

for summary judgment. *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, No. E2012-01422-COA-R3-CV, 2013 Tenn. App. LEXIS 541, *51 (Tenn. Ct. App. Aug. 20, 2013).

3. In considering motions to dismiss, courts are to “construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences” and should grant such motions when “it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Higdon* at 482 (internal citations omitted).

Plaintiffs’ claims are time-barred.

4. In this case, even if all of the allegations set forth in Plaintiffs’ Complaint are accepted as true and Plaintiffs are given the benefit of all reasonable inferences, Plaintiffs’ claims against Salem Pointe must be dismissed because they are time-barred.

5. Tennessee courts have long recognized the “meritorious reasons for statutes of limitations,” providing as follows:

Statutes of limitations promote fairness and justice. They are shields, not swords, and they reflect “a societal choice that actions must be brought within a certain time period.” They are based on the presumption that persons with the legal capacity to litigate will not delay bringing suit on a meritorious claim beyond a reasonable time.

We have frequently pointed out that statutes of limitations (1) promote stability in personal and business relationships, (2) give notice to defendants of potential lawsuits, (3) prevent undue delay in filing lawsuits, (4) “avoid the uncertainties and burdens inherent in pursuing and defending stale claims,” and (5) “ensure that evidence is preserved and facts are not obscured by the lapse of time or the defective memory or death of a witness.” Accordingly, the courts construe exceptions to statutes of limitations carefully to assure that they are not extended beyond their plain meaning.

Findley v. Hubbard, No. M2017-01850-COA-R3-CV, 2018 Tenn. App. LEXIS 382, *14-15 (quoting *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456 (Tenn. 2012))

(internal citations omitted).

6. Moreover, it is well-settled that in determining the applicable statute of limitations, a court is to look at the gravamen of each claim. *Id.* at *21 (citing *McFarland v. Pemberton*, 530 S.W.3d 76, 109 (Tenn. 2017)). In order "[t]o determine the gravamen of a claim . . . 'a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought.'" *Id.* See also *Irvin v. Bass, Berry & Sims, PLC*, No. M2014-00671-COA-R3-CV, 2015 Tenn. App. LEXIS 680, *8 (Tenn. Ct. App. Aug. 21, 2015) ("To determine the length of the limitations period, we look to the gravamen or object of the complaint, which presents a question of law.")

7. Similarly, Tennessee law provides that "[l]imitations statutes do not apply to declaratory judgment suits, as such, because a declaratory judgment action is a mere procedural device by which various types of substantive claims may be asserted;" rather, "it is necessary to ascertain the nature of the substantive claims sought to be asserted in a declaratory judgment action in order to determine the appropriate statute of limitations." *Dehoff v. Attorney General*, 564 S.W.2d 361, 362 (Tenn. 1978).

8. Here, Plaintiffs assert in their Complaint that:

A. Plaintiffs purchased Lots 1009 and 1008 in Rarity Bay Subdivision, Phase XI (collectively, "Plaintiffs' Property") in 2006 and 2007, respectively;

B. Plaintiffs' Property is subject to that certain Master Declaration of Covenants, Conditions, and Restrictions for Rarity Bay recorded in Trust Book 444, Page 248 in the Register's Office for Loudon County, Tennessee (the "Master Declarations"), a copy of which is attached as Exhibit 4 to the Complaint;

C. The chain of title for Lot 1009 includes that certain Warranty Deed recorded

in Book D279, Page 252 in the Register's Office for Loudon County, Tennessee, a copy of which is attached as Exhibit 6 to the Complaint, which contains certain language regarding a mandatory social membership in the Rarity Bay Golf and Country Club (the "Club") (the "Deed Provision");

D. In 2006, in conjunction with their purchase of Lot 1009, Plaintiffs entered into a contract with Tellico Lake Properties, LP ("TLP"), Salem Pointe's predecessor in interest, in the form of that certain Application for Membership Privileges attached as Exhibit 8 to the Complaint (the "Contract") pursuant to which Plaintiffs joined the Club, subject to that certain Club Membership Plan dated April 1, 2002, a copy of which is attached as Exhibit 7 to the Complaint (the "Membership Plan")¹;

E. In May 2015, Salem Pointe purchased the amenities and other real and personal property of Rarity Bay, along with the rights of the Declarant under the Master Declarations, from a receivership involving TLP and other related entities;

F. In or about July 2015, Salem Pointe recorded that certain Sixth Amendment of Master Declaration of Covenants, Conditions, and Restrictions for Rarity Bay and Amendment of Bylaws for Rarity Bay Community Association, Inc. dated May 18, 2015, a copy of which is attached as Exhibit 10 to the Complaint (the "Sixth Amendment") which "granted Salem Pointe the right to place a lien in favor of the Club to secure payment of Club dues and the Club initiation fee" (Complaint, ¶ 16(d));

G. In or about July 2015, Salem Pointe began charging Club membership fees

¹ Plaintiffs define the term, "Membership Plan" in Paragraph 9 of their Complaint generally as "a club governing document;" however, confusingly, Plaintiffs also interchangeably use the terms, "membership plan," and "Plan," throughout the Complaint and, at times, use the term, "Membership Plan" to refer specifically to that certain Club Membership Plan dated April 1, 2002 which Salem Pointe defines herein as the "Membership Plan." (See Complaint, ¶¶ 9, 12-13, 15, 24, 26(vii), 42).

which were substantially higher than those previously charged by TLP;

H. On July 26, 2015, Plaintiffs sent a letter to Salem Pointe (the “2015 Letter”) wherein Plaintiffs acknowledge the Sixth Amendment and state, *inter alia*, that (i) they “do not support the social membership fee increase” of more than 200%; (ii) they “do not agree with [Salem Pointe’s] decision to implement mandatory full membership on January 1, 2017 for non active members;” and (iii) they “wish to terminate [their] social membership effective immediately,” a copy of which letter is attached as Exhibit 11 to the Complaint; and

I. After sending the 2015 Letter, Plaintiffs continued to receive statements and notices from Salem Point related to social membership dues. (Complaint, ¶¶ 3-5, 12, 14-16, 18-19).

9. Plaintiffs identify four (4) separate causes of action in their Complaint, namely, (i) Declaratory Judgment: Unenforceable Deed Provision; (ii) Declaratory Judgment: No contract; (iii) Slander of Title; and (iv) Breach of Fiduciary Duties. The nature of the substantive claims sought to be asserted by Plaintiffs as declaratory judgment claims are, in Count I of the Complaint, to set aside the Deed Provision as void, illegal, without authority, and/or unenforceable, and, in Count II of the Complaint, to establish that the Contract and Membership Plan are unenforceable against Plaintiffs as a result of the termination, absolution, disclaimer, and/or breach thereof.

10. The gravamen of Plaintiffs’ Complaint is to challenge the validity of the mandatory social membership obligation in the Club imposed by Salem Pointe and the validity of those certain dues and fees charged to Plaintiffs by Salem Pointe for such mandatory social membership in the Club. The basis for Plaintiffs’ assertion that no such obligation exists and that Salem Pointe lacks the authority to charge such dues and fees is the purported unenforceability, voidness, termination, breach, illegality, absolution, and/or disclaimer of (i) the Deed Provision; (ii) the Contract; (iii) the

Membership Plan; and/or (iv) the Sixth Amendment, all of which are contract claims governed by Tenn. Code Ann. § 28-3-109.

11. Tenn. Code Ann. § 28-3-109 provides that “[a]ctions on contracts not otherwise expressly provided for” must be “commenced within six (6) years after the cause of action accrued.”

12. The Tennessee Court of Appeals has explained that “[o]nce an injury occurs, a cause of action accrues to the person injured, and, subject to certain exceptions, the time for filing a lawsuit to redress the injury begins to run.” *Akins v. State Farm Ins. Co.*, No. E2008-01108-COA-R3-CV, 2009 Tenn. App. LEXIS 187, *8 (Tenn. Ct. App. May 8, 2009).

13. The “discovery rule,” under Tennessee law, “is an equitable exception that tolls the running of the statute of limitations until the plaintiff knows, *or in the exercise of reasonable care and diligence, should know that an injury has been sustained.*” *Fortune v. Unum Life Ins. Co. of Am.*, 360 S.W.3d 390, 402 (Tenn. Ct. App. 2010) (quoting *Schmank v. Sonic Automotive, Inc.*, No. E2007-01857-COA-R3-CV, 2008 Tenn. App. LEXIS 291 (Tenn. Ct. App. May 16, 2008)).

14. Here, the injury complained of by Plaintiffs is Salem Pointe’s imposition of a mandatory social membership in the Club and assessment of dues in connection therewith. The allegations in Plaintiffs’ Complaint, even when viewed in the light most favorable to Plaintiffs, demonstrate that (i) such purported injuries occurred in July 2015 when Salem Pointe recorded the Sixth Amendment and began charging membership fees which were higher than those previously charged by TLC; and (ii) Plaintiffs’ had knowledge of such purported injuries no later than July 2015 when they sent the 2015 Letter to Salem Pointe, criticizing the increased fees and referencing the Sixth Amendment.

15. Moreover, even if Plaintiffs’ claims are considered strictly in light of the labels

Plaintiff assigns to them, rather than the underlying legal basis therefor and damages sought thereby as required by Tennessee law, Plaintiffs' claims are still time-barred.

16. Restrictive covenants are generally examined by Tennessee courts as contracts, such that the application of Tenn. Code Ann. § 28-3-109(a)(3) to an action challenging the validity of restrictive covenants is appropriate under certain circumstances; *Haiser v. McClung*, No. E2017-00741-COA-R3-CV, 2018 Tenn. App. LEXIS 509, *37 (Tenn. Ct. App. Aug. 29, 2018) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 475 (Tenn. 2012)) (finding that the restrictive covenants at issue arose from a series of overlapping contractual transactions such that they should be viewed and examined as contracts). Here, the Deed Provision and the Sixth Amendment were recorded in 2003 and 2015, respectively, and all of the events triggering the accrual of Plaintiffs' claims in relation thereto occurred in July 2015 at the latest.

17. A claim for breach of fiduciary duty sounds in tort such that the statute of limitations applicable thereto is three (3) years from the accruing of the cause of action pursuant to Tenn. Code Ann. § 28-3-105. *Cartwright v. Garner*, No. W2016-01423-COA-R3-CV, 2018 Tenn. App. LEXIS 460, *4 (Tenn. Ct. App. Aug. 10, 2018) (citing *Mike v. Po Grp., Inc.*, 937 S.W.2d 790, 795 (Tenn. 1996)). Plaintiffs' breach of fiduciary duty claim is two-fold, namely, that Salem Pointe breached (i) the duty of good faith and fair dealing; and (ii) certain fiduciary duties as the declarant/developer of Rarity Bay. Specifically, Plaintiffs contend that Salem Pointe absolved itself from the duties and obligations of the Contract and Membership Plan; denied and altered Plaintiffs' rights thereunder; conspired to take over the Rarity Bay HOA to force through self-serving policies; concealed and misrepresented the existence, terms or nature of the 'membership plan' in the Club; and unreasonably and inequitably increased the fees and liabilities it was charging Plaintiffs, while exempting itself and related others from those same fees and

charges.” (Complaint, ¶ 42). However, each of the foregoing purported actions complained of by Plaintiffs’ occurred no later than July 2015, more than six (6) years before Plaintiffs’ filing of the Complaint.

18. Plaintiffs couch Count III of their Complaint in terms of slander of title, which actions are typically governed by the three (3) year statute of limitation set forth in Tenn. Code Ann. § 28-3-105 and accrue from the date of recordation of the instrument at issue. See *Ross v. Orion Fin. Grp., Inc.*, 2019 Tenn. App. LEXIS 113, *25-26 (Tenn. Ct. App. Mar. 7, 2019). However, the entire basis of such claim is a challenge to the validity of the Sixth Amendment, as evidenced by Paragraphs 35 and 36 of Count III of the Complaint wherein Plaintiffs allege “[t]he Sixth Amendment does not apply to Plaintiffs’ property, as it was recorded after their interest vested,” and “[t]he Six Amendment is unenforceable, in any event.” Again, Plaintiffs recorded the Sixth Amendment and began taking action to enforce the same in July 2015, and Plaintiffs had knowledge thereof no later than July 2015.

19. In light of the foregoing, Plaintiffs’ claims are time-barred, and Plaintiff should not be permitted to extend the time for bringing such claims based upon the nature in which it characterizes such claims.

Salem Pointe Is Entitled to Recover Reasonable Attorney’s Fees and Costs pursuant to Tenn. Code Ann. § 20-12-119.

20. Tenn. Code Ann. § 20-12-119 provides:

(a) In all civil cases, whether tried by a jury or before the court without a jury, the presiding judge shall have a right to adjudge the cost.

(b) In doing so, the presiding judge shall be authorized, in the presiding judge’s discretion, to apportion the cost between the litigants, as in the presiding judge’s opinion the equities of the case demand.

(c)(1) Notwithstanding subsection (a) or (b), in a civil proceeding, where a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil

Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorney's fees incurred in the proceedings as a consequence of the dismissed claims by that party or parties. The awarded costs and fees shall be paid by the party or parties whose claim or claims were dismissed as a result of the granted motion to dismiss.

(2) Costs shall include all reasonable and necessary litigation costs actually incurred due to the proceedings that resulted from the filing of the dismissed claims, including, but not limited to:

- (A) Court costs;
- (B) Attorneys' fees;
- (C) Court reporter fees;
- (D) Interpreter fees; and
- (E) Guardian ad litem fees.

20. Accordingly, Salem Pointe further requests that it be awarded costs and reasonable attorney's fees in the event this Motion to Dismiss is granted.

WHEREFORE, Defendant, Salem Pointe, respectfully requests that the Court enter an Order dismissing Plaintiffs' Complaint for failure to state a claim upon which relief may be granted and awarding Salem Pointe its costs, attorney's fees and such other and further relief to which it may be entitled.

Respectfully submitted,

HOWARD & HOWARD, P.C.

By: _____



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the persons listed below by delivering same or by posting same in the United States mail, postage prepaid, or by sending same electronically via email:

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Dated this 13 day of October 2021.


