

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-019613

02/05/2008

HONORABLE A. CRAIG BLAKEY II

CLERK OF THE COURT  
L. Gilbert  
Deputy

MIRAGE CROSSING RESORT CASITAS  
HOMEOWNERS ASSOCIATION INC

JOHN E CHAIX

v.

MIRAGE HOMES CONSTRUCTION INC, et al.

JILL ANN HERMAN

JACK G BARONE  
DANIEL A BEATTY  
JASON J BLISS  
ADAM B CAMPBELL  
DOUGLAS H FITCH  
MICHAEL J FRAZELLE  
MICHAEL L GREEN  
SUSANNE E INGOLD  
MELISSA LIN  
ANDREW R PESHEK  
JAN-GEORG ROESCH  
KACI YOUNG BOWMAN  
JOHN A ELARDO  
WILLIAM R METTLER JR.  
F LISA ALLEN  
LLOYD J ANDREWS  
MARK ANDREW NICKEL

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MINUTE ENTRY

This matter has been under advisement on numerous motions for summary judgment. The Court has considered the memoranda and the voluminous attachments, heard oral argument and now rules as follows:

**Standing**

Defendants/Third-Party Plaintiffs Mirage Homes Construction, Inc. and Mirage Homes, LLC (“Mirage”) and Third-Party Defendant Castle Drywall move for summary judgment regarding Plaintiff’s right to bring a dwelling action pursuant to A.R.S. §33-2002. The statute allows a homeowner’s association (“HOA”) to file a dwelling action if certain prerequisites are met. To fulfill these requirements, the HOA must provide full written disclosure to every association member setting forth “all material information” relating to the filing of the civil action. Once the disclosure is issued, the HOA must have a meeting with the association members and its board of directors. The board of directors may then vote to file an action. A.R.S. §33-2002(A)(1)-(3).

Plaintiff contends that it has substantially complied with §33-2002, that its suit is allowed by §33-1242 because “common elements” within the Association is the focus, not defects within the unit owners’ boundaries. Furthermore, even if it has not complied with the statute, Mirage and Castle Drywall lack the ability to challenge compliance.

The Court finds that Defendants and Third-Party Defendants have the right to challenge Plaintiff’s standing. Otherwise, individual unit owners may not be bound by the outcome of the present suit, resulting in further liability to Mirage and Castle Drywall.

The Court further finds that Plaintiff has failed to establish its compliance with §33-2002. Mr. Jeffrey Hennick’s Affidavit does not prove statutory compliance nor does Plaintiff’s counsel’s September 20, 2005 letter to the “homeowners” or his December 19, 2005 letter to the board of director’s comply with the statute. There is no evidence that the HOA ever provided its members with the necessary “material information” required by §33-1242(A)(1). Therefore, any board authorization to file an action was premature.

The Court further finds that A.R.S. §33-1242 does not allow the requirements of §33-2002 to be ignored. Instead, A.R.S. §33-2002 begins: “[n]otwithstanding any provision to the contrary in . . . chapters 9 . . . of this title and in addition to any requirements prescribed in the community documents of a homeowners’ association, a homeowners’ association may file a homeowners’ association dwelling action only after” material information is disclosed to all

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members. *See* 33-2002(A) and (A)(1). This information includes how any action “will be funded.” *Id.* At (A)(1). Here, no written information was provided by the HOA to its members.

Finally, Plaintiff’s argument that it is merely seeking redress for damages to the common elements or the limited common elements which the association has a duty to maintain or repair, and thus does not need the approval of the Association’s members, does not relieve the HOA from its statutory obligation. Because the HOA is funded by its members, the Association has a duty to inform them whenever HOA monies are to be used to prosecute a lawsuit. Accordingly, finding that no genuine issue of material fact exists and that the Defendants are entitled to judgment as a matter of law,

IT IS ORDERED granting Mirage’s Motion for Summary Judgment re: Compliance with A.R.S. §33-2002, as well as Castle Drywall’s similar Motion re: Standing.

With respect to the Third-Party Defendant GAC, Inc.’s (“GAC”) Motion for Summary Judgment re: HVAC Claims, for the reasons set forth above the Court finds that GAC is entitled to summary judgment. Therefore,

IT IS ORDERED granting GAC’s Motion for Summary Judgment re: HVAC Claims. The Court’s ruling does not address whether the Plaintiff can file claims on behalf of the individual unit owners.

IT IS FURTHER ORDERED granting summary judgment in favor of all Third-Party Defendants who joined in one or more of the above motions.

**Liability Motions**

While the Court believes that Plaintiff’s own Motion for Partial Summary Judgment re: Liability, as well as its argument in support of the issue of extrapolation, is untenable considering the facts and the methodology used in this case, in light of the above rulings the Court finds that it is unnecessary to address either Plaintiff’s motion or the Defendants or Third-Party Defendants’ Motion for Summary Judgment on Claims for Damages for Allegations of Defect Not Supported by Evidence, or Mirage’s motions regarding Plaintiff’s breach of contract and breach of fiduciary duty claims.

The Court’s rulings on the Defendants and the Third-Party Defendants’ motions regarding the issues of indemnification and/or the duty to defend will be issued via separate minute entry.