APPENDIX

APPENDIX

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APPENDIX A

SUPREME COURT OF ILLINOIS

No. 122332

[Filed September 27, 2017]

SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, etc., et al., respondents,	)
v.	)
SIENA AT OLD ORCHARD, L.L.C., etc., et al., petitioners.	)

Leave to appeal, Appellate Court, First District. 1-15-1846

Opinion

Petition for Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal Denied.

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Fifth Division

2017 IL App (1st) 151846
No. 1-15-1846

[Filed March 24, 2017]

SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, an Illinois Not-for-Profit Corporation, and THE BOARD OF DIRECTORS OF THE SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, Plaintiffs-Appellants and Cross-Appellees,	)
v.	)
SIENA AT OLD ORCHARD, L.L.C., an Illinois Limited Liability Company; LENNAR CHICAGO, INC., an Illinois Corporation; and LARRY KEER, Individually, Defendants-Appellees	)
(Siena at Old Orchard, L.L.C.; and Lennar Chicago, Inc., Cross-Appellants).	)

Appeal from the Circuit Court of
Cook County. No. 13 L 8154

The Honorable Patrick J. Sherlock, Judge Presiding

PRESIDING JUSTICE GORDON delivered the judgment of the court, with opinion. Justices Lampkin and Reyes concurred in the judgment and opinion.

OPINION

¶ 1

The instant appeal arises from a dispute over construction defects discovered at a condominium complex in Skokie, Illinois. Plaintiffs, Siena at Old Orchard Condominium Association and its board of directors (collectively, the Association), filed suit against the developer, Siena at Old Orchard, L.L.C.; the developer's management company, Lennar Chicago, Inc. (collectively, the developers); and Larry Keer, the president of the Association's initial board of directors. Defendants filed a motion to dismiss the complaint, claiming that the Association had failed to follow the mandatory arbitration requirements contained in the Association's declaration, resulting in waiver of their claims. The trial court granted the motion to dismiss, finding that the Association had waived all claims by failing to abide by the declaration's requirements. The Association appeals the trial court's dismissal of its complaint. The developers cross-appeal, claiming that the trial court did not award them all of the attorney fees and costs to which they were entitled. For the reasons that follow, we reverse.

¶ 2

BACKGROUND

¶ 3

I. Complaint

¶ 4

A. Allegations

¶ 5

On July 17, 2013, the Association filed an eight-count complaint against defendants. The complaint alleges that Siena at Old Orchard, L.L.C., was the developer of Siena at Old Orchard Condominium, a residential condominium complex located in Skokie, and that Lennar Chicago, Inc., was the developer's manager. The Association was established on July 24, 2006, and from its formation until March 2007, it was governed by a board of directors appointed by the developer. In March 2007, control of the Association was transferred from the initial developer-appointed board to a board of directors elected from the unit owner membership. Larry Keer was the president of the Association's board of directors on July 18, 2008.

¶ 6

The complaint alleges that "the common elements of the building are experiencing numerous latent defects in the construction of the common areas for the Association, namely water leaks are entering the interior of the building." The complaint further alleges that the exterior walls were constructed "without the required flashing and weeps" and were also "undergoing severe cracking and deterioration." Finally, the complaint alleges that "an improper water proofing system was utilized."

¶ 7

The complaint alleges that after the turnover, some of the unit owners retained a consultant to investigate the cause of water infiltration problems that were being experienced. During the course of his investigation, "the consultant performed several tests and made exploratory investigations into the common elements of the building to determine the causes of the leaks." The consultant issued a report to the Association in May 2010, identifying "defective" portions of the property, including the asphalt paving, the exterior masonry walls, the masonry expansion joints, and balcony deck membranes. The complaint further alleges that "[t]his is the first time that the post developer Board became aware that there [were] defects at the Association that were attributable to the developer's defective development of the Association." These construction defects were "affecting the structural integrity of the building and its common elements." Furthermore, the complaint alleges, "the manner in which several portions of the building were installed and constructed is contrary to the architectural drawings and specifications prepared for the Association building."

¶ 8

The complaint alleges that prior to the turnover, the developer and the initial board had actual knowledge of the construction defects in the common elements, but that "[t]he unit owner controlled board did not have knowledge of these construction defects until after" the May 2010 report by the Association's consultant. However, despite having knowledge of the construction defects, the developer and the initial board "failed to inform the post developer Board of the fact that the defective conditions at the Association were caused by the defective development, design and construction of the Condominium."

¶ 9

The complaint set forth eight counts. Counts I through IV were applicable to the developers, while counts V through VIII were aimed at Keer. Count I was for breach of fiduciary duty and alleged that the initial developer-appointed board breached its fiduciary duty to the unit owners by failing to properly investigate the complex, failing to ask the developer to remedy the defects, and "otherwise fail[ing] to protect the interests of the Association's members," which the complaint alleged were intentional acts done "for the purpose of increasing and maximizing the Developer's profits in the development and sale of the Complex and units in the Association and to avoid its share of assessment responsibility for reserves and repairs, all to the detriment of the owners in the Association."

¶ 10

Count II was for breach of contract and alleged that the developer failed to construct the condominium complex according to the terms set forth in the purchase agreement. Count III was for breach of the implied warranty of habitability and count IV was for breach of the implied warranty of good workmanship and materials. All of the counts directed at the developers sought damages "in an amount equal to the total cost of repair or replacement of the aforesaid defects," which the complaint alleged "is believed to be in excess of $500,000.00."

¶ 11

Counts V through VIII were directed at Keer, who was the president of the Association on July 18, 2008, when he executed a release[1] "that indicated that the Association was releasing its claims against the developer purportedly on behalf of the Association." However, the complaint alleged that Keer did not have the authority to sign documents on behalf of the Association without the approval of the majority of the board, which he did not have at the time of the signing of the release. Accordingly, the complaint set forth two counts for breach of fiduciary duty and two counts of constructive fraud.

¶ 12

B. Declaration of Condominium Ownership

¶ 13

Attached to the complaint was the declaration of condominium ownership for Siena at Old Orchard Condominium, recorded on July 24, 2006. Article 12 of the declaration was entitled "Dispute Resolution," and contained five sections. Section 12.01 was entitled "Consensus for Action by the Condominium Association" and provided that, "[e]xcept as provided in

---

[1] Two of the counts refer to a release executed on July 18, 2008, while the other two counts refer to a release executed on October 30, 2008.

this Section, the Condominium Association may not commence a legal proceeding or an action under this Article without the affirmative vote of at least seventy-five percent (75%) of the Voting Members." Section 12.01 further provided that "[p]rior to the Condominium Association or any member commencing any proceeding to which Declarant[[2]] is a Party, including but not limited to an alleged defect of any improvement, Declarant shall have the right to be heard by the members, or the particular member, and to access, inspect, correct the condition of, or redesign any portion of any improvement as to which a defect is alleged or otherwise correct the alleged dispute."

¶ 14

Section 12.02 was entitled "Alternative Method for Resolving Disputes" and provided, in full:

> "Declarant, its officers, directors[,] employees and agents; the Condominium Association, its officers, directors and committee members; all Persons subject to this Declaration; and any Person not otherwise subject to this Declaration who agrees to submit to this Article (each such entity being referred to as a 'Bound Party') agree to encourage the amicable resolution of disputes, without the emotional and financial costs of litigation. Accordingly, each Bound Party covenants and agrees to submit those Claims, grievances or disputes described in Section 12.03

[2] "Declarant" was the developer, according to the declaration's definitions section.

> (collectively, 'Claims') to the procedures set forth in Section 12.04."

¶ 15

The "Claims" referred to in section 12.02 of the declaration were set forth in section 12.03, which was entitled "Claims." Section 12.03 provided, in relevant part:

> "[A]ll claims between any of the Bound Parties regardless of how the same might have arisen or on what it might be based, including but not limited to Claims (a) arising out of or relating to the interpretation, application or enforcement of the provisions of the Act, this Declaration, the By-Laws and reasonable rules and regulations adopted by the Board or the rights, obligations and duties of any bound Party under the provisions of the Act, this Declaration, the By-Laws and reasonable rules and regulations adopted by the Board, (b) relating to the design or construction of improvements; or (c) based upon any statements, representations, promises, warranties, or other communications made by or on behalf of any bound Party shall be subject to the provisions of Section 12.04."

¶ 16

Section 12.04, which was entitled "Mandatory Procedures," set forth the procedure the parties agreed to follow in the event a claim arose. Specifically, section 12.04(a) was entitled "Notice" and provided:

> "As a condition precedent to seeking any action or remedy, a Bound Party having a Claim

('Claimant') against any other Bound Party ('Respondent') (the Claimant and the Respondent referred to herein being individually, as a 'Party,' or, collectively, as the 'Parties') shall notify each Respondent in writing (the 'Notice'), stating plainly and concisely:

(i) the nature of the Claim, including the defect or default, if any, in detail and the Persons involved and the Respondent's role in the Claim;

(ii) the legal basis of the Claim (i.e., the specific authority out of which the Claim arises);

(iii) the proposed remedy;

(iv) any evidence that depicts the nature and cause of the Claim and the nature and extent of repairs necessary to remedy the Claim, including expert reports, photographs and videotapes; and

(v) the fact that Claimant will meet with Respondent to discuss in good faith ways to resolve the claim.

Notices given to Respondent pursuant to this Section shall be deemed sufficient if personally delivered, delivered by commercial messenger service, or mailed by registered or certified mail, postage prepaid, return receipt requested to the last known address of the Respondent as it appears on the records of the Condominium Association on the date of mailing."

¶ 17

Section 12.04(b), entitled "Claims Involving Declarant," provided additional rights for the Declarant developer. These provisions included that: "Claimant agrees to permit Declarant and its agents to perform inspections and tests and to make all repairs and replacements deemed necessary by Declarant to respond to the claim," and "Declarant or Condominium Association, as the case may be, shall have not less than 35 days nor more than 90 days from receipt of the Notice (the 'Cure Period') to cure as provided herein or to otherwise respond to the Claimant in the event that the Declarant determines that no default has occurred and/or default exists." The provision provided that "Declarant shall have the right, but not the obligation, to take action during the Cure Period and/or respond to any notice received from Claimant."

¶ 18

Section 12.04(b)(iv), entitled "Dispute Resolution," then provided:

> "Any dispute (whether contract, warranty, tort, statutory or otherwise) including, but not limited to (a) any and all controversies, disputes or claims arising under, or related to, the Purchase Agreement, the Unit, or any dealings between the Declarant and Owner ***, (b) any controversy, dispute or claim arising by virtue of any representations, promises or warranties alleged to have been made by Declarant or Declarant's representative, and (c) any personal injury or property damage alleged to have been sustained by Purchaser on the Property

> (hereinafter individually and collectively referred to as 'disputes' or 'Claims'), shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided in Paragraphs 12.04(c) and 12.04(d) below and as provided by the Federal Arbitration Act (9 U.S.C. Section 1 et seq.) or applicable state law relating to arbitration and not by or in a court of law."

¶ 19

Section 12.04(c), entitled "Negotiation and Mediation," provided under subsection (ii), in relevant part, "If the Parties do not resolve the Claim within 90 days after the date of the Notice and the Cure Period has expired (or within such other period as may be agreed upon by the Parties) ('Termination of Negotiations'), either Party shall have 30 days from the date of Termination of Negotiations to submit the claim to mediation." Subsection (iii) stated that "[i]f a Claimant does not submit the Claim to mediation within such time, or does not appear for the mediation, then the Claimant shall be deemed to have waived the Claim, and the Respondent shall be released and discharged from any and all liability to Claimant on account of such Claim."

¶ 20

Section 12.04(e), entitled, "Costs and Expenses" provided, in full,

> "Except as otherwise provided under subparagraph 12.04(b) above, each Party shall bear its own costs and expenses, including attorney's fees, for any mediation and

> arbitration. Notwithstanding the foregoing, if a Party unsuccessfully contests the validity or scope of arbitration in a court of law, the non-contesting Party shall be awarded reasonable attorneys fees and expenses incurred in defending such a contest. In addition, if a Party fails to abide by the terms of a mediation settlement or arbitration award, the other Party shall be awarded reasonable attorneys fees and expenses incurred in enforcing such a settlement or award."

¶ 21

Section 12.05, entitled "Amendment of Article," stated in full, "Without express prior written consent of Declarant, this Article may not be amended for a period of twenty years from the effective date of this Declaration."

¶ 22

Attached as an exhibit to the declaration was the Association's bylaws. Section 5.10 of the bylaws provided that, "[e]xcept as otherwise expressly provided herein or in the Declaration, any action may be taken upon the affirmative vote of a majority of the Directors present at a meeting at which a quorum is present." Furthermore, section 8.01 discussed authority for the execution of instruments:

> "EXECUTION OF INSTRUMENTS: The Board may authorize any officer or officers, agent or agents of the Condominium Association, in addition to the officers so authorized by these By-Laws, to enter into any contract or execute and deliver any instrument (including

> amendments to the Declaration or these By-Laws which must be executed by the Condominium Association) in the name of and on behalf of the Condominium Association and such authority may be general or confined to specific instances. In the absence of any such authorization by the Board, any such contract or instrument shall be executed by the President or a Vice President and attested to by the Secretary or an Assistant Secretary of the Condominium Association."

¶ 23

Finally, included within the declaration is a document entitled "Amendment of the Declaration of Condominium Ownership for Siena Old Orchard Condominium Association." Pursuant to the amendment, Article 12 of the declaration was deleted in its entirety. The amendment stated: "[T]he following Amendment has been approved by the affirmative vote of Voting Members having no less than sixty-seven percent (67%) of the owners as evidenced by the Certification attached hereto ***." The document was signed by the president of the Association and dated August 14, 2011.

¶ 24

C. Real Estate Purchase Agreement

¶ 25

Also attached to the complaint was the "Real Estate Purchase Agreement" for the purchase of a unit within the condominium building, executed by the developer and Larry and Theresia Keer,[3] dated June 24, 2006. The agreement contains a section entitled, "Seller's Limited Warranty/Waiver of Implied Warranty of Habitability." The language stated, in all capital letters, "seller hereby disclaims and purchaser hereby waives the implied warranty of habitability described above." The agreement further stated, "if a dispute arises with seller and if a dispute arises with seller and the dispute results in a lawsuit, purchaser will not be able to rely on the implied warranty of habitability described above as a basis for suing the seller." In an addendum to the agreement, a clause was added that stated, "Purchasers agree that in consideration for Seller providing Purchaser with Limited Warranties, Purchaser will accept the Limited Warranties as a substitute for the Implied Warranty of Habitability." The addendum additionally stated, in all capital letters: "if a dispute arises with seller and the dispute results in a lawsuit, purchaser will not be able to rely on the implied warranty of habitability described above as a basis for suing the seller. Purchaser may, however, rely on the limited warranties made by seller to purchaser." Larry Keer's and Theresia Keer's initials are located under both of these sections. The document is followed by a document entitled, "Siena Condominium Unit Warranty." Though the document failed to identify the parties, the agreement provided the purchaser with a limited warranty of one year after the closing date. Section 8 of the agreement required the parties to submit all claims to mediation and

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[3] The record does not disclose Theresia Keer's relationship to defendant Keer, but we presume she is his spouse.

binding arbitration. The warranty is not dated or signed.

¶ 26

D. Releases

¶ 27

Additionally attached to the complaint are the two releases referred to in counts V through VIII of the complaint against Keer. The Association, represented by Keer, and the developer executed the documents on July 18, 2008, and October 30, 2008. According to the releases, which contained identical language, "[t]he Association *** made various claims against the Developer including, among other things, the 'Items' on the Punch list attached hereto as Exhibit A," which included problems such as broken concrete in the parking lot and improper placement of the wood trim in the hallways,[4] and "[t]he parties desire to resolve the claims made by the Association and any and all other future claims or causes of action." Accordingly, the developer agreed to pay the Association $20,734 in the July 18, 2008, release and agreed to pay $7,779.53 in the October 30, 2008, release. In exchange, the

[4] "Exhibit A" was identical in both releases, except that in the exhibit attached to the October 30, 2008, release, there was an additional item that provided that, "[a]s a result of [water-seepage issues due to the pitch of the garage floor], the elevator system control sustained $20,734 of damage." The "status" of this item provided that "[the developer] has reimbursed the [Association] for the cost of the repairs." We note that the $20,734 listed as the amount of damage is also the precise amount the developer agreed to pay in the July 18, 2008, release.

Association agreed to release and discharge the developer from:

> "any and all claims, causes of action, or liabilities whosoever, known or unknown, asserted or unasserted, whether arising out of contract, tort, or otherwise, in law or in equity arising, accruing, or based on any action or inaction of any such parties, including, without limitation, any claim for construction defects in connection with the construction of the improvements which are part of the Condominium, the administration of the Association prior to the turnover of control to a board of directors elected by the unit owners and the payment of assessments, charges or other amounts whatsoever due to the Association from the Developer."

¶ 28

The developer agreed to release the Association from "any and all claims and causes of action or liabilities whatsoever, known or unknown, asserted or unasserted, whether rising out of contract, tort, or otherwise in law or in equity, arising, accruing, or based on any action of the Association or its directors, officers, or agents." Defendant Lennar Chicago, Inc., through its vice president, Glenn V. Richmond, signed the releases on behalf of the developer, while defendant Larry M. Keer signed on behalf of the Association.

¶ 29

II. Motions to Dismiss

¶ 30

On August 28, 2013, Keer filed a motion to dismiss the Association's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)). On October 9, 2013, the developers filed a motion to dismiss the Association's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). These two motions contained identical arguments despite the fact they were seeking dismissal pursuant to different sections of the Code. The developers and Keer argued article 12 of the declaration deprived the court of jurisdiction and required the parties to submit the dispute to arbitration. In response, the Association argued that, prior to filing this lawsuit, the board amended article 12 to delete the article in its entirety. On February 13, 2014, the trial court granted the motions to dismiss and dismissed the Association's complaint without prejudice. The court relied on section 12.05 of the declaration, which required express written consent from the developer prior to an amendment of the declaration, to find that the amendment removing article 12 was not valid.

¶ 31

On February 26, 2014, the Association filed a motion to reconsider the trial's order, based on an error in the court's previous application of existing law. The Association argued that the amendment removing article 12 was proper pursuant to section 27(a)(i) of the Condominium Property Act (Act) (765 ILCS 605/27(a)(i)

(West 2012)), which provides that the "only" basis for amendment to a declaration is "upon the affirmative vote of 2/3 of those voting" and that "in no event shall the condominium instruments require more than a three-quarters vote of unit owners." The Association argued that pursuant to the Act, section 12.05, which required the developer's consent prior to an amendment, was invalid. The Association also argued that section 32 of the Act should be interpreted to permit mandatory arbitration only in matters below $10,000 in dispute and, since the instant dispute had a higher value, the mandatory arbitration requirement in article 12 was invalid. In response, the developers argued that the Association waived these arguments by failing to bring this law to the court's attention during the pendency of the motions to dismiss.

¶ 32

On May 8, 2014, the trial court granted the Association's motion to reconsider, based on an error in the court's previous application of existing law.[5] The trial court held that section 27 of the Act invalidated section 12.05 of the declaration, since the only means to amend a declaration was through a 2/3 vote and section 12.05 sought to impose an additional requirement, namely, the developer's consent to the amendment. As such, the board's vote to amend and delete article 12 of the declaration was proper, and the parties were not required to submit the claim to

[5] Although the trial court stated that the motion was based on an error in the previous application of the law, the trial court had not previously applied section 27 or section 32 of the Act granting the motions to dismiss.

arbitration. However, the court rejected the Association's argument under section 32 of the Act. The court found that section 32 cannot be interpreted to permit mandatory arbitration only in disputes involving less than $10,000, as this interpretation was unsupported by case law and contrary to the plain meaning of the Act. The court also found this interpretation of section 32 violated the Illinois public policy favoring the enforcement of arbitration and mediation agreements.

¶ 33

III. Amended Complaint and Motion to Dismiss

¶ 34

On May 29, 2014, the Association filed an amended complaint, and defendants again filed motions to dismiss the amended complaint, with Keer filing a motion to dismiss under section 2-619 of the Code and the developers filing a combined motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). While the motions to dismiss were pending, the Association sought leave to file a second amended complaint, claiming that the section 2-615 portion of the developers' motion to dismiss raised pleading deficiencies that the Association sought to amend through the filing of a second amended complaint; the Association claimed that "[a]llowing this amendment would permit the hearing of all issues raised, both 2-615 and 2-619, issues, at one time and prevent duplicative pleadings and motion practice."

¶ 35

The Association was granted leave to file a second amended complaint, and it filed its second amended complaint on September 10, 2014. The second amended complaint included allegations regarding the board's amendment to delete article 12 of the declaration, which required the parties to submit all claims to arbitration and mediation. These allegations included that the amendment occurred on August 14, 2011, and was properly recorded with the Recorder of Deeds' Office of Cook County. The amended complaint also alleged that, prior to this amendment, the Association had not sent notice pursuant to section 12.04(a) of the declaration to trigger the mediation and arbitration requirements.

¶ 36

On September 24, 2014, the developers filed a combined motion to dismiss the Association's second amended complaint pursuant to section 2-619.1 of the Code.[6] The developers claimed that prior to the amendment of article 12 of the declaration, the Association sent a letter to the developer that constituted notice to trigger the mediation and arbitration process required by the declaration. The developer argued that, pursuant to section 12.04(c), the Association waived its claims by failing to submit the claims to mediation within the allotted time

---

[6] The record does not show that Keer filed a new motion to dismiss after the filing of the second amended complaint. However, since the second amended complaint sought to remedy only the pleading deficiencies raised by the developers' section 2-615 motion, Keer's section 2-619 motion would have remained pending.

requirement. The developers also claimed the releases executed by Keer extinguished the cause of action. Further, as to count I for breach of fiduciary duty, the developers argued the count was not sufficiently pled.

¶ 37

The letter, which was attached to the motion to dismiss, was dated August 13, 2010, and signed by an attorney representing the Association. The letter indicated that it had been sent via email and that its subject was "Re: Claim against Developer: Siena at Old Orchard Condominium Association." The letter stated, in full:

> "Please be advised that I represent the Above referenced condominium association relative to its *** claim against the developer for certain construction defects. Attached please find a transition study outlining, in detai[l] the construction and design deficiencies. Also please find[] [a] 'bid comparison' sheet setting forth bids for correcting some of the work.
>
> The Association intends on scheduling the work *** in the next two weeks. Accordingly, in order to avoid a claim by the Developer of spoliation of evidence, you are hereby advised that your representatives may inspect/test/photograph the area to be repaired so that evidence may be secured for upcoming litigation. Please contact the undersigned prior to August 30, 2010 in order to avail yourself this opportunity."

In response to the motion to dismiss, the Association claimed that the letter acted only to prevent spoliation and did not conform to the notice requirements under section 12.04(a). As such, the letter did not trigger the mediation and arbitration requirement.

¶ 38

Additionally, attached to Keer's motion to dismiss was a letter sent by the Association to Keer in his capacity as a unit owner on September 16, 2010, which he claimed was an additional way that the Association gave him notice. The letter provided, in relevant part:

> "[T]he purpose of this letter is to clarify facts regarding exterior building issues and what led up to issues of payment for the required work. In the fall of 2009 management brought to Lennar's attention that there were defects to the exterior of the buildings. Two members of Lennar showed up and admitted that indeed it appeared that there was unfinished work done by the contractors regarding the balconies. They said they would come back out the following summer (2010) to discuss scheduling repairs, but would not admit to any other defects.
>
> But on November 5, 2009 Lennar sent out an email to us (see attachment) and again on August 24, 2010 a letter to our attorneys attaching a Release dated July 2008 and signed by the then Board President Larry Keer. In the Release, in return for approximately $28,500 towards elevator and boiler repairs, Larry Keer signed a Letter of Release that removed Lennar from any further work and held Lennar harmless from further issues. *As a result you will see from the attached documentation,*

'Lennar respectively declines any responsibilities for any repairs to the project.[']

This was the first time the current Board ever heard or saw of the Release.

This Release becomes very significant, since in August 2010 the current Board had a transition report completed where it was discovered that substantial work needs to be done to both buildings, amounting to close to $900,000. The Board sought Legal Council [*sic*], where it was learned that because of the Release signed by Larry Keer, the Association would likely lose any lawsuit against the developer[.]

It should be emphasized that by simply walking around the North building one could have seen cracked and crumbling masonry and unfinished balconies clearly visible to anyone who took the time to look. With such knowledge nobody could possibl[y] have signed the Release, which gave away the Association's ability to seek corrective action by Lennar.

Knowing that the suit by the Association would be dismissed, the only option open to the Association would be to sue Larry Keer in the hope that the Directors and Officers insurance would kick in to pay for the error made by signing the Release in the first place without having pertinent information regarding the repair costs." (Emphasis in original.)

¶ 39

On November 4, 2014, the parties came before the trial court for a hearing on the developers' motion to dismiss. The trial court found the letter drafted by the Association's attorney constituted notice under section 12.04(a) to initiate the mediation and arbitration process as delineated in article 12 of the original declaration. The trial court also found that the Association waived its claims by failing to submit the claims to mediation as required. The trial court dismissed the Association's second amended complaint with prejudice as to all defendants. On March 3, 2015, the trial court denied the Association's motion to reconsider.

¶ 40

IV. Motion to Recover Costs and Attorney Fees

¶ 41

On December 4, 2014, the developers filed a motion to recover fees and costs and for sanctions pursuant to section 12.04(e) of the declaration and Illinois Supreme Court Rule 137 (eff. July 1, 2013). The Association argued that section 12.04(e) did not apply due to the amendment of the declaration on August 14, 2011. On March 3, 2015, the trial court held that article 12 must be applied in its entirety. Pursuant to section 12.04(e), the developer was entitled to recover fees and expenses it incurred in defending the validity of Article 12 of the declaration.

¶ 42

On May 27, 2015, the trial court awarded the developers attorney fees in the amount of $106,237.50 and costs in the amount of $700.50. The trial court found recoverable only those fees associated with the defense of article 12 and the mandatory arbitration provisions as proscribed under section 12.04(e). Thus, the court found that the developers could not recover for insurance related matters or for paralegal time that involved general office overhead functions. The developers also could not recover for any matters simply deemed "other tasks." The court held that the large amounts of money claimed were warranted due to the aggressive litigation tactics of the developers and the complexity of the legal issues involved. The trial court additionally awarded defendant Keer attorney fees in the amount of $22,904.50 and costs in the amount of $451.80. Because the trial court awarded fees under section 12.04(e), the trial court denied the developers' motion for sanctions under Illinois Supreme Court Rule 137 (eff. July 1, 2013).

¶ 43

On June 26, 2015, the Association filed a notice of appeal and, on July 8, 2015, the developers filed a notice of cross-appeal.

¶ 44

ANALYSIS

¶ 45

On appeal, the Association raises a number of ways in which it claims that the trial court erred in dismissing its complaint: (1) that the letter sent by the Association's attorney did not constitute "notice" such that it triggered the dispute resolution procedure under article 12 of the declaration; (2) that public policy voided the mandatory mediation and arbitration requirements of article 12 of the declaration; (3) that the releases did not release the Association's claims; and (4) that the second amended complaint stated a cause of action for breach of fiduciary duty. The Association also argues (5) that defendants were not entitled to an award of attorney fees and costs. In their cross-appeal, the developers claim that the trial court erred by (1) declining to award them certain fees and costs and (2) failing to rule on their Rule 137 motion. The developers also claim that the trial court erred in finding that section 27 of the Act invalidated section 12.05 of the declaration. We first consider the parties' arguments concerning the propriety of the dismissal of the complaint and then turn to the consideration of the award of fees and costs.

¶ 46

I. Dismissal of the Complaint

¶ 47

In the case at bar, the trial court dismissed the Association's initial complaint without prejudice under section 2-615 of the Code, but then granted the Association's motion to reconsider, finding that section 12.05 of the declaration, which required the developer's consent to amend the declaration, was inconsistent with section 27 of the Act. After the Association amended its complaint, the trial court dismissed the second amended complaint under section 2-619 of the

Code, finding that the Association had waived its claims by failing to abide by the mandatory dispute resolution procedures triggered by its sending notice of its claims to the developers. The trial court then denied the Association's motion to reconsider, which was based on a public policy argument concerning an amendment to the Act.

¶ 48

A section 2-615 motion to dismiss "tests the legal sufficiency of a complaint," while a section 2-619 motion to dismiss "admits the sufficiency of the complaint, but asserts affirmative matter that defeats the claim." *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. "In ruling on motions to dismiss pursuant to either section 2-615 or 2-619 of the Code, the trial court must interpret all pleadings in the light most favorable to the nonmoving party" (*Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004)), and a cause of action should not be dismissed under either section unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief (*Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009) (section 2-615 motion); *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003) (section 2-619 motion)). Our review of a motion to dismiss under either section is *de novo* (*Carr v. Koch*, 2012 IL 113414, ¶ 27), and we may affirm the dismissal of a complaint on any ground that is apparent from the record (*Golf v. Henderson*, 376 Ill. App. 3d 271, 275 (2007)). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Additionally, while the decision to grant or deny a motion to reconsider lies within the discretion of the trial court, " 'where a motion to reconsider raises a question of whether the trial court erred in its previous application of existing law, we review *de novo* the trial court's determinations of legal issues.' " *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, ¶ 41 (quoting *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 259 (2008)).

¶ 49

A. Adequacy of Notice

¶ 50

The Association first takes issue with the trial court's finding that the August 13, 2010, letter from its counsel to the developers constituted "notice" so as to trigger the mandatory dispute resolution procedures. "Because many of the facts are not disputed, and because condominium declarations are covenants running with the land, we need only examine the language of the declaration in this case, to the extent the language is unambiguous, to determine whether the trial court acted properly." *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 48. The construction of condominium declarations is a question of law. *Carl Sandburg Village Condominium Ass'n No. 1 v. Carl Sandburg Village Condominium Homeowners' Ass'n*, 175 Ill. App. 3d 1, 5 (1987). " 'The paramount rule for the interpretation of 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.' " *Carney v. Donley*, 261 Ill.

App. 3d 1002, 1008 (1994) (quoting *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 331 (1985)).

¶ 51

As an initial matter, the developers claim that this issue has been forfeited because the Association did not raise it until it filed a motion to reconsider the order granting the developers' motion to dismiss. However, we note that the second amended complaint contained an allegation that "prior to the Amendment of the Declaration on or about August 14, 2011, the Association did not provide to any defendant, or any other entity or person, a notice that was in compliance with or pursuant to Section 12.04(1) of the original Declaration." Additionally, the developers argued that the Association had failed to comply with the mandatory arbitration requirements in their motion to dismiss the Association's second amended complaint and, in response, the Association argued that the letter relied upon by the developers did not comply with the declaration's notice requirements so as to trigger the arbitration process. Thus, we find no basis for the developers' argument that this issue has been forfeited on appeal and proceed to consider the merits of the Association's argument.

¶ 52

As noted, section 12.04 of the declaration, which was entitled "Mandatory Procedures," set forth the procedure the parties agreed to follow in the event a claim arose. Specifically, section 12.04(a) was entitled "Notice" and provided:

> "As a condition precedent to seeking any action or remedy, a Bound Party having a Claim

('Claimant') against any other Bound Party ('Respondent') (the Claimant and the Respondent referred to herein being individually, as a 'Party,' or, collectively, as the 'Parties') shall notify each Respondent in writing (the 'Notice'), stating plainly and concisely:

(i) the nature of the Claim, including the defect or default, if any, in detail and the Persons involved and the Respondent's role in the Claim;

(ii) the legal basis of the Claim (i.e., the specific authority out of which the Claim arises);

(iii) the proposed remedy;

(iv) any evidence that depicts the nature and cause of the Claim and the nature and extent of repairs necessary to remedy the Claim, including expert reports, photographs and videotapes; and

(v) the fact that Claimant will meet with Respondent to discuss in good faith ways to resolve the claim.

Notices given to Respondent pursuant to this Section shall be deemed sufficient if personally delivered, delivered by commercial messenger service, or mailed by registered or certified mail, postage prepaid, return receipt requested to the last known address of the Respondent as it appears on the records of the Condominium Association on the date of mailing."

Under section 12.04(c), "[i]f the Parties do not resolve the Claim within 90 days after the date of the Notice and the Cure Period has expired (or within such other period as may be agreed upon by the Parties) ('Termination of Negotiations'), either Party shall have 30 days from the date of Termination of Negotiations to submit the claim to mediation." Additionally, "[i]f a Claimant does not submit the Claim to mediation within such time, or does not appear for the mediation, then the Claimant shall be deemed to have waived the Claim, and the Respondent shall be released and discharged from any and all liability to Claimant on account of such Claim." Thus, if notice pursuant to section 12.04(a) was sent, and the claim was not submitted to mediation within 30 days after the date of termination of negotiations, the claim would be considered waived. In the case at bar, then, if a notice was sent that triggered the mandatory dispute resolution process, then the Association would be deemed to have waived its claims against defendants, because there is no dispute in the instant case that the Association's claims against defendants were never submitted to mediation.

¶ 53

In the case at bar, the developers argued, and the trial court agreed, that the Association sent the developers notice pursuant to section 12.04(a) when the Association's attorney sent them a letter concerning the Association's claims. The letter was dated August 13, 2010, and was signed by an attorney representing the Association. The letter indicated that it had been sent via email and that its subject was "Re: Claim against

Developer: Siena at Old Orchard Condominium Association." The letter stated, in full:

> "Please be advised that I represent the Above referenced condominium association relative to its *** claim against the developer for certain construction defects. Attached please find a transition study outlining, in detai[l] the construction and design deficiencies. Also please find[] [a] 'bid comparison' sheet setting forth bids for correcting some of the work.
>
> The Association intends on scheduling the work *** in the next two weeks. Accordingly, in order to avoid a claim by the Developer of spoliation of evidence, you are hereby advised that your representatives may inspect/test/photograph the area to be repaired so that evidence may be secured for upcoming litigation. Please contact the undersigned prior to August 30, 2010 in order to avail yourself this opportunity."

The Association argues that this letter was merely intended to prevent a spoliation of evidence claim and was not "notice" that would trigger the mandatory dispute resolution process.

¶ 54

"The rules of construction for contracts govern our interpretation of the covenants contained in the declaration." *Forest Glen Community Homeowners Ass'n v. Bishof*, 321 Ill. App. 3d 298, 303 (2001); *Stobe v. 842-848 West Bradley Place Condominium Ass'n*, 2016 IL App (1st) 141427, ¶ 13. "The primary rule of interpretation is to give effect to the drafting parties' intent." *Stobe*, 2016 IL App (1st) 141427, ¶ 13. "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning." *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011).

¶ 55

In the case at bar, there is no dispute that the letter sent by the attorney fails to satisfy a number of the declaration's requirements. First, the letter was sent via email, not "personally delivered, delivered by commercial messenger service, or mailed by registered or certified mail." Additionally, the letter does not state "the fact that Claimant will meet with Respondent to discuss in good faith ways to resolve the claim." Finally, while the letter makes reference to "upcoming litigation" and a "claim against the developer for certain construction defects," the letter does not state "the legal basis of the Claim (i.e., the specific authority out of which the Claim arises)." The Association also claims that the letter failed to set forth "the proposed remedy," but we note that the letter indicated that the Association was planning on scheduling the required work within two weeks, leading to the conclusion that the proposed remedy was repair of the damaged areas.

¶ 56

The Association argues that the letter's failure to satisfy all of section 12.04(a)'s requirements means that the letter did not constitute "notice" so as to trigger the mandatory dispute resolution process. By contrast, the developers argue that any deficiencies are immaterial, since they received actual notice that there was a claim against them. The trial court found that the letter was sufficient to trigger the dispute resolution process. However, we cannot agree with this conclusion.

¶ 57

As stated, there is no dispute that the letter does not satisfy a number of the requirements of section 12.04(a). Thus, there is no basis for concluding that it is a "notice" under that section. The developers' arguments that "actual notice" excuses any noncompliance with section 12.04(a) presupposes that the letter sent by the Association's attorney is, in fact, a notice under section 12.04(a); it is a circular argument. "The purpose of a contract's notice provision is to ensure that the notice was delivered and that the party was informed." *Denis F. McKenna Co. v. Smith*, 302 Ill. App. 3d 28, 32 (1998). It is axiomatic that, in order for notice to be sent, there must have been some type of "notice." The developers' argument would turn the letter into section 12.04(a) "notice" through the simple fact that the developers received it.

¶ 58

If the form of mailing was the sole way in which the letter failed to satisfy section 12.04(a), the developers' argument would be more persuasive, since a provision concerning the form of mailing is merely intended to ensure that the notice was delivered. *Vole, Inc. v. Georgacopoulos*, 181 Ill. App. 3d 1012, 1019 (1989) ("A provision requiring sending of notice by registered mail is merely intended to insure delivery."). However, that is not the case. In the case at bar, there were a number of ways in which the letter failed to satisfy the requirements for notice under section 12.04(a), and we do not agree with the developers that these failures are "immaterial."

¶ 59

For instance, the letter does not state "the legal basis of the Claim (i.e., the specific authority out of which the Claim arises)," and does not state "the fact that Claimant will meet with Respondent to discuss in good faith ways to resolve the claim." The letter does not even mention arbitration or mediation at all, nor does it refer to section 12.04(a). The specific, detailed requirements of section 12.04(a) protect both parties. They protect the claimant both by ensuring that a communication that complies with the requirements of the section will undisputedly be considered notice to the respondent of a claim against it, and also by ensuring that not every communication sent to the respondent will trigger the dispute resolution procedures. They also protect the respondent by providing details concerning the claim and offering the opportunity to remedy it before proceeding to mediation or arbitration. The requirements of section 12.04(a) are clear and unambiguous. Thus, "they must be given their plain, ordinary and popular meaning." *Thompson*, 241 Ill. 2d at 441. Here, there is no dispute that not all of the requirements of section 12.04(a) were satisfied. Consequently, the letter sent to the developer cannot be considered a notice under that section and the trial court erred in finding that it was.

¶ 60

Keer also argues that he received the required notice by virtue of a letter sent to all unit owners by the Association's board on September 16, 2010. While this was not a basis for the trial court's dismissal of the complaint, we may affirm the dismissal of a complaint on any ground that is apparent from the record (*Golf*, 376 Ill. App. 3d at 275). The letter, which was received by Keer in his capacity as a unit owner, provided, in relevant part:

> "[T]he purpose of this letter is to clarify facts regarding exterior building issues and what led up to issues of payment for the required work. In the fall of 2009 management brought to Lennar's attention that there were defects to the exterior of the buildings. Two members of Lennar showed up and admitted that indeed it appeared that there was unfinished work done by the contractors regarding the balconies. They said they would come back out the following summer (2010) to discuss scheduling repairs, but would not admit to any other defects.
>
> But on November 5, 2009 Lennar sent out an email to us (see attachment) and again on August 24, 2010 a letter to our attorneys attaching a Release dated July 2008 and signed by the then Board President Larry Keer. In the Release, in return for approximately $28,500 towards elevator and boiler repairs, Larry Keer signed a Letter of Release that removed Lennar from any further work and held Lennar harmless from further issues. *As a result you will see from the attached documentation, 'Lennar respectively declines any responsibilities for any repairs to the project.[']*
>
> This was the first time the current Board ever heard or saw of the Release.

> This Release becomes very significant, since in August 2010 the current Board had a transition report completed where it was discovered that substantial work needs to be done to both buildings, amounting to close to $900,000. The Board sought Legal Council [*sic*], where it was learned that because of the Release signed by Larry Keer, the Association would likely lose any lawsuit against the developer[.]
>
> It should be emphasized that by simply walking around the North building one could have seen cracked and crumbling masonry and unfinished balconies clearly visible to anyone who took the time to look. With such knowledge nobody could possibl[y] have signed the Release, which gave away the Association's ability to seek corrective action by Lennar.
>
> Knowing that the suit by the Association would be dismissed, the only option open to the Association would be to sue Larry Keer in the hope that the Directors and Officers insurance would kick in to pay for the error made by signing the Release in the first place without having pertinent information regarding the repair costs." (Emphasis in original.)

¶ 61

We cannot find that this letter constitutes notice such that the mandatory dispute resolution process was triggered. As with the letter drafted by the Association's attorney, this letter does not satisfy all of section 12.04(a)'s requirements and therefore cannot be considered notice under that section. Furthermore, the letter itself was not even directed at Keer but was sent to all of the unit owners, and it was only in that capacity that Keer received the letter. A finding that such a letter serves to trigger the mandatory dispute resolution process would render section 12.04(a) effectively meaningless, since it would mean a communication could be considered notice even if (1) it did not comply with the declaration's clearly specified requirements and (2) it was part of a mass communication to all unit owners as opposed to a communication directed at the person against whom the claim was going to be made. Accordingly, we do not find this letter serves as an alternative basis for affirming the trial court's finding that the Association had waived its claims against defendants.

¶ 62

B. Validity of Amendment to Declaration

¶ 63

Since we have concluded that there was no notice sent under section 12.04(a), the mandatory dispute resolution process was never triggered and the Association's claims against defendants were never waived for noncompliance with that process. However, the Association would still be required to submit its claims to mediation and arbitration under section 12.04(b)(iv) if not for the fact that, in 2011, the Association amended the declaration to remove article 12 in its entirety. The trial court found this was a valid amendment, a ruling which the developers challenge in their cross-appeal.

¶ 64

The basis for the developers' argument is that section 12.05 concerned the amendment of article 12 and provided:

> "AMENDMENT OF ARTICLE: Without the express prior written consent of Declarant, this Article may not be amended for a period of twenty years from the effective date of this Declaration."

The developers claim that, because the amendment was done without their express prior written consent, the amendment was invalid.

¶ 65

The trial court found that section 12.05's restrictions on amending the declaration conflicted with the terms of the Condominium Property Act, rendering the restrictions void. In deciding a controversy concerning a condominium, "we must examine any relevant provisions in the Condominium Property Act [citation], and the declaration or bylaws of the condominium and construe them as a whole. [Citation.]" *Goldberg*, 2012 IL App (1st) 110620, ¶ 47. Further, the Act makes clear that "[a]ny provisions of a condominium instrument that contains provisions inconsistent with the provisions of this Act are void as against public policy and ineffective." 765 ILCS 605/2.1 (West 2010).

¶ 66

In the case at bar, the trial court found that section 12.05 was inconsistent with section 27 of the Act, which provides, in relevant part:

> "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; and
>
> (ii) with the approval of any mortgagees required under the provisions of the condominium instruments." 765 ILCS 605/27(a) (West 2010).

The trial court found that section 12.05 was invalid because "here[,] the Illinois legislature has defined the only manner by which amendments to condominium declarations can be accomplished—a 2/3, but not more than 3/4 vote of the condominium owners. Defendant has inserted a term that is more onerous than the Act allows and requires the approval of the declarant. The Act does not allow for such a provision." We find the trial court's reasoning, and the Association's arguments, persuasive.

¶ 67

"The fundamental objective of statutory construction is to ascertain and give effect to the intent of the legislature." *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 21 (citing *Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13). "The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning." *1010 Lake Shore Ass'n*, 2015 IL 118372, ¶ 21 (citing *State Building Venture v. O'Donnell*, 239 Ill. 2d 151, 160 (2010)). "A reasonable construction must be given to each word, clause, and sentence of a statute, and no term should be rendered superfluous." *1010 Lake Shore Ass'n*, 2015 IL 118372, ¶ 21 (citing *Slepicka v. Illinois Department of Public Health*, 2014 IL 116927, ¶ 14). " '[W]hen statutory language is plain and certain the court is not free to give it a different meaning.' " *Kalkman v. Nedved*, 2013 IL App (3d) 120800, ¶ 12 (quoting *In re Estate of Hoehn*, 234 Ill. App. 3d 627, 629 (1992)). "[A] court may not depart from the plain statutory language by reading into it exceptions, limitations, or conditions not expressed by the legislature." *Kalkman*, 2013 IL App (3d) 120800, ¶ 12 (citing *In re Estate of Ellis*, 236 Ill. 2d 45, 51 (2009)).

¶ 68

In the case at bar, section 27 of the Act clearly provides that, "[i]f there is any unit owner other than the developer, the condominium instruments shall be amended *only as follows*." (Emphasis added.) 765 ILCS 605/27(a) (West 2010). We agree with the trial court that this language means that additional restrictions to the amendment process are not permitted. The developers argue that this language is intended merely to distinguish between amendments to the declaration, which are subject to a heightened threshold for amendments, and amendments to bylaws or rules passed by an association's board, which may be amended with fewer votes. We do not find this argument persuasive at all. First, the language does not *require* a heightened threshold but only *permits* it; section 27(a) requires the "affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments," up to a three-quarters requirement, meaning that a simple majority could be sufficient if the condominium instrument so provides. 765 ILCS 605/27(a) (West 2010). Furthermore, had the legislature intended simply to impose a heightened threshold for amending a declaration without also prohibiting the imposition of more severe restrictions, it could have provided so specifically. In fact, it did so several times in the Act, including within other subsections of section 27. See, *e.g.*, 765 ILCS 605/27(b)(1) (West 2010) (providing vote requirements for correcting omissions or errors in condominium instruments "unless the Act or the condominium instruments specifically provide for greater percentages or different procedures"); 765 ILCS 605/15(a) (West 2010) ("Unless a greater percentage is provided for in the declaration or bylaws," setting forth minimum vote requirements for selling the property); 765 ILCS 605/14.3 (West 2010) ("Unless the condominium instrument expressly provides for a greater percentage or different procedures," setting a majority vote requirement for authorization of a grant of an easement for cable television cable). It did not do so with respect to section 27(a). Instead, it imposed a default threshold of a two-thirds affirmative vote, as well as an absolute ceiling of a three-quarters affirmative vote and stated that the declaration "shall be amended *only*" through this vote, along with the approval of any necessary mortgagees. (Emphasis added.) 765 ILCS 605/27(a) (West 2010). Thus, the language of the statute itself shows that the legislature specifically selected a range that it felt appropriate and limited the restrictions for amendments to that range. Indeed, section 27 originally did not provide a ceiling but only required "the affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments." Ill. Rev. Stat. 1983, ch. 30, ¶ 327. Section 27 was amended in 1984 (Pub. Act 83-833, § 1 (eff. July 1, 1984)) to impose a ceiling of a three-quarters vote requirement, which demonstrates the legislature's desire not to permit overly severe vote requirements. Ill. Rev. Stat. 1983, ch. 30, ¶ 327(a). As noted, " '[w]hen statutory language is plain and certain the court is not free to give it a different meaning.' " *Kalkman*, 2013 IL App (3d) 120800, ¶ 12 (quoting *In re Estate of Hoehn*, 234 Ill. App. 3d at 629). Here, we find no basis for the developers' argument that section 27 was intended to mean something different than its plain language requires.

¶ 69

We are not persuaded by the developers' arguments that "Illinois courts have upheld *** similar additional requirements for amending a condominium declaration," because none of the cases cited by the developers has any application to the case at bar. First, in *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182, 192-93 (1983), there is no indication that there was any issue as to whether the declaration's requirements for amendments were valid under section 27(a) of the Act; the only issue concerning an amendment was whether the proposed amendment itself complied with those requirements, a question that the supreme court did not decide because it found that there was not enough information in the record. Moreover, the "additional requirement" in that case was simply a requirement that the secretary of the association's board certify the amendment, which is a far cry from the type of additional requirement the developer seeks to impose here.

¶ 70

Additionally, *Schaffner v. 514 West Grant Place Condominium Ass'n*, 324 Ill. App. 3d 1033, 1042 (2001), the second case cited by the developer, required the court to consider whether the proposed amendment was a scrivener's error such that section 27(b)(2) applied and did not involve section 27(a). In fact, section 27(a) would not have been applicable to that case, since the proposed amendment involved the diminishment of the common elements, which is governed by section 4(e) of the Act. See 765 ILCS 605/27(a) (West 1998) ("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 ***."); 765 ILCS 605/4(e) (West 1998) (the percentages of ownership interest in the common elements allocated to each unit "shall remain constant unless otherwise provided in this Act or thereafter changed by agreement of all unit owners"). Thus, the court did not interpret the language of section 27(a) to determine if the restrictions to the amendments were permissible under that section. Similarly, the court in *Picerno v. 1400 Museum Park Condominium Ass'n*, 2011 IL App (1st) 103505, ¶ 14, was asked to consider a proposed amendment that would diminish the unit owners' interest in the common elements and was not asked to interpret the language of section 27(a); that case does not even set forth the declaration's amendment procedures, but only makes reference to "certain paragraphs of the declaration [that] require additional approval" (*Picerno*, 2011 IL App (1st) 103505, ¶ 26). These cases thus do not add support to the developers' argument that additional restrictions to the amendment process are permitted under the language of section 27(a).

¶ 71

We are similarly unpersuaded by the developers' reliance on *Scott v. York Woods Community Ass'n*, 329 Ill. App. 3d 492 (2002), a case they cite for a holding that 25- and 30-year restrictions on amendments were presumptively valid. However, *Scott* did not involve interpretation of the Act; indeed, it does not appear that there was even a condominium involved, as the case involved "homeowners in a residential community" and the association was a "Community Association."[7] *Scott*, 329 Ill. App. 3d at 493. Furthermore, as pointed out by the Association, the *Scott* court noted that "[a]lthough the amendment restrictions may strike some people as unwise, the Association never identified any statute or other expression of public policy that might bar them." *Scott*, 329 Ill. App. 3d at 501. Here,

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[7] We also note that the name of the community appears to have simply been "York Woods" (see *Scott*, 329 Ill. App. 3d at 493), which also lends support to the conclusion that the community was not a condominium, as the Act requires the name of the condominium to include the word "Condominium" or be followed by the words "a Condominium." 765 ILCS 605/4(c) (West 2000).

by contrast, the Act governs the condominium documents at issue and specifically provides that "[a]ny provisions of a condominium instrument that contains provisions inconsistent with the provisions of this Act are void as against public policy and ineffective." 765 ILCS 605/2.1 (West 2010). As we have concluded, the plain and clear language of section 27(a) of the Act provides the only method for amending the declaration and section 12.05 seeks to impose alternate, more severe, restrictions. This is not permitted by the Act and, accordingly, the trial court properly found that the amendment removing article 12 in its entirety was valid. Since the amendment was valid, the Association was not required to submit its claims to mediation or arbitration prior to filing the instant lawsuit.

¶ 72

C. Scope of Releases

¶ 73

Our conclusion on the issues concerning article 12 of the declaration—that there was no notice such that the mandatory dispute resolution process was triggered and that the declaration was validly amended to remove that article—means that the Association's complaint should not have been dismissed based on noncompliance with the mandatory dispute resolution process. However, as noted, we may affirm the dismissal of a complaint on any ground that is apparent from the record. *Golf*, 376 Ill. App. 3d at 275. Accordingly, we must consider the effect of the releases executed by Keer when he was the Association's president.

¶ 74

In the case at bar, the Association, represented by Keer, and the developer executed two releases, one on July 18, 2008, and the other on October 30, 2008. According to the releases, which contained identical language, "[t]he Association *** made various claims against the Developer including, among other things, the 'Items' on the Punch list attached hereto as Exhibit A," which included problems such as broken concrete in the parking lot and improper placement of the wood trim in the hallways,[8] and "[t]he parties desire to resolve the claims made by the Association and any and all other future claims or causes of action." Accordingly, the developer agreed to pay the Association $20,734 in the July 18, 2008, release and agreed to pay $7,779.53 in the October 30, 2008, release. In exchange, the Association agreed to release and discharge the developer from:

> "any and all claims, causes of action, or liabilities whosoever, known or unknown, asserted or unasserted, whether arising out of contract, tort, or otherwise, in law or in equity arising, accruing, or based on any action or inaction of any such parties, including, without

---

[8] As noted, "Exhibit A" was identical in both releases, except that in the exhibit attached to the October 30, 2008, release, there was an additional item that provided that, "[a]s a result of [water-seepage issues due to the pitch of the garage floor], the elevator system control sustained $20,734 of damage." The "status" of this item provided that "[the developer] has reimbursed the [Association] for the cost of the repairs." We note that the $20,734 listed as the amount of damage is also the precise amount the developer agreed to pay in the July 18, 2008, release.

> limitation, any claim for construction defects in connection with the construction of the improvements which are part of the Condominium, the administration of the Association prior to the turnover of control to a board of directors elected by the unit owners and the payment of assessments, charges or other amounts whatsoever due to the Association from the Developer."

¶ 75

The Association has raised two different arguments concerning the validity of the releases throughout the instant litigation. First, in responding to the developers' motion to dismiss its second amended complaint, the Association argued that Keer did not have the authority to execute the releases on behalf of the Association; this argument also serves as the basis for the counts of the Association's complaint that allege that Keer breached his fiduciary duty to the Association. On appeal, however, the Association focuses on the scope of the releases, arguing that the claims against the developers were not encompassed within the language of the releases. The developers claim that this change of focus means that the Association "does not contest" Keer's authority to execute the releases on appeal. We find this to be an overly restrictive characterization of the Association's position, especially given that the issue the developers claim is "not contest[ed]" serves as the basis for two counts of the complaint. Accordingly, we consider both of the Association's arguments concerning the validity of the release.

¶ 76

A release " 'is the abandonment of a claim to the person against whom the claim exists.' " *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 21 (2003) (quoting *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 88 (1999)); *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007). It is a contract and is therefore governed by contract law. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991) (citing *Polo National Bank v. Lester*, 183 Ill. App. 3d 411, 414 (1989)).

¶ 77

"A contract executed by a party that does not have authority is void *ab initio*." *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass'n*, 2015 IL App (1st) 150169, ¶ 29 (citing *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 164 (2004)). Such authority may be actual or apparent, and actual authority may be either express or implied. *Cove Management v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶ 23. "Express authority is actual authority granted explicitly by the principal to the agent, while implied authority is actual authority proven circumstantially by evidence of the agent's position. [Citation.] Apparent authority, by contrast, is authority imposed by equity. [Citation.]" *Cove Management*, 2013 IL App (1st) 120884, ¶ 23. "Generally, the question of whether an agency relationship exists and the scope of the purported agent's authority are questions of fact." *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 210 (2003).

¶ 78

With respect to condominiums, the unit owners' association is responsible for the overall administration of the condominium property through its duly elected board of managers. 765 ILCS 605/18.3 (West 2006). This board of managers "shall exercise for the association all powers, duties and authority vested in the association by law or the condominium instruments except for such powers, duties and authority reserved by law to the members of the association." 765 ILCS 605/18.4 (West 2006).

¶ 79

In the case at bar, section 5.10 of the bylaws provides that, "[e]xcept as otherwise expressly provided herein or in the Declaration, any action may be taken upon the affirmative vote of a majority of the Directors present at a meeting at which a quorum is present." Furthermore, section 8.01 discusses authority for the execution of instruments:

> "EXECUTION OF INSTRUMENTS: The Board may authorize any officer or officers, agent or agents of the Condominium Association, in addition to the officers so authorized by these By-Laws, to enter into any contract or execute and deliver any instrument (including amendments to the Declaration or these By-Laws which must be executed by the Condominium Association) in the name of and on behalf of the Condominium Association and such authority may be general or confined to specific instances. In the absence of any such authorization by the Board, any such contract or

> instrument shall be executed by the President or a Vice President and attested to by the Secretary or an Assistant Secretary of the Condominium Association."

Thus, in order for there to be actual authority to execute the releases at issue, (1) the action must have been approved by a majority of the directors at a meeting at which a quorum is present or (2) the contract must have been executed by the Association's president or vice president and attested to by the secretary or an assistant secretary. Here, the complaint alleges that at the time of the execution of the releases, Keer did not have the approval of a majority of the board to execute the releases. Furthermore, while Keer was the president of the Association at the time, an examination of the releases shows that they were executed by Keer and by the developer's representative; there is no attestation by the Association's secretary or assistant secretary. Thus, taking the facts alleged in the complaint as true, as we must when reviewing a motion to dismiss (*Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8), under the terms of the bylaws, Keer had no actual authority to execute the releases.

¶ 80

Furthermore, Keer did not have apparent authority to execute the releases. Apparent authority is the authority that a reasonably prudent person would naturally suppose the agent to possess, given the words or conduct of the principal. *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423, 431-32 (1991). "It is a well-established precept of agency law that a principal will be bound by the authority he *appears* to give to another, as well as that authority which he actually gives." (Emphasis in original.) *Burgos*, 145 Ill. 2d at 431 (citing *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill. 2d 415, 426 (1980)). Once the principal has created the appearance of authority, he is estopped from denying it to the detriment of a third party. *Burgos*, 145 Ill. 2d at 432. To establish apparent agency, the party alleging the existence of the agency must prove that (1) the principal or its agent acted in a manner that would lead a reasonable person to believe that the individual allegedly at fault was an employee or agent of the principal, (2) the principal had knowledge of and acquiesced in the acts of the agent, and (3) the injured party acted in reliance upon the conduct of the principal or its agent, consistent with ordinary care and prudence. *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 18. However, "[i]f [the third person] knows, or has good reason for believing, that the acts exceed the agent's powers or if such reasonable inquiry as he is under the duty to make, would result in discovery of the true state of the powers, and he fails to fulfill that duty, he cannot assert an apparent authority effective against the principal." (Internal quotation marks omitted.) *Cove Management*, 2013 IL App (1st) 120884, ¶ 27.

¶ 81

In the case at bar, the bylaws were attached to the declaration, which was drafted by the developers. Accordingly, the developers would have, or should have, been aware of the provisions of the bylaws, including those provisions defining the authority to execute contracts on the Association's behalf. When the releases were signed by Keer alone, the developers therefore should have known that he was acting outside the scope of his authority. Given their knowledge of the bylaws, there can be no argument that the Association gave the developers reason to believe that Keer had the authority to execute the releases. Thus, Keer did not have apparent authority to execute the releases.

¶ 82

The developers argue that, even if Keer did not have actual or apparent authority, the Association nonetheless ratified his signature by accepting the funds provided in exchange for the releases. Even if an agent did not have authority to execute a release, it is possible for the principal to be bound by the release if the principal later ratified it. *Borsellino v. Putnam*, 2011 IL App (1st) 102242, ¶ 104. "Ratification occurs when the principal learns of an unauthorized transaction, then retains the benefits of the transaction or takes a position inconsistent with nonaffirmation." (Internal quotation marks omitted.) *Cove Management*, 2013 IL App (1st) 120884, ¶ 31.

¶ 83

In the case at bar, however, there is no indication that the Association was aware of the releases at the time that it accepted any funds from the developers. Indeed, in its letter to the unit owners, which Keer attached to his motion to dismiss, the Association's board states: "[O]n November 5, 2009 Lennar sent out an email to us (see attachment) and again on August 24, 2010 a letter to our attorneys attaching a Release dated July 2008 and signed by the then Board President Larry Keer. In the Release, in return for approximately $28,500 towards elevator and boiler repairs, Larry Keer signed a Letter of Release that removed Lennar from any further work and held Lennar harmless from further issues. As a result you will see from the attached documentation, 'Lennar respectively declines any responsibilities for any repairs to the project.['] This was the first time the current Board ever heard or saw of the Release." (Emphasis omitted.) Thus, according to this letter, the Association did not become aware of the releases until over a year after their execution and so, at this early stage of the proceedings, we cannot find that the Association ratified the releases. See *Alliance Property Management*, 2015 IL App (1st) 150169, ¶ 41 (finding no ratification where "the Board did not have knowledge of the restriction in the bylaws during the relevant period"). Since it is not clear as a matter of law that Keer had the authority to execute the releases, we cannot find the releases to provide an alternate basis to affirm the trial court's dismissal of the Association's second amended complaint. Accordingly, the trial court's dismissal must be reversed.

¶ 84

II. Attorney Fees and Sanctions

¶ 85

The parties also raise several issues concerning the trial court's award of attorney fees. Specifically, the Association argues that the trial court should not awarded attorney fees at all, and if it did properly award some fees, it nevertheless awarded too much. By contrast, the developers argue that the trial court should have awarded more and also argue that the trial court should have considered their motion for Rule 137 sanctions. However, since we have determined that the trial court erred in dismissing the Association's second amended complaint, we have no need to consider the arguments concerning attorney fees, as the case remains active. Similarly, we have no need to consider the propriety of the trial court's decision concerning Rule 137 sanctions.

¶ 86

CONCLUSION

¶ 87

For the reasons set forth above, the trial court erred in finding that the Association had waived its claims against defendants by failing to follow the mandatory dispute resolution procedures set forth in article 12 of the declaration. Furthermore, since that article was subsequently amended, the Association could properly proceed directly to a lawsuit without first seeking mediation or arbitration. Accordingly, we find that the trial court erred in dismissing the Association's second amended complaint. We further find that the releases signed by Keer do not provide an alternate basis for affirming the trial court's dismissal, as the facts as alleged in the complaint show that Keer did not have the authority to execute the releases.

¶ 88

Reversed.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 13 L 8154

[Filed February 13, 2014]

SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation, and THE BOARD OF DIRECTORS OF THE SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION,
Plaintiffs,

v.

SIENA AT OLD ORCHARD, L.L.C., an Illinois limited liability company, LENNAR CHICAGO, INC., an Illinois Corporation, and LARRY KEER,
Defendants.

Commercial Calendar Q
Honorable Patrick Sherlock

ORDER

This matter is before the Court on two motions. Both of which will be addressed simultaneously below. The first motion is Defendant Larry Keer's ("Defendant

Keer" or "Keer") Motion to Dismiss the Second Amended Complaint ("Complaint") pursuant to 735 ILCS 5/2-619 ("Motion"). The second motion is Defendants Siena at Old Orchard, LLC, and Lennar Chicago, Inc.'s (collectively "Siena" or "Defendant Siena") Motion to Dismiss the Complaint pursuant to 735 ILCS 5/2-615 (all three defendants will be referred to as "Defendants").

As a preliminary note, Siena and Keer bring their motions pursuant to different code sections. However, both present the same arguments in favor of dismissal and neither presents any matter outside of the pleadings to support dismissal. Moreover, after a close examination of the Defendants' motions both argue that Plaintiffs have failed to allege facts as to standing to sue and jurisdiction. Since the Defendants essentially argue that Plaintiffs pleadings are insufficient as a matter of law, the Court will consider both motions as brought pursuant to section 2-615 as opposed to section 2-619. *See Schramer v. Tiger Ath. Ass'n*, 351 Ill. App. 3d 1016, 1019 (2d Dist. 2004) (stating that the substance of a motion not the code section designated therein determines how a court will treat the motion as long as it causes no prejudice to non-moving party).

THE COMPLAINT

The instant action arises from alleged various construction defects at the Siena at Old Orchard Condominium Association ("Plaintiff")[1] Plaintiff alleges

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[1] The Complaint lists two plaintiffs: Siena at Old Orchard Condominium Association, an Illinois not-for-profit corporation,

that Defendant Siena, the developers of Plaintiff, failed to inform Plaintiff and Plaintiff's Board of certain known construction defects prior to the time of board Turnover and constructed the individual properties with certain known defects, which are and will cause Plaintiff to expend substantial sums of money in repairing the alleged construction defects. For purposes of these motions, the nature and extent of the damages is not relevant. As such, they will not be discussed. However, each count will be summarized to provide context.

Count I alleges that Defendant Siena breached their fiduciary duties owed to Plaintiff and Plaintiff's board in its appointment of the initial board after Turnover by failing to perform diligent inspections of the common elements of the association or otherwise fully investigate and remedy certain defects found to exist on the common areas of the association. Count II alleges that Defendant Siena as developer failed to construct the condominium association in accordance with plans and specifications thereby breaching certain purchase agreements. Count III alleges that Defendant Siena has breached the implied warranty of habitability by constructing the condominium development in a manner not suitable for the uses and purposes it was intended. Count IV alleges that Defendant Siena also breached an implied warranty of good workmanship and materials as their original

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and the Board of Directors of the Siena at Old Orchard Condominium Association. However, we will refer to Siena at Older Orchard Condominium Association as Plaintiff and the Board of Directors of the Siena at Old Orchard Condominium Association as Plaintiff's Board.

construction had latent defects at the time of sale not reasonably discoverable by the purchasers. Counts V through VII are all brought against Plaintiff's first elected President of the association, Defendant Keer. Those counts allege that Keer breached fiduciary duties owed to Plaintiff and committed constructive fraud by executing, without the approval of a majority of then elected board of directors of Plaintiff, two general mutual releases in favor of Defendant Siena and without obtaining adequate consideration. As such, Plaintiff and Plaintiff's board argue that these general mutual releases damaged them by compromising their claims against Defendant Siena.

STANDARD

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008); *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Napleton v. Vill of Hinsdale*, 229 Ill. 2d 296, 305 (2008); *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Turner v. Mem'l Med. Ctr.*, 233 Ill. 2d 494, 499 (2009); *Napleton*, 229 Ill. 2d at 305; *Vernon*, 179 Ill.2d at 344. Moreover, Illinois is a fact-pleading jurisdiction wherein a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Napleton*, 229 Ill. 2d at 305.

ANALYSIS

Defendants present two arguments in favor of dismissal. Each will be addressed in turn.

1.) Standing

First, Defendants argue that Plaintiffs failed to allege standing to bring the current lawsuit as the Declaration at issue mandates that Plaintiffs receive a vote of 75% percent of the condominium association's members prior to filing lawsuit and Plaintiffs have failed to allege that they so obtained the requisite vote.

This first argument is not well-taken. Illinois courts have long held that standing is established by simply demonstrating some injury to a legally cognizable interest. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 745 (1st Dist. 2009). "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit" and "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (1st Dist. 2010). It is a bedrock principal under Illinois law that lack of standing is an affirmative defense as it admits the well-pled allegations of a complaint, but asserts some other matter to defeat liability. *Burnette v. Stroger*, 389 Ill. App. 3d 321, 331 (1st Dist. 2009); See also *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (1st Dist. 2010). Under Illinois law, contrary to Defendant's assertion, it is the defendant, not the plaintiff, who has the burden to both plead and prove plaintiff lacks standing. *Chicago Teachers Union v. Board of Education*, 189 Ill. 2d 200, 206 (2000). Within the same vein, Illinois law states that a plaintiff is not required to allege facts in the complaint that establish the plaintiff's standing to sue. *Id.* Since Defendants merely argue without supporting admissible evidence that Plaintiffs lack standing, the Court finds that Defendants have not met their burden of establishing that Plaintiffs do indeed lack standing.

As such, both motions are DENIED based on the theory of failure to plead standing.

2.) <u>Mandatory Alternative Dispute Resolution provided by the Declaration and Jurisdiction.</u>

Defendants next argue that section 12 of the Declaration (attached to Compl. as Ex. 1) requires Plaintiffs to mediate and arbitrate the claims at issue and prevents any cause of action being brought by Plaintiffs in any court. As such, Defendants' argue that the Court lacks jurisdiction to hear the suit.

"It is a well-established principle that arbitration is a favored alternative to litigation by state, federal and common law because it is a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions." *Bd. of Managers of the Courtyards at the Woodlands Condo. Ass'n v. Iko Chi.*, 183 Ill. 2d 66, 71 (1998). "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract." *Id.* (quoting 710 ILCS 5/1

(West 1994)). "Where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration." *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1988).

Here, the Court finds Defendants' second argument is persuasive. However, we note that Plaintiff might be able to cure the defects by repleading. As such, for the reasons explained more fully below the Complaint is DISMISSED without prejudice.

Section 12.02 of the Declaration states that:

> Declarant, its officers, directors employees and agents; the Condominium Association, its officers, directors and committee members; all persons subject to this Declaration; and any person not otherwise subject to this Declaration who agrees to submit to this Article (each such entity being referred to as a "Bound Party") agree to encourage the amicable resolution of disputes, without the financial costs of litigation. Accordingly, each Bound Party covenants and agrees to submit those claims, grievances or disputes described in Section 12.03 (collectively, "Claims") to the procedures set forth in Section 12.04.

Section 12.03 states:

> All Claims between any of the Bound Parties regardless of how the same might have arisen or on what it might be based including, but not limited to Claims (a) arising out of or relating to

> the interpretation, application or enforcement of the provisions of the Act, this Declaration, the By-Laws and reasonable rules and regulations adopted by the Board, (b) relating to the design or construction of improvements; or (c) based upon any statements, representations, promises, warranties, or other communications made by or on behalf of any Bound party shall be subject to the provisions of section 12.04.

Section 12.04, entitled "Mandatory Procedures," spells out the steps of the alternative dispute resolution procedures. Section 12.04 (a) of the Declaration requires that "[a]s a condition precedent to seeking any action or remedy, a Bound Party having a claim ("claimant") against any other Bound Party ("Respondent"). . . shall notify each Respondent in writing (the "Notice"), stating plainly and concisely: (i) the nature of the Claim . . .(ii) the legal basis of the Claim . . .(iii) the proposed remedy . . .[etc.]." Section 12.04 goes on to provide that "[t]he Parties shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation." Section 12.04 mandates that:

> [i]f the Parties do not resolve the Claim within 90 days after the date of the Notice and the Cure Period has expired . . . either party shall have 30 days from the date of Termination of Negotiations to submit the Claim to mediation . . . if the Parties do not settle the Claim within 30 days after submission of the matter to the mediation, or within such other time as determined by the mediator or agreed to by the Parties, the mediator shall issue a notice of

termination of the mediation proceedings ("Termination of Mediation").

Finally, if mediation is terminated, only then can a party bring a claim with an arbitrator. Article 12 does not confer any right to file suit in a circuit court. Rather, the sole means of dispute resolution is binding arbitration. (See Compl. Ex. 1 at Article 12.04) ("[Claims] shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided in Paragraphs 12.04 (c) and 12.04(d) below and as provided by the Federal Arbitration Act . . . or applicable state law relating to arbitration *and not by or in a court of law.*) (Emphasis added). Thus, absent some exception to Article 12, the Court lacks jurisdiction to hear this matter.

Plaintiffs argue that Article 12 was removed in its entirety two years prior to filing the current suit. Normally this would be a valid response that defeats the arbitration clause. However, here, Article 12 expressly states that "Without the express prior written consent of the Declarant, this Article may not be amended for a period of twenty years from the effective date of this Declaration." Here, the Declaration was dated June 2006. As such, amendment cannot be effectuated without the express written consent of the Declarant. The Declarant under the Declaration is Siena. (*See* Compl. Ex. 1). As such, the Declaration's alternative dispute resolution procedures could not be amended within 20 years without Defendant Siena's prior express written permission.

This begs the question of whether such a restriction on amendment is valid under Illinois law. We find that such a restriction is presumptively valid under Illinois law "absent a showing that [the restriction is] wholly arbitrary in [its] application, in violation of public policy, or that [it] abrogate[s] some fundamental constitutional right." *Board of Dirs. of 175 E. Del. Place Homeowners Ass'n v. Hinojosa*, 287 Ill. App. 3d 886, 892 (1st Dist. 1991); *See also*, *Scott v. York Woods Cmty. Ass'n*, 329 Ill. App. 3d 492, 500-501 (2d Dist. 2002) (finding that declaration's 30 and 25 year limitations on amendments were valid).

Here, Plaintiffs have not shown that the amendment provision is wholly arbitrary, violates public policy, or that it abrogates some fundamental constitutional right. Additionally, Plaintiffs have not alleged that they validly obtained Siena's prior express written consent to write out the arbitration clause from the Declaration. However, since Siena's motion to dismiss is a 2-615 motion, Plaintiffs may amend the Complaint to show that they validly amended the Declaration by obtaining Siena's prior express written consent.

Accordingly, the Complaint is DISMISSED without prejudice.

Wherefore, it is hereby

ORDERED:

1. Plaintiffs' Complaint is DISMISSED without prejudice.

2. Plaintiffs have until March 13, 2014 to file their First Amended Complaint.

3. Defendants have until April 10, 2014 to answer or otherwise plead.

4. Status set for <u>April 15, 2014 9:45</u>.

February 13, 2014

Entered:

____

Judge Patrick J. Sherlock
Circuit Court of Cook County, Illinois
County Department, Law Division

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 13 L 8154

[Filed May 9, 2014]

SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation and THE BOARD OF DIRECTORS OF THE SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, Plaintiffs, v. SIENA AT OLD ORCHARD, L.L.C., an Illinois limited liability company, LENNAR CHICAGO, INC., an Illinois Corporation, and LARRY KEER, Defendants.	))))))))))))))))

Commercial Calendar Q
Honorable Patrick Sherlock

ORDER

This matter is before the Court plaintiffs' motion to reconsider this Court's Order of February 13, 2014.

BACKGROUND

This case arises from alleged construction defects at the Siena at Old Orchard Condominium Association ("Association")[1]. The Association alleges that defendant Siena, the developers of the Association, failed to inform the Association and its Board of certain known construction defects prior to the time of board turnover and constructed the individual properties with certain known defects, which are and will cause plaintiffs to expend substantial sums of money in repairing the alleged construction defects.

On February 13, 2014, the Court was presented with two motions to dismiss on the basis that Article 12 of the Association's Declaration (the "Declaration") deprived the court of jurisdiction and required that plaintiffs first exhaust the mediation and arbitration procedures set forth in the Declaration. The Association argued that Article 12's mandatory alternative dispute resolution language was removed from the Declaration by amendment prior to filing. Defendants countered by arguing that the Association's attempted amendment of the Declaration was ineffectual because the Article 12 of the Declaration required the Association to obtain the developer's approval before it could properly amend that section of the Declaration. The Court found the Declaration's

[1] The Complaint lists two plaintiffs: Siena at Old Orchard Condominium Association, an Illinois not-for-profit corporation, and the Board of Directors of the Siena at Old Orchard Condominium Association. However, we will refer to Siena at Old Orchard Condominium Association as Plaintiff and the Board of Directors of the Siena at Old Orchard Condominium Association as the Board.

plain language prevented plaintiffs from maintaining suit because 1) they had no properly amended the Declaration, and 2) they were required to arbitrate their disputes pursuant to the Declaration's plain language.

Plaintiffs now move for reconsideration of the Court's February 13, 2014 Order ("Prior Order"). Plaintiffs argue that the Court erred in applying the law. Plaintiffs first argue that §27 of the Illinois Condominium Property Act ("Act") provides the only mechanism for amending a condominium association's declaration. Plaintiffs argue that the language in the Declaration providing that it could only be amended with the developer's prior approval for the first 20 years of its existence is contrary to Illinois public policy as set forth in §27 of the Act. Thus, plaintiffs argue that §27 invalidates the Declaration's amendment procedures.

Plaintiffs' second argument is that the Declaration's mandatory alternative dispute language is contrary to section 32 of the Act. As such, plaintiffs argue that the Court should find that the Declaration's mandatory arbitration provision should be declared invalid due to its conflict with section 32 of the Act.

Defendants argue that even if plaintiffs are correct on their two arguments plaintiffs cannot succeed on their motion to reconsider because to allow plaintiffs to succeed eliminates improperly a vested right that the developer reserved expressly in the Declaration. Defendants also argue that the amendment post-dated the accrual of the cause of action and plaintiffs should not be allowed to unilaterally change their procedural position.

ANALYSIS

The intended prupose of a motion to reconsider is to bring to the court's attention: (1) newly discovered evidence which was not available at the time of the hearing; (2) changes in the law; or (3) errors in the court's previous application of existing law. See *Kaiser v. MEPC American Properties*, 164 Ill. App. 3d 978, 986 (1st Dist. 1987).

"It is a well-established principle that arbitration is a favored alternative to litigation by state, federal and common law because it is a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions." *Bd. of Managers of the Courtyards at the Woodlands Condo. Ass'n v. Iko Chi.*, 183 Ill. 2d 66, 71 (1998). "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract." *Id.* (quoting 710 ILCS 5/1). "Where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration." *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1998)

Plaintiffs' Section 27 Argument

Plaintiffs argue that the Declaration's amendment procedure violates §27 of the Act by making amendment of the Declaration more difficult than provided under §27. If the Court were to find that plaintiffs could amend the declaration without the developer's prior consent, then plaintiffs argue they have validly removed the arbitration and mediation language. Thus, plaintiffs contend that the Court would have jurisdiction to hear the instant dispute.

Section 27 of the Act provides, in pertinent part:

> **Sec. 27. AMENDMENT OF CONDOMINIUM INSTRUMENT.**
>
> (a) If there is any unit owner other than the developer, and unless otherwise provided in this Act, 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 all unit owners; and
>
> (ii) with the approval of any mortgagees required under the provisions of the condominium instruments.

(Emphasis added).

Defendant's response is that §12.05 of the Declaration is not inconsistent with §27 of the Act. Defendant argues that the Declaration is entitled to the presumption of validity. The Court does not agree. However, here the Illinois legislature has defined the only manner by which amendments to condominium declarations can be accomplished -- a 2/3, but not more than 3/4 vote of the condominium owners. Defendant has inserted a term than is more onerous than the Act allows and requires the approval of the declarant. The Act does not allow for such a provision.

Therefore, the Court finds that §12.05 of the Declaration is improper under the Act. The amendment restrictions cannot survive. Therefore, plaintiffs' motion to reconsider is granted, in part.

Plaintiff's Section 32 Argument.

Plaintiffs argue that §12 of the Declaration is invalid by §32 of the Act. Section 32 (a) states that:

> The declaration or bylaws of a condominium association may require mediation or arbitration of disputes in which the matter in controversy has either no specific monetary value or a value of $ 10,000 or less, other than the levying and collection of assessments, or that arises out of violations of the declaration, bylaws, or rules and regulations of the condominium association. A dispute not required to be mediated or arbitrated by an association pursuant to its powers under this Section, that is submitted to mediation or arbitration by the agreement of the disputants, is also subject to this Section.

765 ILCS 605/32. Plaintiffs argument that §32 bars an condominium's declaration from requiring mediation or arbitration of any dispute in controversy that exceeds $10,000. Plaintiffs argue that this means that §32 invalidates the Declaration's mandatory mediation and arbitration provisions.

The Court disagrees. First, the Court notes that plaintiffs have failed to cite to any case in Illinois specifically interpreting §32 in this manner. Second, plaintiffs' interpretation of §32 is contrary to its plain language. The Act does not state that no declaration or bylaw may require the mediation or arbitration of dispute over $10,000.00. Rather, it states that a declaration may require arbitration for amounts less than $10,000 in controversy or if a claim has no specific monetary value. Indeed, had the legislature intended such an effect, it could have easily worded the Act in such a manner.

Plaintiffs' interpretation of §32 of the Act violates clear Illinois public policy requiring the enforcement of arbitration provisions between consenting paities. *Bd. of Managers of the Courtyards at the Woodlands Condo. Ass'n.*, 183 Ill. 2d at 71. Indeed, construing §32 of the Act in such a manner would violate both the Federal Arbitration Act and the Illinois Uniform Arbitration Act. The Federal Arbitration Act has been held on numerous occasions to preempt similar statutory prohibitions on arbitration. *See, Southland Corp. v. Keating*, 465 U.S. 1 (U.S. 1984) (holding that federal law making arbitration provisions enforceable is binding on states and a state law that invalidates such provisions is preempted by federal law on arbitration issues). *See also, Folser v. Midwest Care Center II, Inc.*, 398 Ill. App. 563, (2d. Dist. 2010) (holding that sections 3-606 and 3-607 of the Nursing Home Care Act prohibiting waiver of trial by jury was preempted by the Federal Arbitration Act).

The Court rejects plaintiffs' construction of §32. The alternative dispute resolution provisions are appropriate. Plaintiffs' motion to reconsider is denied, in part.

Defendants' Argument that the Result Does Not Change Because Plaintiffs' claims are <u>Otherwise Barred Under §12.04(c)(iii)</u>

The question the Court now answers is this: (i) since the alternative dispute resolution provisions survive attack, and (ii) the amendment restriction did not survive attack: Can plaintiffs' amendment resurrect a claim that may have been otherwise barred by agreement of the parties?

Section 12.04 of the Declaration describes the process by which disputes must be addressed. In general, the parties are required to attempt to work out their dispute. If they cannot reach agreement, either party can commence mediation within 30 days with the American Arbitration Association. If the Claimant does not assert within the appropriate date 30 day window the disputed claims "then Claimant shall be deemed to have waived the Claim, and the Respondent shall be released and discharged from any and all liability to Claimant on account of such Claim." §12.04(c)(iii).

The Court does not believe that plaintiffs' amendment revives a claim that would otherwise have been barred by the parties' contract. If plaintiffs' claim was barred under § 12.04(c)(iii) of the Declaration as defendants claim, plaintiffs' amendment to the Declaration does not revive an otherwise extinguished claim. The Court previously allowed plaintiff to file an Amended Complaint because it may be possible to plead sufficient facts that fall within such a fact pattern.

Wherefore, it is hereby

ORDERED:

1. Plaintiffs' motion to reconsider is granted in part and denied in part.
2. Plaintiffs are granted 21 days to file an Amended Complaint, or to choose to stand on their current complaint.
3. Status set for June 23, 2014 @ 9:45.

May 8, 2014

Entered:

____

Judge Patrick J. Sherlock
Circuit Court of Cook County, Illinois
County Department, Law Division

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

No. 13 L 8154

[Filed November 4, 2014]

SIENA AT OLD ORCHARD	)
CONDOMINIUM ASSOCIATION,	)
an Illinois not-for-profit corporation,	)
and THE BOARD OF DIRECTORS	)
OF THE SIENA AT OLD ORCHARD	)
CONDOMINIUM ASSOCIATION,	)
Plaintiffs,	)
	)
vs.	)
	)
SIENA AT OLD ORCHARD, LLC,	)
an Illinois limited liability company,	)
LENNAR CHICAGO, INC., an Illinois	)
corporation, and LARRY KEER,	)
Defendants.	)
	)

Honorable Patrick J. Sherlock

ORDER

This cause coming on to be heard on the Section 2-619.1 motion of defendants Siena at Old Orchard, LLC and Lennar Chicago, Inc. to dismiss the second amended complaint and the Court being fully advised, it is hereby ordered:

Background

This lawsuit arises out of certain alleged construction defects at the Siena at the Old Orchard condominium complex in Skokie, Illinois. The condominium association and board of directors have sued the developer, Siena at Old Orchard LLC, and the developer's manager, Lennar Chicago, Inc., as well as Larry Keer, a former president of the condominium association.

Section 12 of the complex's Declaration of Condominium provided for mandatory alternative dispute resolution ("ADR"). Specifically, it required claims involving signatories to the Declaration, including but not limited to claims for defective construction, to be resolved according to the following procedure:

First, the claimant had to notify the respondent of the claim by personal delivery, messenger, or registered/certified mail-return receipt requested.

Second, if the respondent was the developer, it could cure the defect within ninety days.

Third, if the dispute remained, the parties had ninety days to resolve the claim through good faith negotiations.

Fourth, if the claim remained unresolved after the ninety day negotiating period, the parties had thirty days to submit the claim to mediation under the rules of the American Arbitration Association. If the claim was not submitted to mediation within this time period, the claim was waived.

Fifth, if the mediation was terminated without resolving the claim, the parties could proceed with a binding arbitration proceeding before the American Arbitration Association.

The Declaration further stated that these provisions in Section 12 could not be amended for twenty years without the express consent of the developer.

On August 30, 2011, despite the prohibition against amendments, the Declaration was amended to remove the mandatory ADR provisions.

Plaintiffs filed this lawsuit on July 17, 2013.

On February 13, 2014, this Court held that the ban on amending Section 12 was valid and that the mandatory ADR provisions remained in full force and effect. Plaintiffs moved to reconsider on the ground, inter alia, that the ban violated Section 27 of the Illinois Condominium Property Act, 765 ILCS 605/27. In an order of May 8, 1941, the Court agreed. It held that the amendment removing the mandatory ADR requirements of Section 12 was valid, but cautioned that the holding would not "revive" a lawsuit that had been barred by Section 12 before it was removed. The Court granted plaintiffs leave to file an amended complaint. Plaintiffs subsequently filed an amended complaint, withdrew it, and filed a second amended complaint, which is the subject of this Order.

The Second Amended Complaint and Motion to Dismiss

Plaintiff's second amended complaint, defendants' motion to dismiss and the exhibits accompanying both pleadings reflect the following chronology:

On July 24, 2006, the Declaration containing Section 12's mandatory ADR provisions became effective.

In May 2010, plaintiffs learned of their cause of action against defendants for defective construction.

On August 13, 2010, plaintiffs emailed defendants a notice of defect which did not conform to the technical requirements of the notice provisions of the Declaration. Plaintiffs did not, thereafter, commence mediation.

On August 20, 2011, the Declaration was amended to remove the mandatory ADR provisions.

On July 13, 2013, plaintiffs filed this lawsuit.

Notably, the Declaration did not require a claimant to start the ADR process within any particular time after learning it had a claim. All of the time requirements started running as of the date the notice of claim was sent. This structure appears sensible in light of the Declaration's twenty year prohibition of amendments to the ADR process. A claimant would make a timely claim because there was no point in not doing so. But with the success of the amendment removing the ADR provisions only five years after they were enacted, a potential claimant could attempt to use the Declaration's failure to give a 'due date' for potential claims as a means to avoid ADR altogether.

Defendants' Argument. Defendants' motion to dismiss contends that plaintiffs began the ADR process with their emailed letter of August 13, 2010. From that date, defendants had thirty days, until November 11, 2010, to cure the alleged defects. After the cure deadline ended, plaintiffs had ninety days, until February 9, 2011 in which to negotiate. If negotiations failed, plaintiffs had thirty days, until March 11, 2011, to submit the claims to mediation before the AAA. Plaintiffs did not submit the claims to mediation. Under the Declaration, the claims were thereby waived.

Plaintiffs' Response. Plaintiffs respond by pointing to the technical defects in their August 13, 2010 letter: that contrary to the requirements of the Declaration, it did not state the "legal basis" for their claim, did not state that they would meet with defendants to discuss good faith ways to resolve the claim, and was not sent by messenger or certified/registered mail. Plaintiffs argue that these defects nullified the notice. Without the notice, the ADR process never started. Therefore, the valid amendment removing the ADR requirements was in place before plaintiffs filed this lawsuit.

<u>Analysis</u>

The Court's prior orders in this case have set forth the standards application to Section 2-619 motions. There is no need to repeat them here.

Resolution of the issue turns on the critical August 13, 2010 letter. If the letter constituted a valid notice under Section 12 of the Declaration as defendants contend, it started the ADR process. By not completing the process, plaintiffs waived their claims. If, however, the letter was not a valid notice, it did not start the ADR process, plaintiffs did not waive their claims and—by virtue of the subsequent removal of the ADR provisions from the Declaration—are now free to pursue them in this lawsuit.

As noted in the Court's prior orders, arbitration is a favored alternative to litigation because it is a speedy, informal and relatively inexpensive way to resolve commercial disputes. *Board of Managers of the Courtyards at the Woodlands Condominium Ass'n v. Iko Chicago, Inc.*, 183 Ill.2d 66, 71 (1998). Here, plaintiffs are attempting to avoid arbitration by pointing to defects in their own notice. As defendants point out, if this Court were to permit plaintiffs to use their own defective notices as a ground to avoid arbitration, it would be a simple matter for all potential plaintiffs, faced with an unpalatable arbitration clause, to fail to comply with the preconditions and manipulate the result.

Illinois courts have not hesitated to hold that actual notice trumps a contract's technical notice requirements. *Denis F. McKenna Co. v. Smith*, 302 Ill.App.3d 28, 32 (1st Dist. 1998); *Rogers v. Balsley*, 240 Ill.App.3d 1005, 1011 (2d Dist. 1993) (whether technical defects in a contractually-required notice are "material, thereby discharging the other party's duty to perform, is an issue to be determined on the inherent justice of the matter."). See also, *Hickox v. Bell*, 195 Ill.App.3d 976, 992 (5th Dist. 1990).

The 'inherent justice' of this matter lies with defendants. The purpose of the technical notice requirements—that the notice state the legal basis for the claim, that it state the claimant would meet to discuss resolution, and that it be sent by messenger or certified/registered mail—were for the purpose of protecting the recipients of the notice, not the senders.

Here, plaintiffs clearly intended to start the ADR process by sending the August 13, 2010 letter. The letter stated it was in reference to a claim against the developer for construction defects and attached a lengthy report from plaintiffs' engineers outlining the defects. Following this notice, for reasons unknown to the Court, the plaintiffs apparently had a change of heart. They stopped the ADR process and amended the Declaration to remove the ADR requirements. Being faced with this Court's ruling that while the removal of the ADR requirements was valid, those requirements would still be applicable to claims that arose prior to the removal, plaintiffs now point to the technical defects in their own ADR notice as evidence that they never started the process in the first place.

What plaintiffs are asking this Court to do is nullify a contract—Section 12 of the original Declaration—because of a technical deficiency in a notice required by that contract. This request is particularly unfair since the technicalities were placed in the contract for defendants' benefit, not plaintiffs'. There would be an inherent injustice to defendants in allowing plaintiffs to utilize their own defective notice to create a forfeiture of the ADR provisions in Section 12 of the Declaration. We therefore hold that plaintiffs' letter of August 13, 2010 was sufficient notice to commence the ADR process. By not completing the process, plaintiffs waived the claims it now advances in this lawsuit.

In light of this Court's ruling, the Court does not address the other grounds for dismissal of the second amended complaint that are raised in defendants' motion to dismiss.

* * *

WHEREFORE, by reason of the foregoing, it is hereby ordered:

A. The motion of defendants Siena at Old Orchard, LLC and Lennar Chicago, Inc. to dismiss the second amended complaint is granted.

B. The second amended complaint is hereby dismissed with prejudice as to all defendants.

C. This is a final order disposing of all matters in controversy between the parties.

Date: NOV 04 2014

Patrick J. Sherlock
Judge Presiding

APPENDIX F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 13 L 8154

[Filed March 3, 2015]

SIENA AT OLD ORCHARD	)
CONDOMINIUM ASSOCIATION,	)
an Illinois not-for-profit corporation,	)
and THE BOARD OF DIRECTORS	)
OF THE SIENA AT OLD ORCHARD	)
CONDOMINIUM ASSOCIATION,	)
Plaintiffs,	)
	)
vs.	)
	)
SIENA AT OLD ORCHARD, LLC,	)
an Illinois limited liability company,	)
LENNAR CHICAGO, INC., an Illinois	)
corporation, and LARRY KEER,	)
Defendants.	)
	)

Honorable Patrick J. Sherlock

ORDER

This cause coming on to be heard on the motion of the plaintiffs, Siena at Old Orchard Condominium Association and the Board of Directors of the Siena at Old Orchard Condominium Association, to reconsider the Court's November 14, 2014 order and the Court being fully advised, it is hereby ordered:

<u>Background</u>

This is a lawsuit by a condominium association against the condominium's developer and managers for alleged construction defects. On November 14, 2014, the Court granted defendants' Section 2-619 motion to dismiss the second amended complaint with prejudice. The basis for the Court's ruling was that (1) the provisions of the Declaration of Condominium in effect at the time required mandatory alternative dispute resolution of plaintiffs' claims, and (2) plaintiffs failed to complete the ADR process, thereby waiving the claims they now advance in this lawsuit. Plaintiffs seek reconsideration of that order.

<u>Analysis</u>

I. <u>Standards for Reconsideration.</u>

The purpose of a motion for reconsideration is limited to information the court of newly discovered evidence, informing the court of a change in the law, or pointing out errors in the court's earlier application of the law. *Farley Metals, Inc. v. Barber Coleman Co.,* 269 Ill.App.3d 104, 116 (1st Dist. 1994). Legal theories and factual arguments not previously made are waived. *River Plaza Homeowners Association v. Healey*, 389 Ill.App.3d 268, 280 (1st Dist. 2009).

II. <u>Plaintiffs' Grounds for Reconsideration.</u>

Plaintiffs raise two arguments in their motion for reconsideration: that a newly-enacted statute reflects a prior public policy that disfavored ADR provisions in condominium declarations, and that the Court misconstrued plaintiffs' August 13, 2010 letter to the developers by deeming it to be a notice that commenced the ADR process.

A. <u>Public Policy and the New Statute.</u>

This argument is proper on a motion for reconsideration since plaintiffs are informing the Court of a change in the law. The change occurred on January 1, 2015, when HB 4783 became effective. The bill amended Section 18.8 of the Illinois Condominium Property Act, 765 ILCS 605/1 et seq., to read that,

> (a) Any provision in a condominium instrument is void as against public policy and ineffective if it limits or restricts the rights of the board of managers by:* * * requiring the board of managers to arbitrate or mediate a dispute with any one or more of all of the declarants under the condominium instruments or the developer or any person not then a unit owner prior to the institution of any action by the board of managers or a demand for a trial by jury.

Plaintiffs contend that the new 2015 law codified what had been a pre-existing public policy against arbitration of condominium disputes. An unspoken attribute of that contention is that the purported public policy existed as far back as 2010 when plaintiffs' obligations to submit to ADR arose.

Plaintiffs do not cite any authority for their reading of the 2010 public policy. They do not cite any legislative history of HB 4783, let alone one showing that the legislature considered the bill to be codifying a well-established public policy that had been in existence since at least 2010. Plaintiffs do not cite any cases or statutes reflecting a 2010 public policy against arbitration of condominium disputes.

In fact, the prior public policy was in <u>favor</u> of arbitration of condominium disputes. In 1998, the Illinois Supreme Court made that fact crystal clear when it compelled arbitration of third party claims in a dispute between a condominium board and the developers for construction defects. *Board of Managers of the Courtyards at the Woodlands Condominium Ass'n. v. lko Chicago, Inc.*, 183 Ill.2d 66 (1998).

In an ill-considered attempt to bolster their public policy argument, the plaintiffs contend that this Court's November 4, 2014 order,

> . . . relied heavily on the principle that ADR is a favored alternative to litigation in the context of commercial disputes. The Court then equated the instant disputes between the Defendants and the Plaintiffs to an ordinary commercial dispute, and used this premise for the backbone for its ruling. . . .

(Plaintiffs' Motion for Reconsideration at unnumbered page 3)[1]

Plaintiffs must know this statement is wrong. The order did not rely at all, let alone heavily, "on the principal that ADR is a favored alternative to litigation in the context of commercial disputes." The Court did

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[1] All of plaintiffs' filings in this case omit page numbers, an inconsiderate practice.

not "equate" this case to an "ordinary commercial dispute." The order did not even mention commercial disputes. It cited one case to support its finding that the arbitration provisions in the Declaration were valid and enforceable—*Board of Managers of the Courtyards at the Woodlands Condominium*, *supra*, 183 Ill.2d 66. That was not a commercial dispute. That was a suit by a condominium board against developers for construction defects.

Plaintiffs' public policy argument does not mandate reversal of the Court's November 4, 2014 order.

B. Plaintiffs' August 13, 2010 Letter.

The Declaration set forth the steps of the mandatory ADR process. The first step was that the plaintiffs give written notice of their claim to the developer. The Declaration stated that the written notice should be sent by messenger or certified/registered mail, state the legal basis for the claim and indicate that the plaintiffs would meet with the developer to discuss good faith ways to resolve the claim.

A major question before the Court on the defendants' Section 2-619 motion to dismiss was whether an August 13, 2010 letter from the condominium association's attorney to the developer fulfilled the Declaration's notice requirement. Plaintiffs argued that the letter did not fulfill the requirement because it (1) did not state the legal basis for the association's claim, (2) did not state that the association would meet with defendants, and (3) was not sent by messenger or certified mail. The Court considered these arguments, rejected them, and ruled in favor of defendants that the letter stood as notice under the ADR process outlined in the Declaration. On reconsideration, the plaintiffs advance a fourth reason why the letter was not valid notice; namely, that the letter was not intended to start the ADR process by giving the developer notice of plaintiffs' claim, but was only intended to alert the developer that the plaintiffs were going to correct the defective work, and that to avoid any future claim by the developer of spoliation of evidence, the developer could inspect, test or photograph the area to be repaired "so that the evidence may be secured for upcoming litigation."

The purpose of a motion for reconsideration is not to take a second bite of the apple and make an argument that slipped through the cracks the first time around. *Kyles v. Maryland Academy*, 359 Ill.App.3d 423, 433 (1st Dist. 2005). Factual arguments not previously made are waived. *River Plaza Homeowners Association, supra,* 389 Ill.App.3d at 280.

Plaintiffs try to obscure the fact that they waived the argument by claiming that the Court erred in not construing the letter in a light most favorable to them, as it is required to do on a Section 2-619 motion to dismiss. While that is indeed the law,[2] Section 2-619 does not require the Court to ignore the first half of the letter—which clearly and repeatedly stated that plaintiffs were making a "claim" against the developer for defective construction—and focus solely on the second half which discussed spoliation of evidence.

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[2] *Mayfield v. ACME Barrel Co.*, 258 Ill.App.3d 32, 34 (1st Dist. 1994).

Even in that second half, the letter spoke of securing the evidence for "upcoming litigation."

Assuming plaintiffs had not waived their spoliation argument, it would not have changed the result.

* * *

WHEREFORE, by reason of the foregoing, it is hereby ordered:

A. The motion for reconsideration of the plaintiffs, Siena at Old Orchard Condominium Association and the Board of Directors of the Siena at Old Orchard Condominium Association, is granted as to reconsideration and denied as to reversal.

B. After reconsideration, the Court reaffirms the rulings in its November 4, 2014 order and declines to reverse those rulings.

Date: MAR 03 2015

____
Patrick J. Sherlock
Judge Presiding

APPENDIX G

THIS INSTRUMENT PREPARED
BY AND SHOULD BE RETURNED TO:

Brian Meltzer
MELTZER, PURTILL & STELLE LLC
1515 East Woodfield Road
Second Floor
Schaumburg, Illinois 60173-5431

PINS: 10-16-204-011, 10-16-222-013

RECORDING FEE 322 06/23/06
DATE 7.24.06 COPIES 6x
OK BY /s/

Doc#: 0620534084 Fee: $322.00
Eugene "Gene" Moore RHSP Fee: $10.00
Cook County Recorder of Deeds
Date: 07/24/2006 02:03 PM Pg: 1 of 71

ABOVE SPACE FOR RECORDER'S USE ONLY

DECLARATION OF CONDOMINIUM OWNERSHIP FOR SIENA AT OLD ORCHARD CONDOMINIUM

This Declaration is made by and entered into by Siena at Old Orchard L.L.C., an Illinois limited liability company ("Declarant").

* * *

ARTICLE TWELVE
Dispute Resolution

12.01 CONSENSUS FOR ACTION BY THE CONDOMINIUM ASSOCIATION:

(a) Except as provided in this Section, the Condominium Association may not commence a legal proceeding or an action under this Article without the affirmative vote of at least seventy-five percent (75%) of the Voting Members. A Voting Member representing Units owned by Persons other than the Voting Member shall not vote in favor of bringing or prosecuting any such proceeding unless authorized to do so by a vote of Owners of two-thirds of the total number of Units represented by the voting Member. This Section shall not apply, however, to (i) actions brought by the Condominium Association to enforce the provisions of the Act, this Declaration (including, without limitation, the foreclosure of liens), the By-Laws and reasonable rules and regulations adopted by the Board; (ii) the imposition and collection of Annual Assessments; (iii) proceedings involving challenges to ad valorem taxation; or (iv) counterclaims brought by the Condominium Association in proceedings instituted against it.

(b) Prior to the Condominium Association or any member commencing any proceeding to which Declarant is a Party, including but not limited to an alleged defect of any improvement, Declarant shall have the right to be heard by the members, or the particular member and to access, inspect, correct the condition of, or redesign any portion of any improvement as to which a defect is alleged or otherwise correct the alleged dispute.

12.02 **<u>ALTERNATIVE METHOD FOR RESOLVING DISPUTES</u>:** Declarant, its officers, directors employees and agents; the Condominium Association, its officers, directors and committee members; all Persons subject to this Declaration; and any Person not otherwise subject to this Declaration who agrees to submit to this Article (each such entity being referred to as a "Bound Party") agree to encourage the amicable resolution of disputes, without the emotional and financial costs of litigation. Accordingly, each Bound Party covenants and agrees to submit those Claims, grievances or disputes described in Section 12.03 (collectively, "Claims") to the procedures set forth in Section 12.04.

12.03 **<u>CLAIMS</u>:** Unless specifically exempted below, all Claims between any of the Bound Parties regardless of how the same might have arisen or on what it might be based including, but not limited to Claims (a) arising out of or relating to the interpretation, application or enforcement of the provisions of the Act, this Declaration, the By-Laws and reasonable rules and regulations adopted by the Board or the rights, obligations and duties of any Bound Party under the provisions of the Act, this Declaration, the By-Laws and reasonable rules and regulations adopted by the Board, (b) relating to the design or construction of improvements; or (c) based upon any statements, representations, promises, warranties, or other communications made by or on behalf of any Bound Party shall be subject to the provisions of Section 12.04 and, if applicable, the dispute resolution provisions of the purchase agreement for the purchase of a Unit ("Purchase Agreement"). In the event of an inconsistency or contradiction between the provisions relating to dispute resolution as set forth in this Declaration and those which are set forth in the Purchase Agreement, the provisions of the Purchase Agreement shall prevail.

Notwithstanding the foregoing, unless all parties thereto otherwise agree, the following shall not be Claims and shall not be subject to the provisions of Section 12.04:

(a) any suit by the Condominium Association against any Bound Party to enforce the provisions of Article Six;

(b) any suit by the Condominium Association or Declarant to obtain a temporary restraining order or injunction (or equivalent emergency equitable relief) and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Condominium Association's ability to act under the enforce the provisions of Article Three;

(c) any suit between or among Owners, which does not include Declarant or the Condominium Association as a Party, if such suit asserts a Claim which would constitute a cause of action independent of the provisions of the Act, this Declaration, they By-Laws and reasonable rules and regulations adopted by the Board; and

(d) any suits which any indispensable party is not a Bound Party.

With the consent of all parties hereto, any of the above may be submitted to the alternative dispute resolution procedures set forth in Section 12.04.

12.04 <u>MANDATORY PROCEDURES</u>:

(a) <u>Notice</u>. As a condition precedent to seeking any action or remedy, a Bound Party having a Claim ("Claimant") against any other Bound Party ("Respondent") (the Claimant and the Respondent referred to herein being individually, as a "Party," or, collectively, as the "Parties") shall notify each Respondent in writing (the "Notice"), stating plainly and concisely:

(i) the nature of the Claim, including the defect or default, if any, in detail and the Persons involved and Respondent's role in the Claim;

(ii) the legal basis of the Claim (i.e., the specific authority out of which the Claim arises);

(iii) the proposed remedy;

(iv) any evidence that depicts the nature and cause of the Claim and the nature and extent of repairs necessary to remedy the Claim, including expert reports, photographs and videotapes; and

(v) the fact that Claimant will meet with Respondent to discuss in good faith ways to resolve the Claim.

Notices given to Respondent pursuant to this Section shall be deemed sufficient in personally delivered, delivered by commercial messenger service, or mailed by registered or certified mail, postage prepaid, return receipt requested to the last known address of the Respondent as it appears on the records of the Condominium Association on the date of mailing.

(b) Claims Involving Declarant. With respect to any Claim to which the Declarant is the Respondent:

(i) Right to Inspect. Claimant agrees to permit Declarant and its agents to perform inspections and tests and to make all repairs and replacements deemed necessary by Declarant to respond to the Claim. Declarant shall have the Cure Period (defined below) to inspect and correct any alleged default. Declarant shall be given a reasonable opportunity to perform all inspections and tests and make all repairs and/or replacements deemed to be necessary by Declarant.

(ii) Right to Cure. Declarant shall have the right to repair, replace or pay the Claimant the reasonable cost of repairing or replacing any defective item. Unless otherwise provided by law or agreed by the Parties, Declarant or Condominium Association, as the case may be, shall have not less than 35 days nor more than 90 days from receipt of the Notice (the "Cure Period) to cure as provided herein or to otherwise respond to the Claimant in the event that the Declarant determines that no default has occurred and/or default exists. A Claimant shall have no right to bring any action against the Declarant until expiration of the Cure Period. The Cure Period shall be extended by any period of time that Claimant refuses to allow Declarant to perform inspections and/or perform tests as provided in subsection 12.04(b)(i). Declarant shall have the right, but not the obligation, to take action during the Cure Period and/or respond to any notice received from Claimant.

(iii) Time. The time periods provided for the inspection and cure by Declarant shall be extended by any period of time that Claimant refuses to allow Declarant to make inspections, tests, repairs and/or replacements. Any inspection, test, repair or replacement performed on a business day between 9 a.m. and 5 p.m. shall be deemed to be reasonable hereunder.

(iv) Dispute Resolution. Any dispute (whether contract, warranty, tort, statutory or otherwise), including, but not limited to (a) any and all controversies, disputes or claims arising under, or related to, the Purchase Agreement, the Unit, or any dealings between the Declarant and Owner (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Act, 15 U.S.C. Section 2301 et seq., and the regulations promulgated thereunder), (b) any controversy, dispute or claim arising by virtue of any representations, promises or warranties alleged to have been made by Declarant or Declarant's representative, and (c) any personal injury or property damage alleged to have been sustained by Purchaser on the Property (hereinafter individually and collectively referred to as "disputes" or "Claims"), shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided in Paragraphs 12.04(c) and 12.04(d) below and as provided by the Federal Arbitration Act (9 U.S.C. Section 1 et seq.) or applicable state law relating to arbitration and not by or in a court of law.

(v) Small Claims Court. Notwithstanding the requirement of arbitration, Claimant shall have the option, after mediation to seek relief in a small claims court for disputes or Claims within the scope of the court's jurisdiction in lieu of proceeding with arbitration.

(vi) Mediation Fees. Declarant shall pay for one (1) day of mediation (mediator fees plus any administrative fees relating to the mediation). Any mediator and associated administrative fees incurred thereafter shall be shared equally by the Parties.

(vii) Arbitration Fees. The fees for any claim in an amount of $10,000 or less shall be apportioned as provided in applicable AAA rules. Unless provided otherwise by applicable AAA rules, for claims that exceed $10,000, the filing Party shall pay up to the first $750 of any initial filing fee to initiate arbitration. Under the following conditions, Declarant agrees to pay up to the next $2,000 of any initial filing fee: (1) Claimant has participated in mediation prior to initiating the arbitration; (2) the parties have mutually agreed to waive mediation; or (3) Declarant files for arbitration under Paragraph (d)(i) below. The portion of any filing fee not covered above, and any case service fee, management fee or fees of arbitrator(s), shall be shared equally by the Parties.

(viii) Declarant and Claimant agree that notwithstanding anything to the contrary, the rights and obligations set forth in this Article Twelve shall survive (1) the closing of the sale of the Unit; (2) the termination of the Purchase

Agreement by either party; or (3) the default of the Purchase Agreement by either party. The waiver or invalidity of any portion of this paragraph shall not affect the validity or enforceability of the remaining portions of this paragraph. Declarant and Claimant further agree (1) that any dispute involving Declarant's affiliates, directors, officers, employees and agents shall also be subject to mediation and arbitration as set forth herein, and shall not be pursued in court of law; (2) that Declarant may, at its sole election, include its sub-contractors and suppliers, as well as any warranty company and insuror as parties in the mediation and arbitration; (3) that the mediation and arbitration will be limited to the parties specified herein.

(c) <u>Negotiation and Mediation</u>.

(i) The Parties shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation. If requested in writing, accompanied by a copy of the Notice, the Board may appoint a representative to assist the Parties in negotiation.

(ii) If the Parties do not resolve the Claim within 90 days after the date of the Notice and the Cure Period has expired (or within such other period as may be agreed upon by the Parties) ("Termination of Negotiations"), either Party shall have 30 days from the date of Termination of Negotiations to submit the Claim to mediation. The mediation shall be filed with the administered by the American Arbitration Association ("AAA") in accordance with the AAA's Supplementary Mediation Procedures for Residential Construction

Disputes in effect on the date of the Notice. If there are no Supplementary Mediation Procedures for Residential Construction Disputes currently in effect, then the AAA's Construction Industry Mediation Rules in effect on the date of the Notice shall be utilized. Unless mutually waived in writing by the Parties, submission to mediation is a condition precedent to either Party taking further action with regard to the Claim.

(iii) If a Claimant does not submit the Claim to mediation within such time, or does not appear for the mediation, then the Claimant shall be deemed to have waived the Claim, and the Respondent shall be released and discharged from any and all liability to Claimant on account of such Claim.

(iv) Any settlement of the Claim through mediation shall be documented in writing by the mediator and signed by the Parties. If the Parties to not settle the Claim within 30 days after submission of the matter to the mediation, or within such other time as determined by the mediator or agreed to by the Parties, the mediator shall issue a notice of termination of the mediation proceedings ("Termination of Mediation"). The Termination of Mediation notice shall set forth that the Parties are at an impasse and the date that the mediation was terminated.

(d) Binding Arbitration.

(i) Upon Termination of Mediation, either Party shall thereafter be entitled to initiate binding arbitration of the Claim under the auspices of AAA in accordance with the AAA's Supplementary Arbitration Procedures for Residential Construction Disputes in effect on the date of the Notice. If there are no Supplementary Arbitration Procedures for Residential Construction Disputes in effect, then the AAA's Construction Industry Arbitration Rules in effect on the date of such Notice shall be utilized. Any judgment upon the award rendered by the arbitrator may be entered in and enforced by any court having jurisdiction over such Claim. Unless the Parties agree otherwise, Claims in excess of $10,000 but less than $500,000 shall utilizes the Regular Track Procedures of the Construction Industry Arbitration Rules, as modified by the Supplementary Arbitration Procedures for Residential Construction. If the Claim amount exceeds $250,000 or includes a demand for punitive damages, the Claim shall be heard and determined by three arbitrators. Otherwise, unless mutually agreed to by the Parties, there shall be one arbitrator. Arbitrators shall have expertise in the area(s) of dispute, which may include legal expertise if legal issues are involved. All decisions respecting the arbitrability of any Claim shall be decided by the arbitrator(s).

(ii) At the request of any Party, the award of the arbitrator(s) shall be accompanied by detailed written findings of fact and conclusions of law. Except as may be required by law or for confirmation of an award, neither a Party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the Parties.

(e) Costs and Expenses. Except as otherwise provided under subparagraph 12.04(b) above, each Party shall bear its own costs and expenses, including attorney's fees, for any mediation and arbitration. Notwithstanding the foregoing, if a Party unsuccessfully contests the validity or scope of arbitration in a court of law, the non-contesting Party shall be awarded reasonable attorneys fees and expenses incurred in defending such contest. In addition, if a Party fails to abide by the terms of a mediation settlement or arbitration award, the other Party shall be awarded reasonable attorneys fees and expenses incurred in enforcing such settlement or award.

12.05 AMENDMENT OF ARTICLE: Without the express prior written consent of Declarant, this Article may not be amended for a period of twenty years from the effective date of this Declaration.

* * *

Dated: June 13, 2006.

DECLARANT:

SIENA AT OLD ORCHARD L.L.C.

By: /s/Deborah T. Haddad
Its Vice President

STATE OF ILLINOIS)
) SS.
COUNTY OF Cooke)

The undersigned, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Deborah T. Haddad personally known to be to be the same person whose name is subscribed to the foregoing instrument as such Vice President, appeared before me this day in person and acknowledged that he signed and delivered said instrument as his own free and voluntary act, and as the free and voluntary act of Siena at Old Orchard L.L.C., for the uses and purposes therein set forth.

GIVEN under my hand and Notarial seal this 13 day of June, 2006.

/s/Ellen Sepke
Notary Public

OFFICIAL SEAL
ELLEN SEPKE
NOTARY PUBLIC-STATE OF ILLINOIS
MY COMMISSION EXPIRES 08/28/07

{30034:079; 00035715.DOC:2}