

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-053132

04/09/2008

HON. PAUL A KATZ

CLERK OF THE COURT
W. Bobrowski
Deputy

DOMINICK ABATEMARCO

BRIAN M BERGIN

v.

CANTERRA AT SQUAW PEAK
CONDOMINIUM ASSOCIATION INC, et al.

MARK A HOLMGREN

UNDER ADVISEMENT RULING

The Court having conducted an Evidentiary Hearing on Plaintiff's Application for Preliminary Injunction; having considered the memoranda of the parties and legal authorities cited therein; having reviewed the evidence presented at said Hearing; and good cause appearing, the Court enters the following findings of fact, conclusions of law and orders:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On or about March 1, 1998, Plaintiff, Dominick Abatemarco ("Abatemarco") purchased condominium unit number 226 at the Canterra at Squaw Peak Condominium Complex (the "complex"), located 1747 E. Northern Avenue, Phoenix, Arizona. Abatemarco is a full time resident at the complex, and is current in the payment of his homeowner's association dues.
2. Many of the units within the complex and common areas have construction defects including defective and dangerous balconies. The homeowners association ("association") has filed a construction defects lawsuit against the

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builder of the complex, which has apparently resulted in a likely settlement which will be inadequate to cover needed association repairs.

3. Abatamarco's balcony is currently in need of substantial repair, as are the balconies of many other homeowners within the complex.
4. A.R.S. §33-1255(C)(1) provides that unless the declaration of a homeowners association provides otherwise, common expenses associated with the maintenance, repair or replacement of limited common elements are to be equally assessed against only the units to which the limited common element is assigned. In the immediate case, Abatamarco's balcony, and other similarly situated balconies within the complex are limited common elements.
5. In the case at bar, Section 4.2 of the declarations of the association specifically provides that the maintenance, repair and replacement of limited common elements is the responsibility of the association and pursuant to Section 6.7, the association is required to equally assess all unit owners for the costs of any needed repair.
6. Defendant's closing argument suggesting that the Complaint in this matter was not verified until two weeks prior to the Hearing and accordingly, should not be considered, is without merit. The Complaint has been belatedly verified.
7. While the association is clearly responsible for the repair and/or needed replacement of Abatamarco's balcony, this Court is without authority to compel the association to do so by imposing the necessary assessment to facilitate such remediation, by way of preliminary or permanent injunction. The reason for this is that the Plaintiff has an adequate remedy at law. Doing so would also violate the spirit, if not the letter of the declarations of the association by giving priority to the repair of Plaintiff's balcony and not doing so for the benefit of all similarly situated homeowners.
8. If Abatamarco wishes to proceed in having the balcony repaired, he may do so at his own expense, and amend the immediate Complaint, if necessary, to seek money damages against the association as reimbursement to him for the repairs which the association is obligated to make pursuant to Arizona law.

ORDERS

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Now therefore, IT IS ORDERED denying Plaintiff's Application for Preliminary Injunction.