SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-020533 05/27/2005

HONORABLE JANET E. BARTON

CLERK OF THE COURT
D. Caggiano-Sapp
Deputy

FILED: 05/30/2005

RON EHNINGER, et al. ASA WILLIAM MARKEL

v.

DREAMLAND VILLA COMMUNITY CLUB JILL TSIAKILOS

RULING

On March 28, 2005, the Court heard oral argument on Defendant Dreamland Villa Community Club's ("Dreamland's") Reurged and Amended Motion to Dismiss Pursuant to Ariz.R.Civ.Pro. 12(b)(6) ("Motion to Dismiss"). The Court also requested certain additional information from the parties. As of April 6, 2005 that additional information, and all pleadings in connection therewith, had been filed with the Court and the Court deemed the matter to be under advisement. With respect to Dreamland's Motion to Dismiss the Court now rules as follows.[1]

In Count I of their Complaint, Plaintiffs challenge the corporate acts taken by Dreamland at the January 2004 meeting. Dreamland contends that pursuant to A.R.S. §10-3304(B)(1), Plaintiffs lack standing to pursue such a challenge.

A.R.S. §10-3304 provides that the validity of a non-profit corporation's corporate action shall not be challenged except as provided in subsection B.[2] A.R.S. §10-3304(B)(1) provides that if the non-profit corporation is not a condominium association or a planned community association then the challenge must be in a proceeding against the corporation that is brought by members of the corporation "having at least ten per cent or more of the voting power or by at

[1]Dreamland's Motion to Dismiss clearly relies upon and presents matters outside the pleadings. Therefore, pursuant to Rule 12(b), Ariz.R.Civ.P., the Court has treated Dreamland's Motion to Dismiss as a Motion for Summary Judgment.

[2] It is undisputed that Dreamland is a non-profit corporation.

least fifty members, unless a lesser percentage or number is provided in the articles of incorporation. . . ."

The six named Plaintiffs in this matter admittedly do not represent ten per cent or more of Dreamland's voting power. Indeed, several of the named Plaintiffs were not even members of Dreamland at the time the corporate actions at issue herein occurred.

Plaintiffs argue that A.R.S. §10-3304(B)(1) is inapplicable for either of two reasons. First, they argue that Dreamland is a planned community association and, therefore, A.R.S. §10-3304(B)(2) applies. A.R.S. §10-3304(B)(2) allows *any* member of a planned community association to bring a proceeding to enjoin or challenge the validity of an association's act. Because certain of the Plaintiffs were members of Dreamland at the time of the January 2004 meeting, Plaintiffs contend that they do, indeed, have standing to challenge the corporate acts at issue herein.

The Court disagrees with Plaintiffs' position that A.R.S. §10-3304(B)(2) is applicable herein. At the January 2004 meeting when Dreamland took the corporate acts at issue, Dreamland was not a planned community association, as defined in A.R.S. §33-1802. In other words, Plaintiffs are not challenging acts taken by a planned community association. Rather, they are challenging acts taken by a non-profit corporation which resulted in that corporation becoming a planned community association. Thus, in this Court's opinion, A.R.S. §10-3304(B)(1) is applicable herein.

The second argument raised by Plaintiffs is that A.R.S. §10-3601(B) has priority over A.R.S. §10-3304(B)(1).[3] Plaintiffs base their contention in this regard on the holding in *Shamrock v. Wagon Wheel Park Homeowners Ass.*, 206 Ariz. 42, 75 P.3d 132 (App. 2003). Once again, the Court disagrees.

Shamrock did not, nor was it required to, address whether A.R.S. §10-3601(B) has priority over A.R.S. §10-3304(B)(1). According to the holding in *Shamrock*, the acceptance of a deed containing deed restrictions is binding upon the property owner. In addition, deed restrictions that allow for amendments thereto by a majority of the membership are expansive enough to allow for the passage of an amendment requiring membership in a non-profit homeowners' association. 206 Ariz. at 45-46, 75 P.3d 135-136. Thus, there has been no violation of A.R.S. §10-3601(B) herein because by consenting to be bound by deed restrictions that can be amended by a majority of the membership, Plaintiffs have impliedly consented to be bound by a properly passed and recorded amendment requiring membership in a non-profit homeowners' association.

[3] A.R.S. §10-3601(B) provides that "[n]o person shall be admitted as a member [to a non-profit corporation] without that person's consent. Consent may be express or implied."

For the reasons set forth above, the Court agrees with Dreamland that the named Plaintiffs lack standing to challenge the corporate acts taken by Dreamland at the January 2004 meeting.

In Count II of their Complaint, Plaintiffs allege that Dreamland, through its agents and employees, intentionally, recklessly or negligently misrepresented or concealed the true purpose for and effect of the Second Amended Declaration of Restrictions when soliciting signatures for its passage.[4] *See* Count II of Plaintiffs' Amended Complaint. According to Plaintiffs, because of this alleged misconduct, the Second Amended Restrictions should be declared null and void and Plaintiffs should be awarded monetary damages. *See* Plaintiffs' Amended Complaint. Dreamland argues that Plaintiffs also lack standing to pursue this claim.

Necessary elements for any claim of intentional, reckless or negligent misrepresentation or concealment are reasonable reliance to the plaintiff's detriment. *See St. Joseph's Hosp. and Medical Center v. Reserve Life Ins. Co.*, 154 Ariz. 303, 742 P.2d 804 (App. 1986) (elements for a negligent misrepresentation claim include false information that is justifiably relied upon causing damage); and *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 647 P.2d 629 (1982) (Showing of fraud requires hearer's reliance on truth of false representation, hearer's right to rely, and a consequent and proximate injury). Here, even if the alleged misrepresentations were made to the Plaintiffs intentionally, recklessly and/or negligently, with the express purpose of inducing Plaintiffs to vote for and/or sign the Second Amended Declaration for their section, they simply cannot prove that they relied on the alleged misrepresentations to their detriment. That is because it is undisputed that none of the Plaintiffs herein voted for and/or signed the Declaration. Thus, the Court agrees with Dreamland that these Plaintiffs lack standing and/or cannot prevail as a matter of law on their claims of intentional, reckless or negligent misrepresentation.

Plaintiffs' final claim is for monetary damages pursuant to A.R.S. §33-420. *See* Count IV of Plaintiffs' Amended Complaint. This Court is of the opinion that Plaintiffs lack standing to pursue that claim for the same reason they lack standing to pursue the claims asserted in Count I of their Complaint.

For the reasons set forth above,

IT IS ORDERED granting Dreamland's Motion to Dismiss and dismissing, without prejudice, Plaintiff's Amended Complaint.[5]

[4] The Second Amended Declaration of Restrictions at issue, which are presumably the Second Amended Declarations for sections 3, 5, 14, and 16 (the sections in which the named Plaintiffs reside) were admittedly passed by a majority of the then owners of the lots in those sections.

[5] The Court makes no findings herein as to the validity of the allegations Plaintiffs have made against Dreamland. The Court is simply of the opinion that these Plaintiffs do not have standing to pursue those allegations.

In addition, because the Court is of the opinion that Plaintiffs cannot cure the standing defects discussed above by conducting discovery,

IT IS FURTHER ORDERED denying Plaintiffs' request for relief pursuant to Rule 56(f), Ariz.R.Civ.P. *See* Plaintiffs' Request for Denial or Continuance of Defendant's Putative Motion for Summary Judgment.

/s/ Janet E. Barton

HONORABLE JANET E. BARTON
JUDGE OF THE SUPERIOR COURT