Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-052668 03/04/2019

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
K. Hartley
Deputy

ROWLEY FAMILY TRUST, THE, et al. JUSTIN R COOLEY

v.

DOVE VALLEY RANCH COMMUNITY ASSOCIATION, et al. B AUSTIN BAILLIO

AMANDA E NELSON
JUDGE CAMPAGNOLO

**MINUTE ENTRY**

The Court has reviewed and considered Defendant Michael Schwartz's Motion to Dismiss, Plaintiffs' Response thereto, Defendant's Reply, the Complaint, and the applicable law.

Defendant Michael Schwartz (Schwartz) contends that the Complaint fails to state a claim for relief as to any of the causes of action against him, pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure. Schwartz' Motion pertains to Counts 1, 4, 5, 6, 7 and 8 of the Complaint. Schwartz filed a separate pleading, asking the Court to take judicial notice of Exhibit 1 to his Motion, which is a copy of the Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Dove Valley Ranch (the CCR). In considering a motion to dismiss for failure to state a claim, if the trial court considers matters outside the pleadings (extraneous matters), it must treat the motion as a Rule 56 motion for summary judgment and allow the non-movant a reasonable opportunity to present all pertinent material in response. *Strategic Development and Construction, Inc. v. 7th and Roosevelt Partners, LLC*, 224 Ariz. 60, ¶1 (App. 2010). Matters of public record or matters that are central to a complaint are not considered "extraneous matters." *Id.* Referring to documents attached to a complaint are not extraneous matters. *Id*. at ¶10. Schwartz' Request for Judicial Notice in Support

of Motion to Dismiss pertaining to the CCR is granted, because the CCR is central to the Complaint and because it was filed with the County Recorder, which makes it a public record. Further, Plaintiff's Response agreed that it should be allowed. Therefore, the Court finds that Exhibit 1 to the Motion to Dismiss (the CCR) is not an extraneous matter, and it can be considered by the Court in a Rule 12(b)(6) proceeding.

As a general policy matter, Rule 12(b)(6) motions are not favored under Arizona law. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). That is especially true when such motions are based on pleading insufficiencies. *See e.g., Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, ¶10 (App. 2005) (reversing summary judgment for defendant and recognizing sufficiency of complaint despite numerous technical deficiencies in the document).

The court assumes the truth of plaintiff's factual allegations when analyzing a complaint for failure to state a claim upon which relief can be granted. *Hogan v. Washington Mutual Bank, N.A.*, 230 Ariz. 584 (2012). Arizona follows a notice pleading standard. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012). Rule 8 of the Arizona Rules of Civil Procedure provides that a plaintiff must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a complaint is to give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved. *Cullen v. Auto-Owners Insurance Co.*, 218 Ariz. 417, ¶7 (2008). A complaint that states only legal conclusions, without supporting factual allegations, does not comply with Rule 8's notice pleading standard. *Cullen v. Auto-Owners Insurance Co.*, 218 Ariz. 417, ¶7 (2008). A Court cannot accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts. *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 389 (App. 2005).

**Count 1: Breach of Contract – Governing Documents**
**Count 5: Breach of Duty of Good Faith and Fair Dealing**

Count 1 alleges breach of contract against all of the Defendants, including Schwartz. During the relevant time period of the Complaint, Schwartz was a member of the Association's Board of Directors. Schwartz contends that the CCR is a contract between the Association and the individual members, and not between the individual members and board members. Plaintiff contends that Schwartz, as a member of the Board, committed individual wrongful acts on behalf of the Board that caused the Association to take allegedly wrongful action against Plaintiff.

A corporation will generally be treated as a legal entity until sufficient reason appears to disregard the corporate form. *Dietel v. Day*, 16 Ariz. App. 206, 208 (1972). However, if a board member acts independently to cause a board to take action, that director may be personally liable.

*See Dawson v. Withycombe*, 216 Ariz. 84, ¶47 (App. 2007)(directors can be liable for torts in which they were personally involved or to which they acquiesced in board action). Further, a director can be liable for his own acts under A.R.S. §10-3830. The Complaint alleges individual action allegedly committed by Schwartz that resulted in the Board taking adverse action against Plaintiff. The Complaint adequately asserts facts to support its allegations and legal conclusions that Schwartz breached the CCR in his capacity as a board member. By virtue of adequately alleging a breach of contract, Plaintiff has also adequately alleged a breach of the covenant of good faith and fair dealing in Count 5, because such a covenant is implied in every contract. *Kuehn v. Stanley*, 208 Ariz. 124, ¶29 (App. 2004).

**Count 4: Negligence *Per Se* - Schwartz**

Count 4 alleges negligence *per se* against Schwartz. Schwartz contends that he cannot be found liable for negligence *per se* as a matter of law under the statute listed in Count 4. Count 4 asserts that the statute upon which negligence *per se* would attach is A.R.S. §10-3830, which provides, in pertinent part:

> **A.** A director's duties, including duties as a member of a committee, shall be discharged:
>
> 1. In good faith.
>
> 2. With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> 3. In a manner the director reasonably believes to be in the best interests of the corporation.
>
> **B.** In discharging duties, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by any of the following:
>
> 1. One or more officers or employees of the corporation whom the director reasonably believes are reliable and competent in the matters presented.
>
> 2. Legal counsel, public accountants or other person as to matters the director reasonably believes are within the person's professional or expert competence.
>
> 3. A committee of or appointed by the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

Negligence *per se* applies when a person violates a specific legal requirement. *Reyes v. Frank's Service and Trucking, LLC*, 235 Ariz. 605, ¶¶34-5 (App. 2014). The statute must proscribe certain or specific acts; if a statute defines only a general standard of care, negligence *per se* is inappropriate. *Id.* The Court finds that A.R.S. §10-3830 refers to acting "in good faith," as "an ordinarily prudent person" would do in a manner that the director "reasonably believes" is in the best interests of the corporation. This language defines a standard of care. It does not contain the certainty or specificity required to invoke negligence *per se*.

The Court notes that Plaintiff's Response, putting aside its unnecessary stridency and hyperbole, did not even address this issue. It appears that Plaintiff's Response on this count mistakenly pertained to Count 3, which is not alleged against Schwartz, rather than Count 4.

As a matter of law, Count 4 does not state a claim for relief as pled.

**Count 6: Interference with Contract – Escrow Agreement [Real Estate Purchase Contract]**

Plaintiff admitted that Count 6 referred to an Escrow Agreement, when it should have referred to the real estate purchase contract. The Court finds that this was an inadvertent mistake, and the Court will presume from a reading of the entire Complaint that the alleged interference pertained to the real estate purchase contract. The Court will grant leave to Plaintiff to amend the Complaint to make this change.

Plaintiff has adequately alleged that Schwartz interfered with the real estate purchase contract. The Complaint contains numerous fact-based allegations as to Schwartz' alleged acts to delay or derail the consummation of Plaintiff's real estate purchase contract.

**Count 7: Breach of Fiduciary Duty/Negligence**

The Court finds that it is unclear whether or not a homeowners association or the association's board of directors owes a fiduciary duty to a member of the association, and under what circumstances such a duty may or may not exist. In *Rohde v. Beztak of Arizona, Inc.*, 164 Ariz. 383,388 (App. 1990), the Court of Appeals held that no such duty exists. However, a subsequent appellate decision held that, on remand, the trial court should have considered the plaintiff's claim of breach of fiduciary duty in a homeowner's association lawsuit. *Johnson v. Pointe Community Association*, Inc., 205 Ariz. 485, ¶38 (App. 2003). Arizona law implies a duty upon a homeowners association to treat members fairly and to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers. *Tierra Ranchos Homeowners Association v. Kitchukov*, 216 Ariz. 195, ¶25 (App. 2007). This is not the appropriate avenue to interpret this area of the law without substantially more briefing, perhaps in a summary judgment or other pre-trial proceeding.

As to the negligence component of Count 7, a director can be liable for his own negligence while acting as a board member. *Dawson v. Withycombe*, 216 Ariz. 84, ¶47 (App. 2007).

For purposes of a 12(b)(6) proceeding, Plaintiff has adequately alleged a cause of action for breach of fiduciary duty and negligence.

**Count 8: Aiding and Abetting Breach of Fiduciary Duty**

For the same reasons stated as to Count 7, Plaintiff has adequately alleged a cause of action for aiding and abetting a breach of fiduciary duty.

**The Rule 12(b)(6) Standard is not the Same as a Rule 56 Standard**

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa*, 230 Ariz. 352, ¶46 (2012). Instead, the narrow question presented by a Rule 12(b)(6) motion is whether facts alleged in a complaint are sufficient to warrant allowing a plaintiff to attempt to prove his or her case. *Id.* Dismissal is permitted only when a plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Security Life Insurance. Co. v. State Department of Insurance*, 191 Ariz. 222, ¶4 (1998).

If a complaint reasonably states a cause of action under Rule 8, the motion must be denied. The more effective and efficient way to deal with the issue is through the disclosure and discovery process. *See e.g., State ex. rel. Corbin*, 136 Ariz. at 594. If disclosure and discovery fail to establish proof sufficient to meet the plaintiffs' *prima facie* burden, then Baron is allowed to file a motion for summary judgment under the principle stated in *Orme School v. Reeves*, 166 Ariz. 301, 310 (1990).

The Complaint sufficiently states the elements of the causes of action and states claims for relief as to each count against Schwartz, pursuant to Rule 8, except for Count 4.

**Unnecessary Language by Plaintiff's Counsel**

Plaintiff's counsel's Response contained numerous examples of petty insults, derogatory statements, and unnecessary commentary pertaining to Schwartz, his lawyer and/or Schwartz' Motion. Such language included the following words, phrases or sentences:

- "Shockingly…."
- Schwartz' "unfounded assertions and misdirection…."
- "…failing to substantiate argument of its counsel at all"

- The "Motion fails to be grounded in any good faith argument"
- Schwartz should have "simply [read] the Complaint and should not have been made to waste this Court's time"
- Schwartz "should be sanctioned for defending against these claims without substantial justification"
- Schwartz' "authorities and unsupported argument of counsel [as to] Counts I and V is misleading, at best"
- "the argument constitutes a violation of counsel's duty of candor to this Court embodied within the Rules of Professional Conduct"
- "Schwartz "audaciously states without basis…."
- Schwartz' arguments "are not only ridiculous, but also are utterly insufficient"
- "Schwartz' unsupported and ludicrous argument…."
- "Despite [Schwartz' counsel's] superficial read of §10-11601(F)…." [As noted above, Plaintiff's counsel was arguing about a count unrelated to Schwartz]
- "Schwartz offers no support or even argument that rationally approaches…."
- "Schwartz' entire argument is based upon dicta this Court may simply ignore"
- "Schwartz' failure to properly apprise the Court of this fact has again caused these proceedings to be expanded for no reason"
- "No authority supports Schwartz' position" on breach of fiduciary duty [even though Defendant cited specific authority on his position]
- Accusing Schwartz' counsel of having an inherent conflict of interest
- "Schwartz baldly asserts…."
- "Schwartz' argument…constitutes an attempt to mislead the Court and is a clear violation of Schwartz' obligations to disclose adverse authorities, properly apprise the Court and Schwartz' counsel's duty of candor to this Court"
- "If Schwartz intended to deceive this Court…"

There is absolutely no reason for including such invectives and hyperbolic adjectival sentences in a court pleading. The Court believes that such personalized criticisms are counter-productive and raise potential issues of lack of professionalism. Such uncivil commentary breeds more uncivil commentary. For example, in this case, Schwartz' Motion stated the facts and the law as he perceived them in a customary and professional manner. The Motion did not contain any insults against Plaintiff. After reading Plaintiff's Response, which contains the comments mentioned above, Schwartz' Response then stooped to the level of hurling invectives and insults against Plaintiff's lawyer.

Additionally, Plaintiff's counsel repeatedly requested that sanctions be imposed, basically on the ground that Schwartz' arguments were baseless, and that it was presumptuous of him to even seek dismissal under Rule 12(b)(6). Merely because the Court has denied the bulk of

Schwartz' Motion does not mean that his arguments were baseless. The Court will not impose the requested sanctions.

If the tone of the Response was a one-time anomaly, the Court would not be highlighting this issue as much. However, in the Court's Minute Entry denying Defendant Baron's motion to dismiss, filed on February 28, 2019, the Court observed the same type of tone in Plaintiff's Response, and found it to be inappropriate. Since this appears to be a pattern in Plaintiff's pleadings, the Court admonishes Plaintiff's counsel to refrain from further unnecessary language to avoid the possibility that the Court may consider imposing sanctions against them.

IT IS ORDERED that Defendant Michael Schwartz's Schwartz' Request for Judicial Notice in Support of Motion to Dismiss is granted.

IT IS FURTHER ORDERED that Michael Schwartz' Motion to Dismiss is granted in part and denied in part.

IT IS FURTHER ORDERED that leave is granted to Plaintiff to amend the Complaint to change the references in Count 6 from "escrow agreement" to "real estate purchase contract."

IT IS FURTHER ORDERED that Defendant Michael Schwartz's Motion to Dismiss is granted as to Count 4 entitled "Negligence *Per Se* – Schwartz," which Count is dismissed.

IT IS FURTHER ORDERED that, except as granted above, Defendant Michael Schwartz's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that Plaintiff's request for sanctions is denied.

IT IS FURTHER ORDERED that Defendant Michael Schwartz shall file an Answer to the Complaint no later than **March 22, 2019.**