

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-007758

04/15/2014

HONORABLE MARIA DEL MAR VERDIN

CLERK OF THE COURT  
M. Nielsen  
Deputy

DESERT PEAK HOMEOWNERS  
ASSOCIATION

TROY B STRATMAN

v.

PINNACLE AT DESERT PEAK  
CONDOMINIUM ASSOCIATION, THE

JOSHUA M BOLEN

UNDER ADVISMENT RULING

This matter came before the Court for Oral Argument on February 21, 2014 regarding Plaintiff's Motion for Summary Judgment, filed August 9, 2013; and Defendant's Cross-Motion for Summary Judgment, filed December 3, 2013. The matter was taken under advisement.

The Court has considered the matters presented.

Summary Judgment is appropriate if, after reviewing the facts in the light most favorable to the non-moving party, no genuine issues of material fact remain. *Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 571 (App 1976). "A 'genuine' issue of material fact is one that a reasonable jury, on the record before the court, could resolve in favor of either party". *Southwest Pet Products, Inc. v. Koch Ind.*, 273 F.Supp. 2d 1041, 1050 (D.Ariz.2003) (citations omitted). Even where the facts are undisputed, a genuine dispute as to conflicting inferences to be drawn from them precludes an award of summary judgment. *Executive Towers v. Leonard*, 7 Ariz. App. 331,439 P.2d 303 (1968). Evidence creating even the "slightest doubt" about the facts may be insufficient to withstand a motion for summary judgment. *Orme School v Reeves*, 166 Ariz. 301, 309 (1990).

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The Plaintiff is a planned community. The Defendant is a condominium community. The Parties agree they have operated pursuant to an "Access, Maintenance and Common Area Easement and Use Fee Agreement" since it was originally recorded in September 2006. This Agreement was amended and recorded by the Parties in July 2012. Pursuant to the terms, the Defendants are granted a permanent and perpetual easement over the Plaintiff's common areas in exchange for an annual use fee and related costs. The Defendant condominium community operates under Covenants, Conditions and Restrictions which specifically outlines the Use Fee Agreement. The Parties further agree the Defendant ceased making payments to the Plaintiff effective May 2013 after a history of making payments without issue since 2008.

There is no dispute there was a contact between the Parties and that the Defendant stopped performing under the contract. The Plaintiff argues that as a result, the Defendant has breached the Agreement and owes fees together with interest and related costs. The Defendant argues that Arizona law permits them to unilaterally terminate the agreement under the circumstances.

The question before the Court is whether A.R.S. s33-1245 grants the Defendant the ability to unilaterally terminate the contact under the circumstances presented. The Parties agree that the contract issue is purely a legal issue that can be decided by the Court. The Defendant seeks a ruling from the Court that the contact can be properly terminated and is otherwise unenforceable because it is not bona fide and is unconscionable.

Pursuant to A.R.S. § 33-1245, an association may terminate the following contracts "if entered into before the board of directors elected by the unit owners pursuant to A.R.S. § 33-1243(G) takes office: (i) any management contract or employment contract; (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant; or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owner at the time entered into under the circumstances then prevailing." A.R.S. § 33-1243(G) provides that "not later than the termination of any period of declarant control the unit owners shall elect a board of directors of a least three members, at least a majority of whom must be unit owners."

The Court is persuaded by the Plaintiff's position that the provisions of A.R.S. § 33-1245 are inapplicable. The Agreement was never entered into between the Plaintiff and the Defendant. It was entered into by Plaintiff and the owner of the property on which the Defendant Association was later created. The Agreement set aside a portion of property which could be enjoyed by all residents and consequently would be maintained by all. Prior to any condominium purchase, individual members of the Defendant Association were on notice of the Use Fee Agreement and accepted its benefits and requirements upon purchase of their property. The Use Fee Agreement is a restrictive covenant designed to maintain common property enjoyment. There has been nothing presented to the Court to show that it is unconscionable or

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that it was not executed in good faith, without fraud or deceit. Everyone who is entitled to enjoyment of the property is subject to the fee.

Therefore,

**IT IS ORDERED** granting the Plaintiff's Motion for Summary Judgment, filed August 9, 2013 and denying the Defendant's Cross-Motion for Summary Judgment, filed December 3, 2013.

**IT IS FURTHER ORDERED** Plaintiff's shall lodge an order for the Court's consideration no later than **May 12, 2014**.

Effective April 15, 2014 new civil rules and forms are in effect for managing cases moving to trial. Be sure to review the new Civil Rules 16, 26, 37, 38, 72 through 74 and 77.