

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

HONORABLE RODRICK COFFEY

CLERK OF THE COURT
K. Tiero
Deputy

VISTA DORADA I I HOMEOWNERS
ASSOCIATION

CHAD M GALLACHER

v.

YUHUAN HAN

YUHUAN HAN
1354 E WALNUT RD
GILBERT AZ 85298

JUDGE COFFEY

MINUTE ENTRY

The Court has considered Plaintiff, Vista Dorado Homeowners Association's Motion for New Trial Pursuant to Rules 59(A)(1)(A) and (H) and Rule 60, ARCP and Defendant, Yuhuan Han's Response to that Motion. No reply was filed and the deadline for filing a reply has expired.

This case involves a dispute between Plaintiff, a homeowners association and Defendant, who is a homeowner. Plaintiff sought injunctive relief against Defendant for alleged violations of the parties' Declaration of Covenants Conditions and Restrictions (the contract"). On June 29, 2021, at the beginning of the evidentiary hearing, after hearing arguments from both parties, the Court dismissed this case. In its Motion, Plaintiff asks the Court to reverse that decision and reschedule another evidentiary hearing. Defendant opposes Plaintiff's request.

DEFENDANT DID NOT WAIVE HIS RIGHT TO ARBITRATION.

Plaintiff first argues that Defendant waived his right to object to the Court's jurisdiction because he did not raise that issue in his Answer. "Jurisdiction of the subject matter cannot be

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

waived by a consent, acquiescence or otherwise, and the lack of it can be raised at any time including on appeal.” *State ex rel. Baumert v. Mun. Ct. of City of Phoenix*, 124 Ariz. 543, 545, 606 P.2d 33, 35 (App. 1979). However, parties may waive their right to enforce an arbitration provision through their conduct in litigation. *Bolo Corp. v. Homes & Son Contr. Co.*, 105 Ariz. 343, 346, 464 P.2d 788, 791 (1970).

Plaintiff incorrectly argues that Defendant did not contest the Court’s jurisdiction until he filed his Pre-Trial Statement on June 9, 2021. Unlike the defendant in *Bolo*, Defendant, who is self-represented and whose primary language is Mandarin, listed lack of subject matter jurisdiction as one of his affirmative defenses in his Answer, which was filed on March 22, 2021. Construing the pleadings liberally, the Court deems Defendant’s assertion that the Court lacked subject matter jurisdiction as an objection to litigating the case in this Court when the parties’ contract required them to participate in multiple forms of alternative dispute resolution rather than litigating their dispute. Less than three months elapsed between the filing of his Answer and the filing of his Pre-Trial Statement in which Defendant more specifically explained his objection to proceeding with litigation, citing the specific sections of the parties’ contract that requires them to participate in alternative dispute resolution. Given that Defendant raised the jurisdictional issue in his Answer and followed that with a more detailed explanation of the issue in his Pre-Trial Statement shortly thereafter, the Court does not find that Defendant waived his right to enforce the alternative dispute resolution provision of the contract.

THE COURT HAD AUTHORITY TO DISMISS THE CASE.

Plaintiff’s second argument is that the Court improperly dismissed the case without having a motion to dismiss before it. A trial court has inherent authority to dismiss claims *sua sponte*. See *Acker v. CSO Chevira*, 188 Ariz. 252, 254, 934 P.2d 816, 818 (App.1997); *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 549, 554, ¶¶ 4, 22, 20 P.3d 590, 592, 597 (App.2001). Moreover, on page four of his Pre-Trial Statement, Defendant stated:

Exhibit THIRTEEN: The Plaintiff violates the CC&R himself.

Based on Plaintiff’s CC&R, Article XIII, section 13.6, The Plaintiff **may only file a (law)suit** after Defendant **fails to abide** by the **terms** of such **Negotiation** (Step One) or **Mediation** (Step TWO), or **Arbitration award** (Step THREE). **Filing a (law)suit would be Step FOUR.**

What are the **terms** written down on **Negotiation, Mediation, Arbitration?**
Which terms the Defendant fails to abide? Nothing, Right???, but there is a lawsuit now!!!

Although Defendant’s statement is not an articulate way of asking for dismissal, the Court deems it to be a request for dismissal. During the June 29, 2021 hearing, after the Court expressed

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

its concerns about whether this matter should proceed, the Court gave Plaintiff an opportunity to review the parties' contract and argue its position in opposition to a dismissal. Plaintiff's counsel stated Plaintiff's best arguments in opposition to a dismissal on the record. After considering those arguments, the Court dismissed the case. Plaintiff could have, but did not request an opportunity to brief the issue more fully before the case was dismissed. Given the Court's inherent authority to dismiss the case *sua sponte* and the fact that the Court gave Plaintiff an opportunity to argue its position in opposition to the dismissal before the case was dismissed, there was nothing improper about the dismissal.

THE ARBITRATION CLAUSE IS VALID AND ENFORCEABLE.

Plaintiff's third argument is that the alternative dispute resolution provisions of the contract it drafted are invalid and unenforceable. Arbitration provisions are appropriate "so long as the prospective litigant effectively may vindicate his or her rights in the arbitral forum." *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 247, 119 P.3d 1044, 1050 (App. 2006). "A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Grounds in equity or law for revocation of a contract include an allegation that the contract is void for lack of mutual consent, consideration or capacity or voidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose." *U.S. Insulation, Inc. v. Hilro Const. Co.*, 146 Ariz. 250, 253, 705 P.2d 490, 493 (App. 1985). "[I]t is also well established that, due to the public policy favoring arbitration, arbitration clauses should be construed liberally and any doubts as to whether or not the matter in question is subject to arbitration should be resolved in favor of arbitration." *Id.* at 258, 705 P.2d at 498.

Section 13.4 of the contract provides:

13.4. Alternative Dispute Resolution: Any dispute or claim between or among (a) a Developer (or its brokers, agents, consultants, contractors, subcontractors, or employees) on the one hand, and any Owner(s) or the Association on the other hand; or (b) any Owner and another Owner; or (c) the Association and any Owner regarding any controversy or claim between the parties, including any claim based on contract, tort, or statute, arising out of or relating to (i) the rights or duties of the parties under this Declaration; (ii) the design or construction of any portion of the Project, (iii) or an Alleged Defect, but excluding disputes relating to the payment of any type of Assessment (collectively a "Dispute"), shall be subject first to negotiation, then mediation, and then arbitration as set forth in this Section 13.4 prior to any party to the Dispute instituting litigation with regard to the Dispute.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

In essence, that provision means that any dispute between Plaintiff and Defendant, except for disputes about the payment of fees Defendant might owe to Plaintiff, must go through negotiation, mediation and arbitration before either party may file a lawsuit against the other party. The subsequent sections of the contract explain in detail the processes for negotiation and mediation. Section 13.4.3 then states:

13.4.3. Final and Binding Arbitration: If the parties cannot resolve their Dispute pursuant to the procedures described in Subsection 13.4.2 above, the Disputing Party shall have thirty (30) days following termination of mediation proceedings (as determined by the mediator) to submit the Dispute to final and binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as modified or as otherwise provided in this Section 13.4. If the Disputing Party does not submit the Dispute to arbitration within thirty days after termination of mediation proceedings, the Disputing Party shall be deemed to have waived any claims related to the Dispute and all other parties to the Dispute shall be released and discharged from any and all liability to the Disputing Party on account of such Dispute; provided, nothing herein shall release or discharge such party or parties from any liability to Persons not a party to the foregoing proceedings.

The existing parties to the Dispute shall cooperate in good faith to ensure that all necessary and appropriate parties are included in the arbitration proceeding. No Developer shall be required to participate in the arbitration proceeding if all parties against whom a Developer would have necessary or permissive cross-claims or counterclaims are not or cannot be joined in the arbitration proceedings. Subject to the limitations imposed in this Section 13.4, the arbitrator shall have the authority to try all issues, whether of fact or law.

Section 13.6 then explains the limited scenario when litigation is permissible under the contract. That Section states:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

13.6. Enforcement of Resolution: If the parties to a Dispute resolve such Dispute through negotiation or mediation in accordance with Subsection 13.4.1 or Subsection 13.4.2 above, and any party thereafter fails to abide by the terms of such negotiation or mediation, or if an arbitration award is made in accordance with Subsection 13.4.3 and any party to the Dispute thereafter fails to comply with such resolution or award, then the other party to the Dispute may file suit or initiate administrative proceedings to enforce the terms of such negotiation, mediation, or award without the need to again comply with the procedures set forth in this Article. In such event, the party taking action to enforce the terms of the negotiation, mediation, or the award shall be entitled to recover from the non-complying party (or if more than one non-complying party, from all such parties pro rata), all costs incurred to enforce the terms of the negotiation, mediation or award including, without limitation, attorneys fees and court costs.

Plaintiff offers virtually no explanation for its contention that the contract is unconscionable other than its claim that going through the alternative dispute resolution steps it established and required when it created the contract, would be expensive and cumbersome for it. Plaintiff's argument that the contract is unconscionable is ironic given that during the June 29, 2021 hearing, Plaintiff's counsel stated that the applicable provisions of the contract, which were drafted for Plaintiff, were deliberately designed to make litigation difficult for homeowners. But apparently, Plaintiff does not think it should be bound by the terms of its own contract when it wants to pursue claims against homeowners. And, contrary to Plaintiff's claim, Plaintiff can seek and obtain injunctive relief through an arbitration pursuant to the Arbitration Rule of the American Arbitration Association. And, its Rules, including Rule 38, set forth procedures for expedited relief. Had Plaintiff availed itself to that Rule, instead of seeking to reverse the Court's ruling, the underlying dispute likely could have already been addressed in an arbitration forum.

SECTION 13.4 OF THE CONTRACT IS NOT AMBIGUOUS.

Plaintiff's final argument is that the contract is ambiguous. The Court strongly disagrees. "Contracts are 'to be read in light of the parties' intentions as reflected by their language and in view of all circumstances; if the intention of the parties is clear from such a reading, there is no ambiguity.'" *In re Estate of Lamparella*, 210 Ariz. 246, 250, 109 P.3d 959, 963 (App. 2005), *as amended* (June 20, 2005). "A contract is not ambiguous just because the parties to it or, as here, a party to it and the other party's successor, disagree about its meaning." *Id.* "Language in a contract is ambiguous only when it can reasonably be construed to have more than one meaning." *Id.* "Although determination of the intent of contracting parties from extrinsic evidence may require fact finding, whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is even admissible is a question of law for the court." *Id.* (internal citations omitted). Section 13.4 of the contract is not susceptible to being construed as having more than one meaning.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

A contract's interpretation is controlled by the intent of the parties, as ascertained through its language. *See generally ELM Ret. Ctr., L.P. v. Callaway*, 226 Ariz. 287, 290-91 (App. 2010) (citations omitted). Words are given their ordinary, common sense meaning, *Azta Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 469 (App. 2010), quoting *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 220 Ariz. 202, 209 (App. 2008), and, when the language is plain and unambiguous, it will be enforced as written. *Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 267 (2008), quoting *D.M.A.F.B. Fed. Credit Union v. Emp'rs Mut. Liab. Ins. Co.*, 96 Ariz. 399, 403 (1964). "Our law generally presumes, especially in commercial contexts, that private parties are best able to determine if particular contractual terms serve their interests." *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 202 (2008). "It [is] neither the duty nor the right of the superior court to rewrite the contract with terms more favorable to either party than those provided by the instrument." *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 522 (1968), citing *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966). "[A] court will enforce a valid contract according to its terms, even though enforcement may be harsh or result in a forfeiture." *Freedman v. Cont'l Serv. Corp.*, 127 Ariz. 540, 545 (App. 1980).

When interpreting a contract, the Court must give effect to the intent of the parties at the time the contract was entered. *Polk v. Koerner*, 111 Ariz. 493, 495 (1975). "A general principle of contract law is that when parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593 (App. 2009), citing *Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86 (App. 2006). In order to determine intent, the Court will first look to "the plain meaning of the words in the context of the contract as a whole." *Id.*

Contrary to Plaintiff's claim, neither the Court nor Defendant have agreed with Plaintiff's claim that the contract was unclear or poorly drafted. To the contrary, during the June 29, 2021 hearing, the Court carefully read aloud and discussed Section 13.4 of the contract with Plaintiff and explained that it clearly provides that all disputes between homeowners and Plaintiff must go through the alternative dispute resolution process set forth in that section unless the dispute solely involves a claim by Plaintiff for unpaid assessments. Plaintiff's reliance on provisions of the contract that discuss construction defects is misplaced. Section 13.4 expressly states that it applies to disputes between Plaintiff and homeowners. There is nothing ambiguous about that provision. Plaintiff cannot unilaterally change the provisions of its contract through a "fine policy" it writes or through a demand letter from its attorney. Nor could Defendant modify the contract by writing a letter to Plaintiff that contained contrary terms to what is stated in the contract. Plaintiff is bound by the contract just as Defendant is bound by the same contract.

For all of those reasons, the Court will not reschedule an evidentiary hearing. However, pursuant to A.R.S. § 12-1502,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090882

08/30/2021

IT IS ORDERED reinstating and staying this case pending the outcome of the parties' compliance with the all of various alternative dispute resolution measures required under Section 13.4 of the contract. The parties are encouraged to move forward with the various phases of alternative dispute resolution that are required under Section 13.4 of the contract.

IT IS FURTHER ORDERED denying Plaintiff's Motion for New Trial Pursuant to Rules 59(A)(1)(A) and (H) and Rule 60, ARCP.