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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-011316 04/12/2016

HON. ROGER E. BRODMAN

CLERK OF THE COURT
S. LaFontaine
Deputy

MATTHEW HILLEBRAND, et al.

MARK BAINBRIDGE

v.

CAMELBACK GARDEN FARMS HOMEOWNERS ASSOCIATION, et al.

JAY J HALL
MARK E LINES

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The Court reviewed defendants' Motion for Summary Judgment and plaintiffs' Cross Motion for Summary Judgment, the responses and reply. The Court held oral argument on April 5, 2016.

1. **Background**

This is a dispute between neighbors. Defendants, two landowners, constructed outbuildings without permission of the Camelback Garden Farms Homeowners' Association. The Association's "Declaration of Covenants, Conditions and Restrictions, Camelback Garden Farms" (CC&Rs) require that the Association's Board must approve in writing of all outbuildings. After receiving after-the-fact submissions from the defendants, the Association's Board issued a letter saying that the outbuildings violated the CC&Rs. The defendants appealed, and the Board changed its mind. The outbuildings were approved. *See* Plaintiffs' Exhibit 16, May 13, 2014 letter from Association ("the Board met in Executive session and approved your appeal to leave the steel building in place on your property. . . .Thank you for working with us in bringing your property into compliance with the CC&R's").

Plaintiffs, who own property near defendants, allege that the Board's approval of the outbuildings was improper. Plaintiffs allege that the outbuildings violate the CC&Rs. As a result, plaintiffs sued the Association and the defendants. Counts 1-3 were against the Association. Plaintiffs alleged in Count 4 that defendants breached the contract established by the CC&Rs and in Count 5 breach of the covenant of good faith and fair dealing. Count 6 was a claim for injunctive relief.

The Association has been dismissed from this lawsuit. Thus, the only remaining claims are against the defendants.

2. **Do the CC&Rs require the Association to find a violation before plaintiffs may directly sue another landowner?**

The Court believes the threshold issue in this case is whether plaintiffs have the ability to directly sue the defendants. The Court finds that the plaintiffs' and defendants' relationship is governed by the CC&Rs.

As an initial matter, "the interpretation of restrictive covenants is a question of law for the court. . . In interpreting the meaning of a covenant, the superior court does not defer to the interpretation given by the association." *Johnson v. Pointe Community Ass'n, Inc*., 205 Ariz. 485, 490 ¶ 23 (App. 2003).

The CC&Rs govern the parties' relationship with each other. As noted in *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448 (App. 1993), CC&Rs are "contracts between the subdivision's property owners as a whole and the individual lot owners." The CC&Rs are not a contract between plaintiffs and defendants. Rather, the CC&Rs are a contract between the subdivision community and defendants. *See Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 47, ¶ 19 (App. 2010). Here, the CC&Rs establish the relationship between the homeowners and limit when one can sue another. The Court will not read into the contract a right of action where none is expressly provided.

In Article XI, the CC&Rs set forth an owner's ability to sue another owner in the "Remedies" provision. In order to analyze the issues presented in this case, the Court breaks the Remedies provision into three separate sections. The first paragraph (I'll call it Section 1) provides that the Association has the authority to prosecute an action against any Owner violating the CC&Rs. It states:

> In the event of any default by any Owner under the provisions of this Declaration, the Articles of Incorporation, the Bylaws, or the rules and regulations of the Association, the

> Association, or its successors or assigns, or the Board, or its agents shall have each and all of the rights and remedies which may be provided for in the Articles of Incorporation, the Bylaws or said rules and regulations, or which may be available by law, and may prosecute any action or other proceeding against such defaulting Owner and others for enforcement or foreclosure of the Association's lien and the appointment of a receiver for the defaulting Lot without notice, without regard to the value of such Lot or the solvency of such Owner, or for damages or injunction, or specific performance, or for a judgment for payment of money and collection thereof, or the right to sell the Lot as hereinafter in this paragraph provided, or for any combination of remedies or for any other relief.

Section 1 thus reserves the right of the Association to bring litigation to enforce the terms of the CC&Rs. Nothing in this first section allows an individual Owner to bring suit. In other words, if the Association believes that the defendants' structures violate the CC&Rs, the Association is clearly empowered to seek judicial relief.

The next paragraph (I'll call it Section 2) specifically provides an Owner a limited right to bring an action against other owners for violations of the CC&Rs. It states:

> Without in any way limiting the rights of the Association as set forth in Section 1 of Article III above, if any Owner (either by his conduct or by the conduct of any other Occupant of his Lot or Unit) shall violate any of the provisions of this Declaration, the Articles of Incorporation, the Bylaws or the rules and regulations, as then in effect, and such violation shall continue for ten (10) days after **notice in writing from the Board** or shall occur repeatedly during any ten day period after written notice or request to cure such violation, the Association, Board or **any aggrieved owner shall have the power to file an action against the defaulting Owner** or Occupant requiring the defaulting Owner to comply with the provisions of this Declaration, the Articles of Incorporation, the Bylaws or the rules and regulations, and granting other appropriate relief, including monetary damages. (Emphasis added)

Section 2 allows an aggrieved owner to bring a lawsuit against a defaulting owner. The precondition for such suit, however, is that the Board must find a violation and provide written notice to the defaulting owner. This provision therefore provides the defaulting owner notice of a violation and an opportunity to cure.

Plaintiffs allege two separate violations. First, plaintiffs allege that the outbuildings themselves are violations of the CC&Rs. Second, plaintiffs allege that the defendants are improperly storing their RV/trailer.

As a matter of undisputed fact with regard to the outbuildings themselves, the Court finds that plaintiffs have not satisfied the conditions of Section 2 of the Remedies provision. Although the Board originally issued letters indicating that the outbuildings violated the CC&Rs, after consultation with a lawyer the Board changed its mind and approved of the outbuildings. As a result, as a matter of undisputed fact there is no finding from the Board of any current violation of the CC&Rs by defendants. There was no written notice of default and no request to cure. In fact, the Board's May 13, 2014 specifically stated that the outbuildings were in "compliance with the CC&R's."

With regard to RV/trailer storage, plaintiffs acknowledge that the Board never provided defendants with current written notice that the RV or trailer violated the CC&Rs. Plaintiffs claim that notice from plaintiffs themselves satisfies the notice requirement in Section 2.

The Court disagrees. Here, the notice must be "in writing from the Board." The words "after written notice or request to cure such violation" modify the words "writing from the Board." The notice provision could not be satisfied by notice from one disgruntled owner to another owner. If the only prerequisite for a lawsuit was notice from one owner to another, there would be no reason to take the dispute to the Board and receive a written warning from the Board and opportunity to cure.

In conclusion, the Court finds that Section 2 does not provide plaintiffs a right to sue defendants under the undisputed facts in this case.

The next sentence of Article XI (I'll call it Section 3) continues as follows:

> If the **Association**, its successors or assigns or the Board or its agents shall violate or fail to comply with any of the provisions of this Declaration, the Articles of Incorporation, the Bylaws or the rules and regulations, as then in effect, **then any aggrieved owner** shall have the power to file an action **against the Association or Board to comply with the Declaration**, the Articles of Incorporation, the Bylaws or the rules and regulations, and granting other appropriate relief, including money damages. (Emphasis added)

In other words, Section 3 gives an aggrieved owner the power to file an action "against the Association." As opposed to Section 2 where the aggrieved owner specifically has a claim against the defaulting owner, no authorization is provided in Section 3 to allow an aggrieved owner to file a suit directly against a defaulting owner.

If the Association approves of an action that allegedly violates the CC&Rs, the Association's conduct – not that of the alleged defaulting owner – is in question. The Court

believes the language of Section 3 limits the aggrieved owner's action in such a case to a claim against the Association.

As a result, nothing in Sections 1, 2 or 3 provides plaintiffs a right to sue defendants in this case. This interpretation is logical. In the event an owner is accused of violating the CC&Rs, notice must be provided to the Association. If the Association finds a violation, the defaulting owner must be provided notice and an opportunity to cure. If the defaulting owner refuses to cure the situation, the Association may -- but is not required to -- bring litigation to enforce the CC&Rs. If the Association elects not to bring litigation, then the aggrieved owner is entitled to bring an action on his or her own behalf.

In the event an owner is accused of violating the CC&Rs but the Association does not find a violation (such as the case here), the aggrieved owner may bring a claim against the Association to force the Association "to do your job" -- but has no direct claim against the alleged defaulting owner. The Court believes this process focuses on the consistent application of the CC&Rs by the Association, therefore avoiding *ad hoc* litigation by one owner against another resulting in possibly inconsistent results.

Johnson v. Pointe Community Ass'n, Inc., supra, is distinguishable. In that case, the court of appeals held that one homeowner could sue directly to enforce the declaration. Of course, in that case the court noted that "The Declaration provides for the enforcement of its provisions by either the Association or its members." *Id*. at 486, n. 1. By contrast, the CC&Rs in the instant case specifically set forth limited situations where the members may directly enforce the declarations -- none of which apply here.

Plaintiffs argue that *Continental Oil Co. v. Fennemore*, 38 Ariz. 277, 281 (1931), gives plaintiffs the right to directly sue the defendants. The Court is not persuaded. Not only does *Continental Oil* predate homeowners' associations, but the case stands for the proposition that one grantee can enforce covenants running with the land against another. Here, the CC&Rs run with the land. But the CC&Rs provide an express definition for remedies by one grantee against another. By disallowing plaintiffs' direct cause of action against defendants, the Court is simply enforcing the terms of the restrictive covenants placed on the land.

Citing Colorado law, plaintiffs argue that a homeowner's association does not have discretionary power to approve of conditions that violate deed restrictions. The Court has no quarrel with this general proposition. But plaintiffs' argument fails to take the next step. The issue is framed as follows: What is the remedy if an association erroneously approves an improper deed restriction? Under the CC&Rs in this case, the answer is "sue the Association to enforce compliance."

Finally, plaintiffs have not established a claim for monetary damages. To the extent plaintiffs have any standing to sue at all (and the Court does not believe they do), the claims for monetary damages would be dismissed.

3. Other matters

Although not necessary for its decision, the Court will briefly address plaintiffs' claim that the outbuildings in question violate the CC&Rs as a matter of law.

Plaintiffs' argument is premised on Article II, Section 2 of the CC&Rs. That section provides:

> Construction. All Units and structures on the lots shall be of new construction and no buildings or structures shall be moved from any other location on to any of the lots. Erection of modular, modular type construction or manufactured housing shall not be permitted on said lots.

Plaintiffs contend that this provision prohibits the type of outbuildings constructed in the instant case since the structures are constructed of pre-fabricated steel. Plaintiffs move for summary judgment on the issue.

As a practical matter, the Court was not persuaded that the outbuildings violate the CC&Rs. The phrase "modular type construction" is vague and subject to varying interpretations. Does it mean construction that is preassembled off site such as a manufactured home or a Tuff Shed? Or does it mean pre-fabricated steel buildings such as the structures in question?

In interpreting this provision, the Court would, among other items, look at previously constructed buildings in the subdivision. Plaintiffs acknowledge that there are numerous noncomplying structures in the subdivision. *See, e.g.*, defendants' Exhibit E. The Court would be more inclined to adopt plaintiffs' interpretation if every outbuilding in the subdivision was a classic "stick and frame" construction. On the other hand, if evidence shows that outbuildings in the subdivision were regularly constructed of pre-fabricated steel, the Court would be less inclined to adopt plaintiffs' interpretation of "modular type construction." In other words, past practices in the subdivision are relevant to determine how the members of the subdivision interpret the contract. *See Associated Students of Univ. of Arizona v. Arizona Bd. of Regents*, 120 Ariz. 100, 105 (App. 1978) (in interpreting contract, "acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms"). Moreover, a plethora of prefabricated steel structures (or uncovered RVs) could suggest that any ban against prefabricated steel structures -- to the extent one ever existed -- may have been abandoned or waived. *See College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz.

533, 539, ¶ 18 (App. 2010) (deed restrictions may be considered abandoned or waived if frequent violations of those restrictions have been permitted; when CC&Rs contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations do not constitute a "complete abandonment" of the CC &Rs).

The Court is similarly unpersuaded by plaintiffs' claim that, as a matter of law, the defendants are improperly storing their RV/trailer.

In short, the Court would deny plaintiffs' motion for summary judgment.

4. <u>Conclusion and Orders</u>

The Court finds that plaintiffs have no direct cause of action against the defendants and therefore no viable defendants remain in this case. This finding applies to plaintiffs' claims for both monetary damages and injunctive relief.

The Court further finds that plaintiffs have no claim for monetary damages.

IT IS ORDERED that defendants' Motion for Summary Judgment is GRANTED.

In light of the Court's finding that 1) plaintiffs do not have standing to sue the defendants; and 2) plaintiffs' interpretation of the CC&Rs does not prevail as a matter of undisputed fact,

IT IS ORDERED that plaintiffs' Cross Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that defendants file a proposed form of judgment and any applications for fees and costs within 20 days of the date of this order. The judgment should include Rule 54(c) language.