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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

NANCY KNIGHT,

Plaintiff,

Case No. B8015CV2018 04003

vs.

GLEN LUDWIG and PEARL LUDWIG,
Trustees of THE LUDWIG FAMILY
TRUST; FAIRWAY CONSTRUCTORS,
INC.;
MEHDI AZARMI; JAMES B. ROBERTS
and DONNA M. ROBERTS, husband and
wife; JOHN DOES 1-10; JANE DOES 1-
10; ABC CORPORATIONS 1-10; AND
XYZ PARTNERSHIPS 1-10.

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
JOIN REQUIRED PARTIES
PURSUANT TO RULE 19(a)

Defendants.

At the status conference before this Court on October 25, 2021, this Court ordered the parties to brief the Court on the issue of which party must bear the burden of joining all necessary and indispensable parties. Plaintiff, NANCY KNIGHT, through her undersigned counsel, hereby responds to Defendants Motion to Join Required Parties Pursuant to Rule 19(a), ARIZ. R. Civ. P., and respectfully requests that if Defendants

1 insist on maintaining their affirmative defense of abandonment, a defense which they
2 bear the burden of proving, then this Court order Defendants to join all necessary and
3 indispensable parties. Plaintiff sets forth her reasoning for her position in the
4 accompanying Memorandum of Points and Authorities.
5

6 7 MEMORANDUM OF POINTS AND AUTHORITIES

8 I. FACTUAL BACKGROUND

9 This case concerns Plaintiff's claims that Defendants have violated certain
10 provisions of the Covenants, Conditions, and Restrictions for Desert Lakes Golf Course
11 and Estates Tract 4076-B in Fort Mohave, Arizona (hereinafter referred to as "CC&Rs").
12 Plaintiff did not sue all of the property owners in violation of the CC&Rs because section
13 20 of those CC&Rs specifically does not require that she do so.
14

15 Defendants in this case assert, among other things, an affirmative defense that the
16 CC&Rs have been abandoned. Defendants have the burden of proving any affirmative
17 defense they assert. The parties agree that A.R.C.P Rule 19 is an issue that must be
18 considered by this Court in order to proceed with this litigation.
19

20 II. ARGUMENTS OF LAW

21 A. Before this Court can rule that the CC&Rs have been abandoned, Rule 22 19 requires that all of the property owners in Tract 4076-B be joined in 23 this lawsuit

24 Rule 19 provides as follows:

25 (a) Persons Required to Be Joined if Feasible.

1 (1) *A Person Required to Be Made a Party*. A person who is
2 subject to service of process and whose joinder will not
3 deprive the court of subject-matter jurisdiction must be joined
4 as a party if:
5 (A) in that person's absence, the court cannot accord complete
6 relief among existing parties.

7 The present parties to this lawsuit represent less than two percent (2%) of the
8 property owners in Tract 4076-B. The CC&Rs in this case contain a number of
9 restrictions concerning the construction of residences in Tract 4076-B, such as what
10 owners of properties can post on their vacant lots before construction and what and where
11 owners can build on their lots during and after initial construction. One court in Arizona
12 stated:

13 “Restrictions as to the use of land are mutual, reciprocal,
14 equitable easements in the nature of servitudes in favor of
15 owners of other lots within the restricted area, and constitute
16 property rights which run with the land. Where the covenants
17 manifest a general plan of restriction to residential purposes,
18 such covenants constitute valuable property rights of the
19 owners of all lots in the tract.”

20 *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Arizona*, 689 P.2d 178,
21 181,142 Ariz. 235, 238 (Ariz. App. 1984) (*quoting Montoya v. Barreras*, 473 P. 2d 363,
22 365 (N.M. 1970)). A ruling in this case that the restrictions have been abandoned and are
23 no longer enforceable against the Defendants’ properties would affect the property rights
24 of all other owners subject to the CC&Rs. In other words, the absence of 98% of the
25 owners in Tract-B in this lawsuit means, according to Rule 19(a)(1)(A), that this Court
“cannot accord complete relief among existing parties”; the necessary parties (the
remaining owners in Tract 4076-B) must be joined.

1 **B. The CC&Rs cannot be completely abandoned as to the existing**
2 **Defendants only**

3 Absent an express non-waiver provision, deed restrictions may be considered
4 abandoned or waived “if frequent violations of those restrictions have been permitted.”
5 *Coll. Book Ctrs. Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 538-
6 539, 241 P.3d 897, 902-903 (Ariz. App. 2010) (quoting *Burke v. Voicestream Wireless*
7 *Corp. II*, 207 Ariz. 393, 398, ¶ 21, 87 P.3d 81, 86 (App. 2004)). However, when a
8 Declaration contains a non-waiver provision, restrictions remain enforceable, despite
9 prior violations, as long as the violations do not constitute a “complete abandonment”
10 of the Declaration. *Id.* at 539, ¶ 18, 241 P.3d at 903 (quoting *Burke*, 207 Ariz. at 399, ¶
11 26, 87 P.3d at 87). Deed restrictions are considered completely abandoned when “the
12 restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly
13 disregarded as to result in such a change in the area as to destroy the effectiveness of
14 the restrictions [and] defeat the purposes for which they were imposed.”
15
16 *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954), *quoted in*
17 *Coll. Book Ctrs.*, 225 Ariz. at 539, ¶ 18, 241 P.3d at 903.
18

19 Paragraph 20 of the CC&Rs for Tract 4076-B provides the authority for Plaintiff
20 in this case to enforce the CC&Rs. It also contains a non-waiver provision:
21

22 “20. If there shall be a violation or threatened or attempted violation
23 of any of the foregoing covenants, conditions or restrictions it shall be
24 lawful for Declarant, its successors or assigns, the corporation whose
25 members are the lot owners or any person or persons owning real property
located within the subdivision to prosecute proceedings at law or in equity
against all persons violating or attempting to or threatening to violate any
such covenants, restrictions or conditions and prevent such violating party
from so doing or to recover damages or other dues for such violations. In

1 addition to any other relief obtained from a court of competent jurisdiction,
2 the prevailing party may recover a reasonable attorney fee as set by the
3 court. No failure of the Trustee or any other person or party to enforce any
4 of the restrictions, covenants or conditions contained herein shall, in any
5 event, be construed or held to be a waiver thereof or consent to any further
6 or succeeding breach or violation thereof. The violation of any of the
7 restrictions, covenants or conditions as set forth herein, or any one or more
8 of them, shall not affect the lien of any mortgage or deed of trust now on
9 record, or which may hereafter be placed on record.”

10 Defendants seek to be relieved of the burden of the CC&Rs. Essentially, they are
11 asserting that this Court should rule that the CC&Rs have been abandoned as to them
12 only. A complete abandonment of the CC&Rs cannot exist when the alleged
13 abandonment only affects a small percentage of the owners. As stated in *La Esperanza*,
14 above, at 238 “Restrictions as to the use of land are mutual, reciprocal, equitable
15 easements in the nature of servitudes in favor of owners of other lots within the restricted
16 area, and constitute property rights which run with the land.”

17 **C. Defendants asserted the affirmative defense of abandonment; they bear
18 the burden of proving abandonment**

19 An affirmative defense must be plead and proved by the defendant. *Lakin Cattle*
20 *Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (Ariz. 1966) (quoting, *New York*
21 *Life Insurance Co. v. Rogers*, 9 Cir., 126 F.2d 784. “[T]he record shows appellees plead
22 the alleged prior judgment (though not with specificity), but they must prove it was *res*
23 *judicata*”. *Williams v. Hall*, 30 Ariz. 581, 249 P. 755 (Ariz. 1926). Defendants have plead
24 the affirmative defense of abandonment to Plaintiff’s claims of CC&R violations.

25 Pleading an affirmative defense does not mean that such a defense prevails; the
Defendants must carry the burden of proving the defense. If Defendants prove

1 abandonment without all of the Tract 4076-B owners having been joined, 98% of the
2 owners will lose valuable property rights which run with their land without having the
3 opportunity to assert their rights.

4 Plaintiff has the right to enforce the CC&Rs against any of those in violation.
5 Section 20, above, contains a non-waiver clause as described above in *Coll. Book Ctrs.*
6 *Inc.* at 539, ¶ 18, 241 P.3d at 903. As set forth in Section 20, an owner of property located
7 within a subdivision has the lawful right to sue those in violation of the CC&Rs to file
8 suit. The critical portion of Section 20 is the non-waiver clause which states:

9
10 “[N]o failure of the Trustee or any other person or party to
11 enforce any of the restrictions, covenants or conditions
12 contained herein shall, in any event, be construed or held to
13 be a waiver thereof or consent to any further or succeeding
14 breach or violation thereof.”

15 According to this provision, if Plaintiff fails to prosecute CC&R violations at one point
16 in time against violators, she is not precluded from doing so at a later point in time.

17 Defendants’ position seems to be that even if Plaintiff sues to enforce the
18 CC&Rs against one property owner, she must join some 500+ other property owners.
19 This is an absurd position to take. It disregards the entire purpose of CC&Rs if the
20 burden of enforcing them is so severe. The only reason the parties and this Court are
21 engaged in this discussion is because Defendants asserted the affirmative defense of
22 abandonment. Abandonment is extremely difficult to prove. Deed restrictions are
23 considered completely abandoned when “the restrictions imposed upon the use of lots
24 in [a] subdivision have been so thoroughly disregarded as to result in such a change in
25

1 the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for
2 which they were imposed.” *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d
3 1069, 1071 (1954), *quoted in Coll. Book Ctrs.*, 225 Ariz. at 539, ¶ 18, 241 P.3d at 903.

4
5 Merely asserting the affirmative defense of abandonment does not mean that
6 Plaintiff must then join all the necessary and indispensable parties. This is a
7 procedurally flawed position and one that makes no sense. If Defendants merely
8 withdrew their abandonment defense, there would be no need to join any additional
9 parties. However, if Defendants insist on abandonment as one of their affirmative
10 defenses, they bear the burden of proving the defense and because of the elements
11 necessary to prove complete abandonment are so consequential, Defendants must join
12 all necessary and indispensable parties.

13
14 **D. The authority cited by Defendants at 59 AmJur 2d, §97, p. 524,**
15 **supports Plaintiff’s position, not Defendants’.**

16 On page 9, line 22 of Defendants’ brief they state “[P]laintiff appears to agree that
17 all lot owners are both necessary and indispensable . . .” Plaintiff does not so agree. Only
18 as a result of Defendants asserting the affirmative defense of abandonment does the issue
19 of Rule 19 arise. Defendants then cite 59 AmJur 2d, §97, page 524 which contains the
20 following language: “[T]he burden of procuring the presence of all such indispensable
21 parties is on the plaintiff”. There is a footnote which Defendants failed to include in this
22 quotation. It is footnote # 23, which cites *National City Bank v. Harbin Electric Joint-*
23 *Stock Co.* (CA9) 28 F. 2d 468, 61 ALR 961. In that case, the court took the opposite
24 position, stating:
25

1 But, if we are right in the opinion that the joint depositors
2 were indispensable parties to the action, **then the law has**
3 **cast upon the defendant in error the burden of procuring**
4 **the presence of all such parties.** New York Life Ins. Co. v.
5 Smith (C. C. A. 9) 67 F. 694, certiorari denied 159 U. S. 262,
6 15 S. Ct. 1041, 40 L. Ed. 145; Franz v. Buder (C. C. A. 8) 11
7 F. (2d) 854, certiorari denied 273 U. S. 756, 47 S. Ct. 459, 11
8 L. Ed. 876.

9 *National City Bank*, above, at 472 (emphasis added).

10 **E. The party who seeks to invalidate restrictions must bring in the**
11 **interested parties and give them a day in court**

12 Plaintiff in this case seeks to enforce the provisions of the CC&Rs, not abrogate
13 them. In a North Carolina case the plaintiff sought to condition the sale of a parcel of
14 property to defendant without any deed restrictions and included as part of the sales
15 contract a provision that imposed that condition. After the contract was fully executed
16 Defendant refused to comply with the restriction and plaintiff sued for specific
17 performance. After the trial court declared the restriction null and void, Defendant
18 appealed. In reversing the trial court's determination, the court of appeals ruled:

19 The judgment herein is not conclusive as to anyone other
20 than plaintiff and defendant. Plaintiff's predecessor in title and
21 those who may claim that the covenant was inserted pursuant
22 to a general plan or scheme of development are not estopped
23 from hereafter asserting their rights thereunder. Under such
24 circumstances equity will not require defendant to comply
25 with his contract in direct violation of the stipulation that the
property is to be conveyed free of restrictive covenants. **If
plaintiff desires to have this covenant invalidated and
stricken from the deed of the original grantee, he must
bring in the interested parties and give them a day in
court.**

1 *Sheets v. Dillon*, 20 S.E.2d 344, 348, 221 N.C. 423, 427 (N.C. 1942) (Emphasis added).

2 Fifty-eight years later the North Carolina supreme court reiterated its *Sheets*
3 determination in *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 W.E.2d 40
4 (N.C.2000). First, it identified the only issue before it:

5
6 The sole issue before this Court is whether the nonparty
7 property owners of the Elizabeth Heights Subdivision as
8 shown in map number 3 (Elizabeth Heights) were required to
9 be joined in this action pursuant to Rule 19 of the North
10 Carolina Rules of Civil Procedure. Plaintiffs contend
11 defendant's change-of-circumstances affirmative defense
could result in the invalidation of the restrictive covenant
requiring residential use of property in the subdivision.
Consequently, the additional property owners should be
joined as parties to the action. We agree.

12 *Karner v. Roy White Flowers, Inc.*, 351 N.C. 435, 527 S.E.2d 40,42 (N.C. 2000).

13 Then the *Karner* court restated the *Sheets* determination as to who bears the
14 burden of joining the non-party property owners:

15
16 This Court, in *Sheets*, specifically stated, "If plaintiff desires
17 to have this covenant invalidated and stricken from the deed
18 of the original grantee, he *must* bring in the interested parties
and give them a day in court." *Sheets*, 221 N.C. at 432, 20
S.E.2d at 348 (emphasis added).

19 *Karner*, at 437, 527 S.E.2d at 44.

20
21 Although the roles are reversed between the *Sheets* case and the present case, the legal
22 principle is the same. The roles in the *Karner* case and the present case are identical. The
23 Defendants in the *Karner* case asserted an affirmative defense of "change of
24 circumstances" which is the equivalent of the abandonment affirmative defense the
25 Defendants have asserted in the present case. The supreme court of North Carolina

1 agreed with the plaintiffs' position that defendant's change-of-circumstances affirmative
2 defense could result in the invalidation of the restrictive covenant requiring residential
3 use of property in the subdivision and that as a result, the additional property owners
4 should be joined as parties to the action. It is the Defendants in the present case who
5 desire to have the CC&Rs invalidated. Therefore, they must bring in the interested parties
6 so those interested parties can have their day in court.
7

8 **III. CONCLUSION**

9 This Court ordered the parties to submit their positions regarding which parties are
10 responsible for joining the necessary and indispensable parties. This issue would not exist
11 but for Defendants' assertion of the affirmative defense of abandonment. It is without
12 dispute that Defendants shoulder the burden of proving their affirmative defenses. The
13 parties agree that the property owners in 4076-B are necessary and indispensable if this
14 court rules on the abandonment issue. It logically follows that if Defendants bear the
15 burden of proving abandonment, they bear the burden of joining the necessary and
16 indispensable parties so those interested parties can have their day in court.
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20 DATED this 29th day of November, 2021.

21 **J. JEFFREY COUGHLIN PLLC**

22
23 By: /s/ J. Jeffrey Coughlin
 Attorney for Plaintiff

24 ORIGINAL of the foregoing efiled via eFileAZ
25 this 29th day of November 2021 to:

1 Clerk
2 MOHAVE COUNTY SUPERIOR COURT

3 Copy emailed this 29th day of November, 2021
4 to:

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By: /s/ Christi Brasil