Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001777 11/07/2019

HON. TERESA SANDERS

CLERK OF THE COURT
A. Durda
Deputy

JOSH CLARK FAMILY TRUST DATED MAY 9 2013, et al. JONATHAN A DESSAULES

v.

RUSSELL RANCH HOMEOWNERS ASSOCIATION INC CARLOTTA L TURMAN

JUDGE SANDERS

RULING

The Court has read and considered Plaintiffs' *Motion for Summary Judgment* filed March 1, 2019, Defendant's *Response in Opposition to Plaintiffs' Motion for Summary Judgment* filed April 8, 2019, Plaintiffs' *Reply in Support of Motion for Summary Judgment* filed May 17, 2019, as well as Defendant's *Motion for Summary Judgment* filed June 28, 2019, Plaintiffs' *Response to Defendant's Motion for Summary Judgment* filed August 2, 2019, and Defendant's *Reply in Support of Motion for Summary Judgment* filed August 26, 2019, as well as the accompanying Statement of Facts for each. The Court has also considered the authorities cited by counsel, and their arguments made on October 1, 2019.

In their Complaint, filed March 3, 2017, Plaintiffs, owners of real property in the Russell Ranch planned community, seek a declaratory judgment, and monetary damages, including reimbursement for special use fees, monetary penalties, attorney's fees, and expenses and costs,

for breach of contract against Defendant, the Russell Ranch Homeowner's Association, in connection with Defendant's imposition of "special use" fees against homeowners in the "Phase III" portion of the planned community.

Plaintiffs contend that they are entitled to summary judgment on their claims against Defendant. Specifically, Plaintiffs allege that they are entitled to judgment as a matter of law for the following reasons: (1) the $2,700.00 per lot charge does not meet the definition of a "special use fee", or a "special use charge", (2) Defendant's use of Section 5.6 of the Declaration is contrary to the Declarant's intent, and (3) exempting twenty-one (21) lots from the special use charge renders it invalid.

In their response, and own motion for summary judgment, Defendant submits that it is entitled to summary judgment, and Plaintiff's motion must be denied because (1) the plain language of Section 5.6 entitled the association to impose the special use capital improvement charge and/or special use fee, (2) the Association did not exempt 21 lots from the special use fee, (3) at least half of the Plaintiffs have waived their claims because they specifically approved it, and (4) the requisite number of Phase III lot owners approved the proposed special use capital improvement charge in accordance with the Declaration's procedural requirements.

Pursuant to Ariz. R. Civ. P. Rule 56(a), "[t]he court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Evidence is viewed in the light most favorable to the nonmoving party. *Sanchez v. City of Tucson*, 191 Ariz. 128, 953 P.2d 168 (1998). "It is only the existence of uncontroverted competent evidence favorable to a movant, from which only one inference can be drawn, that entitles a party to summary judgment." *Nemec v. Rollo*, 114 Ariz. 589, 592, 562 Pl.2d 1087, 1090 (App. 1977) (citing *Choisser v. State ex rel. Herman*, 12 Ariz.App. 259, 469 P.2d 493 (1970)).

"When deciding a motion for summary judgment, '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 444, ¶ 19, 153 P.3d 1069, 1073 (App. 2007) (quoting *Thomspon v. Better-Bilt Aluminum Prds. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992)). "Summary judgment is inappropriate where the facts, even if undisputed, would allow reasonable minds to differ." *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994).

From a review of the motions and responses filed by the parties, it appears that neither party alleges disputed issues of material fact, but each contends they are entitled to summary judgment regarding this action.

As noted above, Plaintiffs are all "Phase III" homeowners in the planned community of Russell Ranch, and Defendant is the Homeowner's Association. Russell Ranch is located in Litchfield Park, Arizona, and the Association is governed by the "Declaration of Covenants, Conditions and Restrictions for Russell Ranch" and its amendments.

The community was originally planned to be developed in six phases, with construction commencing within Phases I and II in 2001 and 2003. These phases are mostly developed. Construction commenced within Phase III in 2005, but it remains largely undeveloped. Phases II and III are gated. The remaining phases have never been developed or annexed into the community.

Due to drainage issues in Phase III, Maricopa County imposed a construction moratorium in 2007 which prohibited further construction until these issues could be resolved. Between that time and 2015, Defendant expended approximately $165,000.00 in connection with assessing and repairing Phase III drainage issues. By early 2015, Maricopa County had continued to refuse to grant new building permits to Phase III lot owners, and imposed a deadline of June 15, 2015 for Defendant to correct these issues.

In an effort to comply with the deadline imposed by the county, and to allow the further development of Phase III, Defendant obtained bids and determined that the cost for correcting the drainage defects would be approximately $415,000.00. After reviewing the governing documents, specifically the Declaration, and reviewing its options, it formally proposed the imposition of a $2,700.00 "Special Use Capital Improvement Charge" upon each Phase III lot owner, with two exceptions noted below, to finance the cost, correct the drainage issues, and succeed in having the new construction moratorium imposed by the county lifted. The "SUCIC" was ultimately approved by a majority of the Phase III lot owners, 65-8. The Kidwell, Latta, Lindstrom, Maher, and Runnels Plaintiffs each voted in favor of the assessment. Thereafter, in December, 2015, Maricopa County lifted the moratorium on new construction within Phase III.

Section 5.6 of the Declaration provides as follows:

> 5.6 Special Use Fees. The Board shall assess to each Lot (except as provided in Section 5.12) that is within a Gated Community, as identified in Section 3.13 above, Special Use Fees allocating to such Lots the costs and expenses incurred or to be incurred by the Association that are related specifically to the Gated Community but not common to all Lots. The Special Use Fees relating to ordinary and customary costs and expenses concerning the Gated Community shall be determined each year by the Board as provided in Section 5.11 below. Such Special Use Fees shall be paid on the dates and in such installments as may be determined by the Board.

> In addition to the other Assessments identified in this Section 5, in any assessment year, an additional Special Use Fee may be levied by the Association applicable only to that fiscal year for purposes of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement of the Common Area that is situated solely within the Gated Community in question, including, without limitation, the gate structures and private roads situated within or at the boundary of such Gated Community (the "Special Use Capital Improvement Charge"), provided, that, unless otherwise provided herein, any such Assessment for a Special Use Capital Improvement Charge shall have the assent of Members having at least two-third (2/3) of the votes cast by Members of the Gated Community in question who are voting in person or by proxy at a meeting of the Members of such Gated Community called for such purposes. For these purposes, the presence of Members or of proxies entitled to cast ten percent (10%) of all of the votes of Members owing Lots in the Gated Community in question shall constitute a quorem.

It is pursuant to this provision that Defendant sought and gained approval from a quorem of the Phase III lot owners, and ultimately imposed the $2,700.00 fee upon each lot owner, except those noted below. Plaintiffs contend that the approval was not validly obtained because Defendant failed to disclose prior to the vote that Western Camelback Property, LLC, an owner of twenty undeveloped Phase III lots, was exempt from paying any assessments, including the "SUCIC" during the time period that the construction moratorium was in place, and two years afterwards. Western Camelback Property has since paid the SUCIC applicable to its lots, after the commencement of this lawsuit and the two-year period since the moratorium was lifted. Defendant, the owner of one lot, did not impose the assessment against itself because it had already expended approximately $165,000.00 towards assessing and correcting the drainage defects.

Plaintiffs further contend that the $2,700.00 per lot assessment did not meet the definition of a "special use fee" because the costs and expenses associated with it were not "related specifically to the Gated Community", but were "common to all Lots", and "the Declarations definitions of 'Common Area' and 'Common Expenses' underscore the conclusion that an additional Special Use Fee to pay for drainage repairs was improper."

Defendant submits that contrary to Plaintiffs' assertions, it complied with all requirements set forth in Section 5.6, and that "the drainage work performed within Phase III was only performed to or in relation to 'private streets', 'private storm drains', 'drainage ways', 'retention basins', 'certain landscaped areas', and other similar facilities located exclusively on Tracts A through P", and "the Phase III Gated Community includes all of the Lots located within Phase III

'together with the adjacent Common Areas'."

Arizona courts interpret CC & Rs according to their plain language. *Saguaro Highlands Cmty. Ass'n v. Biltis*, 224 Ariz. 294, ¶ 14, 229 P.3d 1036, 1040 (App. 2010). As noted above, Section 5.6 permits Defendant to levy an "additional special use fee", applicable to only one fiscal year, "for purposes of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement of the Common Area that is situated solely within the Gated Community in question, including, without limitation, the gate structures and private roads situated within or at the boundary of such Gated Community." "Special Use Fee" includes "the costs and expenses incurred or to be incurred by the Association that are related specifically to the Gated Community but not common to all Lots." "Gated Community" includes "such designated lots, together with the adjacent common areas." "Common areas" includes real property located within the community used "for the common use and enjoyment of the members", which includes, without limitation, "private streets, private storm drains, drainage ways, retention basins, walkways, parking areas, certain landscaped areas, walls or fences."

Based upon the matters presented, and for the reasons set forth above, the Court finds as follows:

(1) Due to drainage issues in Phase III, Maricopa County imposed a construction moratorium in 2007 which prohibited further construction until these issues could be resolved. The moratorium only applied to Phase III, the drainage issues only related to Phase III, and the "Memorandum of Understanding" entered into between Defendant and Maricopa County in December, 2015, only related to Phase III.
(2) Section 5.6 of the Declaration authorizes Defendant to impose an "additional special use fee" for purposes of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement of the common area that is situated solely within the gated community in question, including, without limitation, the gate structures and private roads situated within or at the boundary of such gated community. By its definition, the "additional special use fee" is not limited to only gate structures and private roads.
(3) The Court finds that addressing the drainage issues in Phase III that were so severe they caused the county to place a moratorium on construction within that phase only are within the type of contemplated costs that an "additional special use fee" would be utilized to fund. Although such funds had not been expended in this manner in the past, such use is authorized, and not prohibited by, the Declaration.
(4) The drainage issues were peculiar to Phase III, and "situated solely" within it.
(5) Phase III is a "gated community".
(6) The "gated community" includes Phase III and its "adjacent common areas".

(7) The repairs funded by the "additional special use fee" were utilized for Phase III and its "adjacent common areas", in order to have the construction moratorium imposed by the county lifted.
(8) The requisite two-thirds (2/3) of the Phase III lot owners approved the "additional special use fee", including several Plaintiffs.
(9) The drainage issues that had prevented construction in the Phase III area for several years were repaired and/or addressed by the funds generated from the "additional special use fee", the construction moratorium was thereafter lifted, and Phase III lot owners benefitted as a result.
(10) The agreement entered into between Defendant and Western Camelback Property on or about January 9, 2015, delayed Western Camelback's responsibility for payment of assessments, including "special use fees", and "additional special use fees", but did not exempt it from this obligation. Western Camelback Property has since paid its proportionate share of the $2,700.00 per lot fee pursuant to that agreement.

For the reasons set forth above, the Court finds that the $2,700.00 "additional special use fee" and/or "Special Use Capital Improvement Charge" was approved by, and properly imposed upon the Phase III lot owners, and therefore, they are not entitled to reimbursement of that assessment or any other requested relief as set forth in their Complaint filed March 3, 2017.

Therefore, it is ordered granting Defendant's *Motion for Summary Judgment* filed June 28, 2019.

It is further ordered denying Plaintiffs' *Motion for Summary Judgment* filed March 1, 2019.

Defendant is directed to submit a form of Order within 30 days of the date of this minute entry.