

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-094239

11/08/2022

HONORABLE STEPHEN M. HOPKINS

CLERK OF THE COURT  
C. Avena  
Deputy

ROBERT GIEDT, et al.

KEVIN R HARPER

v.

TREVISO COMMUNITY ASSOCIATION

NICHOLAS C NOGAMI

JUDGE HOPKINS

MINUTE ENTRY

The Court has taken under advisement Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment and Defendant/Counterclaimant's Motion for Partial Summary Judgment. The Court has reviewed the written submissions of the parties, hear arguments of counsel, and after due deliberation now rules as follows.

The salient facts necessary for the Court's decision are uncontroverted. Paragraph 3.1.1 of the applicable Covenants, Conditions and Restrictions (C, C& Rs) for the property provide as follows:

In the event that the Architectural Committee fails to approve or disapprove an application for approval within sixty (60) days after a complete application, together with any fee payable pursuant to Subsection 3.1.4 of this Declaration and all supporting information, plans and specifications requested by the Architectural Committee, have been submitted to the Architectural Committee, approval will not have be required and this Subsection 3.1.1 will be deemed to have been complied with by the Owner.

Plaintiff's Statement of Facts ("PSOF") ¶¶ 6.

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On March 2, 2019 Plaintiffs/ Counterdefendants (hereafter “Plaintiffs”) submitted their initial request in accordance with this section. *Id.*, ¶ 3. Sixty days from March 2, 2019 was May 2, 2019.

On March 5, 2019 Plaintiffs received notice from the then property manager for Defendant/Counterclaimant (hereafter “Defendant”) that the request had been received and forwarded for approval. *Id.*, ¶ 4, exhibit 7.

On April 1, 2019 Plaintiffs were asked to stop construction pending formal approval. *Id.*, ¶ 11. In this notice of violation letter Plaintiffs were directed to “disregard this notice” if “this situation [failure to provide their submittal] has already been corrected.” Plaintiffs were not told the prior submission had been rejected, nor were they told it had been or would be approved.

On April 22, 2019 Defendant (through its new property manager) requested additional information regarding the pergola. *Id.*, ¶ 13, exhibit 9. Specifically, even though Plaintiffs had submitted a request over forty-five days earlier Defendant requested a renewed “architectural request” and were advised that failure to do so would result in monetary penalties.<sup>1</sup> Sixty days from April 22, 2019 was June 21, 2019.

The next communication from Defendant to Plaintiffs was June 5, 2019. *Id.*, ¶ 17. This letter indicated the Architectural Committee approved the request “as submitted with the following stipulations: all pergolas need to be the same material, color, height and design to existing pergolas.” At that point the pergola had been built, but was slightly higher than the existing pergola.

Plaintiffs contend that Defendant failed to formally disapprove their application under the section of the C, C & Rs cited above. Plaintiffs alternatively contend that their submittal was actually approved via the June 5, 2019 letter.

Defendant contends that the letter of April 22, 2019 operates as a rejection of the submittal under the C, C & Rs, and further maintains that the letter cited by Plaintiffs was not an approval since Plaintiffs did not build the new structure to the same height as the existing structure.

C, C & Rs are considered a contract. *See Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006). Interpretation of a contract is a question of law for the Court. *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 218 P.3d 1045 (App. 2009).

Per the language of Section 3.1.1, the sixty day period for approval does not commence until all plans requested by the Architectural Committee have been provided. That request was made on April 22, 2019. Plaintiffs maintain that everything had already been provided in March.

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<sup>1</sup> At that point, the structure had already been constructed.

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But this is not accurate. The other “information” regarding the existing pergola was relevant to consideration by Defendant. Defendant clearly and reasonably viewed facts regarding the existing structures as “all supporting information” supporting Plaintiffs’ request. There is no evidence to support Plaintiffs’ argument that this request was simply to delay and provide a work around for the sixty day waiver period. The Court finds that under the clear language of the C, C & Rs the sixty day waiver period championed by Plaintiffs does not apply.

By June 21, 2019 the request was “approved” with a key caveat; the pergola had to be identical to the existing one. While the Court may interpret an unambiguous contract, the so-called conditional approval is ambiguous and subject to multiple interpretations. Plaintiffs claim was “APPROVED.” However, the approval was conditioned on it being the same height as the existing pergola. At the time of the “approval” it was not the same height. Yet it had already been constructed. It is unclear what was being approved or how the so-called approval should be interpreted. This vague letter is subject to different interpretations. Whether the discrepancy in height is “material” is also a fact question for a jury. Summary judgment is not a substitute for trial. *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 639 P.2d 330 (1982). The Court has reviewed the photo of the pergolas, Exhibit 14 to Plaintiffs’ Statement of Facts. The Court concurs that this is persuasive evidence in support of Plaintiffs’ position. But this Court will not grant summary judgment based upon its own “take” on the evidence and which party will likely prevail at trial.

**IT IS THEREFORE ORDERED** denying Plaintiffs/Counterdefendants’ Motion.

**IT IS FURTHER ORDERED** denying Defendant/Counterclaimant’s Motion.