Clerk of the Superior Court
*** Electronically Filed ***
05/05/2025 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-053589 05/02/2025

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
T. Williams
Deputy

JIMMIE KLATT JACOB A KUBERT

v.

SUNBIRD GOLF RESORT HOMEOWNERS ASSOCIATION INC LORI N BROWN

JUDGE GORDON

MINUTE ENTRY

Introduction

In this lawsuit, Jimmie Klatt (Klatt) has sued his Sunbird Golf Resort Homeowner's Association (Association). Klatt challenges amendments to the Sunbird Golf Resort Homeowners Association 's CCR's that were recorded in 2021. He alleges that these amendments were unforeseeable and violated contractual principles as set forth in *Kalway v. Calabria Ranch HOA*, LLC, 252 Ariz. 532 (2022). He claims that the Association violated Arizona law which limits the right of homeowner's associations (HOA) to charge transactional fees upon resale of property within a HOA. *See* A.R.S. § 33-1806 (HOA Transfer Statute).

On September 27, 2024, after oral argument, the Court denied Plaintiff Jimmie Klatt's (Klatt) Motion for Summary Judgment (filed May 6, 2024). The Court found that factual questions regarding foreseeability precluded the entry of summary judgment.

The Court's denial triggered Klatt's Motion for Reconsideration (filed September 27, 2024) wherein he argued that the issue of whether an amendment to the covenants, conditions, and restrictions (CCRs) is foreseeable is a question of law--- to which the Court ordered a

Response be filed. In its Response, Defendant Sunbird Golf Homeowner's Association (Association) agreed that it was a question of law.

On December 4, 2024, the Court granted Klatt's Motion for Reconsideration. The Court agreed to reconsider its ruling on Klatt's Motion for Summary Judgment (filed May 6, 2024) *de novo*. The Court further granted the Association leave to file a cross motion for summary judgment.

Thus, now pending is Klatt's Motion for Summary Judgment (filed May 6, 2024) and the Association's Cross Motion for Summary Judgment (filed January 6, 2025).The Court has reviewed the motions, the responses, replies, the file and the applicable case law. The Court has also considered the parties' arguments advanced at oral argument held on March 15, 2024.

The matter is ready for ruling. The Court will grant Klatt's Motion *in part* with respect to the *Kalway* issue and will grant the Association's Motion *in part* with respect to the HOA Transfer Fee.

Background

The summary judgment record establishes that Klatt owns a home he purchased in 2018 which is managed by the Association. Developed by Sunbird Golf (SBG) between 1990-1994, the homes sit and around a resort which was originally surrounded by 17 individual homeowner associations through which a golf course (Golf Course) runs.

In 1999, the various homeowners, through a transition agreement (Transition Agreement), consolidated the associations and formed the Association. In addition to the Transition Agreement, other documents were executed including the full set of CCRs applicable to all homes (1999 CCRs) and a 1999 Common Areas Lease (Common Areas Lease).

Under the 1999 CCRs, the Golf Course remained separately owned by SBG and was never made part of the Association. Moreover, the Common Areas Lease did not and still does not include any part of the Golf Course.

In 2015, the 1999 CCRs were amended and recorded (2015 CCRs). The 2015 CCRs were those in effect when Klatt purchased his home.

Like the 1999 CCRs, the 2015 CCRs left out the Golf Course. In a separate section captioned "Golf Course" sub-captioned "Operation," these CCRs stated that "[n]either the Association nor its members shall be responsible for costs and expenses incurred in the operation and maintenance of the golf course" *See* 2015 CCRs, § 9.2.

The 1995 CCR's also limited the expenditure of Assessments. In a separate section captioned "Purpose of Assessments," the 1995 CCRs limited the expenditure of funds to those they called a "common expense" (Common Expense). *See* 2015 CCRs, § 6.3(A). The provision expressly stated that any costs associated with the Golf Course were not a Common Expense. *Id.*

The 2015 CCRs also authorized the Association to create a Capital Improvement Contribution Fund (CCIF). *See* 2015 CCRs, § 6.7(B). The CCIF was to be imposed only n new members upon the acquisition of lots within the Association. *Id.* The CCIF funds must be deposited in a separate account and be used for the "maintenance, repair, replacement or capital improvements of the Common Areas or other areas that benefit the Association but shall not be used for any work on any portion of any Lot." *Id.*

In 2020, the Golf Course owner reported financial troubles to the Association. It approached the Association seeking financial assistance. The Golf Course needed maintenance that could not be sustained by its owners.[1] Some of the maintenance the Golf Course needed in late 2020 appeared to be due in part to precipitation runoff from the residential lots and common areas controlled by the Association.

The 2015 CCRs contain general amendment power. *See* 1995 CCRs, § 13.2. Amendments require a majority vote of the lot owners. *Id.*

In 2021, the Association amended the 2015 CCRs with the approval of the majority Association members. (2021 Amendments). They were approved by a majority of the homeowners.

First, the 2021 Amendments altered section 6.3(A) by removing the Golf Course exclusion from a list of Common Expenses. The 2021 Amendments added the Golf Course but directed that such funds be collected as a CCIF.

Second, the 2021 Amendments also changed Section 9.2. Section 9.2, as amended, permitted funds to be used for the Golf Course.

Third, the 2021 Amendments authorized the Association to charge a $300 transfer fee called a "Capital Improvement Assessment" (CIA) for the Golf Course. Consistent with CCIF requirements, the CIA had to be imposed to new home buyers and the funds had to be deposited in a separate account.

[1] Klatt did not deny this fact but instead stated that this fact was irrelevant. Instead, he stated that he is "not in a position to admit or dispute these factual allegations." Having not disputed it, the Court deems it to be uncontested.

Klatt has filed a one-count Complaint. He asserts: 1, (Count 1) Declaratory Judgment/Injunction that the 2021 Amendment is invalid under *Kalway v. Calabria Ranch HOA*, LLC, 252 Ariz. 532 (2022), the HOA Transfer Fee, *i.e.,* the CIA, is invalid under A.R.S. § 33-1806(D) and a fine for violation of that statute.

Legal Standards for Summary Judgment

The case law directs that "[s]ummary judgment is appropriate when the record shows that there is no real dispute as to any material facts and the moving party is entitled to judgment as a matter of law." *United Bank of Ariz. v. Allyn,* 167 Ariz. 191, 194-95 (App. 1990) (citing Rule 56, Arizona Rules of Civil Procedure; *Nicoletti v. Westcor, Inc*., 131 Ariz. 140, 142 (1982); State ex rel. *Corbin v. Sabel*, 138 Ariz. 253, 255 (App.1983)). If a genuine issue of material fact exists upon which reasonable people might reach different conclusions, summary judgment is not appropriate. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10 (1990); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "Even if no factual dispute exists, summary judgment is inappropriate when reasonable jurors could draw conflicting inferences from the circumstances." *Bishop v. State Dep't of Corrections*, 172 Ariz. 472, 475 (App. 1992) (citing *N. Contracting Co. v. Allis-Chalmers Corp*., 117 Ariz. 374, 376 (1977)).

The party moving for summary judgment must produce evidence that they believe demonstrates the absence of a genuine issue of material fact and must explain why summary judgment is warranted. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 (App. 2008); If the nonmoving party has the burden of proof of the claim or defense at trial, the moving party need not disprove the nonmoving party's claim or defense but need only point out the lack of evidence on an essential element of the claim or defense. *Thruston*, 218 Ariz. at 117; *see also Vig v. Nix Project II P'ship*, 221 Ariz. 393, 396 (App. 2009).

Ruling

A. The Enforceability of the 2021 Amendment under *Kalway*.

The Court begins with the proposition that covenants, conditions, and restrictions constitute a contract between the property owners and the Association. *Ahwatukee Custom Estates Mgt. Ass'n., Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5 (App. 2000). They contain vested rights, and the owners are entitled to rely on these covenants and their stability. *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 330 (App. 1995).

Nonetheless, "Arizona law permits the amendment of CCRs by a majority vote if such voting is specified in the original declaration." *Kalway,* at 537-538. ¶10 (citing A.R.S. §33-1817(A) (2022)). The amendments must be foreseeable. *Kalway.*

The *Kalway* Opinion and §33-1817(A) do not overrule the common law requirement which prohibits some amendments even if passed by majority vote. *Kalway,* at 537-538, ¶10. The CCRs can only amend the original covenants when such amendments would be "reasonable and foreseeable." *Id.; see also Dreamland Villa Community Club, Inc. v. Ramsey*, 224 Ariz. 42, 51, ¶38 (App. 2010); *see also Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 45-46 (App. 2003); *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513 (App. 2005)). This is because "[a]llowing substantial, unforeseen, and unlimited amendments would alter the nature of the covenants to which the homeowners originally agreed." *Id.* at 536 (citing *Dreamland*, 224 Ariz. at 51).

The *Kalway* issue is whether the 2015 CCRs gives sufficient notice that common expenses could be used to support the Golf Course. More specifically, the question is whether the 2021 Amendments that now authorize the charging of a $300 CIA were reasonably foreseeable from the 2015 CCRs perspective. As the parties have agreed, this is a legal issue to be decided by the Court. *See Vista del Corazon HOA v. Smith,* 2024 WL 1007275 (App. 2024); *Preston v. Las Sendas Community Association, Inc*., 2023 WL 7139326 (App. 2023).[2]

At the outset, the Court rejects the Association's argument that because Klatt is not subject to the CIA he has a diminished right to challenge the 2021 Amendments. That such fees are collected from only new homeowners is of no moment given that such fees become the property of all homeowners through the Association. It is the amendment of expenditure Association's funds at ---- not the funds' source--- that directly impact Klatt's rights. As a member he of the Association, he can challenge its expenditures.

Similarly, the Court rejects the Association's claim that the CIA did does not have a sufficient impact on Klatt's use of the land. The 2021 Amendments effectively marry the homeowners to the Golf Course inextricably linking both financially. As noted by Klatt, the Association has used substantial funds on such matters as rebuilding the Golf Course's maintenance grid ($20,000), for a new maintenance gate ($20,000), a new ball catcher ($5,000) and a new lawnmower ($4,000).

The Court now evaluates foreseeability and must interpret the 2015 CCR's to assess the drafters' intent. *Kalway,* at 59, ¶¶ 16, 17. The Court must look *objectively* at the 2015 CCRs to

[2] The Court finds these authorities to be persuasive and cites them pursuant to Arizona Supreme Court Rule 111(c).

determine whether there was notice that the amended covenants could be altered. *Id.* The Court is to resolve all ambiguities against the drafters. *Id.*

On the critical point of measuring foreseeability, the *Kalway* Court observed:

> The restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. *Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way.* []. But future amendments cannot be "entirely new and different in character," untethered to an original covenant. []. Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants.

Id., at 59, ¶17 (emphasis added).

Thus, *Kalway* provides a two-part test. First, the Court evaluates whether the 2015 CCR's give notice of the restrictive covenant, that is whether using funds for the Golf Course is prohibited. And if so, whether the covenants give notice that they can be amended to refine, correct an error, fill in a gap, or change it.

As for step one, the Court finds that the 2015 CCRs give notice that no funds were to be used for the Golf Course. Sections 6.3(a) and 9.1 make that clear.

Turning to step two, the Court appraises whether 1995 CCRs give notice that they "can be amended to refine it, correct an error, fill in a gap, or change it" in a manner that permits the expenditure of Association funds on the Golf Course. The answer to that question is no.

The Court begins with section 6.3(A) which provides in relevant part:

> **6.3(A) Purpose of Assessments**. The Association shall apply all funds and property received by it, including the Annual and Special Assessments, fees, loan proceeds, surplus funds and all funds and property received by it from any other source for the common good and benefit by devoting the funds and the property to the expenses of the administration and operation of the Common Areas and to any other expenses incurred in conformance with this Declaration, the Articles, Bylaws, or Association Rules (which expenses are sometimes referred to herein as "Common

> Expenses."). Common expenses include, without limitation expenses for the acquisition, construction, maintenance, provision and operation, by any manner or method whatsoever of any and all land, properties, improvements, recreational facilities (except for the golf course).

Section 6.3(A) is self-captioned as "*Purpose of Assessments*" and the Court construes this provision in that context. That said, the Court is mindful that the 2015 CCRs set forth interpretive rules which state that "[t]he marginal or topical headings of the Sections contained in this Declaration are for convenience only and do not define, limit or construe the Sections of this Declaration." 2015 CCRs, § 15.2. The captions, therefore, provide a roadmap but not substance to the Court's decision today.

Section 6.3(A)'s "purpose" signals that it contains "something set as an object or end to be attained." Meriam Webster Dictionary, merriam-webster.com/dictionary/purpose. Contextually, section 6.3(A)'s object is to limit the expenditure of assessments on matters for the "common good and benefit."

The Court does limit 6.3(A) as simply setting forth the purpose. Substantively, section 6.3(Ak) also requires that be made for the common expenses that provide the common good and benefit. While whatever constitutes common good and benefit is not exhaustively defined, section 6.3(A) expressly excludes maintenance of the Golf Course as falling within its parameters.

Section 6.3(A) also makes clear that what constitute expenditures captures resources well beyond the members' assessments. They constitute "all funds and property received [by the Association], including the Annual and Special Assessments, fees, loan proceeds, surplus funds and all funds and property received by it from any other source."

Having thoroughly reviewed section 6.3(A), the Court sees nothing that signals the provision is subject to modification and/or there are gaps to be filled. That the Association and a majority of its members later believed that an ill-maintained Golf Course running through and around the community undermined the common good and benefit, does not change that fact---even it seems like good policy.

The Association posits that section 6.7(B) adds to this foreseeability. It authorizes the Association to create the CCIF for the "maintenance, repair, replacement or capital improvements of the Common Areas *or other areas that benefit the* Association but shall not be used for any work on any portion of any Lot." *Id.* (Emphasis Added). Consistent with *Kalway,*

the Association argues, section 6.7(B) leaves open "other areas" and thereby gives notice that it can be amended to fill in that gap--- and the 2021 Amendments fill in that gap.

Section 6.7(B) does indeed leave open a gap and gives notice that the CCIF could be used for the common areas or other areas *that benefit* the Association. The question is whether "other areas that benefit the Association" can include the Golf Course--- when the Declaration already stated that the Golf Course is exempt from the common good and benefit

The short answer to the question no. This is especially true given the all-encompassing sweep of section 6.2(A)'s broad definition of common expenses—from which the Golf Course is excluded.

On this point, the Court again reviewed what constitutes common expenses:

> Common expenses include, without limitation expenses for the acquisition, construction, maintenance, provision and operation, by any manner or method whatsoever of any and all land, properties, improvements, recreational facilities (except for the golf course).

There is no daylight between use of Association funds for common expenses that which exclude the Golf Course, and use of CCIF funds for "other areas that benefit the Association." While CCIF does leave open its use for areas not expressly listed in section 6.7, they do not include the Golf Course.

Finally, section 9.2, captioned "Operation" falls under the broad section captioned "Golf Couse." Like section 6.3(A), there is nothing in section 9.2 that offers any notice that it can be amended. This provision states unequivocally that neither the Association nor its members shall be responsible for costs incurred or the maintenance of the Golf Course—hard stop.

In the end, the Court finds that a proper interpretation of the 2015 CCR's does not allow the 2021 Amendments. While the 2015 CCRs also provided for creation of a CCIF, there is insufficient notice that it could be used for the Golf Course.

The Court therefore finds that the 2021 Amendments violate *Kalway* and Klatt's motion for summary judgment will be granted on the *Kalway* issue.

B. Title 33-1806

Klatt also asserts that the 2021 Amendments violate Arizona law because they are a prohibited fee under the Transfer Fee Statute. The HOA Transfer Fee Statute requires HOA's to

deliver to purchasers of property a copy of its bylaws, rules, declaration and a statement of disclosure addressing assessments and other matters impact the HOA. Ariz. Rev. Stat. Ann. § 33-1806(A)(1-3) (2025).

The HOA Transfer Statute permits the charging of a fee for costs incurred in the preparation and delivery of mandatory disclosures required under the Transfer Fee Statute. Ariz. Rev. Stat. Ann. § 33-1806(C) (2025). The HOA Transfer Statute expressly prohibits the charging of other fees relating to services for resale disclosure, lien estoppel and other services. *Id.* An association that charges or collects a fee in violation of this section is subject to a civil penalty of not more than one thousand two hundred dollars." *Id.*

Klatt alleges that the CIA violates the HOA Transfer Statute and, therefore, the Association should pay the civil penalty. That the Court found the CIA violates *Kalway* does not mean that it also violates the HOA Transfer Statute. It was the lack of notice that renders it ineffective, and for no other reason.

As such, the Court finds that the CIA does not violate the HOA Transfer Fee Statute. The Association is therefore entitled to summary judgment on this issue.

Conclusion

For the foregoing reasons,

IT IS ORDERED granting Klatt's Motion for Summary Judgment (filed May 6, 2024) *in part* on the *Kalway* issue only and denying it on the HOA Transfer Statute.

IT IS FURTHER ORDERED granting the Association's Cross Motion for Summary Judgment (filed January 6, 2025) on the HOA Transfer Statute only and denying it on the *Kalway* issue.

IT IS FURTHER ORDERED that the parties shall file any Application for attorney's fees and taxable costs, and each shall lodge a form of judgment **within 20 days** from the filing date of this minute entry.