

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-051923

09/07/2018

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
W. Tenover
Deputy

SUNRISE CONDOMINIUM ASSOCIATION

TROY B STRATMAN

v.

ROBERT K WELCH

MATTHEW ALLEN KLOPP

JUDGE BRUCE COHEN

TRIAL RULING
DEADLINE SET FOR FILING ATTORNEY FEE APPLICATION

This matter was tried before the court on September 6, 2018. By agreement of the parties, the presentation was made in the form of offers of proof, stipulated exhibits, and argument.

History of Case

The Complaint in this matter was filed by Plaintiff, Sunrise Condominium Association (hereinafter referred to as "Association") on February 1, 2017. It alleged that Defendant, Robert K. Welch (hereinafter referred to as "Welch") owned the real property located at 3600 North Hayden, #3629 in Scottsdale (hereinafter referred to as "Property") and the property was subject to a Condominium Declaration for Sunrise Condominium (hereinafter referred to as "Declaration").

The Association alleged that there exists a financial obligation on the part of Welch under the terms of the Declaration to pay assessments and other fees/charges levied by the Association. It is further alleged that Welch was delinquent in the payment of those obligations. The Association sought foreclosure and brought a claim for breach of contract.

Welch filed his Answer on March 31, 2017. Beyond general denials, he put forth certain affirmative defenses. He followed this with the filing of a Motion For Partial Summary Judgment

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on July 27, 2017. He based the motion primarily on statute of limitations issues. The Association responded and filed its own Cross-Motion For Partial Summary Judgment on August 31, 2017.

On March 30, 2018, Judge Brnovich ruled on the dueling motions. She found that a statute of limitation defenses applied and limited the damage award that may be sought by the Association to obligations accruing: (1) on or after February 1, 2014 as to Count 1 of the Complaint; and (2) on or after February 1, 2013 as to Count 2 of the Complaint. She further ruled in favor of the Association on the issue of liability on the part of Welch. The remaining issues were the damage amounts for Counts 1 and 2.

Welch filed a subsequent Motion For Summary Judgment on May 14, 2018. Plaintiff moved to strike the Motion. Judge Brnovich granted the Motion To Strike (minute entry of June 6, 2018). She found that the Motion For Partial Summary Judgment was filed beyond the deadline for dispositive motions and that the judicial economy argument for proceeding despite the untimeliness was not persuasive.

Trial Issue

For trial, the primary issue relates to how certain payments made by Welch to the Association are to be credited. Based upon that determination, the specific amount for the damage award can be determined.

Applicable Law, Relevant Findings of Fact and Analysis

There are two operative statutes that impact the ruling herein. ARS Section 33-1256(J) designates how payments received shall be credited. It provides, in pertinent part, as follows:

...unless the member directs otherwise, all payments received on a member's account shall be applied first to any unpaid assessments, for unpaid charges for late payment of those assessments, for reasonable collection fees and for unpaid attorney fees and costs incurred with respect to those assessments, in that order, with any remaining amounts applied next to other unpaid fees, charges and monetary penalties or interest and late charges on any of those amounts.

ARS Section 33-1256(A) sets the minimum threshold for when foreclosure is permissible. It provides, in pertinent part, as follows:

The association's lien for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees

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and costs incurred with respect to those assessments may be foreclosed in the same manner as a mortgage on real estate but may be foreclosed only if the owner has been delinquent in the payment of monies secured by the lien, *excluding* reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, *for a period of one year or in the amount of one thousand two hundred dollars or more, whichever occurs first.* (emphasis added).

The law of the case has been set by Judge Brnovich. The Association may only seek recovery for obligations accruing on or after February 1, 2014 for Count 1 and on or after February 1, 2013 for Count 2. This does not, however, affect how interim payments were to be credited.

There was a zero balance owed to the Association as of August 1, 2010 (Exhibit 3, page 3). By January 16, 2013, the balance owed for the past assessments was \$5,810, which is derived by subtracting the accumulated late fees from the balance owed of \$6,525 (Exhibit 3, page 6).

It is undisputed that Welch made the payments during the period of July, 2014 through the time immediately before the filing of this action totaling \$9,537. The Association has conceded that of these payments, \$651 is to be credited against on-going obligations. It is the position of the Association that with the crediting against all unpaid assessments, Welch now owes \$7,366. This accounts for the statute of limitations ruling.

Welch maintains that the Association's theory for the computation of damages was not disclosed, and objected to the entire trial presentation as to the damage calculation (reflected through Exhibit 9, which was made part of the record for demonstrative purposes only). This argument fails on two grounds: First, page 8 of the Disclosure Statement from the Association provides the theory and basic details upon which the damage calculation can be determined. It also disclosed extremely close approximations of the damages that they were seeking. Therefore, there has been no violation of Rule 26.1.

Second, a party is entitled to make reasonable inferences from the evidence presented. Here, the evidence of payments and credits is detailed in exhibits 3 and 4. The presentation of the Association at trial (including its use of demonstrative exhibit 9) did little more than explain the evidence and make reasonable inferences. The presentation was not an entirely undisclosed theory of damage calculation, as asserted by Welch.

For the court, the pivotal question relates to the crediting of payments that were made by Welch to the Association between July 2, 2014 and February 23, 2017. Welch argues that the \$6,525 balance owed as of February 1, 2013 is eliminated based upon Judge Brnovich's statute of limitations ruling. Using that as a baseline, the interim payments made by Welch after February

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1, 2013 serve to satisfy a significant portion of the liability that accrued from February 1, 2013 through August, 2018. Alternatively, Welch argues that the Association failed to specify which part of the total balance owed was being credited when payments were made and, as such, the Association cannot now argue that the undesignated payments are first applied to the oldest unpaid assessments.

The Association maintains that the undesignated portions of payments made by Welch during the period from July 2, 2014 through February 23, 2017 (referenced above) must be credited against the unpaid assessments, which began to accrue after August 1, 2010. They argue that the unpaid assessments include those amounts that accrued before February 1, 2014 (for Count 1) and before February 1, 2013 (for Count 2).

On this argument, the Association prevails. The operative language from ARS Section 33-1256(J) directs that absent specification by the paying party, "...all payments received on a member's account **shall** be applied first to any unpaid assessments..." (emphasis added). It matters not how the Association may have accounted for the payments in Exhibits 2 and 3. Rather, since there was no designation made by Welch as to how his payments were to be credited, the law mandates that it be credited against the unpaid assessments.

Further, the statute of limitations determination made by Judge Brnovich applies only to the remaining balance from before February 1, 2013 for the personal judgment (Count 2 of the Complaint) and the remaining balance that accrued before February 1, 2014 for the foreclosure judgment (Count 1 of the Complaint). Her ruling did not impact how payments made on or after February 1, 2013 were to be credited. When, for example, Welch made a payment of \$5,217 on July 25, 2016, the undesignated portion of \$5,000 was properly credited against the accumulated unpaid assessments from August 1, 2010 through the date of payment, not solely to the unpaid assessments that accrued since February 1, 2013.

Lastly, since the amounts owed exceed the statutory threshold under ARS Section 33-1256(A), foreclosure is an available remedy.

Conclusions

Based upon the foregoing as well as the overall evidence presented, the court finds that the Association is entitled to the following:

- (1) Judgment on Count 1 of the Complaint totaling \$6,596, which includes late fees and collection fees but does not include attorney fees.

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- (2) Judgment on Count 2 of the Complaint totaling \$770, which is comprised of assessments totaling \$590 and late fees totaling \$180, but does not include attorney fees.
- (3) An award of attorney fees and costs to be determined.¹

The Association shall file its attorney fee and cost application by no later than October 5, 2018. Welch shall then have the applicable period to object. Once the attorney fee issue has been decided, the Association may lodge with this court a form of Judgment consistent with the rulings made by the court.

This matter having been taken under advisement, and there being no further need to retain the exhibits not offered in evidence in the custody of the Clerk of Court,

IT IS ORDERED that the clerk permanently release all exhibits not offered in evidence to the counsel/party causing them to be marked or their written designee. Counsel/party or written designee shall have the right to refile relevant exhibits as needed in support of any appeal. Refiled exhibits must be accompanied by a Notice of Refiling Exhibits and presented to the Exhibit Department of the Clerk's Office. The Court's exhibit tag must remain intact on all refiled exhibits.

IT IS FURTHER ORDERED that counsel/party or written designee take immediate possession of all exhibits referenced above.

¹ The court has not yet been presented with the specific attorney fee claim. Anticipating that a claim is forthcoming, the court notes that while the Association prevailed on each issue presented at this trial, such is not the functional equivalent of finding that Welch proceeded in bad faith or without substantial justification. Parties have a right to their day in court and a party should not be penalized for exercising that right in good faith, even if it is later shown that the claim or defense could not prevail. Of course, the eventual award of attorney fees shall be dictated by statute, but as to discretionary amounts, this court shall take into account that no sanctionable defenses have been advanced by Welch.