STATE OF MICHIGAN

COURT OF APPEALS

KELLISON WOODS DEVELOPMENT COMPANY, LLC,

Plaintiff/Counterdefendant-Appellee,

v

BRADLEY S. SOLAREK and KAREN L. SOLAREK, also known as, KAREN L. KURNCZ,

Defendants/Counterplaintiffs-Appellees,

and

KELLISON WOODS CONDOMINIUM ASSOCIATION,

Appellant.

UNPUBLISHED
October 15, 2020

No. 350036
Kalamazoo Circuit Court
LC No. 2015-000446-CH

KELLISON WOODS DEVELOPMENT COMPANY, LLC,

Plaintiff/Counterdefendant-Appellee,

v

BRADLEY S. SOLAREK and KAREN L. SOLAREK, also known as, KAREN L. KURNCZ,

Defendants/Counterplaintiffs-Appellees,

and

OSHTEMO CHARTER TOWNSHIP,

Appellant.

No. 350067
Kalamazoo Circuit Court
LC No. 2015-000446-CH

Before: MURRAY, C.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

This dispute involving the validity of a condominium development began as a claim for forfeiture on a land contract. Plaintiff Kellison Woods Development Company, LLC, the developer of the condominium project, initiated the case against defendants Bradley and Karen Solarek, owners of Units 6, 7, and 8 in the development. The Solareks filed a counterclaim with several claims, including claims for violations of the Condominium Act, MCL 559.101 *et seq*. Among other requests for relief, the Solareks asked the trial court to declare the condominium project, the site plan, and the condominium documents void *ab initio*. Ultimately, the trial court entered a judgment that, among other relief, removed the Solareks' units from the development, granted the Solareks an easement over the common elements in the easement, and ordered the Solareks to pay the developer's attorney fees in the amount of $40,000. Following entry of the judgment, appellants, the Kellison Woods Condominium Association and Oshtemo Charter Township, filed motions to intervene and motions for reconsideration or to vacate the judgment. The trial court denied these motions. Appellants now appeal. For the reasons explained in this opinion, we conclude that, although the trial court did not err by denying the township's motion to intervene, the trial court erred by failing to join the Association as a necessary party. Accordingly, we affirm the postjudgment order denying intervention as to the township but we vacate this order with regard to the Association. We also vacate the judgment, and remand for further proceedings consistent with this opinion.

I. FACTS

The Kellison Woods Development is a condominium development in Oshtemo Charter Township. The master deed establishing the project, as well as bylaws for the project, were recorded on March 28, 2000. Plaintiff Kellison Woods Development Company, LLC, was the developer for the condo project. William Klerk is owner, sole member, and president of the development company. The Solareks own three units—Units 6, 7, and 8—in the Kellison Woods Development. The Solareks' units were part of Phase I of the development. In connection with their purchase of Lot 6, the Solareks entered into a land contract with the developer.

In August 2015, the developer began the current lawsuit by filing a district court complaint, seeking to recover possession of Unit 6 by forfeiture of the land contract for nonpayment. The Solareks responded and filed a countercomplaint, alleging trespass and constructive eviction during the construction of Phase II of Kellison Woods; the Solareks sought damages in excess of $25,000.[1] The district court transferred the case to circuit court.

[1] Although not directly relevant to this appeal, the Solareks' underlying complaints about the development appear to stem from the flooding of their basement, which they contend resulted from surface-water runoff during the construction of Unit 15 at Kellison Woods in 2013. See *Solarek v*

In circuit court, the developer filed an amended complaint for possession of Unit 6. At that time, the amount in arrears totaled $51,049.76. The developer also sought late payment penalties and attorney fees under the land contract agreement. The Solareks responded and filed a counterclaim, which they amended several times. As set forth in their third amended counterclaim, the Solareks alleged: (1) breach of contract, (2) fraud, (3) professional negligence, (4) unjust enrichment, and (5) violations of the Condominium Act. Briefly stated, the Solareks maintained that the Kellison Woods Development was not a valid condominium development. According to the Solareks, although the township conditionally approved Phase I of the development in 1997, the developer (1) failed to comply with conditions imposed for approval of Phase I, (2) failed to obtain approval for construction of Phrase II, and (3) otherwise generally failed to satisfy the requirements of the Condominium Act and the applicable zoning ordinances. The Solareks alleged that these violations supported claims against the developer because, when the developer sold Units 6, 7, and 8 to the Solareks, the developer made representations to the effect that the units were legally created units that were part of a condominium development in compliance with applicable laws. Significant to the issues on appeal, in their request for relief, in addition to requests for damages, attorney fees, and costs, the Solareks asked the trial court for the following relief:

> A. Enter an order to recorded in the Kalamazoo County Register of Deeds declaring that the Master Deed, Bylaws, Recorded Site Plan and any subsequent Amendments are void ab initio;
>
> B. Enter an order to be recorded in the Kalamazoo County Register of Deeds declaring that [the Kellison Woods Development] is not a legal site condo project in Michigan;
>
> C. Grant Permanent injunctive relief against [the developer] prohibiting any future development of The Project by [the developer], any future sale of Units in the Project by [the developer] and any future attempt to enforce the Master Deed and subsequent Amendments;
>
> D. Enter an order declaring that no valid Condominium Association ever existed with respect to the Project and further declaring that any liens issued under the auspices of The Project Association are null and void;
>
> E. Enter an order declaring that [the Solareks'] ownership of Unit 7 of The Project is not part of any valid condominium and further declaring that the Solareks[] hold title to said Unit in fee title absolute, subject to recorded mortgages or record, and further declaring that said Unit shall be legally described with a metes and bounds legal description as unplatted land.

Oshtemo Charter Twp, unpublished opinion of the United States District Court for the Western District of Michigan, issued April 26, 2019 (Case No. 1:18-CV-204); *Solarek v Oshtemo Charter Twp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued November 5, 2019 (Case No. 1:18-CV-204).

Given the Solareks' assertion that the Kellison Woods Development was an illegal development that did not comply with the law, the trial court instructed the parties to bring the township into the action to obtain "some clarification."

As a result, the Solareks filed a third-party complaint against the township, alleging that the developer did not comply with the Condominium Act and local ordinances. And, regarding the township, the Solareks asserted that the township "failed to enforce" "compliance with applicable laws and ordinances," despite have actual knowledge of the developer's noncompliance. The Solareks asked the trial court to "issue a judgment/order of mandamus requiring the Township to make [the developer] comply with all laws and ordinances relating to the Development."

Before trial, there were numerous motions filed; notable among the various motions, the township filed a motion for summary disposition regarding the third-party complaint under MCR 2.116(C)(7), (C)(8), and (C)(10), asserting that governmental immunity applied, that the Solareks failed to state a claim, and that the township was entitled to judgment as a matter of law. Before concluding that the township should be dismissed from the case, the trial court ordered the township to provide an "opinion" about the legality of the condo development. The township complied by providing several documents related to the township's approval of the development, including the opinions of the township's attorney, James Porter, who averred in an affidavit that Phase I and Phase II of the development were "lawfully established" in 1997. Following the submission of these documents from the township, the trial court granted the township's motion for summary disposition and dismissed the township from the case.

Although the township was brought into the lawsuit and then dismissed, appellant Kellison Woods Condominium Association was *never* made a party to the suit, despite arguments from the developer—in response to the Solareks' third motion for summary disposition—that the Association was an "indispensable party" that should be joined in the case because the interests of all homeowners in the Association would be affected by the equitable relief sought by the Solareks.[2]

The matter eventually proceeded to a bench trial that lasted less than an hour. Following arguments from the parties, the trial court granted the Solareks' renewed motion for summary disposition, and the trial court later entered a written order as follows:

> **IT IS HEREBY ORDERED AND ADJUDGED** that Unit 6, 7 and 8 of Kellison Woods Site Condominium (Kellison Woods) were never established as . . . legal units in Kellison Woods and Unit 6, 7 and 8 status as part of Kellison Woods is extinguished nunc pro tunc;

[2] Despite the developer's arguments, the trial court did not expressly decide whether the Association was a necessary party. The trial court simply indicated that "a contractual analysis of the case is the most appropriate route to take." Implicitly, it appears that the trial court viewed the case as a simple contract dispute between the developer and the Solareks. And as a result, the Association and the other homeowners in the development were not joined to the case.

IT IS FURTHER ORDERED AND ADJUDGED that Kellison Woods Development Company LLC's (KWDC) interest it has in Unit 6 and Unit 8 of Kellison Woods are extinguished nunc pro tunc and are hereby vested in fee simple in Bradley S. Solarek and Karen L. (Kurncz) Solarek (Solareks);

IT IS FURTHER ORDERED AND ADJUDGED that KWDC shall execute such other documents as the Solareks may require to discharge any mortgages, liens or executory contracts it holds with respect to Units 6, 7 and 8 of Kellison Woods;

IT IS FURTHER ORDERED AND ADJUDGED that the Master Deed, Bylaws and recorded Site Plan of Kellison Woods, and any subsequent amendments thereto, are void ab initio as to Solareks and as to Units 6, 7 and 8 of Kellison Woods;

IT IS FURTHER ORDERED AND ADJUDGED that Units 6, 7 and 8 are removed from the Site Condominium and shall hereafter have a metes and bounds legal description as set forth in the attached Exhibit A, which property is hereby vested in the Solarek's [sic] in fee simple as unplatted land;

IT IS FURTHER ORDERED AND ADJUDGED that Solareks are granted permanent easements for utilities and for ingress and egress to all their metes and bounds described real property that run with the land across all roads and common areas located in Kellison Woods;

IT IS [FURTHER] ORDERED AND ADJUDGED that the Solareks shall pay to [the developer] attorney fees in the amount of $40,000.

IT IS FURTHER ORDERED AND ADJUDGED that, except as set forth herein each party shall be responsible for their own attorney fees and costs;

IT IS FURTHER ORDERED AND ADJUDGED that this judgment resolves the last pending claim and closes the case.[3]

Following entry of this judgment, the township and the Association each filed motions to intervene and to reconsider or vacate the judgment. The trial court denied the motions to intervene, and having denied the motions to intervene, the trial court also denied the requests for reconsideration or to vacate the judgment because the movants were nonparties.

[3] Although not specifically identified as a consent judgment, during other proceedings the trial court referred to the final judgment as a "judgment presented to the Court" by the parties and a "settlement."

The Association now appeals as of right in Docket No. 350036, and the township appeals as of right in Docket No. 350067.[4] On appeal, appellants argue that the trial court erred by denying their respective motions to intervene. The Association also specifically asserts that it was a necessary party to the action. Additionally, appellants assert that the trial court lacked jurisdiction to declare the development void *ab initio* and that the Solareks' only remedy at this time was to seek damages from the developer under the Condominium Act.

II. STANDARDS OF REVIEW

We review a trial court's decisions regarding joinder and motions to intervene for an abuse of discretion. *Mason Co v Dep't of Community Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011); *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id*. (quotation marks and citations omitted). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't Of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). Whether the trial court had jurisdiction is a question of law, which we review de novo. *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016). This Court also reviews de novo questions involving the interpretation of statutes. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007).

III. JOINDER OF THE ASSOCIATION AS A NECESSARY PARTY

On appeal, as in the trial court, the Association asserts that it was a necessary party under MCR 2.205. We agree. In light of the relief sought by, and afforded to, the Solareks, the trial court abused its discretion by failing to join the Association to the action.

The joinder of necessary parties is governed by MCR 2.205, which states:

> (A) Necessary Joinder. Subject to the provisions of subrule (B) and MCR 3.501 [which relates to class action lawsuits], *persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties* and aligned as plaintiffs or defendants in accordance with their respective interests.
>
> (B) Effect of Failure to Join. When persons described in subrule (A) have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action, and may prescribe the time and order of pleading. If jurisdiction over those persons can be acquired only by their consent or voluntary appearance, the court may proceed with the action and grant appropriate relief to persons who are parties to prevent a failure of justice. In determining whether to proceed, the court shall consider

[4] The appeals were consolidated to advance the efficient administration of the appellate process. *Kellison Woods Dev Co LLC v Solarek*, unpublished order of the Court of Appeals, entered September 4, 2019 (Docket Nos. 350036 and 350067).

(1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;

(2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;

(3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and

(4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.

Notwithstanding the failure to join a person who should have been joined, the court may render a judgment against the plaintiff whenever it is determined that the plaintiff is not entitled to relief as a matter of substantive law.

(C) Names of Omitted Persons and Reasons for Nonjoinder to Be Pleaded. In a pleading in which relief is asked, the pleader must state the names, if known, of persons who are not joined, but who ought to be parties if complete relief is to be accorded to those already parties, and must state why they are not joined. [Emphasis added.]

The purpose of MCR 2.205, "is to prevent the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present." *Mason Co*, 293 Mich App at 489.

In addition, MCR 2.207 states:

Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just. *When the presence of persons other than the original parties to the action is required to grant complete relief in the determination of a counterclaim or cross-claim, the court shall order those persons to be brought in as defendants if jurisdiction over them can be obtained.* A claim against a party may be severed and proceeded with separately. [Emphasis added.]

In this case, as detailed earlier, the Solareks' third amended complaint sought (1) to have the master deed and other condo documents declared void *ab initio*; (2) to have it recorded in the Register of Deeds that the project was not a legal site condo project; (3) to receive injunctive relief to prevent future development, sales of units, and enforcement of the master deed; (4) to have it declared that the Association never existed; and (5) to have the Solareks' units removed from the condo development, vested in the Solareks in fee simple, and described by a metes and bounds description as unplatted land. Despite the developer's assertion that the Association was an indispensable party in light of the relief sought, the Association was not joined as a necessary party. Notwithstanding the Association's absence, as detailed earlier, the final judgment provided the Solareks with relief by (1) ordering that the Solareks' units were never established as legal units and were extinguished nunc pro tunc; (2) ordering that the Solareks were vested with title in

fee simple; (3) voiding the master deed and other condominium documents as to the Solareks and their units; (4) removing the Solareks' units from the development and ordering a metes and bounds description as unplatted land; and (5) granting the Solareks an easement over the condominium roads and common elements.

In light of the final judgment, the Association sought to intervene; specifically, the Association asserted that it was a necessary party under MCR 2.205, and the Association requested that the trial court vacate the judgment. In denying the Association's motion to intervene, the trial court erroneously rejected the Association's contention that the judgment affected the rights of nonparties. The trial court reasoned:

> [T]he judgment as presented the Court recognized that at least those individuals and institutions who were not parties to this case were not to be totally disregarded. Hence the narrow crafting as Counsel, I believe, appropriately did crafting to specifically identify those units the Solareks had—have ownership of as being not part of any particular condominium association. Not—quite frankly—not blowing up the existing association, at least in the minds of the other condo—condominium association owners. That issue was not before the Court and the Court did not issue a ruling in that respect.

Considering the trial court's explanation, we conclude that the trial court's decision rests on an error of law—namely, a failure to recognize the Association's property rights and interests under the Condominium Act that were at issue in this case and that were affected by the judgment. In other words, contrary to the trial court's reasoning, the Association had a "real interest in the litigation," *Mason Co*, 293 Mich App at 489, and the Association constituted a party whose presence was required to grant complete relief in the determination of the Solareks' counterclaims, see MCR 2.205(A).

Condominiums are governed by the Condominium Act. A condominium project, consisting of at least two condo units, is established "upon the recording of a master deed that complies with" the Condominium Act. MCL 559.172(1); see also MCL 559.104(1). A condo unit is the "portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, recreational, use as a time-share unit, or any other type of use." MCL 559.104(3). In contrast, the common elements of a condo development are "the portions of the condominium project other than the condominium units." MCL 559.103(7). "Each co-owner has an exclusive right to his condominium unit *and has such rights to share with other co-owners the common elements* of the condominium project as are designated by the master deed." MCL 559.163 (emphasis added).

In addition, by statute, "[e]ach unit co-owner, tenant, or nonco-owner occupant shall comply with the master deed, bylaws, and rules and regulations of the condominium project and this act." MCL 559.165. See also *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015) ("Bylaws are attached to the master deed and, along with the other condominium documents, the bylaws dictate the rights and obligations of a co-owner in the condominium."). And these condominium documents may only be materially altered with consent—by vote—of the co-owners. See MCL 559.190.

> [I]nherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic subsociety of necessity more restrictive as it pertains to use of condominium property than may exist outside of the condominium organization. [*Bruce E Cohan, MD, PC v Riverside Park Place Condo Ass'n, Inc*, 140 Mich App 564, 569-570; 365 NW2d 201 (1985) (quotation marks and citation omitted; alteration in original).]

In other words, no single co-owner enjoys exclusive rights; rather, the rights of a co-owner are enjoyed "coextensively with other members of the condominium project." *Id*. In a condo project, there are, for example, limitations on the alterations an owner may make to the exterior of his or her property. MCL 559.147. Further, co-owners agree to share in common expenses for the development. See MCL 559.169. A co-owner's "[f]ailure to comply with any of the terms or provisions of the condominium documents, shall be grounds for relief, which may include without limitations, an action to recover sums due for damages, injunctive relief, foreclosure of lien if default in payment of assessment, or any combination thereof." MCL 559.206(1). "Actions on behalf of and against the co-owners shall be brought in the name of the association of co-owners. The association of co-owners may assert, defend, or settle claims on behalf of all co-owners in connection with the common elements of the condominium project." MCL 559.160.

In this case, the relief sought by the Solareks, and the judgment entered by the trial court, affected rights of all co-owners in the development project. First, the judgment awarded the Solareks an easement over the common areas of the condo development. An easement is a limited property interest that imposes a burden on the servient estate. See *Mich Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005). The easement created for the Solareks burdens the common elements, thereby affecting the co-owners' clear statutory rights to share in the common elements. See MCL 559.163. The Association, as representative of the co-owners, was a necessary party to an action involving the creation of a property interest affecting the common elements. See MCL 559.160. Indeed, the grant of an easement in a lawsuit between the Solareks and the developer is of little use because an action determining interests in land "determines only the rights and interests of the known and unknown persons *who are parties to the action*." MCR 3.411(H) (emphasis added). In other words, the absent co-owners are not bound by the judgment in this case, a fact that further supports the conclusion that the Association, as the representative of the co-owners in a dispute involving the common elements, constituted a necessary party under MCR 2.205(A). See 2 Longhofer, Michigan Court Rules Practice, Text § 2205.9 (7th ed). Indeed, although not binding on the co-owners, the judgment purporting to create an easement for the Solareks potentially clouds the co-owners' rights and interests in the common elements. See *Skurski v Gurski*, 329 Mich 474, 477; 45 NW2d 359 (1951) (recognizing, in the context of a necessary-party determination, that even a nonbinding decree could have "the effect of clouding the title to real estate"). Overall, MCR 2.205 is intended "to ensure that all parties having a real interest in the litigation are present," *Mason Co*, 293 Mich App at 489, and for a complete determination of rights and property interests in the

common elements, the Association, as the representative of the co-owners who have an interest in the common elements, was a necessary party. See MCL 559.160.

Second, in granting the Solareks their request to have their units removed from the condo project, the trial court relieved the Solareks of their obligation to comply with the condo documents and to contribute to the common expenses of the development. See MCL 559.165; MCL 559.169; MCL 559.206(1). As a corollary of relieving the Solareks of these obligations, the other co-owners have been stripped of their right to enforce the condo documents against the Solareks, and the co-owners have been effectively apportioned a larger share of the common expenses—all this having been done without the co-owners' participation or consent. Given the mutual rights and obligations of co-owners under the Condominium Act and the implications of declaring any part of the condo development void, the co-owners had a real interest in the case, and the Association was a necessary party to the action. Cf. *Rockwood v Hugg*, 373 Mich 332; 129 NW2d 380 (1964) (concluding that a landowner was a necessary party to a lawsuit to have zoning proceedings declared void).

Overall, considering the Association's rights to the common areas over which the Solareks were granted an easement, as well as the Association's interests in the enforcement of the condominium documents and the Condominium Act against all co-owners, including the Solareks, the Association constituted a party "having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief." See MCR 2.205(A). For this reason, the Association qualified as a necessary party that should have been joined to the case. See MCR 2.205; MCR 2.207.[5] The trial court's decision to the contrary—founded on the erroneous legal conclusion that the rights of nonparties were not implicated in the case—was outside the range of principled outcomes and an abuse of discretion. See *Mason Co*, 293 Mich App at 489; see also *Denton*, 317 Mich App at 314. And, given the exclusion of the Association as a necessary party, the judgment purporting to interfere with the Association's rights and interests is a nullity. See *Wicker v Trombly*, 311 Mich 262, 264; 18 NW2d 817 (1945); see also *Martin v Beldean*, 469 Mich 541, 552; 677 NW2d 312 (2004).

[5] We also see no principled reason for denying the Association's motion to intervene under MCR 2.209. Although timeliness is a consideration when ruling on a motion to intervene, intervention is not foreclosed merely because the motion is filed after judgment is entered, particularly when the Association does not seek to the reap the benefit of a favorable ruling but instead seeks to intervene to challenge an order entered with the apparent agreement of the parties and to the detriment of a necessary party who was not joined to the action or adequately represented by the parties involved. Cf. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 762; 630 NW2d 646 (2001) (permitting intervention to challenge consent judgment affecting nearby landowners); *Precision Pipe & Supply, Inc v Meram Const, Inc*, 195 Mich App 153, 156; 489 NW2d 166 (1992) (allowing intervention as of right to challenge consent judgment). Indeed, timeliness does not appear to have been the reason the trial court denied the Association's motion to intervene; rather, in denying the motion, the trial court committed an error of law by failing to recognize the Association's rights and interests affected by the current litigation.

On appeal, the Solareks fail to directly address whether the Association constitutes a necessary party. Instead, the Solareks assert that there are two Kellison Woods homeowners' associations and that the association that is attempting to intervene does not actually exist but is instead a "counterfeit" association. The "real" association is, according to the Solareks, still under Klerk's control because the procedures for transferring power from the developer to the co-owners were not followed. The Solareks also maintain that Klerk could have sought to involve this "real" association in this lawsuit but failed to so. Because the developer was a party to the suit and Klerk did not seek to add the Association, the Solareks contend that the Association lacks standing and that the motion to intervene was properly denied.[6]

The Solareks' standing argument lacks merit for several reasons. First, as the Association correctly notes on appeal, the Solareks cannot claim that the Association is a "counterfeit" organization that does not exist because the Solareks lack standing to challenge the Association's existence as a nonprofit corporation. See MCL 450.2221; see also *Miller v Allstate Ins Co*, 481 Mich 601, 611; 751 NW2d 463 (2008). Second, even if the Association's legal existence were open to challenge from the Solareks, this would not be a basis to unilaterally exclude the Association from the lawsuit because it would be improper to adjudicate the Association's existence without the Association's participation. Cf. *Graham v Foster*, 500 Mich 23, 30; 893 NW2d 319 (2017) ("The ability of a nonparty to raise a particular defense should not be preemptively adjudicated in the nonparty's absence."). And finally, even if there are, as the Solareks contend, two factions—a "counterfeit" group and a "real" group—the facts remain that there are other co-owners in the development, there is undoubtedly *a* condominium association, and the Association (regardless of who controls it) is a distinct corporate entity from Klerk and his development company.[7] See *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 222-226; 880 NW2d 793 (2015), and cases therein. The Association—a distinct entity from Klerk and the developer—was the appropriate entity to litigate questions regarding the common elements to protect the interests of the co-owners. See MCL 559.160; see also *Salem Springs, LLC*, 312 Mich App at 222-226. The fact, therefore, remains that the Association was a necessary party that should

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[6] In comparison, the developer appears to concede on appeal that individual landowners might have had the right to intervene. But the developer seeks to distinguish the Association from the landowners, and the developer asserts that the Association should not be permitted to intervene. Such an argument ignores that "[a]ctions on behalf of and against the co-owners shall be brought in the name of the association of co-owners." MCL 559.160. The developer's attempt to distinguish the Association from the individual co-owners lacks merit.

[7] The Association is a registered nonprofit corporation, and the Solareks do not dispute this fact. Instead, the Solareks contend that Klerk remains in control because procedures for transferring power from the developer to the homeowners were not followed. On the basis of their contention that Klerk remains in power, the Solareks attempt to create confusion by asserting the existence of "two" associations. But in actuality, there is one registered association, and the Solareks' concerns actually relate to whether the individuals claiming to be in power were properly elected. Who is in charge of the Association is a separate question from whether the Association exists. See generally 19 CJS Corporations, § 526 (providing general overview of challenges to corporate elections). And ultimately, regardless of who is in charge, there is an association, and the Association was a necessary party.

have been joined to the action under MCR 2.205. See also MCR 2.207. The Solareks' arguments to the contrary lack merit.

IV. THE TOWNSHIP'S MOTION TO INTERVENE

On appeal, the township contends that the trial court erred by denying its motion to intervene. We disagree. On the facts of this case, the trial court did not abuse its discretion by denying the township's postjudgment motion to intervene when, despite being an earlier party to the case and knowing of the relief sought by the Solareks, the township waited until after entry of the judgment to file its motion to intervene.

The township asserts that its motion to intervene should have been granted as of right under MCR 2.209(A)(3) or as a matter of permissive intervention under MCR 2.209(B). These provisions state:

> (A) Intervention of Right. On timely application a person has a right to intervene in an action:
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> * * *
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> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (B) Permissive Intervention. On timely application a person may intervene in an action
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> * * *
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
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> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [MCR 2.209.]

MCR 2.209(A)(3) "should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Auto-Owners Ins Co*, 284 Mich App at 612. However, "MCR 2.209(A)(3) and (B) both condition intervention on timely application." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 379; 937 NW2d 716 (2019). "There should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant." *Dean v Dep't of Corrections*, 208 Mich App 144, 150; 527 NW2d 529 (1994), aff'd 453 Mich 448 (1996). For example, "a trial court abuses its discretion in granting a motion to intervene after a judgment favorable to the intervenor has already been entered for the original party to the suit with whom the intervenor is

attempting to align." *WA Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 525; 534 NW2d 206 (1995).

Considering the "considerable reluctance" that courts should show to allow intervention after entry of judgment, the trial court did not abuse its discretion by denying the township's motion. See *Dean*, 208 Mich App at 150. Nowhere in its motion—or on appeal—has the township explained its failure to move for intervention while the main action was pending. See *id*. at 150-151. This failure is particularly notable given that the township was in fact brought into the case as a third-party defendant and plainly provided with notice of the relief sought by the Solareks, including their contention that the development failed to comply with the applicable laws as stated in the Solareks' third amended counterclaim as well as the Solareks' third-party complaint. Indeed, the township was present and represented at the hearing on the Solareks' motion to file their third amended complaint. Yet, despite the issues raised concerning the validity of the development, the township repeatedly sought to be dismissed from the case. And the trial court granted this request. Further, contrary to the township's suggestion on appeal that it believed the validity issue to have been resolved at the time of the township's dismissal, there was no decision from trial court regarding the validity of the development.[8] Rather the Solareks' claims challenging the legality of the development, as stated in their third amended complaint, remained pending. And, despite knowledge of these pending claims, the township did not seek to intervene before trial. See *Precision Pipe & Supply, Inc*, 195 Mich App at 156 (considering notice of claims and fault for any delay in seeking to intervene as factors bearing on motion to intervene). In other words, as explained by the trial court, the township showed "reluctance" to get involved and instead opted to take a "hands off approach."

Indeed, the township waited until after entry of the judgment—which granted the very relief requested by the Solareks in their third amended complaint—to file a motion to intervene. And in a complete about-face from its earlier request to be dismissed, the township asserted for the first time that it should be allowed to intervene to litigate the question whether the development had been lawfully established under the applicable laws and ordinances. A party seeking to intervene must be diligent. See *Sch Dist of Ferndale v Royal Oak Twp Sch Dist No 8*, 293 Mich 1, 11; 291 NW 199 (1940). That is, "[g]enerally, a right to intervene should be asserted within a reasonable time and laches or an unreasonable delay is a proper reason to deny intervention." *Karrip v Cannon Twp*, 115 Mich App 726, 731; 321 NW2d 690 (1982). On the facts of this case, given the township's earlier involvement in the case, its clear knowledge of the issues in dispute in the main action, its "hands off approach" and efforts to be dismissed from the case, and its failure to file a motion to intervene until after entry of the judgment, the trial court did not abuse its discretion by denying the township's motion to intervene under MCR 2.209. See *Dean*, 208 Mich App at 150; *Karrip*, 115 Mich App at 731.

[8] The township believes that the issue was resolved because it provided information about the township's approval of the development in 1997. However, the township offered this information in the form of an "opinion" from the township's attorney. Whether the attorney's interpretation of the law was correct was never decided in the trial court.

V. JURISDICTION AND AVAILABLE REMEDIES

Finally, the Association[9] argues on appeal that the Solareks' request to have the project declared void *ab initio* constitutes an untimely, collateral attack on the township's approval of the project and that the trial court lacked jurisdiction to declare the condo development void *ab initio* in contravention of the township's approval of the development in 1997. According to the Association, at this time, the Solareks' sole possible remedy consists of a claim for damages against the developer under MCL 559.215(2). To the extent that the Solareks contest the propriety of the township's approval of the development, we agree that the trial court lacked jurisdiction to declare any portion of the condo development void *ab initio*. With that said, the trial court had jurisdiction over the Solareks' claims for breach of contract, fraud, and violation of the Condominium Act, and we are not persuaded by the Association's contention that monetary damages are necessarily the Solareks' only possible remedy.

"[J]urisdiction refers to the power of a court to act and the authority a court has to hear and determine a case." *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 269; 583 NW2d 512 (1998). "The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992) (quotation marks and citations omitted). Further, jurisdiction "should be determined not by how the plaintiff phrases its complaint, but by the relief sought and the underlying basis of the action." *Colonial Village Townhouse Co-op v City of Riverview*, 142 Mich App 474, 478; 370 NW2d 25 (1985).

Assuming competent jurisdiction, once a decision has been reached, a party cannot use a second proceeding to collaterally attack a tribunal's decision in a previous proceeding. *Workers' Compensation Agency Dir v MacDonald's Indus Prods, Inc*, 305 Mich App 460, 474; 853 NW2d 467 (2014).

> The final decree of a court of competent jurisdiction made and entered in a proceeding of which all parties in interest have due and legal notice and from which no appeal is taken cannot be set aside and held for naught by the decree of another

[9] On appeal, the township also raises arguments regarding jurisdiction and the remedies available to the Solareks. Having concluded that the trial court did not abuse its discretion by denying the township's motion to intervene, the township remains a nonparty without standing to appeal the trial court's substantive rulings. See *In re Sanders*, 495 Mich 394, 419; 852 NW2d 524 (2014); see also 1 Restatement of Judgments, § 115, comment *a* ("Only parties to an action are entitled to relief in the proceeding itself against the consequences of a judgment. Persons who are not parties but whose interests may be affected by a judgment must intervene in the action and thus become parties in order to have the judgment set aside or modified."). Nevertheless, we will consider these questions of law because the issues have also been raised by the Association on appeal. See generally *Skurski*, 329 Mich at 478 (recognizing that, upon intervention, a necessary party "becomes invested with the rights of a defendant to contest plaintiff's claimed right to recovery or redress"). See also *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 444-445; 695 NW2d 84 (2005).

> court in a collateral proceeding commenced years subsequent to the date of such final decree. [*Id*. (quotation marks and citation omitted).]

For example, a challenge to an administrative decision of a planning commission must be brought in a direct appeal from the planning commission, and an untimely challenge to the planning commission's decision will be dismissed for lack of subject-matter jurisdiction. *Krohn v Saginaw*, 175 Mich App 193, 196-198; 437 NW2d 260 (1988).

In this case, in their counterclaim, the Solareks sought to have the condominium development, the condominium documents, and the condo site plan declared void *ab initio* and to instead have their property described by a metes and bounds description as unplatted land. Although the Solareks couched their requests in terms of a breach of land contract and allegations that the developer committed fraud by making misrepresentations when selling property to the Solareks, the relief sought by the Solareks was clear—they wanted the condo development project declared void *ab initio*, i.e., "null from the beginning," *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 102 n 2; 825 NW2d 329 (2012) (quotation marks, citation, and brackets omitted)—contrary to the township's approval of the development and the site plan in 1997. However, the proper procedure for challenging the township's initial approval was to timely appeal the decision of the township's planning commission, and the time for that appeal has long passed. See MCR 7.122(B). "The time limit for an appeal to the circuit court is jurisdictional; a circuit court lacks jurisdiction over an untimely-filed claim of appeal." *Quality Market v Detroit Bd of Zoning Appeals*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 346014); slip op at 3. Accordingly, to the extent the Solareks contest the propriety of the township's 1997 approval of the development, the trial court lacked jurisdiction over the Solareks' request for declaratory relief to have any portion of the condo development declared void *ab initio*. See *Krohn*, 175 Mich App at 196-198.

With that said, it does not follow that the trial court lacked jurisdiction to decide this case. That is, we do not suggest that the trial court lacked jurisdiction over the contract action, or claims of fraud or violation of the Condominium Act. And incidental to such claims may be a determination whether the developer violated the Condominium Act in a manner that adversely affected the Solareks. See MCL 559.215. Indeed, while the Association focuses on the approval in 1997, there were events that transpired after that approval in 1997, including questions whether the developer complied with conditions imposed by the township and whether Phase II was ever approved. But regardless of these subsequent factual developments, the fact remains that, at this juncture, the trial court may not disregard the township's approval—given more than 20 years ago—and declare the project void *ab initio*. See *Krohn*, 175 Mich App at 196-198. In other words, the Solareks may not use this action to collaterally attack the township's approval in 1997.

In contrast to this conclusion, the Solareks assert that the trial court had jurisdiction to declare the project void *ab initio* because circuit courts have jurisdiction to grant declaratory relief under MCR 2.605. Under MCR 2.605(A)(1), "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." However, the power to grant declaratory judgment under MCR 2.605 does *not* expand a court's subject-matter jurisdiction. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Rather, for purposes of MCR 2.605, "an action is considered within the

jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." MCR 2.605(A)(2). Contrary to the Solareks' argument, the trial court's general authority to grant declaratory judgment did not provide the trial court with jurisdiction over an untimely challenge to an administrative decision from 1997. In sum, to the extent the Solareks challenged the propriety of the township's approval and sought to have the project declared void *ab initio*, the trial court lacked jurisdiction over this untimely challenge to the township's approval.

In addition to contesting the trial court's jurisdiction, the Association also contends on appeal that the Solareks' only available remedy is to seek damages from the developer under MCL 559.215(2). We disagree.

In their third amended counterclaim, the Solareks alleged a violation of the Condominium Act, specifically violations of MCL 559.111, MCL 559.121, MCL 559.131, MCL 559.152, MCL 559.171, MCL 559.183, MCL 559.184a, MCL 559.137, and MCL 559.141. And, in seeking relief for violations of the Condominium Act, the Solareks specifically relied on MCL 559.215, which states:

> (1) A person or association of co-owners adversely affected by a violation of or failure to comply with this act, rules promulgated under this act, or any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction. The court may award costs to the prevailing party.
>
> (2) A developer who offers or sells a condominium unit in violation of [MCL 559.121 or MCL 559.184a] is liable to the person purchasing the condominium unit for damages. [MCL 559.215.]

On appeal, relying on MCL 559.215, the Association contends that the Solareks' remedy for violations of the Condominium Act is limited to damages from the developer. Although MCL 559.215(2) provides for a damage remedy, when read as a whole, MCL 559.215 does not limit available remedies to damages. In particular, under MCL 559.215(2), if a developer violates MCL 559.121 or MCL 559.184a,[10] a person purchasing the condo unit may bring a claim for damages. And, to the extent that the Solareks claimed a violation of MCL 559.121 or MCL 559.184a, their sole remedy under MCL 559.215(2) would be a claim for damages against the developer. That is, because the Solareks have an adequate remedy provided by statute, equitable relief for violations of MCL 559.121 or MCL 559.184a would be precluded. See *Gleason v Kincaid*, 323 Mich App 308, 318; 917 NW2d 685 (2018) ("[W]hen an adequate remedy is provided by statute, equitable relief is precluded.").

In comparison to the specific relief afforded by MCL 559.215(2), MCL 559.215(1) is broader, both in terms of the wrongs at issue and the relief available. Again, under MCL 559.215(1), a person "adversely affected by *a violation of or failure to comply* with this act,

[10] MCL 559.184a requires a developer to provide prospective purchasers with particular documents, and MCL 559.121 mandates, in part, that a condo unit "shall not be offered for its initial sale in this state unless the offering is made in accordance with" the Condominium Act.

rules promulgated under this act, or any provision of an agreement or a master deed may bring an action *for relief* in a court of competent jurisdiction." (Emphasis added.) Unlike MCL 559.215(2), MCL 559.215(1) is not concerned with violations of specific provisions of the Condominium Act—it provides a means to redress a violation of the Condominium Act, rules promulgated under the act, and condominium documents. To redress these violations, MCL 559.215(1) generally allows for "an action for relief," not specifically an action for damages against the developer as in MCL 559.215(2). "Relief" in this context would encompass "[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court. — Also termed remedy." *Black's Law Dictionary* (11th ed). Generally speaking, "courts possess an inherent power to afford equitable remedies," and we will not read MCL 559.215(1)'s silence on the specific remedies available in a private action for relief from violations of the Condominium Act as limiting a court's power to fashion an appropriate equitable remedy. See *Tkachik v Mandeville*, 487 Mich 38, 59; 790 NW2d 260 (2010). In short, contrary to the Association's arguments, the relief available to the Solareks under MCL 559.215(1) is not necessarily limited to monetary damages, rather relief in a private cause of action afforded under MCL 559.215(1) could potentially include equitable relief.

With that said, we do not hold at this time that the relief granted to the Solareks in this case was appropriate. Frankly, the Solareks' claims are muddled, the factual record is undeveloped, and it is not clear what specific violations of the Condominium Act are supposed to have occurred. Perhaps more importantly, there is absolutely no explanation how essentially removing the Solareks' units from the condo development will equitably redress these unspecified and unproven violations of the Condominium Act, particularly when the trial court's judgment excuses the Solareks from compliance with the Condominium Act and condo documents to the determinant of other co-owners who were not a party to the action. See *Tkachik*, 487 Mich at 45-46 ("Equity jurisprudence mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life.") (quotation marks and citation omitted; alteration in original); *Kernen v Homestead Dev Co*, 232 Mich App 503, 514; 591 NW2d 369 (1998) (including interests of third-parties and the public as considerations when granting equitable relief, such as an injunction).

On this record, particularly when the Association was not joined to the action as a necessary party, we vacate the judgment. The trial court may not be categorically precluded from fashioning some form of equitable relief under MCL 559.215(1) to redress alleged violations of the Condominium Act, but the relief afforded in this case—affecting the rights of the co-owners as represented by the Association—is a nullity without joinder of the Association as a necessary party. See *Wicker*, 311 Mich at 264; see also *Martin*, 469 Mich at 552.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron