Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000334-001 DT 11/20/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

SUNDANCE RESIDENTIAL HOMEOWNERS ASSOCIATION INC

JASON N MILLER

v.

GEISEL JARVIS (001)
JOSEPH JARVIS (001)

GEISEL JARVIS
1894 S 216TH LN
BUCKEYE AZ 85326
JOSEPH JARVIS
1894 S 216TH LN
BUCKEYE AZ 85326

REMAND DESK-LCA-CCC
WHITE TANK JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011064291RC.

Defendants-Appellants Geisel and Joseph Jarvis, (Defendants) appeal the White Tank Justice Court's determination granting Plaintiff, Sundance Residential Homeowners' Association, Inc., summary judgment. Defendants contend the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. Factual Background.

On April 4, 2011, Plaintiff, an Arizona non-profit corporation, filed a Complaint alleging Defendants—homeowners within the Sundance Residential Development—failed to pay their mandatory Association fees and assessments. Plaintiff requested $1,931.74 plus continuing assessments, interest, costs and attorneys' fees. On March 10, 2012, the parties were notified a trial was set for July 2, 2012, at 2:00 PM before the Hon. Jeff Fine. On March 20, 2012, Plaintiff filed its summary judgment motion. On April 19, 2012, Defendants responded to the summary judgment motion by filing a document entitled Defendants [sic.] Answer to Plaintiffs' [sic.] Motion for Summary Judgment, and claimed the action was unjustified because Plaintiff breached the CC&Rs by failing to properly provide upkeep and improvements to the property.

On April 30, 2012, Plaintiff filed its reply to Defendants responsive motion. The trial court record does not reflect Defendants filed an Answer, any Rule 12(b) motions, or a Counterclaim.

The parties submitted a number of documents detailing the duties and obligations of the subdivider, HOA, and purchasers of property. The earliest of these documents was the Subdivision Public Report for Sundance Parcel 48 (Subdivision Public Report) with an effective date of August 10, 2006, submitted by the subdivider, Rick Hancock Homes, LLC. That report mentioned the Property Owners Association[1] and provided (1) Sundance Residential Homeowners Association, Inc. was the Association and (2) the control of the Association was by Sundance Master Community Association, Inc. The Subdivision Public Report indicated:[2] (1) all lot purchasers will be members of the Homeowners' Association; (2) payments to the Association are subject to change in accordance with the Recorded Restrictions; and (3) purchasers were advised to read the CC&Rs to determine the rights of the lot owners to participate in the Association and to determine the rights, duties and limitations of owners in the use of their lots. Purchasers were also cautioned to determine for themselves if the subdivider's arrangements and plans for assessments on unsold lots would be sufficient to fulfill the financial obligations of the association.

The subdivider, Hancock Communities LLC submitted another Subdivision Public Report for Parcel 48 with an effective date of May 9, 2008. This Subdivision Public Report recommended that the purchaser not sign any agreement until the purchaser read the report. On page 10 of this report, the purchaser is warned that the purchaser has no assurance that the subdivider will purchase or build homes on all development lots. As with the earlier Subdivision Report, purchasers are told Sundance Residential Homeowners Association Inc. is the Property Owners Association.[3]

The trial court was also provided with the CC&Rs for Sundance Residential Community. Section 2.02 of the CC&Rs state all present and future owners and owner's occupants are subject to and bound by the Residential Project Documents and the Master Association Documents. Section 3.01 of the CC&Rs provided every owner of a parcel within the residential community is bound by the Residential Project Documents and is:

> . . . deemed to have personally covenanted and agreed to be bound by all covenants and restrictions contained in the residential Project Documents, and is deemed to enter into a contract with the Residential Association and each other Owner for the performance of the respective covenants and restrictions. . .

[1] Subdivision Public Report for Sundance Parcel 48, August 10, 2006, at p. 10.
[2] *Id*. at p. 11.
[3] Subdivision Public Report for Parcel 48, May 9, 2008, at p. 12.

Section 4.01(b) provides each assessment becomes the personal, joint, and several obligation of each person who was the owner of property at the time when the assessment became due. Additionally, section 4.07(d) provides (1) each owner of a living unit, by accepting a deed for the living unit, or otherwise becoming an owner, "specifically vests in the residential Association and its agents the right and power to bring all actions against the Owner personally for the collection of all assessments due under the Residential Project Documents as a debt to the Residential Association; and (2) allows the Residential Association to bring suit to recover a money judgment for unpaid assessments. Article V of the CC&Rs described the Association's responsibilities but stated the Association was only required to maintain the level of maintenance imposed by the Town. Section 5.01 states:

> So long as the level of maintenance exceeds those minimum standards, if any, imposed by the Town, the Board will be the sole and absolute judge as to the appropriate maintenance of the Residential Common Area and the Areas of Residential Association Responsibility.

Section 10.19 addresses the imposition of attorneys' fees and provides the prevailing party in any action will be entitled to reasonable attorneys' fees and court costs.

On May 16, 2012, Defendants filed a second response to Plaintiff's summary judgment motion. On May 24, 2012, Plaintiff filed a motion to strike the second response. On June 11, 2012, the trial court granted Plaintiff's summary judgment motion and notified the parties the court date for July 2, 2012, was cancelled. In its June 19, 2012, Order re Summary Judgment, the trial court specifically mentioned it had considered all timely filed pleadings and supporting evidence and ruled on the merits of the summary judgment motion. In its June 19, 2012, Ruling on Motion the trial court said:

> IT IS FURTHER ORDERED Plaintiff's Motion For Summary Judgment is granted on 05–01–12. Defendant's Response filed on 05–16–12 was not filed timely. Court ruled on the merits taking into consideration all Pleadings Timely filed. Plaintiff's Motion To Strike granted. Judgment stands. Please submit formalized judgment.

The Ruling was signed by the Justice of the Peace and the clerk of court certified a copy was mailed to each party on June 19, 2012. However, the address listed for Defendants on the June 19, 2012, Ruling on Motion was the address for Plaintiff's attorney and not Defendants' address.

Defendants then filed a number of motions which the trial court—on October 17, 2012,—denied. The trial court re-affirmed its decision awarding Plaintiff summary judgment and stated it had reviewed and considered the contents of the pleading prior to granting the summary judgment. The trial court explained it granted the summary judgment because:

> After reviewing and considering the contents of the pleadings the Court

> granted Plaintiff's Motion for Summary Judgment on 5/1/12. Judgment was granted on the basis that the Plaintiff met the provisions of Rule 56 and applicable burden of proof while Defendants failed to sufficiently support the defense contained within their response.

The trial court also explained it struck Defendants' "second reply"[4] which Defendants filed following the trial court's granting of judgment for Plaintiff and said it did not consider this pleading because (1) it was filed after judgment; and (2) the trial court agreed with Plaintiff's interpretation that the rules did not allow a second response to a motion. The trial court detailed the series of post judgment motions and denied many of Defendants' post-judgment motions. On Jan. 9, 2013, the trial court ruled on the remaining post-judgment motions and awarded Plaintiff attorneys' fees of $11,460.00.[5]

Defendants filed a timely appeal.[6] Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to Arizona Constitution Art. 6, § 16, and A.R.S. § 12–124(A).

II. Issues:

A. Did The Trial Court Err By Awarding Plaintiff Summary Judgment.

Appellate courts review both the factual and legal determinations in motions for summary judgment *de novo*, *Aranki v. RKP Investments, Inc.*, 194 Ariz. 206, 979 P.2d 534, ¶ 6 (Ct. App. 1999), to determine if the material facts are uncontested and the prevailing party is entitled to judgment as a matter of law.

> Summary judgment should only be granted in cases where there is no genuine issue of material fact and the case may therefore be decided on the pleadings. We view the facts in the light most favorable to the non-moving party.

Kiley v. Jennings, Strouss & Salmon, 187 Ariz. 136, 139, 927 P.2d 796, 799 (Ct. App. 1996) (citations omitted.) In this case, Plaintiff had the burden of proving (1) no genuine issue of material fact; and (2) Plaintiff was entitled to judgment as a matter of law. That burden remained Plaintiff's.

At the time the trial court considered Plaintiff's summary judgment motion, actions in Justice Court were governed by the Arizona Rules of Civil Procedure (ARCP), Rule 56.[7] In reviewing a summary judgment, the reviewing court must view the facts and the reasonable inferences to be drawn from the facts in the light that is most favorable to the party against whom

[4] The trial court referenced Defendants' May 16, 2012 second response to Plaintiff's summary judgment motion.
[5] Plaintiff initially requested attorneys' fees of $13,560.00.
[6] In filing their appellate memorandum, Defendants ignored the mandates of Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) Rule 8(a)(4) re page limitations and size of type. Defendants also failed to conform to SCRAP—Civ. Rule 8(a)(3) as they did not provide a concise argument. Defendants' argument lacked clarity. However, and pursuant to SCRAP—Civ. Rule 2, this Court will address the main issues which Defendant presented and will suspend the requirements of Rule 8(a)(4) in the interest of justice.
[7] Effective Jan. 1, 2013, actions at Justice Court became subject to the Justice Court Rules of Civil Procedure.

judgment was entered. *Maycock v. Asilomar Dev. Inc*., 207 Ariz. 495, 88 P.3d 565, ¶ 2 (Ct. App. 2004). Therefore, this Court must view the facts in the light that most favors the Defendants. Here, both parties agree Defendants did not pay their monthly assessments. Defendants, however, claimed they were exempt from the requirement that they pay these assessments because they alleged Plaintiff breached the CC&Rs and failed to provide the required upkeep services that would cause and/or allow their investment in their real property to appreciate.

It has long been recognized that summary judgment is only appropriate where the material facts are not in controversy and a party is entitled to a judgment as a matter of law. ARCP 56(c)(1). Here, the material facts are not in controversy. Therefore, the salient question is whether Plaintiff was entitled to judgment as a matter of law.

In a contract case, the Plaintiff has the burden of proof, *Yeazell v. Copins*, 98 Ariz. 109, 116-17, 402 P.2d 541, 546 (1965), and must prove its case by a preponderance of the evidence. The phrase "preponderance of the evidence" was defined by our Arizona Supreme Court where the Arizona Supreme Court stated:

> The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence." Indeed, this court stated long ago that by a preponderance of the evidence "the ultimate test is, does the evidence convince the trier of fact that one theory of the case is more probable than the other." The United States Supreme Court on several occasions has agreed with this statement of the preponderance of the evidence test. Thus, we disagree with the court of appeals' definition of the preponderance of the evidence standard, and hold that that standard requires simply that the trier of fact find the existence of the contested fact to be more probable than not.

Matter of Appeal in Maricopa County Juvenile Action No. J-84984, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983) (citations omitted).

> The moving party's burden of persuasion on the motion remains with that party; it does not shift to the non-moving party.

Nat'l Bank of Arizona v. Thruston, 218 Ariz. 112, 180 P.3d 977, ¶ 16 (Ct. App. 2008). Although the burden is a heavy one, Plaintiff met the burden because it submitted admissible evidence that would compel a reasonable juror to find Defendants obligated themselves to the Declaration and CC&Rs when they purchased their property. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 292 P.3d 195, ¶ 18 (Ct. App. 2012). Plaintiff established (1) Defendants purchased the property; (2) the property was subject to the CC&Rs; and (3) Defendants reneged on their obligation to pay the assessed monthly fees. Defendants did not deny these factual claims. Instead, as stated, Defendants proposed—in their response to Plaintiff's summary judgment—the Association

lacked the right to collect any assessed fees because the Association failed to properly maintain the property. To factually support this allegation, Defendants provided a plethora of pictures showing trash on the property, dead plants, mud in the streets, bugs, detritus and undone landscaping.

The Association's right to collect its assessments is separate from its obligations under the CC&Rs. Article IV, section 4.01(a) of the CC&Rs imposes an obligation on all homeowners in the Sundance Residential Community. That section—in relevant part—states:

> By accepting a deed for a Parcel or Living Unit, as the case may be, (whether or not expressed in the deed or conveying instrument) or otherwise becoming an Owner, each Owner is deemed personally to covenant and agree to be bound by all covenants and restrictions of the residential Project Documents and to pay to the Residential Association or to the Master Association, as applicable: (i) the Annual Assessments described in Section 4.02 below; (ii) the Special Assessments described in Section 4.04 below; (iii) any Community Master Assessments; (iv) any Neighborhood Master Assessment to the extent applicable to Owners within a Neighborhood; (v) any Neighborhood residential Association Assessments to the extent applicable to Owners within a Neighborhood; (vi) . . . .

Section 4.06(a) of the Declaration requires that assessments be paid in full and specifically addresses the issue of offsets.[8] That provision states a homeowner may not offset his/her obligation to pay the full amount of the assessment even if the homeowner claims the Association is not properly exercising its duties. The specific language is:

> Assessments will be payable in the full amount specified by the assessment notice, and no offsets against this amount will be permitted for any reason whatsoever including, without limitation, abandonment of the Owner's Living Unit, a claim that the residential Association is not properly exercising its duties in maintenance or enforcement, a claim against the Declarant or its affiliates, or the non-use or claim of non-use by Owner of all or any portion of the Residential Common Area.

The Arizona Court of Appeals addressed a similar issue and held a condominium owner was required to pay assessments to the homeowners' association even if the Association had not made the required improvements to the individual's home. *Mountain View Condominiums Homeowners Ass'n Inc. v. Scott*, 180 Ariz. 216, 883 P.2d 453 (Ct. App. 1994). The Court of

[8] Although Defendants claimed the assessment provision was "hidden", the provision was set out in the CC&Rs.

Appeals held the rights and obligations of the owners were contained in the Declaration, the bylaws, and state statutes and determined the owners had the obligations as well as the benefits of the Association. The Court of Appeals stated:

> It seems obvious that the defendants' ownership interests must necessarily include not only the benefits but also the obligations of the previous owner. One of the obligations conveyed with unit ownership is the continuing obligation to pay assessments. The declarant initially arranges for the payment of assessments until conveyance of the first unit to an owner. Then the Association, standing in the shoes of the declarant, takes over. The obligation to pay assessments is continuing, therefore, without interruption.
>
> In addition, the defendants' ownership interests cannot logically be defined as other than unit owners, by the unambiguous terms of the Condominium Documents. As such, they are deemed members of the Association obligated, as are all other members, to pay the assessments. To define their interests in any other manner brings about an absurd result: they become owners and members of the Association with all the benefits of membership and none of the obligations. The Condominium Documents and relevant statutes, when read in harmony, dictate otherwise.

Mountain View Condominiums Homeowners Ass'n Inc. v. Scott, 180 Ariz. at 221, 883 P.2d at 458. The logic behind this ruling is that the Association can only continue to make repairs and do maintenance to the common elements if the homeowners pay their assessments. Here, Defendants admitted they failed to pay their assessments for a number of years but complained about the upkeep of the premises. While Defendant may be correct that the Association is not properly maintaining the property, the Association's failure to meet Defendants' expectations does not allow them to unilaterally decide when and if they will honor their financial obligations.

This Court has carefully reviewed the entire trial court file including the DVDs as well as the witness statements Defendants provided to support their alleged claims.[9] However, Defendants made no claim against Plaintiff because Defendants filed no counterclaim. ARCP Rule 13 deals with counterclaims. Rule 13(a) authorizes compulsory counterclaims when the claim arises out of a transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of third parties over whom the court cannot acquire jurisdiction.

[9] This Court reviewed the provided CD but was not able to locate any hearing on the proffered CD. Neither Plaintiff nor Defendant referenced the CD in the respective memoranda. This Court notes the photographs indicate (1) large weeds growing in the neighborhood; (2) trash in the area; (3) a child's plastic swimming pool filled with dirt; (4) construction debris; (5) construction material; (6) unfinished lots; (7) empty homes; (8) graffiti on the outside of the retaining walls; (9) evidence of a broken street light with an APS sign; (10) a dead bird; and (11) several pictures of an insect infestation at one of the homes. Defendants did not specify which problems the HOA was required to correct.

> In Arizona a compulsory counterclaim must be asserted against the plaintiff in order to avoid the application of the principle of res judicata. A counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third persons over whom the court cannot acquire jurisdiction.

Levin v. Hindhaugh, 167 Ariz. 110, 111, 804 P.2d 839, 840 (Ct. App. 1990) (citations omitted). A failure to assert a compulsory counterclaim allows for res judicata to become effective and bars litigation of the counterclaim in a subsequent lawsuit. As the Court of Appeals stated:

. . . . .

> We agree with PJ. Rule 13(a), Rules of Civil Procedure, 16 A.R.S., provides that a counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. The test to determine if a counterclaim is compulsory or permissive is whether there is any logical relation between the claim and counterclaim. If there is, the counterclaim is compulsory.

Aries v. Palmer Johnson, Inc., 153 Ariz. 250, 255, 735 P.2d 1373, 1378 (Ct. App. 1987) (citation omitted). Because Defendants filed no counterclaim—and therefore made no legal claim against Plaintiff—the only evidence that is relevant is evidence that pertains to the assessments. Defendants admitted—on more than one occasion—they failed to pay their assessments.[10] Because Defendants admitted they did not pay the assessed fees, the trial court did not err in granting Plaintiff's summary judgment.

B. Did The Trial Court Err By Denying Defendants' Requested Trial By Jury.

Defendants alleged the trial court denied them their Constitutional right to a trial by jury pursuant to Amendments V and XIV. In making this allegation, Defendants erred. In Arizona, there is no guaranteed right to a trial by jury in every civil case. Taken to its logical conclusions, Defendants' claim is that the summary judgment process is unconstitutional because summary judgments end cases and there is no trial when summary judgments are granted. Defendants

[10]For example, Defendants noted they only paid assessments for two quarters from July 2007 through December 2007, in "Defendants Correction of Defendands [sic.] Pleading Dated August 27th 2012" at p. 2, ll. 18–20. In addition, Defendants claimed the HOA failed to enforce all of the CC&Rs because the subdivision is incomplete and lacked infrastructure such as streets, sidewalks, street lights, roads, and walls, and also contains vacant lots. Defendants provided no proof that the HOA was ever responsible for providing the infrastructure of the subdivision. Although Defendants maintained the HOA failed to "protect the value, attractiveness and desirability of the Residential Community" Defendant failed to demonstrate the CC&Rs obligated the HOA to perform any construction in the subdivision. The HOA did not guarantee completion of the subdivision. Indeed, the HOA is not the responsible party for the subdivision. As demonstrated by the Subdivision Public Report for Sundance Parcel 48 (Subdivision Public Report) with an effective date of August 10, 2006, Rick Hancock Homes, LLC (1) was the subdivider—not the HOA—;and (2) authored the Subdivision Public Report. However, because Defendants failed to assert any claim against the HOA by way of a counterclaim, Defendants are precluded from litigating these allegations.

provide no support for this position and the summary judgment process has been accepted at both the state and federal levels.

As early as 1902, the U.S. Supreme Court discussed the possibility of ending a case when a Defendant failed to provide a sufficient affidavit to contest a plaintiff's claim. *Fid. & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 317, 23 S. Ct. 120, 47 L. Ed. 194 (1902). The Supreme Court interpreted the rules allowing a trial court to enter judgment prior to a trial and stated:

. . . . .

. . . . .

> The rule requires the affidavit, not only to deny the right of the plaintiff, but to state also in precise and distinct terms the grounds of defense, 'which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part.'

Fid. & Deposit Co. of Maryland, 187 U.S. at 322, 23 S. Ct. at 123. This holding has provided the legal basis on which summary judgments have been held constitutional under the Seventh Amendment.[11]

Arizona trial courts have long utilized summary judgments. The Arizona Supreme Court commented on the use of summary judgment and held:

> We hold, therefore, that although the trial judge must evaluate the evidence to some extent in ruling on a motion for summary judgment, the trial judge is to apply the same standards as used for a directed verdict. Either motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. Thus, assuming discovery is complete, the judge should grant summary

[11] Persuasively, our British antecedents allowed a common law judge to inspect the evidence and decide "obvious" cases without impaneling a jury. As stated by Blackstone, the famous eighteenth century British jurist:

> When for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of dubious facts; and therefore when the fact, from its nature must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.[17]

William Blackstone, 3 Commentaries *331-32 as quoted in Edward Brunet, Summary Judgment Is Constitutional, 93 Iowa L. Rev. 1625, 1651 (2008).

> judgment if, on the state of the record, he would have to grant a motion for directed verdict at the trial.

Orme Sch. v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Furthermore, our Arizona Court of Appeals specifically ruled on the issue as to whether the summary judgment process was an unconstitutional deprivation of a right to a trial by jury and held:

> The Alafaces argue that the granting of summary judgment deprived them of their constitutional right to trial by jury. This argument has been raised previously in Arizona and has been found to be without merit. *See Gurr v. Willcutt,* 146 Ariz. 575, 580–81, 707 P.2d 979, 984–85 (App.1985); *Cagle v. Carlson,* 146 Ariz. 292, 297–98, 705 P.2d 1343, 1348–49 (App.1985), *cert. denied,* 476 U.S. 1108, 106 S. Ct. 1956, 90 L.Ed.2d 365 (1986). As explained by the *Cagle* court, "the granting of summary judgment does not deprive a plaintiff of his constitutional rights to a jury trial because, in such cases, there are simply no genuine issues of fact for a jury to consider." 146 Ariz. at 298, 705 P.2d at 1349.

Alaface v. Nat'l Inv. Co., 181 Ariz. 586, 599, 892 P.2d 1375, 1388 (Ct. App. 1994).

Additionally, even had Plaintiff not succeeded in winning its summary judgment motion, Defendants still would not have been entitled to a jury trial. To obtain a jury—as opposed to a judge—trial, a litigant must timely request a trial by jury. ARCP Rule 38(b) governed the demand for jury trial during the relevant time period. That rule states:

> Any person may demand a trial by jury of any issue triable of right by jury. The demand may be made by any party by filing and serving a demand therefor in writing at any time after the commencement of the action, but not later than the date on which the court sets a trial date or ten days after the date a Joint Report and Proposed Scheduling Order under Rule 16(b) or Rule 16.3 are filed, whichever first occurs. The demand for trial by jury shall not be endorsed on or be combined with any other motion or pleading filed with the court.

The trial court set the date for trial on March 10, 2012. Defendants did not file their request until June 25, 2012. By that time, not only had the allowable time period for filing a request for a jury trial lapsed, but the trial court had also granted Plaintiff's summary judgment request, thereby mooting any need for any trial—jury or judge. Defendants' argument about their alleged deprivation of a right to a trial by jury fails.

C. Did The Trial Court Consider All Relevant and Admissible Evidence.

Defendants claimed the trial court erred because it did not consider all of the evidence they produced. The basis for this claim appears to be that if the trial court had considered their plethora of pictures, it would not have found in Plaintiff's favor. Although Defendants produced

many pictures showing trash, bare ground, graffiti, and dead plants, those claims refer to a claim about the Association's upkeep of the property. As this Court previously stated, failure to pay assessments is distinct from upkeep. Additionally, Defendants failed to file any counterclaim incorporating these allegations and, as stated above, cannot litigate these claims.

Defendants also asserted the affidavit Plaintiff provided was insufficient as a matter of law because the signature on the affidavit was signed under the penalty of perjury and not notarized. ARCP Rule 80(i) allows a party to sign under the penalty of perjury. That Rule permits unsworn verifications to be used in place of formal sworn declarations, affidavits, certificates or verifications provided (1) the unsworn declaration is in substantially similar form to the declaration specified in the rule; and (2) the unsworn declaration is subscribed by the person making the declaration under the penalty of perjury. In discussing the ambit of this rule, our Court of Appeals stated:

> Evergreen asserts on appeal that this statement, and Bowles's declaration, are insufficient to preclude summary judgment because they contain hearsay and are unsigned and unsworn.[10] *See* Ariz. R. Civ. P. 56(e), 16 A.R.S., Pt. 2 (affidavits supporting or opposing summary judgment "shall set forth such facts as would be admissible in evidence"); *In re Wetzel*, 143 Ariz. 35, 43, 691 P.2d 1063, 1071 (1984) ("An 'affidavit' is a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true."). Although the declarations by Bowles, Fairman, and AFX employee Leigh Abbot attached to AFX's response to Evergreen's summary judgment motion were unsigned, AFX later submitted signed copies of those declarations. The signed declarations stated they were made under penalty of perjury. *See* Ariz. R. Civ. P. 80(i), 16 A.R.S., Pt. 2 (any matter that rules require or permit to be supported by affidavit "may, with like force and effect, be supported ... by the unsworn written declaration ... subscribed by such person as true under penalty of perjury, and dated").

Airfreight Exp. Ltd v. Evergreen Air Ctr., Inc., 215 Ariz. 103, 111-12, 158 P.3d 232, 240-41 ¶ 25 (Ct. App. 2007). Although the unsworn declarations were not accepted *in Airfreight Exp. Ltd.*, because they were not dated, this does not detract from the Court of Appeals' decision accepting unsworn declarations as admissible evidence.

Defendants also claimed Mr. Tom Campanella's affidavit should not have been considered because it was hearsay and the affiant did not have knowledge about their account. However, in light of the Defendants' own admission that they failed to pay their assessments, any error in considering this affidavit would be harmless. ARCP Rule 61 governs harmless error and states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

As the Arizona Court of Appeals stated:

> The reception of inadmissible evidence that has at some other point been admitted is harmless error.

Starkins v. Bateman, 150 Ariz. 537, 544, 724 P.2d 1206, 1213 (Ct. App. 1986).

Although Defendants claimed Plaintiff failed to provide evidence showing the HOA had the right to assess them, the CC&Rs (1) indicate Defendants obligated themselves to pay these assessments; and (2) authorized the Association to proceed with litigation. When Defendants purchased a home within an HOA community, they constrained their ability to refuse to pay the assessments.

D. Did The Trial Court Provide Proper Notice To Defendants.

Defendants maintained the trial court failed to provide them with proper notice of the trial court's June 19, 2012, ruling. Although the clerk of the court indicated the clerk mailed a copy of the ruling to Defendants, the ruling itself listed an incorrect address for Defendants. Defendants have not alleged what damage they may have suffered from the trial court's error in improperly listing their address on the June 19, 2012, ruling on summary judgment, particularly in light of the fact that the trial court had—on June 11, 2012,—also ruled granting Plaintiff's summary judgment motion. Even if the trial court inadvertently sent Defendants' copy of the June 19, 2012, ruling to the incorrect address, Defendants have not demonstrated they suffered any wrong that should be attributed to Plaintiff.

E. Did The Trial Court Err By Striking Defendants' Second Response To Plaintiff's Summary Judgment Motion.

Defendants claimed the trial court erred by (1) striking their May 16 responsive motion to Plaintiff's requested summary judgment and (2) granting Plaintiff summary judgment because they responded to the summary judgment motion. Merely filing a response is not sufficient to counter a summary judgment motion. Defendants alleged (1) Plaintiff failed to respond to their May 16 response to the summary judgment motion so they should win this motion by default; and (2) they were allowed a second response to the summary judgment motion because Rule 15(a) A.R.C.P. allows an amendment to a pleading one time. Defendants misconstrued Rule 15(a). The rule states:

> 1. A party may amend the party's pleading once as a matter of course:
>
> A. within twenty-one days after serving it if the pleading is one to which no responsive pleading is permitted; or
>
> B. within twenty-one days after service of a responsive pleading if the pleading is one to which a responsive pleading is required or, if a motion under Rule 12(b), (e), or (f) is served, on or before the date on which a response to the motion is due, whichever is earlier.
>
> Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires. Amendment as a matter of course after service of a motion under Rule 12(b), (e), or (f) does not, by itself, moot the motion as to the adequacy of the allegations of the pleading as revised in the amended pleading and does not relieve a party opposing the motion from filing a timely response to the motion.

The rule refers to pleadings and not to motions. Our Arizona Court of Appeals defined the term "pleadings" for purposes of this rule and held:

. . . . .

> Arizona Rule 15(a) is derived from Federal Rule 15(a). Both rules provide for amendment of 'pleadings.' This term refers to complaints, answers, replies to a counterclaim, answers to cross-claims, third-party complaints, third-party answers, and, pursuant to court order, replies to answers or third-party answers.

Romo v. Reyes, 26 Ariz. App. 374, 375, 548 P.2d 1186, 1187 (1976). Defendants' reliance on Rule 15(a), A.R.C.P. was inapposite.

The rules of civil procedure do not allow for a second response to a motion for summary judgment. ARCP Rule 56(c) only provides for a single response. ARCP Rule 12(f) allows a trial court to strike a redundant or immaterial matter from any pleading. Because the trial court struck Defendants' May 16 responsive motion, Plaintiff had no need to respond to it.

F. Did The Trial Court Err By Failing To Find For Defendants.

Defendants relied on an Illinois case *Spanish Court Two Condominium Association v. Carlson,* 2012 IL App (2d) 110473, 979 N.E.2d 891, 899 ¶ 27 (2012) appeal allowed, 982 N.E.2d 775 (Ill. 2013) and an Illinois statute to support their claim that the HOA's alleged failure to perform its duties is a viable defense to a suit for failing to pay their required assessments.[12] This Illinois case dealt with a forcible detainer action and neither it nor the Illinois Forcible Entry Act is

[12] Appelants [sic.] Memorandom [sic.] on Appeal, at p. 10, ll. 1–24.

binding in Arizona.[13]

Defendants also cited *Johnson v. Pointe Cmty. Ass'n, Inc*., 205 Ariz. 485, 486, 73 P.3d 616, 617 (Ct. App. 2003) as authority for their contention that the Justice Court lacked the "proper authority to determine which terms and or clauses in the CC&Rs are legal or enforceable".[14] Defendants misconstrue the holding of the *Johnson* opinion insofar as they use it to support their contention that the Justice Court could not determine this action. *Johnson* provided a homeowner could sue an HOA for damages and for an injunction to compel the association to enforce the provisions of the declaration. *Johnson*, at ¶ 21. Defendants, however, (1) filed no counterclaim; (2) did not sue the association; and (3) did not request either an injunction or damages.[15] *Johnson* stands for the proposition that courts rather than the HOA have the opportunity to interpret the meaning of a contract. As the Arizona Court of Appeals stated in *Johnson*:

> The civil courts afford a neutral interpretation of the development's declaration and "significant protection against overreaching" by either homeowners or their association.

Johnson, at ¶ 25. Here, the trial court properly determined the meaning of the contract. A.R.S. §22–201 details the jurisdiction of the justice court in civil actions. It states—in relevant part:

> Justices of the peace have exclusive original jurisdiction of all civil actions when the amount involved, exclusive of interest, costs and awarded attorney fees when authorized by law, is ten thousand dollars or less.

Ariz. Rev. Stat. Ann. § 22-201(B). The Justice Court had the authority to rule on legal questions about the CC&Rs.

Defendants also asserted the trial court did not review the evidence but failed to support this claim. Indeed, in making its ruling, the trial court specifically referred to having reviewed the pleadings and evidence in this case. Additionally, even if the trial court failed to review all of Defendants' photographs, the condition of the property is not at issue because—as previously stated—Defendants never filed a counterclaim in the matter and did not place the matter at issue. This Court recognizes Defendants appeared pro se and likely were not aware of all of the requirements for proper filings in civil actions. However, Arizona treats pro se litigants (those who represent themselves) according to same standards used for attorney representation and courts do not excuse the failure to conform to mandated rules because a litigant represents himself or herself. The Arizona Court of Appeals held:

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[13] In light of Arizona law, this case is not persuasive.
[14] Appelants [sic.] Memorandom [sic.] on Appeal at p. 10, ll. 25–33.
[15] The Johnson case is distinguishable from the Defendants' situation as an injunction was requested. Justice courts only have the specific jurisdiction that is conferred by law. A.R.S. § 22–201. Justice courts do not have the jurisdiction to decide cases involving injunctions.

> Parties who choose to represent themselves "are entitled to no more consideration than if they had been represented by counsel" and are held to the same standards as attorneys with respect to "familiarity with required procedures and . . . notice of statutes and local rules." A party's ignorance of the law is not an excuse for failing to comply with it.

In re Marriage of Williams, 219 Ariz. 546, 200 P.3d 1043, ¶ 13 (Ct. App. 2008) [citations omitted.] Accord, *Higgins v. Higgins*, 194 Ariz. 266, 279, 981 P.2d 134, 138 (Ct. App. 1999) and *Kelly v. NationsBanc. Mortg. Corp*., 199 Ariz. 284, 17 P.3d 790, ¶ 16 (Ct. App. 2001). This may be a harsh determination. However, it is the decision required by our state law

G. Did The Trial Court Err By Not Scheduling A Hearing On Plaintiff's Summary Judgment.

Defendants asserted the trial court erred by not scheduling hearings on the summary judgment motion. Trial courts have great discretion in the conduct of their cases and are only required to set a time for hearing a summary judgment motion when a party requests a hearing. ARCP Rule 56(c)(1) states—in relevant part:

> Upon timely request by any party, the court shall set a time for hearing of the motion. If no request is made, the court may, in its discretion, set a time for such hearing.

Neither party requested a hearing. Consequently, the trial court had discretion to decide if it needed to hold a hearing as one was not mandatory. In ruling on whether a trial court erred by not holding a hearing in a summary judgment case the Arizona Court of Appeals determined a trial court is only required to consider those portions of verified pleadings, depositions, answers to interrogatories and admissions which the parties bring to the trial court's attention. The Arizona Court of Appeals held:

> In deciding a motion for summary judgment, the trial court considers "those portions of the verified pleadings, deposition, answers to interrogatories and admissions on file *which are brought to the court's attention by the parties*."

Tilley v. Delci, 220 Ariz. 233, 204 P.3d 1082, ¶ 10 (Ct. App. 2009). In *Tilley*, the Court of Appeals also decided (1) there was no requirement for a trial court to conduct a hearing before granting summary judgment; and (2) summary judgment was a final judgment on the merits. *Tilley*, at ¶ 13.

H. Did The Trial Court Err By Not Giving Defendants An Opportunity To Present Their Discovery.

Defendants also claimed—p. 15, ll. 1–2 of their appellate memorandum—the trial court "ruled incorrectly for failure to give the Appellants an opportunity at any time during these proceedings to properly present their discovery." Discovery is presented to the adverse party. It is

not provided to the trial court. This claim fails.

I. Did The Trial Court Err By Awarding But Reducing Plaintiff's Attorneys' Fees.

The CC&Rs provide for an award of reasonable attorneys' fees. Additionally, A.R.S. § 33–1807(H) and A.R.S. § 12–341.01 provide for the award of reasonable attorneys' fees. Plaintiff prevailed and therefore was entitled to an attorneys' fee award. Attorney fee awards are reviewed under an abuse of discretion standard. *Chase Bank of Arizona v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (Ct. App. 1994). Normally, appellate courts do not adjust the attorney fee award determined by the trial court because (1) the trial court has a "superior understanding of the litigation" and (2) appellate review of primarily factual matters is not desirable. *Chase Bank of Arizona v. Acosta, id.*, 179 Ariz. at 574, 880 P.2d at 1120.

Where this Court reviews the trial court's actions based on an abuse of discretion standard, this Court will not change or revise the trial court's determination if there is a reasonable basis for the order. A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp*., 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006). However, the trial court may—and should—review the requested fee to insure that it is not an unreasonable one. In *McDowell Mountain Ranch Community Ass'n Inc. v. Simons*, 216 Ariz. 266, 165 P.3d 667 ¶ 18 (Ct. App. 2007), the Court ruled that while a defendant may be obligated to pay the full amount of the attorneys' fees, that obligation may not be enforced when the requested amount for the fees is "obviously excessive."

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In determining if the award of attorney fees is reasonable, this Court is guided by the underlying purpose behind the attorney fees statute—to mitigate the burden of the expense of litigation. *Fousel v. Ted Walker-Mobile Homes, Inc*. 124 Ariz. 126, 602 P.2d 507 (Ct. App. 1979). Before determining any award, this Court notes (1) the attorney must provide a China Doll affidavit detailing the work performed, *Schweiger v. China Doll Restaurant, Inc*., 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983) and (2) any award of attorney fees under A.R.S. 12–341.01 is subject to an analysis about the reasons for the shifting of responsibility for fees. In *Schweiger v. China Doll, id*., 138 Ariz. at 188, 673 P.2d at 932 the Court of Appeals reviewed the types of services which may be included in a fee application but cautioned if "a particular task takes an attorney an inordinate amount of time, the losing party ought not be required to pay for that time."

The Arizona Supreme Court discussed the factors a court should consider prior to making an award. These include:

1. whether the unsuccessful party's position or defense had merit;
2. whether the litigation could have been avoided, or settled and how the successful party's efforts influenced the result;
3. whether assessing fees against the unsuccessful party would cause extreme hardship;
4. whether the successful party prevailed with respect to all of the relief sought;
5. whether the legal question was novel;
6. whether a similar claim had been previously adjudicated in this jurisdiction;
7. whether the particular award would discourage other parties with tenable claims or defenses from litigating or defending for fear of incurring liability for substantial amounts of attorney fees.

Assoc. Indem. Corp. v. Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985); *Moedt v. General Motors Corp*., 204 Ariz. 100, 60 P.3d 240 ¶ 19 (Ct. App. 2003). In establishing these factors, the Arizona Supreme Court considered the language of A.R.S. 12–341.01 and cited subsection B which states the award:

> ". . . should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted. . .".

Assoc. Indem. Corp. v. Warner, 143 Ariz. at 569, 694 P.2d at 1183. Here, before awarding the attorneys' fees, the trial court noted the numerous pleadings Defendants filed and found many of these pleadings lacked merit. In addition, Defendants had multiple opportunities to settle their case. Furthermore, Plaintiff is able to recover attorneys' fees that exceed the underlying claim. Our Court of Appeals stated:

> The fact that the attorney's fees are in excess of the amount in dispute does not mean they are unreasonable. Appellants took the risk of having to pay such an amount by its refusal to agree to a proper adjustment of the taxes.

Wagner v. Caster, 136 Ariz. 29, 32, 663 P.2d 1020, 1023, (Ct. App. 1983). The determination of the amount of attorney fees—according to A.R.S. § 12–341.01—is subject to the court's discretion. "The trial court has broad discretion in determining whether to award attorneys' fees under A.R.S. section 12–341.01(A)." *State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 963 P.2d 334 ¶ 27 (Ct. App. 1998). "[The] trial court abuses its discretion as to attorneys' fees only when its view would not be taken by a reasonable man." *Moser v. Moser*, 117 Ariz. 312,

315, 572 P.2d 446, 449 (Ct. App. 1977). Here, Defendants' actions caused the HOA to expend a great deal of funds to respond to Defendants' many motions. Thus, the only issue is whether the requested fees were reasonable as both the CC&Rs—Section 10.19—and our statutory scheme provide for reasonable fees. In this case, the trial court reduced the amount of requested fees. From the record before this Court, it appears the trial court determined the appropriate amount of attorneys' fees to award after (1) analyzing the specific charges and (2) considering the factors required by *Assoc. Indem. Corp. v. Warner*, *id*., 143 Ariz. at 570, 694 P.2d at 1184. The trial court's fee determination stands.

J. Is Plaintiff Entitled To Attorneys' Fees For The Appeal.

Plaintiff prevailed on appeal. It is entitled to reasonable attorneys' fees for the appeal provided Plaintiff submits a China Doll affidavit.

III. Conclusion.

Based on the foregoing, this Court concludes the White Tank Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the White Tank Justice Court.

IT IS FURTHER ORDERED remanding this matter to the White Tank Justice Court for all further appropriate proceedings.

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

/s/ Myra Harris

The Hon. myra harris

Judicial Officer of the Superior Court 112020131413

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.