

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-053589

03/15/2024

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
C. Curley
Deputy

JIMMIE KLATT

JACOB A KUBERT

v.

SUNBIRD GOLF RESORT HOMEOWNERS
ASSOCIATION INC

STEVEN D CROCCHI

JUDGE GORDON

ORAL ARGUMENT

Courtroom 111 – Northeast Regional Court

10:08 a.m. This is the time set for an Oral Argument regarding Defendant's Motion to Dismiss Plaintiff's Complaint filed on October 5, 2023, the Plaintiff's Response to Motion to Dismiss and Cross-Motion for Judgment on the Pleadings filed on November 7, 2023, the Defendant's Reply in Support of Defendant's Motion to Dismiss Plaintiff's Complaint and Defendant's Response to Plaintiff's Cross-Motion for Judgment on the Pleadings filed on November 20, 2023, the Plaintiff's Reply in Support of Cross-Motion for Judgment on the Pleadings filed on December 4, 2023, the Defendant's Motion to Strike Plaintiff's Cross Motion for Judgment on the Pleadings and Reply in Support filed on December 14, 2023 and the Plaintiff's Response to Motion to Strike filed on December 14, 2023. Plaintiff, Jimmie Klatt, is represented by counsel, Jacob Kubert. Defendant, Sunbird Golf Resort Homeowners Association, Inc, is represented by counsel, Steven Crocchi.

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

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Argument is held regarding Defendant's Motion to Dismiss Plaintiff's Complaint filed on October 5, 2023.

IT IS ORDERED taking the matters under advisement.

10:55 a.m. Matter concludes.

LATER:

UNDER ADVISEMENT RULING

Pending before the Court is:

- Defendant Sunbird Golf Resort Homeowners Association, Inc.'s (Sunbird HOA) Motion to Dismiss Plaintiff's Complaint (filed 10/5/23).
- Plaintiff Jimmie Klatt's (Klatt) Cross-Motion for Judgment on the Pleadings (filed 11/17/23).
- Sunbird HOA's Motion to Strike Plaintiff's Cross Motion for Judgment on the Pleadings and Reply in Support (filed 12/14/23).

The Court has reviewed the motions, the responses, replies, the file and the applicable case law. The Court has also considered the parties' arguments advanced at oral argument held on March 15, 2024. The matter is ready for ruling.

A. Background

With this lawsuit Klatt challenges 2021 amendments to Sunbird HOA's Covenants, Conditions and Restrictions (CC&R's) and asserts that Sunbird HOA violated A.R.S. §33-1806(D). Those amendments permit the use of common assessments for a golf course that runs through the properties but are not owned by Sunbird HOA. He contends that 2021 amendments were not foreseeable and they violate the principles set forth in *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022).

More specifically, Klatt alleges that he owns a home managed by Sunbird HOA located in Chandler, Arizona which sits near the Sunbird Golf Resort (Resort). Developed between 1990-1994, the Resort was originally surrounded by 17 individual homeowner associations through which the Sunbird Golf Course (Golf Course) ran. Complaint, ¶¶ 6-7. In 1999, the homeowners, through a transition agreement (Transition Agreement) consolidated the associations and formed Sunbird HOA. *Id.* at ¶8.

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Klatt further alleges that the Golf Course remains separately owned and was never made part of the HOA and that the 1999 CC&Rs expressly provided that “The Golf Course Owner shall be responsible for maintaining the Golf Course Land...”. *Id.* at ¶ 17. He alleges that “Over the years, the Association amended the CC&Rs on several occasions but did not change anything insofar as it related to the Association’s relationship with the Golf Course.” *Id.* at 20. Klatt avers that, as evidenced by the 2015 version of the CC&Rs, one of the primary purposes of the Sunbird HOA was to “apply all funds” for maintenance of common areas, and the Golf Course is not part of the common area. *Id.* at ¶¶ 22-26.

Klatt further alleges that in March 2020, the Sunbird HOA Board, and the Golf Course owner “met in a secret meeting where they discussed how to amend the 2015 CC&Rs so the Association could use its funds to support the Golf Course.” *Id.* at ¶ 29. Ultimately, in 2021, “the Sunbird HOA adopted three amendments and apparently persuaded enough owners to pass them (2021 Amendment).” *Id.* at ¶ 30. The 2021 Amendment gave the Board the authority to use common expenses for the Golf Course and assessed all new owners a \$300.00 transfer fee (Transfer Fee) to be used for common areas including the Golf Course. *Id.* ¶¶31-33.

Klatt has filed a one-count Complaint. He asserts: 1, (Count 1) Declaratory Judgment/Injunction that the 2021 Amendment is invalid under *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022), the Transfer Fee is invalid under A.R.S. § 33-1806(D), and a fine for violation of that statute.

On October 5, 2023, the Sunbird HOA filed the extant Motion to Dismiss, which triggered Klatt’s Response and a Cross-Motion for Judgment on the Pleadings, filed on November 7, 2023. The Sunbird HOA, in turn, filed a Motion to Strike the Cross Motion for Judgment on the Pleadings because Rule 12(c) requires the pleadings be closed before a judgment on the pleadings is appropriate.

A. Motion to Dismiss & the Parties’ Arguments¹

In ruling on a Rule 12(b)(6) motion to dismiss, the Court will “assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom.” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). The Court will grant the motion only if the plaintiff is not entitled to relief “under any facts susceptible of proof in the statement of the claim.” *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 289 (App. 2010), quoting *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346 (1996). The Court, however, will not “speculate about hypothetical facts that might entitle the plaintiff to relief.” *Cullen*, 28 at 420. Nor will the Court “accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily

¹ To the extent the Court omits a party’s argument, that argument is rejected.

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implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 (App. 2005).

Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects.” *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439 (App. 1999); *see also Dube v. Likins*, 216 Ariz. 406, 415 (App. 2007). But a request for leave to amend should be made in a proper motion. *Blumenthal v. Teets*, 155 Ariz. 123, 131 (App. 1987).

Turning to the motion to dismiss, Sunbird HOA alleges that there is no justiciable issue because Klatt has paid no assessment under the amendments, which only apply to new home purchasers, and he is at “no risk” of ever paying those assessments. The Sunbird HOA further argues that Klatt has not and cannot allege that Sunbird HOA has used any money collected from existing homeowners, including his monies, for the Golf Course.

Sunbird HOA further challenges Klatt’s allegation that the 2021 Amendment affects “the marketability” because it is no more than a “conclusory statement.” It argues that Klatt has not alleged that he intends to sell the home.

Sunbird also claims that Klatt has failed to allege a justiciable issue under *Kalway*. It asserts that a homeowner’s association (HOA) may amend CC&R’s by a majority vote if such voting rights are in the original declaration. Sunbird HOA acknowledges that *Kalway* requires the amendment fall within reasonable expectations based on the declaration in effect at the time of purchase. Because Klatt is not being asked to pay the assessment, the 2021 Amendment does not run afoul of *Kalway*.

Finally, the Sunbird HOA alleges that Klatt’s claims under A.R.S. 33-1806(D) fails as a matter of law because the declaratory judgment/Injunction claim does not encompass monetary damage. Section 33-1806(D) prohibits a HOA (and subjects it to a fine) from collecting a fee “relating to services for resale disclosure, lien estoppel and any other services related to the transfer or use of a property except as specifically authorized by that statute.” The Sunbird HOA contends that the transfer fee provides additional funds “for common expenses.”

Klatt responds and emphasizes that the Transition Agreement expressly provided that the golf course was not conveyed or leased to the Association as common area and expressly “acknowledge[d] and agree[d] that the Sunbird Golf Course ... [is] owned by SBG.” Klatt stresses that Recital A of the 1999 CC&Rs states, “Golf Course Owner owns and operates the Sunbird Golf Course ... [and it] does not constitute ‘common area’ under the various declarations of covenants, conditions, and restrictions applicable to Sunbird Golf Resort.”

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Klatt further highlights the 2015 CC&Rs in place at the time he purchased his home define “common expenses” which provide for the expenses for the acquisition, construction, alteration, maintenance of common areas “except for the golf course.” He further points out that the HOA provides that “[n]either the Association or its members shall be responsible for the costs and expenses incurred in the operation and maintenance of the golf course, driving range and related golf operation (except for the payment of membership fees, green fees, user fees and other related golf fees).”

Klatt argues that the amendment violates *Kalway* because the amendment was unforeseeable and therefore required a unanimous vote. He further argues that he is clearly entitled to the sanctions imposed by section 33-1806(D) that, however packaged, the fee is being charged in connection with the transfer of the property--- and the statute permits only reimbursement for the costs of supplying new owners of the HOA’s government documents. A.R.S. § 33-1806(C) (2024). The statute provides a cap of to \$400.00. *Id.*

In its Reply, Sunbird HOA re-asserts the claim that there is no justiciable controversy because there is no way Klatt can be harmed. The Declaratory Judgment Act, it contends, is not absolute right for homeowners but, also requires equitable considerations. It also again argues that Klatt has not established a violation of *Kalway*.

Having considered the arguments, the Court denies the motion to dismiss. A justiciable controversy under the Declaratory Judgments Act exists if there is “an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party.” *See Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 45, Ct. App. 2000).

The Court finds that Klatt’s claim that the marketability may be effected is not wholly conclusory. The 2021 Amendment’s Transfer Fee, while seemingly nominal, is not all that is at issue. The 2021 Amendment arguably transformed the community from one which is independent of its neighboring golf course to one that is not. That dynamic also impacts marketability.

The Court turns to *Kalway*. In *Kalway*, the Supreme Court held that a general-amendment-power provision in a homeowner association’s CC&Rs “may be used to amend only those restrictions for which the HOA’s original declaration has provided sufficient notice.” *Kalway*, 252 Ariz. at 535. A.R.S. § 33-1817(A) permits amendment of CC&Rs by a majority vote, so long as a voting scheme is included in the original declaration, but common law further requires that the “original declaration must give sufficient notice of the possibility of a future amendment; that is, amendments must be reasonable and foreseeable.” *Id.* at 537-39 (citing *Dreamland Villa Cmty. Club, Inc. v. Rainey*, 224 Ariz. 42, 51 (App. 2010), *Shamrock v. Wagon Wheel Park Homeowners Ass’n*, 206 Ariz. 42, 45-46 (App. 2003), and *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513 (App. 2005)). This is because “[a]llowing substantial, unforeseen, and unlimited amendments would alter

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the nature of the covenants to which the homeowners originally agreed.” *Id.* at 536 citing *Dreamland*, 224 Ariz. at 51).

On the record before the Court, the Court finds that Sunbird HOA has not proven the absence of foreseeability as a matter of law. Indeed, the opposite appears to be the more viable argument and may well carry the day. Moreover, the fact that Klatt is not directly impacted by the 2021 Amendment does not foreclose an award of nominal damages. *Edwards v. Anaconda*, 115 Ariz. 313 (App. 1997)

Finally, the Court denies the motion to dismiss with respect to the statutory claim. Indeed, the Court finds that the 2021 Amendment, absent further authority demonstrating otherwise, violates section 33-1806. That stated, the case is not procedurally postured in a way that would permit the Court to grant Klatt relief on the issue *See* section B, *infra*.

B. Motion to Strike Judgment on the Pleadings and Motion for Judgment on the Pleadings.

Sunbird HOA moves to strike Klatt’s Cross Motion for Judgment on the Pleadings. It correctly argues that Rule 12(c) of the Arizona Rules of Civil Procedure requires that the pleadings be closed. The Court rejects Klatt’s contention that because the dueling motions purportedly resolve the case, he may ignore Rule 12(c).

The Court will strike the motion. It is unequivocally premature under Rule 12(c).

C. Conclusion

For the foregoing reasons,

IT IS ORDERED denying Sunbird HOA’s Motion to Dismiss Plaintiff’s Complaint (filed 10/5/23).

IT IS FURTHER ORDERED granting Sunbird HOA’s Motion to Strike Plaintiff’s Motion for Judgment (filed on 12/14/23).

IT IS FURTHER ORDERED striking Klatt’s Cross Motion for Judgment on the Pleadings (filed 11/17/23).