Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-003577 07/01/2020

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
S. Motzer
Deputy

CLUB WEST CONSERVANCY FRANCIS J SLAVIN

v.

FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION, et al. JEFFREY G SOLLOWAY

JUDGE KILEY

UNDER ADVISEMENT RULING

Plaintiff Club West Conservancy (the "Plaintiff") seeks declaratory and injunctive relief against Defendant Foothills Club West Community Association and various officers thereof (collectively, the "Association") arising out of the Association's "accept[ance]" of "an assignment" of the declarant's rights under a "Golf Course Declaration" relating to the Foothills Club West Golf Course. First Amended Complaint ("FAC") at ¶¶ 16, 37. The Plaintiff alleges that the Association's act in "signing a document stating that [it] was accepting [the] assignment" was not "valid or legal," but was, instead, "an ultra vires act" because the Association "is not permitted to operate or manage property" that is not owned by the Association or its members, "which is not able to be assessed for the purpose of managing, maintaining and operating, or…which is not considered to fall within the Planned Communities Act." *Id*. at ¶¶ 37-39. The Plaintiff further asserts that the Association has engaged in other acts that were not "valid or legal" and were, instead, "[i]n violation and in breach of the Master Declaration," including signing documents purporting to "amend[] the Golf Course Declaration" and "expend[ing] monies collected from assessments imposed on [its] members for the purpose of operating or managing property not owned by the [Association] or its members." *Id*. at ¶¶ 41, 43, 45, 47-48, 50, 54. The Plaintiff seeks declarations that the Association's acts in accepting and subsequent amending the Declaration are "void and unenforceable," a declaration that the Association has no "legal right or authority to expend [Association] funds…for the purpose of operating and

maintaining property not owned by the [Association] or its members," and an injunction against the "expenditure of [Association] monies for unauthorized expenses." *Id*. at pp. 11-12.

The Association has moved to dismiss this case, asserting, *inter alia*, that the Plaintiff has "fail[ed] to allege sufficient facts to support a claim under the legal theories put forth by [the] Plaintiff or other reasonably inferred legal theories that might be applicable." Motion to Dismiss at p. 2.

"Courts look only to the pleading itself when adjudicating a Rule 12(b)(6) motion," *Coleman v. City of Mesa*, 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012) (citation, internal quotations, and internal punctuation omitted), and must assume the truth of the well-pled factual allegations in the complaint and indulge all reasonable inferences therefrom. *See, e.g., Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Moreover, because "[d]ismissals for failure to state a claim are disfavored," *Ariz. Soc'y of Pathologists v. AHCCCS*, 201 Ariz. 553, 557, 38 P.3d 1218, 1222 (App. 2002), a court will not grant a Rule 12(b)(6) motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Cullen*. 218 Ariz. at 419-20, 189 P.3d at 346-47 (citation and internal quotations omitted).

In support of its Motion to Dismiss, the Association asserts, first, that the Plaintiff lacks standing to sue because it "is not a Member of the Association and does not own property in the Association, and otherwise "fails to assert a legal relationship, status or right in which it has a definite interest." Motion to Dismiss at p. 5. The FAC alleges, however, that the Plaintiff "is an Arizona nonprofit corporation" whose "purpose" is to "protect the interests of its Members as each are affected by the Association's wrongful acts" and whose "members…are owners of real property in Foothills Club West master planned community" as well as members of the Association. FAC at ¶ 1. Taking these allegations as true, as the Court must, the Court agrees with the Plaintiff that it meets the requirements of case law "to permit representational appearance." Response to Motion to Dismiss ("Response") at p. 4, *citing Armory Park Neighborhood Ass'n v. Episcopal Cmty. Services in Ariz*., 148 Ariz. 1, 712 P.2d 914 (1985). *See also Armory Park*, 148 Ariz. at 6, 712 P.2d at 919 (holding that neighborhood association had standing to seek to enjoin alleged nuisance created by free food distribution program that attracted transients to neighborhood, where individual members of association "would have had standing to bring an action in their own name," "[p]rinciples of judicial economy [would be] advanced by allowing the issues to be settled in a single action," and the purpose of the association, *i.e*., "to promote and preserve the use and enjoyment of the neighborhood by its residents, "is sufficiently relevant to the issues presented in this action so that [association] will adequately and fairly represent the interests of those of its members who would have had standing in their individual capacities.").

The Association attempts to distinguish *Armory Park* by asserting that, unlike the individual members of the neighborhood association in *Armory Park*, the Plaintiff's members would not have standing to sue the Association because the FAC does not allege "any type of individual, or particularized injury" sustained by those members individually. Reply in Support of Motion to Dismiss ("Reply") at p. 5. Elsewhere in these proceedings, however, the Plaintiff has alleged that its members "own and occupy residences which are adjacent to" the golf course (the "Golf Course") that is at issue in this case. Application for Temporary Restraining Order With Notice and Application for Preliminary Injunction at p. 2. The Plaintiff has supported its allegations on this point with evidence that includes the declaration of one of its members, who states under oath that he owns property that is "contiguous to" the Golf Course and the development of the Golf Course for non-golf uses "would irreparably damage" his "lifestyle and living environment and significantly damage the value of [his] home." Declaration of Matthew A. Tyler in Support of Application for Temporary Restraining Order With Notice and Application for Preliminary Injunction at ¶¶ 3, 12. In determining the Plaintiff's standing, the Court may properly consider this evidence even though it was not pled in the FAC. *See*, *e.g.*, *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 563-64, 81 P.3d 1016, 1022-23 (App. 2003) (affirming trial court's determination that plaintiff had standing to challenge Town's denial of conditional use permit application, the Court cited evidence in the record, including "notices for and minutes of" meetings of the Town Council and its Planning and Zoning Commission "acknowledg[ing] that [plaintiff] was the real-party-in-interest as to the…application," without indicating that the evidence that established the plaintiff's standing was set forth in the complaint). *Cf. Verduzco v. American Valet*, 240 Ariz. 221, 225, 377 P.3d 1016, 1020 (App. 2016) ("Under Arizona's notice pleading rules, it is not necessary to allege the evidentiary details of [the] plaintiff's claim for relief.") (citation and internal quotations omitted).

In support of its Motion to Dismiss, the Association argues, next, that the Plaintiff "has failed to join" a necessary party, *i.e.*, "the current owner of the Foothills Club West Golf Course" (the "Golf Course") Motion to Dismiss at p. 6. In support of its position, the Association cites Ariz.R.Civ.P. 19(a)(1)(B)(i), which provides,

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if…that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may…as a practical matter impair or impede the person's ability to protect the interest[.]

Ariz.R.Civ.P. 19(a)(1)(B)(i) ("Rule 19(a)(1)(B)(i)").

In its Response, the Plaintiff denies that the owner of the Golf Course is a necessary party, arguing that the Association has "fail[ed] to demonstrate [that] the Rule 19(a)(1)(B)(i) requirements have been met." Response at pp. 8-9.

The Association bears the burden of establishing that the owner of the Golf Course is a necessary party. *See Acacia Corporate Mgmt., LLC v. United States*, 2013 WL 2660319 at *7 (E.D.Cal., June 12, 2013) ("The burden is firmly on the party making the motion to show that a party is necessary."). The Court agrees with the Plaintiff that the Association has failed to establish how the resolution of the Plaintiff's claims against the Association would "impair or impede" any interest of the Golf Course owner's. *See* Response at p. 8. In any event, even if the owner of the Golf Course could be deemed a necessary party, the proper remedy would be the joinder of the owner as a party, rather than dismissal of this case. *See Democratic Nat'l Cttee. v. Ariz. Sec'y of State*, 2017 WL 840693 at *2 (D.Ariz., Mar. 3, 2017) ("Dismissal for failure to join a necessary party is appropriate only if," *inter alia*, "joinder is not feasible[.]"); *In re Home America T.V.-Appliance-Audio, Inc.*, 193 B.R. 929, 934 (D.Ariz.Bankr. 1995) ("[T]he proper course for the court to take in the face of a motion to dismiss pursuant to Rule 19 is to attempt to join the necessary party rather than dismiss the lawsuit."). The Court finds that the Association is entitled to no relief on its request for dismissal of this case pursuant to Rule 19(a)(1)(B)(i).

In support of its Motion to Dismiss, the Association argues, next, that the Plaintiff is barred by A.R.S. § 10-3304 "from challenging the Association's power to act except through a proceeding to enjoin the act of which it complaints." Motion to Dismiss at p. 8. After the Association filed its Motion to Dismiss, the Plaintiff amended its original Complaint by filing its FAC, which seeks injunctive, as well as declaratory, relief. *See generally* FAC. In any event, the Plaintiff here seeks a determination of the parties' rights under a contract pursuant to the Declaratory Judgments Act, A.R.S. §§ 12-1831 *et seq*. A determination of the parties' rights under a contract is expressly authorized by the Declaratory Judgments Act. *See* A.R.S. §§ 12-1832. The Court sees no reason why A.R.S. § 10-3304 should preempt the Declaratory Judgment Act in this case, or why the declaratory relief authorized by that act should otherwise be unavailable to the Plaintiff. After all, it is well-established that the Declaratory Judgment Act "is interpreted liberally," *Keggi v. Northbrook Property and Cas. Ins. Co.*, 199 Ariz. 43, 45, 13 P.3d 785, 787 (App. 2000), and "[b]egrudging availability of the declaratory vehicle is inconsistent with [the act's] expressed remedial tenor." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 312, 497 P.2d 534, 538 (1972).

The Association argues that the Plaintiff's claims are derivative in nature, and must be dismissed because the Plaintiff has not complied with the procedural steps set forth in A.R.S. §§ 10-3630 *et seq*. Motion to Dismiss at pp. 9-15. As the Plaintiff correctly points out, however, the applicable Declaration of Covenants, Conditions and Restrictions for Foothills Club West

("CC&Rs") expressly authorize suits against the Association by individual members to enforce the CC&Rs. Paragraph 11.8 of the CC&Rs provides in part that

> any Owner shall have the standing and the right to bring an action against the Association for any violation or breach by the Association of any provision hereof or of the Articles or the Bylaws. In addition, any Owner or Owners shall have the standing and power to enforce the provisions of this Declaration, the Articles and the Bylaws…

CC&Rs at ¶ 11.8, attached as Exhibit C to Defendants' Objection to Plaintiff's Application for Temporary Restraining Order With Notice and Application for Preliminary Injunction. Although the Association asserts that this provision of the CC&Rs was not meant to authorize suits that are derivative in substance, no such limiting language appears in this provision of the CC&Rs, and the Court cannot read such language into it. *See IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 66-67, 263 P.3d 69, 74-75 (App. 2011) ("When the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not…expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.") (citation and internal quotations omitted). The Court finds the language of the Paragraph 11.8 of the CC&Rs to be broad enough to encompass the claims the Plaintiff asserts here.[1]

After reviewing the claims in the FAC and the arguments asserted by the parties, the Court cannot say that "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Cullen*, 218 Ariz. at 419-20, 189 P.3d at 346-47 (citation and internal quotations omitted). Accordingly,

IT IS ORDERED denying the Motion to Dismiss.

[1] The broad language of Paragraph 11.8 of the CC&Rs distinguishes this case from *Albers v. Edelson Tech. Partners, LLC*, 201 Ariz. 47, 31 P.3d 821 (App. 2001), on which the Association relies; no comparable contractual provision authorized the shareholders in *Albers* to assert the claims the Albers court dismissed.