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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

NANCY KNIGHT, Plaintiff, 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. Defendants.	NO.: CV-2018-04003 **REPLY TO RESPONSE TO RULE 19 A.R.C.P. MOTION THAT PLAINTIFF JOIN ALL REQUIRED AND INDISPENSABLE PARTIES**

COME NOW, the Defendants and reply to Plaintiff's Response to Defendants' Motion to join necessary and indispensable parties pursuant to Arizona Rules of Civil Procedure (ARCP) Rule 19, and requiring the Plaintiff to join each lot owner as a party to the pending litigation.

On October 20, 2021, Plaintiff's counsel, in conclusion of its document entitled "Plaintiff's Brief Regarding Compliance with Rule 19," stated:

> "The CC&Rs cannot be completely abandoned as to only the Defendants in this case because the CC&Rs constitute valuable property rights of the owners of all lots in Tract 4076-B. According to Rule 19(a)(1)(A), this Court 'cannot accord complete relief among existing parties'; the necessary parties (the remaining owners in Tract 4076-B) must be joined."

The Defendants agree.

On the same date, the Defendants herein filed their separate motion to join required parties pursuant to Rule 19(a), ARCP, or, in the alternative, a motion to dismiss the Plaintiff's cause of action pursuant to Rule 12(b)(7), ARCP.

In the conclusion of the Defendants' Motion moving this Court to require Plaintiff to join all other lot owners in Tracts 4076-B (as it exists today), 4076-D (as it exists today), and 4163 (as it exists today), and that in the event of the Plaintiff, failing to do so, this Court must dismiss Plaintiff's cause of action and award Defendants their fees and costs incurred.

Plaintiff and Defendants are in accord that Rule 19 is applicable. (See both Plaintiff's and Defendants' Motions/Brief filed October 20, 2021). Plaintiff and Defendants have on a multitude of occasions agreed perhaps only on one thing in this case and before the Court, and that is that Rule 19 is applicable and that the Court, under the fact circumstances before the Court, should find Rule 19 fully applicable. The only issue today before this Court is whether or not the Plaintiff who filed the lawsuit must bring before the Court the remaining necessary/indispensable parties (the remaining lot owners) or must the Defendant who has not filed any kind of counterclaim, cross claim or third party claim be required to do so?

The obligation to bring in the indispensable parties falls upon the party who filed the cause of action and who seeks substantive and affirmative relief that will impact every lot owner in the three affected and impacted subdivisions.

It is respectfully submitted that in accordance with Defendants' original Motion and by this Reply that Plaintiff be required to immediately bring before this Court every lot owner in each of the three subdivision tracts affected. Failing to so do, this Court should dismiss Plaintiff's cause of action, award Defendants their reasonable attorney's fees and all costs incurred herein. Defendants' original Motion and this Reply are further supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 15th day of December, 2021.

LAW OFFICES OF DANIEL J. OEHLER

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Daniel J. Oehler,
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff seeks recovery from the Defendants for alleged violations of various Codes, Covenants and Restrictions that were recorded simultaneous with the development of Desert Lakes Golf Course and Estates Tract 4076-B in 1989. There are approximately 250 existing lots to which the subject covenants apply. As was pointed out by the Defendants in their October 20, 2021, Motion, at the time of Plaintiff's filing the subject litigation in 2018, Defendants owned approximately 2% of the total subdivision lots. At the time of issuance of Defendants' October 20, 2021, memorandum, Defendants owned four lots or .0149% of the subdivided lots in question.

Defendants allege that the 1989 Codes, Covenants and Restrictions have never been enforced, have been fully ignored and have long since been abandoned. Defendants have presented to this Court, in the form of Affidavits filed in conjunction with Defendants' Motion for Summary Judgment, fully unrebutted sworn testimony under oath that in regard to rear yard setback violations, 100% of Tract 4163 residences violate the rear yard setback in the covenants that the Plaintiff seeks to enforce; that 80% of the residences in Tract 4076-D violate the rear yard setback requirements that the Plaintiff is attempting to enforce; and finally, that in Tract 4076-B as it exists today, at least 56.9% of the residences constructed therein violate the rear yard setback requirements.

If one were to combine all tracts which are the subject matter of Plaintiff's cause of action, 65 homes (35.9%) appear to be compliant with the setback covenant, and 116 homes (64.1%) violate the rear yard setback requirement while others including the Plaintiff's home violate both the side and rear yard covenant as well as many of the additional covenants. Yet the Plaintiff today seeks to impose and enforce the covenants only against the Defendants that are before the Court today.

Plaintiff argues to this Court that it is not the Plaintiff but rather the Defendants who are obligated to join the necessary/indispensable parties to this action. In support thereof, Plaintiff alleges that the subject restrictions as to use of the lots or land are mutual, reciprocal and equitable easements (see Plaintiff's November 29, 2021 Response, p.3, lines 13-16.5).

Defendants agree. All lot owners are necessary and Defendants believe indispensable parties that must be joined.

Defendants further agree that there is an express non waiver provision within the 1989 covenants. Defendants also agree that the issue under current Arizona law requires a defendant attempting to successfully defend itself against a plaintiff that seeks to enforce, or as the case may be from time to time, a homeowners association, or others, that seek to enforce covenants, require that a defendant in such circumstances has an affirmative obligation to successfully prove the claim of abandonment. Defendants agree that the burden is upon the defendant to prove that the covenants restricting the lots in question have been fully disregarded to the extent that the effectiveness and the efficiency of the restrictions have been defeated for the purposes for which they were imposed. See, Condos v. Home Development Co., Inc., 77 Ariz. 129, 267 P.2d 1069 (Ariz. 1954), and Coll Book Ctrs. Inc. v. Carefree Foothills Homeowners' Ass'n, 225 Ariz. 533, 241 P.3d 897 (Ariz. App. 2010).

It is abundantly clear that if Plaintiff were to withdraw her Complaint, this action would be over other than on the issue of Defendants' reasonable attorney's fees and all costs incurred in this action. Joining all other lot owners is necessitated solely as a result of Plaintiff's Complaint. Should the Complaint be withdrawn, no other impact would exist to any of the remaining owners of the approximately 246 additional lot owners. Joinder is required only as a result of Plaintiff initiating this litigation, the result of which will impact every owner that will be impacted should this Court proceed forward with Plaintiff's action.

Defendants have previously cited this Court to 59 Am. Jur. 2d §97, p. 524, which addresses the point in controversy simply and specifically:

> "The burden of procuring the presence of all such indispensable parties is on the **PLAINTIFF**." (Emphasis supplied.)

Plaintiff alleges that the subject citation supports Plaintiff's position not the Defendants' as "there is a footnote (23) which Defendant failed to include in this quotation." Footnote 23 cites National City Bank v. Harbin Electric Joint-Stock Co.,28 F.2d 468, 61 A.L.R. 961 (9th Circuit) (1928) and reads in its entirety as follows:

> "**23**. National City Bank v. Harbin Electric Joint-Stock Co. (CA9) 28 F2d 468, 61 ALR 961; Silver v. Superior Court of Coconino County, 83 Ariz. 49, 316 P2d 296; Burnison v. Fry, 199 Kan 277, 428 P2d 809 (holding that plaintiff, who sued only one tenant in common in prior action, could not raise question of lack of proper parties in such action as basis for questioning binding effect of judgment against him)." 59 Am. Jur. 2d §97, p. 524.

Plaintiff alleges to this Court that the National City Bank v. Harbin Electric Joint-Stock Co., supra, states that the "defendant" (in this case Harbin Electric Joint-Stock Co.) must join the indispensable parties, and therefore supports the Plaintiff's position in the present lawsuit. Plaintiff herein provided to this Court accurately the operable language of the Ninth Circuit Court in National City Bank, supra, stating:

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

It would appear that Plaintiff herein lacks familiarity with the term "defendant in error" and apparently thinks that the Ninth Circuit Court was referring to the trial court defendant, Harbin Electric Joint-Stock Co., in the original case. At the appellate level, the actual "defendant in error" is National City Bank of New York, the PLAINTIFF in the trial court. The Bank/plaintiff that initiated the original action failed to bring before the court the presence of all parties, i.e., the engineering corporation and "Beardsley," and in conclusion, the Ninth Circuit Court of Appeals made the following ruling, in pertinent part:

> "... the trial court could make no decree in a suit in the absence of the parties whose rights were necessarily affected thereby. Shields v. Barro, 17 How. 130, 15 L. Ed. 158; Ribon v. R. R. Co. , 16 Wall. 446, 21 L. Ed. 367. The doctrine of that case is controlling of this, and our conclusion is that, without the presence of the engineering corporation and Beardsley as parties, the court below could award no judgment in the suit.
>
> The judgment is reversed and the cause is remanded for further proceedings."

See also, Hubert v. Board of Public Utilities of Kansas City, et al., 162 Kan. 205, 174 P.2d 1017 (Kansas 1946), quoting in pertinent part from the syllabus of the court:

> "Whenever an indispensable party to an action is no longer a party to the litigation, the effect is the same as if such party never had been a party thereto and results in an abatement of the action." Id., at p. 1018.

And then the Supreme Court of Kansas went on to cite 39 Am. Jur. 884 §25 as follows:

> "The burden of procuring the presence of such indispensable parties is on the plaintiff."

Plaintiff is exactly accurate in repeating the applicable courts' words. Plaintiff's problem is that Plaintiff clearly misunderstands the term "defendant in error" used by the Ninth Circuit Court of Appeals. In National City Bank v. Harbin Electric Joint-Stock Co., 28 F.2d 468, 61 A.L.R. 961 (9th Circuit) (1928), the defendant in error is the original plaintiff, i.e., National City Bank, that obtained the judgment at the trial level from which the defendants, Harbin Electric, et al., appealed becoming the "plaintiff in error." Harbin Electric Joint-Stock Co. was successful in its appeal securing reversal of the trial court's decision in favor of National City Bank since National City Bank failed to join"the engineering corporation and Beardsley" (at 28 F.2d 468, 472) who were indispensable parties to the litigation.

The term "plaintiff in error" is defined as:

> "The unsuccessful party in a lawsuit who commences proceedings for appellate review of the action because a mistake or 'error' has been made resulting in a judgment against him or her – an appellant." West's Encyclopedia of American Law, 2nd Ed. (2008).

Harbin Electric Joint-Stock Co., is the plaintiff in error.

The term "defendant in error" is defined as:

> "In a case on appeal, the prevailing party in the court below. See APPELLEE; RESPONDENT (1)." Black's Law Dictionary 8th Edition.

National City Bank is the defendant in error.

National City Bank, the original plaintiff in the litigation, failed to include the

indispensable parties, and obtained a judgment against the defendants. The original defendants then appealed becoming the "plaintiff in error" and as a result of National City Bank's failure to join the additional indispensable parties, the Ninth Circuit Court of Appeals reversed the trial court decision as a result of plaintiff's failure to join the additional indispensable parties stating:

> "... the trial court could make no decree in a suit in the absence of the parties whose rights were necessarily affected thereby. Shields v. Barro, 17 How. 130, 15 L. Ed. 158; Ribon v. R. R. Co. , 16 Wall. 446, 21 L. Ed. 367. The doctrine of that case is controlling of this, and our conclusion is that, without the presence of the engineering corporation and Beardsley as parties, the court below could award no judgment in the suit.
>
> The judgment is reversed and the cause is remanded for further proceedings."

See also, Hubert v. Board of Public Utilities of Kansas City, et al., 162 Kan. 205, 174 P.2d 1017 (Kan. 1946), quoting from 39 Am. Jur. 884 §25: "The burden of procuring the presence of all such indispensable parties is on the plaintiff" and Burnison v. Frey, 199 Kan. 277, 428 P.2d 809 (Kan. 1967), also affirmatively referencing 39 Am. Jur. 884 §25. See also Cundiff v. Cox, supra, which is "NOT FOR OFFICIAL PUBLICATION UNDER ARIZONA RULE OF THE SUPREME COURT 111(C), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE." Defendants cite the Court to this case purely for its "persuasive value" as it complies with the three requirements allowing citation to unpublished decisions under certain circumstances that became effective January 1, 2015. First, Cundiff, supra, was decided after January 1, 2015; second, the undersigned knows of no opinions that adequately and squarely addresses the issue before the Court; and third, the citation is not to a de-published opinion or a de-published portion of an opinion.

Cundiff v. Cox, No. 1 CA-CV 15-0371 (Ariz. App. 2016), is a case where the Court of Appeals determined that all property owners were necessary parties and must be joined and on remand the trial court found that all lot owners were indispensable parties and ordered the PLAINTIFF to join all necessary and indispensable parties. (Arizona Appeals 2016 1

CA-CV 15-0371) at p. 3 ¶12, p. 4 ¶13.

Cundiff v. Cox was an action brought by plaintiff to enforce recorded covenants (CC&Rs) that included a "non waiver" clause. Abandonment of the covenants was the defense, the precise fact pattern before the Court today. Plaintiff sought enforcement, defendants claimed abandonment. Plaintiff was required to join the necessary/indispensable parties, i.e., all other lot owners which follows the general rule requiring the plaintiff to join before the Court all necessary/indispensable parties in each of the cases above cited.

Defendants do not contest Plaintiff's allegation that Defendants' defense is abandonment. Defendants' do not contest Plaintiff's position that Defendants must prove their defense that the CC&Rs/covenants have been abandoned. Defendants do not contest the fact that all development on all approximate 250 lots will be affected, not simply the Defendants that own .014% of the lots. If the Plaintiff is successful, all lot owners, not simply the current Defendants, must demolish any offending setback, as well as all other CC&R violations will be subject to curative measures including demolition of 1,000s of square feet of homes, yards and fences throughout the entire community. This would include the fencing surrounding portions of the Plaintiff's residence, the 11 feet of the rear area of Plaintiff's home being removed, the left side of Plaintiff's home being removed, Plaintiff's exterior wrought iron and chain link fencing being removed and the same or similar demolition and reconstruction on the substantial majority of the homes located within the subdivisions.

The Defendants agree that the appellate courts of this state in their applicable findings are expressed in the cases cited by Plaintiff such as La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Arizona, 689 P.2d 178, 181, 142 Ariz. 235, 238 (Ariz. App. 1984) that favorably quoted Riley v. Boyle, 6 Ariz. App. 523, 434 P.2d 527 (1967):

> "We held that any amendment to a set of restrictive covenants must have uniform application to all lots in the subdivision and an amendment which purported to modify the restrictions only as to one lot or a number of lots, but not all the lots, was null and void. We stated:

///

> 'The restrictions imposed pertain to all lots in the subdivision and a fair construction of the words permitting amendments indicate that the power to amend is only as to restrictions for all lots in the subdivision.' (Emphasis added) 6 Ariz.App. at 526, 434 P.2d 525.
>
> We held that to construe the amendment language to permit 51 percent of the lot owners to exempt their property from some or all the restrictions while leaving the remainder of the subdivision subject to those restrictions would lead to an unintended result. We stated:
>
> 'Certainly such an interpretation could easily result in a patchwork quilt of different restrictions according to the views of various groups of 51 percent and completely upset the orderly plan of the subdivision.' 6 Ariz.App. at 526, 434 P.2d 525." La Esperanza, supra, at p. 181.

or Montoya v. Barreras, 473 P.2d 363, 365 (N.M. 1970):

> "... we agree with the Arizona court that absolution from the restrictions as to only some, but not all, of the lots is not a valid construction where the language of the instrument manifests the intent for orderly residential neighborhood development. In Cowherd Development Company v. Littick, 361 Mo. 1001, 238 S.W.2d 346 (1951), in holding that the extension of the restrictions could not apply to part of the lots and not others, the court noted that one of the primary purposes [81 NM 753] of residential restrictions in a subdivision is to assure purchasers of lots that they may build homes without fear of commercial expansion or encroachment." Montoya, supra, at p. 366, 367.

The Plaintiff cannot enforce the CC&Rs on 1, 2 or 3 violating structures or lot owners and not on others such as the Plaintiff herself. What applies to the current Defendants applies to all other home owners and it certainly has been expressed previously by the Plaintiff to this Court that that is precisely Plaintiff's intention.

Plaintiff alleges that because abandonment is an affirmative defense and the Defendant must prove the facts of abandonment that the burden of joining all parties rests on the Defendants' shoulders. Plaintiff has failed to site this Court to a single authority that supports Plaintiff's theory.

The Defendants believe that what applies to Defendants applies to all owners contrary to Plaintiff's statements in Section B of Plaintiff's Response dated November 29, 2021. Plaintiff is absolutely in error when Plaintiff tells this Court that Defendants believe that only the Defendants are legally entitled to build into any setback. The Defendants have no more

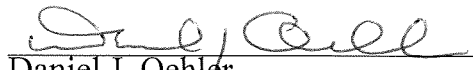
right to do so than any of the 100+ lot owners that have preceded the named Defendants in the very conduct the Plaintiff complains of in this litigation.

Plaintiff cites this Court to the Sheets v. Dillon, 20 S.E. 2d 344, 348, 221 N.C. 423, 427 (N.C. 1942); Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 W.E. 2d 40 (N.C.2000) cases decided in North Carolina in suggesting these cases support Plaintiff's position that the Defendants in the case at bar are obligated to join all parties that may be affected by Plaintiff's litigation. In each case cited by the Plaintiff, the North Carolina courts found that the "plaintiff" is obligated to join the necessary/indispensable parties which is precisely what every case thus far presented to this Court has indicated. The plaintiff, NOT the defendant, filed the lawsuit and is charged with the obligation to "join" all parties that are necessary/indispensable in that litigation.

In summation, the Plaintiff herein has failed to site this Court to a single authority that supports Plaintiff's position that a defendant is obligated to join the remaining lot owners. It is the Plaintiff's lawsuit and Plaintiff must join the remaining parties.

RESPECTFULLY SUBMITTED this 15th day of December, 2021.

LAW OFFICES OF DANIEL J. OEHLER



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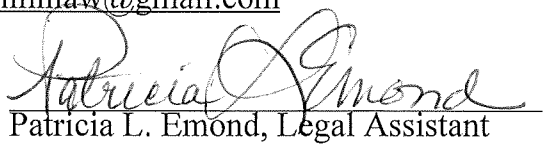
By: 
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