

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-007601

08/16/2016

HONORABLE LORI HORN BUSTAMANTE

CLERK OF THE COURT
T. Nosker
Deputy

M R & B T TRUST

PHILIP B WHITAKER

v.

OLIVE GROVE VILLAGE ASSOCIATION INC JONATHAN D EBERTSHAUSER

RULING MINUTE ENTRY

The court considered the oral arguments presented as well as the following pleadings regarding Defendant's Motion to Dismiss:

- Defendant's Motion to Dismiss
- Affidavit of Art Self in Support of Defendant's Motion to Dismiss
- Response to Motion To Dismiss
- Reply in Support of Defendant's Motion to Dismiss

In reviewing a Rule 12(b)(6) Motion, the "[c]ourts must . . . assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). "Motions to dismiss for failure to state a claim are not favored and should not be granted *unless* it appears that the plaintiff should be denied relief as a matter of law given the facts alleged." *Logan v. Forever Living Products Intern., Inc.*, 203 Ariz. 191, 193, ¶ 7, 52 P.3d 760, 762 (2002) (*emphasis added*) (*citing State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983)). However, "[d]ismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Coleman v. City of Mesa*, 230

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Ariz. 352, 356, ¶ 8, 284 P.3d 863, 867 (2012) (*citing Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶ 4, 954 P.2d 580, 582 (1998)).

Plaintiff's Unverified Complaint

Defendant requests dismissal of Plaintiff's Complaint because it was not verified at the time of filing. On June 30, 2016 Plaintiff filed a Notice of Filing Plaintiff's Verification to Complaint. Since the Plaintiff verified the complaint, Defendant's Motion to Dismiss as to this claim is now moot.

Trustee Must Bring Action on Behalf of Trust

The "trustee is the holder of legal title." *Eardley v. Greenberg*, 164 Ariz. 261, 265, 792 P.2d 724, 728 (1990). "[B]eneficiaries hold the beneficial interests (or 'equitable title') in the trust property, while the trustee (ordinarily) hold 'bare' legal title to the property." Restatement (Third) of Trusts § 42, cmt. a (2003). "A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property . . . may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity." A.R.S. § 14-11010(C).

Defendant, Olive Grove Village Association, Inc. ("Olive Grove"), asserts that Plaintiff, MR & BT Trust's ("BT Trust") complaint should be dismissed because Plaintiff did not bring an action on behalf of the trustee. The trustee is the holder of the legal title to the property, not the trust. The court agrees that the "Plaintiff" is the trustee(s) of the trust, not the trust itself. Plaintiff asserts the Trustee is very private and does not want his name reflected in the caption. The court is not aware of any rule, statute or case law that would protect the Plaintiff's identity under the circumstances presented.

The court recognizes that Plaintiffs should be given an opportunity to amend their Complaint prior to dismissal of a claim if the amendment would correct the defect. Therefore, Plaintiff will be given an opportunity to amend the Complaint to reflect the name of the Trustee(s).

IT IS ORDERED directing Plaintiff to amend the Complaint to reflect the name of the Trustee(s) on or before September 9, 2016.

Breach of Fiduciary Duty

Defendant further contends that Olive Grove did not owe any fiduciary duty to BT Trust, and that this count of Plaintiff's Complaint should be dismissed.

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“The Restatement imposes upon the association the duty . . . to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers.” *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 201, ¶ 25, 165 P.3d 173, 179 (App. 2007). In following the Restatement approach, Arizona Courts reasoned that “unlike jurisdictions requiring the association to prove the reasonableness of its actions, the Restatement approach requires the member challenging the association to establish that its actions were unreasonable.” *Id.* at 201-02, ¶ 26, 165 P.3d 179-80. The Arizona Court of Appeals has held that a homeowners association does not owe a fiduciary duty to a member of the association. *Rohde v. Beztak of Ariz., Inc.*, 164 Ariz. 383, 388, 793 P.2d 140, 145 (App. 1990).

Homeowners Associations are held to a standard of reasonableness. There is no Arizona case law or authority that allows a member of a homeowners association to assert a breach of fiduciary claim against a homeowners association. The *Rohde’s* court specifically found that a member’s breach of fiduciary duty cause of action against a homeowners association had “no merit.” As a homeowners association Defendants do not owe a fiduciary duty to Plaintiff, a member of the association, so there can be no breach of fiduciary duty. Thus, as a matter of law Plaintiff would not be entitled to relief and Defendant’s Motion to Dismiss regarding the Breach of Fiduciary Duty claim must be granted.

IT IS ORDERED granting Defendant’s Motion to Dismiss as to the Breach of Fiduciary Duty claim.