sup>

### C. Dismissal of Counterclaims

Granting partial summary judgment when admissible, disputed evidence is before a trial court, is an abuse of discretion as a matter of law.

... The court invoked summary judgment although Technicians' level of exposure and even the operating definition of toxic level are vigorously contested issues of fact. In so doing, the court abused its discretion. The right of supplicants to prove that which they are able in court is a fundamental tenet of our jurisprudence. See *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, P66, 44 P.3d 663 (stating that by inappropriately dismissing claims, "the district court unconstitutionally denied [the plaintiffs] the opportunity to have their day in court"); *Gitsch v. Wight*, 61 Utah 175, 178-79, 211 P. 705, 706 (1922) ("That every person has a right to his day in court and an opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion. . . .").<sup>9</sup>

## II. DISMISSAL OF AFFIDAVITS SUBMITTED BY APPELLANT ONYEABOR WAS ERROR

Under Rule 56(e) Utah R. Civ. P. and other case law, a trial court has discretion to strike affidavits not admissible as evidence.<sup>10</sup> The Court struck the following pro se prepared affidavits filed in response to the Motion for Partial Summary Judgment: Appellant Onyeabor; James Walker; Robert Mills and Travis Healey; Chinedum Alexander Udeh, and Exhibits 15-21 to Appellant Onyeabor's Opposition Memorandum filed Dec 13, 2006. The Court did so for reasons "set forth" in Plaintiffs various motions to strike and for "good cause." (Record at 3185 .)

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<sup>7</sup> *McEwan v. Mountain Land Support Corp.*, 2005 UT App 240, 116 P.3d 955.

<sup>8</sup> *Republic Group v. Won-Door Corp.*, 883 P.2d 285, 289 (Utah Ct. App. 1994)

<sup>9</sup> *Alder v. Bayer Corp.*, 2002 UT 115, P82, 61 P3d. 1068 (Utah 2002)

<sup>10</sup> See *Murdock v. Springville Mun. Corp.* (In re General Determination of the Rights to the Use of All the Water), 1999 UT 39, P 26, 982 P.2d 65 (Utah 1999)

The standard of review for an abuse of discretion allows for appellate court review of each affidavit.<sup>11</sup> The affidavits and exhibits of Appellant Onyeabor were struck in their entirety. A review of each factual claim relied on in the affidavit cited in the foregoing facts, or as noted hereafter, conforms with the requirements personal knowledge, lack of hearsay, and specific evidentiary assertions that established a prima facie case as a defense or a dismissed counterclaim. Overall, each affidavit of Appellant Onyeabor referred to complied with the requirements of admissibility. As noted above, various portions of the affidavits and exhibits had already been previously admitted in hearings before the trial court.

‘[B]ecause of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.’ ... (bracketed language in original) (quoting *Heathman v. Hatch*, 13 Utah 2d 266, 268, 372 P.2d 990, 991 (1962)).

Accordingly, this court generally is lenient with pro se litigants. Individuals have a right to represent themselves without being compelled to seek professional assistance. Where they are largely strangers to the legal system, courts are understandably loath to sanction them for a procedural misstep here or there.<sup>12</sup>

Based on the foregoing and following citations to the Affidavits and Exhibits that follow, the trial court abused its discretion in striking the foregoing affidavit in *their entirety*. A *pro se* litigant is entitled to the benefit of the admissible facts placed before the court by herself or any other party to the proceeding. Affiants made statements relevant to events they were part of or remarks that they heard.

### III. DISMISSAL OF APPELLANT ONYEABOR’S COUNTERCLAIMS DENIED HER DUE PROCESS

Appellant Onyeabor was denied due process of law the trial court because of lack of notice and the presence of admissible evidence in the record supporting her claims.

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11 Id. P 27. (“Here, the trial court granted the motion to strike the Murdock affidavits for “the reasons suggested by Springville.” Springville argued in detail that the affidavits were riddled with inadmissible testimony. We have reviewed the affidavits ourselves. Many of the facts they assert are not based on personal knowledge, lack foundation, are conclusory, and contain hearsay.”)

12 Lundahl v. Quinn, 2003 UT 11 PP 3-4, 67 P.3d 1000.

A. Quiet Title and Declaratory Judgment.

Appellant Onyeabor was not provided with adequate notice that there was any motion pending that would justify dismissing with prejudice her counterclaim for quiet title/request for declaratory judgment. Both the trial court and Plaintiffs' counsel admitted that it had not been submitted to the court for consideration.

In addition, based on uncontested facts, for reasons reviewed in part IV, *infra*, the Restated CC&Rs are void.

For reasons reviewed in part V, *infra*, under the long-standing "stranger to the deed" doctrine, the deeds conveying Lots # 1 and # 2 did not allow plaintiff LEBR or the Association to claim any easement rights in the Lots because at the time of the conveyance to Appellant Onyeabor, neither Plaintiff owned any property interest in Lots # 1 and # 2.

For reasons reviewed in part VI, *infra*, under the contract provisions of the Original CC&Rs and the Restated CC&Rs, Plaintiffs never demonstrated that the conditions precedent in the Original CC&Rs necessary to amend the CC&Rs were complied with. Absent compliance, the Restated CC&Rs is either a nullity, (depriving Plaintiffs LEBR and the 2004 Association of any "legally protectable interest," necessary to assert standing to enforce the same,) or the purported Restated CC&Rs are not "ripe" for the entry of a judicial decision. For reasons also reviewed in part VII, *infra*, and for all of the foregoing, the 2004 Association is devoid of any "legally protectable interest" that allows it to enforce the Restated CC&Rs.

B. Trespass and Assault Charges

The trespass and assault counterclaims against Mr. Raile were dismissed because of the belief that (1) the common areas were the same as between the two CC&Rs, and (2) the Restated CC&R would apply retroactively to Lot # 1. (Record at 8189 page 4,5 § b.) For reasons noted below in Parts IV, V and VI, the two conclusions are patently wrong. Thus, the dismissal of the trespass and assault claims raised by

appellant Onyeabor were erroneous as a matter of law and must be reinstated on remand.

C. Admissible Evidence Before the Trial Court as to Constructive Fraud was Ignored

The trial court's ruling regarding fraud was based on the traditional nine elements of fraud. The trial court find there had been no false representation by either LEBR or the Association.

(Record at 3185, page 6, § 2h.) Missing from the Court's ruling, however, is the determination regarding a duty owed for constructive fraud or fraudulent non-disclosure.

The claim of fraudulent nondisclosure requires a showing of the following: "(1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate." <sup>13</sup> Admissible evidence before the court satisfied all three requirements.<sup>14</sup>

1. Content of the Restated CC&Rs Were Not Disclosed

The Plaintiffs relied on testimony of Appellant Onyeabor from the preliminary injunction hearing that her signature was on the Restated CC&Rs and that she was "familiar" with the contents of the document. (Record at \_\_\_\_\_.) The context of the questions minimizes the scope of her statements. She was not allowed on cross-examination to explain her understanding as to the content of the Restated CC&Rs. Furthermore, the concept of being "familiar" with the Restated CC&Rs was neither defined nor was a time frame established when this occurred. Ms Onyeabor, a pro se litigant ,

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<sup>13</sup> Hermansen v. Tasulis, 2002 UT 52,P24, 48 P.3d 235.

<sup>14</sup> Counsel for the plaintiffs LEBR and the 2004 Association addressed the duty of disclosure of the contents of the Restated CC&Rs at oral argument. "With respect to the property owners Association, Your Honor, it -- you didn't have a duty to speak to her either, either. They didn't sell the property to her, and her own testimony is that there were many meetings, it wasn't organized until after Mr. Raile bought his property and LEBR bought its property in the development in November. So it really wasn't even in existence -- it wasn't necessary until these Lots started being sold to other parties in, other than Mr. Sanborn so she can't sustain a claim for fraud against the Property Owners Association, as a matter of law because it wasn't organized, by her own testimony and her deposition, until December 2000." (Record at May 2nd Hearing 2007 page 38 l., 39 l..) These oral statements contradict the positions taken in the Plaintiffs' undisputed facts, affidavits and depositions before the Court, and recorded documents.

was served on Friday the 15<sup>th</sup> of October at 1: 53 pm that she had a hearing 2 days later, on Monday the 18<sup>th</sup> of October. Morning. Judge Henriod questioned her preparedness, given the short notice.

(Record at Oct, 18<sup>th</sup> hearing, page 6 ).Judge Henriod::

“What he’s asking is that you agree to go ahead with the hearing in spite of the fact that you haven’t had that much time since you were actually served with notice of this hearing.”

In addition, the terms used to cross examine her were clearly vague. Plaintiffs asked :

“Do you understand the CC&Rs that you signed. . .” Ms Onyeabor signed the original CC&Rs and she never denied it. In August 2004, months prior to the lawsuit, she quoted the CC&Rs in her memorandum to Mr. Raile (Record at 1375; § 5 Exh 18), and she was clearly talking about the “Lots” as per the Original CC&Rs. Appellant Onyeabor presented much more admissible evidence than simply an assertion that she "had no recollection" of signing the same or that she was simply “unaware of the content.” A failure to openly disclose the existence of the same included evidence that (1) the two real estate agents representing both sides in the sale of Lot # 2, and who had the duty of passing the CC&Rs to her, were unaware of the existence of the same, much less its content, (Bob Mills, Record at 2131-2135 Exh 9 and Travis Healey, Record at 2136-2141 Exh. 10 ) (2) the Plat was not amended to reflect the radical changes introduced by “common elements” in the Restated CC&Rs, (3) the requirements to amend the original CC&Rs were not complied with, (Record at 1532 and Record at 1498) and (4) reliance on the Original CC&Rs was expressly represented in the deed to Lot # 2. There was no evidence introduced by any party as to their involvement in disclosing the material amendments to the Original CC&Rs; indeed, it was not disputed at trial there had not been open disclosure.( Record of May 2, 2007 Hearing, pages 38-39). Plaintiffs’ attorneys asserted they didn’t have to tell Ms Onyeabor.

In the June 11, 2002 Memorandum from Attorney Dave Castleton and Bruce Raile (Record at 1229-1232 § 17), they casually inform Ms Onyeabor that “we” were changing the CC&Rs just about “the time you purchased your property to make the declaration a workable document.” Since the letter

from Dave Castleton (Bruce Raile's attorney), and Bruce Raile, says "we were changing...", they would seem to support Mr. Bob Mills' testimony, (Recorded at 2131-2135 Exh 9 ) corroborated by Ms Onyeabor's testimony, Affidavit #3 (Recorded exhibit 7B, Addendum II Record at 2365- 2377 ), which is that Mr. Sanborn's explanation, in 2004 when he was confronted about the restated CC&Rs had been that Mr. Raile demanded a new set of CC&Rs, as a condition to buy Lot #3, and Sanborn told Mr. Raile to just go ahead and make one. They admit in the memorandum that they produced the Restated CC&Rs. There would be no need to inform Ms Onyeabor, of their "intent" if Ms Onyeabor were participant in the change because she would be aware of the "intent," how, why and when the changes were made. Bruce Raile and Dave Castleton did not bother to find out what Ms Onyeabor's "best interest" was, especially considering Raile's and Castleton's gross misinterpretation of their own Restated CC&Rs, evident in memorandum of June 2002.

## 2. Change In The Definitions Of "Common Area" Was Material

The trial court determined that the "common areas" of both CC&Rs was the same. (Record at 3185-2196.) This is patently wrong.

### a. Role of "Common Areas/Elements" in Both CCC&Rs

The Original CC&Rs specifically states that the "Common Areas" each Lot will have "immediate access" would be on the Plat. (Record at 1532, § 3.1)

[t]he Plat shows each Lot, its lot number, location, dimensions from which its size may be determined, and the Common Areas to which it has immediate access. The undivided ownership interest in the Common Areas and Facilities appurtenant to a Lot may not be partitioned from the balance of the Common Areas and Facilities.

The easement in favor of the Association or other property owners was limited to the Common Areas.

"The Association shall have a non-exclusive easement to make use of the Common Areas as may be necessary or appropriate to perform the duties and functions which it is obligated or permitted to perform pursuant to this Declaration and/or Bylaws." (Record at 1532, § 4.7)

Reciprocal easement rights were also subject to the scope of the Common Areas. "Subject to the

limitations in this Declaration, any Owner shall have the non-exclusive right to use and enjoy the Common Areas” (Record at 1532, § 4.7) The basis for assessments by the Association is as also tied to the scope of the Common Areas. (Record at 1532, § 8.2)

The total annual Assessments against all Lots shall be based upon advance estimates of cash requirements by the Association to provide for the payment of all estimated expenses growing out of or connected with the maintenance and operation of the Common Areas, ...

b. Definition of “Common Areas” Is Limited in Original CC&Rs

Section 1.5 of the Original CC&Rs specifically explained that

“Common Areas and Facilities” or “Common Areas” shall mean, refer to, and include:

The Property and interests therein, excluding the Lots;  
All Common Areas and Facilities designated As Such On The Plat;  
All portions of the Property not specifically included within individual Lots; and  
All other parts of the Property normally in common use or necessary or convenient to its use, existence, maintenance, safety or management.

Thus, while “[e]ach Owner shall have the right,... to ingress and egress over, upon and across the Common Areas as reasonably necessary for access to such Owner’s Lot,” (Record at 1498 ,§ 4.7,) this right of “ingress and egress” could not be interpreted as including the "Lots" designated on the Plat.

In addition, an appurtenant right to each Lot included the right “to park, and have its invitees and licensees park, in such parking stalls as do exist on the Property from time to time.” (Record at \_\_\_\_,§ 4.7,) “[P]arking stalls” are not defined; nonetheless, Section 12.8 states that “[a]ll parking stalls are shown on the Plat as Common Area.” (Record at ---- § 12.8) There are no "parking stalls,” much less any "Common Area” designated on the Plat. In addition, the definition of "Common Area” excluded Lots held by individual Owners; so does Utah Code Ann. § 10-9a-601, which states that ‘common areas’ are not “individually-owned property, are not “Lots” or “units.” Utah Subdivision Code 57-8-6 states, “Each unit owner shall be entitled to the exclusive ownership and possession of his unit.”

c. Restated CC & Rs Radically Redefined “Common Areas”

Under the Restated CC&Rs, there was no definition on or reference to “Common Areas” and “Common Area Facilities”. A re-defined “Common Elements” and meant “all Utility lines, lighting not attached to Buildings, fences, landscaping, Accessways, parking spaces, loading/receiving areas, and all other portions of the property other than the Buildings.” The previous reference to “parking stalls” was eliminated. The previous definitions of "Buildings" was narrowed to the “the areas designated as ‘Lease Spaces’ on the Plat.” Thus, the new “Common Elements” -- interchangeably referred to by the Plaintiffs and the trial court judge as “Common Areas” – now included “all other portions of the Property [the entire Plat] except the [structure of the] Buildings.” (Record at 1498, § 1.6) The Restated CC & Rs was accepted by the trial court and found to be binding on the “fee simple title” held by appellant Onyeabor on Lot # 1 and Lot # 2.

That change, however, between the two CC & Rs was material: Seventy-four percent (74%) of Lot # 1, (or the area outside of the Building structure,) and sixty-one percent (61 %) of Lot # 2 were subject to easements in favor of the Association and the other Owners. The 2000 Association, while extinct, and appellant Onyeabor was not even a member, was now assessing her for their "exclusive management, control, maintenance and repair"; and unqualified “ownership” rights. Plaintiff LEBR was asserting unrestrained use of the parking areas in front of or into buildings by him and his employees. Onyeabor was being fined and penalized for using her ‘fee simple ’ property. (see assessments, Record at 665 Exhibit 23) The court failed to consider the evidences before it.

2. Knowledge of Mr. Sanborn, 2000 Association and Mr. Raile

The affidavit of Mr. Donald Sanborn, President of the 2000 Association, clearly established the knowledge of the content of the Restated CC & Rs. The affidavit of Robert Mills, indicated they had been written by Bruce Ralie, President of Plaintiff LEBR, with their adoption being made a condition



of his purchase of Lot # 3 in November of 2000.

3. Fiduciary and Confidential Relationship Between Appellant Onyeabor and Mr. Sanborn, 2000 Association, and Mr. Railie

As President of the 2000 Association, the limited number of Lot Owners, and as the exclusive member of the Association, Mr. Sanborn had a fiduciary and confidential relationship with appellant Onyeabor that required disclosure. This duty was imputed to the 2000 Association as well as Centennial Pointe, LLC. To the degree that Appellee 2004 Association seeks to assume the role of the 2000 Association, it must be responsible for that Association's duty to disclose. To the degree Bruce Railie became president of the Association in December 2000, both he and the Association retained in obligation to disclose what had occurred in amending the Restated CC & Rs, especially when he had actual knowledge in 2002.

Having established admissible evidence regarding the foregoing, Appellant Onyeabor has established a prima facie case of constructive fraud that should be reinstated.<sup>15</sup>

IV. BOTH CC&RS ARE VOID BY REASON OF VIOLATION OF CRIMINAL LAW

The "Plat" defined by both CC&Rs was presented to the district court as part of Appellant Onyeabor's response to the Appellee 2004 Association's Motion for Partial Summary Judgment. (Record at 1454) and the presentation made by the Plaintiffs (Record at 1453.)

A. The Subdivision Plat Is Integrated In Both CC&Rs

As written, the Original and Restated CC&Rs contain explicit references to the recorded

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<sup>15</sup> Apparently, the 2004 Association and Plaintiff LEBR remained unwilling in the trial court to acknowledge the radical change from "common areas" to "common elements," and its imposition of massive easements and assessment liability on the other two previously unmolested property owners. "So the point I want to make, Your Honor, is that there is not a significant distinction in what constitutes common area between the Original declaration and the restated declaration. In both declarations the parking areas, the roads, sidewalks and the landscaped areas and lighting are all common areas in both declarations." (May 2, 2007 hearing, pp. 12-13) For reasons stated in part , infra, a change was material.

Plat map in definitional terms. Both CC&Rs define the “Plat” as “THE SUBDIVISION PLAT OF AMENDED PORTION OF LOT 5, PHASE V, ASSOCIATION INDUSTRIAL PARK, recorded in the Official Records (as defined below) in Book 99-5P of Plats at Page 117, and all modifications, Amendments and/or all supplements thereto recorded in accordance with this Declaration.” (Record at 1532 § 1.20; Record at 1498, § 1.20) The Declarant’s amendment authority included amending the Plat. The right to “amend and supplement this Declaration and the Plat to correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Property.” (Record at 1532, § XIV (b); Record at 1498, § XIV § (b).) “Until the Declarant has sold all Lots, no amendment to the Plat or to any provisions of this Declaration shall be accomplished or effective unless the instrument through which the amendment is purported to be accomplished is consented to in writing by the Declarant.” (Section XIV § (c).)

**B. Past and Present Law Is Incorporated Into Original and Restated CC&Rs**

It is well settled that in the exercise of its police power, a state can enact regulations or laws reasonably necessary to secure the health, safety, morals, comfort or general welfare of the community regardless of whether such laws or regulations affect contracts incidentally, directly or indirectly. Furthermore, we are in agreement with the principle that: ‘The right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of that contract.’<sup>16</sup>

**1. Mandatory State Laws**

Two mandatory state laws require recordation on a plat of “common areas” as well as amendment of a Subdivision Plat, a portion thereof, if a Lot that has to be changed. A “parcel designated as common or community<sup>17</sup> area on plat recorded in compliance with this part may not be separately owned or conveyed independent of the parcels created by the plat.”<sup>18</sup> Under state law, the municipality may, provided notice was given, with or without a petition, consider and resolve an

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<sup>16</sup> George v. Oren, Ltd., 672 P.2d 732, 738 (Utah 1983) (footnotes omitted)

<sup>17</sup> The phrase "or community" was added to the statutory provisions in 2007

<sup>18</sup> Utah Code Ann. § 10-9a-606

“alteration, or amendment of a subdivision plat, a portion of a subdivision plat, or any lot contained in a subdivision plat.”<sup>19</sup> (Record at 1367, Wheelwright’s affidavit, Exh.)

## 2. Mandatory Municipal Laws

“[A] municipality may enact an ordinance imposing stricter requirements or higher standards than required by [Utah Code Ann. Title 10, Chapter 9a]<sup>20</sup> “The subdivider shall prepare maps consistent with the standards contained in this Title.” (SLCCO § 20.24.050) A “Final Plat” is a “map, prepared in accordance with the provisions of title 57, Utah Code Ann., 1953, and of this Title, designed to be placed on record in the office of the Salt Lake County Recorder.” (SLCCO § 20.08.110) On the Final Plat, a “Lot” means “a parcel or portion of land established for purposes of sale, lease, finance, division of interest for separate use, separate from other lands by description on a subdivision map and/or parcel map.” (SLCCO § 20.08.180.) On the Final Plat

[t]he side lines of all easements shall be shown by fine dashed lines. The widths of all easements and sufficient ties thereto to definitely locate the same with respect to the subdivision shall be shown. All easements shall be clearly labeled and identified.

(SLCCO § 20.24.030 H).

### C. “Common Areas,” “Parking Stalls,” “Common Elements,” and “Easements” Are Not Identified on the Plat

It is undisputed the “Common Areas” or “Common Elements” and “easements” are not identified on the Plat. Furthermore, the “non-exclusive” easements within the “Common Areas” identified as belonging to the Association and other Owners are likewise not identified on the Plat nor does the association have title to show.. No affidavit, deposition or pleading can contradict this fact. “Plats are writings and parol evidence is inadmissible to explain or modify an unambiguous plat. . . . oral testimony may not be admitted to vary or contradict the terms of a document[.]”<sup>21</sup>

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19 Utah Code Ann. § 10-9a-608(1)(a).

20 Utah Code Ann. § 10-9a-104(1).

21 Rowley v. Marrcrest Homeowners' Ass'n, 656 P.2d 414, 418-419 (Utah 1982) (citations

**D. By Incorporating Violations of Mandatory State and Municipal Criminal Conduct Law Both CC&Rs Are Void**

Failure to adhere to stated municipal land use requirements is a criminal offense under state and municipal law. By state law, “[v]iolation of any of the provisions of [Utah Code Ann. § 10-9a] or of any ordinances adopted under the authority of [Utah Code Ann. § 10-9a] is punishable as a class C misdemeanor.” Utah Code Ann. § By municipal ordinance, “[i]t shall be unlawful for any person to fail to comply with the provisions of this title, and failure to comply with the provisions of this title shall constitute a class C misdemeanor.” (SLCCO § 20.36.020 )

A contract or a deed that is void cannot be ratified or accepted, ... ‘A thing is void which is done against law at the very time of doing it, and where no person is bound by the act’ and anyone can attack its validity in court.<sup>22</sup>

The Plat is integrated into both CC&Rs. The failure to record on the Plat the “common area,” “common elements,” reciprocal easements, and/mortgagee on or “parking stalls” was and is an on-going criminal offense. “[T]he enforcement of a state's criminal code constitutes a clear and substantial public policy.”<sup>23</sup> The uncontroverted integration of on-going criminal conduct in both CC&Rs violates the foregoing public policy.

Most criminal statutory prohibitions provide narrow and clear-cut definitions of a specific public policy designed to protect both society at large and specific individuals from antisocial acts. The law ought not to allow those prohibitions to be circumvented,<sup>24</sup>

**V. CONVEYANCE DEEDS AS TO APPELLANT ONYEABOR DID NOT CONVEY EASEMENTS RECITED IN THE ORIGINAL AND RESTATED CC&Rs**

Another important policy that requires a negation of any easements claimed in favor of the plaintiffs-Appellee 2004 Association is that which favors the use of deeds unencumbered by easements in favor of third-persons that hold no interest in the real property at the time of its conveyance. This doctrine has been judicially recognized in Utah since 1936 and is supported by legislative enactment.

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omitted.)

22 Ockey v. Lehmer, 2008 UT 37, P14-P23 (Utah 2008)

23 Fox v. MCI Communs. Corp., 931 P.2d 857, 862 (Utah 1997)

24 Fox v. MCI Communs. Corp., 931 P.2d 857, 862 (Utah 1997)

A. Appellant Onyeabor Owns "Fee Simple" Title to Lots # 1 and # 2

A "fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended."<sup>25</sup> No such indication is apparent in the deeds given to Appellant Onyeabor from Centennial Pointe LLC. Lot # 1 was conveyed by a Special Warranty Deed. (Record at 2176.)<sup>26</sup> Lot # 2 was conveyed by a Warranty Deed. (Record at 2175.)

A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, the grantee's heirs, and assigns .. of the premises named in the warranty deed; ... with covenants from the grantor, the grantor's heirs, and personal representatives, that ... the grantor lawfully owns fee simple title to and has the right to immediate possession of the premises.<sup>27</sup>

Section 4.1 of both the Original and Restated CC&Rs confirmed that "[e]ach Owner shall own fee simple title to its Lot(s)." (Record at 1532) Based on the foregoing, it is undisputed as a matter of law that appellant Onyeabor owned fee simple title to Lot # 1 and Lot # 2.

B. No Reservation of CC&R Easements in Favor of Appellee 2004 Association

The 2004 Association has claimed that the direct and indirect reference in the deeds are sufficient to bind Appellant Onyeabor to alleged easements in the 2004 Association contained in the Restated CC&Rs. The claim that "[t]he Association ... shall be responsible for the exclusive management, control, maintenance and repair" (§ 7.1) of "common elements" translates into the use and possession of seventy-four percent (74%) of Lot

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<sup>25</sup> Utah Code Ann. § 57-1-3

<sup>26</sup> Utah Code Ann. § 57-1-12.5 ("A special warranty deed when executed as required by law shall have the effect of: (a) a conveyance in fee simple to the grantee, the grantee's heirs, and assigns, of the property named in the special warranty deed, together with all the appurtenances, rights, and privileges belonging to the property; and (b) a covenant from the grantor, the grantor's heirs, and personal representatives, that: (i) the granted property is free from all encumbrances made by that grantor; and (ii) the grantor, the grantor's heirs, and personal representatives will forever warrant and defend the title of the property in the grantee, the grantee's heirs, and assigns against any lawful claim and demand of the grantor and any person claiming or to claim by, through, or under the grantor.")

<sup>27</sup> Utah Code Ann. § 57-1-12

# 1 and sixty-one percent (61%) of Lot # 2. In addition, “[t]he Association reserves the right to eject or cause to be ejected from any portion of the Property any person not authorized, empowered or privileged to use the same, or uses the same in violation of the provisions of this Declaration.” (1498 § 4.7)<sup>28</sup> The assertions of "exclusive management, control, maintenance, and repair" of the overwhelming majority of Lots # 1 and # 2 by LEBR, the 2004 Association, and Bruce Railie has not only undermined and obliterated Appellant Onyeabor's power and ownership rights associated with the "fee simple title,” but it has also forced her to close her business and vacate the premises.

These illegal Restated CC&Rs have put Ms Onyeabor in a situation whereby the 31% of her Lots which the Association vaguely accepts that she owns is landlocked by the 74% and 61% of her Lots, “exclusively controlled” and purportedly “owned” by a hostile Association and Plaintiff LEBR. The property lost its value due to direct claims to Ms Onyeabor’s title made by denial of her quiet title claim.. The series of Lis pendens filed on her Lots by an Association that has no direct interest claim in her real estate, put a cloud on her title and forced Ms Onyeabor to leave the premises to avoid the continued harassment. Bruce Raile and Dave Castleton have stated they believe the Association “owns” large portions Lots 1 and 2. Ms Onyeabor’s vehicles are towed or threatened to be towed without her knowledge and authorization. Much of the bloated penalties Plaintiffs incorporated in their bills and liens are derived from penalties Ms Onyeabor earned for parking her car in front of her very own property which the Association claims to “own.” \$5700 fines in 08/09/2005; \$2600 a month later, 09/2005; another \$3900 10/05, \$4900 in 11/05 and \$4900 (See Plaintiff’s bill-fines. Record at 665 Addendum II, Exhibit 23) The fines were levied on Onyeabor for one car while

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28 For reasons stated in Part \_\_\_\_\_, infra, these unequivocal assertions of power and authority are at least ambiguous, creating a factual issue as to the intent of the parties, making the granting of summary judgment against appellant Onyeabor an error of law.

Plaintiffs engaged in the Infraction (Record at 1498, § 12.8; 1532. § 12.8)

As a matter of public policy, both for the protection of the purchaser of real property as well as the stability of titles to real property throughout the state of Utah, this type of situation cannot be allowed to occur.

Utah law prohibits parties from expressly creating an easement in a land transaction for the benefit of a third party who is not involved in the transaction--i.e., a "stranger to the deed." See *Johnson v. Peck*, 90 Utah 544, 63 P.2d 251, 254 (Utah 1936). In *Johnson*, the Utah Supreme Court expressly held that two parties to a land transaction could not agree to reserve a right-of-way to a third party who "had no right or interest in the land . . . , having conveyed it away some two years before." *Id.* Similarly, in this case, *Heritage, Inc.* attempted to reserve a right-of-way for *Chadaz*, who had, approximately five months before, conveyed her entire interest in the 1.58 acres, encompassing the area of the alleged right-of-way, to *Heritage Partners* by contract. *Accordingly, Chadaz, a "stranger to the deed," cannot claim any benefit to the right-of-way because she had no interest in the land at the time Heritage, Inc. conveyed the 1.58 acres to Villatek.* Thus, we conclude *Johnson* is controlling in this case and reaffirm the holding that parties may not reserve an easement in favor of a third party who has no interest in the property. . . . The law of real property in Utah after *Johnson* is that a grantor may "reserve" an interest to itself, but not to a third party. Sound public policy supports this distinction. *There is an important interest for property owners to possess unencumbered titles.* As one court noted:

The overriding considerations of the "public policy favoring certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation," persuade us to [apply the 'stranger to the deed'] . . . rule. We have previously noted that in this area of law, "where it can reasonably be assumed that settled rules are necessary and necessarily relied upon, stability and adherence to precedent are generally more important than a better or even a 'correct' rule of law."

In *re Estate of Thomson v. Wade*, 69 N.Y.2d 570, 509 N.E.2d 309, 310, 516 N.Y.S.2d 614 (N.Y. 1987) (citation omitted). We also note this decision comports with other jurisdictions that have adopted the "stranger to the deed" doctrine. See, e.g., *Nelson v. Parker*, 687 N.E.2d 187, 188 (Ind. 1997) (holding reservation of interest in property for benefit of third party invalid because third party is "stranger to the deed"); *Burnell v. Roush*, 404 P.2d 836, 840 (Wyo. 1965) (same).<sup>29</sup>

Thus, there could not be either an ambiguous or unambiguous easement in favor of the Association *by direct or indirect reference to either of the CC&Rs* in the conveyance deeds to Lots # 1 and # 2 because

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29 *Potter v. Chadaz*, 1999 UT App 95 PP 12-13; 977 P.2d 533

the 2000 Association did not have a property interest in either Lot # 1 or Lot # 2. Not only was there no such interest recorded on the Plat, but no deeds from the Declarant to the 2000 Association *as to any real property in the entire subdivision* at the time of the conveyance of Lot # 1 and # 2 were offered in evidence, or recorded at the County Recorder's office.

Even had the "common areas" to which the 2000 Association claimed a responsibility for "exclusive management, control, maintenance and repair," been lawfully designated on the Plat, the inseparable ownership of the "common areas" was appurtenant to each Lot, (Record at 1532) and was retained by the Lot Owners and not the Association. As the 2000 Association owned no interest in the individual Lots when they were conveyed to each Lot Owner, *a fortiori*, any equitable decision that replaced the property-less, dissolved and repudiated 2000 Association with the post-litigation created 2004 Association, neither LEBR nor any other Lot Owner (save Appellant Onyeabor) been able to retroactively convey a real property interest in the 2000 Association that was contemporaneous with the Original conveyance of Lots ## 1-7.

Based on the foregoing, under any equitable or legal theory, neither the 2000 Association nor the 2004 Association, owned property in any area of the Centennial Parke Subdivision that would have been sufficient to justify an easement in their favor by any direct or indirect reference to either the Original CC&Rs or the Restated CC&Rs in the deeds of conveyance from the declarant to be owners of lots ## 1-7.

C. No Reservation of Easements in Favor of Future Owners of Lots ## 2-7 Either By Deed To Lot # 1 or Original CC&Rs

Appellant Onyeabor was the first owner of a Lot in the Subdivision. She received her special warranty deed to Lot # 1 on April 24, 2000. At that time, there were no other Lot Owners who had purchased designated Lots in the Subdivision from the Declarant. Under the authority of Potter v. Chadaz, *supra*, "parties may not reserve an easement in favor of a third



party who has no interest in the property.” There are no unrecorded or recorded interest in Lot # 1 that were contemporaneous with the Conveyance of April 24, 2000. As such, no future Lot Owners in the Subdivision may claim a property interest in Lot # 1 on April 24, 2000, that would allow enforcement rights to any easement or restrictive covenant contained in the Original CC&Rs or any other document.

#### VI. AS A MATTER OF UNAMBIGUOUS CONTRACT INTERPRETATION, THE AMENDMENT PROCEDURES IN THE ORIGINAL CC&RS WERE NOT FOLLOWED

The trial court found that the “[r]estated CC&Rs were validly adopted according to procedures set forth in the CC&Rs.” (Record at 3185; § 2b, pg. 4) This legal conclusion is wrong as a matter of law because unambiguous contract terms containing condition precedents to amending the Original CC&Rs were not complied with.

The Utah Supreme Court has stated that “[f]ailure of a material condition precedent relieves the obligor of any duty to perform.”<sup>30</sup> In other words,

where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, the obligee may not require performance by the obligor, because the obligor's duty, and conversely the obligee's right to demand performance, does not arise until that condition occurs or exists.<sup>31</sup>

Other courts have confirmed that “contractual provisions agreed to by members of the [Association] may provide procedural prerequisites or contractually limit the time, place, or manner for asserting claims.”<sup>32</sup> There are at least three material condition precedents to a valid amendment of the Original CC&Rs that were not complied with, thereby negating the validity of the Restated CC&Rs

A. Condition Precedent of Securing Consent of Mortgagee on Lot # 1  
The Original CC&Rs state the following:

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30 Harper v. Great Salt Lake Council, Inc., 1999 UT 34, § 14, 976 P.2d 1213.

31 Id.

32 Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 96, 614 S.2d 351 (N.C. Ct. App. 2005)

Unless at least 67% of the first Mortgages (based upon one vote for each Mortgage) the individual lots in the first mortgages consent in writing, the Association shall not be entitled by act, omission, or otherwise: ... (e) *to change* the pro rata interests or *obligations of any lot which apply for purposes of (i) levying assessments or charges .....*

(Record at 1532, § 13.3(e).) Based on (1) the stated increase in the size of the "common elements" in the restated CC&Rs to increase the common areas in appellant Onyeabor's Lots from 0% to 74% and 61%, respectively, and (2) the increase maintenance of these "common areas" would become the basis for an increase in assessments against Lot # 1, the restated CC&Rs, in fact, changed the "obligations" of Lot # 1 "for purposes of living assessments or charges". Bruce Raile, as President of the Association, conceded that consent from Appellant Onyeabor mortgagees would be necessary to change the August CC&R. Thus, the burden was on the 2004 Association to demonstrate that the mortgagee on Lot # 1 had either (1) "consented in writing" to the radical change replacing what had been "fee simple title" within easement assuming "exclusive jurisdiction and control" over 74% of the property held by the mortgagee as collateral, or (2) had impliedly done so, twenty days after notice had been given. (Record at 1306 § 13.5) The record indicates that neither the 2000 Association nor any other party or entity satisfied this condition precedent prior to amending the Restated CC&Rs.<sup>33</sup>

**B. Right to Amend CC&RS With Technical or Clarifying Amendment Requires Amendment of Plat**

The Declarants held the right to "amend and supplement this *Declaration and the Plat* to correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Property"(Record at 1532; § XIV (b).) The plain meaning of this provision establishes that the technical or clarifying amendments referred to required amendment or supplementation of *both* the CC&Rs and the Plat. "This Declaration, and

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<sup>33</sup> This was not for lack of awareness. Plaintiffs also agree that mortgagees approval would have to be obtained prior to "amending" or "superceding" the CC&Rs. Bruce Raile and his attorney, Dave Castleton in their memorandum to Ms Onyeabor assert: "You may experience great difficulty among lenders to change the terms of the declaration at this stage." (Record at 1229-1232, 1231, § 16)

any amendment or supplement thereto, and any amendment or supplement to the Plat shall take effect upon its being recorded in the official records.” (Record at 1532; Section 18.6) while the Restated CC&Rs were recorded on August 24, 2000, there is neither evidence in the record nor the County Recorder’s Office nor the City offices that indicates any amendment was made to the Plat that disclosed the radical change in the scope of the "common areas" by a newly defined "common elements."

#### C. Major Amendment of CC&Rs Required Amendment By the Association

The Original CC&Rs states that

[t]he Association shall be formed and maintained as a Utah nonprofit corporation. Until such time as all Lots have been conveyed by the Declarant to Lot purchasers, Declarant shall be the sole Member. From such time as all Lots have been conveyed by the Declarant to Lot purchasers, every Owner shall be a member.

(Record at 1532; § 6.1) The Association, however, was to be separate from the Declarant. “The Board shall manage the Association and shall be determined as set forth in the bylaws. Designees of Declarant, owners, mortgagees (or designees of mortgagee's) ... shall be eligible for membership on the Board. (Record at 1532; § 6.2) “It shall be the duty of the Board to: ... (g) supervise all officers, agents and employees of this Association, and see that the duties are properly performed”[.]

The term “Owner” is defined as “any Person, including the Declarant, owning fee title a Lot.”

(Record at 1532; § 1.17) Except as provided as noted above, (e.g. Mortgagee provisions and Declarant’s unilateral right to amend for technical or clarification reasons,)

the vote of Owners holding at least 67% of the Percentage Interests shall be required to amend this Declaration or the Plat. Any amendment so authorized shall be accomplished with the recordation in the Official Records of an instrument executed by the Association. In such instrument an officer of the Association shall certify the vote required by this Article for amendment has occurred.

The Restated CC&Rs were executed by the Declarants, Centennial Point, LLC, and purportedly by an unknowing and non-“consent[ing]”Appellant Onyeabor, Declarant to Lot # 1. However, even though

Mr. Sanborn stated under oath that he was the “President of the Association,” (Record at 1498, ) the Restated CC&RS were neither executed by the Association nor were certified by an identified officer of the same. They were executed by Centennial Point LLC with Mr. Sanborn as manager. Since the amendment exceeded the authority of a “technical” or clarification amendment, it was required to be recorded in the official records as a document (1) executed by the Association, and (2) containing a certification by a Officer of the Association that the required vote for amendment has occurred.

There is no evidence in the record that suggests any of the foregoing three conditional precedents were met. Thus, the 2004 Association has no legal, protectable interest in the Restated CC&Rs because they were not lawfully amended.

**VII. APPELLEE 2004 ASSOCIATION FAILED TO FULFILL CONDITIONS PRECEDENT IN BOTH CC&RS AS TO ASSESSMENTS, MAKING MONETARY CLAIMS AGAINST APPELLANT ONYEABOR "UNRIPE"**

Assuming *arguendo* the validity of the Restated CC&Rs, and the ability of the 2004 Association to enforce the same, based on the failure to satisfy the condition precedents noted hereafter, the request for contractual enforcement of the assessments against Appellant Onyeabor is not ripe for determination by the Court.

**A. Failure to Give Proper Notice of Annual Assessment for Payment Due**

Paragraph 8.4 of Restated CC&Rs states that the Association

shall give written notice to each Owner as to the amount of the annual Assessment with respect to his Lot not less than 30 days nor more than 60 days prior to the beginning of the beginning of the next calendar year. Such Assessment shall be due and payable in equal monthly installments on the first day of each and every month of each year.

(Exhibit 5, page 12, § 8.4.) The evidence submitted by the Plaintiffs regarding their submission of “assessments”<sup>34</sup> fails to disclose (1) any notice of annual Assessments being provided, or (2) that notice was given (in any manner) to Ms. Onyeabor during the applicable “window” from November 1<sup>st</sup> –

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34 See Supplemental Affidavit of Jennifer Clark.

December 1<sup>st</sup> each year.<sup>35</sup>

Failure of the Association to give timely notice of any Assessment as provided herein shall not affect the liability of any Owner for such Assessment, but the date when the payment shall become due in such a case shall be deferred to a date ten days after such notice shall have been given.

Id. <sup>36</sup> No effort has been made (whether timely or not) to cure the lack of notice has been made.

Having failed to give notice of annual assessments, the payment for the same is not due.

**B. No Properly Filed Lien Was Subject to Judicial Foreclosure**

The evidence submitted in conjunction with Plaintiff's motion for partial summary judgment indicates that a lien of the Appellee Appellee 2004 Association was filed against Lots # 1 and # 2 on June 25, 2005 in the amount of \$ 6,863.01. The evidence submitted by the Plaintiffs indicates that the conditions precedent of Restated CC&Rs to the filing and judicially foreclosing a lien against Myriam Onyeabor and Lots # 1 and # 2 were not complied with.

First, "[a]ll sums assessed to any Lot pursuant to this Article, together with interest thereon, as provided herein, shall be secured by a lien against such a Lot in favor of the Association." (Exhibit 5, page 12, § 8.6(a).) However, "[n]o notice of lien shall be recorded until there is a delinquency in payment of the Assessment." (Id., page 13, at § 8.6) Inasmuch as no notice of annual Assessments were given, the payments for the same, is not due. Id. Without a due date, no lien can be filed.

Second, the liens for assessments post-June 25, 2005 was not in evidence. The Restated CC&Rs states that

to evidence a lien for sums assessed pursuant to this Article, the Association shall

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<sup>35</sup> The "assessment" made November 2, 2004 occurred prior to the incorporation of Appellee 2004 Association.

<sup>36</sup> The materiality of these provisions is evidenced by other provisions and the actions of Appellee 2004 Association. As one of three owners, Ms. Onyeabor's consent was required under Restated CC&Rs to allow the annual assessment to be increased by over twenty-five percent (25%) from the previous year. (See § 8.2.) Efforts made to impose an assessment that far exceeded this amount of increase is evident in the efforts to assess a \$ 10,000 pro rata fee for administrative services on October 17, 2006 statement. It would have necessitated her approval under the Articles of Association I but not those of Appellee 2004 Association.

prepare a written notice of lien setting forth the amount of Assessment, the date due, the amount remaining unpaid, the name of the Owner and the description of the Lot. Such a notice shall be signed by an officer of the Association and shall be recorded in the Official Records. No notice of lien shall be recorded until there is a delinquency in payment of the Assessment. Such lien may be enforced by power of sale or judicial foreclosure by the Association in the same manner in which deeds of trust or mortgages on real property are foreclosed in the State of Utah.

(Id.) No lien asserting assessments after June 25, 2005 against either Myriam Onyeabor or Lot # 1 or Lot # 2 was introduced with the motion for partial summary judgment. Hence, for these obligations, Appellee 2004 Association failed to satisfy the condition precedents under Restated CC&Rs before a judicial remedy is undertaken for any assessment after June 25, 2005.

Third, the June 25, 2005 Lien is mentioned in the undisputed facts for partial summary judgment. This reference, however, is insufficient to establish its validity for several reasons. First, the recorded lien failed to follow the requirements of § 8.6(b) cited earlier. A lien is required to state the date due. Because of lack of notice, *supra*, the date due is not correctly stated, nor could be. Absent the same, the condition precedent is not complied with. Second, the lien is not properly authenticated. Attorney Ray Beck, signator, is not an officer of Appellee 2004 Association. Having failed to file with the County Recorder the contractually mandated liens, the Appellee 2004 Association is without authority to seek a judicial remedy for the same for any assessment or other expense that can be placed as a lien on an Owner's Lot.

Furthermore, the very existence and involvement in the litigation by the 2004 Association also serves as a basis to limit the amount of the assessments claimed against Appellant Onyeabor. Reflecting the 2002 decision to repudiate both the Association relationship as well as any validity attending the Restated CC&Rs, the 2004 Association produced no evidence of any unpaid assessment against Defendant Onyeabor between October 2002 and before June 10, 2004.

The claimed assessments of June 10, 2004 of \$ 2,348.26 and November 2, 2004 of \$ 1,629.23, or a total of \$ 3,977.49, were made prior to the incorporation of the Appellee 2004 Association on

November 29, 2004. Thus, as the Appellee 2004 Association could have had only a “legally protectible interest” in the assessments made after its incorporation, e.g. the total amount of assessments made post-incorporation were \$ 14,752.38 and the applicable interest would be \$ 3,977.49, or a total of \$ 17,762.95, approximately seventy-five percent (75%) of what the trial court found.

The standing of the 2004 Association to claim assessments is also limited by the order substituting parties in this litigation. The order was not executed until September 15, 2005; on the face the order does not state that the substitution of Plaintiffs for the named Plaintiff was authorized nunc pro tunc. If the court’s ruling to substitute parties is effective on the date it is signed and entered, the principal amounts claimed in 2005 on February 22<sup>nd</sup>, April 4<sup>th</sup>, May 31<sup>st</sup>, and August 9<sup>th</sup> would not be included. (Id.) Combined with those paid pre-incorporation, these amounts reflect a principal amount of \$ 7,819.21, and \$ 3, 456.04 of the pre-judgment interest awarded. Combined, the total amount claimed as not being paid in unpaid assessments before entry of judgment, and the interest thereon that occurred before the order substituting parties is \$ 11,275.25, or 47.3% of the assessments awarded by the Court in paragraph 5 of the October 1, 2007 order.

Based on the foregoing, because 47.3% of the Court’s award of assessments and interest arose from either a time when the Appellee 2004 Association was not incorporated, or the order allowing the substitution of parties was entered, Appellee 2004 Association did not have standing to claim the payment of the same.

#### VIII APPELLANT ONYEABOR’S TEMPORARY PARTICIPATION IN THE ASSOCIATION CANNOT RATIFY RESTATED CC&Rs

The trial court found that “through her conduct in her participation in the Centennial Pointe Owners Association (the “Association”), [Appellant Onyeabor] has ratified the Restated CC&Rs.” (Record at 3185; (§ 2a, pg. 4).) For at least three reasons, this conclusion is wrong.

A. The Restated CC&Rs Are Void and Unenforceable for Lack of Standing and Ripeness

For reasons discussed above in parts II, III and IV, the Restated CC&Rs are void, violate public policy expressed by "stranger to the deed" doctrine, the association and the CC&Rs had been repudiated in 2002 by 75% owners, and are not enforceable as a matter of unambiguous contract interpretation. By definition, a void document is not subject to ratification. Because Plaintiff's LEBR and the 2004 Association are "strangers to the deeds" while conveying fee simple ownership to Appellant Onyeabor of Lot # 1 and Lot # 2, they have no "legally protectable interest" in the same. The failure of the 2000 Association to comply with the requirements to amend the Original CC&Rs means that the efforts of Plaintiff LEBR and the 2004 Association to enforce the same are not "ripe" for adjudication.

B. Dissolution of 2000 Association, 2002 Repudiation of Restated CC&Rs and Reliance on the Same Is Enforceable and Does Not Mandate Membership in Post-Litigation Formed 2004 Association Seeking Enforcement of Restated CC&Rs

Appellant Onyeabor does not dispute that she participated with the 2000 Association for a limited time. Her participation, however, does not nullify her early and constant objections to the assertions made by Mr. Riley of LEBR that he somehow was entitled to an unrestricted and burdensome use of all of the parking area in Lot # 1 and # 2. (Exhibit 15 Record at 1458-1480-Exhibits 11-15 of Ms Onyeabor Memorandum in Opposition.) Her continuing objections are evident in at least five different ways over an extended period of years.

First, Declarant Centennial Pointe, LLC relinquished control of the 2000 Association in December of 2000. Only after that time, was an effort made to assert and enforce the radical changes created by the Restated CC&Rs. By early 2001, Appellant Onyeabor was objecting to the agents who sold her the property, Mr. Bob Mills and Mr. Travis Healey, ( Record at 2131-2135; & 2136-2141 respectively. EXH 9 & 10), and Mr. Paul Bezdiyan (Record at 2124-2129 Exhibit 8 of Addendum II).



Ms Onyeabor wrote two strong-worded letters to plaintiffs, complaining about her plight and repudiating Plaintiff's conduct and laying down the rules on her Lots. Ms Onyeabor protested the unexplained assertion of Bruce Raile of LEBR, and the Association, that, somehow, her Lots had become "property of Centennial Pointe" and parts of her building which houses utility was now "property of Qwest communication." Ms Onyeabor called the Police and complained of constant harassment as evidenced by Police Complaint # 04-17013Y-.

In her letters, Ms Onyeabor repudiated the false assertions made by Bruce Raile that her property was subject to the "exclusive management, control, maintenance and repair" of the 2000 Property Association. (Record at 1498 Exh. 2, Addendum I), or that any part of her Lots was "owned by the Association," (Record at 1229-1232 § 14. Exh 24. Also see Plaintiffs' signs Record at 1460 & 1466, Exh 15 of Addendum II)

Second, by 2002, appellant Onyeabor and Mr. Bezdijan were determined to resolve the ongoing disputes regarding the alleged easements on their private property by a now dissolved property owners Association and LEBR. (Affidavit of Paul Bezdijan § 13-14 exhibit 8)

13. In February 2002, a meeting of the owners of the Lots was held. Seventy-five percent (75%) of the owners voted to change the CC&Rs to reflect the following changes

- a) exclusive control of Lots, as depicted on the plat map, by each owner
- b) exclusive maintenance of lots by individual owners only
- c) separation of water and security lights from each other
- d) free and independent use of property by each lot owner
- e) Centennial pointe Association had no further right to anything on any owner's Lot without the owner's permission
- f) individual owners had no right to anything on any other owner slots without the permission of the lot owner.

14. The foregoing agreements, among others that were adopted at that time, were abided by the property owners.

[A] verbal agreement to [vitate] an interest in land can be taken out of the statute of frauds, and that one can be estopped from challenging the oral agreement if three requirements are met: A court must find (1) that there was such an agreement, (2) that there had been part or full performance, and (3) that there was reliance thereon.<sup>37</sup>

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37 Orton v. Carter, 970 P.2d 1254, 1257 (Utah 1998)

"Nothing in [in the Statute of Frauds] shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof."<sup>38</sup>

Third, seeking to enforce the agreement by the property Owners of February 2002, in May of 2002 of appellant Onyeabor submitted a written memorandum to Plaintiff LEBR, and Bruce Railie, (President of a nonexistent 2000 Association,) stating her intent to be separate from the "Association" and separately maintained her private property as had been agreed.

[All maintenance done on my premises will be henceforth handled by me. Any further work done on my premises, without my express written approval, will henceforth, not be paid for by me. I also suggest we find ways of separating our electrical and water bills so that we all take care of their own bill. This request is based on my personal disposition and capability. I am quite firm on these decisions and will not be pressured into doing things otherwise. . . .

Appellant Onyeabor was equally firm. about "parking" rights of other owners tenants or invitees,

"I would also add that I can accept temporary parking on any of the areas within my legal boundary but would very much appreciate it if the persons parking would also clean up after they are done, no stray tissues etc. Mechanical repair work on my premises will not be allowed. Permanent parking will also not be allowed, and I might be compelled to tow such vehicles." (Record at 1373. Exhibit 16)

Fourth, as evidenced by the numerous copies and receipts that were attached as Exhibit 5 B ( Record at 2151-2157,Exhibit 12 addendum II ) to her memorandum in opposition to the Plaintiffs Motion for Partial Summary Judgment, the Lot Owners in the Subdivision continued for over two years to follow the February 2002 decisions to abandon common maintenance and related efforts through any Association. (Record at 2151-2158, Addendum II Exhibit 15.) The trial court failed to understand that the failure of the 2004 Association to seek reimbursement for expenses during 2002 and 2003 was because there was no Association that was functioning, and the only common expenses were those shown in Exhibit B( Record at 2151-2157).Plaintiffs took one photo of her lawn in April 2004 to justify why she was denied full use of her property since 2001, and foster Plaintiffs' motives.

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38 Utah Code 25-5-8 (1998)

Fifth, as evidenced by the decisive letter dated August of 2004, a month before the filing of litigation, (Record at 1375-1379, 1373. Exh 16), Appellant Onyeabor left no question in anyone's mind as to where she stood regarding any authority of the Mr. Railie and the Association.

I hereby notify you I do not recognize any entity called "the Association" with Mr. Bruce Railie as its president and Lara Railie as vice president. I do not remember voting Bruce Railie president of any Association. He had called a meeting at the initial stage of his occupancy of Lot # 3... and told us he had anointed himself president. ... it became clear to me that Mr. Bruce Railie had usurped a nonprofit organization that we had formed to make it possible for us to use our individual lots effectively and cohesively, to enhance his own motives.

Mr. Sanborn (the developer) may have used a covenant made for tall buildings, to define the covenants of Centennial Pointe but the fact remains that Centennial Pointe does not own property and has virtually no property to administer because every piece of the development is an inherent piece of someone's property or Lot. The covenant of Centennial Pointe ... clarifies that the only part of Centennial Pointe, which the association may exercise its powers is that which is NOT part of an owned Lot. That leaves nothing for his "the Association", to administer other than access to utilities because every square footage on Centennial Pointe is sold to someone and they own legal rights over that property. We do not have club houses, parking lots or roads that are NOT inherent parts in parcel of someone's property....

The last meeting I attended, all and I had made it clear that we did not need an Association. Talk at that meeting was on how to come up with an agreement to allow a free passage in back of the building which is the only thorny area in our relationship . . . the Association is non-profit organization, ruled by bylaws. Which are malleable and determined by its members. We determined that we did not need an Association then, we still don't need it now. Our properties are adjacent, not on top of each other. When the Association is hijacked by one of its members, who has the apparent intent of enhancing his own motives, it becomes defunct. It is defunct to me. (Record at 1376.Exh 16)

In light of all the foregoing evidence before the trial court, the court did not have "undisputed facts" on which to base an equitable doctrine of "ratification."

C. Precedent Does Not Justify Application of Equitable Doctrine Of "Ratification"

In the 2006 opinion of *Swan Creek Village Homeowner's Association v. Warne*,<sup>39</sup> the Utah Supreme Court ruled that as a matter of equity a subsequent non-profit home owners association

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39 2006 UT 22, 134 P.3d 1122.

("HOA") could, in principle, make and enforce assessments against certain lot owners. The Court did so for factual reasons not present in this case. In Swan Creek Village, the court held that

[w]here property owners have treated an association as one with authority to govern and impose assessments contemplated under the terms of a duly recorded governing declaration, they ratify its authority to act. ... The availability of equitable relief helps ensure that justice is met and prevents parties from avoiding valid obligations due to technicalities. Particularly in contract cases, we have relied on the principle of ratification to establish the validity of an act even though certain, express formalities have not been met. ...

(PP 32, 34, 35) Incorporated in this section is a table (see exhibit 25 Addendum II)

In its equitable "conclusion" that the second HOA could replace the first HOA, the Utah Supreme Court relied on the following facts, which are absent or contradicted by those in this case: In its equitable "conclusion" that the second HOA could replace the first HOA, the Utah Supreme Court relied on the following facts, which are absent or contradicted by those in this case:

#### IV. LACK OF JURISDICTION PRECLUDES ENFORCING EITHER CC&R

The Restated CC&Rs indicate they were intended to "amend and supersede" the Original CC&Rs. Nonetheless, at the trial court level Plaintiff LEBR and the 2004 Association allowed for the possibility of the enforcement of the Original CC&Rs as to Lot # 1. (Record at 834-1277.) For at several reasons, the enforcement of either CC&R by either Plaintiff is beyond the jurisdiction of the trial court.

"[S]tanding is a jurisdictional requirement that must be satisfied" before a court may entertain a controversy between two parties. Wash. County Water Conservancy Dist. v. Morgan, 2003 UT 58, P 6 n.2, 82 P.3d 1125; accord Harris v. Springville City, 712 P.2d 188, 190 (Utah 1986) ("[L]ack of standing is jurisdictional."); Jenkins v. Swan v. Swan, 675 P.2d 1145, 1148 (Utah 1983) ("[T]he moving party must have standing to invoke the jurisdiction of the court."). Under the traditional test for standing, "the interests of the parties must be adverse" and "the parties seeking relief must have a legally protectible interest in the controversy." Jenkins, 675 P.2d at 1148. A party may assert an interest that is legally protectible under either statute or the common law. See Morgan, 2003 UT 58, P 17, 82 P.3d 1125.<sup>40</sup>

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Jones v. Barlow, 2007 UT 20, P12 (Utah 2007)

First, without an amendment of the Plat, the enforcement of either CC&Rs violates state and municipal criminal constraints on those developing, marketing and maintaining Industrial Park Subdivisions. A “court may not by its ruling entreat a party to take criminal action.”<sup>41</sup> There is no standing, or “a legally protectable interest,” as to a void contract.<sup>42</sup>

Second, because the deeds of the Declarant Centennial Pointe, LLC to Lots # 1 and # 2 failed to properly comply with the “stranger to the deed,” doctrine, Part III, *infra*, there are, in effect, no easements for under either of the CC&Rs that run with the land to Lots #1 and #2.

Third, without a lawfully recorded plat map, the only remaining authority in law that Plaintiff LEBR or the 2004 Association could attempt to assert is a matter of contract right. However, a contract is unenforceable absent the assent and knowledge of the parties. The conditions precedent were not complied with to amend the Original CC&Rs. Hence, any claim to enforce the Restated CC&Rs was neither “a legally protected interest” nor “ripe” for adjudication due to its non-existence. lawfully exist.

Fourth, in 2002, an overwhelming majority of the property owners (75%), repudiated the validity and continuation of any Association and restrictive covenants. During the ensuing two years, all Lot Owners participated in this arrangement. Partial performance of an oral contract removes it from the statute of frauds. Without the original “Association,” Plaintiff LEBR and the Appellee 2004 Association have no “legally protectable right” to “supersede” the previous authority of the six of seven Lot Owners that repudiated the dissolved Association and the adopted standards of conduct between the three property Owners.

Fifth, absent the knowing consent of appellant Onyeabor, after full disclosure, neither Plaintiff LEBR nor Appellee 2004 Association can continue to attempt to enforce a wishful contract claim that

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41 Peterson v. Sunrider Corp., 2002 UT 43, P39-P40, 48 P.3d 918 (Utah 2002)

42 Id.

has been repudiated for years. Absent evidence of specific consent to a "new" contractual relationship with Appellant Onyeabor after February of 2002, neither of the Plaintiffs nor any other Lot Owner has standing to seek a judicial ruling based on contract because of a lack of a "legally protected interest" or a "ripeness" claim effective.

#### IX. TRIAL COURT ERRONEOUSLY FAILED TO RECOGNIZE THE INHERENTLY AMBIGUOUS PROVISIONS OF RESTATED CC&RS

A trial court is to “consider all relevant credible evidence and to make sufficient findings as to whether the [contract] is ambiguous” before determining there is a question of fact regarding the a parties’ intent regarding a contractual provision.

##### A. Material, Ambiguous Contract Provision Precludes Summary Judgment

“[A] motion for summary judgment may not be granted when a legal conclusion is reached an ambiguity exists in a contract and there is a factual issue is to what the parties intended.”<sup>43</sup>

A contractual term or provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" ... In Ward, we indicated that contractual ambiguity at can occur in two different contexts: (1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties. 907 P.2d at 268. The first context presents a question of law to be determined by the judge. WebBank, 2002 UT 88, P 22, 54 P.3d 1139. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, "parol evidence of the parties' intentions should be admitted." Winegar v. Froerer, 813 P.2d 104, 108 (Utah 1991); see also SME Indus., Inc., 2001 UT 54, P 14, 28 P.3d 669. Thus, before permitting recourse to parol evidence, a court must make a determination of facial ambiguity. Ward, 907 P.2d at 268 907 P.2d at 268; Winegar, 813 P.2d at 108. ...

[We] have also found ambiguity in a contract taken as a whole; ... where there are missing terms in a contract; ... and in the parties' course of conduct. In [each case] contrary interpretations of the agreement were checked against the plain language of the contract. Thus, each time we found ambiguity, we found that the contrary interpretations were "reasonably supported by the language of the contract." Ward, 907 P.2d at 268 907 P.2d at 268. ... Thus, a correct application of the Ward rule to determine what the

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<sup>43</sup> WebBank v, American General Annuity Corp., 2002 UT 88 P 22, 54 P.3d 1139 (citations omitted.)

writing means begins and ends with the language of the contract.<sup>44</sup>

B. Association's "Exclusive Management, Control, Maintenance and Repair" Is Ambiguous

Section 7.1 of the Restated CC&Rs contained the following language in Section 7.1:

The Association, subject to the rights of the Owners set forth in Article IV hereof, shall be responsible for the exclusive management, control, maintenance and repair of the Common Elements and all improvements thereon ... The cost of such management, operation, maintenance and repair shall be borne as provided in Article VIII.

(Record at 1498; § 7.1.) Nonetheless, the following equally clear provisions demonstrate direct, and unequivocal conflict with the foregoing assertion of authority by the Association.

The identified Section IV placed the following constraints on the Association: "Each Owner shall own the fee simple Lot." (Record at 1498; § 4.1.) "No part of a Lot or the legal rights comprising ownership of a Lot may be separated from any other part thereof." (Record at 1498; § 4.3.)

The Association shall have *a non-exclusive easement* to make use of the Common Elements as may be *necessary or appropriate* to perform the duties and functions which it is obligated or permitted to perform pursuant to this Declaration and/or Bylaws.

(Record at 1498; § 4.7.) (emphasis added)

In addition, the next section of the Restated CC&Rs state specific duties of each Owner or Occupant has regarding its Lot. Each Owner and Occupant shall, without cost or expense to the Association or any other Owner or Occupant, keep and maintain, or cause to be kept and maintained, its Lot and all Buildings thereon and improvements thereto in a good and safe state of repair and in a clean, sanitary and orderly condition and in compliance with all applicable laws, ordinances, codes, orders, rules and regulations. Each owners and occupants obligation to maintain and operate its Lot shall include, without limitation ...

(Record at 1498 § 5.1(a).)

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44 Daines v. Vincent, 2008 UT 51, P24-P31 (Utah 2008)

C. Irreconcilable Conflict With The Plat Map and Deeds

As explained previously in Part II, *supra*, there were no "common elements" identified on the Plat. Similarly, there was no identification of any "easements" held by the Association or other Lot Owners. As explained previously in part III, *supra*, the deeds to Lots # 1 and # 2 conveyed no easement to the Association or other Lot Owners because they had no property interest in the two Lots at the time of the conveyance. Based on the foregoing, and the unambiguous nature of these documents, there is direct and irreconcilable conflict between these provisions and the terms of the Restated CC&Rs Plaintiff LEBR and the 2004 Association are seeking to enforce against Appellant Onyeabor.

D. Declarant's Intent Creates No Contract Interest As to Lot # 1 and Lot # 2

For several reasons, the intent of Centennial Pointe LLC is insufficient to create an easement or restrictive covenant in favor of future Lot Owners as it relates to Lot # 1 and Lot # 2.

At the time of the conveyance of Lot # 1, the Declarant held no interest in Lot # 1 because it had conveyed it all to appellant Onyeabor by a "special warranty deed," dated April 24, 2000.

As to both Lots, the property interest that was identified is too vague to be enforced. The "common areas" and "parking stalls" in the Original CC&Rs were required as a matter of state and municipal law, as well as contract terms to be recorded on the Plat. They were not. Furthermore, the easements belonging to the Association and other Owners are likewise not identified on the Plat. In addition, the rights and powers that go with such easements were not delimited or limited enough to prevent interference with owner's "fee simple." "Plats are writings and parol evidence is inadmissible to explain or modify an unambiguous plat. ... As in all parol evidence cases, oral testimony may not be admitted to vary or contradict the terms of a document[.]"<sup>45</sup>

The purported and non-"consent[ing]" signature of Appellant Onyeabor to the Restated CC&Rs

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<sup>45</sup> Rowley v. Marrcrest Homeowners' Ass'n, 656 P.2d 414, 418-419 (Utah 1982) (citations omitted.)



could not convey a contemporaneous interest in Lot # 1 sufficient to satisfy the public policies upon which the "stranger to the deed" doctrine is based. This occurs for the simple reason that the conveyance of Lot # 1 occurred on April 24, 2000. Under the Original CC&Rs, recordation was required to amend the CC&Rs. (Record 1532; page 23, § XIV.) Thus, as to the Restated CC&Rs, the amendment would not have been effective until its recordation on August 24, 2000. This late date fails to create a property interest effective April 24, 2000 in Lot # 1.

Fourth, the unambiguous language of the Restated CC&Rs plainly indicates its amendment was not, in any sense, intended to be retroactive. The opening paragraph of the Restated CC&Rs states that it both "amends and supersedes" the Original CC&Rs, (Record 1498; page 1; Opening paragraph,). If it supersedes the Original CC&Rs, it cannot be said that the radical amendment that imposed "common elements" on 74% of Lot #1 was intended to be a retroactive, or *nunc pro tunc*, amendment. Two clearly re-stated sections from the Original CC&Rs in the Restated CC&Rs confirm this position.<sup>46</sup>

Thus, by its own terms, the provisions of the Restated CC&Rs could only apply to Lots conveyed after the recording of the Restated Declaration.

Based on the foregoing, ambiguity is present as a matter of law.

[I]n evaluating ambiguity within the plain meaning of a contract, a court will 'attempt to harmonize all the contract's provisions and all of its terms.' ..... If, however, a 'court cannot resolve the problem by harmonizing ambiguous or conflicting terms, as a matter of law, the court may properly conclude there is an ambiguity.'<sup>47</sup>

The foregoing express contract terms, lack of any "common area," "parking stalls," or "common elements" being indicated on the Plat, as well as the failure to have any easements or covenants

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46 Record at 1532, § 4.11 ("All conveyances of Lots hereafter made, by whatever means, shall be construed to grant and reserve such reciprocal easements as shall give effect to the provisions hereof, even though no specific reference to such easements appears in any such conveyance.") (emphasis added.) "By acquiring any interest in a Lot or in the Property, the party acquiring such an interest consents to, and agrees to be bound by each and every provision of this Declaration." Rec(18.2)

47 Lunceford v. Lunceford, 2006 UT App 266, §139 P.3d 1073 (citations omitted.)

running with the land, establish, at a minimum, ambiguity as to the meaning of the Restated CC&Rs and the ability of Plaintiff LEBR or the Appellee 2004 Association to enforce the same.

**X. WHETHER CC&Rs ARE VOID, UNENFORCEABLE OR AMBIGUOUS, PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS FEES**

For all of the reasons listed hereto for, plaintiff LEBR and the 2004 Association have not prevailed on either the Original CC&Rs or the Restated CC&Rs. For this reason, Plaintiffs are not entitled to attorneys fees or costs. Even if the CC&Rs are upheld as being valid, the scope of work for which attorneys fees are valid are ambiguous. (Compare Record at \_\_\_\_ § and Record at \_\_\_\_, § \_\_\_\_.)

**XI. CLAIM FOR EMOTIONAL DISTRESS**

The trial court found that

[t]he undisputed facts and evidence in this matter, and for the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim for intentional infliction of emotional distress fails as a matter of law. The conduct that Ms. Onyeabor has asserted is not sufficiently made or outrageous to sustain her claim.

(Record at 3185, page 5, § 2g.)

To prove [a claim for intentional infliction of emotional distress], a plaintiff must show (a) that the defendant intentionally engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality (b) with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result, and (c) that severe emotional distress resulted as a direct result of the defendant's conduct.<sup>48</sup>

**A. Conduct is Outrageous and Intolerable**

The long-standing harassment and grief caused appellant Onyeabor, and the lack of legal justification for the same, as well as the close, confidential, if not fiduciary, relationship between Mr. Raile, the

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48 Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905 (Utah 1992)

Association, Plaintiff LEBR, and Mr. Sanborn, all justify a conclusion that the standards of decency and morality have been outrageously and intolerably violated in this case. Her history of dealing with the harassment at the Subdivision, and being personally attacked because of her racial background by, qualify for additional outrageous conduct.<sup>49</sup>

**B. Reasonable Person Would Know Emotional Distress Would Occur**

It is self-evident that a reasonable person would know that a normally situated person would experience emotional distress from what occurred. Sworn testimony from Bob Mills, Travis Healey, her son Chinedum Alexander Udeh, James Walker, Paul Bezdijan, and that of Ms Onyeabor, (Record at 2131-2135; 2136-2141; 2143-2147; 2148-2150; Exh 7 & 7B. All in Addendum II.) all indicate the breadth her excruciating and persistent ordeal. This lawsuit is an emotional infliction of pain, especially, since it was initiated by a non-existent Association.

**C. Severe Emotional Distress Is Direct Result of Conduct**

The detailed personal resume, and professional training in Social psychology and Medical Sociology by Appellant Onyeabor, qualified her to determine that she personally was experiencing severe emotional distress as a result of the conduct of Mr. Bruce Raile, plaintiff LEBR, the 2004 Association as well as Mr. Sanborn. The affidavits of the other individuals were stricken, including her son's, which also provided evidence sufficient to indicate that the emotional distress was sufficiently severe to warrant recognition as a prima facie case of intentional infliction of emotional distress

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49 Ellison v. Stam, 2006 UT App 150, P36 (Utah Ct. App. 2006)

For all of the foregoing reasons, the trial court's Rule 54(b) Motion ruling must be reversed and remanded for disposition in accordance with the arguments raised herein.

By: Myriam Onyeabor, Pro Se

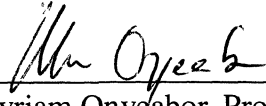
By: Matthew Hilton

Exhibit # 1	October 1, 2007 Order	(Record at 2591-2597)*
Exhibit # 2	January 28, 2008 Order	(Record at 3185-3196)

CERTIFICATE OF SERVICE

I hereby certify that on the <sup>20</sup>~~19~~th day of August, 2008, I caused to be sent by United States mail two true and correct copy of the foregoing, postage prepaid, to:

Jeffrey L. Silvestrini  
Edward T. Vasquez  
COHNE, RAPPAPORT & SEGAL  
257 East 200 South Suite 700  
Salt Lake City, UT 84111

  
\_\_\_\_\_  
By: Myriam Onyeabor, Pro Se

Jeffrey L. Silvestrini (Bar No. 2959)  
Edward T. Vasquez (Bar No. 8640)  
**COHNE, RAPPAPORT & SEGAL P.C.**  
257 East 200 South, Suite 700  
Salt Lake City, Utah 84111  
Telephone (801) 532-2666  
Facsimile (801) 355-1813

**FILED DISTRICT COURT**  
Third Judicial District

OCT -1 2007

SALT LAKE COUNTY

By Rf Deputy Clerk

Attorneys for Plaintiffs and Third-Party  
Defendants Bruce Raile and Jennifer Clark

ENTERED IN REGISTRY  
OF JUDGMENTS  
DATE 10/18/07

IN THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

LEBR ASSOCIATES, LLC, a Utah limited  
liability company, and CENTENNIAL  
POINTE PROPERTY OWNERS  
ASSOCIATION (Registered on November  
29, 2004), a Utah Nonprofit Corporation,  
Plaintiffs,  
v.  
MYRIAM ONYEABOR,  
Defendant.

**ORDER ON PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT AND MOTIONS TO  
STRIKE AND JUDGMENT**

Civil No. 040918762

Judge Robert P. Faust

On May 2, 2007, at the hour of 10:00 a.m., the Court heard oral argument on the following motions: Plaintiffs' Motion for Partial Summary Judgment; Plaintiffs' Motion to Strike the Affidavit of Myriam Onyeabor; Plaintiffs' Motion to Strike the Affidavit of James Walker; Plaintiffs' Motion to Strike the Affidavits of Robert Mills and Travis Healey; Plaintiffs' Motion to Strike the Affidavit of Chinedum Alexander Udeh; Plaintiffs' Motion to Strike

Order on Plaintiffs' Motion for Partial Summary Judgment



American Document Examiner's Expert Report and Exhibits 15 through 21 to Ms. Onyeabor's Opposition Memorandum; Plaintiffs' Motion to Strike Myriam Onyeabor's Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits. Ms. Onyeabor did not oppose Plaintiffs' Motion to Strike the Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits.

The aforementioned Motions were fully briefed and properly submitted to the Court for decision. Plaintiffs were represented by and through their counsel, Jeffrey L. Silvestrini and Edward T. Vasquez of Cohne Rappaport & Segal, P.C., Donald Sanborn was represented by Mark R. Anderson of Williams & Hunt, and Myriam Onyeabor appeared *pro se*.

1. The Court, having reviewed Plaintiffs' Motions to Strike, the affidavits relevant thereto, the exhibits relevant thereto, and the pleadings in this matter, hereby issues the following ruling on those Motions: For the reasons set forth in Plaintiffs' Motion to Strike the Affidavit of Myriam Onyeabor; Plaintiffs' Motion to Strike the Affidavit of James Walker; Plaintiffs' Motion to Strike the Affidavits of Robert Mills and Travis Healey; Plaintiffs' Motion to Strike the Affidavit of Chinedum Alexander Udeh; Plaintiffs' Motion to Strike American Document Examiner's Expert Report and Exhibits 15 through 21 to Ms. Onyeabor's Opposition Memorandum; Plaintiffs' Motion to Strike Myriam Onyeabor's Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits, and good cause therefor,

Plaintiffs' Motions are GRANTED and the aforementioned affidavits, exhibits, and pleadings are STRICKEN in their entirety.

2. The Court, having reviewed Plaintiffs' Motion for Partial Summary Judgment, the affidavits, deposition testimony and other exhibits appended thereto, Ms. Onyeabor's Opposition to Plaintiffs' Motion, Plaintiffs' Reply Memorandum in support of their Motion, the pleadings in this matter, and good cause therefor, hereby RULES as follows:

a. The undisputed facts and evidence in this matter show, as a matter of law, that the Restated Covenants, Conditions and Restrictions of Centennial Pointe recorded in August 2002 ( the "Restated Amended CC&Rs") are valid and encumber the entire Centennial Point development, including Lots 1 and 2 owned by Defendant Myriam Onyeabor. The undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor had actual notice of the Restated Amended CC&Rs by virtue of the fact that Ms. Onyeabor received title work, followed by a policy of title insurance for Lot 2, that expressly disclosed that Lot 2 was encumbered by the Restated Amended CC&Rs. The undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor had record notice of the Restated Amended CC&Rs and that the Special Warranty Deed from Centennial Pointe, LLC to Ms. Onyeabor for Lot 2 expressly states that Centennial Pointe, LLC's conveyance to Ms. Onyeabor was subject to any restrictions of record. Finally, the undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor, through her conduct and her participation in the Centennial Pointe Owners Association (the "Association"), has ratified the Restated Amended CC&Rs.



b. The undisputed facts and evidence in this matter show, as a matter of law, that Centennial Pointe's developer, Centennial Pointe, LLC, had the authority, pursuant to Centennial Pointe's April 2000 CC&Rs, to amend Centennial Pointe's CC&Rs. The undisputed facts and evidence in this matter show, as a matter of law, that the Restated Amended CC&Rs were validly adopted according to the procedures set forth in the April 2000 CC&Rs, and that the Restated Amended CC&Rs are consistent with the general plan and scheme of Centennial Pointe reflected in the April 2000 CC&Rs, particularly in respect to Ms. Onyeabor's objections thereto. Both the April 2000 CC&Rs and the Restated Amended CC&Rs define Centennial Pointe's common area to include the same property, i.e., parking areas, sidewalk areas, landscaped areas, and loading dock areas. Both sets of CC&Rs provided for an owners association empowered to levy assessments for maintenance of Centennial Pointe's common areas and to lien property for unpaid assessments. Both sets of CC&Rs provided for a reciprocal easement for use of Centennial Pointe's common areas by all owners, tenants and invitees. The undisputed facts and evidence in this matter show, as a matter of law, that the purpose of Centennial Pointe, LLC's adoption of the Restated Amended CC&Rs was to clarify and refine certain definitions contained in the April 2000 CC&R's which were unclear, but that the adoption of the Restated Amended CC&Rs did not change the configuration of the Centennial Pointe development respecting the location of buildings on the property, or the nature or extent of common areas.

c. The undisputed facts in this matter show that Ms. Onyeabor has failed and refused to pay her *pro rata* share of Centennial Pointe's common expenses. The undisputed facts

in this matter show that Ms. Onyeabor ceased paying her Centennial Pointe assessments in October 2002.

d. The undisputed facts and evidence in this matter show, as a matter of law, that the Association is entitled to its attorney fees incurred in prosecuting this action and defending against Ms. Onyeabor's counterclaims and third-party claims.

e. Based upon the affidavits of Plaintiffs, the Association is entitled to judgment in the amount of \$18,749.87 for past due and owing assessments and \$5,081.14 accrued as interest, calculated at the rate of 18% per annum.

f. Further, as set forth in the Supplemental Affidavit of Edward T. Vasquez filed with the Court on June 20, 2007, the Association has incurred attorney fees in enforcing Centennial Pointe's CC&Rs and defending against Ms. Onyeabor counterclaims and third-party claims, which necessarily involved defending Centennial Pointe's Restated Amended CC&Rs, in the amount of \$136,589.00. The costs in this matter total \$6,914.09; combined these figures total \$143,503.09. The Association is awarded its reasonable attorney fees in the amount of \$ \_\_\_\_\_, and its costs in the amount of \$ \_\_\_\_\_, for a combined total of attorney fees and costs in the amount of \$ \_\_\_\_\_.

g. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim for intentional infliction of emotional distress fails as a matter of law. The conduct that Ms. Onyeabor has asserted is not sufficiently revulsive or outrageous to sustain her claim.

h. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor has failed to satisfy the nine elements required to show fraud, *see Armed Forces Insur. Exch. v Harrison*, 2003 UT 14, ¶ 16, 70 P.3d 35, including, but not limited to, any false representation by either LEBR or the Association. Ms. Onyeabor's fraud claims against the Association and LEBR fail as a matter of law.

i. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim against Bruce Raile for trespass fails as a matter of law because, *inter alia*, the alleged conduct occurred on Centennial Pointe's common areas, to which all Centennial Pointe owners and invitees have a reciprocal access easement.

j. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim against Bruce Raile for assault fails as a matter of law because, *inter alia*, Mr. Raile has never touched Myriam Onyeabor, threatened her, or called her names and that his statements to her were a privileged attempt to enforce the rights of the Association and its members to use common areas of Centennial Pointe to which they held a reciprocal easement.

k. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claims against LEBR for trespass and assault fail as a matter of law because, *inter alia*, Jennifer Clark is not and has never been an employee of LEBR.

l. Plaintiffs' Motion for Partial Summary Judgment did not reach Ms. Onyeabor's claims for nuisance and breach of the CC&Rs against the Association and LEBR, or Ms. Onyeabor's assault claim against Jennifer Clark.

m. The Court concludes as a matter of law that the Association's affirmative claims against Myriam Onyeabor to enforce the April 2000 CC&Rs and the Restated Amended CC&Rs and Myriam Onyeabor's counterclaims' against the Association, excepting Ms. Onyeabor's claims for nuisance and breach of the CC&Rs, and her third-party claims against Bruce Raile, an officer of the Association, share a common factual basis, are closely related and inextricably intertwined.

n. The Court finds and concludes as a matter of law that Plaintiffs' efforts in developing facts and evidence to establish the validity of the Restated Amended CC&Rs and Ms. Onyeabor's contractual obligation to pay her past due assessments also led to, and were inextricably intertwined with, facts and evidence to defeat Ms. Onyeabor's counterclaims against LEBR for fraud, trespass, and assault.

o. The Court concludes as a matter of law that the Association is entitled to its attorney fees in pursuing its affirmative claims against Myriam Onyeabor to enforce the April 2000 CC&Rs and the Restated Amended CC&Rs and for defending against Myriam Onyeabor's counterclaims against the Association and LEBR, and third-party claims against Bruce Raile, the Association's president. *See Brown v. David K. Richards & Co.*, 1999 UT App 109, ¶¶ 19-24, 978 P.2d 470.

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**FILED DISTRICT COURT**  
Third Judicial District

JAN 28 2008

By                      SALT LAKE COUNTY  
Deputy Clerk

Attorneys for Plaintiffs and Third-Party  
Defendants Bruce Raile and Jennifer Clark

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IN THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

---

LEBR ASSOCIATES, LLC, a Utah limited  
liability company, and CENTENNIAL  
POINTE PROPERTY OWNERS  
ASSOCIATION (Registered on November  
29, 2004), a Utah Nonprofit Corporation,

Plaintiffs,

v.

MYRIAM ONYEABOR,

Defendant.

**CORRECTED ORDER ON  
PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AND MOTIONS TO STRIKE AND  
JUDGMENT**

Civil No. 040918762

Judge Robert P. Faust

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Pursuant to Rule 60(a) of the Utah Rules of Civil Procedure, the Court hereby enters the following Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment ("Corrected Judgment"), which corrects a clerical error made in the original Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment ("Original Judgment"), dated October 1, 2007. The Corrected Judgment clarifies the Original

Corrected Order on Plaintiffs' Motion for Partial Summ



Judgment regarding the Court's ruling awarding attorney fees, specifically, that the attorneys fee award is part of the Judgment amount. This Corrected Judgment relates back to the Original Judgment executed and entered on October 1, 2007.

#### CORRECTED JUDGMENT

On May 2, 2007, at the hour of 10:00 a.m., the Court heard oral argument on the following motions: Plaintiffs' Motion for Partial Summary Judgment; Plaintiffs' Motion to Strike the Affidavit of Myriam Onyeabor; Plaintiffs' Motion to Strike the Affidavit of James Walker; Plaintiffs' Motion to Strike the Affidavits of Robert Mills and Travis Healey; Plaintiffs' Motion to Strike the Affidavit of Chinedum Alexander Udeh; Plaintiffs' Motion to Strike American Document Examiner's Expert Report and Exhibits 15 through 21 to Ms. Onyeabor's Opposition Memorandum; Plaintiffs' Motion to Strike Myriam Onyeabor's Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits. Ms. Onyeabor did not oppose Plaintiffs' Motion to Strike the Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits.

The aforementioned Motions were fully briefed and properly submitted to the Court for decision. Plaintiffs were represented by and through their counsel, Jeffrey L. Silvestrini and Edward T. Vasquez of Cohn Rappaport & Segal, P.C., Donald Sanborn was represented by Mark R. Anderson of Williams & Hunt, and Myriam Onyeabor appeared *pro se*.

1. The Court, having reviewed Plaintiffs' Motions to Strike, the affidavits relevant thereto, the exhibits relevant thereto, and the pleadings in this matter, hereby issues the following ruling on those Motions: For the reasons set forth in Plaintiffs' Motion to Strike the Affidavit of Myriam Onyeabor; Plaintiffs' Motion to Strike the Affidavit of James Walker; Plaintiffs' Motion to Strike the Affidavits of Robert Mills and Travis Healey; Plaintiffs' Motion to Strike the Affidavit of Chinedum Alexander Udeh; Plaintiffs' Motion to Strike American Document Examiner's Expert Report and Exhibits 15 through 21 to Ms. Onyeabor's Opposition Memorandum; Plaintiffs' Motion to Strike Myriam Onyeabor's Answer to Plaintiffs' and Third-Party Defendants' Reply Memorandum of January 17, 2007 and Memorandum in Support of Ms. Onyeabor's Countermotion for Summary Judgment and Exhibits, and good cause therefor, Plaintiffs' Motions are GRANTED and the aforementioned affidavits, exhibits, and pleadings are STRICKEN in their entirety.

2. The Court, having reviewed Plaintiffs' Motion for Partial Summary Judgment, the affidavits, deposition testimony and other exhibits appended thereto, Ms. Onyeabor's Opposition to Plaintiffs' Motion, Plaintiffs' Reply Memorandum in support of their Motion, the pleadings in this matter, and good cause therefor, hereby RULES as follows:

a. The undisputed facts and evidence in this matter show, as a matter of law, that the Restated Covenants, Conditions and Restrictions of Centennial Pointe recorded in August 2002 ( the "Restated Amended CC&Rs") are valid and encumber the entire Centennial Point development, including Lots 1 and 2 owned by Defendant Myriam Onyeabor. The undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor had

actual notice of the Restated Amended CC&Rs by virtue of the fact that Ms. Onyeabor received title work, followed by a policy of title insurance for Lot 2, that expressly disclosed that Lot 2 was encumbered by the Restated Amended CC&Rs. The undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor had record notice of the Restated Amended CC&Rs and that the Special Warranty Deed from Centennial Pointe, LLC to Ms. Onyeabor for Lot 2 expressly states that Centennial Pointe, LLC's conveyance to Ms. Onyeabor was subject to any restrictions of record. Finally, the undisputed facts and evidence in this matter show, as a matter of law, that Ms. Onyeabor, through her conduct and her participation in the Centennial Pointe Owners Association (the "Association"), has ratified the Restated Amended CC&Rs.

b. The undisputed facts and evidence in this matter show, as a matter of law, that Centennial Pointe's developer, Centennial Pointe, LLC, had the authority, pursuant to Centennial Pointe's April 2000 CC&Rs, to amend Centennial Pointe's CC&Rs. The undisputed facts and evidence in this matter show, as a matter of law, that the Restated Amended CC&Rs were validly adopted according to the procedures set forth in the April 2000 CC&Rs, and that the Restated Amended CC&Rs are consistent with the general plan and scheme of Centennial Pointe reflected in the April 2000 CC&Rs, particularly in respect to Ms. Onyeabor's objections thereto. Both the April 2000 CC&Rs and the Restated Amended CC&Rs define Centennial Pointe's common area to include the same property, i.e., parking areas, sidewalk areas, landscaped areas, and loading dock areas. Both sets of CC&Rs provided for an owners association empowered to levy assessments for maintenance of Centennial Pointe's common areas and to lien property for unpaid assessments. Both sets of CC&Rs provided for a reciprocal easement for use of



Centennial Pointe's common areas by all owners, tenants and invitees. The undisputed facts and evidence in this matter show, as a matter of law, that the purpose of Centennial Pointe, LLC's adoption of the Restated Amended CC&Rs was to clarify and refine certain definitions contained in the April 2000 CC&R's which were unclear, but that the adoption of the Restated Amended CC&Rs did not change the configuration of the Centennial Pointe development respecting the location of buildings on the property, or the nature or extent of common areas.

c. The undisputed facts in this matter show that Ms. Onyeabor has failed and refused to pay her *pro rata* share of Centennial Pointe's common expenses. The undisputed facts in this matter show that Ms. Onyeabor ceased paying her Centennial Pointe assessments in October 2002.

d. The undisputed facts and evidence in this matter show, as a matter of law, that the Association is entitled to its attorney fees incurred in prosecuting this action and defending against Ms. Onyeabor's counterclaims and third-party claims.

e. Based upon the affidavits of Plaintiffs, the Association is entitled to judgment in the amount of \$18,749.87 for past due and owing assessments and \$5,081.14 accrued as interest, calculated at the rate of 18% per annum.

f. Further, as set forth in the Supplemental Affidavit of Edward T. Vasquez filed with the Court on June 20, 2007, the Association has incurred attorney fees in enforcing Centennial Pointe's CC&Rs and defending against Ms. Onyeabor counterclaims and third-party claims, which necessarily involved defending Centennial Pointe's Restated Amended CC&Rs, in the amount of \$136,589.00. The costs in this matter total \$6,914.09; combined these figures total

\$143,503.09. The Association is awarded its reasonable attorney fees in the amount of \$68,294.50, and its costs in the amount of \$3,088.19, for a combined total of attorney fees and costs in the amount of \$71,382.69.

g. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim for intentional infliction of emotional distress fails as a matter of law. The conduct that Ms. Onyeabor has asserted is not sufficiently revulsive or outrageous to sustain her claim.

h. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor has failed to satisfy the nine elements required to show fraud, *see Armed Forces Insur. Exch. v. Harrison*, 2003 UT 14, ¶ 16, 70 P.3d 35, including, but not limited to, any false representation by either LEBR or the Association. Ms. Onyeabor's fraud claims against the Association and LEBR fail as a matter of law.

i. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim against Bruce Raile for trespass fails as a matter of law because, *inter alia*, the alleged conduct occurred on Centennial Pointe's common areas, to which all Centennial Pointe owners and invitees have a reciprocal access easement.

j. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claim against Bruce Raile for assault fails as a matter of law because, *inter alia*, Mr. Raile has never touched

Myriam Onyeabor, threatened her, or called her names and that his statements to her were a privileged attempt to enforce the rights of the Association and its members to use common areas of Centennial Pointe to which they held a reciprocal easement.

k. The undisputed facts and evidence in this matter, and the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment, show that Myriam Onyeabor's claims against LEBR for trespass and assault fail as a matter of law because, *inter alia*, Jennifer Clark is not and has never been an employee of LEBR.

l. Plaintiffs' Motion for Partial Summary Judgment did not reach Ms. Onyeabor's claims for nuisance and breach of the CC&Rs against the Association and LEBR, or Ms. Onyeabor's assault claim against Jennifer Clark.

m. The Court concludes as a matter of law that the Association's affirmative claims against Myriam Onyeabor to enforce the April 2000 CC&Rs and the Restated Amended CC&Rs and Myriam Onyeabor's counterclaims' against the Association, excepting Ms. Onyeabor's claims for nuisance and breach of the CC&Rs, and her third-party claims against Bruce Raile, an officer of the Association, share a common factual basis, are closely related and inextricably intertwined.

n. The Court finds and concludes as a matter of law that Plaintiffs' efforts in developing facts and evidence to establish the validity of the Restated Amended CC&Rs and Ms. Onyeabor's contractual obligation to pay her past due assessments also led to, and were inextricably intertwined with, facts and evidence to defeat Ms. Onyeabor's counterclaims against LEBR for fraud, trespass, and assault.

o. The Court concludes as a matter of law that the Association is entitled to its attorney fees in pursuing its affirmative claims against Myriam Onyeabor to enforce the April 2000 CC&Rs and the Restated Amended CC&Rs and for defending against Myriam Onyeabor's counterclaims against the Association and LEBR, and third-party claims against Bruce Raile, the Association's president. *See Brown v. David K. Richards & Co.*, 1999 UT App 109, ¶¶ 19-24, 978 P.2d 470.

p. The Court concludes as a matter of law that the disposition of Plaintiffs' Motion for Partial Summary Judgment in favor of Plaintiffs completely resolves Plaintiffs' claims against Ms. Onyeabor, and that no further judicial action remains to be taken respecting Plaintiffs' claims.

q. The Court concludes as a matter of law that the disposition of Plaintiffs' Motion for Partial Summary Judgment in favor of Plaintiffs wholly disposes of Ms. Onyeabor's counterclaim and third-party claim for intentional infliction of emotional distress, Ms. Onyeabor's counterclaims for fraud against the Association and LEBR, Ms. Onyeabor's counterclaims for trespass and assault against LEBR, and Ms. Onyeabor's third-party claims for trespass and assault against Bruce Raile. No further judicial action remains to be taken respecting these claims.

r. The Court concludes as a matter of law that there is no just reason for delay of entry of a final judgment in this matter on the Association's claims for damages and attorney fees. The claims asserted by Myriam Onyeabor for nuisance, breach of the CC&Rs, and assault are compensable in damages, however, the claims are so dissimilar from the claims for

payment of common area expenses for utilities and maintenance which Myriam Onyeabor and the occupants of her properties have enjoyed, without paying for them, that the Court believes that entry of a final judgment in favor of the Association for the common area expenses, interest and attorney fees incurred in prosecuting this action and defending against the claims of Ms. Onyeabor dismissed to date, are sufficiently separate and distinct as to warrant the entry of a final judgment and certification of that judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

s. The Court concludes as a matter of law that the disposition of Plaintiffs' Motion for Partial Summary Judgment in favor of Plaintiffs wholly disposes of Ms. Onyeabor's claims for quiet title and for declaratory judgment. Because the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's Lots 1 and 2, those claims are DISMISSED with prejudice.

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Partial Summary Judgment is GRANTED;
2. Judgment is hereby entered in favor of the Association and against Myriam Onyeabor for past due assessments in the amount of \$18,749.87, plus interest at the rate of 18% to date in the amount of \$5,081.14;
3. Plaintiffs' request for fines and late fees, as provided for in the April 2000 CC&Rs and the Restated Amended CC&Rs, is DENIED;
4. The Association is awarded its attorney fees and costs, as provided for in the April 2000 CC&Rs and in the Restated Amended CC&Rs, for (a) enforcing the CC&Rs; (b) collecting common area assessments and interest owing for Lots 1 and 2, and (c) defending claims against

the Association or its officers based upon their right to enforce the Restated Amended CC&Rs and their right to use the common areas of Centennial Pointe or asserting their right to do so (e.g. the trespass, assault, and emotional distress claims). The Association is awarded its reasonable attorney fees in the amount of \$68,294.50, and is awarded its costs in the amount of \$3,088.19.

5. Judgment is entered against Myriam Onyeabor in favor of the Association in the total amount of \$95,213.70, plus interest at the judgment rate of 6.99% from and after date of entry;

6. The Sheriff of Salt Lake County is hereby directed to sell Lot 1 and Lot 2 owned by Myriam Onyeabor, for the purpose of satisfying the Judgment, unless Myriam Onyeabor satisfies the same before such sale may be noticed and conducted under law;

7. Myriam Onyeabor's counterclaim and third-party claim for intentional infliction of emotional distress are DISMISSED with prejudice;

8. Myriam Onyeabor's claim for fraud against LEBR and the Association is DISMISSED with prejudice;

9. Myriam Onyeabor's claims for trespass and assault against Bruce Raile are DISMISSED with prejudice;

10. Myriam Onyeabor's claims for trespass and assault against LEBR are DISMISSED with prejudice;

11. In light of the Court's ruling GRANTING Plaintiffs' Motion for Partial Summary Judgment, Myriam Onyeabor's Counterclaims for Quiet Title and Declaratory Judgment alleging

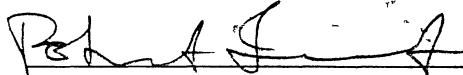
that Lots 1 and 2 are not burdened by the April 2000 CC&Rs and the Restated Amended CC&Rs are DISMISSED with prejudice; and

12. In light of the Court's ruling GRANTING Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike, Myriam Onyeabor's Countermotion for Summary Judgment fails as a matter of law and is DENIED;

13. This Order and Judgment is hereby certified as a Final Order pursuant to the provisions of Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 28th of January, 2008.

BY THE COURT:

  
The Honorable Robert P. Faust  
Third Judicial District Court Judge

Approved as to Form:

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Matthew Hilton  
Attorney for Defendant

WILLIAMS & HUNT

---

George A. Hunt  
Mark R. Anderson  
Attorneys for Donald Sanborn

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of January, 2008, I caused to be mailed a true and correct copy of the foregoing, postage prepaid, to:

Matthew Hilton  
PO Box 1004  
Kaysville, UT 84037

George A. Hunt  
WILLIAMS & HUNT  
257 East 200 South, #500  
Salt Lake City, UT 84111

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IN THE UTAH COURT OF APPEALS

LEBR ASSOCIATES, L.L.C., a :  
Utah Limited Liability Company, and : APPELLANT ONYEABOR'S  
CENTENNIAL POINTE PROPERTY : OPENING BRIEF  
OWNERS ASSOCIATION (formed :  
November 29, 2004), :

Plaintiffs-Appellees, : Case No. 20070851-CA

vs.

MYRIAM ONYEABOR, :

Defendant - Appellant :

---

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