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Plaintiff Pro Per

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

NANCY KNIGHT

Plaintiff,

and

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**

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

Honorable Judge Eric Gordon

Comes now Plaintiff Pro Per Nancy Knight respectfully providing the Court with her Reply to the Defendant's Response to the Plaintiff's December 19, 2018 Motion for Declaratory Judgment. While the Plaintiff has been granted rights to prosecute violations in Tract 4076-B as a result of the Defendant's February 2018 dispositive motion and the Court's Oral Arguments heard on April 2, 2018, the Defendants now seek to take those rights away through an untimely new dispositive motion claiming the CC&Rs are not enforceable as they have been abandoned. In addition to the Arizona statutes cited in the Motion, Plaintiff filed this motion in an effort to expedite litigation.

MEMORANDUM OF POINTS AND AUTHORITES

The Plaintiff's effort to expedite litigation is supported by the following citation that is appropriate for this matter even though this is not an administrative law issue.

Underscore below for emphasis.

> "The declaratory judgment, now adopted in thirty-three American states and territories, has demonstrated its value in the speedy and effective determination of numerous controversies involving status, contracts and other written instruments, and property relations. Borchard, Edwin, "Declaratory Judgments in Administrative Law" (1933). *Faculty Scholarship Series*. 3436. https://digitalcommons.law.yale.edu/fss_papers/3436

The Defendant's February 2018 Motion for Dismissal of the matter in its entirety did not timely include their newest dispositive challenge. As cited in their November 19, 2018 Joint Report's "Description of the Case" on page 6, paragraph B4, "the CC&Rs are not enforceable as they have never been followed or enforced since inception and have been fully abandoned…". The Defendants are imposed with a burden of proof for their claim that the CC&Rs have never been enforced since inception. They have none.

The Plaintiff on the other hand has submitted to the Court a multitude of evidence that the CC&Rs have not been abandoned and have resulted in enforcement on multiple levels and for multiple paragraphs in the Tract 4076-B CC&Rs including paragraph 8 on fences whereby the CC&Rs were imposed on T&M Development in 2005 for fifteen feet of steel rail side yard fences and T&M enforced it upon the fence contractor, Larry Russell of Russells IronWorx, who had filed for a permit to build a solid block wall fence. And for the Plaintiff's litigation in CV 2016-04026 whereby the CC&Rs were enforced in a binding mediated settlement for restoration of a fence height violation and restoration of the Plaintiff's views of the golf course through the CC&R required steel rail fencing for both the adjacent neighbor's rear yard fence and for fifteen feet of the Plaintiff's side yard fence.; paragraph 11 on refuse piles, junk piles or other unsightly

objects whereby Mohave County Road Department who, after the Plaintiff's reports of demolition debris left behind by pipe construction crews on numerous occasions, finally reported to the Plaintiff in a voice mail message that the Contractor was told to never do it again. And by the Mojave Tribe for gradual but agreeable removal of their golf course fill-dirt pile.; paragraph 16 on multiple family dwellings being expressly forbidden whereby the 1998 Board of Supervisor resolution changed the multifamily zoning of parcel VV to single family homes. The CC&Rs have been followed and are not abandoned.

There has never been a homeowner association for Desert Lakes Golf Course and Estates Tract 4076. Individual property owners do not have a fiduciary duty to enforce violations. Any precedence in that regard does not apply to this matter.

Paragraph 19 in CC&R Tract 4076-A and Paragraph 20 in CC&R Tract 4076-B clearly states that "No failure of the Trustee, or any other person or party to enforce any of the restrictions, covenants, or conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof."

A lack of enforcement does not translate to abandonment of the CC&Rs as the Defendants desperately wish the Court to believe. Also, it appears that the authors of the CC&Rs realized the tremendous amount of courage and money for legal fees that it takes for an individual to seek enforcement. The substantial financial damage to the Plaintiff for CV 2016-04026 was over $19,000 in attorney fees for Mr. Lenkowsky and Mr. Moyer.

While the exact number of violations that exist today in the entire 300+acre subdivision is uncertain, the Defendant's claim of hundreds if not thousands of violations existing in Tract 4076-B is patently false and unrealistic. Based on County records, there are 227 lots in Tract 4076-B, including the 32 lots in the Plaintiff's re-subdivided Tract. Over 40 of those 227 lots are vacant. Irrespective of the actual numbers, there is a need for enforcement before the number increases and results in a blighted community. That is why this case is so important. It is wrong to spread rumors in the community that the CC&Rs are abandoned so the self-serving residents do as they please at the expense of others.

The Joint Report filed on November 19, 2018 was referenced on December 17, 2018 with the Honorable Judge Carlisle instructing attorney Oehler to follow through on his dispositive motion. The Plaintiff's Motion for Declaratory Judgment filed on December 19, 2018 would expedite the matter. The urgency is to move the case forward as the Motion for Injunctive Relief is held up due to the uncertainty of the enforceability of the CC&Rs.

The Defendants have burdened the Court and the Plaintiff with case law that is inapposite to the matter at hand. The Seattle Audubon Society case was filed against the Federal Government.

More appropriate is the following case:

> Declaratory judgment actions are justiciable if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *National Basketball Ass'n v. SDC Basketball Club*, 815 F.2d 562, 565 (9th Cir. 1987)

The substantial controversy involves the Plaintiff's proof of enforcement versus the Defendant's inability to understand that any lack of enforcement by individuals does not prove abandonment of the CC&Rs. The relief sought is to declare that the CC&Rs have not been abandoned thereby putting to rest the uncertainty and insecurity with respect to property owner's prosecution rights now and in the future. Pursuant to 12-1842, its purpose is to be liberally construed and administered and shall have the force and effect of a final judgment or decree. The finality of a Declaratory Judgment is in the best interests of the Court as well as to the community.

Regarding the Defendants possible lack of understanding that may have confused the Court as well is in regards to the two-part effect of the 1998 resolution to change the zoning for parcel VV to single family homes and secondly to change the setbacks for the lots. Nowhere does the Plaintiff claim the rezoning was under the auspices of Sterling Varner as an Architectural Committee member. In fact the resolution clearly identifies Mr. Varner as the developer's "representative" for Arizona Property of Mission Viejo, CA. The land had apparently been sold to this unsuspecting buyer who expected to build high density housing in 1998. It is easy to see why Sterling Varner, with close ties to Desert Lakes Development who prohibited multifamily housing in the CC&Rs in 1989 but left parcel VV zoned as such, would need to intervene. Arizona Property LLC did not build single family homes in 1998. In fact by 2001 someone was looking to sell the 5 acres and the asking price was $350,000. The 32 lots sold for $150,000 according to an Initial Disclosure Exhibit provided to the Plaintiff by the Defendants. The Plaintiff's reference to Sterling Varner as an Architectural Committee member was in regards to the

ten foot setbacks in the same resolution. It is easy to see that if a legal controversy over the loss of multifamily housing occurred in 1998, every effort would be made by Desert Lakes Development to provide as high a density for single family homes as possible and it is highly likely that the Architectural Committee was reinstated for the purpose of a variance. This variance was justified as the 10 foot setback was consistent and therefore did not impact any adjacent home. Bottom line is the Plaintiff has a ten foot rear yard setback due to no fault of her own and the Defendants have ten foot setbacks that are deliberately and egregiously the fault of their own and their 10 foot setback does impact adjacent properties.

For clarification purposes, the photographs of construction debris and pile of dirt on the golf course were taken from the Plaintiff's rear yard toward the tri-point intersection of Fairway Drive/Fairway Circle/Fairway Bend in Tract 4076-B. Enforcement for the debris removal may be a matter of semantics with regard to these incidents. By definition enforce means to give force, to urge with energy, to compel, to constrain, to carry out effectively. The Plaintiff's opinion is that even a cordial request of a neighbor, such as to the manager of the golf course, or by complaint to the road department that has the effect to resolve a violation, is enforcement. There exists at least three other examples of compliance with one by the force of law for the Court to rule upon whether the CC&Rs have never been followed as the Defendants claim or if the Plaintiff has provided sufficient examples of enforcement that proves the Plaintiff's position that the CC&Rs have not been abandoned and with due consideration of the CC&Rs that a lack of enforcement does not translate to abandonment.

All of the Arizona Statutes in regards to the Uniform Declaratory Judgment Act are appropriate in this matter. Further, in accordance with the Rules of Professional Conduct (ER 3.2. Expediting Litigation) "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

State Bar of Arizona Comment

Underscore for emphasis

> [1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

The Defendants have realized financial benefit from the delay. The violation of setbacks afforded the Defendants a larger building footprint and therefore increased profit potential - at the expense of adjacent neighbors. The Plaintiff has submitted evidence of this for the home at 1839 Lipan Blvd. in Tract 4076-B with a ten foot setback and protruding roofline that benefitted from the delay as its permit was issued in May 2018.

The Defendants apparently are benefitting from the delay with their photographic evidence of two additional homes in Tract 4076-B currently in the framing stage with setback violations for which the Defendants feel compelled to expand this matter to inclusion of these homes and seek adjudication from harm for a minimum of $100,000 in potential damage. Damages apparently imposed upon the Defendants themselves who

wish to be exonerated from harm. These homes have not been cited in the Plaintiff's complaint and the Court has already subdued the Plaintiff from expanding the matter. The Defendants actions have created a multitude of victims in Desert Lakes Golf Course and Estates and they apparently continue to do so even while this matter is in litigation.

The opposing counsel benefits from the delay in earned attorney fees for which the Defendants repeatedly threaten the Plaintiff for Court awards for their attorney fees. Let it be clear and understood that when the Defendants filed for dismissal of Count one "with prejudice" and the Court signed it, the defendants effectively prejudiced the Plaintiff's ability to remedy a technicality for prosecution of Count one in its entirety. The Court's accommodating the Defendant's request for a ruling with prejudice effectively protected the Plaintiff from awards of attorney fees under Contract Law. It was a taking of the Plaintiff's ability to prosecute Count one fully rather than an inability to win on merit.

The Plaintiff received the Court Ordered decision for Count 1 to be dismissed shortly after the April 2, 2018 open court hearing and the Plaintiff contacted owners of vacant lots for a potential purchase. Based on two favorable responses the Plaintiff filed a "Stay of Execution of the Summary Judgment for Dismissal of Count 1" and pleaded for time to purchase a lot in Tract 4076-A thereby achieving full prosecution rights of her Complaint. The Stay was denied.

Mr. Oehler filed a memorandum of the hearing and included that Count 1 would be dismissed with prejudice and requested attorney fees. On June 11, 2018 in the denial

of the Plaintiff's motion for a Stay the Court addressed the attorney fees. Paragraph 3 stated, "With respect to the issue of attorney fees, the Court finds that the defendants would generally be entitled to attorney's fees since the CC&Rs are a contract. However, one of the factors the Court has to consider is whether the successful party prevailed on all relief sought. *Associated Indemnity Corp. v Warner*, 143 Ariz. 567, 570 (1985). The second count has not been resolved, so the Court cannot determine whether the defendants have prevailed on all the counts. The issue of attorney fees should be resolved when all of the counts have been resolved..." And in paragraph 6 of the court ruling we find the court's opinion that "it is appropriate to dismiss Count one with prejudice." No rationale was cited for the appropriateness. Since the application for attorney fees under Contract Law was clearly compromised by the Defendants themselves, the Plaintiff took it to be appropriate as a protection for her from Defendant attorney fees and also appropriate as a protection for Mr. and Mrs. Roberts who are not completely innocent victims but victims nonetheless.

The Court's decision was based in part, in the opinion of the Court that Desert Lakes Golf Course and Estates cannot be ruled as one subdivision. The Plaintiff had argued that it was a Master Planned Community and based on the intent of the CC&Rs for consistent development and protections of property it made no sense to limit a property owner to prosecution rights based on phases of development. Evidence was a part of the file where the County referred to the community as the Desert Lakes Subdivision but it was not conclusive evidence. The court therefore ruled that Desert

Lakes Golf Course and Estates was not a single Subdivision but rather separate subdivisions with separate CC&Rs for which the Plaintiff has prosecution rights for only the one Tract in which she owns property, CC&R Tract 4076-B. **Exhibit 1** - Transcript page 4, lines 13-15 where the Court discusses the one Subdivision claim made by the Plaintiff.

That one subdivision and the master planned community argument made by the Plaintiff in April 2018 was proven true in October 2018 when Mohave County Development Services reported that the 300+ acre Subdivision was created in 1988 by Bella Enterprises and entitled "Desert Lakes Golf Course and Estates Tract 4076". The Plaintiff also had evidence that a boilerplate CC&R document for the entire 300+acre subdivision had been written. Leave to Amend Complaint based on the new evidence was filed and contrary to the Defendant's opinion, the Motion had merit. New evidence always has merit. The Law was cited to no avail.

Plaintiff pleads for granting this Declaratory Judgment that will afford all concerned with relief from uncertainty and insecurity with respect to rights, status, and other legal relations. The relief sought is to declare that the CC&Rs are enforceable and have not been abandoned.

Plaintiff pleads for denial of Defendant's attorney fees.

RESPECTFULLY SUBMITTED this 7th day of January 2019

Nancy Knight
Plaintiff Pro Per

Copy of the foregoing was emailed on January 7, 2019 to:

djolaw@frontiernet.net
Attorney for the Defendants

The Law Office of Daniel Oehler
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Exhibit 1

Oral Argument Transcript page 4, lines 13-15

where the Court discusses the one Subdivision claim made by the Plaintiff.

4076-A and 4076-B contain some similar language, and I don't know if I'll be able to read it on this monitor because it's somewhat small, but it was referenced in the Motion to Dismiss, and I think both parties are aware of it, and it's taking me a really long time to get there, but it says the violation or threatened or attempted violation of the Codes -- or the Covenants, Conditions or Restrictions -- I think I might have said it wrong -- shall be lawful for the Declarant, its successors or assigns, 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 violate.

So basically it's limited to all persons who -- or any person owning real property located within the subdivision. And within the CC&R's, and, again, this started as a Motion to Dismiss, so I have to start with the CC&R's. It doesn't necessarily define subdivision, what is meant by subdivision.

But when I'm looking at the CC&R's, there are examples, and I'm just going with the most obvious example because it's the easiest one to articulate. The first article talks about a Committee of Architecture, and it says that there is created a Committee of Architecture, and then it says at such time that 90 percent of the lots within the subdivision have been sold by Declarant, or within one year of the issuance