

Box 2

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

MARK AND TAMMY SOMOGYE,)	
)	
Plaintiffs,)	Case No.
)	Division No.
)	K.S.A. Chapter 60
vs.)	
)	
NOTTINGHAM AT HERITAGE PARK)	
HOMES ASSOCIATION, INC.,)	
Serve Resident Agent:)	
Clarence Foxworthy)	
4200 Somerset Drive, Suite 216)	
Prairie Village, KS 66208,)	
)	
Defendant.)	

PETITION

Plaintiffs Mark and Tammy Somogye (the "Somogyes"), by and through their attorneys, Lathrop & Gage LLP, and for their causes of action against Defendant Nottingham at Heritage Park Homes Association, Inc. (the "Association"), hereby state and allege as follows:

PARTIES, JURISDICTION, & VENUE

1. Plaintiffs Mark and Tammy Somogye are husband and wife, and residents of Johnson County, Kansas.
2. Defendant Nottingham at Heritage Park Homes Association, Inc. is a Kansas not-for-profit corporation and may be served with process by notifying its resident agent, Clarence Foxworthy, at 4200 Somerset Drive, Suite 216, Prairie Village, Kansas 66208.

3. This Court has personal jurisdiction over the Association because the Association is a not-for-profit corporation registered in the State of Kansas. K.S.A. § 60-304(e).

4. Venue is proper in this Court pursuant to K.S.A. §§ 60-603 and 60-604 in that all of the parties either reside, conduct business, or have principal places of business in Johnson County, Kansas, and the causes of action arose in Johnson County, Kansas.

ALLEGATIONS COMMON TO ALL COUNTS

5. The Somogyes are homeowners in the Nottingham at Heritage Park subdivision (the "Subdivision") in Olathe, Kansas.

6. The Declaration of Restrictions (the "Restrictions") for the Subdivision was filed with the Johnson County Register of Deeds in 1999. A copy of the Restrictions, as found on Defendant's webpage, is attached hereto as "Exhibit A" and is incorporated herein by reference.

7. The Restrictions allow homeowners in the Subdivision to select from certain roofing materials: wood shingles, wood shakes, slate, or pre-colored concrete tile.

8. Upon information and belief, the Association sent a notice to homeowners in the Subdivision in November 2010, announcing that an annual meeting would be held on December 14, 2010.

9. Upon information and belief, the annual meeting notice did not indicate that roofing materials would be discussed or that Subdivision homeowners would be given an opportunity to vote to amend the Restrictions to permit additional roofing materials.

10. On December 14, 2010, an annual meeting of the homeowners belonging to the Association was held.

11. According to the minutes of the December 14, 2010 annual meeting, approximately thirty (30) people attended the meeting, during which the following individuals were elected as officers: John Lienemann, Co-President; John Brewster, Co-President; Darren Wright, Vice President; and Julie Murray, Secretary.

12. During the December 14, 2010 annual meeting, an Architectural Committee was established, consisting of the following members: Shannon Lyons, Judy Murphy, and Jennifer Claire.

13. The December 14, 2010 annual meeting minutes state, in part:

Roofing materials need to be discussed, Steve Meade to check the by-laws to see how many voters need to be present to make roofing material changes to the "HOA Laws and Regulations," or if only those present at meeting when vote is taken can pass a roofing requirement change. There seems to be a question of if a general majority of all HOA members required in order for a vote/change to take place.

14. The December 14, 2010 annual meeting minutes state, in part: "Those present by show of hands voted Timberline Lifetime Architectural Shingle or Heritage 50 year architectural Shingle. Color: Weathered Wood. Brand: Kamco or Timberline."

15. Upon information and belief, on February 27, 2011 at 3:00 P.M., the Association held a Board Meeting at the home of Darren Wright.

16. According to the February 27, 2011 Board Meeting minutes, those in attendance consisted of Jon Lienemann, John Brewster, Darren Wright, and Julie Murray.

17. Homeowners of the Association were not given notice of the February 27, 2011 Board Meeting prior to the meeting.

18. On April 3, 2011, homes in the Subdivision were damaged by a hailstorm, causing most, if not all, of these homes to require a new roof.

19. Upon information and belief, the Association's Board held a meeting to determine what to communicate to the Association homeowners regarding roofing materials. No notice of this meeting was given to any Association homeowner other than the Board members and/or Architectural Review committee members.

20. On or about April 5, 2011, the Somogyes received a flyer entitled, "URGENT: Message from the Home Owners Association Board." The flyer states, in part:

There is a new, revised standard for roof replacements within the Nottingham at Heritage Park community. This new standard was introduced, voted on, approved, and logged into the last Homes Association Meeting notes in November 2010. There are other by-law updates being done to benefit all the homeowners; however, this particular detail needs to be communicated now before the full revision is complete.

UPDATED ROOF REPLACEMENT STANDARD IS:

Type: Lifetime Architectural Shingle
Material: Composite
Grade: 50-year
Style: 1) Tamko Heritage Premium
2) Malarkey Legacy (class 4)
3) Timberline Ultra
Color: Weathered Wood

There are no other approved replacement roof types, materials, grades, styles or colors. Any deviation from the described roof type above must have the Architectural Committee's written approval prior to work being authorized. This effort will benefit all of the homeowners by maintaining a standardized appearance. Plus, this will assist in maintaining our property values, which is very important.

21. Upon information and belief, on April 6, 2011, at 8:00 P.M., the Association Board held another meeting without providing prior notice to the Association homeowners except for the Board members, select members of the

Architectural Committee, and certain individual homeowners who had worked in the roofing or home-building professions.

22. The April 6, 2011 meeting minutes state that the meeting was held at John Brewster's home and that the following persons attended: John Brewster, Jon Lienemann, Darren Wright, Shannon Lyons, Julie Murray, and two (2) "Construction and Roofing subject matter experts invited by the Board."

23. The April 6, 2011 meeting minutes state that several Board Members received "calls concerning the approved choices and the concern seemed to be that a 'premium' roof was not being offered for selection." The persons present discussed the matter and "decided that color and basic style should be uniform to maintain our neighborhood's overall cohesiveness." Further, "[i]t was decided with the information gathered and homeowners concerns that the Board would add additional roofs for approval. Keeping the original approved roof selections (Voted on 12/14/10) as a minimum standard and adding the following:

Type: Lifetime Architectural Shingle

Material: Composite

Grade: Lifetime

Style: 1) GAF – Grand Sequoia or Grand Canyon (Color – Weathered Wood)

2) Certain Teed – Presidential or Presidential TL (Color – Weathered Wood)

3) Owens Corning – Woodcrest or Woodmore (Color – Sycamore)"

24. During the April 6, 2011 meeting, the Board also decided to hold a "presentation and informative gathering at the pool on Saturday, April 9, 2011, at 1:00

p.m. so homeowners can see the samples and find out the benefits of each one approved."

25. On or about April 8, 2011, the Somogyes received another flyer from the Association Board, entitled "PRESENTATION OF APPROVED ROOFING MATERIALS." The flyer stated the types of roofing materials chosen by the Board at the April 6, 2011 meeting. The flyer further stated that, "There are no other approved replacement roof types, materials, grades, styles, or colors. Any deviation from the described roof type above must have the Architectural Committee's written approval prior to work being authorized. This effort will benefit all of the homeowners by maintaining a standardized appearance. Plus, this will assist in maintaining our property values, which is very important."

26. The Somogyes attended the April 9, 2011 presentation about roofing materials. Subdivision homeowners were not given an opportunity to vote on any roofing materials or changes to the Restrictions during this presentation.

27. During the April 9, 2011 presentation, the Board Members indicated that there was a process in place for submitting a request to use different roofing materials.

28. Upon information and belief, the Board held another meeting on May 2, 2011. No notice of this meeting was given to any of the Subdivision homeowners prior to the meeting except for the Board Members and the Architectural Committee members.

29. The May 2, 2011 meeting minutes state that John Brewster, Jon Lienemann, Darren Wright, Shannon Lyons, Judy Murphy, and Julie Murray were in attendance at the meeting.

30. The May 2, 2011 meeting minutes further state that this meeting was called "for discussion of violations of restrictions and appeal for exception of garden." Notwithstanding this stated purpose of the meeting, the Board discussed other items, including an amendment to the Restrictions for pool fencing and a homeowner's request to install stone-coated steel roofing materials. The minutes state, "The Board as an option for new roofs denied a stone coated steel roof."

31. On May 10, 2011, without any knowledge of the May 2, 2011 meeting or the discussions or decisions made therein, Mark Somogye contacted Shannon Lyons to inquire about the process for submitting a different roofing material for the Architectural Committee's consideration. Ms. Lyons asked Mr. Somogye what type of roofing material he was interested in using. When Mr. Somogye indicated he was interested in a stone-coated roofing material, Ms. Lyons stated that the material had already been denied approval. Upon Mr. Somogye's request for the reason this material had been denied, Ms. Lyons did not provide a direct answer.

32. On the evening of May 10, 2011, Tammy Somogye contacted Shannon Lyons to inquire about which roofing materials had been denied by the Architectural Committee and the reasons therefor. Mrs. Somogye sought to formally submit a roofing material for consideration by the Architectural Committee and to meet with this committee to share a sample of the material, to share pictures of the material on homes in the area, and to have a roofing company available to answer any questions the committee may have about the material. Board Members were copied on this correspondence to Ms. Lyons.

33. On May 11, 2011, John Brewster replied to Tammy Somogy's May 10,

2011 correspondence, stating:

[I]f you would like to drop off a sample, we would be happy to review and get back to you in a timely fashion, but as Shannon communicated to your husband, we have not approved previous metal samples that were submitted even though they were deemed to be similar in color to weathered wood.

The current board has attempted to keep the HOA headed in the same direction that was established by the original developer. Since everyone agreed to the current covenants when they moved into Nottingham, no one can say they didn't know what they were getting into. While this may not appeal to everyone in the neighborhood, most in the HOA seem to be happy with the additional choices that have been provided.

Note that after the hail storm, the current board literally walked to each and every home in the HOA on the Tuesday night after the storm to hand out flyers and answer any questions about the approved shingles from the most recent HOA meeting held this past December.

After further consultation with a roofing specialist one night later, we then decided to amend the approved list with additional options that were a substantial upgrade from the previously approved composites. We then walked door to door again the following night to communicate the recent addition, as well as making everyone aware that we would hold an emergency meeting at the pool to show everyone the approved samples, and answer any questions on that Saturday.

If you or your husband attended the Emergency meeting on that Saturday after the storm, we were very clear with regard to our rationale about the questions you are posing. Unfortunately, the current board and Architectural committee has invested a lot and effort [*sic*] as well these past few weeks, and we are not able to make an exception to discuss this issue further after having turned down other similar requests.

Thank you for your understanding.

34. The Somogyes reviewed the Restrictions, which can be amended via a duly acknowledged and written agreement signed by (1) the owners of at least two-thirds (2/3) of the Lots within the Subdivision then constituted and (2) the Association.

35. On May 14, 2011, the Somogyes and others began canvassing the Subdivision to determine whether homeowners objected to the use of stone-coated steel as an alternative roofing option.

36. As of May 20, 2011, Mark and Tammy Somogye had gathered the opinions of approximately seventy-two (72) Subdivision homeowners. Seventy (70) of them did not object, one (1) wanted to see the material "live" before deciding, and one (1) objected. Others canvassing the neighborhood had gathered approximately fifteen (15) signatures.

37. On May 20, 2011, at approximately 12:13 P.M., the Association Board sent an e-mail message to select Subdivision homeowners (not including the Somogyes).

This e-mail states:

The past few weeks, the HOA Board and Architectural committee has denied a few requests to place a metal shingle that was not approved by the HOA at the last Annual Meeting. Coincidentally, they all have the same roofer who knows that the roof is not approved. After reviewing the samples we unanimously agreed it did not meet the HOA standards, and would cheapen the appeal of the neighborhood. While 3 of those requests were not challenged and they proceeded to go with other options, it appears that one homeowner is still not happy with our response.

While every homeowner would like to have the flexibility to do as they please to satisfy their own personal preferences, the HOA has Declarations and Restrictions in place to ensure that changes and improvements made by EVERY homeowner are made with the best interest of every other homeowner in the community. It is not the duty of the HOA to approve changes that satisfy the personal preferences of one individual homeowner, at the expense of the others.

It's possible you might have already met this husband and wife who are making the rounds in the neighborhood to have you sign a petition. Before you sign the petition, you might want to consider if you would approve of every homeowner in the neighborhood with a personal agenda, doing the same thing every time their request for a special exception to the HOA's Restrictions and Declarations are denied.

After talking with a few of the homeowners who have already signed the petition, they stated they did not fully understand what the ramifications were if this roof was approved. Should these individuals come to your door to have you sign the petition, the HOA Board would encourage you to refuse to sign the petition on their behalf. If they have an issue or suggestion to improve the current covenants of the HOA, then they should contact the Board ask [sic] us to add it to the agenda of the next HOA Annual Meeting, so all the members can vote on the issue. Otherwise, we see no reason to waste the time and expense of notifying all the members of the HOA to call an emergency meeting on this subject.

Also note that the Board of Directors have been working diligently to enforce the Declarations and Restrictions of the Nottingham at Heritage Homeowners Association, which are intended to maintain our investments and upscale appearance of the Neighborhood. For those of you who have faded paint, landscaping in disarray, and fencing in need of maintenance/stain, we would appreciate you taking action now to make the necessary improvements to conform with the HOA covenants.

Sincerely,

Nottingham at Heritage HOA Board of Directors

John Lienemann, Co-President

John Brewster, Co-President

Darren Wright, Vice President

Julie Murray, Secretary

38. After the May 20, 2011 e-mail sent by the Association Board, some Subdivision homeowners refused to participate and/or sign the document presented by the Somogyes and one (1) other homeowner.

39. On May 21, 24, 25, and 30, 2011, Tammy Somogye canvassed the neighborhood, seeking the remaining signatures needed to reach the two-thirds (2/3) threshold.

40. On or about May 30, 2011, Mark and Tammy Somogye and the other homeowners canvassing the neighborhood had obtained at least 106 signatures, meeting the two-thirds (2/3) threshold.

COUNT I—BREACH OF CONTRACT

41. The Somogyes incorporate herein by reference paragraphs 1 through 40 of this Petition as if these paragraphs were more fully set forth herein.

42. The Restrictions state that "[r]oofs shall be covered with wood shingles, wood shakes, slate or pre-colored concrete tile, all of the specific types and colors approved by the Developer in writing." Section 3(a).

43. The Restrictions state that the covenants, conditions, and restrictions contained therein shall run with the land and bind any and all future owners of the covered lands. Section 16.

44. The Restrictions state that "[t]he provisions of this Declaration may be amended, modified or terminated, in whole or in part, at any time by a duly acknowledged and recorded written agreement (in one or more counterparts) signed by (i) the Owners of at least two thirds (2/3) of the Lots within the Subdivision as then constituted and (ii) . . . if after the recording of the Certificate of Substantial Completion, the Homes Association." Section 18(a).

45. The Board modified the Restrictions without two-thirds (2/3) of the vote of Subdivision homeowners, breaching the contract to which the Somogyes are a third party beneficiary.

46. The Somogyes have suffered damages caused by the Association's breach of the Bylaws, Declaration, and/or Restrictions.

WHEREFORE, the Somogyes pray that this Court enter judgment in their favor and against the Association for breach of the Bylaws, Declaration, and/or Restrictions; require compliance with and specific performance of the contract terms, including the

provisions related to roofing materials and modification of the Restrictions; award the Somogyes their costs and attorneys' fees to the extent provided by law, and for such other and further relief as this Court deems just and proper.

**COUNT II—VIOLATION OF THE KANSAS UNIFORM
COMMON INTEREST OWNERS BILL OF RIGHTS ACT**

47. The Somogyes incorporate herein by reference paragraphs 1 through 46 of this Petition as if these paragraphs were more fully set forth herein.

48. The Kansas Uniform Common Interest Owners Bill of Rights Act ("KUCIOBRA") became effective on January 1, 2011.

49. The provisions of the KUCIOBRA, except as expressly provided in the act, are mandatory and apply notwithstanding contrary provisions in the declaration or bylaws of a common interest community. K.S.A. § 58-4603.

50. Every contract or duty governed by the KUCIOBRA imposes an obligation of good faith in its performance or enforcement. K.S.A. § 58-4604.

51. The KUCIOBRA requires officers and members of a homeowners association board to "exercise the degree of care and loyalty to the association required of an officer of a corporation organized" under existing law and they "are subject to the conflict of interest rules governing directors and officers" under existing law. K.S.A. § 58-4609(a).

52. The KUCIOBRA states that "[t]he board of directors may not: (1) Amend the declaration except as provided by law other than this act." K.S.A. § 58-4609(c)(1).

53. The KUCIOBRA requires that "[a]n association notify unit owners of the time, date, and place of each annual and special unit owners meeting not less than 10 days or more than 60 days before the meeting. Notice may be by any method

reasonably calculated to provide notice to the person. The notice for any meeting must state the time, date, and place of the meeting and the items on the agenda, including: (1) A statement of the general nature of any proposed amendment to the declaration or bylaws." K.S.A. 58-4611(c)(1).

54. The KUCIOBRA states that "[u]nit owners must be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association." K.S.A. § 58-4611(e).

55. The KUCIOBRA states that "[m]eetings of the board of directors and committees of the association authorized to act for the association must be open to the unit owners except during executive sessions. . . . No final vote or action may be taken during an executive session." K.S.A. § 58-4612(a).

56. The KUCIOBRA states that "[t]he board of directors and its members may not use incidental or social gatherings of board members or any other method to evade the open meeting requirements of [Section K.S.A. § 58-4612]." K.S.A. § 58-4612(b).

57. The KUCIOBRA requires that notice be given "of each board of directors meeting to each board member and to the unit owners. The notice must state the time, date, place, and agenda of the meeting and, except as provided in subsection (c) of K.S.A. 2010 Supp. 58-4611 and 58-4620, and amendments thereto, be given at least five days prior to the meeting date." K.S.A. § 58-4612(e).

58. The KUCIOBRA requires the Association to retain, for five (5) years, the "minutes of all meetings of its unit owners and board of directors other than executive sessions, a record of all actions taken by the unit owners or board of directors without a

meeting, and a record of all actions taken by a committee in place of the board of directors on behalf of the association"; and the "records of board of directors or committee actions to approve or deny any requests for design or architectural approval from unit owners." K.S.A. § 58-4616(a).

59. Through its actions, omissions, and otherwise, the Association and its board members, committees, and agents have violated the provisions of the KUCIOBRA.

60. The Somogyes challenge the actions taken by the Association and its board of directors, committees, and agents in violation of the KUCIOBRA and request that this Court strike down all of these actions which fail to comply with Kansas law, and specifically challenge all decisions made by the Association and its board of directors, committees, and agents during its 2011 meetings which were not announced in advance, as required by law, and which purportedly amended the Restrictions in violation of KUCIOBRA.

61. The Somogyes' challenge is brought within the sixty (60) day limit pursuant to K.S.A. § 58-4612(j).

62. The Somogyes seek reasonable attorneys' fees and costs pursuant to K.S.A. § 58-4621(a).

WHEREFORE, the Somogyes pray that this Court strike all actions taken by the Association and its board members, committees, and agents in violation of the Kansas Uniform Common Interest Owners Bill of Rights Act, Bylaws, Declaration, and/or Restrictions; award the Somogyes their reasonable attorneys' fees and costs herein incurred; and for such other and further relief as the Court may deem just and proper.

COUNT III—DECLARATORY ACTION

63. The Somogyes incorporate herein by reference paragraphs 1 through 62 of this Petition as if these paragraphs were more fully set forth herein.

64. An actual case or controversy exists between the Somogyes and the Association as to the permissible roofing materials for all residences constructed in the Subdivision, including the Somogyes' residence.

65. Specific relief may be granted pursuant to K.S.A. § 60-1701 *et seq.* for a declaration of rights that will resolve the controversy giving rise to this proceeding.

WHEREFORE, Plaintiffs Mark and Tammy Somogye pray that this Court enter a judgment respecting rights, remedies, and legal obligations of the parties to this lawsuit, and specifically declare that: any residence constructed in the Subdivision is required to have a roof composed of wood shingles, wood shakes, slate, or pre-colored concrete tile as required in the Restrictions; the Restrictions shall be amended to include shake style, stone-coated steel in the color Weathered Timber or Timberwood as a permissible roofing material; and no other roofing materials shall be permitted in the Nottingham at Heritage Park subdivision without following the proper procedures for modifying the Restrictions as set forth in the KUCIOBRA, Bylaws, Declaration, and Restrictions.

COUNT IV—BREACH OF FIDUCIARY DUTY

66. The Somogyes incorporate herein by reference paragraphs 1 through 65 of this Petition as if these paragraphs were more fully set forth herein.

67. In the performance of their duties, the board members and officers of the Association had a duty to exercise the degree of care and loyalty to the Association

required of an officer or director of a corporation organized, and are subject to the conflict of interest rules governing directors and officers under existing laws.

68. The Association, through its board members and officers, breached this duty, causing the Somogyes damages.

WHEREFORE, Plaintiffs Mark and Tammy Somogye pray that this Court require the Association to disgorge any profits obtained as a result of this breach of duty; require all Board Members and officers of the Association to attend a seminar or presentation regarding their responsibilities as board members and officers and regarding their obligations under the KUCIOBRA; require the Association to inform all Subdivision homeowners of their rights under the KUCIOBRA; award the Somogyes their reasonable attorneys' fees and costs herein incurred; and for such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to K.S.A. § 60-238, the Somogyes demand a trial by jury on all issues so triable in the above-captioned matter.

Respectfully submitted,

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