

1 **Final agency action regarding decision below:**

2  
3 **ALJCERT ALJ decision certified as final**

4  
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 **MARTIN W. JOHNSON**

8 **Petitioner,**

9 **vs.**

10 **THE CIENTO CONDOMINIUMS**  
11 **HOMEOWNERS' ASSOCIATION,**

12 **Respondent.**

**No. 12F-H1212007-BFS**

**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

13  
14  
15 **HEARING:** July 25, 2012

16 **APPEARANCES:** Petitioner Dr. Martin W. Johnson appeared on his own behalf. Lydia  
17 Peirce Linsmeier, Esq. represented Respondent The Ciento Condominiums  
18 Homeowners' Association.

19 **ADMINISTRATIVE LAW JUDGE:** Sondra J. Vanella

20  
21 **FINDINGS OF FACT**

22  
23 1. At all times relevant to this matter, Petitioner Dr. Martin Johnson resided in the  
24 condominium community known as The Ciento Condominiums Homeowners'  
25 Association ("Ciento"). Dr. Johnson was the former owner of unit 117E, having recently  
26 sold it.

27 2. At all times material to this matter, the community was governed by a Board of  
28 Directors ("Board"). Kenneth Hamby, Jr. is the Treasurer of the Board and owns unit  
29 217E, directly above Dr. Johnson's unit. Mr. Hamby rents unit 217E to a tenant.

30 3. Ciento is governed by Homeowner Association documents such as the Articles of  
Incorporation, Bylaws, Amended Declaration of Covenants, Conditions and Restrictions

1 (“CC&Rs”), and Rules and Regulations. See documents attached to the Petition and  
2 Answer forwarded to the Office of Administrative Hearings by the Department of Fire,  
3 Building and Life Safety (“Department”).

4 4. On February 6, 2012, Dr. Johnson filed a Petition with the Department alleging  
5 the following:

6 The HOA Board has a covenant obligation but they refuse to enforce it.  
7 My unit has been water damaged four times. The by-laws say that the  
8 HOA Board has the authority to repair and charge the owner of the unit  
9 that caused the problem, but they will not do this.<sup>1</sup>

10 5. On April 3, 2012, Ciento filed an Answer to Petition, denying all of the complaint  
11 items in the Petition. However, attached to the Answer was a letter written by Ciento  
12 that states the following in pertinent part:

13 The Ciento Home Owner’s Association is obligated to operate according  
14 to the documents that have been presented. It is true that reparations  
15 and/or reimbursement for damages can be the responsibility of the HOA.  
16 This includes cases where the building’s facilities cause damages as well  
17 as when an adjacent unit’s facilities cause damage. In the second case,  
18 numerous instances exist (including recent events in 2012) where the  
19 HOA has billed individual property owners for damages caused by their  
20 unit to reimburse another unit’s owner for damages incurred.

21 In the case attached we would like to extend an equal opportunity to claim  
22 and receive reimbursement for damages caused by entities external to  
23 Martin Johnson only if the following can be produced:

- 24 1) A description of the repairs made supported by dollar amounts  
25 concurrent with official insurance claim, professional repair bill paid or  
26 quote obtained.  
27 2) Documentation to prove that damages associated with the amount  
28 being requested be reasonably assigned to another unit or building  
29 facilities that are the responsibility of the HOA.

30 In the current complaint filed, in all complaints that the HOA board is  
aware of, and in all complaints that APM Property Management knows of  
neither of the above have been satisfied. Language like “**my** unit,” “they  
will not **do this**” and “damaged by water four times” has not provided  
actionable evidence to justify a response from Ciento HOA.

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<sup>1</sup> It was determined at hearing that Dr. Johnson was actually referring to Article XII, Section 5, of the CC&Rs.

1 Petitioner's Exhibit C. (Emphasis in original.)

2 6. On June 8, 2012, the Department issued a Notice of Hearing to the parties  
3 notifying them that Dr. Johnson has alleged that Ciento has violated the "Bylaws of the  
4 Ciento Homeowners Association ("Respondent") Covenants, Conditions and  
5 Restrictions."

6 7. At hearing, Dr. Johnson testified concerning the chronology of events regarding  
7 the various instances of damage to unit 117E caused by the tenant in unit 217E. See  
8 *also* Exhibit F.

9 8. On September 23, 2009, Dr. Johnson notified Debra Katzenberger, Ciento  
10 property manager through Associated Property Management ("APM"), that there was  
11 damage to his unit caused by a leak in unit 217E. Ms. Katzenberger contacted a  
12 plumber who billed Ciento \$139.36 for the following work:

13 Received work order for a broken toilet in unit 217 East. Tech found toilet  
14 backed up full of toilet paper and debris. Tech augured toilet multiple  
15 times while running water to finally clear blockage. Tech also found toilet  
16 handle and flapper broken so water would not stop flowing. Installed new  
17 handle and flapper. Toilet now working properly. Toilet had been flooding  
18 over for quite some time causing extensive flooding in unit. Extractor  
19 needed to remove water.

18 See Respondent's Exhibit 1.

19 9. Dr. Johnson testified that his unit sustained extensive water damage during this  
20 incident caused by the tenant in unit 217E. Dr. Johnson filed a claim with his  
21 homeowner's insurance company and paid a \$500.00 deductible. The insurance  
22 company paid \$22,762.74 to various contractors to repair the damage to unit 117E.  
23 See Petitioner's Exhibit A. Dr. Johnson testified that it took five months, until February  
24 2010, to complete the restoration.

25 10. By letter dated April 9, 2010, Dr. Johnson's homeowner's insurance company  
26 notified Ciento of the following in pertinent part:

27 This letter is to advise you payment has been issued to our policyholder,  
28 Martin Johnson, for the water damage to his unit . . .

29 Our understanding is that the homeowners association insurance policy  
30 may provide coverage for this loss. Furthermore, the homeowners

1 association policy is primary over the unitowners insurance policy. Please  
2 refer to the following language from the Arizona State Statute 33-1253:

3 "Insurance policies carried pursuant to subsection A of this section  
4 shall provide the following:

5 4. If, at the time of loss under the policy, there is other  
6 insurance in the name of a unitowner covering the same property covered  
7 by the policy, the association's policy provides primary coverage."

8  
9 Based on the information above, we are asserting our legal right to seek  
10 reimbursement under the homeowner's association policy for Ciento  
11 Homeowners Association.

12 See Respondent's Exhibit 2.

13 11. Ms. Katzenberger testified that on September 23, 2009, she received a call from  
14 Dr. Johnson informing her of a leak from the upstairs unit into his unit. Ms.  
15 Katzenberger immediately contacted a plumber to find the cause of the leak and stop  
16 the damage. Ms. Katzenberger testified that she received a letter from Dr. Johnson's  
17 insurer regarding the damage sustained as a result of the leak. Ms. Katzenberger  
18 asserted that she was only aware of one other leak after the September 23, 2009 leak.  
19 Ms. Katzenberger testified that she received Dr. Johnson's letter requesting  
20 reimbursement for damages, however, she did not see the Statement of Loss attached  
21 thereto. Ms. Katzenberger asserted that Dr. Johnson did not provide any requested  
22 documentation to Ciento.

23 12. Dr. Johnson testified that in May 2010, there was another leak from unit 217E  
24 that caused damaged to his kitchen, including the cabinets, counter, and floor. Ciento  
25 hired Arizona Leak Pro Plumbing and Drain Services, LLC ("plumber") to determine the  
26 cause of the leak. See Petitioner's Exhibit B. Dr. Johnson testified that this leak was  
27 caused by a defective p-trap in unit 217E. The plumber billed Ciento \$163.93 and wrote  
28 on its invoice the following notation:

29 Received call from Debbie indicating that water was coming down from  
30 unit 217E into 117E. Tech arrived and found that the water had stopped  
and up on [sic] further investigation it appeared that there was a drain  
problem with the kitchen sink in the upper unit. Tech returned when  
tenant in 217 was home and cabled the kitchen drain line to fix the  
problem.

*Id.* at 4.

1 13. By letter dated July 26, 2010, Dr. Johnson notified Mr. Hamby and enclosed the  
2 Statement of Loss for the September 2009 damage and the May 2010 damage. See  
3 Petitioner's Exhibit A. Dr. Johnson did not receive a response from Mr. Hamby.  
4 Consequently, Dr. Johnson sent another letter to Mr. Hamby requesting a response by  
5 September 14, 2010. See Respondent's Exhibit 3.

6 14. By letter dated September 3, 2010, Mr. Hamby responded denying any  
7 responsibility, stating in pertinent part that Dr. Johnson "failed to show cause or actual  
8 evidence of any direct involvement or negligence on our part that would have resulted in  
9 damage to your property. We therefore consider this matter closed." See Petitioner's  
10 Exhibit 3.

11 15. Dr. Johnson next testified about a September 7, 2011 leak caused by a clogged  
12 toilet in unit 217E that resulted in substantial damage to his bathroom.

13 16. Dr. Johnson testified that on November 15, 2011, another leak emanating from  
14 unit 217E caused damage to his kitchen.

15 17. On January 19, 2012, Dr. Johnson's unit sustained damage once again to the  
16 ceiling, baseboards, and rugs due to the tenant in unit 217E allowing the bathtub to  
17 overflow.

18 18. Dr. Johnson testified regarding his extensive communications with the Board and  
19 Mr. Hamby, as well as the property management company for Ciento.

20 19. Dr. Johnson testified that he wants the Board to be responsible to him and the  
21 owners of Ciento and to have oversight of tenants in Ciento. Dr. Johnson approached  
22 the Board on several occasions to voice his concerns about Mr. Hamby and the  
23 extensive and numerous instances of damage caused by Mr. Hamby's tenant in unit  
24 217E. The Board responded to Dr. Johnson by advising him to take the matter up with  
25 Mr. Hamby, the owner of unit 217E.

26 20. Ciento contended at hearing that Dr. Johnson's dispute lies with Mr. Hamby and  
27 that it is an owner-to-owner dispute. Ciento further contended that it cannot vet tenants,  
28 that it cannot force landlords to vet their tenants, that it is not a police agency, and it  
29 cannot compel Mr. Hamby to reimburse Dr. Johnson for expenses incurred in rectifying  
30 the damages to his unit.

**CONCLUSIONS OF LAW**

1  
2 1. In this proceeding, Dr. Johnson bears the burden of proving by a preponderance  
3 of the evidence that Ciento violated its bylaws and/or the CC&Rs. See A.A.C. R2-19-  
4 119.

5 2. A preponderance of the evidence is “[e]vidence which is of greater weight or more  
6 convincing than the evidence which is offered in opposition to it; that is, evidence which as  
7 a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW  
8 DICTIONARY 1182 (6th ed. 1990).

9 3. Article XII, Section 5, of the CC&Rs governs damage or destruction of property.  
10 That provision states the following in pertinent part:

11 In the event any Common Element or Apartment is damaged or destroyed  
12 by an act, whether negligent or otherwise culpable, by an Owner or any of  
13 his guests, tenants, licensees, agents, employees or members of his family,  
14 such Owner does hereby irrevocably authorize the Association to repair and  
15 replace said damage, and the Association shall so repair said damage in a  
16 good workmanlike manner in substantial conformance with its original  
17 condition. The Owner shall then repay the Association in the amount  
18 actually expended for such repairs.

16 . . .  
17 . . .

17 The Association shall have no responsibility for resolving any disputes  
18 between or among owners, including, without limitation, claims for damage  
19 to the property of one Owner caused by the acts of another.

20 4. In this case, there is no dispute that Mr. Hamby’s tenant in unit 217E caused  
21 damage to Dr. Johnson’s unit 117E, resulting in Dr. Johnson filing a claim with his  
22 insurance company and incurring the cost of a \$500.00 deductible and substantial  
23 inconvenience and discomfort during the restoration. Because Dr. Johnson’s insurance  
24 company undertook the repair of the damage to his unit, Ciento was not placed in the  
25 position of having to do so and recoup the costs associated therewith from Mr. Hamby  
26 as allowed for by Article XII, Section 5 of the CC&Rs.

27 5. The Rules and Regulations of the Ciento Condominiums Article II, Section 8  
28 require each resident to “maintain the plumbing . . . toilets and bathtubs inside his or her  
29 unit in good operating condition and shall not allow the foregoing to become clogged up  
30

1 and overflow to the detriment of the other residents.” Therefore, Mr. Hamby was  
2 responsible for maintaining the plumbing in his unit, not Ciento or the Board.

3 6. The Administrative Law Judge concludes based on the evidence of record and  
4 the governing documents, that this dispute lies between Dr. Johnson and Mr. Hamby, and  
5 that this Tribunal does not have any jurisdiction over Mr. Hamby and his failure to rectify  
6 the situation with Dr. Johnson. Therefore, the Administrative Law Judge further  
7 concludes that Dr. Johnson failed to prove by a preponderance of the evidence that Ciento  
8 violated its bylaws or CC&Rs.<sup>2</sup>

9 7. The Administrative Law Judge concludes that Dr. Johnson’s Petition should be  
10 dismissed.

11 **RECOMMENDED ORDER**

12 In view of the foregoing, IT IS ORDERED that no action is required of Ciento in  
13 this matter and that the Petition be dismissed.

14 *In the event of certification of the Administrative Law Judge Decision by the*  
15 *Director of the Office of Administrative Hearings, the effective date of the Order will be 5*  
16 *days from the date of that certification.*

17  
18 Done this day, August 14, 2012.

19 /s/ Sondra J. Vanella  
20 Administrative Law Judge

21  
22 Transmitted electronically to:

23  
24 Gene Palma, Director  
25 Department of Fire, Building and Life Safety  
26  
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28

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30 \_\_\_\_\_  
<sup>2</sup> Nothing herein should be construed as precluding Dr. Johnson from seeking relief in a court of competent jurisdiction.