

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-056168

08/20/2018

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT  
W. Tenoever  
Deputy

ROBERT PESHEK

JUSTIN R COOLEY

v.

ANASAZI VILLAGE CONDOMINIUMS  
HOMEOWNERS ASSOCIATION INC, et al.

EMILY H MANN

JUDGE BRUCE COHEN

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Before the court is Defendants' Anasazi Village Condominiums Homeowners' Association, Paul Jensen,<sup>1</sup> and AAM, LLC (hereinafter referred to as "Anasazi," "Jensen" and "AAM" and all collectively referred to as "Defendants") Motion For Summary Judgment filed on January 21, 2018. The court has considered the Motion, along with the Response from Plaintiff filed on March 30, 2018, the Notice of Errata filed on April 10, 2018, Defendants' Reply filed on May 7, 2018, prior rulings from Judge Brnovich, the court record, and the oral argument presented on August 17, 2018.

**Statement of the Case**

For a period from 2014 leading up to May, 2016, Plaintiff was a Board Member of the Homeowner's Association at Anasazi.<sup>2</sup> By action taken by the homeowners, he was removed from the Board on or about May 25, 2016. He has claimed that such removal was improper, filed suit, and alleged a number of causes of action against Anasazi, Jensen and AAM.

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<sup>1</sup> The court is informed that Marlene Jensen is deceased and while she remains a named party, she is no longer part of these proceedings.

<sup>2</sup> The Board is regulated not only by state law, but by contract of the homeowner's association with its members (referred to as "Declaration").

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**Issue Presented and Burden of Proof**

Defendants assert that the removal of Plaintiff from Anasazi's Board was done in compliance with state law and complied with the Declaration. They also assert that Jensen, individually, did not breach any contract and did not, in concert with AAM, breach a covenant of fair dealing and good faith. They also assert that there was no tortious interference with Plaintiff's contract claim involving Anasazi. For each of these claims, Defendants must produce evidence that it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment is warranted. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 (App. 2008).

**Findings of Fact/Summary of Facts**

*The Recall*

A recall action was initiated by Anasazi to have Plaintiff removed from its Board. The Petition was submitted by another homeowner, Michael McGrane. It was received by AAM's representative, Wayne Yurk on or about May 2, 2016. He assessed that there were more than 100 signators to the petition. The Board then called for a special meeting of the members.

A letter was drafted to the members (all homeowners) and was sent on or about May 9, 2016. The letter included notice that the meeting was to be held on May 25, 2016, where it was to be held, the time it was to be held, and the subject matter of the meeting. Included with the letter was an absentee ballot, which reiterated the entirety of the notice and allowed each member to vote whether to retain or remove Plaintiff from the Board.

Defendant actually received the notice and the ballot on or before May 18, 2016, and mailed in his ballot voting against his own removal from the Board. His ballot was received by the Board or AAM on May 24, 2016, the day prior to the special meeting.

*The Vote*

At the special meeting held on May 25, 2016, the Board found that it had a quorum. Members were then given the opportunity to be heard on the issue. This opportunity existed equally for all members, including Plaintiff, who did not appear. No action was taken to prevent him from appearing or being heard.

A vote was cast and more than 50% of those eligible to vote under the quorum voted to have Plaintiff removed from the Board. Immediately following the special meeting, notice was provided to Plaintiff from Mr. Yurk that he had been removed from the Board.

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**Principles of Law**

*Summary Judgment Generally*

The law is well settled that 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); Ariz. R. Civ. P. 56(c)(1). All facts and reasonable inferences flowing from those facts are viewed in the light most favorable to the party against whom summary judgment is sought. *Gipson v Casey*, 214 Ariz. 141, 142, 150 P.3d. 228, 229 (2007).

The Arizona Supreme Court has cautioned against the use of Summary Judgment. The court stated that it should “not be used as a substitute for jury trials, simply because the trial judge may believe the moving party should win the jury’s verdict. *Id.* 166 Ariz. at 210, 802 P.2d. at 1009. On the other hand, if there is only “speculation that some slight doubt...some scintilla of evidence or some dispute over irrelevant or immaterial facts (that) might blossom into a real controversy in the midst of trial,” Summary Judgment is appropriate. *Id.*

Given the facts presented herein, it is important to note an additional principle of summary judgment law. If the moving party meets its burden, the burden shifts to the non-moving party to present sufficient evidence demonstrating the existence of a disputed material fact. *Thruston*, 218 Ariz. at 119. The non-moving party cannot then rest on its pleadings, but must call to the court's attention evidence to explain why the motion should be denied. *Id.* See also *Kelly v. Nations Banc Mortg. Corp.*, 199 Ariz. 284, 287 (App. 2000).

*Arizona Condominium Law*

The law regulating homeowners’ association management is found until ARS Section 33-1241, et. seq. For the removal of a board member, ARS Section 33-1243(H) requires, in pertinent part, as follows:

1. The unit owners who are eligible to vote at the time of the meeting may remove any member of the board of directors...by the declarant, by a majority vote of those voting on the matter at a meeting of the unit owners.
2. The meeting of the unit owners shall be called pursuant to this section and action may be taken only if a quorum is present.

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3. The unit owners may remove any member of the board of directors with or without cause...

4. For purposes of calling for removal of a member of the board of directors, ..., the following apply:

(a) In an association with one thousand or fewer members, on receipt of a petition that calls for removal of a member of the board of directors and that is signed by the number of persons who are eligible to vote in the association at the time the person signs the petition equal to at least twenty-five percent of the votes in the association or by the number of persons who are eligible to vote in the association at the time the person signs the petition equal to at least one hundred votes in the association, whichever is less, the board shall call and provide written notice of a special meeting of the association as prescribed by section 33-1248, subsection B.

(c) The special meeting shall be called, noticed and held within thirty days after receipt of the petition.

(d) For purposes of a special meeting called pursuant to this subsection, a quorum is present if the number of owners who are eligible to vote in the association at the time the person attends the meeting equal to at least twenty percent of the votes of the association or the number of persons who are eligible to vote in the association at the time the person attends the meeting equal to at least one thousand votes, whichever is less, is present at the meeting in person or as otherwise permitted by law.

*The Declaration*

The Declaration specifically allows a board member to be removed with or without cause. It further includes by reference the provisions of ARS Section 33-1243(H) as the procedure to be followed for a member of the Board to be removed. Further, the Declaration provides that the only violations of law that would serve as a violation of the Declaration would be acts that interfered with the use of the property.

*Good Faith and Fair Dealing*

Arizona law imposes a covenant of good faith and fair dealing in every contract. This “implied-in-law covenant ...protects the right of the parties to an agreement to receive the benefits of the agreement that they entered into. The denial of a party’s rights to those benefits, whatever

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they are, will breach the duty of good faith implicit in the contract.” *Wagenseller v Scottsdale Memorial Hospital*, 147 Ariz. 370, 385, 710 P.2d. 1025, 1040 (1985).

*Tortious Interference With Contract*

The elements for a claim or intentional interference with a contract are summarized in *Bar J Bar Cattle Co., Inc. v Pace*, 158 Ariz. 481, 483, 763 P.2d. 545, 547, and require: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interferor; (3) intentional interference inducing or causing a breach; (4) resultant damage to the party whose relationship has been disrupted; and (5) improper action on the part of the defendant.<sup>3</sup>

**Analysis**

The analysis of the breach of contract and violation of state law claims involve the same facts since removal from the Board involved the same procedure. From the factual findings above, Defendants have established that there are no material issues of fact and that all of the requirements of ARS Section 33-1243(H) and the Declaration were complied with in removing Plaintiff from the Board. He has claimed otherwise. However, as noted above, once Defendants demonstrated that they met the burden of proof for summary judgment, which they have, the burden shifts to Plaintiff to demonstrate the existence of disputed facts, which he has not.

During oral argument, Plaintiff’s counsel cited a number of potential irregularities in the process utilized to remove Plaintiff from the Board. Defendant has provided facts showing that the requisite number of valid recall signatures appeared on the recall petition. In response, Plaintiff asserted that AAM or Mr. Yurk failed to assess the validity of the signatures on the recall petition, but has provided absolutely no admissible or even reliable evidence to support that claim or to show any irregularities. He questioned whether notice had truly been given, but provided no admissible facts to counter Defendants’ showing that notice had been properly given. He claimed that Defendants’ interfered with Plaintiff’s ability to be heard yet he cannot factually dispute that he had notice at least one week before the meeting, knew where and when it would be held, and failed to attend. He cannot dispute that he actually voted against his own removal as part of his membership rights, an indisputable fact that goes directly to the notice issue.

In addressing Mr. Jensen, it is impossible to find that he breached the contract when there are no material issues of fact showing that there was any breach of contract at all. Plaintiff has

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<sup>3</sup> For the purpose of this order, the court will assume that even though Defendant Jensen is a party to the contract (the Declaration), there is still the potential for him to tortiously interfere with the contract between Plaintiff and the other parties to the contract.

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picked out Mr. Jensen specifically as the catalyst for the recall. This may or may not be true but the existence of this fact is irrelevant. A member of the Board can be removed with or without cause. Even if the action taken against Plaintiff was at the initiation of Mr. Jensen (for which there appears to be no supporting facts) and it was for some ulterior or improper motive (which has not been shown), the law and the Declaration required only that the proper procedure be followed. It was.

The claim that the covenant of good faith and fair dealing was breached is equally lacking. Defendants have adequately demonstrated the lack of disputed material facts as to this issue. The actions to remove Plaintiff from the Board did not interfere with his contract with Anasazi through the Declaration. Under that contract, he had the rights to undisturbed use of his property, the maintaining of common areas, the regulation of behaviors of other homeowners that might have compromised value, and the like. He had no contractual "right" to be on the Board. He has failed to provide even one material fact in dispute to show that the actions to remove him from the Board and his later actual removal denied Plaintiff any of his rights under the Declaration.

The court now turns to the tortious interference claim. It is undisputed that there is a valid contract (the Declaration) and that the named Defendants for this claim knew of that contractual relationship. Defendants have made their requisite showing that there are no material facts supporting intentional interference by them that caused the contract to be breached or that they acted improperly. More importantly, there is no showing whatsoever of a material fact in dispute as to Plaintiff's damage claim. Defendants have established that service on the Board is not a right, that service on the Board is not a compensated position, and that removal from the Board did not cause any discernable loss to Plaintiff. He has not since come forward to show that there are disputed material facts as to damages. He alleges that he was "substantially damaged" but does not support that with one fact. He alleges that there was a "publication of false statement contained within the petition" for his recall, but cannot trace one fact to establish that any of these named defendants perpetrated the dissemination of false information or even that the information was, in fact, false. Plaintiff has not shown that dissemination of false information caused him to suffer any damages. He has not provided any admissible evidence to show that the alleged actions of any of these Defendants to interfere with his contractual relationship caused him to suffer any loss of his expected benefits under the Declaration.

It bears repeating that the burden of proof to establish no genuine issues of material fact is placed on the moving party. However, when that moving party meets that burden of proof, as has been met here, it is incumbent upon the non-moving party to demonstrate "facts" that are material and in dispute. Plaintiff has provided nothing more than conclusory statements and speculative facts to counter Defendants' well-conceived motion.

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This court is quite wary of preventing parties from having their day in court. But when the support for summary judgment is as overwhelming as it is here, it would be a dereliction of duty to require these Defendants to have to defend this matter, through trial. Summary Judgment is not only appropriate, it is required.

**Conclusions of Law**

A party “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 this burden.

**Order/Ruling**

**IT IS ORDERED** granting Summary Judgment in its entirety as to all claims made by Plaintiff. Defendants are instructed to submit a form of judgment consistent with this ruling by no later than September 25, 2018.