

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-018876

09/26/2022

HONORABLE SCOTT BLANEY

CLERK OF THE COURT  
P. McKinley  
Deputy

PAT MAH

JOHN SUD

v.

CANTERRA AT SQUAW PEAK  
CONDOMINIUM ASSOCIATION INC

HENRY NICKOLAS EICHER

ANDREW B TURK  
JONATHAN D EBERTSHAUSER  
JUDGE BLANEY

**UNDER ADVISEMENT RULING**

The Court has reviewed and considered Defendant's *Partial Motion to Dismiss*, Plaintiff's *Response to Defendant's Motion to Dismiss*, Defendant's *Reply in Support of Partial Motion to Dismiss*, and the arguments received at the September 26, 2022 oral argument.

As a general policy matter, "motions to dismiss for failure to state a claim are not favored under Arizona law." *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). When considering a motion to dismiss under Rule 12(b)(6), the Court will look only to the pleading itself and consider the well-pled factual allegations contained therein. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). The Court must assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom. *Id.* (internal citations omitted).

"Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law []plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (*quoting Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 (1998)).

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**THE COURT MAKES THE FOLLOWING FINDINGS:**

1. This case involves a dispute over assessments issued by the condominium association (the “Association”) for a condominium community.
2. The Association is governed by an elected volunteer Board of Directors.
3. The Association, all owners of property within the Association, and all property or “units” within the community are bound by the CC&Rs (the “Declaration”).
4. Some of the units in the condominium community have balconies and “walk decks” that are designed to serve a single unit, as opposed to all units in the community. Other units, such as Plaintiff’s unit, do not have balconies and walk decks but instead have two patios connected to the unit.
5. The balconies and walk decks are considered “Limited Common Elements” pursuant to the Declaration, Section 3.5.
6. The Association is responsible as part of the Common Expenses for the maintenance, repair and replacement of the Limited Common Elements pursuant to the Declaration, Section 4.2, which includes the balconies and walk decks. Thus, as long as the Association is conducting: (1) maintenance; (2) repair; or (3) replacement associated with the balconies and/or walk decks, the cost is considered a Common Expense.
7. The Declaration’s allocation of Common Expenses for the repair and maintenance of Limited Common Elements – such as the balconies and walk decks – to all unit owners differs from the Arizona Condominium Act, A.R.S. § 33-1255(C)(1)&(2), which allocates such expenses to the specific unit owners that benefit from the exclusive use of the Elements. The Declaration’s deviation from the statute’s mandate is permissible, as recognized by the plain language of the statute. A.R.S. § 33-1255(C) (“**Unless otherwise provided for in the declaration** all of the following apply....”) (emphasis added).
8. Pursuant to Section 6.7 of the Declaration, all Assessments – except special Assessments – are fixed at an equal amount for every unit in the community. This includes Common Expenses arising from maintenance, repair, or replacement associated with balconies and/or walk decks, regardless of whether a unit has a balcony or walk deck.
9. “Special Assessments” are levied by the Association against a unit and its owner to reimburse the association for: (1) costs incurred in bringing a unit and its owner into

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compliance; (2) any other charge designated as a special Assessment in the Declaration, the Bylaws, or the Association Rules; (3) attorney's fees and related charges as provided in the Declaration; or (4) materials or services that the Association offers to a specific owner that the owner voluntarily accepts.

10. Although the Association can undertake maintenance, repair, or replacement associated with the balconies and walk decks, "structural alterations or additions to any building" require, *inter alia*, the prior approval of the majority of the Owners given at a regular or special meeting of the members of the Association and the prior approval of the majority of First Mortgagees. The cost for such alterations or additions is paid by means of a special assessment, levied and collected from each owner in proportion to that owner's undivided interest in the common elements.

11. The Association has assessed the cost for repair of certain balconies and walk decks against all Unit Owners.

Plaintiff seeks a declaratory judgment that the cost of the repair to the balconies cannot be assessed against her because a 1996 Amendment to the CC&Rs limits the allocation of Common Expenses for Limited Common Elements to only those homeowners who benefit from the exclusive use of the Limited Common Elements.

**THE COURT FINDS** specifically that Plaintiff is not entitled to declaratory judgment on this basis. *See* Finding Nos. 5 & 6, above.

Plaintiff further seeks a declaratory judgment that the mechanism for assessing the costs of the repairs of the balconies is through a Special Assessment on the unit owners that benefit from the exclusive use of the balconies.

**THE COURT FINDS** specifically that the Court is unable to determine the proper form of Assessment for the specific work being performed in this case. If the work being performed on the balconies is in fact, "repair," the Association is entitled to rely upon Regular Assessments on all unit owners. But if the work is actually "structural alterations or additions," as Plaintiff suggests, the Association may only pay the costs by Special Assessment. *See* Finding No. 10, above. Again, the Court is unable to make that determination on the limited evidence in the record. But Plaintiff has identified a justiciable controversy and the *Verified Complaint* contains sufficient facts to support a declaratory judgment on this specific issue, with all well-pled facts taken as true for purposes of the present motion, to survive a Rule 12(b)(6) challenge.

**THE COURT FURTHER FINDS** for the sake of clarity that a declaratory judgment on this issue – if issued – would exclude the following language from Count 1: "...as is consistent

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with the admissions of the Association and Sections 1.9 (as amended), 1.10, 1.24, 3.5, 4.1, and 6.5 of the CC&Rs.”

Plaintiff further alleges in Count 2 and Count 3 that the Association violated the CC&Rs by: (1) making structural changes without prior approval from the Unit Owners and First Mortgagees; (2) using Regular Assessments and Capital Improvement Assessments to raise funds for the work performed on the balconies and walk decks; and (3) failing to provide documentation requested by Plaintiff to which she was entitled pursuant to the Declaration.

**THE COURT FINDS** specifically that the *Verified Complaint* contains sufficient facts, taken as true for purposes of the present motion, to survive a Rule 12(b)(6) challenge to Counts 2 and 3.

**IT IS THEREFORE ORDERED** granting Defendant’s *Partial Motion to Dismiss* in part and denying the *Motion* in part. The portion of Count 1 that relies upon the 1996 Amendment to the CC&Rs is dismissed for the reasons stated herein. The *Motion* is denied as to the remaining portions of Count 1 and all of Counts 2 and 3 of the *Verified Complaint*.

**IT IS FURTHER ORDERED**, because the Court has agreed with Defendant’s interpretation of the Declaration, declining to rule on Defendant’s defenses of res judicata and collateral estoppel.

**IT IS FURTHER ORDERED** the parties and their attorneys shall meet and confer informally, **in person** by November 4, 2022 to discuss possible resolution of this dispute. As an alternative, the parties may schedule formal mediation to occur prior to January 20, 2023.

**PLEASE NOTE:** This Division requires that all motions, responses, replies and other Court filings in this case must be submitted individually. Counsel shall not combine any motion with a responsive pleading. All motions are to be filed separately and designated as such. **No filing will be accepted if filed in combination with another. Additionally, all filings shall be fully self-contained and shall not “incorporate by reference” other separate filings for review and consideration as part of the pending filing.**