

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2017-000307-001 DT

05/21/2018

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT

C. Avena

Deputy

TERRAVITA COUNTRY CLUB INC

ANJALI J PATEL

v.

WILLIAM M BROWN (001)
ARIZONA DEPARTMENT OF REAL ESTATE
(001)

WILLIAM M BROWN
1754 LAKEVIEW ESTATES DR
COLDSRING TX 77331
LYNETTE EVANS

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Appellant Terravita Country Club, Inc. (“Terravita”) seeks reversal of the July 24, 2017 Final Order of the Arizona Department of Real Estate requiring Terravita to comply with A.R.S. § 33-1805 regarding Appellee William M. Brown’s request for records. For the following reasons, this Court affirms that Order.

I. FACTS AND PROCEDURAL BACKGROUND

On February 6, 2017, Brown requested records from Terravita. (Decision of Administrative Law Judge, July 14, 2017 (“ALJ Decision”) at 1.) Terravita sent Brown an email message eight days later, informing him that they would not provide the records, because they related to pending criminal litigation against him. (ALJ Decision at 1.)

On April 13, 2017, Brown filed a Petition for Hearing with the Department of Real Estate, alleging that Terravita violated A.R.S. § 33-1805(A) when it failed to timely respond to his records request. (*Id.*) Terravita answered, and the Department set the matter for a hearing before an ALJ at the Office of Administrative Hearings. (*Id.* at 2.)

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After the hearing, the ALJ found that when Brown requested the records, “Brown was facing criminal charges” brought by the City of Scottsdale “and Terravita was not a party to the criminal case.” (*Id.* at 5.) Because Terravita did not fulfill Brown’s request for records within 10 days, the ALJ found that it violated A.R.S. § 33-1805. (*Id.*) The ALJ deemed Brown the prevailing party, ordered Terravita to comply with the request within 10 days, and ordered Terravita to pay Brown’s filing fee of \$500.00. (*Id.*) The ALJ did not impose a civil penalty. (*Id.*)

The Department accepted the ALJ’s Decision. (Final Order, July 24, 2017.) Terravita requested a rehearing; the Department denied the request.

This appeal followed. This Court has jurisdiction pursuant to A.R.S. §§ 12-124(A) and 12 -905(A).

II. STANDARD OF REVIEW

A reviewing court shall affirm the action of an agency unless, after reviewing the record, the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. A.R.S. § 13-910(E).

In reviewing an agency’s decision, the superior court “does not conduct a trial de novo, act as the trier of fact, nor substitute its view of the evidence for that of the agency.” *Siler v. Arizona Dept. of Real Estate*, 193 Ariz. 374, 378, ¶ 13 (App. 1998). Instead, this court should affirm an order “when substantial evidence exists to support it and the remedy ordered is within the range of permissible dispositions.” *Id.* at ¶ 15. A trial court makes its own rulings on questions of law. *Smith v. Arizona Long Term Care Sys.*, 207 Ariz. 217, 220, ¶ 14 (App. 2004).

III. LEGAL ANALYSIS

At issue is the correct interpretation of A.R.S. § 33-1805, which governs disclosure of homeowner association records. Terravita argues that the records related to pending litigation at the time of Brown’s request, and thus Terravita was authorized to withhold them.

The statute provides that in most instances, financial and other association records must be made available to a member within 10 days of a request:

A. Except as provided in subsection B of this section, all financial and other records of the association shall be made reasonably available for examination by

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any member or any person designated by the member in writing as the member's representative. The association shall not charge a member or any person designated by the member in writing for making material available for review. The association shall have ten business days to fulfill a request for examination. On request for purchase of copies of records by any member or any person designated by the member in writing as the member's representative, the association shall have ten business days to provide copies of the requested records. An association may charge a fee for making copies of not more than fifteen cents per page.

In certain cases, records may be withheld, including when the records relate to “pending litigation.” A.R.S. § 33-1805(B)(2).

Here, according to Terravita, the Department’s conclusion that the “pending litigation” must be between the homeowner and the Association in order to justify withholding records is too narrow a construction of the statute. This Court need not reach that issue, however.

Terravita has failed to show how the records requested by Brown relate to the pending litigation between Brown and the City of Scottsdale. According to Terravita, the City prosecuted Brown for threats made against it and several of its board members. But the records requested are not for personal information about board members. Instead, Brown requested records pertaining to business conducted by the Board. Terravita makes no connection between the records and the prosecution, only conclusory statements.

Specifically, Brown requested infraction reports, documents regarding suspension of his privileges, meeting minutes, non-privileged communications regarding sanctions against him, justification for a fine, and an accounting for a \$5,000 assessment. Terravita has not explained how those documents related to the “pending litigation” - the City of Scottsdale’s prosecution against Brown.

Terravita also argues that Brown could have requested the records from the City Prosecutor. But it makes no showing that the City had the records. Moreover, if Terravita had a statutory duty to provide the records, it makes no difference that Brown might have been able to obtain them through another route.

Finally, Terravita makes a passing reference to the Arizona Victims’ Bill of Rights. But it fails to explain how those provisions apply here, and has thus waived any argument based on the

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Victims' Bill of Rights. See, e.g., *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 305, n.7 (App. 2008) (issues not developed on appeal are waived.).

In sum, Terravita never established that the records themselves related to the "pending litigation" against Brown. While there was apparently a criminal case pending against Brown involving Board members and their property, Terravita has never shown how the records requested by Brown related to that litigation. Thus, Terravita failed to establish that the "pending litigation" exception to the records law applied.

IV. CONCLUSION

Based on the foregoing, this Court concludes substantial evidence supports the Order, and the Order was not contrary to law, arbitrary and capricious, or an abuse of discretion.

If any party wishes to appeal this decision, that party must do so pursuant to A.R.S. § 12-913 and Rule 9(a), Ariz. R. Civ. App. Proc.

IT IS THEREFORE ORDERED affirming the July 24, 2017 Final Order of the Department of Real Estate.

IT IS FURTHER ORDERED lifting the partial stay entered by this Court on December 13, 2017.

IT IS FURTHER ORDERED this is a final judgment for purposes of appeal, as no further matters remain pending. See Rule 54(c), Ariz. R. Civ. P.

IT IS FURTHER ORDERED signing this minute entry as a formal order of the Court.

/s/ Patricia A. Starr

THE HON. PATRICIA A. STARR
JUDGE OF THE SUPERIOR COURT

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