

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2018-000316-001 DT

12/11/2018

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT

C. Avena

Deputy

C B S - 136 HOMEOWNERS ASSOCIATION

BRIAN E DITSCH

v.

ANNETTE COHEN (001)
ARIZONA DEPARTMENT OF REAL ESTATE
(001)

ANNETTE COHEN
13603 W COUNTRYSIDE DR
SUN CITY WEST AZ 85375
LYNETTE EVANS

JUDGE STARR
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has considered the Motion to Dismiss filed by the Arizona Department of Real Estate (“the Department”), the Response filed by Appellant CBS-136 Homeowners Association (“the Association”), and the Department’s Reply. The Association requested oral argument, but the Court finds that oral argument is not necessary for its disposition of this matter. The request is thus denied.

The case arises from a dispute between the Association and one of its homeowners, Annette Cohen. Cohen filed a petition with the Department, which referred the matter to the

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Office Administrative Hearings. After a hearing, the Administrative Law Judge found in favor of Cohen. The Real Estate Commissioner later denied the Association's request for rehearing.

The Department argues that it should be dismissed as an Appellee in this matter. First, the Department argues that it a non-jural entity, which has no power to sue or be sued. The Court of Appeals has specifically held that "the legislature has authorized suits to be brought directly against administrative agencies in cases filed under the Administrative Review Act." *Marlar v. State*, 136 Ariz. 404, 408 (App. 1983). But that holding predated the amendment of A.R.S. § 12-908, which no longer mandates that an agency be named as an appellee. And in *Marlar*, the appeal arose from a final decision of the agency, not an ALJ decision.

The Court agrees with the Department that under A.R.S. § 12-908, it is not a necessary party to every appeal arising from a dispute between a homeowner and her association. *Lewis v. Arizona State Personnel Board*, 240 Ariz. 330, ¶ 30 (App. 2016). And here, the binding decision which is before this Court is that of the administrative law judge, not the Department. A.R.S. § 32-2199.02(B). Because the request for rehearing was denied, the order issued by the ALJ is binding and subject to judicial review pursuant to A.R.S. § 41-1092.08.

The Department recognizes that given the nature of the appeal in this case, however, a state entity should be a party. The Department does not object to the substitution of the State of Arizona as an Appellee.

For those reasons,

IT IS ORDERED substituting the State of Arizona as Appellee for the Arizona Department of Real Estate.

IT IS FURTHER ORDERED counsel for the State of Arizona must file a notice of appearance in this matter within 15 days of the filing of this minute entry.

The Court notes that the Association is arguing that the statutes at issue in this matter are facially unconstitutional. The Association is therefore required to serve a copy of its Opening Brief on the attorney general, speaker of the house of representatives, and president of the senate. A.R.S. § 12-841(A). This Court will require proof that those entities have been served before it will rule on the constitutionality of the statutes challenged by the Association.

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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

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 new filings.**