IN THE CHANCERY COURT FOR MONROE COUNTY, TENNESSEE

JOZEF BENAK and wife, OTILIA BENAK,	)	
Plaintiffs,	)	
v.	)	Docket No. 21,406
SALEM POINTE CAPITAL, LLC, a Tennessee limited liability company,	)	
Defendant.	)	

FILED

AUG 27 2021

TIME 1:18

TERESA A. CHOATE

CLERK & MASTER MONROE CTY.

COMPLAINT

COMES **JOZEF BENAK** and wife, **OTILIA BENAK** (hereinafter "Plaintiffs") by and through counsel, and sues **SALEM POINTE CAPITAL, LLC** (hereinafter "SPC or Defendant"), and for cause of action would say as follows:

1. Plaintiffs are citizens and residents of the State of Illinois.

2. Defendant is a Tennessee limited liability company with its principal office and place of business located at 403 Rarity Bay Parkway, Vonore, Tennessee 37885, upon who service of process may be obtained by serving its Registered Agent for service of process, Michael Ayers, at said address.

GENERAL RECITALS

3. Plaintiffs own Lot 1009, Rarity Bay Subdivision, Phase XI, pursuant to a Warranty Deed dated July 3, 2006, of record in the Loudon County Register of Deeds Office in Deed Book 310, page 2001, a copy of which is attached hereto and marked as Exhibit 1.

4. Plaintiffs own Lot 1008, Rarity Bay Subdivision, Phase XI, pursuant to Warranty Deed dated August 24, 2007, of record in the Loudon County Register of Deeds Office in Deed Book 321, page 455, a copy of which is attached hereto and marked as Exhibit 2.

5. Rarity Bay Subdivision is a residential development and community on the Bat Creek Peninsula on Tellico Lake in Monroe and Loudon Counties, Tennessee, consisting of approximately 960 acres and nearly 1400 lots ("Rarity Bay"). In addition, Rarity Bay has other amenities, including community lots, a community center, a semi-public golf course, pool, tennis facilities, restaurant, fitness facility, and a clubhouse. Rarity Bay was developed pursuant to a Land Use Plan between the Tellico Reservoir Development Agency (TRDA) and Tellico Lake Properties, LP (TLP), a true and exact copy of which is attached hereto as Exhibit 3. TLP then recorded that certain Master Declaration of Covenants, Conditions, and Restrictions for each of Phases I-V of Rarity Bay and one, single Declaration for Phases VI – XVI, encumbering Plaintiffs' property dated October 1, 1998, of record in Trust Book 444, page 248 in the Register's Office for Loudon County, Tennessee (hereinafter "**Master Declarations**"), a true and exact copy of which is attached hereto as Exhibit 4.

6. The Master Declarations required all Lot Owners of Phases VI - XVI to be Members of the Property Owners Association and make payments of dues to the Association, among other things; at particular issue in the case, there is no requirement in the recorded Master Declarations regarding "Mandatory Social Membership" (hereinafter "MSM") in the Rarity Bay Golf and Country Club (the "Club").

7. Neither of the Warranty Deeds to Plaintiffs expressly contain a covenant requiring them to be Social Members of the Club.

8. Moreover, the chain of title for Lot 1008 makes no mention of a mandatory social membership requirement, covenant, or restriction in any prior deed. The chain of title for Lot 1009, which originated in TLP, and then went to RB XI Company (Deed Book 263, page 265), from RB

XI to Roger Morenc (Deed Book 264, page 551), from R. Morenc back to TLP (Deed Book 269, page 350), then from TLP to Goldberg (Deed Book 279, page 252) before going from Goldberg to Plaintiffs (Deed Book 310, page 201). The first out-conveyance by TLP to RB XI Company did not contain the MSM requirement. In fact, Plaintiffs chain of title for both Lots 1009 and 1008 runs through RB XI, but the deeds from RB XI to individual lots owners do not have the MSM requirement. Copies of the deed from TLP to RB XI and those from RB XI in Plaintiffs chains are attached as Collective Exhibit 5. The only Deed in Plaintiffs' chains that contains the MSM provision is after TLP re-acquired Lot 1009, when TLP deeded it to Goldberg, the immediate predecessor in title to Plaintiff.

9. The Deed from TLP to Goldberg for Lot 1009 is attached as Exhibit 6. The requirement reads verbatim as follows:

> *This Property (define term above) is also subject to the following requirement regarding the Rarity Bay Golf and Country Club (the "Club"):*
>
> ***Mandatory Social Membership.*** *The Grantee shall be a "Social Member" of the Club, as such membership is defined in the Membership Plan ("Plan") for the Club. There shall be only one (1) Social Membership associated with this conveyance of property. If there is more than one Grantee, all co-Grantees shall be subject to the usage requirements established by the Club in the Club's sole discretion from time to time. The Grantee will be subject to the by-laws, rules, regulations, and charges of the Club and shall be responsible for the payment of Social Membership Dues to the Club. Grantee has already applied for and been approved for a Social Membership at the Club. The Social Membership shall entitle the Grantee and his or her family and guests to Membership privileges at the Club in accordance with the Plan. The Social Membership includes only limited golfing privileges at the Club as set forth in the Plan, and the Club may eliminate all golf privileges for Social Members in its discretion. Grantee shall have no right of reimbursement or refund for initiation fees or deposits related to the Social Membership, and the Social Membership is non-transferable except in connection with the sale of the property relating to such Social Membership.*
>
> *The Club shall be entitled to charge and collect dues directly from the Grantee on an annual basis ("Social Membership Dues"), prorated from the date of this Warranty Deed. The Social Membership Dues shall be payable by Grantee to the Club without setoff, diminution, or abatement for any reason. Grantee, by accepting*

this Warranty Deed as well as entering into a contract of sale for the property conveyed by this Warranty Deed, is deemed to have notice of liability for these Social Membership Dues and to covenant and agree to pay these assessments. All such Social Membership Dues or other charges, together with interest not to exceed the maximum rate allowable by law, late charges of ten percent (10%) per annum or the highest amount allowable by law, whichever is greater, costs of collection, and reasonable attorneys' fees shall be the personal obligation of the Grantee at the time the Social Membership Dues or other charges arose. Upon a transfer of title to property, the Grantee shall be jointly and severally liable for any Social Membership Dues and other charges due at the time of conveyance. However, no first Mortgagee who obtains title to the property by exercising the remedies provided in its Mortgage shall be liable for unpaid Social Membership Dues or other charges which accrued prior to such acquisition of title. Grantee shall not be exempt from liability for Social Membership Dues by non-use of the Club, abandonment of the Unit, or any other means, except as may be provided in the Club's membership program. The obligation to pay Social Membership Dues is a separate and independent covenant on the part of Grantee.

The Basic Social Membership Dues for the year 2003 shall be in the amount of $750.00 per year. The Club shall be entitled to increase the Social Membership Dues.

The Club shall have a lien against the Property to secure payment of delinquent Social Membership Dues, as well as interest at a rate to be set by the Club (subject to the maximum interest rate limitations of Tennessee law), costs of collection and reasonable attorneys' fees. Such lien shall be superior to all other liens, except (i) the liens of all taxes, bonds, assessments, and other levies which by law would be superior, (ii) the lien or charge of any first Mortgage of record (meaning any recorded Mortgage with first priority over other Mortgages) made in good faith and for value, and (iii) the lien(s) of the Association (as such term is defined in the "Declaration") pursuant to the Declaration, regardless of the date of recording of such lien(s). The Club's lien may be enforced by suit, judgment, and judicial or non-judicial foreclosure as permitted under Tennessee law.

The sale or transfer of the Property shall not affect the Club's assessment lien nor relieve the Property from the lien for any subsequent Club assessments. A Mortgage or other purchaser of the Property who obtains title pursuant to foreclosure of the Mortgage shall not be personally liable for Social Membership Dues due prior to such acquisition of title.

The Club will offer a variety of memberships over and above the mandatory Social Membership. Grantee may upgrade their mandatory Social Membership pursuant to the Plan, by-laws, and rules and regulates of the Club, as amended from time to time. If the Grantee upgrades his or her Social Membership, he or she shall receive a credit against the required Social Membership Dues upon the payment of dues related to the upgraded membership category, but shall not be excused from paying Social Membership Dues. If Grantee terminates such upgraded membership,

the Social Membership and the obligation to pay Social Membership Dues, shall continue and shall not be terminated.

The requirement in question (i) does not expressly and/or sufficiently state that it is binding on the *successor and assigns* of Grantees (Goldberg), and thus does "not run with the land" (the only such language in the deed applicable to 'successors and assigns' is prior/elsewhere in the deed, unrelated to the MSM requirement, and limited to the habendum clause and warranties of title in said deed), (ii) the MSM is an affirmative requirement of performance, that does not touch and concern the land, and is thus binding only of the grantee in that deed (Goldberg); it is not a restrictive covenant running with the land, (iii) the MSM requirement is not contained in Plaintiffs' deeds, and (iv) the MSM requirement is dependent upon the existence of a club governing document (the "Membership Plan"), which Defendant did not acquire the rights to, has been terminated by the sale of the Club and/or Defendant's breach thereof, and to which Defendant has absolved itself of anyhow. To any extent the MSM is binding, it is void, and of no force or effect, without a valid, mutually binding, and enforceable "Membership Plan".

10. Plaintiffs would also allege that any such restrictive covenant or requirement of mandatory membership in the Club, is without authorization and in violation of the Land Use Plan under which Rarity Bay was authorized. The TRDA and TLP Agreement expressly stating that the country club would be a non-profit entity and would not be a "burden" on the owners.

11. The Plaintiffs acquired their lots with the intention of constructing a home on one lot and a house for their relatives on the other lot. To this day, the Plaintiffs remain out of state and the lots unimproved and vacant; the Plaintiffs do not frequent Tennessee and have only ever visited the Club on one single occasion.

12. Even though Plaintiffs did not know about the MSM requirement in the prior deed, they joined the Club when buying Lot 1009 under a Club Membership Plan dated April 1, 2002, a true and exact copy of which is attached hereto as Exhibit 7. The Membership Plan, *inter alia,* provides that the Club reserves the right, in its sole and absolute discretion, to modify the terms of this Membership Plan, provided such modification is not materially adverse to the rights of Plaintiffs. The Membership Plan was not recorded in the Register of Deeds Office, and does not affect the title of the real property owned by the Plaintiffs.

13. At the time of purchase, as set forth in the Membership Plan, Plaintiffs paid a *refundable* Membership deposit of $5,000.00, with another $5,000.00 unexpectedly charged at the closing for Lot 1008 in 2007, for a total of $10,000.00 deposited. In 2006, the administration fees for Lot 1009 for a "non-resident inactive status" (NRIS) Social Membership cost $72.50, plus $6.71 in taxes, per quarter; over time, administration fees were modestly increased to $94.00, plus $8.70 in taxes, per quarter through March 31, 2015.

14. In May 2015, Defendant purchased the declarant rights, amenities, and other real and personal property of Rarity Bay from a receivership involving TLP and other Mike Ross related entities. Defendant denies being bound by or a party to the Membership Plan under which Plaintiffs joined the Club, stating that it was with a now defunct entity, yet Defendant has maintained Plaintiffs' liability for Club membership dues and fees.

15. According to the Membership Plan under which Plaintiffs joined the Club as Inactive social members, the sale of the Club terminated their Membership Plan. Moreover, the membership plan is essential to any contract, covenant or liability of Plaintiffs to Defendant for Club dues. The deed provision on which Defendant reportedly charges Plaintiffs Club dues and fees is based on a Membership Plan. By termination, rejection, breach, or lapse/non-existence,

Plaintiffs are not liable to Defendant. Plaintiffs' 2009 Club Membership Plan and Deposits are, according to Defendant, with a defunct entity. Defendant absolves itself of both the contract between Plaintiffs and TLP, the Application for Membership Privileges, attached as Exhibit 8, and the Membership Plan, and there is no sufficiently definitive, bargained for contract between Plaintiff and Defendant. As such, Plaintiffs are no longer members. To the extent that the MSM encumbers Plaintiffs' title, it is now void and of no further force or effect, as the Club they joined and the contract they entered into, no longer exists.

16. On July 20, 2015, immediately after acquisitions of the declarant rights and certain assets of Rarity Bay, Defendant disseminated a "FAQ" notice, attached as Exhibit 9, that the previous plan and deposits were with a defunct entity, that no membership deposits were transferred, there is no possibility of a refund, and there is no plan with SPC that requires deposits and subsequent refunds. In the same timeframe, Defendant increased Inactive Membership fees to $327.75 per quarter, a 220% increase. Defendant also unilaterally recorded that certain Sixth Amendment of Master Declaration dated May 18, 2015, which *inter alia*, (i) imposed a $5,000.00 Club initiation fee on all conveyances due at closing, (ii) added a Mandatory Social Membership Covenant on all future lot owners, except on "Exempt Persons", (iv) amended the defined term of Exempt Person (exempt from paying dues and fees required by all other lot owners) to:

a) Salem Pointe Capital Partners;

b) any person or entity which is a parent, subsidiary or affiliate of Salem Pointe Capital Partners;

c) any officer, director, shareholder, partner, member, manager, or trustee of any of the foregoing, and

d) granted Defendant the right to place lien in favor of the Club to secure payment of Club dues and the Club initiation fee. A true and exact copy of the Sixth Amendment is attached hereto as Exhibit 10. Under the Membership Plan that Plaintiffs joined, the deposit was the procedure by which refunds were to be paid; Defendant now imposes and collects those as 'fees', applicable to the Club and shares those monies collected with its business partners, rather than refunding deposits previously guaranteed to Plaintiffs.

17. Alternatively, these actions by Defendant breached and/or were not authorized by any contract between Defendant and Plaintiffs, or rights held by Defendant, and the actions were undertaken without any notice to Plaintiffs, discussion or opportunity to vote, but they are clearly *materially adverse* to the rights and interest of Plaintiffs.

18. Plaintiffs then sent a registered letter and email dated July 26, 2015, notifying the Defendant of their formal resignation from the Club, effective immediately, a true and exact copy of which is attached hereto as Exhibit 11. No acknowledgment or other response to this notice of resignation has ever made by Defendant; Plaintiffs legally ceased paying Inactive Member administrative fees thereafter.

19. Despite this, Plaintiffs have continued to receive statements and notices from the Defendant, in response to which Plaintiffs have sent more letters and emails; they also hired counsel to send letters and demands, most of which were never acknowledged or answered by Defendant.

20. Defendant has since recorded a Notice of Lien on Plaintiffs' Lot 1009 in the amount of $10,937.55 plus "monthly dues, fees, and other charges which have accrued subsequent to the Effective Date" on April 23, 2019, a copy of which is attached hereto as Exhibit 12. As of May 31, 2021, the total balance claimed for dues, interest, delinquent charges, and attorney's fees is $18,683.01 and purportedly growing. The Notice of Lien cites certain Rules and Regulations,

Plaintiffs' deed, and the Master Declarations as the basis for authorization, but none of those documents actually grant Defendant any lien rights against Plaintiffs' property.

21. Since Defendant acquired the Rarity Bay declarant rights in 2015, the annual dues for Social Membership have continually increased over 400%, to the current amount of $2,400.00 per year.

22. Rarity Bay lacks a common scheme or plan for the mandatory social membership requirement to be an enforceable restrictive covenant, in that, if effective, the Mandatory Social Membership provision is only in some deeds but not all deeds to property owners. Plus, the Sixth Amendment, if enforceable, cannot apply to the existing property owners. Moreover, Defendant has exempted themselves and select parties from the covenant.

23. Finally, Defendant refuses to acknowledge or abide by the Plaintiffs' contractual agreement or the Membership Plan with the Club, if one is in effect, denying Plaintiffs' rights to their financial injury.

24. Defendant has engaged in conduct in violation and breach of its fiduciary duties as the 'declarant/developer' of Rarity Bay owed to Plaintiffs. In addition to the foregoing, Defendant has plotted to take control of the HOA of Rarity Bay, so that it can out-vote property owners concerns, it has been inconsistent, deceptive, and misrepresented the existence of a 'new' club membership plan, and it has unreasonably and inequitably increased the fees and charges that it asserts against Plaintiffs' property, while exempting itself and related and favored entities and persons from the same fees and liabilities, which actions have decreased the marketability and value of Plaintiffs' lots, from what they would have otherwise be in the absence of such conduct.

CAUSES OF ACTION

COUNT I

Declaratory Judgment: Unenforceable Deed Provision

25. The Plaintiffs incorporate Paragraphs 1-24 of this Complaint as if restated herein.

26. The provision in the deed from TLP to Goldberg for Lot 1009 regarding a mandatory social membership is unenforceable for the following reasons:

(i) the provision violates the Land Use Plan authorizing the development of Rarity Bay by TLP, in that it does not permit the Country Club to be a burden on property owners;

(ii) the provision is not authorized by the Master Declarations of Rarity Bay that encumber Plaintiffs' lots;

(iii) the provision was not created effectively;

(iv) the provision is not part of a common scheme or plan, in that it is only in certain deeds, but not others; it is too inconsistently applied to constitute an enforceable restrictive covenant;

(v) the provision was an affirmative, personal requirement, only enforceable against the Goldbergs; and

(vi) the provision does not state that it is binding on the "successors and assigns" of Plaintiffs' predecessors in title; it does not run with the land to be binding on Plaintiffs.

(vii) the MSM provision is dependent on a valid, mutually binding, and enforceable Club Membership Agreement, which was terminated according to its terms by the sale of the Club to Defendant; Defendant absolves itself from the Plan in any event, and/or the Plan has been terminated by Defendant's breach thereof.

COUNT II

Declaratory Judgment: No contract

27. The allegations and averments in Paragraphs 1-26 of this Complaint are incorporated as if restated herein.

28. The sale of the Club terminated the Membership Plan which Plaintiffs entered into with TLP, according to its terms, and which forms the basis of any enforceability, if any, of the MSM requirement on Plaintiffs. Defendant has also absolved itself and disclaimed both the Membership Plan and the contract entered into by Plaintiffs with TLP, and there is no other bargained for, reasonably specific, identifiable membership relationship between Plaintiffs and Defendant.

29. Alternately, the terms of Membership Plan under which Plaintiffs joined as members of the Club has been breached by Defendant in taking unilateral actions, that are materially adverse to Plaintiffs' interests by declaring the Membership Deposit to be non-refundable, and their social membership non-transferrable, and periodically imposing dues, while exempting certain individuals and Defendant-related entities.

30, The MSM deed provision in question, if binding on Plaintiffs, is void and of no force and effect, without an effective, mutually binding Membership Plan between the Club and Plaintiffs.

31. Alternatively, the Social Membership of Plaintiffs in the Club has been properly and justifiably terminated by Plaintiffs.

COUNT III

Slander of Title

32. The allegations and averments in Paragraphs 1-31 of this Complaint are incorporated as if restated herein.

33. Defendant filed a Notice of Lien on Plaintiffs' Lot 1009 in the amount of $10,937.55

34. The Notice of Lien purports to be filed pursuant to the Rules and Regulations of the Club, the deed to Plaintiffs (for Lot 1009), and the Master Declarations; it does not indicate a Membership Plan, a necessary predicate for Plaintiffs to be Members. Furthermore, the documents referenced fail, for reasons previously stated, or do not authorize Defendant to lien Plaintiffs' property.

35. The Sixth Amendment does not apply to Plaintiffs' property, as it was recorded after their interest vested.

36. The Sixth Amendment is unenforceable, in any event.

37. The lien filed by Defendant against Plaintiffs is a cloud on their title, and impairs the value and marketability of their property.

38. The Notice of Lien filed by Defendant against Plaintiffs was recorded after dispute and protest by Plaintiffs, without adequate response, intentionally, willfully and maliciously, without authorization, and in bad faith, causing substantial economic injury and harm to Plaintiffs, rendering Defendant liable to them for damages in an amount to be determined, plus attorney's fees associated with bringing this action.

COUNT IV

Breach of Fiduciary Duties

39. The allegations and averments in Paragraphs 1-38, inclusive, of this Complaint are incorporated herein by reference.

40. Defendant owes Plaintiffs the duty of good faith and fair dealing.

41. Defendant owes Plaintiffs certain fiduciary duties as the 'declarant/developer' of Rarity Bay.

42. Defendant has breached these duties by absolving itself from the duties and obligations of both the contract and the Membership Plan into which Plaintiffs entered, unilaterally denying and materially altering Plaintiffs the rights they had under the same, without notice, discussion or vote, planning and conspiring to commit a hostile takeover of the HOA of Rarity Bay to force through the policies and procedure that were best for the Defendant, by concealed and misrepresenting the existence, terms or nature of the 'membership plan' in the Club, and by unreasonably and inequitably increasing the fees and liabilities it was charging Plaintiffs, while exempting itself and related others from those same fees and charges.

DEMAND FOR RELIEF

Come Plaintiffs and demand the following relief:

1. That proper process issue and be served on Defendant requiring it to answer the Complaint within the time allowed by law; and

2. That upon a hearing in this cause, the Court declare the deed provision in Plaintiffs chain of title concerning mandatory social memberships to be void, illegal, without authority, and/or unenforceable as a matter of law, contract, or equity; and

3. That the Court declare that there is no contract between Plaintiffs and Defendant, that any such contract has lapsed, terminated, breached, and been disavowed, and that Plaintiffs have no liability to Defendant for Club membership dues, fees, assessment, or otherwise, as a result; and

4. That the Court determine that the Notice of Lien filed by Defendant on Lot 1009 is a slander of title, entitling Plaintiffs to relief in the form of a judgment against Defendant for monetary damages and/or attorney's fees; and

5. That Plaintiffs' lot 1008 not be encumbered with a Mandatory Social Membership obligation; and

6. That the Court hold Defendant liable to Plaintiffs for breach of fiduciary duties and breach of the duty of good faith and fair dealing, in an amount to be determined.

7. For such other and further relief as to which Plaintiffs may show entitlement.

This the 12 day of August, 2021.

JOZEF BENAK and wife,
OTILIA BENAK,

By: _____

Gordon D. Foster, BPR #013792
Attorney for Plaintiffs
Winchester, Sellers, Foster & Steele, P.C.
P. O. Box 2428
800 South Gay Street, Suite 1000
Knoxville, Tennessee 37929
Phone: (865) 637-1980
Email: gfoster@wsfs-law.com

COST BOND

We hereby acknowledge ourselves as principal and surety for all costs, taxes and damages in this case in accordance with T.C.A. §20-12-120.

PRINCIPALS:

Jozef Benak

Otilia Benak

SURETY:

WINCHESTER, SELLERS,
FOSTER & STEELE, P.C.

By: Gordon D. Foster, V.P.
Gordon D. Foster, Vice-President