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10 Aviano Condominium Association

REVIEWED

By ADRE at 10:08 am, Feb 23, 2022



11
12 **ARIZONA DEPARTMENT OF REAL ESTATE**
13 **IN AND FOR THE STATE OF ARIZONA**

14 ARLEEN D. JOUXSON,

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Petitioner,

NO. HO22-22/030

MOTION TO DISMISS

v.

THE VILLAGES AT AVIANO
CONDOMINIUM ASSOCIATION,

Respondent.

Respondent, The Villages at Aviano Condominium Association (“Association”), through undersigned counsel, hereby moves to dismiss the Petition because the issues raised by Petitioner are not within the authority of the administrative law judge under A.R.S. § 32-2199, and the issues are barred by res judicata.

Petitioner seeks to void a valid enforceable settlement agreement and has a dispute with another homeowner based on that agreement. The Arizona Legislature has not delegated authority to the Arizona Office of Administrative Hearings to set aside settlement agreements or resolve disputes between homeowners. Because such relief is not within the powers delegated to the Arizona Office of Administrative Hearings under the homeowner dispute resolution process,

1 the matter must be dismissed. If Petitioner seeks to void the settlement agreement, she must seek
2 relief from the Superior Court, not through the Arizona Department of Real Estate. Additionally,
3 the issues raised in the Petition were subjects of litigation, which have been resolved and
4 dismissed, with prejudice by the Superior Court. The dismissal acts as an adjudication on the
5 merits, and Petitioner is barred by res judicata and issue preclusion to re-litigate the issues in this
6 forum. Therefore, the Petition must be dismissed.

7 **I. BACKGROUND**

8 Eloise Figueroa, current President of the Association, filed a Complaint in the
9 Maricopa Superior Court, Case No. CV 2021-006916, on April 27, 2021, challenging the
10 Association’s 2021 annual election. “Figueroa alleged in the Litigation that she and Linda Bahr
11 received the two highest number of votes and should have been declared board members.”
12 [Exhibit A, p. 1 ¶ 3, fully executed settlement agreement (“Settlement Agreement”)]

13 Ms. Figueroa reached an agreement with the Association, and both parties signed a
14 Settlement Agreement and Mutual Release of Claims. [Exhibit A]. The Settlement Agreement
15 stated: “The Association acknowledges and hereby certifies that Figueroa and Bahr are the two
16 candidates receiving the highest number of votes in the 2021 annual election and, therefore, are
17 elected to the Board of Directors. Upon the Parties’ execution of this Agreement and dismissal
18 of the litigation, which shall not be unreasonably delayed or protracted, Figueroa and Bahr will
19 take their seats as board members.” [Exhibit A, p. 1, Outcome of 2021 Election] The lawsuit
20 also dealt with the number of Board of Directors, and the parties agreed that “After executing this
21 Agreement, the new Board shall be free to discuss and deliberate at an open Board meeting
22 whether, how, and with whom to fill the two vacant seats.” [Exhibit A, p. 2, Composition of the
23 Board]

24 The parties agreed to dismiss the lawsuit, with prejudice, and the Superior Court
25 signed the Order of Dismissal, with Prejudice on June 22, 2021. [Exhibit B, Order of Dismissal]
26

1 The Settlement Agreement included a mutual release of any and all claims, which released all
2 directors, officers, and members of the Association. [Exhibit A, p. 2, Release of Claims]

3 Now, Petitioner—a member of the Association—has filed a Petition with the
4 Arizona Department of Real Estate, contesting the settlement agreement, and arguing that the
5 “agreement to seat Eloise Figueroa (“Figueroa”) and Linda Bahr (“Bahr”) on the Board of
6 Directors. . . was an action prohibited by: the Bylaws Article 3 § 3.1; the Declaration Article 6 §
7 6.2; and A.R.S. § 22-1243.B, and should therefore be nullified?” [Petition, p. 1 of Narrative
8 Statement (emphasis added)] She also disagrees with the new Board’s ability to determine
9 whether and how to fill the vacancies, claiming a quorum issue.

10 Both of the issues stem for her disagreement with the Settlement Agreement and
11 Mutual Release of Claims, which was signed by the Association’s President on June 11, 2021.
12 [Exhibit A, p. 4]. That Settlement Agreement resolved claims asserted in a lawsuit, and cannot
13 be challenged by using the administrative tribunal. The dismissal of prejudice acts as an
14 adjudication on the merits, and Petitioner cannot legally challenge issues resolved by the
15 Settlement Agreement. Petitioner’s requested relief could only be granted by a Superior Court,
16 not an administrative law judge. Accordingly, the Petition must be dismissed.

17 **II. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER’S CLAIMS**
18 **SEEK TO VOID A SETTLEMENT AGREEMENT, WHICH IS NOT WITHIN THE**
19 **AUTHORITY OF THE ADMINISTRATIVE AGENCY**

20 Petitioner’s requested relief would “nullify” the Settlement Agreement and would
21 require the administrative agency to void the contract—an action which has not been delegated to
22 the administrative tribunal. Under Arizona law, “an agency **only has the powers delegated to it**
23 **by the Legislature.**” *Whitmer v. Hilton Casitas Homeowners Association*, 425 Ariz. 77, 80, 425
24 P.3d 253, 256 (App. 2018) (emphasis added). Under A.R.S. § 32-2199, the “administrative law
25 judge shall adjudicate complaints regarding and ensure compliance with: 1) Title 33, chapter 9
26 A.R.S. § 32-2199. Under the statutory scheme, the “administrative law judge may order any party

1 to abide by the statute, condominium documents, community documents or contract provision at
2 issue and may levy a civil penalty on the basis of each violation.”

3 But, the hearing officer can only assess whether a violation of a statute or
4 condominium provision occurred. The Arizona statutes **do not** grant the administrative agency
5 the power to interpret, void, or set aside contractual agreements that are not a part of the
6 Association’s community documents.

7 Here, Petitioner identifies issue # 1 as “Whether the **agreement** to seat Eloise
8 Figueroa (“Figueroa”) and Linda Bahr (“Bahr”) on the Board of Directors . . . should therefore be
9 nullified?” [Petition, p. 1 of Narrative Statement] Essentially, she seeks to “nullify” the
10 Settlement Agreement. Similarly, with her second issue, she seeks to void a portion of the
11 Settlement Agreement regarding the new Board’s ability to fill vacancies.¹ The matter must be
12 dismissed because the issue raised by Petitioner is another attack on the settlement agreement
13 itself, and the administrative law judge lacks authority to void a contract.

14 The Settlement Agreement is not a community document or a statute under Title 33,
15 Sections 9 or 16. Thus, the administrative agency has not been granted authority by the
16 Legislature to determine the validity of the contract contested in the Petition. Any decision by the
17 administrative law judge would be void as a matter of law. The Office of Administrative Hearings
18 does not have authority to nullify, void, or set aside contracts. For this reason alone, the Petition
19 must be dismissed.

20 **III. THE DEPARTMENT OF REAL ESTATE LACKS JURISDICTION TO RESOLVE**
21 **DISPUTES BETWEEN HOMEOWNERS UNDER A.R.S. § 32-2199.01.**

22 Here, the Petition is truly a dispute between a homeowner and another homeowner.
23 The Petitioner, Arleen Jouxson, has a disagreement with Eloise Figueroa. The Petition seeks to
24

25 _____
26 ¹ The settlement agreement provides that the new board can decide, “whether, how, and
with whom” to fill the vacancies. [Exhibit A, p. 2]

1 “un-seat” her from the Board of Directors. That is a homeowner vs. homeowner dispute that
2 cannot be resolved by the homeowner dispute resolution process under A.R.S. 32-2199, et. seq.

3 Under A.R.S. § 32-2199.01, the department does not have jurisdiction to hear a
4 “dispute among or between owners to which the association is not a party.” Essentially, Petitioner
5 is an owner that has a disagreement with another owner, regarding a finalized settlement
6 agreement that resolved a lawsuit filed by Ms. Figueroa. This is not the forum to hear owner vs.
7 owner disputes or to evaluate the merits of a settlement agreement. The Settlement Agreement is
8 binding unless invalidated by the Superior Court. It cannot be challenged under A.R.S. § 32-
9 2199.

10 **IV. PETITIONER’S CLAIMS ARE BARRED BY RES JUDICATA**

11 Petitioner’s claims should further be dismissed because they are barred by res
12 judicata or claim preclusion. Under the doctrine of res judicata, a judgment on the merits in a
13 prior action bars a later action involving the same parties or their privies based on the same cause
14 of action. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). Rule
15 41(b) provides that a dismissal with prejudice “operates as an adjudication upon the merits.” Ariz.
16 R. Civ. P. 41(b).

17 Here, Ms. Figueroa sued the Villages at Aviano Condominium Association, by
18 filing a Complaint in Case No. CV 2021-006916, on April 27, 2021. The parties reached a
19 Settlement Agreement, which was fully executed. As stated in the Settlement Agreement, the
20 lawsuit dealt with the 2021 annual election. [Exhibit A, p. 1]

21 In the Petition, Ms. Jouxson alleges many facts regarding the Settlement Agreement,
22 the seating of Eloise Figueroa and Linda Bahr as directors on the Board of Directors, and the
23 ballots and timeline regarding the 2021 annual election. All of these issues were resolved by the
24 Settlement Agreement. [Exhibit A, p. 1] “The Parties have negotiated a settlement as more
25 particularly described below, of all claims which were asserted by the Parties in the Litigation.”
26 [Exhibit A, p. 1]

EXHIBIT A

SETTLEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement and Mutual Release of Claims (“Agreement”) is entered into and made effective on the last date of the signatures below (the “Effective Date”), by and among the Villages at Aviano Condominium Association, an Arizona non-profit corporation (the “Association”), and Eloise Figueroa (“Figueroa”). The Association and Figueroa are collectively referred to herein as the “Parties.”

RECITALS

1. The Association is a condominium association governed by the Declaration of Restrictions recorded at instrument number 2004-0990817 in the Office of the Maricopa County Recorder (the “Declaration”); Bylaws of the Villages at Aviano Condominium Association dated August 26, 2004 (the “Bylaws”); the Arizona Condominium Act (A.R.S. §33-1201 et seq.); and the Nonprofit Corporation Act (A.R.S. § 10-3101 et seq.).

2. On April 27, 2021, Figueroa filed a complaint in the Superior Court of the State of Arizona in and for the County of Maricopa, Case No. CV2021-006916 (the “Litigation”) concerning the Association’s 2021 annual election.

3. Figueroa alleged in the Litigation that she and Linda Bahr received the two highest number of votes and should have been declared board members.

4. The Parties have agreed to settle the Litigation in accordance with the terms, conditions, covenants, and release set forth in this Agreement.

5. The Parties have negotiated a settlement, as more particularly described below, of all claims which were asserted by the Parties in the Litigation;

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

IT IS HEREBY AGREED:

1. Outcome of 2021 Election: The Association acknowledges and hereby certifies that Figueroa and Bahr are the two candidates receiving the highest number of votes in the 2021 annual election and, therefore, are elected to the Board of Directors. Upon the Parties’ execution of this Agreement and dismissal of the litigation, which shall not be unreasonably delayed or protracted, Figueroa and Bahr will take their seats as board members.

2. Appointed Board Members. Upon the Parties’ execution of this Agreement and dismissal of the litigation, which shall not be unreasonably delayed or protracted, the appointments of Joseph Orr and Tony Cancilla shall terminate and they shall cease to be board members unless they are elected or appointed at a later date.

Settlement Agreement and General Release of Claims

3. Composition of the Board. Figueroa acknowledges that the number of Directors on the Board of Directors expanded from three to five seats and that, upon the seating of Figueroa and Bahr, there will be two vacant board seats. After executing this Agreement, the new Board shall be free to discuss and deliberate at an open Board meeting whether, how, and with whom to fill the two vacant seats.

4. Stipulation to Dismissal of Litigation: The Parties agree to vacate all depositions and the evidentiary hearing in this matter and, upon execution of this Agreement, will dismiss the Litigation with prejudice upon the delivery of the Settlement Funds described in section 5 of this Agreement.

5. Monetary Settlement Amount. In exchange for the Figueroa's dismissal of the Litigation with prejudice and within twenty (20) days of execution of this Agreement, the Association agrees to tender to Figueroa the sum of Seventeen Thousand Dollars (\$17,000) as payment in full of Figueroa's attorneys' fees and costs in this matter ("Settlement Funds"). Payment shall be made payable to the Dessauls Law Group and sent to the following address:

Dessaules Law Group
Attn: Jonathan A. Dessauls
5343 North 16th Street, Suite 200
Phoenix, Arizona 85016

6. Release of Claims: In further consideration of the terms, conditions and covenants contained in this Agreement, the Parties unconditionally release, acquit, and forever discharge one another, their agents, attorneys, accountants, employees, heirs, assigns, successors, predecessors, insurers, and affiliated companies, its/their past and present directors, officers, members, shareholders, agents, and their respective spouses, from any and all claims, demands, actions, causes of action, damages, costs, expenses, and liabilities, whether known or unknown, anticipated or unanticipated, suspected or unsuspected, fixed, contingent, or conditional, at law or in equity, that arise from or are related to the Litigation. Notwithstanding anything to the contrary herein, all Parties shall remain bound by the Association's Declaration, Bylaws, and other governing documents.

7. Representations and Warranties: The Parties represent and warrant that (a) they are executing this Agreement as their free and voluntary act after independent investigation and without fraud, duress or undue influence; (b) they understand the terms and legal significance of this Agreement, and that the terms of this Agreement are contractual and are not merely recitations or representations; (c) they are executing this Agreement after the opportunity to confer with legal counsel of their choice and are not relying and have not relied on any representations or statements other than those representations or statements specifically set forth in this Agreement; and (d) they have the sole right and exclusive authority to execute this Agreement, and have not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims referenced in this Agreement.

8. No Admission of Liability: The execution of this Agreement shall not be construed as an admission of liability or fault by any Party. Any and all liability is expressly denied by all Parties.

9. Choice of Law and Venue: This Agreement shall be construed and enforced in accordance with the laws of the State of Arizona, and any action for the breach of this Agreement, or the enforcement thereof, shall be brought only in a court of competent jurisdiction in Maricopa County, Arizona.

10. Attorney's Fees: In the event any party to this Agreement materially breaches the terms of the Agreement, the non-breaching party may exercise any and all remedies available to it under Arizona law consistent with its rights under this Agreement, including specific performance. In the event an action is brought against a party to enforce the terms or provisions of this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable expenses, including, but not limited to, all reasonable attorneys' fees and costs.

11. No Oral Modification: The terms of this Agreement may only be modified in a writing signed by the Parties.

12. Complete Agreement: This Agreement contains the entire understanding and agreement of the Parties with respect to the subject matter hereof, and supersedes all other written or oral exchanges, agreements, or negotiations between the Parties or their representatives. There are not, and have not been, any verbal or other representations, undertakings, agreements, or promises, warranties, or covenants related to this Agreement, which are not expressly set forth herein. This is an integrated Agreement.

13. Severability: To the fullest extent possible, each provision of this Agreement shall be interpreted in such fashion as to be effective and valid under applicable law. If any provision of this Agreement is declared void or unenforceable with respect to particular circumstances, such provision shall remain in full force and effect in all other circumstances. If any provision of this Agreement is declared void or unenforceable in all circumstances, such provision shall be deemed severed from this Agreement and this Agreement shall otherwise remain in full force and effect.

14. Drafting and Construction: The drafting and negotiation of this Agreement have been participated in by all Parties, and for all purposes this Agreement shall be deemed to have been drafted jointly by the Parties. The Parties mutually acknowledge that this Agreement and the related documents have been reviewed by the Parties hereto and their respective attorneys, and the Parties have had a full opportunity to negotiate the contents hereof. This language of all parts of this Agreement shall be construed as a whole, according to its fair meaning, and the Parties hereby expressly waive any common law or statutory rule of construction that ambiguities should be construed against any party.

15. Captions and Headings: The captions and headings set forth herein are inserted for convenient of the Parties only, and shall not be used to interpret, construe, or in any way affect the meaning of the terms and provisions of this Agreement.

16. Gender. All pronouns and any variation thereof used in this Agreement shall be deemed to refer to the masculine, feminine, neuter, singular and plural, as context requires.

17. Cooperation: Each Party agrees to sign and deliver any additional documents and instruments and to perform any additional acts that any other Party may reasonably request, or as may be reasonably necessary or appropriate to effectuate, consummate, or perform any of the terms, provisions, or conditions of this Agreement.

18. Waiver. A waiver of any breach of this Agreement by any Party shall not constitute a continuing waiver or a waiver of any subsequent breach of the same or any other provision of this Agreement.

19. Incorporation of Recitals: The Parties hereby incorporate the Recitals to this Agreement by reference in their entirety and agree that they shall have the force and effect of stipulations of fact.

20. Execution of Agreement: By affixing their signatures below, the parties mutually certify that they have carefully read this Agreement and fully understand its contents.

21. Counterparts: This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one instrument.

22. Facsimile and Electronic Copies: Further, transmission by facsimile or electronic mail of any signed original document shall be deemed the same as delivery of an original.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the dates set forth below.

**THE VILLAGES AT AVIANO
CONDOMINIUM ASSOCIATION**

By: *Tony Basuni*
Name: TONY BASUNI
Title: PRESIDENT
Date: 06-11-21

ELOISE FIGUEROA

DocuSigned by:
Eloise Figueroa
291BB9F54B5E474...
By: _____
Name: Eloise Figueroa
Date: 6/4/2021

EXHIBIT B

1 Jonathan A. Dessaulles, State Bar No. 019439
Ashley C. Hill, State Bar No. 032486
2 **DESSAULES LAW GROUP**
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5 *Attorneys for Plaintiff*

6 IN THE SUPERIOR COURT OF ARIZONA
7
8 COUNTY OF MARICOPA

8 ELOISE FIGUEROA,
9
10 Plaintiff,
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12 vs.
13 THE VILLAGES AT AVIANO
14 CONDOMINIUM ASSOCIATION, an
Arizona non-profit corporation,
15
16 Defendant.

No. CV2021-006916

**ORDER OF DISMISSAL WITH
PREJUDICE**

(Assigned to the Hon. Pamela Gates)

15 The Court, having reviewed and considered the parties' Stipulation to Dismiss With
16 Prejudice and good cause appearing therefore,

17 **IT IS HEREBY ORDERED** granting the stipulation and dismissing this matter with
18 prejudice, with each party to bear its own attorneys' fees and costs.

19 DATED this ___ day of June 2021.

21 _____
Honorable Pamela Gates

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eSignature Page 1 of 1

Filing ID: 13033625 Case Number: CV2021-006916
Original Filing ID: 13012904

Granted with Modifications



/S/ Pamela Gates Date: 6/19/2021
Judicial Officer of Superior Court

ENDORSEMENT PAGE

CASE NUMBER: CV2021-006916

SIGNATURE DATE: 6/19/2021

E-FILING ID #: 13033625

FILED DATE: 6/22/2021 8:00:00 AM

EDITH I RUDDER

JONATHAN A DESSAULES