

Cause No. _____

MIDDLEGATE VILLAGE COMMUNITY
ASSOCIATION, INC.,
Plaintiff,

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IN THE DISTRICT COURT OF

VS.

HARRIS COUNTY, TEXAS

MICHAEL DAVID MACOMBER AND
BERNADETTE MACOMBER,
Defendants,

____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Middlegate Village Community Association, Inc., Plaintiff in this lawsuit, would respectfully show the Court the following.

I. PARTIES; SERVICE OF PROCESS

Plaintiff is a non-profit corporation existing under and by virtue of the laws of the State of Texas with its principal office being located in Harris County, Texas.

Defendants, Michael David MaComber and Bernadette Macomber, are residents of Harris County, Texas, and may be served with process at 15718 Pinyon Creek Dr, Houston, TX 77095 or wherever Michael David MaComber and Bernadette Macomber may be found.

II. JURISDICTION AND VENUE

Pursuant to *Texas Civil Practice and Remedies Code*, jurisdiction and venue of this case properly lie in Harris County, Texas, in that Harris County is the county in which all or part of the property made the basis of this cause is located and/or is the county of Defendants' residence at the time the cause of action accrued.

This lawsuit seeks monetary relief of one hundred thousand dollars (\$100,000.00) or less and non-monetary relief. The damages sought are within the jurisdictional limits of the court.

III. DISCOVERY CONTROL PLAN

Discovery in this matter will be controlled by Discovery Control Plan Level 2 described in Rule 190.3 of the *Texas Rules of Civil Procedure*.

IV. RELEVANT RESTRICTIVE COVENANTS AND TYPE OF CAUSE OF ACTION

“Restrictive Covenant” means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative. TEX. PROP. CODE ANN. § 202.001(4) (Vernon 1995).

There are recorded certain *restrictive covenants* (Restrictions) providing for the creation of assessments and other charges to be paid to the Plaintiff that are the responsibility of the owner or owners of each lot under the jurisdiction of the Plaintiff. These Restrictions and amendments, if any, run with the land, are enforceable at law, and are recorded in the *Official Public Records of Real Property of Harris County, Texas*.

These Restrictions and amendments, if any, continue to be valid and enforceable against all properties under the jurisdiction of the Plaintiff.

These Restrictions constitute a legally binding and enforceable contract between the Plaintiff and Defendants. *Boudreaux Civic Ass’n v. Cox*, 882 S.W.2d 543, 547 (Tex. App. –Houston [1st Dist.] 1994, no writ); *See also Dunn v. Polly Ranch Homeowners Association*, 943 S.W.2d 906. Defendants’ failure to pay assessments to the Plaintiff constitutes a material breach of the contract. Defendants’ breach of the contract caused Plaintiff to suffer monetary damages in the form of unpaid assessments, interest, late fees, attorney’s fees, costs of court and other charges.

It has become necessary for the Plaintiff to bring this case to: (1) obtain a judgment for unpaid assessments and other charges legally due and owing to the Plaintiff; and (2) foreclose its lien for unpaid assessments and other charges legally due and owing to the Plaintiff that are secured by the Plaintiff’s lien on the property in question.

V. OWNERSHIP OF PROPERTY

According to a deed recorded in the office of the County Clerk of Harris County, Texas, Defendants are the owners of a tract of land described as *LOT 32, IN BLOCK 29, OF COPPERFIELD MIDDLEGATE VILLAGE, SECTION TWO (2), A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT RECORDS RECORDED IN VOL 304 PAGE 74 OF THE MAP RECORDS OF HARRIS COUNTY TEXAS* (Property). The street address of the Property is 15718 Pinyon Creek Drive, Houston, TX 77095. The Property is encumbered by the Restrictions and amendments, if any.

VI. PLAINTIFF'S AUTHORITY TO ENFORCE THE RESTRICTIVE COVENANTS

A property owners' association may initiate litigation affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument. TEX. PROP. CODE ANN. § 202.004(b) (Vernon 1995).

VII. NOTICE OF RESTRICTIVE COVENANTS

An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument. TEX. PROP. CODE ANN. § 13.002 (Vernon 1984).

The Restrictions have been properly recorded in the Official Public Records of Real Property of Harris County, Texas.

Despite notice of the Restrictions, Defendants are violating the Restrictions by failing to pay to Plaintiff the assessments and other charges authorized by the Restrictions or applicable law.

VIII. REQUEST FOR JUDGMENT ON ALL AMOUNTS DUE TO PLAINTIFF

The Restrictions obligate the owner or owners of each lot under the jurisdiction of the Plaintiff to pay to the Plaintiff assessments and other charges. Subsequent to the date the

Restrictions were filed in the *Official Public Records of Real Property of Harris County, Texas*, the Defendants obtained an ownership interest in the Property. Upon the Defendants obtaining an ownership interest in the Property, the Defendants became obligated to pay to the Plaintiff assessments and other charges, all as set forth in the Restrictions.

Defendants have been mailed statements from Plaintiff requesting payment of the amount due and owing to the Plaintiff but, despite such requests, Defendants have failed and refused, and continue to fail and refuse to pay such amount. Attached as Exhibit A is a breakdown of the amount owed as of the date of filing this Original Petition. The breakdown does not reflect the total amount of attorney's fees owed as a result of the collection of assessments and other charges owed. Interest will continue to accrue on the principal balance until the total amount due is paid in full.

For the above-described reasons, the Defendants are obligated to pay to the Plaintiff the balance due for unpaid assessments and other charges authorized by the Restrictions or applicable law together with court costs and reasonable attorney's fees.

Plaintiff requests judgment against the Defendants for all amounts that are legally due and owing to Plaintiff.

IX. REQUEST FOR FORECLOSURE OF PLAINTIFF'S LIEN ON AMOUNTS SECURED BY PLAINTIFF'S LIEN ON THE PROPERTY

The Restrictions reserve to Plaintiff a lien on the Property to secure the payment of assessments and certain other charges due and owing on the assessment account of the Property.

Plaintiff is entitled to foreclose its lien on the portion of the total amount due and owing to the Plaintiff that is secured by the Plaintiff's lien on the Property.

X. ATTORNEY'S FEES AND COSTS

Plaintiff is entitled to recover attorney's fees pursuant to the Restrictions.

In addition, and/or in the alternative, in an action based on breach of a restrictive covenant pertaining to real property, the Court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim. TEX. PROP. CODE ANN. § 5.006 (Vernon 1984).

In the alternative, Plaintiff is entitled to recover its reasonable attorney's fees and costs pursuant to Section 38.001 of the Civil Practice & Remedies Code for a breach of contract.

Plaintiff designates the undersigned attorneys as expert witnesses on reasonable and necessary attorney's fees and costs of litigation incurred by the Plaintiff in connection with this suit.

XI. CONDITIONS PRECEDENT

All conditions precedent have been performed or have occurred. TEX. R. CIV. P. 54.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that the Defendants be cited to appear and answer this Petition and, that on a full and final hearing on this cause, that:

1. The Plaintiff have judgment against Defendants for all charges legally due and owing to the Plaintiff on the assessment account of the Property that are not secured by the Plaintiff's lien on the Property together with any additional unsecured charges that may accrue prior to judgment;
2. The Plaintiff have judgment against Defendants for all charges legally due and owing to Plaintiff on the assessment account of the Property that are secured by the Plaintiff's lien on the Property together with any additional charges that are secured by the Plaintiff's lien on the Property that may accrue prior to judgment;
3. The Plaintiff be awarded reasonable attorney's fees (plus additional reasonable post-judgment attorney fees and expenses) and costs pursuant to the terms of the Restrictions and/or the *Texas Property Code*;
4. The Plaintiff have foreclosure of its lien created by the provisions of the Restrictions on the amounts awarded for numbers 2 and 3 above on the following described Property owned by the Defendants:

LOT 32, IN BLOCK 29, OF COPPERFIELD MIDDLEGATE VILLAGE, SECTION TWO (2), A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT RECORDS RECORDED IN VOL 304 PAGE 74 OF THE MAP RECORDS OF HARRIS COUNTY TEXAS more commonly known as 15718 Pinyon Creek Drive, Houston, TX 77095;

5. An *Order of Sale* shall issue to any sheriff or any constable within the State of Texas, directing the sheriff or constable to seize and sell the Property the same as under execution, in satisfaction of the final judgment in this cause subject to any superior liens provided for in the Restrictions or at law, if any;
6. The Plaintiff be allowed all such writs and processes as may be necessary to enforce and collect the final judgment in this cause, including all reasonable attorney's fees incurred in any such proceedings, and that execution issue for the judgment; and
7. The Plaintiff be awarded post-judgment interest on the entire amount awarded, including attorney's fees, at the interest rate authorized in the Restrictions or, where applicable, at the highest rate allowed by law, from the date of judgment until fully paid, together with all costs of court, and all such other and further relief, special or general, at law or in equity, to which Plaintiff may show itself justly entitled or as the Court may deem just.

Respectfully submitted

ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

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