

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2022-004188

08/09/2022

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT  
E. Wolf  
Deputy

VILLA SENDERO HOMEOWNERS  
ASSOCIATION INC

CHANDLER W TRAVIS

v.

DIANA COSTAIN

MARK BAINBRIDGE

MELISSA S DOOLAN  
TAMI SEEKINS  
JUDGE MIKITISH

UNDER ADVISEMENT RULING  
*Defendant's Motion to Dismiss*

The Court has received the *Motion to Dismiss* filed by the Defendant Diana Costain on May 19, 2022; the Response thereto filed by the Plaintiff Villa Sendero Homeowners Association, Inc. ("the HOA") on June 3, 2022; and Ms. Costain's Reply filed on June 9, 2022. The Court heard argument on the Motion on June 17, 2022. For the reasons stated below, the Motion is denied.

**Background**

Ms. Costain owns a residential property within the Villa Sendero Homeowners Association which she purchased in 2013. The property consists of a 35,000 square-foot lot containing a home and multiple buildings and parking. The property is subject to a declaration of covenants, conditions, and restrictions ("CC&Rs") and has been since the time of her purchase.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2022-004188

08/09/2022

In 2020, the HOA adopted an amendment (“the Fifth Amendment”) to the CC&Rs prohibiting rentals of less than 30 days. Ms. Costain filed this action challenging the HOA’s authority to adopt this restriction in the Fifth Amendment.

**Legal Standard**

Arizona rules provide that a claim may be dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Ariz. R. Civ. P. Under the Rule, a claim must be dismissed when the plaintiff is not entitled to relief under any interpretation of the facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012). A court is to look only to the pleading itself and the well pled factual allegations therein. *Cullen v. Auto-Owners Insurance Company*, 218 Ariz. 417, 419 ¶ 7 (2008). Mere conclusory statements are insufficient to state a valid claim. *Id.* Courts must assume the truth of the factual allegations and all reasonable inferences therefrom in the light most favorable to the pleading party. *Logan v. Forever Living Products International Inc.*, 203 Ariz. 191 (2002).

**Discussion**

Ms. Costain argues that CC&Rs are contracts which must be interpreted as a matter of law. She further argues that the Arizona Supreme Court has held that for CC&Rs to be amended, the original declaration must give sufficient notice of the possibility of a future amendment. *See Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 506 P.3d 18, (2022).

Ms. Costain argues that, in this case, the CC&Rs do not restrict rentals and appear to acknowledge the possibility that homeowners may rent their property. She notes that the CC&Rs allow for “rent signs.” *See* Article VIII. She also argues that the CC&Rs allow a homeowner to delegate his right of enjoyment to the common areas and facilities to tenants. *See* Article III, Section 2. Ms. Costain argues that the general amendment provision in the CC&Rs did not provide her with reasonable notice of the restriction on rentals under 30 days. She argues that the restriction also decreases the value of her property.

The HOA argues that Ms. Costain’s position must fail because she did not file a declaratory relief action against Association. The HOA argues that the plaintiff in the *Kalway* decision raised challenges in the context of a declaratory action.

The HOA further argues that the original CC&Rs provided that each lot must be used only for a single-family residence and prohibits any part of the premises to be used for “business, professional, commercial or institutional purposes.” Therefore, according to the HOA, residents like Ms. Costain had notice of restrictions on the use of property in the original CC&Rs. The HOA argues that the amendment provisions in the original CC&Rs can be used to clarify the definition

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2022-004188

08/09/2022

of prohibited commercial operations to include short-term leases of a property as a bed-and-breakfast.

Ms. Costain replies that a declaratory relief counterclaim is not required. She notes that the civil procedure rules permit the court to consider a defense of a counterclaim.

She further argues that the HOA is not revoking or amending a restriction currently in existence but is adding a new and different restriction that is untethered to the original CC&Rs. She argues that short-term rentals are consistent with the use of a “single-family residence.” She argues that operating a bed-and-breakfast is not using the property for business, professional, commercial, or institutional use. She concludes that using a property for a short-term rental is not more of a business operation than using a property for a long-term rental.

Under the Arizona Rules of Civil Procedure, a party need not file a declaratory judgment action to raise a defense regarding the terms of CC&Rs. Nevertheless, **THE COURT FINDS** that key terms and provisions in the CC&Rs are not defined. These include “single-family residence”, “business, professional, commercial or institutional purposes,” and “rent.” Further development of these terms and provisions is appropriate during the course of this action to determine whether the Fifth Amendment to the CC&Rs was properly adopted. Therefore, the Court cannot conclude at this stage that the complaint does not support the allegations of the HOA. The Court notes that the *Kalway* decision was addressed initially by the trial court on motions for summary judgment, rather than a motion to dismiss.

**Conclusion**

Based on the foregoing,

**IT IS ORDERED denying** the Motion.