

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2019-006893

01/02/2020

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT  
S. Motzer/S. Stulz  
Deputy

MARY BEHAR

DAVID E WOOD

v.

MONTANA DEL SOL CONDOMINIUM  
ASSOCIATION

JONATHAN D EBERTSHAUSER

JUDGE KILEY

MINUTE ENTRY

In 2016, Plaintiff Mary Behar, individually and on behalf of The Behar Revocable Trust, (the "Plaintiff") purchased Unit No. 223 (the "Unit") in the Montana Del Sol Condominium community ("Montana Del Sol"), a condominium community in the city of Scottsdale which is managed by Defendant Montana Del Sol Condominium Association (the "Association"). The Association, all of the units within the community, and all of the owners of those units are bound by the Condominium Declaration for Montana Del Sol Condominium (the "Declaration").

Section 4.17 of the Declaration provides in part that

[a]ll valid laws, zoning ordinances, and regulations of all governmental bodies having jurisdiction over the Condominium shall be observed. Any violation of such laws, zoning ordinances or regulations shall be a violation of this Declaration.

Declaration, attached as Exhibit B to Plaintiff's Separate Statement of Facts in Support of Its [sic] Motion for Summary Judgment ("PSOF"), at § 4.17 ("Section 4.17"). At the time the Plaintiff purchased her Unit, a municipal ordinance prohibited short-term rentals (*i.e.*, rentals for less than thirty days) of real property located in residential areas in Scottsdale. Because Section 4.17

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incorporates “all valid laws [and] zoning ordinances,” Section 4.17 had the effect of prohibiting the short-term rental of units within Montana Del Sol.

On January 1, 2017, A.R.S. § 9-500.39 went into effect. That statute prohibits cities and towns from “prohibit[ing] vacation rentals or short-term rentals.” A.R.S. § 9-500.39(A). As the Association acknowledges, “[t]he Legislature’s adoption of A.R.S. § 9-500.39 served to nullify and preempt the applicable City of Scottsdale municipal ordinance” that had barred such short-term rentals. Defendant's Response to Plaintiff's Motion for Summary Judgment (“Response”) at p. 2.

On or about June 7, 2018, roughly a year and half after A.R.S. § 9-500.39 went into effect, the Association’s Board of Directors proposed an amendment to the Declaration (the “Third Amendment”) to prohibit property owners within Montana Del Sol from leasing their units for terms of less than thirty days, or from using their units for vacation rental or timeshare purposes. It is undisputed that the Third Amendment was not passed unanimously, but was passed with the support of roughly two-thirds of the property owners. *See* PSOF at p. 8 ¶¶ 42, 44; Defendant’s Controverting Statement of Facts and Separate Statement of Facts in Support of Its Response to Plaintiff’s Motion for Summary Judgment at p. 11 ¶¶ 42, 44.

The Plaintiff seeks, *inter alia*, a declaration that the Third Amendment is invalid. *See* Verified First Amended Complaint at ¶ 41. In the Plaintiff’s Motion for Summary Judgment (the “Motion”), she asserts numerous challenges to the validity of the Third Amendment. *See generally* Motion. The Court only need address one such challenge, because it is dispositive.

A.R.S. § 33-1227 provides in part that, while a declaration may generally be amended by a 67% majority of unit owners, the “unanimous consent of the unit owners” is required to adopt an amendment that “change[s]...the uses to which any unit is restricted.” A.R.S. § 33-1227(A), (D).<sup>1</sup> The Plaintiff argues that the Third Amendment’s ban on short-term rentals is a restriction on “the use” to which the units in Montana Del Sol may be put, and therefore that the Third

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<sup>1</sup> A.R.S. § 33-1227(D) reads, in its entirety, “Except to the extent expressly permitted or required by other provisions of this chapter, an amendment shall not create or increase special declarant rights, increase the number of units or change the boundaries of any unit, the allocated interests of a unit or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.” A.R.S. § 33-1227(D). The Declaration similarly provides, “Except to the extent expressly permitted or required by the Condominium Act, an amendment to the Declaration shall not create or increase Special Declarant Rights, increase the number of Units or change the boundaries of any Unit, the allocated Interest of a Unit, or the use as to which any Unit is restricted, in the absence of unanimous consent of Unit Owners.” Declaration, attached as Exhibit B to PSOF, at § 12.5.2.

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Amendment required the unanimous approval of the unit owners. Its failure to win unanimous approval, she argues, renders the Third Amendment invalid. Motion at pp. 7-12.

In response, the Association contends that “the legislative intent behind A.R.S. § 33-1227(D) was never to require unanimity for leasing restrictions or anything other than an amendment that would change the use of the property from residential to commercial.” Response at p. 8.

The Court sees no basis for the Association's contention that the term “use” as used in A.R.S. § 33-1227 refers only to “residential” or “commercial” uses. Numerous courts that have considered that argument have rejected it. *See, e.g., Shorewood West Condo. Ass'n v. Sadri*, 992 P.2d 1008, 1013 (Wash. 2000) (interpreting term “use” as used in statute governing declarations “to mean all uses and not just general categories of use such as residential use or commercial use.”); *Filmore, LLLP v. Unit Owners Ass'n of Ctr. Pointe Condo.*, 333 P.3d 498, 501, 505 (Wash. App. 2015) (affirming trial court’s determination that declaration’s amendment purporting to limit the number of units within the complex that could be leased to tenants was invalid because it was passed by only 67 percent of unit owners, rather than the supermajority of 90% of unit owners that was required, by statute, for amendments that “change...the uses to which any unit is restricted,” and rejecting the contention that “the legislature intended ‘use’ to refer only to the distinction between residential versus nonresidential uses...”).

The Court finds, instead, that “use” is a broad term which, in reference to property, is understood to mean “the legal enjoyment of property that consists in its employment, occupation, exercise or practice.” *Filmore*, 333 P.3d at 504, quoting Webster’s Third New International Dictionary (2002). Consistent with the commonly-understood meaning of the term “use,” case law recognizes that limits or prohibitions on short-term rentals are restrictions on the “use” of the property. *See, e.g., Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex.App. 2015) (affirming temporary injunction against enforcement of ordinance prohibiting short-term rentals, the Court repeatedly referred to ordinance’s prohibition on plaintiff’s “use” of her home for short-term rentals); *Kiekel v. Four Colonies Homes Ass'n*, 162 P.3d 57, 62 (Kan.App. 2007) (holding that amendment to bylaws, which was adopted by simple majority of lot owners and which imposed restrictions on owners’ right to lease their property to tenants, was invalid because it conflicted with governing declaration, which did not authorize the imposition of “property use restrictions through the passage of bylaws”; “[A]ny property use restrictions, including restrictions on renting, [had] to be achieved through an amendment to the [d]eclaration.”).

“Unless otherwise defined, words in a statute are construed according to their plain and ordinary meaning.” *Beatie v. Beatie*, 235 Ariz. 427, 431, 333 P.3d 754, 758 (App. 2014). The Court finds that, in accordance with the plain and ordinary meaning of the word “use,” that the Third Amendment’s ban on short-term rentals at Montana Del Sol effected a “change” in “the uses

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to which any unit is restricted” within the meaning of A.R.S. § 33-1227(D). As such, the unanimous vote of the unit owners was required to pass the Third Amendment. Its failure to secure a unanimous vote renders it invalid.

In support of its position, the Association asserts that “the language” of A.R.S. § 33-1227(D) “lends itself to different meanings,” and cites case law for the proposition that, “[w]hen the meaning of [a] statute cannot be discerned from its language alone,” the legislative intent may be discerned from such factors as the statute’s “historical background, effects and consequences, and spirit and purpose.” Response at p. 6, *quoting Calik v. Kongable*, 195 Ariz. 496, 500, 990 P.2d 1055, 1059 (1999). The Association goes on to discuss “the historical background” of the Arizona Condominium Act, asserting that Arizona's act is based on the Uniform Condominium Act (“UCA”) and that “leasing restrictions are not expressly considered ‘use restrictions’ that require unanimous consent under the original UCA.” Response at pp. 6, 7-8.

The Court finds this argument unpersuasive. Because A.R.S. § 33-1227(D) is not ambiguous, the interpretation of that statute need go no further than a reading of its text. *See Montgomery v. Harris*, 237 Ariz. 98, 100, 346 P.3d 984, 986 (2014) (“The best and most reliable index of a statute’s meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute’s construction.”) (citation and internal quotations omitted). An inquiry into the legislative history of A.R.S. § 33-1227(D) is, therefore, neither necessary nor appropriate. *Bridgestone Retail Tire Operations v. Indus. Comm’n of Ariz.*, 227 Ariz. 453, 455, 258 P.3d 271, 273 (App. 2011) (“If the [statutory] language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation.”) (citation and internal quotations omitted). Moreover, as the Plaintiff correctly points out, the Association's Response “offers no legislative history from Arizona.” Plaintiff’s Reply in Support of Motion for Summary Judgment (“Reply”) at p. 7. The legislative history of other statutes enacted in other states is of little relevance when an Arizona court is called upon to interpret an unambiguous Arizona statute.

Noting that the Declaration prohibits the use of units for commercial purposes, the Association contends that “[s]hort term rentals are inherently inconsistent with residential use,” and are, instead, “considered a commercial use,” which is “prohibited by the terms of the Declaration.” Response at p. 16.

The Association’s assertion that short-term rental use is commercial, rather than residential, in nature is inconsistent with case law recognizing that the short-term rental of a home is not a “commercial use.” *See, e.g., Tarr v. Timberwood Park Owners Ass’n, Inc.*, 556 S.W.3d 274, 291-92 (Tex. 2018) (“[S]o long as the occupants to whom [homeowner] rents his single-family residence use the home for a ‘residential purpose,’ no matter how short-lived,” homeowner’s use of residence for short-term rentals “does not qualify as a commercial use.”); *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Ida. 2003) (“[T]he rental of residential property for residential

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purposes is more appropriately deemed residential as opposed to business use.”); *Houston v. Wilson Mesa Ranch Homeowners Ass’n, Inc.*, 360 P.3d 255, 260 (Colo.App. 2015) (“[S]hort-term vacation rentals...are not barred by the commercial use prohibition in the covenants.”); *Estates at Desert Ridge Trails Homeowners Ass’n v. Vazquez*, 300 P.3d 736, 740-41 (N.M.App. 2013) (rejecting argument that, although “long-term rentals...are a permissible residential use,” short-terms rentals “by the nature of their duration, are transformed into a business or commercial purpose”).

More importantly, the Association’s contention that the short-term rental of a unit within Montana Del Sol constitutes a prohibited commercial use is inconsistent with the plain language of the Declaration itself. In providing that all units are to be used exclusively for residential purposes, the Declaration expressly states that “[t]he leasing of a Unit by the Unit Owner shall not be considered a trade or business within the meaning of this Section.” Response at p. 5. *See also* Declaration, attached as Exhibit B to PSOF, at § 4.1. The Declaration thus makes clear that the rental of an owner’s unit does not constitute a prohibited “trade or business.”

The Association argues that the language of the Declaration providing that the leasing of a unit shall not be considered an impermissible “trade or business” refers only to leases of longer than 30 days. Response at p. 5 (“[T]he limited references in the Declaration to leasing must be read as referring to leases for thirty (30) days or more.”). In support of its argument, the Association notes that, at the time the Declaration was adopted, short-term rentals within Montana Del Sol were prohibited by municipal ordinance, and that Section 4.17 of the Declaration expressly incorporates all valid laws and ordinances. *Id.*

To accept the Association's argument on this point would require the Court to rewrite the unambiguous language of the Declaration to add limitations and conditions that are simply not there. The Declaration is, of course, a contract, *Cypress on Sunland Homeowners Ass’n v. Orlandini*, 227 Ariz. 288, 297, 257 P.3d 1168, 1177 (App. 2011), and, as with any contract, the Court is not free to rewrite it to add terms or provisions. *See, e.g., IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd. P’ship*, 228 Ariz. 61, 66-67, 263 P.3d 69, 74-75 (App. 2011) (“[T]he court will not..add something to the contract which the parties have not put there.”) (citation and internal quotations omitted). Because the Declaration provides that “[t]he leasing of a Unit by the Unit Owner shall not be considered a trade or business within the meaning of this Section,” the Court is not free to interpret the Declaration to mean something different, *i.e.*, that the leasing of a unit *may* or *may not* be an impermissible trade or business, depending on the length of the lease term.

In support of its position that A.R.S. § 33-1227(D) does not require that the Third Amendment be adopted by a unanimous vote, the Association argues that the Plaintiff’s “interpretation of A.R.S. § 33-1227(D) would preclude an association from exercising its right to

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regulate the time period for rental [*sic*]” because “the unanimous consent threshold for a community of any measurable size” is, in the Association’s view, “entirely unachievable.” Response at p. 14. The fact that the “unanimity” requirement of A.R.S. § 33-1227(D) may be difficult to achieve is not, however, relevant to the Court’s interpretation of that statute. Whether the unanimous consent of unit owners *should be* required, or whether a lesser degree of consensus should suffice, is a policy decision that is the Legislature’s, not this Court’s, to make. As the Plaintiff correctly argues, “policy considerations cannot create an ambiguity when the words on the page are clear.” Reply at p. 3, *quoting SAS Inst., Inc. v. Iancu*, \_\_ U.S. \_\_, \_\_, 138 S.Ct. 1348, 1358 (2018).

The Court finds that, by prohibiting short-term rentals, the Third Amendment effects a change in the uses to which units at Montana Del Sol are restricted, and therefore that the Third Amendment could be validly adopted only by the unanimous consent of unit owners. A.R.S. § 33-1227(D). Because it was not adopted by a unanimous vote, it is invalid. Accordingly,

**IT IS ORDERED** granting the Plaintiff’s Motion for Summary Judgment to the extent it seeks a declaration that the Third Amendment is void because it was not adopted by a unanimous vote of the property owners.

**IT IS FURTHER ORDERED** denying the Plaintiff’s Motion to Strike Defendant’s Response to Plaintiff’s Separate Statement of Facts.