

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2014-090103

03/02/2015

HON. MARK F. ACETO

CLERK OF THE COURT  
M. Scott  
Deputy

TAPESTRY ON CENTRAL L L C, et al.

AARON M FINTER

v.

TAPESTRY ON CENTRAL CONDOMINIUM  
ASSOCIATION, et al.

KEVIN P NELSON

PAUL D CARDON  
MITCHELL J RESNICK

MINUTE ENTRY

On November 24, 2014, Counterclaimant (the “Association”) filed a “Motion for Summary Judgment Regarding Count Two of the Counterclaim (Foreclosure of the Assessment Lien)”. The Court has reviewed the pleadings.

**UNDISPUTED MATTERS**

The following matters are undisputed:

- Counterdefendant (“TOC”) has owned units 9 through 11 since May 12, 2011.
- TOC has owned unit 8 since February 13, 2012.
- The CC&Rs mandate that unit owners pay assessments.
- Regarding units 9 through 11, for the period after May 12, 2011, the Association has levied assessments and TOC has not paid those assessments.
- Regarding unit 12, for the period after February 13, 2012, the Association has levied assessments and TOC has not paid those assessments.

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- A.R.S. §33-1256 applies. In situations like this, absent a viable defense, this statute generally gives an association the right to foreclose.

**SUMMARY JUDGMENT MOTION DENIED IN PART**

The Association alleges that the amount of the assessment lien is \$112,889.68. Regarding this aspect of the Association's "Motion for Summary Judgment", pursuant to Rule 7.1, the Court declines to schedule oral argument. In order to be entitled to summary judgment regarding this aspect of the counterclaim, the Association must establish as a matter of law that \$112,889.68 is the true amount of the assessment lien. The Court finds that the Association has failed to do so. Therefore,

**IT IS ORDERED** denying this aspect of the Association's "Motion for Summary Judgment".

**RED HERRING**

The Court makes note of the following:

- TOC alleges that TOC and the Association entered into a parking spaces for assessments agreement. More specifically, TOC alleges that the parties entered into an agreement whereby, in exchange for the Association providing certain parking spaces to TOC, TOC would pay the assessments for units 9-11 from and after the date title for those units was conveyed to TOC.
- TOC further alleges that the Association never provided the agreed on parking spaces. Further, TOC argues that the Association's failure to do so constitutes a material breach that excuses TOC's obligation to pay the assessments.
- If the Association's claim that TOC must pay assessments was based on the alleged parking space agreement, TOC might have a viable material breach argument. But the Association's claim that TOC must pay assessments is not based on the alleged parking space agreement. Rather, it is based on the CC&Rs. Thus, in the context of a material breach defense, the alleged breach of the parking space agreement is a red herring.

**SUPPLEMENTAL BRIEFS**

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The Court is considering whether the Association has established as a matter of law that it has a right to foreclose on the subject units. The Court is interested in further briefing regarding the two questions discussed below:

- (1) TOC has asserted the defenses of laches and unclean hands. These are equitable defenses. Through Count Two of the Counterclaim, the Association seeks to recover money due under the CC&Rs (arguably a legal claim). The Association also seeks to foreclose pursuant to §33-1256 (a statutory claim). In Arizona, are the equitable defenses of laches and unclean hands available in response to such a claim?
- (2) TOC argues that it is excused from paying assessments because of alleged material breaches by the Association. Not all breaches are material. For example, if a painter agrees to paint a house in exchange for a payment of \$1,000 and never paints the house, the painter's material breach would certainly prevent a successful suit to recover the \$1,000. On the other hand, if a contractor who agreed to build a house completed the house (except for gutters and downspouts) and sued for payment, there has probably been no material breach. Rather, the amount of recovery the contractor is entitled to would likely be reduced by the unfinished work. In this case, is there evidence that the Association is guilty of a material breach or breaches of the CC&Rs that excuses TOC's obligation to pay assessments?

**IT IS ORDERED** as follows:

- The parties must file simultaneous supplemental briefs regarding the two questions listed above.
- The supplemental briefs must be filed by **4:00 p.m. on March 16, 2015**.
- The supplemental briefs may not exceed four pages per side.

The questions asked by the Court fall within the parameters of issues raised in the pleadings. Counsel must resist the temptation to submit new factual information or to make totally new arguments because, to the extent not already included in the pleadings regarding the "Motion for Summary Judgment", the parties have waived the right to do so.