No. 2019-0120

State of New Hampshire
Supreme Court

BALZOTTI GLOBAL GROUP, LLC AND CEASAR BALZOTTI, SR.,
PLAINTIFFS-APPELLANTS,

v.

SHEPHERDS HILL HOMEOWNERS ASSOCIATION, INC.,
DEFENDANT-APPELLEE.

APPEAL FROM ORDERS OF THE ROCKINGHAM COUNTY SUPERIOR COURT
PURSUANT TO NEW HAMPSHIRE SUPREME COURT RULE 7

BRIEF FOR THE DEFENDANT-APPELLEE, SHEPHERDS HILL HOMEOWNERS ASSOCIATION, INC.

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Oral Argument by Thomas W. Aylesworth

Dated: October 1, 2019

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i. Whether the trial court correctly ruled that Balzotti's claims are barred by the statute of limitations where Balzotti failed to bring the claims within three years after the condominium developer's development rights—and ability to perform under the alleged note to Balzotti—terminated by operation of statute. (Apx. IV, pp. 103-107, Association's Memorandum Regarding Statute of Limitations).[1]

ii. Whether the trial court correctly ruled that the discovery rule did not toll the three-year statute of limitations where Bazlotti is presumed to know that the condominium developer's development rights expired by operation of statute on February 25, 2013, the date that Balzotti's claims accrued. (*Id.*).

iii. Whether the trial court correctly ruled that Balzotti's claims were not tolled by the discovery rule where Mr. Balzotti's testimony was not credible and his reasons for delaying the filing of his lawsuit were unreasonable. (Add. at 31-32).[2]

iv. Whether as a matter of law the Shepherds Hill Homeowners Association, Inc. is not the successor to the other Defendants-Appellees' alleged debt to the Plaintiffs-Appellants. (Apx. IV, pp. 232-235, Association's Objection to Balzotti's Motion for Reconsideration).

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[1] References herein to "Apx." shall mean the Appendix filed by the Appellant.

[2] References herein to "Add." shall mean the Addendum attached hereto.

STATUTORY PROVISIONS INVOLVED IN THE CASE

RSA 508:4 Personal Actions. –

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

RSA 356-B:23 Conversion of Convertible Lands. –

III. All convertible lands shall be deemed a part of the common areas except for such portions thereof as are converted in accordance with the provisions of this section. Until the expiration of the period during which conversion may occur or until actual conversion, whichever occurs first, real estate taxes shall be assessed against the declarant rather than the unit owners as to both the convertible land and any improvements thereon. No such conversion shall occur after 5 years from the recordation of the declaration, or such shorter period of time period as the declaration may specify, provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V.

STATEMENT OF THE CASE AND FACTS

In 1997, Shepherds Hill Development Company, LLC ("SHDC") purchased land in Hudson, New Hampshire and subsequently obtained necessary local and state approvals to construct up to 400 condominium units on the land. (Apx. II, p. 4). On February 25, 2003, SHDC recorded with the Hillsborough County Registry of Deeds the Shepherds Hill Condominium Declaration (the "Declaration"), thereby creating the Shepherds Hill Condominium (the "Condominium"). (*Id.* p. 100). The Intervenor-Appellee, Shepherds Hill Homeowners Association, Inc. (the "Association"), is the organization of unit owners for Condominium. (*Id.* p. 146). The Association was created simultaneously with the Condominium by the recording of the Declaration. (*Id.*).

Pursuant to the New Hampshire Condominium Act and the Declaration, SHDC's rights to develop the Condominium—i.e., to construct or "phase" new units—expired on February 25, 2013, ten years after the Condominium was created. On February 22, 2013, SHDC recorded a new phasing amendment in an attempt to extend its phasing rights beyond the ten-year phasing period (the "Phasing Amendment"). (Apx. III, p. 213). The Association filed suit against SHDC in the New Hampshire Superior Court, seeking a declaration that SHDC's development rights had terminated (the "Development Rights Case"). By order issued on March 21, 2014, the trial court issued an order declaring among other things that SHDC's Phasing Amendment was invalid and its development rights had expired on February 25, 2013. (*Id.* p. 211). The trial court decision was affirmed by this Court by order issued on April 2, 2015.

The Plaintiffs-Appellants Balzotti Global Group, LLC and Ceasar Balzotti, Sr. (together, "Balzotti") filed a Verified Complaint in the Superior Court on February 2, 2018, alleging rights against SHDC and related persons and entities to collect on a promissory note (the "Note") by which SHDC allegedly promised to make payments on a loan from Balzotti's predecessor on the Note, Dawn Balzotti, in connection with SHDC's Bankruptcy Plan from 2000, several years before the Condominium was created. (Apx. I, p. 5). Balzotti alleged an interest in the Condominium land as security on the note. Balzotti failed to name the Association or any Condominium unit owner as defendants, and therefore the Association moved to intervene in the lawsuit, which motion was allowed by the trial court on February 9, 2018. (Apx. II, p. 18). Balzotti then moved twice to amend its Verified Complaint, including among other amendments to add the Association as a party-defendant.

By order issued on August 3, 2018, the trial court ordered that an evidentiary hearing be held on the question as to whether Balzotti's claims as set forth in its various complaints are time-barred by the applicable three-year statute of limitations. (Apx. IV, p. 87). An evidentiary hearing was held on September 5, 2018. By order issued on November 6, 2018 (the "Trial Court Decision"), the trial court granted the defendants' motions to dismiss Balzotti's claims as time-barred. (Add. p. 19). By order issued on January 30, 2019 (the "Reconsideration Decision"), the trial court denied Balzotti's motion for reconsideration. (Add. 35). This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court correctly ruled that Balzotti knew or should have known that SHDC's rights to develop the condominium expired by the statutory time limit imposed by the New Hampshire Condominium Act. Balzotti filed its lawsuit five years after its claim accrued and two years after the three-year statute of limitations had run. The fact that the Association and SHDC were litigating the validity of the Phasing Amendment is not a reasonable excuse for Balzotti's delay in filing suit.

The trial found that Mr. Balzotti's testimony at the evidentiary hearing lacked credibility and his excuses for delaying the filing of the lawsuit are unreasonable. This Court defers to the trial court's rulings as to witness credibility and weight of the evidence.

As a matter of law, the Association is not the successor to SHDC's alleged debt under the Note. A New Hampshire Condominium is a creature of statute, and the creation of a condominium and its association is achieved by operation of statute, not asset purchase. Therefore, none of the elements of successor liability apply, and the Association has no obligation to Balzotti, even if, *arguendo*, Balzotti's claims were not time-barred.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT BALZOTTI KNEW OR SHOULD HAVE KNOWN OF ITS CLAIM ON FEBRUARY 25, 2013.

The defendant has the burden of proving that the statute of limitations applies in a given case. *Lamprey v. Britton Const. Inc.*, 163 N.H. 252, 257 (2012). The burden is met "by a showing that the action was not brought within three years of the act or omission of which the plaintiff

complains." *Id.* The statute of limitations applicable to Balzotti's claims provides that actions "may be brought only within 3 years of the act or omission complained of . . . ." RSA 508:4. The "act or omission complained of" by Balzotti is SHDC's loss of development rights in the Condominium. It is also undisputed that SHCD's loss of development rights occurred on February 25, 2013, upon the expiration of the ten-year deadline imposed by statute.[3] *See* RSA 356-B:23, III. Balzotti filed its original Complaint on February 2, 2018—nearly five years after its alleged claim accrued, and two years after the statute of limitations period expired. (Add. at 21). Thus, the defendants have met their burden, and Balzotti's claims are time-barred unless tolled by the discovery rule. For the reasons that follow, the trial court correctly ruled that the discovery rule did not toll the statute of limitations for Balzotti's claim because Balzotti knew or should have known that SHDC's development rights expired on February 25, 2013.

"Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of proving that the discovery rule applies." *Lamprey*, 163 N.H. at 257. Under the discovery rule, the statute of limitations is tolled "when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission . . . ." RSA 508:4, I. "[A]ccording to the plain meaning of RSA 508:4, I, the discovery rule contained therein applies to contract actions. That rule

[3] On appeal, Balzotti now concedes its cause of action accrued on February 25, 2013, whereas in the trial court proceeding he argued that it accrued in April 2015. (*See* Add. 23).

embodies a two-pronged test: 'First, a plaintiff must know or reasonably should have known that it has been injured; and second, a plaintiff must know or reasonably should have known that its injury was proximately caused by the conduct of the defendant.'" *Wood v. Greaves*, 152 N.H. 228, 232 (2005), quoting *Big League Entm't v. Brox Indus*., 149 N.H. 480, 485 (2003). Importantly, however, "the discovery rule is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself. Rather, that the plaintiff could reasonably discern that the plaintiff suffered some harm caused by the defendant's conduct is sufficient to render the discovery rule inapplicable." *Wood*, 152 N.H. at 233, quoting *Furbush v. McKittrick,* 149 N.H. 426, 431 (2003) (brackets and citation omitted).

Balzotti argues it could not have discovered its claim until April 16, 2015, when this Court affirmed the trial court's ruling in the Development Rights Case. Balzotti's alleged excuse is that SHDC had recorded a phasing amendment purporting to extend its rights beyond ten years, and it was not until April 16, 2015 that this Court affirmed the trial court's ruling that the phasing amendment was invalid. Balzotti's argument is unavailing. SHDC's development rights expired by operation of statute, RSA 356-B:23, III, which imposes a ten-year time limit on condominium development rights on convertible land.[4] Waiting until after the Court ruled on the validity of Thibeault's unlawful phasing amendment is no excuse for Balzotti's belated lawsuit. As the trial court noted, "'every person is

[4] The Condominium Declaration, as amended, expressly provided that SHDC's development rights would expire on February 25, 2013—the maximum time allowed under RSA 356-B:23, III. (Apx. V, p. 627).

presumed to know the law and therefore, to organize his or her conduct and affairs accordingly.'" (Add. at 30), quoting *Lennartz v. Oak Point Assocs., P.A.*, 167 N.H. 459, 464 (2015)). Consequently, Balzotti is presumed to have known that SHDC's development rights terminated after ten-years pursuant to RSA 356-B:23, III.

The trial court aptly reasoned that "Balzotti, having decided to invest in the Development Project, is presumed to have known (or have made himself aware of) the statutory cap on condominium development and, therefore, the date at which the development rights would evaporate pursuant to RSA 356-B:23, III." (Add. at 30). This Court's decision in the Development Rights Case did not terminate SHDC's development rights; rather, that happened by operation of statute on February 25, 2013.[5] The expiration of the ten-year development rights period on that date was more than sufficient to put Balzotti on notice of SHDC's alleged breach, and therefore the trial court correctly ruled that Balzotti's claims are time-barred.

II. MR. BALZOTTI'S TESTIMONY CONCERNING THE PURPORTED DELAYED DISCOVERY OF HIS CLAIMS WAS NOT CREDIBLE.

Balzotti's presumed knowledge of the law, as stated above, is fatal to its attempt to invoke the discovery rule, and its claims are time-barred. Nonetheless, even if that were not enough, Mr. Balzotti's testimony

[5] The trial court "agree[d] with the Association that Judge Colburn's order [in the Development Rights Case] merely recognized and enforced what had already occurred by operation of statute." (Add. at 29) (citing RSA 356-B:23).

concerning his excuses for waiting to file his original Verified Complaint is unconvincing and properly rejected by the trial court.

This Court will "defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence." *O'Malley v. Little*, 170 N.H. 272, 275 (2017). In the case at bar, the trial court stated in no uncertain terms that Mr. Balzotti was not a credible witness: "First and foremost, the Court finds that Balzotti's testimony during the evidentiary hearing was non-responsive and evasive," and among other things that his denial of bad faith concerning a prior bankruptcy proceeding against SHDC, which bad faith is a matter of record, "reflects poorly on Balzotti's credibility as a witness." (Add. at 31; and Add. at 38). The trial court examined all of Balzotti's excuses for waiting to file suit and concluded that his testimony was not credible and his excuses unreasonable. (Add. at 31-33; and Add. 38).

In addition, the trial court found that Mr. Balzotti was not credible in claiming ignorance of New Hampshire law, as he is, by his own admission, a "well-resourced and sophisticated businessman who . . . has supervised numerous construction and real estate projects (including condominium projects) over his 30 years career." (Add. at 30). The trial court further noted Mr. Balzotti's testimony that he "has routinely employed sophisticated law and accounting firms to assist him in his business pursuits." (*Id.*, citing *State Indus. Products Corp. v. Beta Technology Inc.*, 575 F.3d 450, 455 (5th Cir. 2009)). On reconsideration, the trial court again noted that Mr. Balzotti is a sophisticated businessman who was on notice of the statutory ten-year cap on condominium development rights, regardless

of Thibeault's unlawful phasing amendment recorded with the Registry of Deeds. (Add. at 38).

This Court should defer to the trial court's conclusions that Mr. Balzotti was not a credible witness and his excuses are unreasonable, and the trial court's ruling that Balzotti's claims are time-barred should be affirmed.

III. BALZOTTI MAKES NO ALLEGATION THAT COULD POSSIBLY SUPPORT A THEORY THAT THE ASSOCIATION IS A SUCCESSOR TO SHDC.

The trial court correctly ruled that, even if the Association were the successor to SHDC, any claim Balzotti could possibly have against the Association was extinguished by the expiration of the three-year statute of limitations. (Add. at 39-40). Nonetheless, Balzotti makes a broad allegation that the Association is a successor to SHDC's obligations under the bankruptcy plan generally, and therefore somehow his claims against the Association survive the statute of limitations. Balzotti makes no effort to explain—and his Amended Complaints contain no allegations—as to how the Association could possibly be the successor to SHDC's debt.

As a matter of law, the Association has no successorship liability for Thibeault's debts, because the creation of a New Hampshire condominium is not an asset purchase. A New Hampshire condominium is a creature of statute. *See* RSA 356-B, *et seq.* "The filing of the [condominium declaration] divides interests formerly held by one entity in fee simple in separate and distinct real estate interests." *Aldrich v. ADD, Inc.*, 437 Mass. 213, 219, 770 N.E.2d 447, 453 (2002). The condominium association does not "succeed" to the developer with respect to the developer's obligations,

nor does the association "take over [the developer's] business." *Id*.[6] There is no rational construction of the New Hampshire Condominium Act that would allow the declarant's debts to pass on to the condominium association when a condominium is created; to the contrary, the plain intent of the act is to protect the condominium, the condominium association, and the condominium unit owners. *See* RSA 356-B, *et seq*. If Balzotti's theory held water, every creditor to a condominium declarant would have a claim against the condominium association for the unpaid debts of the declarant. That cannot be the law.

The issue as to whether one corporate entity is the successor to another entity's debts is governed by New Hampshire's law of successorship. That law is ill-fitting in the context of this case where the change of ownership in the condominium and the condominium development rights are established by statute, not an asset purchase. This square peg cannot be made to fit the round hole of successor liability law. As a general rule of successor liability, "a corporation purchasing the assets of another corporation is not liable for the seller's debts." *Bielagus v. EMRE of New Hampshire Corp.* 149 N.H. 635, 640 (2003). "This rule is consistent with [New Hampshire's] statute that allows, in the regular course

[6] The *Aldrich* decision was issued by the Massachusetts Supreme Judicial Court. While there are some differences between the Massachusetts and New Hampshire Condominium Acts, they are not distinguishable as to the statutory mechanism that creates a condominium. In both states, a condominium and its association are established by operation of statute, not asset purchase, and nothing in either statute suggests that a condominium association could be a successor to the developer's debts.

of business, free alienability of corporate assets to maximize their productive use. . . . It also is consistent with our recognition that an ordinary contract will not bind an unconsenting successor to a contracting party." *Id.* (citing RSA 293-A:12.01; and *Appeal of SAU # 16 Coop. Sch. Bd.*, 143 N.H. 97, 103 (1998)). There are four recognized exceptions to the general rule:

> (1) when the purchasing corporation expressly or impliedly agrees to assume the obligations of the selling corporation; (2) when the asset transfer amounts to a de facto merger of the two corporations;[7] (3) when the purchasing corporation becomes a 'mere continuation' of the selling corporation; and (4) when the transaction is fraudulent because its only purpose is to evade corporate liability.

Bielagus, 149 N.H. at 640. None of these exceptions could possibly apply to the context of this case in which the Condominium, the Association, and the development rights were created by operation of statute, and where Balzotti makes no allegation that the Association purchased SHDC's assets.

Balzotti grasps at straws by arguing that the trial court misunderstood that its claim against the Association is that the Association intended to sell the condominium development rights in a manner that would "potentially wipe out any further payments under the bankruptcy plan." (Apx. IV at 166, cited in Balzotti's Appellant Brief at 25). In fact,

[7] A *de facto* merger involves a sale of assets and the following factors: continuance of the seller's corporate enterprise by the buyer, continuity of shareholders in buyer and seller corporations, seller corporation dissolves, and buyer assumes sellers' obligations. *Bielagus*, 149 N.H. at 641-42. Balzotti makes no allegation of any facts that would support a *de facto* merger theory in this matter.

the trial court fully understood that Balzotti's ability to collect from SHDC under the bankruptcy plan ceased to exist when Thibeault's development rights expired on February 25, 2013. The only thread of a theory suggested by Balzotti is that the bankruptcy plan survives as a "mortgage, lien or encumbrance" on the Condominium land. Balzotti's theory makes no sense. The bankruptcy plan mortgage, lien, or encumbrance to which Balzotti refers was a security interest on a debt owed by SHDC—it was not the debt itself. To the extent Balzotti had a secured interest in the Condominium land after the Condominium was created (which the Association disputes), the interest terminated when Balzotti's claims against SHDC terminated at the expiration of the statute of limitations period.

In sum, Balzotti's claims are untimely and barred by the statute of limitations. But even if Balzotti's claims were not time-barred, he nonetheless would have no claim against the Association because, as a matter of law, the Association is not the successor to SHDC.

CONCLUSION

For the foregoing reasons, the Association requests that this Honorable Court affirm the trial court's Order on Defendants' Motion to Dismiss and Order on Plaintiff's Motion for Reconsideration and dismiss Balzotti's action.

ORAL ARGUMENT

The Association requests that if oral argument is granted, more than 15 minutes be allotted to counsel for the Appellees due to the issues presented on appeal that are unique to the Association. Thomas W.

Aylesworth will present on behalf of the Association and requests 10 minutes for oral argument separate from and in addition to the time allowed for argument by counsel for the other Appellees.

Respectfully submitted,

SHEPHERDS HILL HOMEOWNERS ASSOCIATION, INC.

By its attorney,

/s/Thomas W. Aylesworth

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Dated: October 1, 2019

ADDENDUM

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
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NOTICE OF DECISION

File Copy

Case Name: **Balzotti Global Group, LLC, et al v Shepherds Hill Proponents, LLC, et al**
Case Number: **218-2018-CV-00117**

Enclosed please find a copy of the court's order of October 31, 2018 relative to:

Defendants' Motion to Dismiss

November 06, 2018

Maureen F. O'Neil
Clerk of Court

(504)

C: Matthew R. Johnson, ESQ; Thomas W. Aylesworth, ESQ; Jeremy T. Walker, ESQ; Joseph Allen Foster, ESQ; John M. Sullivan, ESQ; Emile R. Bussiere, Jr, ESQ; Steven J. Dutton, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

BALZOTTI GLOBAL GROUP, LLC ET AL

v.

SHEPHERDS HILL DEVELOPMENT COMPANY, LLC ET AL

v.

SHEPHERDS HILL HOMEOWNERS ASSOCIATION, INC.

Docket No.: 218-2018-CV-117

ORDER ON DEFENDANTS' MOTION TO DISMISS

The instant lawsuit arises out of a failed condominium development enterprise. Plaintiffs Balzotti Global Group, LLC ("BGG") and Cesear Balzotti, Sr. ("Balzotti") seek damages and equitable relief from Shepherds Hill Development Company, LLC, ("SHDC"), Shepherds Hill Proponents ("SHP")[1], Ernest J. Thibeault, III ("Thibeault"), Ralph Caruso ("Caruso"), and Shepherds Hill Homeowners Association, Inc. (the "Association") (collectively "Defendants"). For the following reasons, Defendants' motion to dismiss is **GRANTED**.

Background

The following background facts are drawn from Balzotti's Second Amended Complaint, unless otherwise noted. See Doc. # 47 ("Second Am. Compl."). At some point prior to 1999, SHDC obtained approval from the New Hampshire Attorney General's Office and the Town of Hudson to construct 400 condominium units in

[1] When appropriate the Court will refer to SHDC and SHP as the "Shepherd Defendants" as they are represented by the same counsel and make the same arguments in support of dismissal.

Hudson, New Hampshire (the "Development Project"). Second Am. Compl. ¶ 9.[2] After work had begun on the Development Project, the real estate market collapsed, the Development Project stalled, and SHDC filed for bankruptcy on April 2, 1999. Id. ¶ 10. Balzotti, Thibeault, and Caruso formed SHP to create a reorganization plan of SHDC (the "Bankruptcy Plan") to complete the Development Project and to pay creditors. Id. ¶ 11. Thibeault and Caruso each owned 40% of SHP, Balzotti owned 20% of SHP, and SHP, in turn, owned the entirety of SHDC. Id. ¶ 17. The Bankruptcy Plan was accepted by the Bankruptcy Court on July 21, 2000. Id. ¶ 11. As part of the Bankruptcy Plan, SHDC issued a $714,000 promissory note (the "Note") to Balzotti's wife, Dawn Balzotti. Id.

On March 18, 2014, SHDC lost the right to further develop the Shepherds Hill Condominiums. In short, the Superior Court (Colburn, J.) ruled that by operation of statute the undeveloped condominium land transferred from SHDC to the Shepherds Hill condominium owners. See Pl.'s Ex. 6; RSA 356-B:23, III. This decision was appealed to the New Hampshire Supreme Court and affirmed on April 2, 2015. See Pl.'s Ex. 5.

On February 2, 2018, Balzotti filed a Complaint against the Shepherd Defendants, Thibeault, and Caruso, asserting a number of claims arising out of the loss of the development rights. See Doc. # 2. Contemporaneous with the filing of this Complaint, Balzotti moved to attach the Shepherds Hill Condominiums to satisfy any potential judgment. See Doc. # 3.

On February 8, 2018, the Association moved to intervene in this action on behalf of the individual condominium owners. See Doc. # 6. This motion was granted by the

[2] The Second Amended Complaint does not state when exactly this approval was granted.

Court on February 9, 2018. See id. Thereafter, the Association objected to Balzotti's attachment and moved for judgment on the pleadings. See Doc. 10, 12. In short, the Association argued that Balzotti had no right to attach the condominium land because the individuals and entities that he was suing (the Shepherd Defendants, Thibeault, and Caruso) no longer owned that land. See id. In response, Balzotti withdrew his motion to attach and moved to amend his Complaint to allege equitable claims directly against the Association. See Doc. # 11, 23, 24. With these new allegations in place, Balzotti then renewed his motion to attach the condominium property. See Doc. # 25. Thereafter, Defendants objected to Balzotti's motions to attach and to amend, and/or moved to dismiss the Complaint. See Doc. # 27, 28, 33, 34, 35.

The Court held a hearing on June 5, 2018. At that hearing Balzotti informed the Court that he would be amending the Complaint yet again. See Doc. # 47. He further informed the Court that he was now only seeking to attach the right to develop the property, and not the property itself. The Second Amended Complaint was filed on June 15, 2018. See id. Defendants continue to object to the amendment of the Complaint, and/or move for dismissal of this action.

Balzotti's new (but substantially similar) claims are as follows: (1) breach of the Note against the Shephard Hill Defendants and Thibeault; (2) breach of the implied covenant of good faith and fair dealing against Thibeault and Caruso; (3) a declaratory ruling holding that the Association is a successor-in-interest of the Shepherd Hill Defendants and thus liable under the Note; (4) constructive trust against the Association; and (5) unjust enrichment against the Association.

In essence, Balzotti claims that: (1) the Shepherd Defendants and Thibeault

breached the terms of the Note when they lost the development rights; (2) the individual defendants breached the covenant of good faith and fair dealing when they failed to act to preserve the development rights; and (3) the Association should be equitably barred from profiting through the sale of the development rights.

All of the Defendants argue that this action is barred by the statute of limitations. In response to this argument, Balzotti contends that his claims against the Defendants "did not exist until after the Supreme Court ruled against Mr. Thibeault and SHDC in April of 2015" and that "[he] did not learn of the Supreme Court ruling until the Fall of 2016 when [he] met with Mr. Thibeault to ask him when he was restarting the project and he told [him] that he had lost the rights." See Doc. # 38 (attaching Balzotti Aff. at ¶ 9).

In sum, Balzotti claims that the statute of limitations has not expired for two independent reasons: (1) his claims against Defendants only accrued after the New Hampshire Supreme Court issued a ruling in April of 2015; and (2) he did not learn about that ruling until the fall of 2016.

Argument (2) above is in direct reference to the discovery rule relevant to the statute of limitations. See RSA 508:4. "RSA 508:4, I, codifies the common law discovery rule by providing that all actions must be brought within three years of the act or omission complained of except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission." Dobe v. Comm'r, 147 N.H. 458, 461 (2002).

In response to the foregoing, the Court ordered an evidentiary hearing to determine when Balzotti knew or should have known about the loss of the development

rights. See Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 638 (1993) (holding that an evidentiary hearing was required to determine whether the discovery rule applied). That hearing took place on September 5, 2018, during which the Court heard testimony from Balzotti and Thibeault and took numerous exhibits into evidence. After consideration of said testimony and exhibits, the Court finds and rules as follows.

Factual Findings

The following facts are derived from the September 5, 2018 evidentiary hearing, unless otherwise noted. Balzotti is the CEO and Chairman of BGG. Balzotti has over 30 years of experience in construction and real estate and has completed condominium projects in Massachusetts and New Hampshire, among other states. BGG is national company owned by Balzotti's wife, Dawn, and his son, Cesear Balzotti, Jr. Although he is not the official owner, Balzotti plays a dominant role in BGG and oversees each project the company undertakes from planning through completion. See Def. Ex. T-A.

As stated above, Balzotti, Thibeault, and Caruso formed SHP and purchased the Development Project out of bankruptcy in the early 2000s. On February 25, 2003, SHDC filed a Declaration of Condominium at the Hillsborough County Registry of Deeds. One day later, on February 26, 2003, SHDC filed an amendment to that declaration which explicitly stated that SHDC would have "until February 25, 2013 to complete conversion of Units located within the convertible land as described in the Declaration of Condominium." Def.'s Ex. T-F. This amendment was in accord with the New Hampshire condominium statute which places a ten year cap upon a developer's ability to develop condominium land after a declaration has been filed. See RSA 356-B:23, III ("No such conversion shall occur after 5 years from the recordation of the

declaration, or such shorter period of time period as the declaration may specify, provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration . . . ."). The above statutory cap was the subject of Judge Colburn's March 18, 2014 order. See Pl.'s Ex. 6.

By 2006, the Development Project had slowed and Thibeault and Balzotti's relationship had deteriorated. That same year, Balzotti brought a state court lawsuit against Thibeault relative to the Development Project. That litigation was costly to both parties, and ended with a jury verdict in favor of Thibeault.

In 2010, Balzotti, through his wife Dawn (who was the holder of the Note at that time), brought involuntary bankruptcy proceedings against SHDC, SHP, and Thibeault in the United States Bankruptcy Court for the District of New Hampshire.[3] That case, however, was deemed to have been brought in bad faith, and Balzotti was forced to pay tens of thousands of dollars in attorney's fees, and thousands of dollars in punitive damages. See Doc. # 49 (attaching the bankruptcy order). In short, the Bankruptcy Court (Deasey, J.) determined that Balzotti instructed his wife to file the involuntary bankruptcy petition as a way of exerting pressure on Thibeault in the hopes that Thibeault would relent and pay the Note or settle the case. See id. at 7. The specter of that petition damaged Thibeault's reputation in the business community. See id. at 12 (awarding Thibeault $5,000 in punitive damages after finding that "Thibeault's business affairs outside of Shepherds Hill and Proponents were at risk and required significant efforts by him to minimize" the damage caused by the involuntary bankruptcy petition).

[3] It is clear from the record in both the bankruptcy case, as well as here, that Dawn Balzotti acted as Balzotti's agent during that litigation. In other words, Balzotti controlled, and was the catalyst for, the involuntary bankruptcy proceeding initiated against Thibeault. See Doc. # 49, Bankr. Order at 3–4 ("[Balzotti] testified that it was his decision to file the involuntary petitions against the Alleged Debtors and that his wife did not have any input into filing the petitions.").

Unsurprisingly, Balzotti conceded at the evidentiary hearing that he knew that Thibeault was upset with him for bringing that petition.

Naturally, the above litigation resulted in the complete deterioration of the relationship between Balzotti and Thibeault. According to Thibeault, there was no need to communicate with Balzotti because the bankruptcy plan clearly set forth the manner in which he would be paid. Furthermore, the Note was the most junior claim under the Bankruptcy Plan, and there were many other outstanding claims. See Def. Ex. T-C at 1–3, 5 (the Final Decree which states that the Note was voluntarily subordinated to the most junior claim). For his part, Balzotti believed that Thibeault had treated him unfairly. Indeed, he admitted on cross examination that he did not trust Thibeault. From 2010 on, the only time these two men conversed about the Development Project was when Balzotti made infrequent and unannounced trips to Thibeault's place of business[4]. Notwithstanding the foregoing, Balzotti claims that he relied exclusively on Thibeault for information relative to the Development Project.

By summer of 2014, Balzotti's son, Caesar Jr., was attempting to start his own roofing business. To support this endeavor, Balzotti orchestrated the reassignment of the Note from Dawn Balzotti to BGG so that his son could use it as contributed equity. Specifically, Balzotti hoped that the Note would provide his son with financial clout so that he could obtain financing from a bank to kick start the roofing company.[5] Despite his plans for the Note, Balzotti claims that he did nothing to determine the value of it prior to it its assignment to BGG. Thibeault disagrees. According to Thibeault, in the summer of 2014 Balzotti visited him at his business in New Hampshire to inquire about

[4] The trips were necessitated because Thibeault refused to accept any telephone calls from Balzotti.
[5] As stated above, by this point Judge Colburn had ruled in favor of the Association and that case was on appeal to the New Hampshire Supreme Court.

the status of the Development Project and, thus, the Note. It was at this point that Thibeault claims to have informed Balzotti about the Superior Court litigation and the pending appeal. Although Balzotti agrees that this meeting occurred, he refutes Thibeault's timeline. Specifically, he claims that the above meeting occurred in late March or early April of 2015.

Standard of Review

In ruling on a motion to dismiss, the Court must determine if the allegations in Plaintiff's Complaint "are reasonably susceptible of a construction that would permit recovery." Riso v. Dwyer, 168 N.H. 652, 654 (2016) (quotation omitted). "Dismissal is appropriate if the facts pled do not constitute a basis for legal relief." Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010) (quotation and alteration omitted). When deciding whether the discovery rule should apply, the trial court acts as the trier of fact and may decide statute of limitations questions at a preliminary hearing in advance of trial. Keshishian v. CMC Radiologist, 142 N.H. 168, 179–80 (1997). This is so because "a litigant has no constitutional right to a jury trial when his or her claim is time-barred." Id. at 179.

Analysis

Balzotti argues that the statute of limitations does not bar this action. For the reasons that follow, the Court disagrees. RSA 508:4 provides as follows:

> Except as otherwise provided by law, all personal actions . . . may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

RSA 508:4.

"The statute of limitations constitutes an affirmative defense, and the defendant bears the burden of proving that it applies in a given case." Lamprey v. Britton Constr., 163 N.H. 252, 257 (2012) (citation omitted). "That burden, however, is met by a showing that the action was not brought within three years of the act or omission of which the plaintiff complains. Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of proving that the discovery rule applies." Id. (citations omitted). "Although the discovery rule tolls the limitations period until a plaintiff discovers, or should reasonably have discovered, the causal connection between the harm and the defendant's negligent or wrongful act, this rule is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself." Beane, 160 N.H. at 713 (quotation omitted). "Rather, that the plaintiff could reasonably discern that he suffered some harm caused by the defendant's conduct is sufficient to render the discovery rule inapplicable." Id. (quotation omitted). "Further, a plaintiff need not be certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the discovery rule." Id. (citation omitted).

Here, the injury or damage at issue is Balzotti's inability to collect upon the Note through the sale of new condominium units, and the act or omission complained of is the loss of the development rights. Put differently, all of Balzotti's claims relate to the loss of the development rights. See Second Am. Compl. ¶ 36 (stating that SHDC has breached the Note by losing the development rights); id. ¶ 45 (alleging that Thibeault and Caruso were responsible for the loss of the development rights and that this conduct amounts to a breach of the covenant of good faith and fair dealing); id. ¶¶ 50–

61 (alleging that the Association should be equitably barred from profiting from the sale of the development rights). Accordingly, the Court now determines: (1) when the development rights were lost; and (2) when Balzotti knew or should have known of that harm.

I. When the Development Rights were Lost

As stated above, the condominium declaration, and the first amendment made thereto, was filed in February of 2003. That amendment explicitly stated that SHDC would have "until February 25, 2013 to complete conversion of Units located within the convertible land as described in the Declaration of Condominium." Def.'s Ex. T-F. This amendment was not a self-imposed cap on development but, rather, a statutory mandate. See RSA 356-B:23, III ("No such conversion shall occur after 5 years from the recordation of the declaration, or such shorter period of time period as the declaration may specify, provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration . . . ."). Thus, the Court agrees with the Association that Judge Colburn's order merely recognized and enforced what had already occurred by operation of statute. See RSA 356-B:23, III. Accordingly, the Court concludes that the development rights were lost on February 25, 2013. [6]

II. When Balzotti Knew or Should Have Known about the Loss

a. The Declaration

As stated above, the declaration, and the first amendment made thereto, was

[6] Because the Court's decision is predicated upon RSA 356-B:23 and the plain language of the declaration recorded at the registry of deeds, it need not resolve the parties' disagreement as to whether the statute of limitations commenced at the conclusion of either the Superior Court litigation or the Supreme Court litigation.

recorded at the registry of deeds in February of 2003. This information was publicly available to any person who was interested in the property, including Balzotti.

Moreover, It is well-settled that "every person is presumed to know the law and, therefore, to organize his or her conduct and affairs accordingly." Lennartz v. Oak Point Assocs., P.A., 167 N.H. 459, 464 (2015). Balzotti, having decided to invest in the Development Project, is presumed to have known (or have made himself aware of) the statutory cap on condominium development and, therefore, the date at which the development rights would evaporate pursuant to RSA 356-B:23, III. See id.

This conclusion is buttressed by the fact that Balzotti is a well-resourced and sophisticated businessman who, pursuant to his own testimony, has supervised numerous construction and real estate projects (including condominium projects) over his 30-year career. See Def.'s Ex. T-A; see also Power Control Devices, Inc., v. Orchid Technologies Engineering and Consulting, Inc., 968 F.Supp.2d 435, 443 (D. Mass. 2013) ("When the parties stand in relatively equal positions of knowledge in a commercial transaction, as was the case here, it would be inappropriate to apply the discovery rule." (citation omitted)). Indeed, the testimony at the evidentiary hearing revealed that Balzotti has routinely employed sophisticated law and accounting firms to assist him in his business pursuits. See State Indus. Products Corp. v. Beta Technology Inc., 575 F.3d 450, 455 (5th Cir. 2009) ("Further, as a sophisticated corporate party in the same business as [defendant], [plaintiff] is not the type of 'lay' party that the discovery rule is designed to protect." (citation omitted)). For the foregoing reasons, the Court finds that Balzotti knew or should have known about the loss of the development rights at the moment they expired in 2013.

III. The Meeting

Alternatively, the Court also finds that Balzotti knew, or should have known, about the loss of the development rights by at least August of 2014. Balzotti alleges that he learned about the loss after BGG acquired the Note in August of 2014, and while the underlying Superior Court case was on appeal. Second Am. Compl. ¶ 22. He then testified at the evidentiary hearing that such knowledge actually accrued immediately before the appeal was decided in late March or early April of 2015. By contrast, Thibeault claims that the meeting at issue took place in the summer of 2014. For the reasons that follow, the Court credits Thibeault.

First and foremost, the Court finds that Balzotti's testimony during the evidentiary hearing was non-responsive and evasive. Balzotti downplayed facts which painted him in a negative light. For example, Balzotti refused to admit that the involuntary bankruptcy proceeding that he brought against Thibeault was deemed to have been brought in bad faith, or that such proceeding negatively affected Thibeault. The Judge's order in that case was unequivocal on those points. Considering that the bankruptcy proceeding: (1) took place in the recent past, see Doc. # 49 (attaching the May 18, 2011 order on sanctions); (2) has been the subject of extensive discussion and briefing during this litigation; and (3) led to the imposition of severe monetary sanctions against Balzotti, the Court concludes that this denial, among other things, reflects poorly on Balzotti's credibility as a witness.[7] In contrast, the Court finds that Thibeault testified in a cohesive and non-evasive manner, even when such testimony did not put him in the

[7] Similarly, the Court finds that Balzotti's testimony regarding his son's employment with BGG, in response to a work product objection, was evasive. In general, the Court finds that Balzotti testified in an unnecessarily equivocal fashion throughout the hearing. Take, for example, Balzotti's explanation of the 2006 litigation against Thibeault, see Hr'g 2:57:45–2:58:58. These examples are not exhaustive.

best light.

Moreover, it makes sense that Balzotti would have contacted Thibeault about the Development Project (and thus the Note which relates to it) in the summer of 2014 when Balzotti was in the process of assigning the Note to BGG for use as contributed capital. In short, the Court does not credit Balzotti's assertion that he did nothing to ascertain the value of the Note before transferring it to BGG.[8] For the above reasons, the Court alternatively concludes that Balzotti knew or should have known about the loss of the development rights by August of 2014.

IV. Reliance on Thibeault

Finally, the Court finds that it was unreasonable for Balzotti to rely solely upon Thibeault for information relative to the Development Project and, therefore, application of the discovery rule is not proper in this case because Balzotti was not reasonably diligent. As documented above, by 2010 Balzotti and Thibeault were not on speaking terms. After Balzotti brought the bad-faith involuntary bankruptcy petition against Thibeault, it was abundantly clear to Balzotti that Thibeault was shunning him. Indeed, the only time these men communicated was when Balzotti showed up unannounced at Thibeault's place of business to corner him about the Development Project. Balzotti even admitted during cross-examination that he did not trust Thibeault. Given the acrimonious nature of this relationship, the Court concludes that Balzotti's sole reliance upon Thibeault for information relative to the Development Project was manifestly unreasonable under the circumstances. Cf. Marcucci v. Hardy, 65 F.3d 986, 989 (1st

[8] Assuming, arguendo, that Balzotti did nothing to ascertain the value of the Note prior to assigning it to BGG, the Court concludes that such conduct establishes that Balzotti was not reasonably diligent in discovering the harm suffered (i.e. the loss of the development rights) and therefore application of the discovery rule is improper.

Cir. 1995) (reasoning that defendant's "conduct served to toll the limitations period by engendering in [plaintiff] a reasonable sense of confidence which disguised the need for any legal action." (citation omitted)). Accordingly, the Court concludes that Balzotti was not reasonably diligent in discovering the injury and its causal relationship to the act or omission complained of. Had he been, the Court concludes that Balzotti would have learned about the underlying litigation and, most importantly, the expiration date of the Development Project, well before February 2, 2015. See RSA 508:4; RSA 356-B:23, III; Def. Ex. T-F.

In sum, the Court concludes that Balzotti knew or should have known about the loss of the development rights when: (1) they expired pursuant to the declaration—and the statute that it tracks—on February 25, 2013; and/or (2) in the summer of 2014 when he met with Thibeault and transferred the Note to BGG for use as contributed capital. Moreover, the Court concludes that Balzotti's sole reliance upon Thibeault for information relative to the Development Project was unreasonable under the circumstances and, therefore, Balzotti was not reasonably diligent in discovering the harm suffered. In other words, the Court concludes that, had Balzotti been diligent, he would have "reasonably discern[ed] that he suffered some harm caused by" Defendants well before February 2, 2015. Beane, 160 N.H. at 713 (quotation omitted); see also id. ("[A] plaintiff need not be certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the discovery rule." (citation omitted)). Accordingly, the Court concludes that Balzotti's claims are barred by the statute of limitations.

Conclusion

For the foregoing reasons, Defendants' motion to dismiss is **GRANTED**.

So Ordered.

October 31, 2018
DATE

Marguerite L. Wageling
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Balzotti Global Group, LLC, et al v Shepherds Hill Proponents, LLC, et al**
Case Number: **218-2018-CV-00117**

Enclosed please find a copy of the court's order of January 29, 2019 relative to:

Motion for Reconsideration

January 30, 2019

Maureen F. O'Neil
Clerk of Court

(595)

C: Matthew R. Johnson, ESQ; Thomas W. Aylesworth, ESQ; Jeremy T. Walker, ESQ; Joseph Allen Foster, ESQ; John M. Sullivan, ESQ; Emile R. Bussiere, Jr, ESQ; Steven J. Dutton, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

BALZOTTI GLOBAL GROUP, LLC ET AL

v.

SHEPHERDS HILL DEVELOPMENT COMPANY, LLC ET AL

v.

SHEPHERDS HILL HOMEOWNERS ASSOCIATION, INC.

Docket No.: 218-2018-CV-117

ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION

The instant lawsuit arises out of a failed condominium development enterprise (the "Development Project"). Plaintiffs Balzotti Global Group, LLC ("BGG") and Caesar Balzotti, Sr. ("Balzotti") seek damages and equitable relief from Shepherds Hill Development Company, LLC, ("SHDC"), Shepherds Hill Proponents ("SHP"), Ernest J. Thibeault, III ("Thibeault"), Ralph Caruso ("Caruso"), and Shepherds Hill Homeowners Association, Inc. (the "Association") (collectively "Defendants"). Following an evidentiary hearing, the Court granted Defendants' motion to dismiss on statute of limitations grounds. See Doc. 62. Plaintiffs now move for reconsideration of that Order. Defendants object. For the reasons that follow, Plaintiffs' motion for reconsideration is **DENIED**.

Analysis

In its prior Order, the Court recited the background facts of this case as well as factual findings the Court made following the evidentiary hearing. See Doc. 62. Those facts are incorporated by reference herein.

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended" in coming to the challenged decision. Super. Ct. Civ. R. 12(e). With this standard in mind, the Court turns to Plaintiffs' arguments.

Plaintiffs' motion claims that the Court erred by: (1) concluding that Balzotti knew or should have known about the loss of the development rights by February 25, 2013; (2) concluding that the meeting between Balzotti and Thibeault occurred in August of 2014; (3) overlooking the role Thibeault played as the manager of the Development Project; (4) concluding that the claims against the Association were time barred; and (5) "unfairly and prejudicially" changing the scope of the evidentiary hearing. The Court will address each of these arguments in turn.

I. Loss of the Development Rights

Plaintiffs argue that the Court erred in finding that Balzotti knew or should have known about the loss of the development rights by February 25, 2013. In short, the Court ruled that pursuant to the explicit terms of the condominium declaration and the statutory mandate contained in RSA 356-B:23, III, the development rights expired on February 25, 2013. The Court further found that Balzotti should have known about that timetable and the resulting loss of the development rights.

Plaintiffs argue that the Court overlooked the fact that a legally erroneous 24th amendment to the condominium declaration was recorded at the Registry of Deeds which, by its terms, purported to extend the Development Project past its statutory expiration date. Thus, Plaintiffs argue that Balzotti should not have known about the loss of the development rights on February 25, 2013. For the reasons stated in its prior

Order, the Court is unpersuaded. Even though an erroneous amendment was recorded, the condominium statute clearly sets forth a ten-year cap. As a sophisticated developer, Balzotti should have known of that cap. Moreover, the record does not suggest that Balzotti detrimentally relied upon the 24th amendment. Accordingly, the Court declines to reconsider its prior ruling on this issue.

II. The Meeting

Plaintiffs challenge the Court's factual finding that the meeting between Balzotti and Thibeault occurred in August of 2014. Plaintiffs continue to assert that the meeting actually took place in late March or early April of 2015. The Court's factual findings in this case were the product of a multi-hour evidentiary hearing wherein the Court assessed the credibility of witnesses, their testimony, and the documents submitted by the parties. The Court stands by its factual findings and, therefore, declines to reconsider its ruling.

Notwithstanding the foregoing, the Court reached an alternative but equally salient conclusion on this issue. As stated in the Court's prior Order, Balzotti orchestrated the assignment of the Note to BGG in the summer of 2014 and, by his own testimony, did nothing to ascertain its value—or the status of the Development Project with which it was inextricably intertwined—at the time of that transfer. At the time of the 2014 assigment, Judge Colburn had already ruled in favor of the Association, and that case was on appeal to the New Hampshire Supreme Court. Thus, the Court stands by its ruling that Balzotti did not act with reasonable diligence when he arranged for the transfer of the Note to BGG without investigating the status of the Development Project which, by that point, had been judicially terminated.

III. Thibeault's Role

Plaintiffs argue that the Court misapprehended the role Thibeault played in managing the Development Project, SHP, and SHDC. Specifically, Plaintiffs argue that it was reasonable for Balzotti to have relied upon Thibeault as he had a duty to disclose any material information regarding the Development Project. For the reasons stated in the Court's prior Order, the Court reaffirms its finding that given the acrimonious relationship between Thibeault and Balzotti, it was unreasonable for Balzotti to rely exclusively upon Thibeault for information relative to the Development Project.

Additionally, the discovery rule concerns when the plaintiff knew or should have known about the harm suffered and the defendant's causal connection to that harm. As stated previously, the harm suffered in this case was the loss of the development rights. For the reasons stated above, Balzotti knew or should have known about the loss of the development rights well before February of 2015. Concomitantly, Balzotti knew or should have known of Thibeault's actions or inactions relative to the loss of the development rights within that same timeframe. Accordingly, the Court declines to reconsider its ruling on this issue.

IV. Claims Against the Association

Plaintiffs argue that its claims against the Association have a different statute of limitations period and are not barred by the statute of limitations. The Court disagrees. Assuming, arguendo, that a viable claim may be made against the Association as a successor-in-interest to the development rights, any such claim would have necessarily accrued at the time the development rights were transferred to the Association pursuant to the terms of the statute, the declaration, and Judge Colburn's order. Accordingly, the

Court declines to reconsider its ruling on this issue.

V. The Scope of the Evidentiary Hearing

Finally, Plaintiffs argue that the Court unfairly and prejudicially changed the scope of the evidentiary hearing. Specifically, Plaintiffs claim that the Court's Order regarding the evidentiary hearing "stated that the focus of the hearing would be 'when Balzotti knew, or should have known about Judge Colburn's March 18, 2014 order.'" Pl.'s Mot. Reconsider at 8. Plaintiffs have mischaracterized the Court's Order. The Court did not indicate that the scope of the hearing would be limited to when Balzotti knew or should have known about Judge Colburn's Order. Rather, the Court specified that the scope of the hearing would "necessarily include[ ] when Balzotti knew, or should have known about Judge Colburn's March 18, 2014 order." Doc. 55 at 5; see Black's Law Dictionary 880 (10th Ed. 2014) (defining "include" as "[t]o contain as a part of something" and noting that the word "including" "typically indicates a partial list"). In other words, the Court flagged Balzotti's knowledge of Judge Colburn's order as one necessary avenue of inquiry but did not mandate that the scope of the hearing was limited to that single issue. Plaintiffs' interpretation of the word "include(s)" is flawed. Moreover, their interpretation of the sentence upon which that word was used cannot be squared with the sentence that came immediately before it: "In light of the foregoing, the Court orders an evidentiary hearing in this case to determine when Balzotti knew or should have known about the loss of the development rights." See Doc. 55 at 5 (emphasis added, citation omitted). Accordingly, the Court declines to reconsider its ruling on this issue.

Conclusion

For all of the foregoing reasons, Plaintiffs' motion for reconsideration is **DENIED**.

So Ordered.

January 29, 2019
Date

Marguerite L. Wageling
Presiding Justice

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2019, copies of this brief were forwarded to all other counsel of record, Matthew R. Johnson, Esq, John M. Sullivan, Esq., Emile R. Bussiere, Jr., Esq., Jeremy T. Walker, Esq, Joseph A. Foster, Esq., and Steven Dutton, Esq., by the Court's electronic filing system's electronic service.

/s/Thomas W. Aylesworth
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