

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-001329

06/30/2021

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

MARYBETH ABODEELY

MARK W HORNE

v.

OASIS ASSOCIATION, THE, et al.

JEREMY C JOHNSON

JUDGE VIOLA

**PLAINTIFF ABODEELY'S PARTIAL MOTION FOR
SUMMARY JUDGMENT – Denied**

**DEFENDANT THE OASIS ASSOCIATION'S MOTION FOR
SUMMARY JUDGMENT – Granted in part; denied in part**

The Court has received and considered the following:

1. Plaintiff's Partial Motion for Summary Judgment and Separate Statement of Facts filed April 9, 2021;
2. Defendant The Oasis Association's Response to Plaintiff's Partial Motion for Summary Judgment, Controverting Statement of Facts, and Additional Statement of Facts filed May 17, 2021;
3. Plaintiff's Reply in Support of Partial Motion for Summary Judgment filed June 7, 2021.

The Court has further considered the following:

1. Defendant The Oasis Association's Motion for Summary Judgment and Statement of Facts filed April 9, 2021;
2. Plaintiff's Response to Defendant's Motion for Summary Judgment and Controverting Statement of Facts filed May 21, 2021; and

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3. Defendant's Reply in Support of Defendant The Oasis Association's Motion for Summary Judgment filed June 14, 2020.

The Court further considered the arguments of counsel presented on June 21, 2021.

Relevant Background

Marybeth Abodeely owns a condominium located at 5550 N. 12th St. #14, Phoenix, AZ 85014 (the "Property").¹ The Oasis Association ("Oasis") is the homeowners association of the condominium complex. The Management Trust, Inc. is the management company hired by Oasis to manage the condominium complex.² The Property is subject to the governing documents which include Oasis's Covenants, Conditions, and Restrictions ("CC&Rs") and the operating rules of the Oasis ("House Rules"). In May 2018, Ms. Abodeely began receiving notices to clean up her patio which included directives to remove the empty planters from the common areas. The House Rules in place at the time stated:

Only appropriate furniture and small potted plants will be used on porch areas. All unsightly items shall be removed upon the request of the HOA. Textile items, including towels, bathing apparel and clothing, brooms, mops, cartons, etc., shall not be placed on porch areas so as to be in view from the outside of the building.

DSOF ¶ 3. Section 15.2 of the CC&Rs states:

Except for customary patio furniture and potted plants on patios or balconies, nothing shall be stored, placed, erected, hung or permitted on any patio, balcony, roof, the Common Elements, the exterior of the building, or upon the windows or outside the doors of any Unit.

DSOF ¶ 4. Ms. Abodeely did not comply with the request to remove the empty planters. As a result, Oasis began fining Ms. Abodeely on June 8, 2018. Ms. Abodeely hired an attorney to

¹ Ms. Abodeely also owns another unit (Unit #3) at the condominium complex. *See* Defendant's Controverting SOF, Ex. K. Plaintiff's Complaint does not specifically reference the other unit. Notices in the record include violation notices for Unit #3. *See* Plaintiff's Controverting SOF, TMT00138-TMT000143. It is unclear from the record whether Plaintiff's claims involve Unit #3 and any associated violation notices for that unit or if Plaintiff's claims are limited to Unit #14.

² The Management Trust, Inc. was previously dismissed from this action pursuant to the Court's Minute Entry dated June 8, 2020. The other defendants named in the complaint, Sadie Marsh and Gregory Marsh, were dismissed pursuant to the Notice of Dismissal filed March 5, 2020. The only remaining defendant is Oasis.

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dispute the fines. Counsel for the parties exchanged several letters relating to the fines and associated policies. Oasis continued assessing fines for Ms. Abodeely's failure to comply with the violation notices.

Standard

A party is entitled to summary judgment under Rule 56(c) only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *National Bank of Arizona v. Thruston*, 218 Ariz. 112, 115 (App. 2008). The moving party bears both the *initial* burden of producing sufficient, competent evidence that demonstrates the absence of any genuine issue of material fact (the "burden of production") and the *ultimate* burden of persuading the Court that it is entitled to prevail on its summary judgment motion (the "burden of persuasion"). *Id.* "The burden of persuasion on the summary judgment motion is heavy. '[W]here the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper.'" *Id.* at 116 (citations omitted). Furthermore, in reviewing summary judgment pleadings "a court must view the evidence in a light most favorable to the non-moving party and draw all justifiable inferences in its favor." *Id.* (citations omitted). Each motion must be considered independent 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).

Plaintiff's Motion

Ms. Abodeely asks this Court to grant partial summary judgment as to Count One of the Complaint for breach of statutory and common law duties to homeowner and Count Four for a declaratory judgment. Ms. Abodeely also asks this Court to enter an injunction against further harassment. Ms. Abodeely asserts that the only issue that should remain for the jury is the amount of damages.

For Count One, Ms. Abodeely asserts that the Oasis has breached the following duties: (1) the duty to treat Plaintiff fairly; (2) the duty to act reasonably in the exercise of Oasis's discretionary powers, including rulemaking and enforcement; (3) the duty to give Ms. Abodeely notice and the opportunity to be heard prior to assessing her with fines; and (4) the duty to give her twenty-one calendar days to respond to a violation notice and request information from Oasis. *See Plaintiff's Motion* at 2. Ms. Abodeely asserts that Oasis violated these duties by (1) refusing to enforce the CC&Rs against Gregory Marsh and Sadie Marsh; (2) sending numerous successive, harassing and frivolous violation notices to Ms. Abodeely; (3) constantly photographing Ms. Abodeely's property and harassing her despite pleas to stop; and (4) adopting arbitrary and unreasonable rules solely to target and harass Ms. Abodeely. *See Plaintiff's Motion* at 4. Ms. Abodeely's motion is based on conclusory statements regarding the duties she claims Oasis owed to her and does not demonstrate an absence of disputed facts.

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Ms. Abodeely contends that Oasis did not enforce the CC&Rs against Gregory and Sadie Marsh by allowing them to keep a dog at their condo. Ms. Abodeely seems to concede in her Motion that the Marsh's dog is a "compassion" dog. *See* Plaintiff's Motion at 3, n. 1. However, Ms. Abodeely maintains that Oasis has a duty to ensure that the dog is not a nuisance to the neighbors regardless of the dog's status as a compassion dog. The facts presented by Oasis show that it did address the issue with the dog. *See* Defendant's Additional SOF ¶ 1 (community manager exchanged emails with Ms. Abodeely regarding the Marsh's dog). Ms. Abodeely's conclusory statements are insufficient to provide a basis for the Court to enter summary judgment that Oasis breached its duty to her by allowing the Marsh's to keep their dog at their condo.

Ms. Abodeely also asserts that Oasis should have given her twenty-one days to respond to the violation notices and that the violation notices were deficient as a result of Oasis's failure to give her the required time to respond. Under A.R.S. § 33-1803(C), "[a] member who receives a written notice that the condition of the property owned by the member is in violation of the community documents without regard to whether a monetary penalty is imposed by the notice may provide the association with a written response by sending the response by certified mail within twenty-one calendar days after the date of the notice." The association has 10 business days to respond to the member. A.R.S. § 33-1803(D). Ms. Abodeely has acknowledged that the first notice did give her the opportunity to respond but asserts that the subsequent notices did not. *See* Plaintiff's Motion at 2. As noted by Oasis, Ms. Abodeely has not provided any authority to substantiate her position that each notice must contain the required opportunity to respond even if they are related to the same violation. However, there is a dispute as to the reasonableness of imposing a fine 14 days after the initial notice when Ms. Abodeely still had 7 days to respond to the notice under A.R.S. § 33-1803. This is a question for the jury.

Ms. Abodeely further asserts that Oasis was harassing her by photographing the Property. Ms. Abodeely specifically asserts that Mr. Humphreys took pictures of the Property. PSOF ¶ 18. Ms. Abodeely has failed to substantially address this issue beyond these statements. Ms. Abodeely also claims that Oasis adopted arbitrary and unreasonable rules solely to target and harass her. Ms. Abodeely asserts that Oasis adopted rules prohibiting artificial plants and flower pots that were empty or contained dead plants in October 2018 that were targeted at her. PSOF ¶ 24. The House Rules at issue when the initial violation notice was sent had been in effect since January 2016. DSOF ¶ 3. The CC&Rs were recorded on July 17, 1980. DSOF, Ex. D. Ms. Abodeely asserts that Oasis adopted rules prohibiting artificial plants and flower pots that were empty or contained dead plants in October 2018 that were targeted at her. PSOF ¶ 24. Oasis acknowledges that new House Rules were adopted in October 2018 but disputes that they were targeted at Ms. Abodeely. Defendant's Controverting SOF ¶ 24. While it is plausible that Oasis wanted to clarify the rules regarding plants and pots on the patio following the dispute with Ms. Abodeely earlier in 2018, the rules at issue in the initial violations were in place long before the Board adopted the rules allegedly targeted at Ms. Abodeely. Again, Ms. Abodeely did not specifically support her position

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that the rules improperly targeted her. Ms. Abodeely has not provided anything beyond her conclusory statements that would allow the Court to enter summary judgment on Count One in her favor.

In Count Four, Ms. Abodeely asserts she is entitled to a declaratory judgment that she is not in violation of the CC&Rs, that she does not have to pay the fines imposed by Oasis, that Oasis has not complied with A.R.S. § 33-1803(C), and that rules were adopted unreasonably by Oasis and targeted Ms. Abodeely improperly. Ms. Abodeely's claim for declaratory judgment fails for the same reasons as stated for Count One. Ms. Abodeely's conclusory motion is inadequate in establishing that she is entitled to summary judgment.

Ms. Abodeely indicates in the initial paragraph of her Motion that she is seeking summary judgment for an injunction against further harassment. However, Ms. Abodeely does not mention anything further in the Motion regarding the injunction. As a result, Ms. Abodeely has failed to show she is entitled to summary judgment for an injunction.

IT IS ORDERED denying Plaintiff's Partial Motion for Summary Judgment.

Defendant's Motion

Defendant Oasis seeks summary judgment on all claims asserted by Plaintiff against it (breach of statutory and common law duties to homeowner; permanent injunction; and declaratory relief) as well as the issue of emotional distress damages.

For Count One, Oasis asserts that it did not breach any duty owed to Ms. Abodeely. First, Oasis contends that its treatment of the Marsh's dog is not a breach of any duties owed to Ms. Abodeely because it cannot enforce the no-pet policy against Ms. Marsh. Oasis asserts that the Marsh's dog is a service dog. Oasis claims it had to make reasonable accommodations to its no-pet policy and cannot enforce the no-pet policy against Ms. Marsh. Ms. Abodeely seems to concede in her Motion that the Marsh's dog is a "compassion" dog. *See* Plaintiff's Motion at 3, n. 1. Oasis has not breached any duty based on the allegations surrounding the Marsh's dog. As a result, Oasis is entitled to summary judgment that it has not breached any duty owed to Ms. Abodeely in its treatment of the Marsh's dog.

Oasis argues that Ms. Abodeely was in violation of the House Rules and CC&Rs by having pots in the common areas and having an unsightly patio containing restricted items. Oasis asserts that it did not breach its duties to Ms. Abodeely by exercising its rights to fine Ms. Abodeely as a result of the violations. Oasis also asserts that it has not violated A.R.S. § 33-1803(C). The notice sent to Ms. Abodeely on May 24, 2018 included information regarding the process identified in A.R.S. § 33-1803. DSOF, Ex. B. The notice indicates that Ms. Abodeely had 14 days to remedy

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the violation but also states she has 21 days to request a written explanation of the violation. *Id.* Oasis asserts that Ms. Abodeely did not respond according to A.R.S. § 33-1803(C). DSOF ¶ 5.³ The record includes several courtesy notices and fine notices, some referencing the unsightly patio and some the common areas. *See* Plaintiff's Controverting SOF, TMT000036-TMT000039, TMT000056, TMT000078, TMT000080-TMT000081. It appears from the record there are still genuine disputes as to what notices are at issue, whether Oasis violated § 33-1803, and whether it was reasonable for Oasis to begin imposing fines on Ms. Abodeely 14 days after the courtesy notice. As a result of the disputed facts (or at least an unclear record), the Court concludes that Oasis is not entitled to summary judgment on the violation notices.

In Count Two, Ms. Abodeely alleges that she is entitled to a permanent injunction directing Oasis to enforce the CC&Rs against the Marsh's and enjoining Oasis from sending the unjustified violation notices and enforcing the unlawful fines against her. In order to obtain a permanent injunction, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citations omitted). Oasis asserts that Ms. Abodeely has not established the required elements to obtain an injunction. Because Oasis is entitled to summary judgment on Count One regarding the Marsh's dog, Oasis is also entitled to summary judgment on Count Two regarding the dog. Oasis is not entitled to summary judgment on the remainder of Count Two because of the outstanding items in dispute as stated above.

In Count Four, Ms. Abodeely asserts she is entitled to a declaratory judgment that she is not in violation of the CC&Rs, that she does not have to pay the fines imposed by Oasis, that the Marsh's are not allowed to keep a dog at their condo, and that Oasis has not complied with A.R.S. § 33-1803(C). Because Oasis is entitled to summary judgment on Count One regarding the Marsh's dog, Oasis is entitled to summary judgment on Count Four regarding that issue. Oasis is not entitled to summary judgment on the remainder of Count Four.

Lastly, Oasis asserts that Ms. Abodeely has claimed during discovery that she is entitled to damages for emotional distress because of the violation notices sent by Oasis. As Oasis notes, Ms. Abodeely has not alleged any claim regarding the infliction of emotional distress and has only

³ In her Controverting Statement of Facts, Plaintiff denies this statement of fact and refers to her Separate Statement of Facts. However, nothing in Plaintiff's Separate Statement of Facts disputes her statement in her deposition. The Court also notes that on July 5, 2018, although beyond the statutory deadline, Ms. Abodeely's previous counsel sent a letter to Oasis requesting information under A.R.S. § 33-1803(D). DSOF, Ex. G.

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referenced emotional damages in the prayer of her Complaint. Ms. Abodeely contends that a separate claim for infliction of emotional distress is unnecessary because her other claims allow for damages for emotional distress. The Court agrees. *See Thomas v. Goudreault*, 163 Ariz. 159, 166 (App. 1989) (“It is not necessary to assert intentional infliction of emotional distress as the exclusive tort to recover damages for emotional or mental distress.”)

Ms. Abodeely relies on *Farr v. Transamerica Occidental Life Ins. Co. of California*, 145 Ariz. 1 (App. 1984). *Farr* involved an insurance bad faith claim resulting from a refusal to pay benefits for complications of childbirth. The Court found that damages for emotional distress could be awarded as part of an insurance bad faith claim rather than a separate cause of action once a plaintiff proves a loss of property. *Id.* at 7. The Court recognized that “[t]he primary reason for precluding recovery of mental distress damages ‘is that to permit recovery of such damages would open the door to fictitious claims.’” *Id.* quoting *Crisci v. Security Insurance Co.*, 66 Cal.2d 425, 434, 58 Cal.Rptr. 13, 19, 426 P.2d 173, 179 (1967). The Court found that “[i]n the case of bad faith, however, ‘where . . . the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced . . .’” *Id.* In *Thomas v. Goudreault*, the Court allowed emotional distress damages for breaches of the Arizona Residential Landlord and Tenant Act under the same rationale as *Farr*. 163 Ariz. 159 (App. 1989). The Court found, “A tenant who is not provided with necessary services and maintenance of the leased premises as required under the Act suffers property damage because the value of his leasehold is decreased by the absence of adequate water, heat, cooling or proper maintenance of the building. However, the more immediate damage that he suffers is the annoyance and discomfort of living in inadequate housing.” *Id.* at 167. In analyzing *Farr*, *Thomas* and another case allowing recovery of damages for emotional distress arising out of tortious loss of property, the Court of Appeals found, “these cases share a common nucleus—the tortious act directly harmed the plaintiff and affected or burdened a personal, as opposed to an economic or other interest belonging to the plaintiff.” *Kaufman v. Langhofer*, 223 Ariz. 249, 253, ¶ 15 (App. 2009).

Here, the only claim that could potentially involve an award for emotional distress damages is Count One for breach of common law and statutory duties. As stated above, Oasis is entitled to summary judgment on Count One relating to the allegations by Ms. Abodeely that Oasis refused to enforce the CC&Rs against the Marsh’s and their dog. The remaining allegations are those relating to the notices Oasis sent to Ms. Abodeely, the photographs taken of her Property, and the rules allegedly targeting Ms. Abodeely. On its face, this case does not appear to be the type of case that would warrant an award of emotional damages. However, because disputed facts remain and the record is unclear, the Court cannot rule out such damages at this time.

IT IS ORDERED granting Defendant Oasis’s Motion for Summary Judgment in part as to Counts One, Two, and Four regarding the Marsh’s dog. Any other relief requested is denied.