Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-015165 07/29/2019

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

NICDON 10663 L L C

JONATHAN A DESSAULES

v.

DESERT MOUNTAIN MASTER ASSOCIATION

CURTIS S EKMARK

JUDGE VIOLA

Under Advisement Ruling
Defendant's Motion for Summary Judgment - Granted
Plaintiff's Motion for Summary Judgment - Denied
Defendant's Motion to Strike – Denied
Defendant's Rule 11 Motion – Denied
Defendant's Amended Request for Rule 56(D) Relief - Denied as Moot

The Court has received and considered the following:

1. Defendant's Motion for Summary Judgment filed January 14, 2019;
2. Defendant's Statement of Facts In Support of Its Motion for Summary Judgment (DSOF) filed January 14, 2019;
3. Plaintiff's Response to Defendant's Motion for Summary Judgment (PCSOF) filed February 22, 2019;
4. Plaintiff's Controverting Statement of Facts In Opposition to Defendant's Motion for Summary Judgment (PCSOF) filed February 22, 2019;
5. Defendant's Reply filed March 25, 2019;
6. Defendant's Supplemental Statement of Facts (DSSOF) filed March 25, 2019;
7. Plaintiff's Motion for Summary Judgment filed April 10, 2019;
8. Plaintiff's Statement of Facts filed April 10, 2019;

9. Defendant's Response filed May 6, 2019;
10. Defendant's Controverting Statement of Facts In Support of Its Opposition to Plaintiff's Motion for Summary Judgment (DCSOF) filed May, 6, 2019;
11. Plaintiff's Reply filed May 31, 2019;
12. Defendant's Motion to Strike filed May 6, 2019;
13. Plaintiff's Response filed May 10, 2019;
14. Rule 11 Motion filed May 9, 2019;
15. Plaintiff's Response to Rule 11 Motion filed May 20, 2019;
16. Defendant's Reply in Support of Rule 11 Motion filed May 30, 2019;
17. Defendant's Amended Request for Rule 56(D) Relief Submitted Pursuant to Court's Minute Entry dated May 31, 2019;
18. Defendant's Notice of Errata filed June 3, 2019; and
19. Plaintiff's Response to Defendant's Amended Request for Rule 56(D) Relief filed June 3, 2019.

The Court has further considered the arguments of counsel presented on June 7, 2019. The parties have filed competing motions for summary judgment. Despite the number of filings, the dispute between the parties is fairly simple: 1) whether a homeowners' association followed the correct procedures in adopting an amendment to the association governing document that restricted homeowners' ability to lease their property on a short term (less than 30 day) basis; and 2) whether the restriction is valid.

Each summary judgment motion must be decided independently of the other. *E.g., Arizona Land Title & Trust Co. v. Safeway Stores, Inc.*, 6 Ariz. App. 52, 58, 429 P.2d 686, 692 (App. 1967) ("The well-settled rule is that [c]ross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not disputed" (citation and internal quotations marks omitted)). Thus, when considering the Defendant's Motion for Summary Judgment, the court is required to view all facts in the light most favorable to the Defendant, and when considering the Plaintiff's Motion for Summary Judgment, the court must view all facts in the light most favorable to the Plaintiff. *See e.g., Airfreight Express Ltd v. Evergreen Air Center, Inc*., 215 Ariz. 103, 106, ¶2, 158 P.3d 232, 235 (App. 2008)

General Background

Plaintiff is the owner of a resident home which is part of a homeowners association called Desert Mountain Master Association (DMMA). Plaintiff's principals purchased the home in November 2015 and conveyed the home to Plaintiff (an LLC holding company) in September 2017. DCSOF ¶¶ 7, 8. As of the transfer, the Association's Master Declaration Use Restrictions did not contain any restrictions concerning the length of time that one could rent their own property. DCSOF ¶ 6. For purposes of these Motions, the Court will accept Plaintiff's allegation

that the principals looked for a home without restrictions. PSOF ¶¶ 2, 6 filed April 10, 2019. In July 2018, DMMA recorded an amendment (the Amendment) to its Master Declaration which banned homeowners from renting their homes to outsiders unless these guests are prospective members of the Desert Mountain Golf Club (the Club) or the lease is for longer than thirty days. Plaintiff's principals claim they would not have purchased the property if they were aware the Master Declaration could restrict rentals. DCSOF ¶ 12. At the time Plaintiff's principals purchased the property, a City of Scottsdale municipal ordinance prohibited Plaintiff from using their property for rentals of less than 30 days. DSSOF ¶ 1.

In July 2017, the DMMA Board of Directors announced to the members that it had approved a resolution purporting to add a new Use Restriction to the Master Declaration restricting rentals to "Ineligible Renters" for periods of less than sixty (60) days in duration. DSCOF ¶ 4. The Board further announced it would unilaterally adopt the new restrictions unless more than 10% of the Members objected in writing within 45 days. DCSOF ¶ 15. The proposal contemplated "Eligible Renters" would include individuals or entities that are members of the Association and/or members of the Club. DCSOF ¶ 17. "Ineligible Renters" were those who were not members of the Association or the Club. DCSOF ¶ 18. The Amendment also allowed "for prospective Club members to rent short-term." DCSOF ¶ 19. DMMA sent an email to the owners to explain the restriction which clarified when rentals would be allowed or not allowed under the Amendment. DSCOF 20. The email clarified that owners could not rent to non-club/non-property owners for less than 60 days. DSCOF ¶ 20.

Approximately 700 people objected to the proposed Amendment. DCSOF ¶ 22. Later, On December 4, 2017 and January 29, 2018, the Board considered options given the survey results related to the Amendment. On January 29, 2018, the Board voted to rescind the 2017 proposed Amendment and proposed a 30-day minimum. DCSOF ¶¶ 23-27. The Board further appointed an ad hoc committee to vet the options and set rules in place. DCSOF ¶¶ 30-31.

The Board later approved a Resolution adopted by the Master Board of Directors at the Board Meeting held on February 26, 2018. DSSOF, Ex. F at ¶¶ 2, 5-7.[1] On March 8, 2018, the Board emailed the homeowners to trigger the 45 day objection period under Section 5.20 of the Master Declaration expressly giving members until April 27, 2018 to object to the Amendment. DCSOF ¶ 56. The DMMA obtained written objections from 10% of the community before the

[1] For purposes of the competing motions, the Court has focused on the conduct as of February 26, 2018. To the extent that the Board may have failed to comply with open meeting requirements at a past board meeting, Plaintiff has not presented authority to establish such actions are void or otherwise invalidate the subsequent actions of the Board taken consistent with Section 5.20. Accordingly, the Court does not set forth the description of the various meetings leading up to the unanimous approval of the instant Amendment at the February 26, 2018 meeting.

April 27, 2018 deadline. DCSOF ¶¶ 57, 58. Before the objection period ended, the Board sent out a ballot for the Amendment and a Notice of Special Meeting scheduling a vote for May 2, 2018. DCSOF. Out of 2,397 total members, 1,323 voted for the Amendment and 430 voted against with 8 abstentions. DCSOF ¶ 59; DSSOF ¶ 16. The only substantive differences between the 2017 proposed Amendment and the 2018 Amendment were the reduction of the rental restriction from 60 days to 30 days and allowing home exchanges. DCSOF ¶ 61. The Amendment was recorded in July 2018. DCSOF ¶ 60.

Defendant asserts the Amendment is valid for the following reasons:

1. Section 4.2 of the Declaration, titled Permitted Uses and Restrictions, warns prospective purchasers that "the Board shall have the right, from time to time, to amend, repeal or add to the restrictions. . ."
2. The process for amending Use Restrictions is set forth in section 5.20 of the Declaration. The process allows for amendment by 2/3 of the owners who vote at a meeting called for a specific purpose. The instant Amendment required a 2/3 approval of the owners who voted.

Plaintiff asserts the Amendment is invalid for the following reasons:

1. No provisions contained in the four corners of the Master Declaration specifically alerted purchasers to the possibility that DMMA would create an entirely new covenant imposing a 30-day minimum duration on leases;
2. The Amendment unreasonably favors the Golf Club over non-Golf Club members.
3. The Amendment was passed in violation of the Arizona Open Meeting Law (A.R.S. § 33-1804) and DMMA's own governing documents.

ANALYSIS

DMMA Followed the Procedures to Amend the Use Restrictions in the Declaration

Defendant asserts the Amendment could be adopted by a vote of 2/3 of the homeowners attending the meeting (or by absentee ballot) for the purpose of considering the Amendment. Plaintiff contends that either a majority of all members or all of the members should have approved the Amendment.

1. Section 4.2 Expressly Contemplates Use Restrictions Can Be Added

Plaintiff asserts that an association cannot use the general amendment provision contained in CC&Rs to "unreasonably alter the nature of the covenants" in a manner that "substitutes new obligations of the original bargain" or has a "substantial and unforeseeable impact on owners." *Wilson v. Playa de Serrano,* 211 Ariz. 511, 513 (App. 2005). In *Wilson,* a resident of a townhouse

subdivision challenged the homeowners' association after the association adopted bylaws that imposed a 55 year or older requirement. The original declaration provided that the development was an "adult" development. Later, the owners attempted to pass an amendment to the by-laws by a vote of 25 to 6 to make the community an age-restricted community. The plaintiff in *Wilson* asserted the declaration does not impose a 55 year or older age restriction so the bylaws could not create an enforceable deed restriction. *See Shamrock v. Wagon Wheel Part Homeowners Ass'n*, 206 Ariz. 42 42, ¶ 14 (App. 2003) ("If the recorded declaration does not contain or at least provide for later adoption of a particular restriction or requirement, that restriction or requirement is invalid.").

In *Wilson*, the association relied on a portion of the Restatement (Third) of Property: Servitudes (2000) to support restricting occupancy by amending its bylaws. As the *Wilson* court explained, the Restatement provides that a common interest association does not have inherent authority to restrict the occupancy of its lots absent specific authorization in the declaration unless the restrictions are designed to protect the common property. The court further concluded the declaration did not expressly impose a 55 year or older restriction nor did it grant the association the power to impose such a restriction. *Id*. at 513. This case is different than *Wilson* because Section 4.2 specifically contemplates the addition of restrictions under the process outlined in Section 5.20.

> Section 4.2 of the Declaration addresses lot restrictions:
>
> Permitted Uses and Restrictions. The permitted uses and restrictions of the Lots, Parcels and Common Area are set forth on the attached Exhibit "E" and made a part hereof. The Board shall have the right, from time to time, to amend, repeal, or add to the restrictions in Exhibit "E" concerning the Lots, Parcels or Common Area by Recording a certificate of amendment, *subject to the approval of the Members as set forth in Section 5.20* hereof for Major Decisions.

(Emphasis added). Section 4.2 expressly recognizes that restrictions may be added and then identifies the Section under which such amendment shall be considered.

2. Section 5.20 of the Declaration Does Not Require Unanimous Consent or a Majority of Members to Approve an Amendment

The process for amending Use Restrictions is set forth in section 5.20 of the Declaration:

> Major Decisions. All decisions of the Master Association identified as Major Decisions herein shall be approved according

> to the following procedure. All Major Decisions shall first be approved by the Board of Directors through a written Board resolution. Thereafter, the Master Association shall give notice to all Owners of the proposed Major Decision and of their right to object to it. If not more than ten percent (10%) of the Members object to the Major Decision in writing within forty-five (45) days after notice is given, the Board is authorized to implement to the Major Decision without a meeting or vote of the Members. If, however, more than ten percent (10%) of the Members object to the Major Decision in writing within forty-five (45) days after notice is given, the Major Decision may only be authorized if approved by eligible Members holding two-thirds (2/3) of the eligible votes in the Master Association who are present in person or by absentee ballot at a meeting of the Master Association called for this purpose. The following actions are Major Decisions of the Master Association:
>
> (a) . . .
> (b) Subject to the Developer's written approval, if required, the Board's right to amend, repeal, or add restrictions in Exhibit "E", pursuant to Section 4.2.

Accordingly, under Section 5.20, a Major Decision can be implemented by the Board without a vote if no more than 10% of the Members object in writing within 45 days after notice. Alternatively, if 10% of the Members object, authorization may only be authorized by a vote of 2/3 of the eligible votes in the Master Association who are present at a meeting called for "this purpose."

Here, there was a written Board resolution approved by the Board of Directors. The Board approved a Resolution adopted by the Master Board of Directors at the Board Meeting held on February 26, 2018. DSSOF, Ex. F at ¶¶ 2, 5-7. More than 10% of the Members objected in writing within 45 days. DCSOF ¶¶ 57, 58. The Board held a meeting where 2/3 of the Members voted in person or by absentee ballot. Out of 1761 votes cast, 1,323 voted for the Amendment and 430 voted against it with 8 abstaining. DCSOF ¶ 59; DSSOF ¶ 16. Under the plain reading of 5.20, the appropriate number of Members voted for the Amendment.

3. <u>DMMA Correctly Required a 2/3 Majority of the Members Voting</u>

The parties have a fundamental disagreement as to whether the Amendment required a majority of all Members or a majority of all the Members who voted at the meeting. Plaintiff asserts a majority of all Members was required and Defendant asserts only a majority of the

Members voting was required. Plaintiff asserts that a majority of members (i.e. 1,199) would be required to approve various "mundane or minor issues" such as how to handle surplus funds, budgets, assessments, late fees, etc. Response filed February 22 at 11.

Under Plaintiff's theory, it is inconsistent with Arizona law and fundamental precepts of common interest communities to allow such significant decisions to be made by potentially so few owners (i.e., 2/3 of the owners voting). Plaintiff queries why "Major Decisions" would require a lesser percentage. "Major Decisions" include selling, conveying, and abandoning common areas; borrowing money; annexing property into the Association; de-annexing property out of the Association; and adding, repealing or amending use restrictions.

Plaintiff argues it is an absurd result that DMMA would seek to allow so few members to make fundamental changes but require more for more mundane and minor changes. Compare language in Section 19.1 with Section 5.20.

Section 19.1 of the Master Declaration provides:

> Amendments may be adopted only with the affirmative vote or written consent of a Majority of all of the Members and written consent of Developer as long as Developer owns any portion of the Potential Development Parcels or Club owns the Golf Club Facilities. Notwithstanding the foregoing, the percentage of Members necessary to amend a specific clause or provision of the Master Declaration shall not be less than the percentage of affirmative votes prescribed for actions to be taken under the clause or provision.

The plain language in Section 5.20 provides an amendment could be approved by "Members holding two-thirds of the eligible votes in the Master Association who are voting in person or by absentee ballot at a meeting of the Master Association called for this purpose." The language in 5.20 is different and more specific than language appearing in other sections of the Declaration:

7.3.4 "majority of all the Members"

10.3 "Majority of Members"

5.20 "2/3 of the eligible votes who are present in person or by absentee ballot at a meeting of the Master Association called for this purpose"

Section 1.33 defines the term "Majority of Members" as:

> any specified fraction or percentage of the Members means that fraction or percentage of the total votes entitled to be cast by Members with respect to a given matter.

PSOF, Ex. 1 at 1.33. The language in 5.20 contains a specified fraction or percentage but then it also makes clear that the percentage required applies to the eligible votes in the Master Association who are present in person or by absentee ballot at a meeting of the Master Association called for this purpose. PSOF, Ex. 1 at 5.20.

Moreover, Section 5.20 does not contain the term "Majority of the Members." Plaintiff argues that 5.20 should be reasonably interpreted to mean that DMMA needed 2/3 of the whole which is supported by 1.33. While the Court recognizes the arguments presented by Plaintiff, accepting the argument would require the Court to ignore the express language of 5.20 - "who are voting in person or by absent ballot." If the Court ignores the express language, such language would be rendered superfluous. *See Taylor v. State Farm Mut. Auto Ins. Co*., 175 Ariz. 148, 153, 158-159, no. 9 (1993). Other portions of the Declaration provide support that the drafters intended to use the specific language contained in 5.20:

7.34 requires vote of a "majority of all the Members"

10.3 requires a vote of "Majority of Members, at a special meeting held for such purpose"

Neither of the above sections contains the additional language for members "who are present in person or by absentee ballot at a meeting called by the Master Association for this purpose." Additionally, while not dispositive, Bob Borsch was involved with drafting 5.20 and he testified that Section 5.20 requires only two-thirds of those voting. DCSOF filed May 6, 2019 at ¶ 13.

4. *Dreamland* is Distinguishable

Plaintiff relies on *Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz. 42, 49-41, ¶¶ 31-35 (App. 2010) to argue that any amendment "must be directed at, and is limited by, the scope of restrictions and cannot create new obligations not previously mentioned." *Id*. at 49-50. *Dreamland* is distinguishable from the present case because it was governed by deed restrictions which required that every residence be occupied by at least one person over 55 years old.[2] In *Dreamland*, the homeowners objected to an amendment to the declaration which required membership in a non-profit corporation. The question presented was whether deed restrictions for

[2] Defendants identify seventeen reasons why Dreamland is distinguishable from this case. *See* Reply filed March 25, 2019 at pages 3-4.

a community without common areas, containing only restrictive covenants pertaining to each lot owner's personal residence, can be amended by majority vote of the lot owners to require membership in an association and the imposition of assessments. *Id*. at 49. As noted in *Dreamland*, homeowners had no right appurtenant to the lot ownership to membership in the club and no right in the recreational facilities. Additionally, there were no assessments paid to the club and many homeowners chose not to become members. In *Dreamland*, the Court concluded that the authority to amend the original declaration did not allow 51% of the lot owners to force the other 49% into club membership against their wishes nor to assess and lien the properties of such homeowners for an association they did not seek. This case, unlike *Dreamland*, does not involve forcing the homeowners to join an association or to pay assessments.

Plaintiff further asserts that its principals purchased the property in reliance on the Master Declaration which had no restrictions related to short term rentals. At the time Plaintiff purchased the home, however, Scottsdale banned all rentals under thirty days. Declaration section 20.8 and Use Restriction 1.1.2 stated any violations of law are Declaration violations. Even if Plaintiff's subjective belief was that the Use Restrictions would never be amended, such a belief is not objectively reasonable given the plain language of the Declaration. Specifically, Section 4.2 warned that Use Restrictions existed and the Board had the right to repeal, amend or **add** to the restrictions under 5.20.

Unlike in *Dreamland,* Section 4.2 specifically pertains to Use Restrictions and Section 4.2 expressly provides notice that use restrictions exist and can be amended via 5.20. According to Plaintiff, the Master Declaration expressly recognized and affirmed unfettered rental rights in Section 1.2.2 of Exhibit E as long as the owner leased "the entire Dwelling Unit on a Lot." This exact language, however, supports a finding that it was foreseeable that the scope of lease restrictions could be altered. For example, a modification could be made to allow for a lease of something less than the entire dwelling. Plaintiff argues there were no rental restrictions in the terms of who you can rent to or for what period of time prior to the Amendment and nothing in Section 5.20 or anywhere else gave any warning that such rights could be eliminated without owners' consent. On the contrary, the fact that owners had to lease the entire dwelling is necessarily a limitation against leasing only one room of the dwelling. At the time that Plaintiff purchased the home, the Declaration contained various other leasing restrictions, including:

1. "all leases must restrict occupancy to a single family" (1.2.2)
2. Leases "must contain a provision that any violation of the Governing Documents of Master Association shall be a default under the lease and is grounds for eviction" (1.2.2)
3. All property shall be devoted "exclusively to residential use by Single Families" (1.2.1)
4. "No Business Use or other nonresidential use shall be made of any Lot or Parcel" (1.2.1)

5. Prohibited any type of plan that allows three or more unrelated persons to use the property during any 365 day period 1.8/1.2.3
6. No violation of Law or Insurance and Laws, Ordinances and Regulations (20.8/11.2).

Although none of the identified restrictions specifically restricts rentals based on time restrictions, the restrictions certainly provide notice that restrictions existed and the plain language of 4.2 explains the Board could add restrictions using the process outlined in 5.20.

Additionally, Section 5.4 specifically authorizes the Board to enact Rules regulating the Lots and those rules shall have the same force and effect as if in the Declaration. Section 1.2.2 of the Use Restrictions specifically states that leases are "subject to the provisions of the Master Declaration and the Association Rules." Accordingly, the rental restriction would also be valid and enforceable if adopted under 5.4.

5. The Amendment Equally Impacts Those That Consented and Those That Did Not Consent

Plaintiff relies on Restatement 6.10 to claim that non-unanimous amendments that materially change the allocation of burdens in the community and that have an unfair or disproportionate impact on only certain lot owners should be rejected. *See* Response filed February 22, 2019 at p. 6. Plaintiff asserts the Amendment "unfairly shifts the lucrative benefits of short-terms rentals from Plaintiff to the Club." Response filed February 22, 2019 at page 7. Contrary to Plaintiff's assertion, there is no meaningful difference in the impact of the restrictions as between the homeowners and the Club. For example, homeowners, including the Club, may not enter into a short term rental of less than thirty days with any "Ineligible Renter." Homeowners, including the Club, may enter into short term rentals of less than thirty days with any "Eligible Renter." Eligible Renter is defined as "individuals and/or entities that are members of the Association (set forth in the Master Declaration at 6.1) and/or individuals and/or entities that are members of the Desert Mountain Club)." PSOF ¶ 62.

Plaintiff's position focuses on the status of the renters as opposed to the property owner. The fact that eligible short-term renters may ultimately be Club members or prospective Club members does not unfairly impact the property owners who may enter into short-term leases with those individuals. The effect of the Amendment is that short-term rentals will only be made to people who are associated with the Association or the Club as opposed to others. The Club or Club members cannot enter into short-term leases with a different population of renters than any other member of the association. The Amendment does not provide that the Club be involved in transactions nor that the Club receive any remuneration. That the Club may receive some incidental benefit as a result ofmore golfers entering into short-term rentals does not equate to Plaintiff's interests being disproportionately impacted.

6. The Amendment Is Not Invalid As A Result of Board Informalities

Plaintiff claims DMMA violated the open meeting law or its amendment procedures. Defendant asserts that Plaintiff did not raise this issue in the Complaint but instead only in response to summary judgment and is not properly before the Court. *Cutrera v. Board of Supervisors*, 429 F.3d 108, 113 (2005). The Court agrees. The procedural deficiencies were not pled except to the extent the Complaint alleges the Amendment is invalid, improper, "was not adopted in accordance with the Declaration or Arizona law", and the "voting process was defective." None of these allegations makes clear that Plaintiff was complaining about a process that preceded putting the Amendment to a vote of the members. Even if Plaintiff had raised the issues in the Complaint, as explained at pages 15-18 of the Defendant's Response fled May 6, 2019, the issues are not material.

The Court has addressed the procedural question as to the voting requirement elsewhere in this ruling. As to the alleged violation of the open meeting law, Plaintiff cites to authority drafted by opposing counsel in support of its position. A review of the authority cited does not support the proposition for which Plaintiff offers it. Moreover, Plaintiff relies on A.R.S. § 33-1804 (A)-(E) and *Op. Atty. Gen. No*. 197-012. The Court recognizes that the opinion concludes that a board of a homeowner's association must follow the open meeting and notice provisions of A.R.S. § 33-1804 if a quorum of the board meets informally to discuss board matters, regardless of whether the board votes or takes action on any matters. The opinion does not address the validity of action taken following a failure to comply. The statute does not support a conclusion that the action of 2/3 of the voting members at a meeting called to consider the Amendment should be considered void or otherwise invalidated. Neither does the citation to Community Association Law in Arizona, 5th Ed. (2015), Scott B. Carpenter, Esq., § 4.8.

Whether or not a violation of an open meeting law may have occurred is not necessarily dispositive to the issues presented. While perhaps significant, Plaintiff presented no authority to support a conclusion that the Board's alleged past failures result in voiding a properly noticed proposed amendment when the requisite number of Members voted for approval. *See* A.R.S. § 33-1804(D). Moreover, that the vote was called early after receiving objections from 10% of the members does not necessarily invalidate the process nor has Plaintiff cited to any such authority. The Court concludes no purpose is served to wait the entire objection period when only 10% need object in order to force a vote. If the Board instead adopted the Amendment without a vote or without waiting until the deadline to see if 10% objected, the Court would agree that the process was deficient. Plaintiff has not alleged any such defect.

Unanimous Consent Was Not Required

1. DMMA Was Not Required by A.R.S. § 33-1227 to Obtain Unanimous Consent

In the Arizona Condominium Act (ACA), the Arizona Legislature imposed a unanimous consent requirement for restrictions that create or increase the uses to which any unit is restricted. *See* A.R.S. § 33-1227(D). The unanimous consent requirement in A.R.S. § 33-1227 is not applicable here. According to section 33-1201, the chapter applies to all *condominiums* created within this state without regard to the date the condominium was created. A.R.S. § 33-1201 (emphasis added). *See also Vales v. King's Hill*, 211 Ariz. 561, 566 (2005) (noting that trial court was correct in ruling the unanimous consent requirement in A.R.S. § 33-1227 only applies to condominiums).

Plaintiff asserts the Amendment violates the ACA because it unfairly shifts the lucrative benefits of short-term rentals from Plaintiff to the Club. Contrary to this position, there is nothing about the Amendment that shifts the benefits of rentals from Plaintiff to the Club. Nor is the Amendment designed to financially benefit DMMA and the Club and there is nothing in the record to the contrary. Plaintiff admits that the Amendment does not allow the Club to rent properties and then sublease to third parties. Reply filed March 25, 2019 at page 8, fn 5.

2. Restatement 6.10 Does Not Require Unanimous Consent

Plaintiff asserts Restatement 6.10 requires unanimous approval of amendments that deprive owners of significant property rights or unfairly/disproportionately impacts them. To the extent Plaintiff relies on § 6.10(2), the section is not applicable for two reasons: 1) as discussed above, the Amendment applies uniformly; and 2) the Declaration expressly provides that amendments may be made to use restrictions. To the extent Plaintiff relies on § 6.10(1), the section is not applicable because Section 4.2 and 5.20 include a specific process for making amendments, including a specific voting requirement. Arizona recognizes that when a homeowner "takes deed containing restriction allowing amendment by majority vote, homeowner implicitly consents to any subsequent majority vote to modify or extinguish deed restrictions." *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 319-20 (citing *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42 at ¶¶ 15-16).

Arizona Law Allows Associations to Restrict Rental Periods

Under A.R.S. § 33-1806, an association member by use their property "as a rental property unless prohibited in the declaration and shall use it in accordance with the declaration's rental time period restrictions." Under A.R.S. § 33-1802, declaration includes any amendment. In this case, the DMMA has imposed a restriction on rental periods via amendment. Accordingly, the Court concludes § 33-1806 supports enforcement of the restriction.

A motion for summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves,* 166 Ariz. 301, 309 (1990). A plaintiff "may only obtain summary judgment if it submits undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 293, 229 P.3d. 1031, 1035 (2010). Defendant has met the burden. Plaintiff has not met the burden.

Based on the above, the Court finds as follows: 1) DMMA followed the requirements in the Declaration for amending the use restrictions; 2) DMMA applied the correct voting threshold for approval; and 3) the restrictions are not inconsistent with Arizona law.

IT IS ORDERED granting Defendant's Motion for Summary Judgment filed January 14, 2019.

IT IS ORDERED denying Plaintiff's Motion for Summary Judgment filed April 10, 2019.

IT IS FURTHER ORDERED denying Defendant's Motion to Strike filed May 6, 2019.

IT IS FURTHER ORDERED denying Defendant's Rule 11 Motion filed May 9, 2019.

IT IS FURTHER ORDERED deeming the Joint Statement of Discovery Dispute filed May 31, 2019 and the Notice of Errata Re: Joint Statement of Discovery Dispute resolved as moot.

IT IS FURTHER ORDERED Defendant shall lodge a proposed form of order and any related Motion for Attorneys' Fees and Statement of Costs on or before **August 29, 2019.**