

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-007601

12/06/2018

HON. TERESA SANDERS

CLERK OF THE COURT
A. Durda
Deputy

M R & B T TRUST, et al.

PHILIP B WHITAKER

v.

OLIVE GROVE VILLAGE ASSOCIATION INC JONATHAN D EBERTSHAUSER

JUDGE SANDERS

RULING

The Court has read and considered Defendant's *Motion to Dismiss* filed September 25, 2018, Plaintiff's response filed October 15, 2018, and Defendant's reply filed October 22, 2018. The Court has also considered the authorities cited by counsel, and the arguments of counsel made on November 2, 2018.

In his Amended Complaint, filed September 6, 2016, Plaintiff, on behalf of a private trust that he claims to be the trustee and trustor of, seeks a declaratory judgment from the Court regarding numerous disputes between himself and the Homeowners' Association of the property where he resides.

In its motion, Defendant requests that the Court dismiss Plaintiff's Amended Complaint in its entirety pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure. Based upon prior proceedings, only Count One, the declaratory judgment claim, remains. With regard to that remaining count, Defendant contends that Plaintiff has "failed to show that he has standing to bring suit to challenge the corporate acts." Specifically it claims that Plaintiff is not the owner of record with the Maricopa County Recorder, and that he has refused to provide any documentation that supports his claim that he is the "settlor, beneficiary, trustor, and trustee" of the MR & BT Trust.

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Plaintiff submits that Defendant's motion should be denied because it is untimely, waived, and that Defendant, through counsel, specifically admitted that Plaintiff was a member of the association and it would not contest that he is a member. Specifically, in written correspondence dated January 27, 2016, Defendant's counsel at the time, wrote:

1. The status of Mr. Sinnott as Owner and Voting Member.

Thank you for kindly allowing me to review documentation of January 20, 2016 in order to verify that Mr. Sinnott is a member of Olive Grove. Olive Grove appreciates that Mr. Sinnott is Trustee. As a Trustee, Mr. Sinnott is entitled to vote on behalf of the Trust. Olive Grove does not contest that Mr. Sinnott is a member, and he will be accorded the rights and responsibilities of a member as set forth in the Olive Grove community documents.

Arizona Rules of Civil Procedure Rule 12(b)(6) allows for the dismissal of a claim for "failure to state a claim upon which relief can be granted." Motions to dismiss for failure to state a claim are strongly disfavored. *Acker v. CSO Chevira*, 188 Ariz. 252, 934 P.2d 816 (Ariz. App. Div. 1 1997) (citing *Folk v. City of Phoenix*, 27 Ariz.App. 146, 151, 551 P.2d 595, 600 (1976)). In reviewing a Rule 12(b)(6) Motion, the "[c]ourts must . . . assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Rule 12(b)(6) requires that the Court look only to the complaint itself to determine whether or not a claim is stated upon which relief can be granted. The court must indulge all reasonable inferences in favor of Plaintiff.

In reviewing the Complaint, the Court notes that Plaintiff alleges he is the "settlor and beneficiary", and "trustee of the Trust." Pursuant to Rule 12(b)(6) standards, the Court must accept this allegation as true. This presumption is further bolstered by Defendant's admission through counsel.

Under the standards imposed for motions to dismiss, assuming the truth of the factual allegations in the Complaint and indulging all reasonable inferences therefrom, a dismissal of Plaintiff's Complaint pursuant to Rule 12(b)(6) is not appropriate.

It is therefore ordered denying Defendant's *Motion to Dismiss* filed September 25, 2018.