

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-016141

02/08/2013

HONORABLE LISA DANIEL FLORES

CLERK OF THE COURT
D. Glab
Deputy

BERGER FARMS INC

STEVEN W CHEIFETZ

v.

ANGEL PARK CONDOMINIUM
ASSOCIATION, et al.

MARK E LINES

ORAL ARGUMENT HELD

Courtroom 412 – East Court Building

9:32 a.m. This is the time set for oral argument on Defendant John Kowatt's Motion to Dismiss. Plaintiff is represented by counsel, Steven W. Cheifetz. The Bergers are present. Defendants are represented by counsel, Mark E. Lines.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Argument is held.

IT IS ORDERED taking the motion under advisement.

9:55 a.m. Matter concludes.

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LATER:

The Court heard oral argument on Defendant Kowatt's Motion to Dismiss, filed November 5, 2012. A response and reply were filed. The Court considered the parties' papers related to the motion, their arguments and the complaint.

In deciding a motion to dismiss filed pursuant to Rule 12(b)(6), A.R.C.P., the Court assumes the facts alleged in the complaint are true. *Dressler v. Morrison*, 212 Ariz. 279, 130 P.3d 978 (2006).

Plaintiff homeowner sued its homeowners association (HOA) and the HOA president alleging they committed a series of wrongful acts that harmed Plaintiff. Count 1 was against Defendant HOA President Kowatt only, and it alleges breach of fiduciary duty. The instant motion concerns only Count 1, and only Defendant Kowatt. The complaint alleges that Defendant Kowatt owes fiduciary duties to the Association, as well as to its individual members. It is undisputed that Plaintiff is a member of the Association.

Kowatt owes a duty of good faith and fair dealing to Plaintiff as a member of the Association. The complaint alleges that he breached that duty of good faith and fair dealing by abusing his power as HOA President to intentionally harm Plaintiff. As stated in *Bischofshausen*, "[c]orporate directors are not personally liable for torts committed by the corporation or by one of its officers merely by virtue of the office they hold. To be held liable, the directors or officers must participate or have knowledge amounting to acquiescence or be guilty of negligence in the management or supervision of the corporate affairs causing or contributing to the injury." *Bischofshausen, et al. v. D.W. Jaquays*, 145 Ariz. 204, 210-211, 700 P.2d 902, 908-909 (App. 1985).

Taking all well-pled allegations as true, the Court finds that the complaint states a cause of action against Defendant Kowatt.

IT IS ORDERED denying Defendant Kowatt's Motion to Dismiss.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.