

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-010791

09/14/2020

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
D. Charbagi
Deputy

MARDY C TOEPKE, et al.

MITCHELL W FLEISCHMANN

v.

PIONEER CONDOMINIUM ASSOCIATION OF SUN CITY WEST DAVID G SCHMIDT

JUDGE WARNER

MINUTE ENTRY

Cross-motions for summary judgment are under advisement following argument. The court finds no material fact dispute and grants each party's motion in part. The challenged Amendments to the Declaration cannot be enforced because they were not adopted in the manner required by A.R.S. § 33-1227(D).

Defendant Pioneer Condominium Association of Sun City West is a condominium association. Plaintiffs Toepke own a unit in the condominium and are members of the Association. In late 2018, the Association's board proposed an Amendment to the Declaration to address, among other things, short-term rentals. It submitted the Amendment to the member-owners for a vote, and the Amendment passed by a 25-8 vote. A preliminary injunction later issued enjoining enforcement of the Amendment.

Two parts of the Amendment are challenged here. Section 2 of the Amendment prohibits owners from leasing their unit to a single family for less than 30 days. Before the Amendment, owners could rent their units for shorter terms, provided they gave notice to the Association and the rental was not disapproved.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-010791

09/14/2020

Section 15 of the Amendment modifies the Declaration's age-restriction provisions. Before the Amendment, the Declaration prohibited any occupant younger than 18 years old, and required at least one occupant to be 50 years old or older. Section 15 raises the age requirement to 55 years old. It also clarifies that one 55+ resident has to occupy the unit when there is someone under 55 residing there, and if the occupancy period is less than 10 months, the unit has to be vacant when there is no 55+ resident there.

These two provisions, the Toepkes argue, were not lawfully adopted by unanimous vote of the member-owners as required A.R.S. § 33-1227(D). That statute says:

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.*

A.R.S. § 33-1227(D) (emphasis added). Although the placement of commas makes this provision a little hard to decipher, its meaning is clear. If an amendment changes "the uses to which any unit is restricted," unanimous consent of all unit owners is required.

So the question is whether Section 2 and Section 15 change the uses to which condominium units are restricted. They do. Section 2 prohibits owners from renting their units for terms less than 30 days. Before the Amendment, they could do that. Section 15 requires that at least one occupant be 55 years old or older. Before the Amendment, they only had to be 50 years old. Both the ability to rent one's unit and age requirements for occupants are use restrictions, and the Amendment changes them.

For this reason, the Toepkes are entitled to summary judgment on their claim for declaratory and injunctive relief. Sections 2 and 15 of the Amendment are not valid because they were not unanimously approved as required by A.R.S. § 33-1227(D). The Toepkes are entitled to an injunction against their enforcement.

But the Association's cross-motion for summary judgment must be granted on the remainder of the Toepkes' claims. Although Sections 2 and 15 of the Amendment were not lawfully adopted, the remedy for that is declaratory and injunctive relief. The Association board's application of the wrong voting standard is not a breach any express provision in the Declaration, nor is it a breach of the implied duty of good faith and fair dealing. It also is not a breach of the Association's duty of care. And there is no statutory claim for damages for breach of the Condominiums Act.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-010791

09/14/2020

Nor do the Toepkes have a claim under A.R.S. § 33-420 for recording a false document. That statute does not apply to the recording of an amendment to declarations, even if the amendment is later determined to have been improperly approved.

IT IS ORDERED granting the Toepkes' Motion for Summary Judgment in part. Summary judgment is granted in their favor on the claims for declaratory and injunctive relief. It is denied in all other respects.

IT IS FURTHER ORDERED granting the Association's Cross-Motion for Summary Judgment in part. Summary judgment is granted in favor of the Association on the Toepkes' claims for breach of contract, breach of the duty of good faith and fair dealing, breach of association duty of care, breach of statutory condominiums act, and breach of statutory recording act. It is denied in all other respects.

IT IS FURTHER ORDERED that, within 30 days of this order, the Toepkes must, and the Association may, lodge a form of judgment that includes declaratory and injunctive relief, and that contains Rule 54(c) language.

IT IS FURTHER ORDERED that, within 30 days of this order, any party seeking an award of attorneys' fees or costs must file a motion for attorneys' fees or statement of costs.

The parties should notify the court if they reach agreement on the form of judgment, attorneys' fees, and/or costs.