

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-007601

12/17/2018

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 for Summary Judgment* filed August 3, 2018, Plaintiff's response filed September 28, 2018, and Defendant's reply filed October 26, 2018, as well as the accompanying Statement of Facts for each. 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.

Plaintiff's claims for Breach of Contract (Count Two), and Receivership (Count Three) have been dismissed. The only remaining claim is for Declaratory Judgment (Count One).

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Defendant contends that it is entitled to summary judgment on each of Plaintiff's disputes against the Association. Specifically, Defendant contends that it is entitled to judgment as a matter of law for the following reasons:

1. Plaintiff's failure to comply with the Association's governing documents and refusal to provide proof of his identify to serve as a qualified member of the Association precludes him from relief.
2. The Association's 2016 election was held in accordance with the governing documents.
3. The 2015 special election was held properly and the removal of the Treasurer was proper.
4. Audits have been completed for 2014 and 2016.
5. The former property manager did not have a conflict of interest with the Board of Directors.
6. Architectural approval is required for modifications on Plaintiff's balcony.
7. The Board has authority to impose fines for violations of \$100.00 per day for continued use of the unapproved architectural modifications.
8. The Board's treatment of the unapproved lattice on Unit 2008 as a violation of the governing documents is appropriate.
9. The late fees and charges on the Plaintiff's ledger were properly assessed.
10. The engagement of the plumbing contractor in the Association was proper.

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11. The Association's meetings are held in accordance with open meeting requirements.
12. The Association is entitled to enforce violations relating to door hangings.
13. Plaintiff's claims for relief regarding removal of the current board members and a request for a new election are moot.

In his response, although not specifically identified as a cross-motion for summary judgment, and not accompanied by a statement of facts in support of such a motion, Plaintiff contends that he is entitled to judgment as a matter of law regarding several issues. In any event, it appears it is his position there are genuine issues of material fact that preclude summary judgment in Defendant's favor.

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).

Plaintiff's Standing as a Qualified Member of the Association

For the reasons set forth in the Court's minute entry dated December 6, 2018, which denied Defendant's *Motion to Dismiss*, it is ordered denying Defendant's *Motion for Summary Judgment* regarding this issue.

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The 2016 Election

Plaintiff contends that the 2016 election “was marred by material violations of the governing documents.” Specifically, Plaintiff alleges that the Board improperly refused to place his name on the ballot, the ballots were not “secret”, no nomination committee was used, and irregularities in the election because “a last-minute, write-in candidate received more votes than names on the pre-printed ballot when there were mail-in ballots.”

Defendant claims it is entitled to summary judgment on this issue because the ballots utilized were compliant with A.R.S. § 33-1250(C), and the Bylaws provide for a secret written ballot, even though they do not set forth a procedure for executing a secret ballot. Defendant ultimately asserts that “despite the fact that Arizona law arguably does not require the Association to do so, it has retained the secrecy of the ballots cast at the Association’s 2016 annual meeting of the members.”

In reviewing each party’s respective Statement of Facts, the Court finds there are multiple disputed material facts with regard to this issue.

It is therefore ordered denying Defendant’s *Motion for Summary Judgment* regarding this issue.

The 2015 Special Election

Plaintiff contends the 2015 special election to remove the treasurer was improper. Specifically, he alleges that the petition did not include the valid number of signatures, Defendant could not identify who circulated the petition, how it was circulated, who verified the signatures, and whether they were ever verified. He further alleges that “since the election is required to be by secret ballot, then an implicit term is any removal election also must be secret ballot.”

Defendant claims it is entitled to summary judgment on this issue because the petition for removal exceeded the requisite threshold, ballots cast for the removal of a member of the Board of Directors are not required to be secret ballots, and the volunteers that counted the ballots were impartial.

In reviewing each party’s respective Statement of Facts, the Court finds there are multiple disputed material facts with regard to this issue.

It is therefore ordered denying Defendant’s *Motion for Summary Judgment* regarding this issue.

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The 2014 and 2016 Audits

The Association has performed an audit, by a certified public accountant, for 2014 and 2016. There is no disputed material fact regarding this issue. This issue is moot.

The Property Manager

Plaintiff contends that the property manager, Art Self, engaged in misconduct, “was self-serving and was not neutral”, and was “demeaning, nasty, and unprofessional.” His major areas of complaint refer to a conflict of interest with regard to soliciting plumbing bids, and that he “retaliated” against Plaintiff in several regards.

Defendant asserts that the **former** property manager was a hired agent for the Board of Directors and lacked any independent authority over the Association. It further contends that Plaintiff has provided “no case law or support for Plaintiff’s claim”, and is therefore entitled to summary judgment on this issue.

In reviewing each party’s respective Statement of Facts, the Court finds there are disputed material facts with regard to this issue.

It is therefore ordered denying Defendant’s *Motion for Summary Judgment* regarding this issue.

Architectural Approval for Modifications on Plaintiff’s Balcony

Plaintiff contends that architectural approval is not required for the lattice on his balcony. Defendant asserts it is entitled to summary judgment on this issue because the Declaration and Bylaws clearly state that architectural approval is required for modifications on Plaintiff’s balcony.

In reviewing each party’s respective Statement of Facts, the Court finds there is no genuine dispute that (1) Plaintiff’s modifications to his balcony required architectural approval, and (2) Plaintiff did not seek or obtain the Board’s approval prior to making any modifications.

It is therefore ordered granting Defendant’s *Motion for Summary Judgment* regarding this issue.

The Board’s Authority to Impose Monetary Fines

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Plaintiff contends that the Board does not have authority to impose monetary fines. In support of this argument he points out that (1) the CC & R's do not authorize the Board to impose financial fines, (2) the Articles of Incorporation expressly limits remedies to suspension of voting rights and the use of recreational facilities for 90 days, (3) Defendant has not "proffered any duly adopted Rules", and (4) Defendant "has never established the foundation to show any type of fine was ever approved."

Defendant asserts it is entitled to summary judgment on this issue because A.R.S. § 33-1242(A)(11) specifically provides, subject to the provisions of the declaration, it may impose reasonable monetary penalties on unit owners for violations of the declaration, bylaws and rules of the Association. It further points out that the Associations Rules and Regulations provide for fines "ranging from \$10.00 to \$500.00 per violation."

The Court finds, as a matter of law, that the Association is empowered to impose monetary fines for violations pursuant to A.R.S. § 33-1242(A)(11).

It is therefore ordered granting Defendant's *Motion for Summary Judgment* regarding this issue.

The Board's Treatment of Plaintiff's Lattice

Plaintiff contends that he "has not been furnished a declaration or any deposition testimony to support the claim that any fine currently is outstanding based on alleged lattice violations."

Defendant asserts it is entitled to summary judgment on this issue because (1) Plaintiff failed to submit the required written architectural application, (2) Plaintiff's unapproved modification constitutes a violation, and (3) he was provided with violation notices.

In reviewing each party's respective Statement of Facts, the Court finds there is no genuine dispute that (1) Plaintiff's modifications to his balcony required architectural approval, (2) Plaintiff did not seek or obtain the Board's approval prior to making any modifications, (3) Plaintiff's modifications constitute a violation, and (4) Plaintiff was provided with violation notices.

It is therefore ordered granting Defendant's *Motion for Summary Judgment* regarding this issue.

The Late Fees and Charges on Plaintiff's Ledger

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Plaintiff disputes the late fees and charges on his ledger and asserts “there is no foundation for the purported ledger of fines.”

Defendant asserts that the late fees and charges on Plaintiff’s ledger were properly assessed.

In reviewing each party’s respective Statement of Facts, the Court finds there are disputed material facts with regard to this issue.

It is therefore ordered denying Defendant’s *Motion for Summary Judgment* regarding this issue.

The Plumbing Contractor

Plaintiff, who describes himself as a “retired plumber” believes that a plumber engaged by the association “did not properly repair the boiler”, and this caused the former property manager to “retaliate against him.”

Defendant asserts that the engagement of the plumbing contractor was appropriate, not a conflict-of-interest, the sought bids, and “the Association’s right to engage vendors and to decide whether to submit a claim to its insurance carrier is held by the corporation.”

The Court finds that Defendant has the authority to engage vendors to make repairs to the property. No evidence has been presented that Defendants acted improperly in this regard.

It is therefore ordered granting Defendant’s *Motion for Summary Judgment* regarding this issue.

Open Meeting Laws

Plaintiff contends the Board is violating open meeting laws. Defendant asserts the Association’s meetings are conducted in accordance with open meeting requirements.

Defendant also submits that the specific examples of violations that Plaintiff refers to in his response all allegedly occurred **after** he filed his Amended Complaint and therefore are not properly pled or before this Court for determination.

In reviewing each party’s respective Statement of Facts, the Court finds no evidence has been presented to support the claim that Defendant violated open meeting requirements as set forth in Plaintiff’s Amended Complaint.

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It is therefore ordered granting Defendant's *Motion for Summary Judgment* regarding this issue.

Door Hangings

This dispute involves Plaintiff posting documents on the front door of his residence, which pertain to judgments issued against certain members or residents within the Association.

Defendant contends that the Declaration provides that Plaintiff's front door is a "common area", and prohibits "advertising or other signs" remaining on it "except as otherwise approved by the Condominium Association."

Plaintiff argues that this is a "content based prohibition" and violates his constitutional right to free speech.

The Court finds, as a matter of law, that Plaintiff's front door is part of the Association "common area", and subject to the Declaration and Association Bylaws and Rules and Regulations.

It is therefore ordered granting Defendant's *Motion for Summary Judgment* regarding this issue.

Plaintiff's Claim for Removal of Current Board Members and a New Election

Insofar as Plaintiff requests the Court issue orders invalidating prior elections and ordering a new one, the Court agrees with Defendant that this issue is moot.

Conclusion

Based upon the matters presented, and for the reasons set forth above, it is ordered granting in part, and denying in part, Defendant's *Motion for Summary Judgment* filed August 3, 2018.