

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

06/17/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

DESERT RIDGE COMMUNITY ASSOCIATION JEFFREY D GROSS

v.

B R E THUNDER DESERT RIDGE PROPERTY STEVEN MARTIN AARON
OWNER L L C, et al.

J GARY LINDER
MICHAEL J PLATI
JUDGE BRODMAN

RULING ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

The Court reviewed the parties' cross motions for judgment on the pleadings, the responses and replies. The Court held oral argument on June 14, 2019.

This case involves interpretation of a contract provision that both parties claim is unambiguous.

Plaintiff Desert Ridge Community Association ("Association") is suing JW Marriott Phoenix Desert Ridge Resort & Spa ("Resort"), which operates a resort in Desert Ridge containing 950 rooms.

The facts in this case are undisputed. The parties' relationship is governed by the July 7, 1993 Declaration of Covenants, Conditions, Restrictions and Easements for Desert Ridge ("the Declaration"), as amended. The Declaration controls the calculation of assessments that are charged to property owners. Construction of the Resort was completed in 2002. For the last 14

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years, the Resort (or its predecessor) has been paying for 95 memberships -- one for each 10 rooms. In May 2015, the Association signed an estoppel certificate indicating that the Resort had no unpaid assessments. In June 2016, the Association's auditor suggested that the Association had wrongfully calculated assessments.

Pulling a flip turn, the Association now asserts that it has erroneously calculated assessments for the last 14 years and the Resort owes 950 memberships. The Association alleges that "After completion of construction in 2002, the Association mistakenly continued to assess the Resort based on 95 memberships." In other words, the Association is seeking to increase the Resort's monthly membership fee by a factor of ten and is seeking to collect 14 years of underpaid assessments.

Section 8.1.5 is the provision in dispute. It reads:

For an Owner of a Parcel designated for use as a resort under the Land Use Plan, one (1) Membership for each ten (10) rooms which may be constructed within its resort under the Land Use Plan. After the resort is constructed, the number of Memberships shall be adjusted to reflect the actual number of rooms constructed within the resort.

The Court's purpose in interpreting a contract is to ascertain and enforce the parties' intent. *Elm Retirement Center, LP v. Callaway*, 226 Ariz. 287, 290, ¶ 15 (App. 2010). *Elm Retirement* summarizes Arizona law concerning the interpretation of contracts. To determine the parties' intent, the Court will look to the plain meaning of the words as viewed in the context of the contract as a whole. When terms of a contract are plain and unambiguous, its interpretation is a question of law for the Court. *Id.* at 290-91, ¶ 15. A disagreement about a contract's meaning does not establish an ambiguity. *Id.* at ¶ 21.

The Court does not consider the contract to be ambiguous. The contract is not reasonably susceptible to the interpretation offered by the Association for several reasons.

The language is clear and unambiguous. The Resort must pay memberships in a 1:10 ratio. Section 8.1.5 provides that the Resort will pay "one (1) Membership for each ten (10) rooms which may be constructed." Then, if there is a different number of rooms than the planned 950, "[a]fter the resort is constructed, the number of Memberships shall be adjusted to reflect the actual number of room constructed within the resort." Thus, if only 900 rooms were constructed instead of the planned 950 rooms, the number of Memberships would be adjusted accordingly.

If the drafters of the Declaration had intended the resort to be charged with a membership for each room once construction was completed, the last sentence of Section 8.1.5 would read: "After the resort is constructed, the resort will be assessed one Membership for each resort

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room.” The drafters clearly knew how to adjust Membership ratios once construction was complete,¹ but did not in Section 8.1.5.

The Association argues that following completion of construction, assessments should have been adjusted upward to reflect a single membership for each room. This interpretation does not comport with the terms of the Declaration. The word “adjust” applies to the number of rooms, not to the ratio. Moreover, no language of the Declaration supports the Association’s claim that “adjust” means changing the 1:10 ratio. Nothing in the Declaration describes how the Membership ratio for a resort room is to be adjusted. Nothing in the Declaration suggests that the Resort must pay a Membership for each individual room. The Declaration clearly provides that different land uses will pay different ratios. Nowhere does the Declaration provide that the ratio for resort rooms is anything other than 1:10.

In interpreting a contract, each part of the contract must be read together to bring harmony, if possible, between all parts of the writing. *Elm Retirement* at ¶ 18. Although other parts of the Declaration provide clear calculations for how membership ratios are to be re-assessed or changed once construction is complete, the provision in question provides no such mechanism. Moreover, the Declaration provides that apartments are to be assessed one-half of a membership. The Association provides no logical explanation for why an apartment would be assessed on a fraction of a Membership but a hotel room would be assessed as a whole.

Third, the Association has been making assessments on the 1:10 ratio for 14 years. The Court does not consider the interpretation of the provision in question to be doubtful, but even if it was, in interpreting a contract the “acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms.” *Associated Students of Univ. of Arizona v. Arizona Bd. of Regents*, 120 Ariz. 100, 105 (App. 1978). *See also* RAJI Contract 26 (provision is interpreted by what the parties meant at the time the contract is formed; jury to consider “acts and statements of parties before any dispute arose”). The interpretation advocated by the Association was not discovered by anyone who had involvement in the original Declaration, but rather a third-party auditor looking for a loophole. The Association presents no evidence that its recent interpretation comports with the drafters’ intent. In fact, as recently as May 2015 the Association signed an estoppel certificate confirming that there were no claims for unpaid assessments.

1. Compare Section 8.1.5 to Section 8.1.2 which applies to apartments. Section 8.1.2 reads: “Apartment Units. One-half (1/2) Membership for each completed Apartment Unit owned by an Owner.” (Emphasis added) If the Association’s interpretation was correct, instead of the last sentence of 8.1.5 the Court would expect a companion statement to the effect that “Resort Rooms. One (1) Membership for each completed resort room.”

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The Court finds that the Resort is entitled to summary judgment as a matter of law. As a result, there is no need to resolve the statute of limitations argument. Nevertheless, the Court would reject the Association's claim that the discovery rule applies. Here, the Association claims that its interpretation of the contract is clear and unambiguous. If so, this interpretation would have been clear to any member of the Association who read the contract. As noted in *Elm Retirement*, the discovery rule does not permit a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim. *Elm Retirement*, 226 Ariz. at 290, ¶ 12. Failing to read a contract for 14 years is not reasonable diligence. Plaintiff fails to make any showing of reasonable diligence and plaintiff alleges no facts suggesting that the Resort covered up or precluded the Association from discovering its cause of action. In fact, the Association's auditors reviewed the books and found no problems for more than a decade. Any lien claims after June 22, 2015 would be barred. All other claims before June 22, 2012 would likewise be barred.

IT IS ORDERED that the Association's motion for partial judgment on the pleadings is denied.

IT IS ORDERED that the Resort's motion for judgment on the pleadings on Count 7 is granted. This would seem to moot the Resort's other counts.

Given this Court's ruling, it is unclear what additional disputes remain between the parties. The Court suspects that it should make a ruling on the inevitable application for attorneys' fees and costs and then render a final judgment under Rule 54(c). As a result, the Court offers two options.

IT IS FURTHER ORDERED that, within ten days of the filed date of this order, the Resort is to do **either** (not both) of the following: 1) submit a report describing any issues remaining to be litigated; or 2) submit a proposed form of final judgment containing Rule 54(c) language and any application for attorneys' fees and costs supported by an appropriate *China Doll* affidavit.