2012 IL App (1st) 111330-U

FOURTH DIVISION
May 10, 2012

No. 1-11-1330

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

6-8 WEST MAPLE CONDOMINIUM ASSOCIATION, Plaintiff-Appellee, v. JOZEF KARLUK and JASON MODZELEWSKI, Defendants-Appellants (The Estate of George Modzelewski, Malgorzata Waszak, and Dominick Gusmanos, Defendants).	)	Appeal from the Circuit Court of Cook County No. 08 CH 31608 Honorable Sophia H. Hall, Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court did not err in granting plaintiff's motion for summary judgment where the amendments recorded by the developers were not authorized pursuant to the Condominium Property Act, which provides specific guidelines for amendments to the

condominium instruments once there is any unit owner other than the developer. Moreover, the amendment to the condominium declaration was not authorized by a provision in the declaration itself, where the provision applied to errors in the measurement of individual units or clerical errors. The provision in the easement agreement that authorized the developers to amend that agreement did not authorize amendments to the declaration and plat of survey, and, pursuant to the Condominium Property Act, the language of the declaration prevails where there is an inconsistency between the declaration and any other condominium instrument. Finally, the circuit court did not abuse its discretion in denying defendants' motion for leave to file a counterclaim where the motion was filed 14 months after the answer and most of the issues had been resolved.

¶ 2 Plaintiff-appellee, 6-8 West Maple Condominium Association (Association), filed a complaint seeking a declaratory judgment that certain amendments to the declaration of condominium (Declaration) and the reciprocal easement agreement (Easement Agreement) recorded by defendants George Modzelewski[1] and Jozef Karluk (Developers) were void. The parties filed cross-motions for summary judgment. The circuit court granted the Association's motion for summary judgment and denied the defendants' motion. The circuit court also denied the defendants' motion for leave to file a counterclaim. Defendants-appellants Karluk and Jason Modzelewski contend that the circuit court erred in granting the Association's motion for summary judgment because: (1) the Easement Agreement defines the east wall as retail property, (2) the Declaration expressly excludes parking, (3) the circuit court failed to address whether the inconsistencies in the Declaration and Easement Agreement should be deemed a mistake, and (4) the Developers had the authority to record the 2006 amendment to the Declaration and the 2006 and 2007 amendments to the Easement Agreement. Appellants further contend that the circuit

[1]George Modzelewski passed away during the trial proceedings and The Estate of George Modzelewski was substituted as a party-defendant on January 25, 2011. The Estate is not a party to this appeal.

court abused its discretion in denying defendants' motion for leave to file a counterclaim because it was filed before the final judgment and there was no surprise or prejudice to the plaintiff. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The Developers formerly owned real property commonly known as 6-8 West Maple Avenue in Chicago, Illinois. The Developers converted the existing four-story building on the property to condominiums in 2004. The building consists of eight condominium units located on the third and fourth floors, and four retail units located on the first and second floors. Immediately north of the building is a concrete slab used for parking, which is gated and accessible by a battery-operated transponder. The first floor of the building contains a utility room in the northwest corner and a laundry room in the northeast corner. A sign used for advertising hangs at the top of the east wall of the building at the level of the fourth floor.

¶ 5 The Association was formed by the Developers on March 18, 2004, by filing articles of incorporation with the Illinois Secretary of State. The Association is a not-for-profit corporation that administers the condominium property at 6-8 West Maple. The Developers recorded the Declaration with a plat of survey attached on September 30, 2004. On or around October 1, 2004, the Developers entered into an agreement to lease the advertising space on the east wall to Deco Creations, Inc., for a term of 50 years. On October 1, 2004, the Developers also recorded the Easement Agreement. Between October 1, 2004 and April 15, 2005, the Developers sold and conveyed the eight condominium units to individual purchasers. The Developers acted as the interim board of directors of the Association until January 6, 2005, when the individual unit

owners elected their own board of directors. On October 26, 2005, pursuant to requests by the Association, the Developers' attorney sent all of the documentation relating to the condominium property to the Association.

¶ 6 The plat of survey that was recorded with the Declaration designates the two retail units on the first floor as parcel 1. The two retail units on the second floor are also designated parcel 1, an apparent typographical error. The legal description indicates that the entire property is condominium property with the exception of the commercial areas designated as parcel 1 and parcel 2. The drawing for the two lots also contains a notation that an exception exists for parcels 1 and 2, which are designated as commercial property. On the drawing for the first floor, the laundry room and utility room are both labeled "common element." The drawing for the two lots shows an area to the north of the building that is labeled "concrete area." The legal description on the plat of survey states that the concrete area is part of the condominium property and not part of the commercial property. According to the plat of survey, any portion of the building above the second floor would constitute condominium property.

¶ 7 Article 3 of the Declaration covers the common elements, which are described as all portions of the property, except the units, unless otherwise expressly specified in the Declaration. The common elements include, *inter alia*, the walls, roof, hallways, stairways, entrances and exits, mechanical equipment areas, "the Parking Area," and structural parts of the building. Section 3.01 states that any references to "common elements" appearing on the plat are for general information purposes only and such references do not define the common elements. Article 4 of the Declaration relates to general provisions. Section 4.09 states that no parking

spaces or parking area have been designated, but that the Association may allocate portions of the common elements as parking spaces or a parking area in the future.

¶ 8 The Easement Agreement defines the retail property as "approximately 4000 square feet on the ground floor and lower level of the Building and exterior east wall which is subject to the Lease attached hereto." A perpetual easement was granted in favor of the retail property for the use, support and maintenance of the exterior east wall for the purpose of placing advertising material. The legal description attached to the Easement Agreement defined the retail property as parcel 1, consisting of the retail units on the first floor of the building, and parcel 2, consisting of the retail units on the second floor of the building. Everything else on the two lots was defined as residential property.

¶ 9 After the condominium unit owners elected their own board of directors, several disputes arose between the Association and the Developers. The Association alleged that the unit owners initially had access to the laundry room but one day the locks were changed. Upon inquiry, the Association alleged that it was told by the Developers that the laundry room had been sold and the Developers had merely been loaning it to the owners, even though the listing sheets provided by the Developers to prospective purchasers stated that the condominium included "Laundry On-Site." There was also some correspondence between the Association and the Developers' attorney regarding which party had the right to collect income from the billboard on the east wall. Finally, there was correspondence between the Association and the Developers' attorney regarding the fact that the Association noticed that the parking area was not being devoted to the retail units.

¶ 10 On August 10, 2006, the Developers recorded an amendment to the Easement Agreement, reflecting a division of the retail property into four separate parcels. The amendment also changed the legal description to include the parking area, which was divided into four parking spaces, in the definition of retail property. Under the amended description, a parking space designated parcel 1a was included with retail unit 1SW, associated with the revised parcel 1, and three parking spaces designated parcels 3a, 3b and 3c were included with retail unit 2SW, associated with the newly created parcel 3. On August 18, 2006, the Developers recorded an amendment to the Declaration, changing the legal description to reflect that, in addition to the retail units, the commercial property included the utility room, laundry room and parking area.

¶ 11 On August 16, 2006, the Developers conveyed retail unit 1SW, its associated parking space, and the utility room to Karluk. On April 18, 2007, the Developers conveyed retail unit 1SE and the laundry room to defendant Dominick Gusmanos. On October 17, 2007, the Developers recorded another amendment to the Easement Agreement, providing that the right to use the exterior east wall for advertising purposes was reserved solely for retail unit 1SW. On November 17, 2007, the Developers conveyed the remaining three parking spaces to defendant Malgorzata Waszak (Karluk's wife and the owner of one of the residential units) and defendant-appellant Jason Modzelewski (George Modzelewski's son) as tenants in common.

¶ 12 On August 27, 2008, the Association filed a lawsuit, naming Karluk and George Modzelewski as defendants in their capacity as developers, and Karluk, Waszak, Jason Modzelewski and Gusmanos as defendants in their capacity as interested parties based on the conveyance to them of property purportedly owned by the Association. The Association's

complaint alleged counts for declaratory judgment, ejectment, trespass, quiet title, and violation of the Consumer Fraud Act, as well as a count related to a lien recorded against the property by the Developers. Count I of the complaint sought a declaratory judgment that the 2006 and 2007 amendments to the Easement Agreement and the Declaration were void *ab initio* and of no effect, and a finding that the Association was entitled to a fee simple ownership in the parking area, laundry room, utility room and east exterior wall.

¶ 13 The parties filed cross-motions for summary judgment on count I of the complaint. The Association attached the affidavit of Michael Emmert, a professional land surveyor, to its motion. Emmert stated that he had reviewed the Declaration and the attached plat of survey, as well as the 2006 amendment to the Declaration with the attached plat of survey. Based on Emmert's review, the Declaration and plat of survey originally designated the entire real property commonly known as 6-8 West Maple as condominium property with two exceptions, the retail areas on the first and second floors that were designated as parcel 1 and parcel 2 in the legal description. Emmert stated that as a result of the 2006 amendment, the retail parcels were divided into four units as follows: (1) Parcel 1 - Retail Unit 1SW, (2) Parcel 2 - Retail Unit 1SE, (3) Parcel 3 - Retail Unit 2SW, and (4) Parcel 4 - Retail Unit 2SE. The utility room was removed from the condominium property and included as part of parcel 1, the laundry room was likewise removed from the condominium property and included as part of parcel 2, and four parking spaces were "carved out" of the concrete area and removed from the condominium property.

¶ 14 The Association also attached excerpts from the deposition transcripts of Daniel Lauer, one of the Developers' attorneys, and George Modzelewski. Lauer testified that he considered

the turnover from the Developers to the Association to have occurred as of October 26, 2005, pursuant to a letter he signed. Lauer further testified that the attorney who recorded the original Declaration and plat of survey was no longer with his firm, but that it was obviously a mistake made by the surveyor not to include the parking area, laundry room and utility room as part of the retail units, and that the mistake was not caught by the original attorney, Lauer, or Chicago Title. George Modzelewski testified that he told Lauer that the developers planned to keep the commercial units and the parking, and he also told him about the lease for the sign. George further testified that before the condominium conversion, he used one of the parking spaces and his wife, brother and son used the others. He testified that he later sold the spaces to his son because his son always wanted them, and because George was spending a lot of time in Florida and did not use the parking spaces that much anymore.

¶ 15 The Developers attached the affidavit of George Modzelewski to their motion, in which he stated that access to the parking area was controlled by a transponder and at no time was any device which could open the gate given to the Association. The affidavit further stated that the parking area was never intended to be part of the residential area, but was part of the retail property. The Developers also attached excerpts from the deposition transcript of Barbara Chiaraluce, one of the condominium owners and a member of the Association's board of directors. Chiaraluce testified that the board members discussed the parking area and their lack of access to it from the time the owners elected their own board. Chiaraluce also testified that the board attempted unsuccessfully to communicate with the Developers, so the Association retained an attorney to review the condominium documents. The attorney advised them that the

parking area was part of the common elements. Finally, the Developers attached the affidavit of Daniel Lauer to their motion. Lauer stated that the Developers instructed him that the parking area, storage rooms, utility room, and east exterior wall with its existing sign were to be part of the retail property and not part of the residential property. Lauer further stated that the Declaration indicated that the parking area, storage rooms, utility room, and the east exterior wall with the sign attached were not part of the residential property. However, Lauer stated that there were errors in the survey and legal descriptions that were not identified prior to the sale of the condominium units.

¶ 16 On July 23, 2010, the circuit court issued a written decision granting summary judgment in favor of the Association and declaring the amendments void to the extent that they removed the parking area, laundry room and utility room from the common elements of the condominium. The court continued the issue concerning the east exterior wall for additional briefing. In its July 23 order, the circuit court stated that the issue of whether the Developers made a mistake was not relevant to the issue of whether the procedure used to correct the mistake was authorized. The circuit court examined the relevant statute and the language of the Declaration, and determined that the Developers no longer had the authority to unilaterally amend the condominium documents because all of the condominium units had been sold at the time the amendments in question were recorded. The court further determined that the provision in the Declaration that the Developers relied on was only applicable to clerical errors related to construction or the effect of construction, and not to mistakes made regarding what was included in the common elements. Finally, the court determined that the provision in the Easement Agreement relied on by the

Developers provided no authority for amendments to the legal descriptions in the Declaration or plat of survey. The circuit court noted that the Developers were prohibited by statute from unilaterally correcting errors where the correction would materially or adversely affect the property rights of the unit owners, and that provisions in the condominium documents that were inconsistent with the statute were void. In a separate order dated July 23, 2010, the circuit court denied the defendants' motion for summary judgment, granted in part the Association's motion for summary judgment, and declared that the Association had a fee simple ownership in the laundry room, utility room, and parking area.

¶ 17 On August 19, 2010, defendants filed a motion to reconsider the July 23 orders. On September 24, 2010, defendants filed a motion to file a counterclaim for claims relating to reformation, *quantum meruit*, and unjust enrichment related to the parking area. The motion was denied without prejudice on October 4, 2010. Defendants filed a new motion for leave to file a counterclaim on October 19, 2010, on the same grounds that were raised in the previous motion. In the meantime, both parties also filed briefs on the remaining issue of the east exterior wall. At a hearing on November 5, 2010, the circuit court denied defendants' motion to reconsider.

¶ 18 The circuit court then addressed the parties' arguments with respect to the east exterior wall. The court first noted that the Developers provided no evidence to support their argument that it was impossible to create a legal description that would exclude the east exterior wall from the condominium property. As for the argument that the buyers knew of the Easement Agreement when they purchased their units, the circuit court found that such knowledge did not support the position that a definition in the Easement Agreement that included the east exterior

wall in the retail property could amend the legal description of the condominium property. The circuit court noted that the definition of retail property in the Easement Agreement conflicted with both the legal description attached to the Easement Agreement and the legal description in the Declaration. Finally, the circuit court rejected the Developers' argument that some unspecified method in the statute would allow a definition in the Easement Agreement to amend the attached legal descriptions to the Easement Agreement and the Declaration.

¶ 19 The order entered on November 5, 2010 denied defendants' motion to reconsider, continued defendants' motion for leave to file a counterclaim, granted the Association's motion for summary judgment, finding the east wall was part of the condominium, and spread of record the death of George Modzelewski. On April 5, 2011, the circuit court entered an order denying defendants' motion for leave to file a counterclaim as untimely and granting the Association's motion to voluntarily dismiss the remaining counts in their complaint. Karluk and Jason Modzelewski timely filed this appeal.

¶ 20 ANALYSIS

¶ 21 Appellants first contend that the circuit court erred in granting summary judgment in favor of the plaintiff. Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). We review *de novo* an order granting summary judgment. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). In reviewing a grant of summary judgment, the appellate court will construe the record strictly against the movant and

liberally in favor of the nonmoving party. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 748 (2008).

¶ 22 Appellants contend that the circuit court: (1) failed to consider that the Easement Agreement includes the east wall as retail property; (2) failed to consider that the Declaration excludes parking; (3) failed to analyze whether the Declaration and Easement Agreement contained errors or inconsistencies; (4) incorrectly interpreted that the Declaration, the Easement Agreement and the Condominium Property Act (Act) (765 ILCS 605/2, *et seq*. (West 2008)) precluded the 2006 and 2007 amendments; (5) failed to consider the evidence in its entirety; and (6) improperly resolved disputed issues of fact by concluding that the Association owns the disputed areas despite such relief not being sought and material evidence establishing the contrary.

¶ 23 We will address the first three arguments and the fifth argument together because they are closely related. Appellants did not develop the fifth argument separately in their brief, therefore, we will only consider this argument to the extent that it was included and developed as part of the remaining arguments. Appellants' arguments that the circuit court failed to consider certain facts or analyze whether there were inconsistencies have no support in the record. In fact, when appellants expand on these arguments in their brief, they acknowledge that the circuit court expressly noted that the definition of retail property in the Easement Agreement includes the east wall. Appellants further acknowledge the circuit court's observation that the definition in the Easement Agreement conflicts with the legal descriptions attached to both the Easement Agreement and the Declaration. Appellants also contend that the circuit court's order ignored

language in the Declaration to the effect that no parking spaces had been designated, and the fact that the sales contracts for the individual condominium units specified that no parking was included. However, the July 23 written order expressly acknowledges the fact that the Developers presented evidence to support their position that they made a mistake in including the concrete area in the common elements, and specifically notes the purchase/sale documents and documents stating that no parking is provided for the unit owners. Thus, it appears that the issue appellants are actually raising in these related arguments is that the circuit court erred in concluding that whether a mistake was made was not relevant to the issue of whether the procedure used by the Developers to correct any alleged mistakes was authorized. Appellants contend that the circuit court was required to first interpret the Declaration and determine whether a mistake was, in fact, made.

¶ 24 Appellants rely on *LaSalle National Trust, NA v. Board of Directors of State Parkway Condominium Ass'n*, 327 Ill. App. 3d 93, 97 (2001), for the proposition that because the circuit court was required to interpret the Declaration in such a way as to give effect to the actual intent of the parties, it was first required to address whether there were mistakes in the Declaration and the Easement Agreement. We find this reliance to be misplaced. In *LaSalle National Trust*, this court merely stated the well settled principle that condominium declarations are covenants running with the land, and the principal rule for the interpretation of such covenants is " 'to expound them so as to give effect as to the actual intent of the parties as determined from the whole document construed in connection with the circumstances surrounding its execution.' " *Id.* (quoting *Carney v. Donley*, 261 Ill. App. 3d 1002, 1008 (1994)). The *LaSalle National Trust*

court addressed the issue of whether the developers had the right to create a perpetual easement after ceding control of the board to the unit owners, but while still retaining an interest in the property. *Id*. at 96-97. Because the Act neither granted nor expressly denied such a right to the developers, the court was required to interpret the language of the Declaration to determine whether the developers had the right to record the easement at a certain point in time. *Id*. However, there is no support in *LaSalle National Trust* for the proposition that in order to interpret the language of the Declaration, the circuit court was required to determine whether a mistake was made in the drafting of the Declaration.

¶ 25 In the case *sub judice*, contrary to appellants' assertions, the language of the Declaration itself does not support the contention that the Developers intended to exclude the disputed areas from the condominium property. The laundry room is not mentioned in the Declaration, and is designated on the plat of survey as a common element. Although the Declaration makes clear that such a designation is not legally binding, there is nothing in any of the documents to indicate an intent to exclude the laundry room from the condominium property. The only indication of intent related to the laundry room is found in the listing sheets provided by the Developers to prospective purchasers, which made it clear that laundry was available on site, with no limitations. Similarly, the utility room is also designated on the plat of survey as a common element, and there is nothing to indicate an intent to exclude this room from the condominium property. Moreover, the utility room includes equipment that services the entire building and, as such, must be maintained by the Association. The Declaration also defines the common elements as including the mechanical equipment areas.

¶ 26 Appellants' argument that the sales contracts for the individual units specified that no parking was included is unavailing. According to the record, the Association has never asserted that individual unit owners had an expectation that parking was included with the units. Rather, it contends that the concrete area was included as part of the common elements. The definition of common elements in the Declaration expressly includes "the Parking Area." Section 4.09 of the Declaration clearly states that no parking spaces or parking area have been designated by the Developers. However, the next sentence of that section states that the Association may, in the future, allocate portions of the common elements as parking spaces and determine any fees, rules and regulations that will apply to such parking spaces. This language is consistent with the legal description which only excluded the four retail units from the condominium property, and not the concrete area. Thus, the language of the Declaration does not support appellants' contention that the Developers intended to exclude the concrete area from the condominium property.

¶ 27 The only inconsistency in the condominium instruments regarding the disputed areas relates to the east exterior wall. The Easement Agreement defines the retail property to include the four retail units and the exterior east wall. This language supports the Developers' claim that their intent was to exclude the east exterior wall from the condominium property. However, the Declaration contains no language to indicate this intent, and the legal descriptions attached to both the Declaration and the Easement Agreement do not exclude the east exterior wall from the condominium property. As the circuit court noted, the Developers provided no evidence to support their argument that it was impossible to create a legal description that would exclude the east exterior wall. Thus, viewed together, the condominium instruments do not support an

interpretation that the Developers intended to exclude the east exterior wall from the condominium property. Therefore, we conclude that the circuit court correctly determined that whether the Developers made a mistake when they originally drafted the condominium documents was not relevant to the issue of whether or not the Developers had the authority to record the 2006 and 2007 amendments to purportedly correct any such errors.

¶ 28 We now turn to appellants' argument that the circuit court erred in determining that the 2006 and 2007 amendments were void, against public policy, and ineffective. Appellants contend that the Developers were authorized to record the amendments pursuant to section 2.01(d) of the Declaration, section 19.4 of the Easement Agreement, and section 27(b)(1) of the Act (765 ILCS 605/27(b)(1) (West 2008)). Where there is a controversy involving the rights of condominium unit owners, we must examine any relevant provisions in the Act and the Declaration or other condominium instruments and construe them as a whole. *Carney*, 261 Ill. App. 3d at 1008. Moreover, any provisions in the condominium instruments that are inconsistent with the Act are "void as against public policy and ineffective." 765 ILCS 605/2.1 (West 2008). Thus, we must first examine the relevant provisions of the Act.

¶ 29 The condominium property became subject to the Act upon the recording of the Declaration and plat of survey. 765 ILCS 605/6 (West 2008). Section 8 of the Act prohibits the partition of common elements, except in the case of fire or other disaster where the insurance proceeds are insufficient for construction. 765 ILCS 605/8, 14 (West 2008). Unless otherwise provided by the Act, authorized amendments to the condominium instruments shall be executed and recorded by the president of the association or such other officer authorized by the board of

managers. 765 ILCS 605/17 (West 2008). Section 27 of the Act governs amendments to the condominium instruments and provides, in pertinent part:

> "(a) If there is any unit owner other than the developer, the condominium instruments shall be amended only as follows:
>
> (i) upon the affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments, provided that in no event shall the condominium instruments require more than a three-quarters vote of unit owners
>
> ***
>
> ***Except to the extent authorized by other provisions of this Act, no amendment to the condominium instrument shall change the boundaries of any unit or the undivided interest in the common elements***.
>
> (b)(1) If there is an omission or error in the declaration, bylaws or other condominium instrument, the association may correct the error or omission by an amendment to the declaration, bylaws, or other condominium instrument in such respects as may be required to conform to this Act, and any other applicable statute or to the declaration by vote of two-thirds of the members of the Board of Managers or by a majority vote of the unit owners at a meeting

> called for this purpose, unless the Act or the condominium instruments specifically provide for greater percentages or different procedures.
>
> * * *
>
> (4) The procedures for amendments set forth in this subsection (b) cannot be used if such an amendment would materially or adversely affect property rights of the unit owners unless the affected unit owners consent in writing." 765 ILCS 605/27 (West 2008).

¶ 30 Appellants rely on the phrase "or different procedures" at the end of section 27(b)(1) to support their position that the Developers had the authority to amend the condominium instruments, and then point to language in both the Declaration and the Easement Agreement that purportedly outlines these "different procedures." As an initial matter, we note that an interpretation such as appellants are urging would render section 27 of the Act meaningless. Under such an interpretation, the restrictions placed by the Act on amendments to the condominium instruments could be circumvented by merely specifying "different procedures" in the instruments themselves. As previously noted, any provision in the condominium instruments that is inconsistent with the Act is void and ineffective. See 765 ILCS 605/2.1 (West 2008). Moreover, the phrase providing an exception where the condominium instruments provide for "greater percentages or different procedures" is at the end of a paragraph that addresses requirements for the correction of errors in the condominium instruments by the association, not

the developers. It also directly follows a requirement of a specific percentage, two-thirds of the members of the Board of managers or a majority of the unit owners, and a specific procedure, a meeting called for the purpose of voting on an amendment. It has no application to procedures in general or to anyone other than the condominium association recording amendments to the condominium instruments.

¶ 31 Appellants further contend that the Act does not prohibit the Developers' 2006 and 2007 amendments. We disagree. It is not necessary for the Act to include language expressly prohibiting developers from unilaterally amending condominium instruments where the language clearly states that if there is *any* unit owner other than the developer, amendments to the condominium instruments may *only* be made subject to certain percentages and procedures involving unit owners and the condominium association. In fact, the only exception provided by the Act related to a developer's authority to record an amendment, once there is any unit owner other than the developer, is limited in time to a date prior to the latest date on which the initial membership meeting of the unit owners must be held, and in scope to bringing the condominium instruments into compliance with federal regulations. See 765 ILCS 605/27(6) (West 2008). In the case *sub judice*, the initial membership meeting was held more than a year before the first disputed amendment was recorded, and the amendments had nothing to do with federal compliance.

¶ 32 Moreover, the Act expressly prohibits amendments that change the undivided interest in the common elements. For the reasons previously noted, we reject appellants' contention that the disputed areas were never common elements. The Easement Agreement was the only document

to include the east exterior wall as part of the retail property. However, in the event of a conflict between the Declaration and other condominium instruments, the Declaration prevails unless it is inconsistent with the Act. 765 ILCS 605/4.1(b) (West 2008). According to the Declaration and plat of survey, the only areas that were excluded from the condominium property were the four retail units on the first and second floors of the building. Thus, the Developers had no authority pursuant to the Act to record the 2006 and 2007 amendments.

¶ 33 We now address appellants' arguments that certain provisions in the Declaration and the Easement Agreement granted the Developers the right to amend the condominium instruments. Appellants point to section 2.01(d) of the Declaration, in which the Developers reserved the right, "from time to time, as further data becomes available, to amend the Plat so as to set forth the measurements, elevations, locations and other data required by the Act." The first sentence of paragraph 2.01(d) notes that the plat sets forth the measurements and elevations to the extent such data is available with respect to the parcel, the exterior boundaries, each floor of the building, and the horizontal and vertical dimensions of each unit. Section 2.01(d) of the Declaration clearly refers to changes in measurements based on the availability of additional data that was not available at the time the plat was recorded and, thus, is inapplicable to the disputed amendments.

¶ 34 Appellants contend that section 2.01(d) contains an additional paragraph, and it is this paragraph that gives the Developers the right to amend the plat to correct errors other than those relating to measurements, without notice to the unit owners, and even if the Developers no longer own a unit. We note that the paragraph in question is not part of section 2.01(d). Section 2.01

contains (a) through (d) and each paragraph is indented. After paragraph (d), there is a full paragraph that is not indented, and is clearly intended to apply to section 2.01 generally, which encompasses such topics as access by individual unit owners to the public way, measurements to individual units, the exclusion of the building's structural components from the description of individual units, and prohibitions on the subdivision of any individual unit. The final paragraph of section 2.01 states that after the Developers no longer own a unit, the Developers are only authorized to record amendments to the plat without notice to the unit owners for the purpose of "correcting clerical errors or other errors in the preparation of this Declaration."

¶ 35 Moreover, we note that article II of the Declaration is entitled "Units," article III is entitled "Common Elements," and article IV is entitled "General Provisions as to Units and Common Elements." We cannot interpret a paragraph in article II, which explicitly deals with individual units, as applying to the common elements as well, when there is a separate article for common elements, and a separate article addressing issues related to both units and common elements. Thus, to the extent that the final paragraph in section 2.01 grants any authority to the Developers to record amendments after the Developers no longer own any of the units, it allows for the correction of clerical errors related to the measurements and description of individual units.

¶ 36 Even if we were to interpret section 2.01 as applying to the correction of errors related to the common elements, it is inapplicable here where the errors at issue are not merely clerical errors. In *Schaffner v. 514 West Grant Place Condominium Ass'n, Inc.*, 324 Ill. App. 3d 1033, 1042 (2001), this court held that the failure to include the outdoor parking spaces in the

Declaration and the plat could not be considered a "scrivenor's error." The *Shaffner* court noted that a "scrivenor's error" is defined as a "clerical error," which is defined by Black's Law Dictionary as: " 'An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.' " *Id.* (quoting Black's Law Dictionary 463 (7th ed. 1999)). The *Shaffner* court further noted that, whatever the reason for omitting the parking spaces from the Declaration, it was a deliberate decision, not a minor mistake or inadvertence. *Id.* In the case *sub judice*, the purported mistake is even more egregious. We cannot see how the omission of the laundry room, utility room, concrete area and east exterior wall from the legal description of commercial property could be considered a minor mistake or inadvertence. Finally, even if the amendments to the descriptions of the common elements were allowed by section 2.01 of the Declaration, such a provision would be void because, as previously discussed, it would conflict with section 27 of the Act.

¶ 37 Next, appellants contend that section 19.4 of the Easement Agreement authorized the Developers to make revisions to the legal descriptions of the condominium and commercial property as long as they held title to any portion of the property. Appellants argue that the amendments were valid because the Developers still held title to a portion of the retail property at the time the amendments were recorded, and the amendments were recorded solely to correct internal inconsistencies in the Easement Agreement. Section 19.4(a) provides that the Easement Agreement may be amended or terminated only by an instrument signed by the owners and the mortgagee, except as otherwise provided by the agreement itself. In section 19.4(b), the Developers reserved the right to record a special amendment at any time to correct "clerical or

typographical errors in this Agreement." The Developers also reserved the right to include, within a special amendment, revisions to the legal descriptions of both the residential and retail properties, until such time as the Developers no longer hold title to any portion of the property.

¶ 38 The language in section 19.4(b) relates to amendments to the Easement Agreement and its attached legal description. Nothing in section 19.4(b) gives the Developers the authority, nor could it, to amend the plat and legal description attached to the Declaration. We agree with appellants that the definition of retail property in the Easement Agreement is inconsistent with the legal description attached to that agreement. However, it is also inconsistent with the language of the Declaration, and with the plat and legal description attached to the Declaration. As previously noted, in the event of a conflict between the Declaration and other condominium instruments, the Declaration prevails unless it is inconsistent with the Act. See 765 ILCS 605/4.1(b) (West 2008). Where the legal descriptions attached to both the Declaration and Easement Agreement are consistent, the right to amend the legal description attached to the Easement Agreement is futile absent the authority to also amend the legal description attached to the Declaration. Moreover, as previously discussed, the Developers did not have the authority to amend the Declaration. Thus, the language of the Declaration prevails and the provision in the Easement Agreement that allows the Developers to amend the legal description of the Easement Agreement is meaningless. The circuit court correctly determined that the definition contained in the Easement Agreement could not operate to amend the language and legal description of the Declaration.

¶ 39 Appellants next argue that, even if the amendments are void, the circuit court erred in

granting the Association fee simple ownership of the disputed areas, and failed to resolve all pending issues. Appellants contend that genuine issues of material fact exist concerning ownership based on the intent of the Developers, and that the circuit court's order did not address the current deeds reflecting the conveyance of the disputed areas to various purchasers. Declaratory judgment is proper if there is an actual controversy and the entry of a declaratory judgment would terminate that controversy or some part thereof. 735 ILCS 5/2-701(a) (West 2008); *In re Marriage of Best*, 228 Ill. 2d 107, 116 (2008). Moreover, the court may make binding declarations of rights whether or not any consequential relief is or could be claimed. 735 ILCS 5/2-701(a) (West 2008).

¶ 40 It is clear that the requirements for the entry of a declaratory judgment have been satisfied here. An actual controversy existed, and the determination that the amendments were void and ineffective terminated that controversy. Appellants concede that pursuant to the Declaration, the disputed areas are part of the condominium property. Because the Developers had no authority to record the amendments that removed these areas from the condominium property, they had no authority to convey these areas, and any deeds purporting to do so are void. Moreover, as previously noted, whether or not the Developers made a mistake in drafting the original documents is not relevant. The circuit court correctly determined that there is nothing in the language of the Declaration to support the Developers' claim that they intended to include the disputed areas in the definition of commercial property. Although the definition in the Easement Agreement does support the Developers' claim that they intended to include the east exterior wall as part of the retail property, there is no evidence of such an intent in the Declaration and, where

there are inconsistencies between the Declaration and other condominium instruments, the Declaration controls. Thus, the circuit court's entry of a declaratory judgment granting the Association a fee simple ownership in the disputed areas was proper and there are no pending issues to be resolved.

¶ 41 Finally, appellants contend that the circuit court erred in denying the defendants' motion for leave to file a counterclaim. Appellants argue that their motion was timely because the circuit court had not yet entered judgment on the issue of the east exterior wall. Appellants further contend that the Association was not surprised or prejudiced by the defendants' attempt to proceed with their counterclaim.

¶ 42 Counterclaims are to be filed with the defendant's answer to the complaint. 735 ILCS 5/2-608(b) (West 2008). However, amendments to assert counterclaims may be allowed on just and reasonable terms at any time before final judgment. 735 ILCS 5/2-616(a) (West 2008). It is within the trial court's discretion to permit a party to file a counterclaim subsequent to the answer (*Cianci v. Safeco Insurance Co. of Illinois*, 256 Ill. App. 3d 767, 776 (2010)), and we will not disturb the denial of a motion for leave to file a counterclaim absent an abuse of that discretion (*In re Estate of Nicholson*, 268 Ill. App. 3d 689, 695 (1994)). In exercising its discretion, the trial court may consider the timeliness of the request, whether the movant had previous opportunities to amend, whether the proposed amendment will cure a defective pleading, and whether the opposing party has been prejudiced or surprised. *Id*. "The overriding concerns, however, are justness and reasonableness." *Id*. (citing *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993)).

¶ 43 In *Otto Real Estate, Inc. v. Shelter Investments*, 153 Ill. App. 3d 756, 762-63 (1987), this court held that the failure to provide a satisfactory explanation for a delay of 11 months in filing a counterclaim was sufficient to support the trial court's denial of a motion for leave to file the counterclaim. In the case *sub judice*, defendants filed their answer to the complaint on July 15, 2009. The circuit court ordered that all discovery be closed by January 15, 2010, and set the matter for trial on May 3, 2010. In March 2010, the parties filed cross-motions for summary judgment. On July 23, 2010, the circuit court granted the Association's motion for summary judgment on all issues except for the east exterior wall, and denied the defendants' motion for summary judgment.

¶ 44 On September 24, 2010, the defendants filed a motion for leave to file a counterclaim, "for claims relating to reformation, quantum merit [*sic*] and unjust enrichment as it relates to the parking area that is the subject of the litigation." The motion was denied without prejudice on October 4, 2010. The defendants filed a second motion for leave to file a counterclaim on October 19, 2010. The motion again stated that the counterclaim only related to the parking area, although the attached draft of the counterclaim included identical claims related to the east exterior wall. On November 5, 2010, the circuit court granted summary judgment in favor of the Association on the issue of the east exterior wall, and on April 5, 2011, the circuit court denied the defendants' motion for leave to file a counterclaim as untimely.

¶ 45 Appellants contend that the defendants' counterclaim for reformation did not become relevant until after the circuit court determined that the amendments were void, because the Declaration and plat contained ambiguities regarding whether the disputed areas were

condominium or retail property. This argument is unavailing. As previously discussed, there are no ambiguities in the Declaration or the plat regarding the disputed areas. Regardless of the Developers' subsequent claims that they did not intend to include the disputed areas in the condominium property, there is no evidence in the language of the Declaration or the plat to support such claims. Instead, pursuant to the Declaration and the plat, the only parcels that were excluded from the condominium property were the parcels comprised of the retail units on the first and second floors. The Association's complaint clearly requested a declaration that the Association was entitled to fee simple ownership in the disputed areas, so the defendants were aware of that possibility at the time they filed their answer. Thus, we cannot conclude that the circuit court abused its discretion in determining that a request to file a counterclaim 14 months after defendants filed an answer, and after most issues had been resolved, was untimely.

¶ 46 For the reasons stated, we affirm the circuit court's grant of summary judgment in favor of the Association and the circuit court's denial of the defendants' motion for leave to file a counterclaim.

¶ 47 Affirmed.