

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-024476

05/18/2010

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT
C. Castro
Deputy

PINNACLE PEAK VISTAS I I I
HOMEOWNERS ASSOCIATION

JOSHUA M BOLEN

v.

DERAILED L L C

STEVEN R RENSCH

MINUTE ENTRY

Courtroom 704 – Central Court Building.

11:13 a.m. This is the time set for oral argument on Defendant's Motion for Summary Judgment, filed on April 13, 2010. Plaintiff is represented by counsel, Joshua M. Bolen and Kellie J. Callahan. Defendant is represented by counsel, Steven R. Rensch.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Motion is argued to the Court.

IT IS ORDERED taking this matter under advisement.

11:55 a.m. Matter concludes.

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LATER:

Defendant Derailed, LLC (“Derailed”) has moved for summary judgment against Plaintiff Pinnacle Peak Vistas III Homeowners Association (“Pinnacle”) in this action brought by an HOA against a homeowner stemming from the homeowner’s erection of a large sculpture in the front yard of a residential lot.

Derailed argues that Pinnacle “has no authority under its CC&Rs or otherwise” to seek injunctive relief mandating the removal of the subject sculpture.¹ Pinnacle responds that it has such authority and, moreover, Derailed has failed to lodge the necessary application for approval of the sculpture. Derailed concedes it has not sought such approval but maintains, as mentioned, that it does not need any approval from Pinnacle in this matter.

Pinnacle cites several CC&R provisions to support its position. First, it notes that Article I, §15 calls for “landscaping plans” to be submitted for approval by homeowners and affirmatively states that “[o]nly desert landscaping may be installed in the front...yard...unless otherwise approved.” Pinnacle argues that Derailed has violated this provision by failing to seek approval for the sculpture. However, it is clear from the full text of this provision that the term “landscaping” is meant to encompass grading, ground cover, plant materials and edging.²

Pinnacle also makes reference to Article II, §1 which prohibits any “structure or dwelling” being built until its design, location and kind of materials have been approved. But a sculpture is not a “structure or dwelling.” That is clear from the context of the CC&Rs references to “structures” which strongly imply that enclosures are contemplated.

CC&R provision Article II, §4 allows for written standards and procedure to be promulgated for “proposed improvements.” Those standards, composed of Architectural Committee Rules (“Rules”), themselves expressly contemplate the promulgation of such standards and procedures. See §1.0 of Rules. The closest the Rules come to addressing the issue of sculptures is in Rule 2.28 which bars “unsightly objects” from being “erected...on any of the lots.” However, Pinnacle has not argued in its brief or at oral argument that Derailed’s sculpture is an “unsightly object” subject to this restriction.

¹ The sculpture consists of a large (between nine and fifteen feet) representation of a saguaro cactus wearing sunglasses and playing an electric guitar.

² The text refers to “natural desert landscape” and states its goal as the preservation of “desert growth.” The entity reviewing landscaping plans is charged with prohibiting activities which are “allergy producing, contribute[] to odors, or otherwise would be inconsistent with clean air and natural desert environment.” None of these concerns apply to sculpture.

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Pinnacle states unequivocally that the CC&R or Rule “provisions require Defendant to submit plans for all...improvements, including the sculpture at issue.” [Response at 12] No citation is provided for that assertion.

As a matter of law, Pinnacle’s CC&Rs and Rules does not require Derailed to seek approval for sculpture.³

Accordingly,

Detrailed’s Motion for Summary Judgment is granted and the Preliminary Injunction Hearing and Trial on the Merits scheduled for May 28, 2010 @ 9:30 a.m. is vacated.

Plaintiff’s Motion to Strike Defendant’s Motion for Summary Judgment, filed April 27, 2010, is denied.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

³ Derailed alternatively argues that Pinnacle has, as a matter of undisputed fact, enforced the CC&Rs and Rules arbitrarily and capriciously. The Court need not and does not reach that issue.