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Nancy Knight
1803 E. Lipan Cir.
Fort Mohave, AZ 86426
Telephone: (951) 837-1617
nancyknight@frontier.com

Plaintiff Pro Per

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.	Case No.: **CV 2018 04003** **MOTION FOR ATTORNEY OEHLER TO STATE A CLAIM OF ABANDONMENT PURSUANT TO RULE 12 AND TO CONFORM WITH AN EXTENSION OF TIME TO SERVE INDISPENSABLE PARTIES WITH THEIR SERVICE PACKET** **Assigned to visiting Hon. Judge Nielson**

COMES NOW, Plaintiff Pro Per, NANCY KNIGHT ("Knight") motioning the Court to Order Attorney Oehler (Oehler) to comply with Rule 12(b)(6) to state a claim of abandonment with specificity of each claim Knight is expected to defend at trial. This request has been included in other motions currently pending before this Court but not with the specificity or rationale that has come to Knight's attention since reviewing the Transcript of the May 11, 2020 Oral Arguments and developments in CV 2022 00177 for

some of the arguments made by Oehler for his frequency claim with a purpose of having the Court grant dismissal of Count Two for abandonment of the non-waiver clause.

Compliance to Rule 12(b)(6) is to be completed before any indispensable parties are noticed. If not complied with prior to Knight's receipt of the Service Packet contents having been received by the Court and/or Clerk of the Court, the Court shall order that the 150 days for process service upon the indispensable parties will be extended to 150 days from compliance by Oehler.

MEMORANDUM OF POINTS AND AUTHORITIES

The entire premise of the Defendant's December 6, 2019 Motion for Summary Judgment was for dismissal of Count 2 (Injunctive Relief) on the basis of frequency data where no case law could be cited by Oehler in his 1.5 hours of Oral Arguments where a ruling of abandonment of a non-waiver clause existed. All case laws to date had low frequency claims. Oehler has concluded that he has rights to assert that the non-waiver clause could be ruled abandoned if he shows a high frequency of claims.

The problem with his premise is that he intends to parse out Tract 4163 for 100% of the homes having less than a 20 foot rear yard setback. Tract 4163 cannot be separated from Tract 4076-B because Parcel VV runs with the land approved in 1988 as a part of Phase II for development and lots in Phase II and Phase III on the preliminary plat are a part of the Tract 4076-B CC&Rs as well as the 11 homes on Lipan Blvd. with the exception of lot 81 that had a change in position where it is no longer adjacent to the golf course and caused Tract 4076-D CC&RS to be recorded.

Tract 4163 did not have a separate Declaration of CC&Rs. Title companies and

the Arizona Department of Real Estate Public Report filed by T&M, who acquired the Tract 4163 plat in 2002, lists the CC&Rs for these lots as a part of the Tract 4076-B CC&Rs Recorded in Book 1641, pages 895-901.

Mr. Oehler is apparently expecting the jury to set a precedent in this case for his claims of high frequency data in the December 6, 2019 MSJ. Much has occurred in the years since that data was attached to the MSJ that makes the claims no longer valid.

A breach of contract claim requires an existing violation. Azarmi, had an existing signage violation and Knight sought Injunctive Relief that was stalled by the Fraudulent claim that the defendant's "build to suit" signs were protected by Statute §33-441 as "for sale" signs. Injunctive Relief is still required to stop the defendant's signs permanently and the Arizona Department of Real Estate determined the signs are the developer's signs and not for sale or for lease signs.

Seventeen servitudes exist in the Tract 4076-B CC&Rs and they have multiple parts that cannot be parsed out with the exception of Servitude 5 i - v. The problem with a frequency claim is that when a servitude has multiple parts, frequency for abandonment of the entire servitude requires an extremely high percentage of violations.

For example, if the defendants are claiming abandonment of Servitude 6 for setbacks, there are 244 residential lots subject to the Tract 4076-B CC&Rs that have front yards, 245 lots have rear yards including Knight's two rear yards, and 244 lots have two side yards for a total of 977 possible violations where the defendants must find a high frequency for the entire servitude. Knight's one rear yard setback that Oehler is claiming abandoned cannot be ruled completely abandoned because the majority of the rear yard

has a setback that is greater than 20 feet in full compliance with the CC&Rs. Complete meaning a 100% violation exists.

Servitudes cannot be parsed out for just the rear yard setback. A portion of a subdivision cannot be parsed out as Oehler attempted to do with Tract 4163 by claiming 100% of those 24 built lots have less than a twenty foot rear yard setback.

Based on real evidence provided by attorney Haws, representing Mohave County in CV 2022 00177, up to November 2022 only 35 lots have been given rear yard permits of less than 20 feet among the three Tracts A, B, and C with CC&Rs since Azarmi's Ord. 37,C.4 was approved in April 2016. Based on the Plot Plans and Applications, only 15 of those are in Tract 4076-B and 5 of the 15 were built by Azarmi. Only one side yard violation is known to exist and that is on Knight's property as found on her survey. There exists 23 lots in Tract 4163 that have 100% rear yard setback violations as built prior to 2016. It is known that P&Z denied a permit to Azarmi in 2015 for less than 20 foot setbacks so it is up to Oehler to find real evidence to support a high frequency that is not based on shadows from a computer monitor survey of a GIS Map as was found for the two lots attempted to be claimed in support of McKee's Affidavit.

At this point in time, 15 plus Knight's side yard setback and 23 lots in Tract 4163 with a complete rear yard setback of less than 20 feet is a total of 39 violations out of 977 possible violations or about 4% that can be proven to be in violation of servitude 6 for setbacks.

Then we have the issue of 28 of the 39 of those setbacks being violated by the party wanting to claim abandonment. How valid in law that would be is up to the Court.

In the Appeal Case (1 CA-CV 08-045) filed in 2010 as it relates to Azarmi/Fairway, it states at **¶16** that a purchaser of land who has notice of restrictions placed on the land by agreement is bound to follow the restrictions "because it would be unconscionable and inequitable for him to violate or disregard a valid agreement in regard to the estate of which he had notice when he became the purchaser" (Emphasis supplied by Knight).

At **Footnote 7,** it states, The non-waiver provision in *Burke* provided that "failure to enforce any of the restrictions, rights, reservations, limitations, and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof." *Burke v. Voicestream Wireless Corp.* 207 Ariz. at 396, ¶ 12, 87 P.3d at 84.

At **¶18...** when CC&Rs contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations did not constitute a "complete abandonment" of the CC&Rs. *Id.* at 399, ¶ 26, 87 P.3d at 87. Complete abandonment of deed restrictions occurs when "the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions **[and]** defeat the purposes for which they were imposed[.]" Id. (quoting *Condos v. Home Dev. Co.,* 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954)). (Emphasis underscored and emboldened by Knight.)

Pursuant to case law, this percentage of 4% would not qualify as abandonment of the non-waiver provision. Given that seven of the setback violations are currently being prosecuted in CV 2022 00177, the setbacks have not experienced defeat that is defined as an inability to act on the violation. An inability to act on a violation is when there exists no remedy. All of the setback violations have the cutting away remedy as Knight did in CV 2016 04026 for fence violations by cutting away cement blocks and restoring wrought iron rail panels.

At ¶22 it states, Waiver is the intentional relinquishment of a known right. *See Am. Cont'l Life Insur. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980).

Due to the non-waiver clause, Knight is not required to sue everyone at once. She is currently enforcing remedy for her own setback violations in CV 2022 00177 against those who caused the damage and against seven other property owners in Tract 4076-B. Currently being enforced are violations of setbacks and fences.

It is clear that in three cases to date, CV 2016 04026, CV 2018 04003, and CV 2022 00177, Knight has not caused an intentional relinquishment of her known right to prosecute violations of the CC&Rs.

There should be no claim of frequency data based on fraud in an Affidavit. Such is the case for affiant McKee who claimed he built homes generally to a rear yard distance of ten feet when the real evidence proves he built homes in excess of the 20 foot setback in compliance with SD/R and Res. 93-122. Of the four homes built by McKee found by

Knight to date, the County did not issue any permits for him to violate Res. 93-122. Claims made under Oath need real evidence and not the word of someone who has close ties to Azarmi for jobs. Oehler is the agent of service for McKees' business.

When Azarmi, as planning commissioner in 2016, realized that Ord. 37.C.4. could not be applied to lots in Desert Lakes he proposed Res. 2016-125 and Res. 2016-126 to amend Res. 93-122 to reduce the setbacks to 15 feet. That attempt failed to pass by the Board of Supervisors on October 3, 2016 for Fraud (lack of full disclosure of consequences) in the information mailed to over 700 Desert Lakes' property owners.

Knight attempted to prosecute Azarmi in this case for Res. 2016-125 and 2016-126 that was a Breach of Contract for an attempted violation of setbacks, but Oehler got the Hon. Judge Carlisle to go back on his word spoken during Oral Arguments where the judge had confirmed for Knight that he was only dismissing Count One for the Robert's home. Judges need to be wary of any order written by Oehler that he intends for them to sign.

STATEMENT OF THE CASE AND FACTS

Discovery since the Oral Arguments were held on May 11, 2020 has revealed that Oehler's arguments regarding setbacks in Tract 4163 were, in part, caused by his clients and one of his affiants (Kukreja) in collusion with Mohave County employees for zoning Fraud. That discovery occurred on September 21, 2021. Knight knew Desert Lakes Development had been approved for only 23 lots on this land in 1991. But all Knight knew during the Oral Argument hearing on May 11, 2020 was that "somebody got

greedy and decided they were going to squeeze 32 lots into 5 acres" **TR pg. 48 lines 16-17.**

It was affiant Kukreja who owned Parcel VV and applied for a zoning change from Agricultural - that did not exist - to SD/RO. As Oehler pointed out during Oral Arguments, Kukreja is an out of the area investor either from New York or Florida.

Parcel VV was never zoned Agricultural. Parcel VV did not exist until the 1988 preliminary plat that created Subdivision Tract 4076 delineated this parcel for residential development that was not a part of the golf course and was elevated above the golf course fairway and drainage easement identified as Parcel KK. The land was a part of the SD/R approved zoning and Res. 93-122 for 20 foot setbacks, front and rear.

Parcel VV was never zoned for multifamily housing as the County erroneously inserted on a plat when it was clear that multifamily housing is prohibited in the entire SD/R zoned Subdivision Tract 4076. The CEO of Desert Lakes Development found this out in 1991 and had the County abandon that claim of future multifamily on the Parcel VV plat. That was enforcement of the CC&Rs where multifamily housing is expressly forbidden in Desert Lakes (Servitude 16).

The Desert Lakes Golf Course & Estates Subdivision Tract 4076 was approved in 1989 per Res. 89-116 for a reduction in the county-wide setbacks of 25 feet to 20 feet front and rear.

In 1991, Parcel VV was granted approval for a maximum of 23 lots as Tract 4076-E with the condition that Desert Lakes Development acquire land from the Mojave Tribe for a 35 foot widening of Lipan Blvd. That condition could not be met and the Plat

approval expired.

In 1993, that SD/R zoning and 20 foot setback was "clarified" as Res. 93-122. That resolution has been applicable for nearly thirty years and has guided new home construction applications that are followed unless someone in development services is bribed or threatened for loss of their job. A 2018 Complaint filed by Development Services personnel resulted in a 58 single spaced report by investigator Jellison. The employees have been gagged with a non-disclosure agreement.

Along comes Kukreja and Azarmi where the widening of Lipan Blvd was lifted and the maximum of 23 lots on the five acres was lifted. Azarmi's Ludwig Engineering Associates was granted approval of their Tract 4163 Plat for 32 small lots carved out of the 5 acres, was granted an exception for the a frontage road that allowed seven of the 32 lots to have direct driveway access onto a two lane boulevard at an intersection with no stop sign and unsafe egress from Knight's street, was granted small lots where the privately owned golf course was taken to fulfill the Subdivision Regulation requirement for recreation land and without permission from the golf course owners.

Since trespass has not been enforced for gate access to the golf course, by law the property owners can claim adverse possession and the gate access provision would be considered no longer a part of the CC&Rs nor a part of the defendant's frequency claims for the fence servitude. Just as by law, Oehler's use of frequency data for Dish antennas cannot be used in frequency data since the law was passed in 1996, seven years after the CC&Rs were recorded.

Paint color is a part of the fence servitude and black paint is both arguably

arbitrary and easily remedied if need be with less than a gallon of black paint. Not all lots are required to have fences but if the property owners choose to install their own fence, as Azarmi's clients did according to his Affidavit, then they must follow the CC&Rs for materials and fence height. That is what the county imposed for Tract 4163 including boundary fences of not more than 6 feet in height between adjacent properties and for homes adjacent to the golf course the County imposed about a 2 foot high solid block wall topped with about 3 foot high wrought iron panels between cement block columns. Azarmi's firm provided the cost estimate required by the County for all of the boundary wall fences required for Kukreja's and Azarmi's 32 lot Plat approval.

It is likewise arguable that servitude 6 for fences is for boundary fences and not for golf ball barriers. No servitude has any condition or restriction defined for golf ball barriers that are a necessary safety feature for lots on a golf course. Oehler should be admonished for attempting to claim chain link on golf ball barriers for lots adjacent to the fairways is a violation of servitude 6.

As the court can see, the time has come for Rule 12(b)(6) to be followed for whatever claims the defendants are expecting to argue at trial and before any indispensable parties are served for joining as defendants or plaintiffs.

CONCLUSION

Knight pleads for this court to order Attorney Oehler to make claims with specificity pursuant to Rule 12 (b)(6) as it applies to all 244 residential lots subject to the Tract 4076-B CC&Rs. In the Court's discretion, if he cannot do so the MSJ on abandonment should be dismissed.

Oehler also needs to stop claiming that Tract 4076-D is a separate subdivision from Tract 4076-B. All twelve of the lots subject to the Tract D CC&Rs are tax assessed as Tract 4076-B lots. The service packet should only require one lot to receive the Tract 4076-D CC&Rs.

Azarmi built the Fairway Constructor's rental property situated at 1927 Lipan Blvd. with a 29 foot rear yard setback and a 20 foot front yard setback. Azarmi's permit clearly states the zoning is SD/R in Tract 4076-B and "meets the setbacks". Azarmi/Fairway built that rental home in compliance with the CC&Rs that are also in compliance with Res. 93-122. Azarmi/Fairway did not violate setbacks on their own property but do so when they intend to sell the home to some unsuspecting buyer. The only lot that actually would require a copy of the Tract 4076-D CC&Rs is lot 81 because it had an orientation change that made it not a lot that was adjacent to the golf course. It is situated at the intersection of Mountain View and Lipan Blvd and was required to have a frontage road as listed on the Tract 4076-B CC&Rs at Servitude 7.

RESPECTFULLY SUBMITTED this 12th day of June 2023.

Nancy Knight, Plaintiff Pro Per

COPY of the foregoing was emailed this day to:

djolaw10@gmail.com Daniel Oehler, Attorney for the Defendants
kalerma@courts.az.gov Judicial Assistant to the Hon. Judge Nielson
Transcript provided.