Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-013508 02/05/2018

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
C. Ramirez
Deputy

WINDMILL VILLAGE HOMEOWNERS ASSOCIATION INC

MARK K SAHL

v.

STANLEY BIBBS, et al.

MINUTE ENTRY

Courtroom 712 – East Court Building

8:22 a.m. This is the time set for Oral Argument Re: Plaintiff's Motion for Summary Judgment. Plaintiff is represented by counsel, Nicholas C Nogami and Mark Sahl. Defendants are present on their own behalf.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court has received and considered Plaintiff's Motion for Summary Judgment, filed on January 8, 2018. No answers or responses has been submitted by the Defendants.

Argument is presented.

Accordingly,

IT IS ORDERED taking this matter under advisement.

9:04 a.m. Hearing concludes.

LATER:

The Court has considered Plaintiff's Motion for Summary Judgment filed January 8, 2018, Plaintiff's Separate Statement of Facts in Support of Its Motion for Summary Judgment (with exhibits), and the oral argument conducted on February 5, 2018. Defendants did not file a response but appeared for the oral argument. An answer was not filed by Defendants.

Plaintiff is a nonprofit corporation whose members are owners of lots in a planned community known as Windmill Village. Defendants have been owners of a lot in that community. Plaintiff is governed by the Declaration of Covenants Conditions and Restrictions for Windmill Village (the CC&Rs). The CC&Rs provide in pertinent part that any recreational vehicle exceeding one ton shall be parked, kept, placed or maintained on a lot so that it is not visible to any neighboring property unless there is prior written approval by a designated committee. In November 2015, Defendants stored their recreational vehicle on their lot and it was visible to neighboring properties. No written approval had been obtained to store it at that location. Plaintiff demanded Defendants remove the recreational vehicle and not return it to their lot. Defendants did not comply. Plaintiff sent letters to Defendants in January 2016 and September 2017 demanding compliance. Defendants did not respond. Plaintiff filed a complaint seeking injunctive relief and a claim for breach of contract.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App. 2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011) and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P.

The opponent of a motion for summary judgment does not raise a genuine issue of fact by merely stating in the record that such an issue exists. The party must show that competent evidence is available which will justify a trial on the issue. *Flowers v. K-Mart Corp*. 126 Ariz. 495, 499 (App. 1980). An unsupported contention that a dispute exists is insufficient to defeat a motion for summary judgment. *Sewell v. Brookbank*, 119 Ariz. 422, 426 (App. 1978). A nonmoving party may not rest on allegation in its pleadings. See Rule 56, Ariz.R.Civ.P. and *MacConnell v. Mitten*, 131 Ariz. 22, 25 (1982). Vague or generalized unsupported statements are not sufficient to withstand a motion for summary judgment. *Burrington v. Gila County*, 159 Ariz. 320, 767 P.2d 43 (App. 1988).

Generally, a party must file a written response whenever a motion is filed. *Schwab v. Ames Const*., 207 Ariz. 56, 59, 83 P.3d 56, 59 (App. 2004); *Choisser v. State ex rel. Herman*, 12 Ariz.App. 259, 260, 469 P.2d 493, 494 (1970). If the party opposing a motion fails to respond in writing, the trial court may, in its discretion, dispose of the motion summarily. *Choisser*, 12 Ariz.App. at 260, 469 P.2d at 494; Ariz. R. Civ. P. 7.1(b). When a motion is one for summary judgment, Rule 56 provides that a party opposing a summary judgment motion "must file affidavits, memoranda or both within 15 days after service of the motion." The admonition in Rule 56(e) simply means that a nonmoving party who fails to respond does so at his peril because the trial court will presume that any uncontroverted evidence favorable to the movant, and from which only one inference can be drawn, is true. *Schwab*, 207 Ariz. at 60, 83 P.3d at 60; *Choisser*, 12 Ariz.App. at 261, 469 P.2d at 495. If that uncontroverted evidence would entitle the movant to a judgment as a matter of law, then the trial court must grant the summary judgment motion. *Id*. However, if a moving party's summary judgment motion fails to show an entitlement to summary judgment, by either omitting evidence of essential elements of its claim or by providing evidence which supports conflicting inferences on a material issue, then there is no basis for awarding summary judgment, even if a written response is not filed. *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 196-97, 805 P.2d 1012, 1017-18 (App. 1990).

Plaintiff has the burden of establishing a contract, its breach, and damages that resulted from the breach. *Savoca Masonry Co. v. Homes & Son Const. Co.*, 112 Ariz. 392, 542 P.2d 817 (1975) and *Graham v. Asbury*, 112 Ariz. 184 (1975). The Court may award attorney fees arising out of a contract, express or implied. A.R.S. § 12-341.01. When interpreting contracts, the parties' intent controls. When a contract is ambiguous (when there is more than one reasonable interpretation), what the parties intended is a fact question decided on the contract language and any parole evidence. *Taylor v. State Farm*, 175 Ariz. 148, 854 P.2d 1134 (1993). The court will look to the plain meaning of the words as viewed in the context of the contract as a whole to discover and enforce the parties' intent at the time the contract was made. *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 475 (App. 2015).

Given the quantum of evidence required to establish the claims in the complaint and, viewing the evidence in a light most favorable to Defendants, the Court finds there are genuine issues of material fact and summary judgment for the Plaintiff is not appropriate. At oral argument, Defendants did not dispute most of the facts relied upon by Plaintiff. However, Defendants contend their recreational vehicle is not visible from neighboring properties. Defendants also argue the association, through a board member, gave them permission to park their vehicle on their property. When Defendants asked for written authorization, they were told it was not necessary. Defendants argue they reasonably believed the board member had authority to grant them permission to park their vehicle on their property. There are thus issues for the trier of fact to resolve.

Accordingly,

IT IS ORDERED denying Plaintiffs' Motion for Summary Judgment.