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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-090949 12/17/2007

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
T. Soto
Deputy

DESERT RIDGE COMMUNITY ASSOCIATION CHARLES E MAXWELL

v.

DONALD J LAWRENCE JR., et al. CLINT G GOODMAN

MARIA E LAWRENCE
NO ADDRESS ON RECORD

MINUTE ENTRY

The Court previously received a Motion for Summary Judgment from Defendants Lawrence, and a Cross-Motion for Summary Judgment from Plaintiff Desert Ridge Community Association. At oral argument, the Court denied Defendants' motion and asked for further briefing from the parties on Plaintiff's motion. The Court held supplemental oral argument on December 4, 2007, and took Plaintiff's motion under advisement. Below is the Court's ruling.

This case involves the Association's attempt to enforce a 15 foot minimum setback requirement contained in the Association's Design Guidelines. At issue here is a play set that both parties agree does not comply with the 15 foot minimum guideline. Plaintiff contends that it is entitled to summary judgment because there is no dispute that Defendants intentionally violated the guideline. Defendants contend that the Association should be estopped from enforcing the guidelines because enforcement here would be unreasonable under the circumstances.

Although the parties disagree on exactly how to frame the issue, both parties agree that the analysis regarding whether the Association's motion should be granted centers on the recent Arizona Court of Appeals decision in *Tierra Ranchos Homeowners Ass'n v. K itchukov*, 216

Ariz. 195, 165 P.3d 173 (App. 2007). In *Kitchukov*, the Court of Appeals adopted the Restatement approach to review the discretionary decisions of a community association. This approach requires the member challenging the association to establish that the Association's actions were unreasonable. The *Kitchukov* Court specifically found that there was an issue of fact regarding whether the Association in that case had breached its duty to act reasonably, noting that "issues of reasonableness are usually a question of fact." The Court considered the uniqueness of the Kitchukov's property, the impact of the Kitchukovs' disputed garage on other neighbors and likeliness that the Association's proposed requirement would accomplish the stated goal and found that they all involved disputed issues of fact.

Here, Defendants urge that the Association's enforcement is unreasonable "because at least 15 neighbors testify [sic] that the play equipment in their backyards are less than 15 feet from adjoining properties and that the Association never enforced a setback requirement against them." Defendants also claim that this number might actually be higher, since the 15 other alleged violations came from only 500 of the approximately 3300 homes covered by the Association. Further, Defendants claim that like *Kitchukov*, the "uniqueness" of their property makes it unreasonable to enforce the design guideline against them (Defendants claim that the shape of their yard can only accommodate the play structure where it now sits) and that the play structure will not negatively impact other neighbors.

The Association counters that only 15 other violations in an Association of this size is a minimal amount and that it has acted quickly and reasonably to address the additional violations pointed out by Defendants. The Association relies primarily on several cases which the Association believes control. Foremost among these cases is *Swenson v. Erickson*, 998 P.2d 807 (Ut. 2000). In *Swenson*, the Utah Supreme Court determined that a restrictive covenant prohibiting residents from constructing certain structures was fully enforceable, despite the homeowners' argument that the Association had abandoned the requirement because there were 19 other violations in the 52 member association. The Association argues here that this is the "seminal" case and that if 19 other violations out of 52 does not constitute a waiver or abandonment of the right to enforce a restriction, then 15 out of 3300 surely does not.

However, the Court believes that *Swenson* is distinguishable from this case. First, *Swenson* did not appear to be following the Restatement approach. In fact, the *Swenson* Court required the homeowner to prove by clear and convincing evidence that the violations of the other homeowners were so substantial as to destroy the usefulness of the covenant. Second, the violation of the Defendant homeowner in *Swenson* was far more significant in comparison with the other 19 violations – those violations involved structures far smaller than the Defendant's structure, making the violations less significant than the Defendant's. The Court has reviewed the Arizona cases cited by the Association (*Whitker, Riley and Decker*) and believes that they are

distinguishable in that none of them explicitly applied the Restatement approach and (as pointed out by Defendants) they contain other factual differences to this case as well.

The Court believes that a fact finder might well find that the Association's enforcement of the design guideline against these Defendants was reasonable. The number of other violations appears to be relatively low in comparison with the number of homeowners, the Defendants' violation did affect other residents (Defendants' neighbor complained to the Association) and the Association has now pursued (after Defendants pointed them out) other homeowners who are allegedly in violation of the guideline. However, a fact finder might also reasonably conclude that the existence of other violators, the lack of any enforcement by the Association prior to this case, and the uniqueness of the Defendant's yard all make it unreasonable for the Association to enforce the guidelines here.

IT IS THEREFORE ORDERED denying Plaintiff's Motion for Summary Judgment.