

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-094239

01/25/2021

HONORABLE TRACEY WESTERHAUSEN

CLERK OF THE COURT
C. Avena
Deputy

ROBERT GIEDT, et al.

KEVIN R HARPER

v.

TREVISO COMMUNITY ASSOCIATION

NICHOLAS C NOGAMI

ALTERNATIVE DISPUTE
RESOLUTION - CCC
JUDGE WESTERHAUSEN

MINUTE ENTRY

Ruling denying Treviso’s motion to compel alternative dispute resolution.

Plaintiffs Robert and Leslie Giedt applied to Defendant Treviso Community Association (a homeowners association) for the construction of a pergola on their property. After the Giedts built the pergola, they and Treviso developed a conflict. This lawsuit resulted:

First Cause of Action – breach of contract/duty of good faith and fair dealing;

Second Cause of Action – declaratory judgment;

Third Cause of Action – Violation of A.R.S. Sections 33-1803/1805 (planned communities legislation); and,

Fourth Cause of Action – breach of fiduciary duty.

Treviso filed a “Motion to Compel Arbitration.” 9/11/2020 Filing ID 11993591. It asked the Court to send the case to alternative dispute resolution (“ADR”) under the documents that govern the association. The Association’s Declaration states at Article 10.4:

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Alternative Dispute Resolution. Any dispute or claim between or among... (ii) any Owner and another Owner; or (iii) the Association and any Owner regarding any controversy or claim between the parties, including any claims based on contract, tort, or statute, arising out of or relating to (i) the rights or duties under this Declaration... shall be subject first to negotiation, then mediation, and then arbitration as set forth in this Section 10.4 prior to any party to the Dispute instituting litigation with regard to the Dispute.

There is an exception to the ADR clause, not applicable here.

The response¹ from the Giedts was that identical governing documents at issue in the instant matter were already the subject of an appellate opinion: *Saguaro Highlands Community Ass'n v. Biltis*, 224 Ariz. 294, 298 Para 14 (App. 2010):

¶ 14 In sum, under a plain language reading of the CC & Rs as a whole, section 10.4 applies to disputes over alleged construction defects, as the preamble to article 10 indicates, and 9.1² applies to enforcement actions related to violations of the CC & Rs. Therefore, the Association or any owner would have the authority to take action to obtain an injunction, under section 9.1, “to compel removal of any [i]mprovements constructed in violation of [the CC & Rs][>>>>.]” As did the superior court, we read sections 9.1 and 10.4 to represent distinct procedures for resolving disputes between the Association and individual homeowners concerning violations of the CC & Rs—construction of an improvement made by the homeowner, on the one hand, and construction defects by a

¹ “Response to Defendant Treviso Community Association’s Motion to Compel Arbitration,” 9/29/2020 10:05:23 AM
Filing ID 12050417

² The Section 9.1 at issue in *Saguaro* is identical to Section 9.1 here. In *Saguaro*, it read: “The Association or any Owner shall have the right to enforce the Project Documents in any manner provided for in the Project Documents or by law or in equity, including, but not limited to, an action to obtain an injunction to compel removal of any Improvements constructed in violation of this Declaration or to otherwise compel compliance with the Project Documents. ... If any lawsuit is filed by the Association or any Owner to enforce the provisions of the Project Documents or in any other manner arising out of the Project Documents or the operations of the Association, the prevailing party in such action shall be entitled to recover from the other party all attorneys’ fees, costs and expenses incurred by the prevailing party in addition to any relief or judgment ordered by the court in the action (including postjudgment attorneys’ fees and costs).”

Saguaro, 224 Ariz. at 297.

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developer or contractor, on the other. Because the dispute at issue in this case does not involve a construction defect, Article 10 of the CC & Rs is not applicable and the superior court did not err in denying the motion to compel arbitration.

While in *Saguaro*, the association was the plaintiff seeking to obtain an injunction to compel removal of a swing set, and here, it is the homeowners seeking relief, the Court of Appeals has already held that Article 10 and the Section 10.4 ADR provision of the governing documents applies only to construction defects.

This Court is bound by *Saguaro*. It finds that Section 9.1, not Section 10.4, governs the enforcement issues in this case, and denies the motion to compel ADR.