

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-010791

09/24/2019

HON. ROSA MROZ

CLERK OF THE COURT
D. Charbagi
Deputy

MARDY C TOEPKE, et al.

MARK BAINBRIDGE

v.

PIONEER CONDOMINIUM ASSOCIATION OF SUN CITY WEST DAVID G SCHMIDT

JUDGE MROZ

MINUTE ENTRY

The Court has considered Plaintiffs' Application for Preliminary Injunction, Defendant's Response, Plaintiffs' Reply, Defendant's Sur-Reply, Plaintiffs' Response to Defendant's Sur-Reply, the evidence presented, and oral arguments of counsel.

Plaintiffs own a condominium unit located at 13471 W. Copperstone Drive, Sun City West, Arizona (the Property), which they acquired in November 2015. At the time Plaintiffs bought the Property, the Property was governed by a Declaration of Restrictions, Establishment of Board Management, and Lien Rights ("Declaration") that was recorded on May 10, 1978.

Defendant is the Pioneer Condominium Association of Sun City West (the "Association"). The Association appointed the Board of Management (the "Board").¹ According to the Association, in November 2018, the Association notified the owners that there would be a meeting on December 6, 2018, to discuss the Amended Declaration. On December 6, 2018, the Association

¹ The Court notes that in the Application for Preliminary Injunction, Plaintiffs challenged the legitimacy of the Association. This argument has been abandoned for the purposes of the Application for Preliminary Injunction only. The Court's ruling assumes for the purposes of Application for Preliminary Injunction only that the Association is legitimate.

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held the meeting attended by 19 of the owners, including Plaintiffs. The Board made the owners aware of the provisions of the Declaration that were to be amended. On December 27, 2018, the Board voted to approve the Amended Declaration and present it to the owners for their review. The Association sent the Amended Declaration and a mail-in/absentee ballot (“Ballot”) to all of the owners to vote on whether to approve the Amended Declaration. On January 24, 2019, the Board tallied the votes cast. The final total was twenty-five “yes” and eight “no,” which resulted in 75.76% of the votes approving the Amended Declaration. On January 28, 2019, the Association recorded the Amended Declaration with the Maricopa County Recorder’s Office.

Plaintiffs request that the Court issue a preliminary injunction to enjoin the Association from enforcing Section 2 of the Amended Declaration because the Association did not receive unanimous approval from the owners in violation of A.R.S. § 33-1227(D). Section 2 of the Amended Declaration prohibits any owner within the Pioneer Condominium Association from leasing their property for periods of less than thirty days.

A party seeking a preliminary injunction must establish: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury not remediable by damages; (3) a balance of hardships in that party’s favor; and (4) public policy favoring the requested relief. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

Likelihood of Success on the Merits

Plaintiffs argue that Section 2 of the Amended Declaration cannot be enforced because the Association did not receive unanimous approval from the owners in violation of A.R.S. § 33-1227(D).

Defendant essentially argues that A.R.S. § 33-1227(D) is not applicable. A.R.S. § 33-1227(D) states: “Except to the extent expressly permitted or required by other provisions of this chapter, ***an amendment shall not*** create or increase special declarant rights, increase the number of units or ***change*** the boundaries of any unit, the allocated interests of a unit or ***the uses to which any unit is restricted***, in the absence of unanimous consent of the unit owners.” (Emphasis added). The Court finds that limiting the rental time period to not less than 30 days is a change to the restricted uses to Plaintiff’s Property. While it is true that the original Declaration required the owners to seek the approval from the Board for any sale, lease, or sublease and give the Board 15 days to act, *see* Section 19 of the Declaration, the original Declaration had no restrictions as to how long the rental period had to be. Even Keith Resnick, the President of the Association, agrees that there is a change in use restriction from the original Declaration to the Amended Declaration, and that short-term rentals of less than 30 days were not previously prohibited in the original Declaration.

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Defendant also argues that even if “a rental time period restriction could be considered under A.R.S § 33-1227(D), that restriction is expressly permitted by A.R.S. § 33-1260.01(A) and, therefore, exempted from the unanimous requirement of A.R.S § 33-1227(D).”

A.R.S. § 33-1260.01(A) states: “A unit owner may use the unit owner's unit as a rental property unless prohibited in the declaration and shall use it in accordance with the declaration's rental time period restrictions.” This statutory provision says nothing about how many votes it takes to amend a declaration to add a rental time period restriction.

A.R.S. § 33-1260.01(A) must be read in conjunction with A.R.S § 33-1227(D). While a declaration may include a rental time period restriction, if the declaration does not have such a restriction, and a condominium association wants to amend the declaration to add such a restriction, that association must obtain the unanimous consent of the owners.

The Court finds that Plaintiffs have a strong likelihood of success on the merits.

The possibility of irreparable injury not remediable by damages

Defendant’s main argument for why Plaintiffs’ Application fails is that Plaintiffs’ alleged injury can be easily remediated by money damages that may be calculated if Plaintiffs win their lawsuit.

Monetary damages may provide an adequate remedy at law. *See Cracchiolo v. State*, 135 Ariz. 243, 247, 660 P.2d 494, 498 (App.1983). However, where a loss is uncertain, monetary damages may be inadequate.³ *See Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 164 Ariz. 54, 59, 790 P.2d 752, 757 (App.1989), *overruled* on other grounds by *Farber*, 194 Ariz. 363, 982 P.2d 1277. To determine whether damages would be an adequate remedy at law, the court should consider “the difficulty of proving damages with reasonable certainty.” Restatement (Second) of Contracts § 360 (1981); see also Restatement § 352 (damages not recoverable for loss beyond amount established with reasonable certainty); Restatement § 360 cmt. b (damages inadequate remedy if injured party can prove some but not all loss); *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, ¶ 35, 31 P.3d 114, 121 (2001) (McGregor, J., concurring in part and dissenting in part) (Arizona courts generally apply law of the Restatement absent Arizona law to contrary).

IB Prop. Hldgs., LLC v. Rancho Del Mar Apts. Ltd. P’ship, 228 Ariz. 61, 65, ¶10, 263 P.3d 69, 73 (App. 2011).

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Mardy Toepke testified that as a result of the short-term rental period restriction in Section 2 of the Amended Declaration, he adjusted his setting on his AirBnB rental page to reflect that the Property can only be rented for 30 days or more. If someone wants to rent the Property for less than 30 days, his Property would not even appear on the AirBnB website as an eligible property.

The Court finds that calculating Plaintiffs' monetary damages at the end of the case would be extremely difficult and speculative because there is no reasonably certain way of knowing how often the Property would have been rented and for how long.

The Court also agrees with Plaintiffs' argument that "[i]njunctive relief is normally available to redress violations of easements and restrictive covenants without proof of irreparable injury or a showing that a judgment for damages would be inadequate", citing Restatement (Third) of Property; Servitudes § 8.3 (2000)("The value of a restrictive covenant or easement is often difficult to quantify and may be impossible to replace. When it is enjoyed as an appurtenance to ownership of land, its value to the land owner may not be adequately reflected by market values. An award of damages instead of injunctive relief that would allow the other party to buy out of the servitude obligation will seldom be appropriate....").

The Court finds that the injury to Plaintiffs from the enforcement of the rental time period restriction pending final resolution of the case is not remediable by money damages with any reasonable certainty.

Balance of hardships in that party's favor

Plaintiffs' request to the Court is narrowly tailored to only enjoining the enforcement of Section 2 of the Amended Declaration. Plaintiffs' hardship is that it will not be able to receive rental income from short-term rentals of less than 30 days during the pendency of this case.

In its Response, Defendant claims the following hardships: (1) it would be forced to rely on the outdated Declaration for an uncertain period; (2) it would be forced to prepare an entirely new amended and restated declaration and go through the process again for all of the provisions in the Amended Declaration that Plaintiffs do not raise an issue with; (3) it would not be able to protect its status as an age-restricted community status, and allow all owners to rent for less than 30 days; and (4) Plaintiffs included access to the Sun City Recreation Center when the Sun City Recreation Center prohibit transferring membership benefits from owners to guests, and does not allow guests to purchase access for periods less than thirty days.

The first two reasons cited by Defendant does not exist since only Section 2 of the Amended Declaration would be enjoined. As to the third and fourth reason, allowing Plaintiffs to rent their Property for periods of less than 30 days does not impact any valid restrictions Defendant

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may have about renting to age-appropriate renters, or Sun City Recreation Center's guest policies. Plaintiffs have only requested to enjoin Section 2 of the Amended Declaration. Section 15 of the Amended Declaration, which is about age restrictions, is not affected. Defendant also argues that the all of the provisions of the Amended Declaration must be read together for cohesive meaning. However, Section 45 of the Amended Declaration specifically states: "Should any of these restrictive covenants be invalidated by law, regulation or court decree, such invalidity of any such restrictive covenant shall in no way affect the validity of the remainder of the restrictive covenants."

At the hearing, Defendant also argues that the Association would face the hardship of having unknown persons within their community, and noise complaints that come with short-term rentals. Noise complaints can occur whether it is caused by an owner, a long-term rental, or a short-term rental. The Court has no evidence to support that Plaintiffs' short-term rental tenants or any owner's short-term rental tenants caused more noise than an owner or a long-term rental tenant. The Court does find that there is hardship associated with having unknown persons within the Association's community with short-term rentals.

Overall, the Court finds that the balance of hardships favor Plaintiffs.

Public policy favoring the requested relief

The Court further finds that public policy favors the enforcement of contract. When Plaintiffs bought the Property, it was done so with the understanding that there were no rental time period restrictions. The Court further finds that public policy favors the requested relief because Defendant needs to follow the law as directed by the legislature. Arizona's legislature intended any changes to use restrictions to be approved unanimously; otherwise, the legislature would have only required 67% of the votes to amend a declaration as it did for almost all other types of amendments. *Compare* A.R.S. § 33-1227(D) *with* § 33-1227(A).

Based on the foregoing,

IT IS ORDERED granting Plaintiffs' Application for Preliminary Injunction, as amended by Plaintiffs' Reply.

IT IS FURTHER ORDERED that Section 2 of the Amended and Restated Declaration of Covenants, Conditions, and Restrictions, as recorded by Pioneer Condominium Association of Sun City West with the Maricopa County Recorder's Office on or about January 28, 2019 (at Recording Number 20190059398) shall not be enforced, until further orders from this Court.

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IT IS FURTHER ORDERED that Pioneer Condominium Association of Sun City West shall not prohibit any condominium owners within the Pioneer Condominium residential community from leasing their property for periods of less than thirty (30) days, until further orders from this Court.

The Court signs the Preliminary Injunction Order this date.