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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-018443 07/02/2014

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
J. Polanco
Deputy

ANDREW KUHN JONATHAN A DESSAULES

v.

SOUTHERN VILLAGE ESTATES CONDOMINIUM ASSOCIATION, et al. NIKITA VERMA PATEL

RULING

The Court received and considered the briefing submitted on Plaintiff Andrew Kuhn's [Plaintiff] Motion for Summary Judgment on Issue of Water Shut-Off. Defendants Southern Village Estates Condominium Association and Pride Asset Management Inc. [collectively Defendants] have filed a responsive pleading and also seek judgment on these issues as a matter of law. Plaintiff has requested oral argument on the issues presented. However, the Court finds the briefing is sufficient, and that oral argument would not add to the Court's consideration of the issues presented. Accordingly, oral argument is waived pursuant to Ariz. R. Civ. P. rule 7.1[c][2] to expedite the business of the Court. The Court herein issues the following ruling.

General Background. Plaintiff owns a condominium in a development known as Southern Village Estates. As an owner of a condo unit in this development, Plaintiff is a member of the homeowners association. It is undisputed that Plaintiff failed to pay past assessments imposed by the homeowners association on his owned unit. As a consequence, Defendant Southern Village Estates Condominium Association [SVECA] sought and secured a judgment against Plaintiff for all past due and accruing assessments.[1] In an effort to collect on this judgment SVECA retained Defendant Pride Asset Management to commence collection efforts. These collection efforts were not initially successful.

[1] Southern Village Estate v. Kuhn, Kyrene Justice Court Cause No. CC2011-154601.

The homeowner's association pays a utility for water delivered to each condo unit. These funds are taken from the monthly assessment dues paid by each unit. As a result of Plaintiff's non-payment, Defendants took the affirmative action of either shutting off [Plaintiff's version] or significantly restricting [Defendants' version] the flow of water to Plaintiff's individual condo unit. Plaintiff asserts that this action essentially rendered his home uninhabitable.

Plaintiff asserts he did not receive adequate notice of Defendants' action. As a consequence he initially removed the shut-off box placed on the water line to his individual unit. Thereafter, Defendants placed another shut-off box and posted warnings regarding removal of the shut-off box and notice that the action was taken pursuant to Defendants' collection policies. After several months' time, Plaintiff again removed the water shut-off box affixed to his unit and this action followed.

In December 2012, Plaintiff paid the outstanding judgment due to Defendants. Since that time, Plaintiff's unit has been provided with water.

Plaintiff seeks summary judgment alleging that, as a matter of law, the Defendants did not have the legal right to shut off water to his unit. Plaintiff asserts that the disconnection of water, as a collection remedy, is not expressly authorized by Arizona Statute or by this homeowner association's governing documents.

Defendants assert that the association's water restriction policy is valid and enforceable. Defendants concede that the Declarations [governing documents of the association] did not expressly authorize this action. Further, Defendants concede that there exists no express statutory authority authorizing this action. It is Defendants' position that A.R.S. §33-1242 gives the association the authority to adopt rules. That pursuant to this statutory authority the association has adopted a rule allowing it to restrict water to an individual condo unit if a homeowner fails to pay the monthly HOA assessment.[2]

Legal Standard. Summary judgment should be granted if the evidence shows there is no genuine dispute about any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. rule 56[a]. The moving party has the burden of showing that material facts are not genuinely disputed. *Celotex Corp. v. Catrett*, 477 U. S. 317 [1986]. To meet this burden, the moving party must point out the lack of evidence supporting the nonmoving party's claim, but need not produce evidence negating that claim. *Id.* at 325. When the moving party has carried its burden under Rule 56[c], the nonmoving party must show that there are genuine issues

[2] Defendant SVECA's Rules & Regulations, Paragraph 7 provides that the association has "the right to turn off water to the unit for non-payment of monthly assessment."

of material fact. A material fact is one that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 [1986]. A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The nonmoving party must produce evidence to support its claim or defense by more than simply showing "there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenity Radio Corp.,* 475 U.S. 574 [1986]. The Court must view this evidence in the light most favorable to the nonmoving party, must not assess its credibility, and must draw all justifiable inferences from it in favor of the nonmoving party. *Anderson, 477 U.S. at 255.* Where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue of material fact for trial. *Matsushita, 475 U.S. at 586.*

On summary judgment, the nonmoving party's evidence is presumed true, and all inferences from the evidence are drawn in the light most favorable to the nonmoving party. *Eisenbery v. Ins. Co. of North America,* 815 F.2d 1285 [9th Cir. 1987]. But the evidence presented by the parties must be admissible or able to be produced in admissible form. *Ariz. R. Civ. P. rule 56[c][2]*. Conclusory and speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and to defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730 [9th Cir. 1979].

Discussion. As part of its effort to collect delinquent monthly assessments, this Board of Directors adopted a rule that allows it to shut water off of units that do not pay their assessments. The question raised by these parties is whether under these circumstances this practice is lawful. The answer to this question turns on whether the rule adopted by this association is reasonable; the test is one of reasonableness.[3] If the rule adopted is reasonable it may be adopted. However, if the rule adopted bears no relationship to the health, happiness and enjoyment of life of the various unit owners, it is arbitrary or capricious and therefore, unreasonable.

The parties agree that the neither the Declaration nor the By-Laws of this association expressly provide the right to shut off water to a unit owner as a means of collecting unpaid assessments. Further, there is no state statute that expressly provides this authority or otherwise prohibits this practice.

Defendants argue that the rule adopted by its Board of Directors was authorized by A.R.S. §33-1242 and is reasonable. This is based on the fact that the association pays for the water delivered to each unit directly from the receipt of monthly assessments.

Plaintiff argues that the rule is unreasonable. First, he argues that the right to shut off water is not addressed in the Declaration or By-Laws and that any rule adopted under A.R.S.

[3] *Makeever v. Lyle,* 125 Ariz. 384 [App. 1980].

§33-1242 must be "subject to" and not inconsistent with the Declaration. Plaintiff argues that the lack of any provision in the Declaration authorizing water shut off is dispositive. Secondly, Plaintiff alleges that shutting off water to a condo as an extra-legal means of collecting unpaid assessments is per-se unreasonable and improper. The act of shutting off water renders the unit uninhabitable. The rule as adopted by the Board of Directors bears no relationship to the health, happiness and enjoyment of life by unit owners and is therefore unreasonable.

The Court concurs with Defendants that the association has the authority to promulgate and adopt rules, so long as the rules are themselves reasonable. However, the rule must have some relationship to the general welfare of the residences of the condominium for it to be valid and enforceable. Whether under these circumstances the rule at issue was "reasonable" presents an issue of fact, for the finders of fact. Under these factual circumstances, this Court cannot, as a matter of law, hold that the imposition of this rule was arbitrary and inconsistent with the wellbeing of the homeowners, thus either reasonable or unreasonable. Whether the rule bears any relationship to the health, happiness and enjoyment of life of the various unit owners as a whole, presents a question of fact. There are genuine issues of material fact that prevent entry of judgment as a matter of law for either party.

For the reasons stated,

IT IS ORDERED denying Plaintiff's Motion for Summary Judgment Regarding Water Shut-Off;

IT IS FURTHER ORDERED denying Defendants' cross-motion for summary judgment on this same issue.