

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Sean McCoy
4 Petitioner,
5 vs.
6 Barclay Place Homeowners Association,
7 Respondent.

No. 19F-H1919062-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** December 4, 2019

9 **APPEARANCES:** Petitioner Sean McCoy appeared on his own behalf.
10 Respondent Barclay Place Homeowners Association was represented by Nathan
11 Tennyson.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

13 **FINDINGS OF FACT**

14 1. On or about May 8, 2019, Petitioner Sean McCoy filed a Homeowners
15 Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of
16 Real Estate (Department). Petitioner indicated a three issues would be presented, paid
17 the appropriate \$1,500.00 filing fee, and asserted violations of A.R.S. § 33-1810, A.R.S. §
18 33-1805, A.R.S. § 33-1804, Barclay Place Homeowners Association Bylaws Article VIII,
19 Section 8(D), and Amendment to the Bylaws 3.3, and Desert Ranch Bylaw 2.4. Petitioner
20 summarized his three issues as follows:

21 Complaint One: Failure to allow videotaping, discriminatory application. . . .

22 Complaint Two: Failure to provide required Compiled Financial
23 Statement. . . .

24 Complaint Three: Denial of Homeowner's right to reasonable access and
25 communication.

26 2. On or about May 31, 2019, Respondent submitted an Answer to the Petition
27 in which it denied all of the complaint items in the Petition.

28 3. On or about June 11, 2019, the Department issued a Notice of Hearing in
29 which it set forth the issue for hearing as follows:

30 The Petitioner alleges that the Barclay Place Homeowners Association
violated A.R.S. § 33-1810, 33-1805, 33-1804 and Community Document

1 Bylaws Article VIII, Section 8(D), Amendment to Bylaws in a multiple issue
2 petition.

3 4. At the initial hearing, Petitioner testified on his own behalf. Frank Puma,
4 Jamie Murad, and Dana Young Jungclaus testified on behalf of Respondent.

5 5. At the conclusion of the initial hearing, the Administrative Law Judge issued
6 an Administrative Law Judge Decision in which Petitioner was deemed the prevailing
7 party with respect to Complaint Item Two and Respondent was deemed the prevailing
8 party with respect to Complaint Items One and Three.

9 6. Petitioner filed a Request for Rehearing seeking a rehearing on Complaint
10 Item Three. The Department of Real Estate granted the Request for Rehearing. The
11 rehearing was held on December 4, 2019.

12 Complaint Item Three

13 7. On January 11, 2019, Jamie Murad, Community Manager with AZCMS,
14 emailed Petitioner a “response to the letter” Petitioner had issued to the residents of
15 Barclay Place. The response was a letter from Respondent’s attorney Jonathan Olcott
16 asking Petitioner to provide Mr. Olcott with information Petitioner had referenced in his
17 letter to the residents.

18 8. On or about January 14, 2019, Petitioner sent a letter to Mr. Olcott that
19 provided, in part, as follows:

20 I am confused as to who on the Board instructed you to initiate this
21 communication. Please provide the name of the Board member, the date of
22 the communication, the method of communication, and if in writing, please
23 provide a copy of the communication. If this communication is pursuant to a
24 Board Resolution, please provide a copy of the Resolution, the Notice of
25 Meeting, the agenda and the vote tally for the meeting at which this
26 Resolution was passed.

27 If this communication was initiated by someone other than a Board member,
28 please so state and identify the communicant, including the date, time and
29 method of communication. This request is made pursuant to ARS §33-1805
30 A.

All errors in original.

1 9. On or about January 24, 2019, Jamie Murad, Community Manager with
2 AZCMS, emailed Petitioner a “cease and desist” letter from Respondent’s attorney
3 Jonathan Olcott. The letter advised Petitioner as follows:

4 This law firm represents the Barclay Place Homeowners Association
5 (“Association”). Please be advised all of your further communications
6 regarding the community must be directed to Brown | Olcott. Please do not
7 contact the directors or management company to address any concerns you
8 may have within the community. They will not return your telephone calls.
9 They will not respond to your emails. If you wish to address any community
10 concerns, you may contact Brown | Olcott in writing at 5201 N. 7th Avenue,
11 Phoenix, AZ 85013. You may also attend board meetings. You may not
12 communicate directly with the Board Members outside of the board
13 meetings. You may not communicate directly with any Arizona Community
14 Management Service employees. That you for your anticipated
15 cooperation.

16 10. On or about January 24, 2019, Petitioner’s attorney, James A. Whitehill, sent
17 a letter to Mr. Olcott indicating that Petitioner was “entitled to communicate with his fellow
18 members of the association and with the board members of his homeowner’s association”
19 and that he also had “a right to communicate with the management firm of the association
20 regarding association business.” At hearing, Petitioner asserted that this letter from his
21 attorney, in some way, rescinded the cease and desist letter issued by Respondent’s
22 attorney on January 14, 2019.

23 11. On or about March 6, 2019, Petitioner emailed Ms. Murad the following
24 document request,

25 Please send me copies of each year’s contracts and fee schedules for
26 contracts between AZCMS and Barclay Place HOA for the years 2017-18
27 and 2018-19. I am making this request under the provisions of ARS 33-
28 1805A. Your timely compliance with this request is both anticipated and
29 appreciated.

30 All errors in original.

12. On or about March 8, 2019, Frank Puma, Vice President of Client
Operations with AZCMS, responded to Petitioner’s email as follows:

Attached please find the letter, dated January 23, 2019, sent to you from
Jonathan Olcott, legal counsel for Barclay Place Homeowners Association.

1 You have failed to comply with the communication instructions outlined in
2 the letter. Please consider this email as our final notice that this office, will
3 no longer accept emails from you (any AZCMS employee). We have
4 blocked you from our server effective immediately. Please send further
correspondence as directed in the attached letter. Other forms of
correspondence will not be accepted.

5 All errors in original.

6
7 13. Attached to the email was a letter from Mr. Olcott that provided as follows:

8 This law firm represents the Barclay Place Homeowners Association
9 (“Association”). Please be advised all of your further communications regarding
10 the community must be directed to Brown | Olcott via United States Mail. Please do
11 not contact the directors or management company to address any concerns you
12 may have within the community. They will not return your telephone calls. They
13 will not respond to your emails. If you wish to address any community concerns,
14 you may contact Brown | Olcott in writing at 5201 N. 7th Avenue, Phoenix, AZ
85013. You may also attend board meetings. You may not communicate directly
with the Board Members outside of the board meetings. You may not
communicate directly with any of Arizona Community Management Service
employees. Thank you for your anticipated cooperation.

15 **CONCLUSIONS OF LAW**

16 1. Arizona statute permits an owner or a planned community organization to
17 file a petition with the Department for a hearing concerning violations of planned
18 community documents or violations of statutes that regulate planned communities.
19 A.R.S. § 32-2199 *et seq.* That statute provides that such petitions will be heard before the
20 Office of Administrative Hearings.

21 2. Petitioner bears the burden of proof to establish that Respondent committed
22 the alleged violations by a preponderance of the evidence.¹ Respondent bears the burden
23 to establish affirmative defenses by the same evidentiary standard.²

24 3. “A preponderance of the evidence is such proof as convinces the trier of fact
25 that the contention is more probably true than not.”³ A preponderance of the evidence is
26 “[t]he greater weight of the evidence, not necessarily established by the greater number of
27

28 ¹ See ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); *see also Vazanno v. Superior Court*,
74 Ariz. 369, 372, 249 P.2d 837 (1952).

29 ² See A.A.C. R2-19-119(B)(2).

30 ³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
4 the other.”⁴

5 Complaint Item Three

6 4. A.R.S. § 33-1805 provides, in relevant part, as follows:

7 A. Except as provided in subsection B of this section, all financial and other
8 records of the association shall be made reasonably available for
9 examination by any member or any person designated by the member in
10 writing as the member's representative. The association shall not charge a
11 member or any person designated by the member in writing for making
12 material available for review. The association shall have ten business days
13 to fulfill a request for examination. . . .

14 B. Books and records kept by or on behalf of the association and the board
15 may be withheld from disclosure to the extent that the portion withheld
16 relates to any of the following:

17 1. Privileged communication between an attorney for the association and
18 the association.

19 5. Petitioner’s January 14, 2019 request was made to the attorney prior to Mr.
20 Olcott issuing the cease and desist letter on January 24, 2019. Further, the request was
21 seeking privileged communications between Mr. Olcott and the association. Accordingly,
22 Mr. Olcott was not required to respond to Petitioner’s January 14, 2019 request at that
23 time.

24 6. Petitioner’s March 6, 2019 request was made to Ms. Murad after Mr. Olcott
25 issued the cease and desist letter on January 24, 2019. While Petitioner asserted that the
26 January 24, 2019 letter from his attorney to Mr. Olcott somehow terminated the cease and
27 desist letter, Petitioner offered no authority for such an assertion. Accordingly, Ms. Murad
28 was not required to respond to Petitioner’s March 6, 2019 request at that time.

29 7. Thus, Petitioner failed to establish that Respondent violated the provisions
30 of A.R.S. § 33-1805.

ORDER

IT IS ORDERED that Petitioner’s petition is denied as set forth above.

⁴ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

1 **IT IS FURTHER ORDERED** that Respondent be deemed the prevailing party with
2 respect to Complaint Item Three.

3
4 **NOTICE**

5 **This administrative law judge order, having been issued as a**
6 **result of a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B).**
7 **A party wishing to appeal this order must seek judicial review as**
8 **prescribed by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6.**
9 **Any such appeal must be filed with the superior court within thirty-five**
10 **days from the date when a copy of this order was served upon the**
11 **parties. A.R.S. § 12-904(A).**

12 Done this day, January 2, 2020.

13
14 /s/ Tammy L. Eigenheer
15 Administrative Law Judge

16 Transmitted by either mail, e-mail, or facsimile January 2, 2020 to:

17 Judy Lowe, Commissioner
18 Arizona Department of Real Estate
19 100 N. 15th Avenue, Suite 201
20 Phoenix, Arizona 85007

21 Attn:

22 jlowe@azre.gov
23 LDetorre@azre.gov
24 AHansen@azre.gov
25 djones@azre.gov
26 DGardner@azre.gov
27 ncano@azre.gov

Sean McCoy
PO Box 12757
Scottsdale, AZ 85267

Nathan Tennyson
BROWN/OLCOTT, PLLC
373 S. Main Ave.
Tucson, AZ 85701

Nathan Tennyson
5201 N. 7th Ave
Phoenix, AZ 85013
nathant@azhoalaw.net

28
29 By

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30