

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-094239

09/28/2023

HONORABLE ADAM D. DRIGGS

CLERK OF THE COURT
C. Avena
Deputy

ROBERT GIEDIT, et al.

KEVIN R HARPER

v.

TREVISO COMMUNITY ASSOCIATION

NICHOLAS C NOGAMI

JUDGE DRIGGS

MINUTE ENTRY

The Court held a bench trial in this matter on September 5 and 6, 2023. Plaintiffs brought four claims in their complaint - (Count 1) Breach of Contract, (Count 2) Declaratory Judgment, (Count 3) Violation of A.R.S. §§ 33-1803/1805, (Count 4) Breach of Fiduciary Duty, asking for an award of monetary damages and their attorneys' fees and costs incurred in connection with this lawsuit. Defendant brought counterclaims – (Count 1) Breach of Contract, and (Count 2) Injunctive Relief.

At the conclusion of the trial, the Court took the matter under advisement. The Court has since considered the evidence, including the demeanor of the witnesses, reviewed the exhibits as well as the case history, and considered the parties' arguments. After significant deliberation, the Court makes the following findings and enters the following orders:

FINDINGS OF FACT

1. The Court has jurisdiction over this matter, and venue is proper before this Court.
2. Treviso Community Association (the "Association") is a planned community subject to the provisions of A.R.S. §§ 33-1801 to 33-1819.

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3. The Association is a nonprofit corporation subject to the provisions of A.R.S. §10-3101, *et. seq.*
4. The Association is governed by the Treviso Declaration of Covenants, Conditions and Restrictions recorded at Sequence Number 2003-1581405 in the office of the Maricopa County Recorder (“CC&Rs”) and the Treviso Design Guidelines (“Design Guidelines”).
5. The Plaintiffs, Robert Giedt and Leslie Giedt, own the real property located at 36255 N. Livorno way, Scottsdale, Arizona 85262, which is located in the Treviso Community Association.
6. The Plaintiffs submitted an Architectural Approval Request dated March 1, 2019, to the Association’s management company seeking approval for construction of a pergola structure in the backyard of their property.
7. The request stated: “We intend to add a shade structure to the southeast portion of our building envelope. It will be constructed of wood beams with metal braces and stone accents to match the existing materials in our yard. The dimensions are to be 10 x 10 x10 and will be in compliance with necessary setbacks from property lines and NAOS. Drawing already submitted to Steve Patricola.” The request stated they intended to begin construction of the Structure on March 4, 2019, and complete the same by April 25, 2019.
8. On March 2, 2019, the Plaintiffs received an email confirmation of submission for their Architectural Request. The email stated that the request would “be reviewed by HOA personnel to verify that it is complete (all required information is included). Once verified, your request will be sent to the Architectural Committee for review.”
9. On or about March 5, 2019, the Plaintiffs received notification that the Architectural Approval Request was received and was reviewed by HOA personnel and had been forwarded to the Committee for review. This letter specifically stated: “Please do not start any work on your request until it has been approved and you have received an official approval letter from the Association.”
10. Several weeks after Plaintiffs submitted an architectural application seeking approval of a pergola structure, Plaintiffs called Leann Morlan, the Association’s then Property Manager employed by City Properties, inquiring about the status of the submittal.

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11. Ms. Morlan informed Plaintiffs that the Board had been notified of the request and that she had reserved a conference room for the Board to meet and address the request and other business.
12. Ms. Morlan also stated that there was a time limit for the Board to approve/disapprove the application and that the exact time could be found in the community documents.
13. Plaintiffs then reviewed the Association's Design Guidelines, and read in Section M, which states, which covers "Landscape Plan Submittal and Requirements" that the review process indicates that "[t]he Association will issue a written response within fourteen (14) days upon receipt of your submission."
14. Section M of the Association's Design Guidelines were not applicable to the Architectural Approval Request.
15. Plaintiffs erroneously believed that Section M applied to their request, believing that the fourteen-day time period was what Ms. Morlan was referring to during their conversation and that the submission was therefore deemed approved after that time had passed.
16. Section M does not contain any provision which indicates that a request is deemed approved if a written response is not issued within 14 days.
17. Plaintiffs began construction on the pergola without approval on or about March 22, 2019, while their application was pending.
18. Plaintiff's actions to begin construction prior to obtaining approval were in violation of the Association bylaws.
19. On or about April 1, 2019, Plaintiffs received a notice from Mark Rounsaville indicating that they were in violation of Article 3, Section 3.1.1. The letter asked Plaintiff's to "complete and return the enclosed architectural submittal form for the following:" (No further request or instruction was given after the colon.)
20. The April 1, 2019, letter asked the Plaintiffs to stop construction until the committee has approved their request.
21. The Plaintiffs complied by discontinuing construction on the project, although the pergola was essentially completed at that time.

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22. Plaintiffs received no communication from the Association until April 22, 2019, when they received a letter from Treviso's newly hired management company, Kachina Management, written by Mark Rounsaville.
23. The April 22, 2019, letter indicates that the new property management company mistakenly believed that the Plaintiffs had two newly installed pergolas in the backyard. The letter asked the Plaintiffs to resubmit for the 2 newly installed pergolas in the backyard by April 30, 2019. The request asked that they return the architectural request along with any other blueprints, diagrams or drawings.
24. On April 22, 2019, Plaintiffs resubmitted a virtually identical Architectural Approval Request with the exact schematics of the pergola structure.
25. On May 13, 2019, Treviso Community Association property manager Mark Rounsaville sent a letter to Plaintiffs regarding the three erected pergolas in their rear yard.
26. On May 13, 2019, Plaintiffs sent a letter to the board explaining their prior compliance regarding all pergolas on their property, a copy of which was provided to Mr. Rounsaville.
27. On May 20, 2019, Treviso Community Association sent an additional letter to Plaintiffs regarding the three pergolas and the Plaintiff's prior correspondence with Defendants.
28. On or about June 5, 2019, Plaintiffs received a letter confirming that the Architectural Committee had "reviewed [their] request and it is APPROVED as submitted with the following stipulations: all pergolas need to be the same material, color, height and design to existing pergolas and construction must be completed within 30 days of receipt of this approval letter."
29. On June 5, 2019, construction of the new pergola was already completed.
30. The June 5, 2019, approval letter is factually incorrect. It states that the Plaintiffs had submitted a request to "construct 2 pergolas in the backyard." However, the submission was to construct a single pergola.
31. The June 5, 2019, letter was an approval notice and not a violation notice, as the Association later claimed. The word "approved" was emphasized in ALL CAPS, while nothing in the text of the letter suggests that the Plaintiffs were in violation of any of the listed stipulations.

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32. The approval letter's plain text does not suggest that the approval was merely conditional, and that the Plaintiffs were still required to make modifications to the completed pergola within 30 days or they would be subject to a violation. The letter did not indicate any specific modifications for Plaintiffs to make within the 30-day period.
33. The portion of the text of the approval letter which states that "construction must be completed within 30 days of receipt of this approval letter" has no contextual significance because the "two" pergolas had already been completed and because the letter did not clearly indicate that the approval was a "conditional" subject to future action to be completed within those 30 days. A reasonable person would not believe that future action was required within the 30-day period.
34. The stipulations in the June 5, 2019, letter indicates that "all pergolas need to be the same material, color, height and design to existing pergolas." This provision is difficult to understand because none of the pergolas fit the description. Each of the Plaintiffs' pergolas have some similar features and distinct differences, but none have the same material, color, height and design. The new pergola could not have matched the "existing pergolas" as indicated, because the existing pergolas were different from each other.
35. The Association testified that the letter indicated that only the new pergola was meant to match the original pergola, but that contradicts the plain text of the approval letter, which uses the term "all" and uses the plural form of pergola, when discussing the existing pergolas.
36. The height of the new pergola was known and observable to the drafters of the approval letter.
37. The new pergola was constructed "as submitted" and it materially complies with the other stipulations regarding material, color, height, and design. The new and the original pergola are different heights because the original pergola was raised from the originally planned 10-foot height so that it would not interfere with the existing window in the home.
38. A Violation Notice, according to the Association bylaws, must clearly indicate what the violation is, and provide the information as stated in 5.2. None of the provisions of 5.2 were addressed in the approval letter.
39. The Plaintiff's filed a complaint with the ADRE in August 2019, which raised concerns about the Association's failure to comply with open meeting laws and failure to produce

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documents to homeowners in response to requests. The Association's Board of Directors received the ADRE Petition on August 22, 2019.

40. On August 22, 2019, the Association sent two violation letters addressed to Plaintiffs.
41. The first violation letter demanded that Plaintiffs "discontinue building the wall until the architectural committee has approved your request," and imposed a fine in the amount of \$50.00.
42. Plaintiffs were not building any wall, and months-later representations from the Association's counsel suggested this notice was a mistake and the fine was removed from Plaintiffs' account.
43. The second violation letter, also dated August 22, 2019, demanded that Plaintiffs "return the submittal form to have the Ramada/Gazebo approved."
44. The vague reference to a Ramada/Gazebo approval left Plaintiffs confused because they were not in the process of any current construction and their new pergola (which was neither a "ramada" or "gazebo") had already been submitted to the Architectural Committee and approved months earlier.
45. No reasonable person would expect the Plaintiffs to interpret their August 22, 2019, letter to indicate they were in violation of 3.1 and needed to resubmit an Architectural Approval Request to build a pergola that had already been approved. There is nothing in the text of the August 22 letter to suggest that their pergola was in violation.
46. The Court acknowledges that there has been confusion over the use of the terms pergola, ramada and gazebo during the course of this conflict and litigation. A pergola is opened and latticed, while gazebo is often rounded and solid. Ramadas are similar to gazebos but often have a single wall and built in structures. Reasonable people can easily mix up and misuse the wrong term when describing any of these outdoor shade structures.
47. The Association's board member testified that both August 22, 2019, letters were mistakes and did not make sense. The testimony suggested that those two letters may have been erroneously sent to the Plaintiffs and may have actually pertained to their neighbors.
48. The two August 22, 2019 letters were not sent to the Plaintiffs at the Association Board's direction.

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49. On September 25, 2019, Treviso Community Association sent a Notice of Suspension of Voting Rights letter to the Plaintiffs. This letter provided notice that their voting rights would be suspended effective 15 days from the date of this letter.
50. The Letter cited to Article 5, Section 5.12, which authorizes the Association to suspend the voting rights of any owner who fails to pay any assessment within 15 days, or any owner who violates any other provision of the Project Documents and such violation is not cured within 15 days.
51. The letter gave notice that Plaintiff's voting rights were being suspended for the following specific reasons:
 - a. Plaintiffs had previously been notified that they were in violation of the Declaration due to the following issues: "submittal for existing Ramada/Gazebo in rear yard."
 - b. Plaintiff's failure to pay charges to the Association in the amount of \$50.
52. The Suspension Notice stems from and is directly related to the two August 22, 2019, violation letters.
53. The Plaintiffs were never afforded an opportunity to be heard on this issue and the Association suspended their voting rights on or about October 10, 2019.
54. The Association acknowledges that by October 2019, the fine or assessment was removed, and that Plaintiff did not have any unpaid fines or fees, nor did it claim that Plaintiffs were in violation for failure to submit any architectural application for a gazebo or ramada.
55. The Association's suspension of Plaintiffs' voting rights was unreasonable and contrary to the Association's Bylaws and CC&Rs, in that the Association suspended the Plaintiffs after giving Plaintiffs notice of alleged violations the Association knew were not valid or accurate.
56. On or about October 15, 2019, the Association's counsel confirmed via email to Plaintiff's counsel that "the issue with the wall and accompanying \$50 fine on your clients' Lot has been addressed and cleared up. Specifically, the fine has been removed from [the] account and no further steps will be taken on that issue."

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57. In that same email, the Association’s counsel told Plaintiff’s counsel for the first time that “your clients’ newest pergola was not built in compliance with this requirement, as it does not match the other pergolas’ heights, which has been verified by the Board and which was the basis for the recent correspondence to you clients from the Association.” Again, the Association uses the plural form of pergolas in their text.
58. The new pergola does match the height of the 2016 pergolas.
59. The Association’s own counterclaim specifically states that at the time of the Plaintiff’s request, their property contained three other similar pergola structures, all of which were nearly identical in height and appearance.
60. The 2016 and original pergola are the least similar in height and appearance, as the 2016 pergolas use columns, whereas the new pergola matches the appearance of the original pergola, with the variation in height because the original pergola was heightened to accommodate the home’s window.
61. Both Plaintiff and the Association testified that the height difference between the new and original pergolas appeared different depending on the viewer’s vantage point and perspective.
62. The Plaintiff testified that the height of each pergola leg is different to accommodate for the slope in the property, indicating that because the lattice on top of the pergola is level, even the height of the legs of the same pergola are different from each other.
63. For several months, the Association did not offer an explanation of which of the structure(s) it claimed was not in compliance or how they were not in compliance.
64. Plaintiffs also repeatedly demanded that the Association withdraw the violation notices and fine and restore Plaintiffs’ voting rights.
65. The Association never sent any violation letter that informed Plaintiffs they had failed to meet the stipulations of the June 5, 2019, approval letter by failing to make sure the pergola was the correct height.
66. The Association never served a “Notice of Violation” under 5.2 of the Associations bylaws regarding the height of the Plaintiff’s pergola. The bylaws clearly state that a Notice of Violation shall contain (i) a description of the violation, (ii) the appropriate time and place

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at which the violation was observed, (iii) the maximum amount of fine that can be imposed for such violation, (iv) the name of the person issuing the Notice of Violation, (v) a statement advising the Owner of the Owner's right to request a hearing pursuant to Section 5.2.4 of the Bylaws, and (vi) a statement pertaining to the manner in which any fine will be enforced.

67. Although Plaintiffs' voting rights were wrongly suspended, Plaintiff still enjoyed the benefits of the monthly homeowner's association fees paid while his voting rights were suspended.
68. The Plaintiffs failed to establish that the Association had an obligation to timely produce the requested documents and failed to timely produce them.
69. The Plaintiffs failed to establish that the Association wrongfully retaliated against Plaintiffs for filing a ADRE complaint.
70. The Plaintiff failed to establish that Defendant breached a fiduciary duty to Plaintiff.
71. The Plaintiffs did not establish that they are entitled to recover damages in the form of their monthly dues paid during the months their voting privileges were suspended.
72. The Plaintiffs did not establish that they are entitled to punitive damages.

For the foregoing reasons,

THE COURT FINDS Plaintiff violated the Association bylaws when they began construction on the pergola without approval on or about March 22, 2019, while their application was pending.

THE COURT FURTHER FINDS the Association did not act reasonably in their written correspondence and communications with Plaintiff. In nearly every instance, the Association's letters and notices of violation were seriously flawed and difficult to understand.

THE COURT FURTHER FINDS the Association's June 5, 2019 letter approved the Plaintiff's Architectural Request that were submitted on March 1, 2019, and April 22, 2019.

THE COURT FURTHER FINDS the Association did not act reasonably in drafting their approval letter if their actual intent was that the approval was conditional to the Plaintiff's subsequent modification of the pergola by increasing the height to match the neighboring original pergola, and that such modification was expected to be done within 30 days.

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THE COURT FURTHER FINDS the Associations, as the drafter of the approval letter, had a duty to clearly identify those important terms and condition in the approval letter. This Court will not construe the vague language of the approval letter against the Association Member, in favor of the Association who failed to clearly state, if it was their intention, that the approval was conditional on Plaintiffs' future modification to their already completed pergola.

THE COURT FURTHER FINDS that the issuance of the approval letter rendered Plaintiffs' prior violation of the bylaws moot.

THE COURT FURTHER FINDS the Association did not act reasonably when suspending the Plaintiff's voting rights, as the Notice of Suspension of Voting Rights was based on erroneous violations. The Association had no lawful basis to suspend Plaintiff's voting rights.

THE COURT FURTHER FINDS the Association acted unreasonably when it failed to reinstate Plaintiff's voting rights once it became known that the two provisions listed in the Notice of Suspension of Voting Rights were erroneous.

THE COURT FURTHER FINDS the Association acted unreasonably when it believed that the suspension of voting rights could remain in force because of the Plaintiff's failure to modify the pergola height, when the Association never provided proper notice to the Plaintiff of this alleged violation.

THE COURT FURTHER FINDS that the Association breached its contractual duties owed to Plaintiffs, as expressed in the governing documents.

THE COURT FURTHER FINDS that Plaintiffs are not entitled to recover damages in the form of their monthly dues paid during the months their voting privileges were suspended, because they have received a benefit from the payment of those fees.

THE COURT FURTHER FINDS that the Association did not fail to timely produce requested documents.

THE COURT FURTHER FINDS that the Association did not retaliate against Plaintiffs for filing an ADRE complaint.

IT IS THEREFORE ORDERED declaring that the Association failed to establish that Plaintiff is in violation of the governing documents.

IT IS FURTHER ORDERED declaring that the Association violated its contractual duties owed to the Plaintiffs.

IT IS FURTHER ORDERED declaring that the Association wrongfully suspended the Plaintiffs' voting privileges.

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IT IS FURTHER ORDERED that Plaintiff's voting rights be reinstated effective immediately.

IT IS FURTHER ORDERED denying Plaintiff's request for compensatory damages and punitive damages.

IT IS FURTHER ORDERED denying Plaintiff's request to declare the Association failed to produce requested documents.

IT IS ORDERED denying Plaintiff's request to declare the Association breached a fiduciary duty to Plaintiff.

Counter Claim

Based on the findings above,

THE COURT FINDS that the Defendant/Counterclaimant did not meet their burden to establish a breach of contract claim against Plaintiff.

IT IS ORDERED denying Defendant's Counterclaim for breach of contract.

IT IS FURTHER ORDERED denying Defendant's request that a permanent injunction be ordered to remove the Subject Structure from their lot or otherwise bring it into compliance with the Association's June 5, 2019, approval letter.

This is an action arising out of a purported contract, which entitles Plaintiff to apply for an award of attorney's fees. *Keystone Floor & More, LLC v Arizona Registrar of Contractors*, 223 Ariz. 27, 219 P.3d 237 (App 2009). Therefore,

IT IS ORDERED that not later than 20 calendar days after the entry of this order, Plaintiff may submit an application for an award of attorney's fees and statement of costs. If an application or statement is submitted that Defendant Treviso wishes to oppose, a response must be filed not later than 20 calendar days after service. Plaintiff is not permitted to file a reply unless requested to do so by the court.

IT IS FURTHER ORDERED that not later than 20 calendar days after the entry of this order, Plaintiff must also submit a proposed form of judgment, leaving blank spaces for attorney's fees and taxable costs. That form of judgment may incorporate by reference what is said here but otherwise should be confined to the amounts being awarded along with Rule 54(c) language.