

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2017-055942

09/14/2020

HONORABLE ANDREW J. RUSSELL

CLERK OF THE COURT

J. Escarcega

Deputy

GENE D WATSON, et al.

FREDERICK E DAVIDSON

v.

LEISURE WORLD COMMUNITY  
ASSOCIATION

KATHERINE J MEROLO

COMM. RUSSELL

MINUTE ENTRY

After an oral argument on July 17, 2020, the Court took Defendant Leisure World Community Association's Rule 59(a) Motion for New Trial under advisement. The Court has considered that Motion, as well as Plaintiffs' Response, Defendant's Reply, the arguments from counsel for all parties, and the record in this matter. For the reasons that follow, the Court will grant Defendant's Motion, in part, revise the Amended Judgment, in part, and deny any other relief sought in Defendant's Motion.

This Court's predecessor<sup>1</sup> granted Plaintiffs' Supplemental Motion for Summary Judgment on February 4, 2020, and later entered judgment on Plaintiffs' behalf. *See* February 4, 2020 Order, April 3, 2020 Judgment, and May 15, 2020 Amended Judgment. Defendant asks this Court to vacate the Amended Judgment and grant a new trial on the

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<sup>1</sup> The Governor of the State of Arizona appointed this Court's predecessor (Judge Bailey) to Division One of the Court of Appeals before the completion of briefing on Defendant's Motion for New Trial. Typically, this Court would forward such a Motion to the Judicial Officer who issued the Judgment in question, but Judge Bailey's elevation to the appellate court prevents such a procedure. This Court generally declines requests to alter the decision of a fellow Judicial Officer, and does not lightly do so here.

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issues in dispute. In support of its request, Defendant presents six arguments, which the Court will address individually.

Application of A.R.S. § 33-1812

Section 33-1812(A) sets forth requirements for a homeowners' association to take action "at an annual, regular or special meeting of the members" if the association utilizes "absentee ballots or ballots provided by some other form of delivery." In adopting the amendments in question, Defendant did not schedule a meeting of its members, but instead sought written consents from the members. Section 10-3704 specifically allows an association's members to approve the association's actions "by one or more written consents describing the action taken, signed by those members representing at least the requisite amount of the voting power." *See* A.R.S. § 10-3704(A).

Plaintiff notes that a written consent "has the effect of a meeting vote," *see* A.R.S. § 10-3704(C), and claims they must therefore comply with § 33-1812. The Amended Judgment agreed. *See* Amended Judgment, ¶ 18. However, § 10-3704(C) does not say that written consents must comply with the requirements of meeting votes – it merely states that such consents have "the *effect* of a meeting vote." The Court presumes that had the Legislature intended that written consents meet the requirements outlined in § 33-1812, the Legislature would have so stated. It did not. Instead, the Legislature set up a separate alternative to § 33-1812's meeting/ballot requirement. Any findings to the contrary are stricken from the Amended Judgment.

Sufficiency of Consent Forms

The process Defendant used in its attempt to obtain approval for the 2014 Amendment was convoluted at best. For reasons that remain unclear to this Court, Defendant used several different forms throughout that process. The Amended Judgment found that those forms were "insufficient in both number and form" and did not comply with the applicable CC&R provisions. *See* Amended Judgment, ¶ 17. The Court agrees. At least one version of the written consents did not include a return date, and another

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version made it unclear whether the 2013 documents or the original documents were being amended.<sup>2</sup> The Court will not grant a new trial on this issue.

Unanimous Consent Requirement

Defendant claims that the 2014 Amendment only required approval from 75% of the Plat 24 owners. That Amendment changed the method for making future amendments to certain Plats' controlling documents. Under the original documents (and the 2013 documents), such amendments would require approval from 75% of the individual Plat owners. The 2014 Amendment purported to change that requirement, now allowing amendment approval by 75% of the owners in each Plat.

Plat 24 consists of 54 owners, while the entire community consists of 2,664 owners. Thus, whereas 41 of the Plat 24 owners could previously amend their Plat's documents, now such an amendment would require votes from as many as 1,998 owners (75% of all owners in the community). This radical change effectively prevents the Plat 24 owners from making decisions regarding their Plat, and puts them at the mercy of the other Plats' owners. Essentially, 75% of the Plat 24 owners voted to remove self-governance from themselves and from those owners who voted against the amendment. The loss of this ability to control – or at least have a substantial voice in controlling – the rules that apply to their own Plat was not a foreseeable alteration of the Plat 24 owners' contract with each other. This Court believes that *Dreamland Villa Community Club, Inc. v. Raimey* 224 Ariz. 42, 578 P.3d 411 (App. 2010) prohibits such an amendment absent approval from 100% of the Plat 24 owners, and will not grant a new trial on this issue.

Release of "Consolidated Declaration" and 2014 Amendment as to All Lots

The Amended Judgment releases the 2013 documents and the 2014 Amendment as against all lots, instead of limiting such release to Plaintiff's property. Defendant suggests that the issue of a blanket release was not before the court, but CC&Rs must apply to all units. See *O'Malley v. Central Methodist Church*, 67 Ariz. 245, 194 P.2d 444 (1948). Releasing the 2014 Amendment as against Plaintiff's unit, while keeping the Amendment in place as to other units, would violate that requirement, and set the stage for yet more

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<sup>2</sup> Defendant claims that the 2013 documents merely consolidated earlier documents, but the reference in several of the written consent forms to both 2103 and earlier documents suggests that Defendant may once have had a different view.

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litigation should Defendant attempt further amendments. The Court will not grant a new trial on this issue.

Adoption of “Consolidated Declaration”

In 2013, Defendant recorded a document entitled “Consolidated and Restated Declaration of Covenants, Conditions and Restrictions for Leisure World Plats 6 through 15, Plat 16F and Plats 17 through 27.” Plaintiff refers to the document as the “2013 Amendment,” and claims its adoption did not comply with legal requirements. Defendant refers to the document as the “Consolidated Declaration,” and claims it merely consolidated earlier documents and made no amendments. This Court agrees with Defendant – the 2013 documents did not amend the previously recorded CC&Rs such as to require a full vote of the Association’s members. As such, the Amended Judgment should not have invalidated the 2013 documents. Any provisions to the contrary are stricken from the Amended Judgment.

Alleged Violation of § 33-420

The Amended Judgment found that Defendant’s recording of the 2013 Consolidated Declaration and the 2014 Amendment violated A.R.S. § 33-420 (A) and (C). Plaintiff was awarded statutory damages for the invalid recordings (*see* Amended Judgment, page 12, ¶¶ D-G), and attorneys’ fees pursuant to §§ 33-420(A), 33-420(C), 12-341.01, and 12-1101. *See* Amended Judgment, pages 12-13, ¶ H.

As noted above, this Court has determined that the written consents used to adopt the 2014 Amendment did not need to comply with § 33-1812, and the 2013 “Consolidated Declaration” did not constitute an amendment requiring member approval. As such, Plaintiff is not entitled to statutory damages stemming from Defendant’s recordation of the Consolidated Declaration. The Consolidated Declaration also cannot constitute an impermissible cloud on Plaintiff’s title. Any provisions to the contrary are stricken from the Amended Judgment.

But the Court has also found that the 2014 Amendment was not properly adopted because it required but did not receive 100% approval of the Plat 24 members, and the written consents themselves were insufficient in number and form. Plaintiff notified Defendant of these deficiencies prior to Defendant recording the 2014 Amendment, but Defendant recorded it anyway. The Amended Judgment therefore correctly found that

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Defendant violated § 33-420 by recording a document it knew or reasonably should have known was invalid. Plaintiff therefore remains entitled to statutory damages stemming from Defendant's recordation of the 2014 Amendment.

**IT IS ORDERED** granting Defendant's Motion for New Trial, in part, and revising the Amended Judgment, in part, as delineated above.

**IT IS FURTHER ORDERED** denying all other relief requested in Defendant's Motion for New Trial not expressly granted herein.

*Andrew J. Russell*

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HON. ANDREW J. RUSSELL  
JUDICIAL OFFICER OF THE SUPERIOR COURT