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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF MARICOPA

8 PATRICIA BOCCHINO,

9 Plaintiff,

10 v.

11 FOUNTAIN SHADOWS
12 HOMEOWNERS ASSOCIATION,

13 Defendant.

Case No.: CV2015-012434

**DEFENDANT’S REPLY IN SUPPORT
OF DEFENDANT’S CROSS-MOTION
FOR SUMMARY JUDGMENT**

*(Assigned to the Honorable
Douglas Gerlach)*

14 Defendant Fountain Shadows Homeowners Association (the “Association”), by and
15 through undersigned counsel, hereby submits its Reply in support of the Association’s
16 Cross Motion for Summary Judgment (the “Cross Motion”). Because there are no genuine
17 issues of material fact and the law supports the actions taken by the Association,
18 Defendant’s Cross Motion should be granted in favor of the Association.

19 **I. The Contract entitles Association Legal Fees to Enforce Plaintiff’s Compliance
20 with the Declaration.**

21 Plaintiff continues to emphasize that the Association obtained an *ex parte* Injunction
22 against Workplace Harassment against Plaintiff. Procedurally, hearings for Injunction

1 Against Workplace Harassment are generally held without the Defendant. The Association
2 does not dispute this. It is also undisputed that the Association did not request attorney's
3 fees in its petition for the Injunction Against Work Place Harassment filed against Plaintiff
4 for her violation of the Declaration and other Governing Documents by acting in a
5 harassing manner constituting offensive behavior. *See* CSOF at ¶ 6.

6 The fact that Plaintiff was not present at the injunction hearing (which generally
7 occurs without the Defendant) or that the legal fees were not reduced to a judgment do not
8 support Plaintiff's claim that the Association is not contractually entitled to legal fees and
9 costs incurred for Plaintiff's breach of contract. Plaintiff could have requested a hearing to
10 contest the injunction, but did not. Therefore, she waived her right to do so and, by her
11 refusal to do so, effectively admitted to harassing the Association, its directors and
12 managing agents.

13 Plaintiff breached Article XIII, Section 10 of the Declaration by harassing the
14 Association's board members and employees of the Association's managing agent, Planned
15 Development Services, Inc. by engaging in a series of acts that have caused the board
16 members to be both seriously harmed and annoyed. *See* CSOF at ¶ 8. As a result of her
17 actions, the Association incurred attorneys' fees, costs and expenses to enforce Plaintiff's
18 compliance with the terms and conditions of the contractual Declaration, including but
19 limited to filing and obtaining an Injunction Against Workplace Harassment. *See* CSOF at
20 ¶ 9.

21 **II. The Declaration entitles the Association to Legal Fees**

1 In Plaintiff's Response to the Association's Cross-Motion for Summary Judgment,
2 she incorrectly asserts that the Association claims it has a statutory right to attorneys' fees
3 because it was entitled to an Injunction Against Workplace Harassment. *Pl. Resp. 3:6-8*.
4 The Association's claim for legal fees is based on contract not based on statute. The
5 Declaration entitles the Association to its legal fees incurred to enforce Plaintiff's
6 compliance with the contractual Declaration.

7 The plain language of the Declaration's provision for attorneys' fees, costs and
8 expenses does not require that such fees and costs be litigated in a lawsuit and ultimately
9 awarded in a judgment as a prerequisite to reimbursement. The plain language of this
10 provision specifies that if the Association prevails in an action seeking enforcement of the
11 terms and conditions of the Declaration, then the Association is entitled to all attorneys'
12 fees, costs, and expenses. See CSOF at ¶ 11. The Association had different options in
13 enforcing compliance with the Declaration. It chose to proceed with obtaining an
14 injunction against harassment because that was the most likely option to effect compliance
15 with the Declaration. Making this choice did not eliminate its right to reimbursement of
16 expenses pursuant to the Declaration.

17 "[I]t is well-settled in Arizona that '[c]ontracts for payment of attorneys' fees are
18 enforced in accordance with the terms of the contract.'" *McDowell Mountain Ranch Cmty.*
19 *Ass'n v. Simons*, 216 Ariz. 266, ¶ 14, 165 P.3d 667, 670 (App.2007), quoting *Heritage*
20 *Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App.1977).

21 In this case, provision in the Declaration provides:
22

1 In the event the Association employs an attorney or attorneys to enforce the
2 collection of any amounts due pursuant to this Declaration or in connection
3 with any lien provided for herein, or the foreclosure thereof, **or to enforce**
4 **compliance with or specific performance of the terms and conditions of**
5 **this Declaration, the Owner, Owners and parties against whom the action**
6 **is brought shall pay all attorneys' fees and costs and expenses thereby**
7 **incurred by the Association in the event the Association prevails in any**
8 **such action.**

9 See CSOF at ¶ 10 (emphasis added).

10 The Association employed an attorney to enforce Plaintiff's compliance with the
11 terms of the Declaration—to require that Plaintiff cease and desist her offensive behavior—
12 and prevailed in obtaining an Injunction Against Workplace Harassment in its favor. The
13 Association is contractually entitled to the legal fees and costs it incurred for Plaintiff's
14 breach of contract.

15 **III. The Declaration's Attorneys' Fees Provision is Applicable**

16 Plaintiff also claims that her actions did not constitute a nuisance and therefore the
17 nuisance provision of the Declaration does not apply. Specifically, the Declaration
18 prohibits members or residents in the community from carrying on any offensive activity:

19 No noxious or offensive activity shall be carried on upon any Lot or any part
20 of the Properties, nor shall anything be done thereupon which may be, or may
21 become, an annoyance or nuisance to the neighborhood, or which shall in any
22 way interfere with the quiet enjoyment of each of the Owners of his respective
Townhouse, or which shall in any way increase the rate of insurance.

Plaintiff engaged in a series of acts that have caused the board members to be both
seriously harmed and annoyed. See CSOF at ¶ 8. Plaintiff removed "closed" signs at the
Association pool that were required by Maricopa County Health Services. *Id.* Plaintiff
used e-mail, voice mail, phone conversations and her physical presence at Association

1 Board of Directors meetings to continuously harass the members of the Association. *Id.*
2 Her actions required members of Glendale Police Department, including SWAT team
3 members, to attend the Association's Board of Directors meetings. *Id.* As a result of her
4 actions, many of which occurred on her Lot or the "Properties" as those terms are defined
5 in the Declaration, the Association incurred attorneys' fees, costs and expenses to enforce
6 Plaintiff's compliance with the terms and conditions of the contractual Declaration,
7 including but limited to filing and obtaining an Injunction Against Workplace Harassment.
8 *See* CSOF at ¶ 9.

9 Therefore, Art. XIII, Sec. 10 of the Declaration applies. Plaintiff's violated the
10 Declaration because her actions became an annoyance and nuisance and otherwise
11 interfered with the quiet enjoyment of each of the Owners.

12 **IV. Arizona Rules of Civil Procedure 54(g) Does not Apply**

13 Plaintiff claims she was not afforded protections of Rule 54(g), ARIZ. R. CIV. P. It is
14 undisputed that the Association did not request attorney's fees in its petition for the
15 Injunction Against Work Place Harassment filed against Plaintiff for her violation of the
16 Declaration and other Governing Documents by acting in a harassing manner constituting
17 offensive behavior. However, the plain language of the Declaration's provision for
18 attorneys' fees, costs and expenses do not require that such fees and costs be litigated in a
19 lawsuit and ultimately awarded in a judgment. The plain language of this provision
20 specifies that if the Association prevails in an action seeking enforcement of the terms and
21 conditions of the Declaration, then the Association is entitled to all attorneys' fees, costs,
22 and expenses. *See* CSOF at ¶ 11.

1 Therefore, Rule 54(g), ARIZ. R. CIV. P. does not apply.

2 **V. Plaintiff Failed to Preserve her Breach of Contract Claim**

3 All that is required to waive a breach of contract claim is knowledge of the essential
4 facts that give rise to the claim, not the legal effect of those facts. *Restatement (Second) of*
5 *Contracts* § 84 cmt. b. (1981) (“The common definition of waiver may lead to the incorrect
6 inference that the promisor must know his legal rights ... it is sufficient if he has reason to
7 know the essential facts.”)⁴; see also *Sw. Cotton Co. v. Valley Bank*, 26 Ariz. 559, 563, 227
8 P. 986, 988 (1924) (holding that waiver occurs when one who is in possession of a right
9 and is “with full information of the material facts” acts inconsistently with that right
10 (citation omitted)) *In re Estate of Cortez*, 226 Ariz. 207, 212, ¶ 8, 245 P.3d 892, 897
11 (App.2010) (holding that the type of knowledge a party must have to intentionally waive a
12 known right is knowledge that “one using reasonable care or diligence should have”).

13 Here, Plaintiff was aware she was being charged for attorneys’ fees and costs. See
14 Pl. SOF at ¶ ¶18-20; 24-25. Attorneys’ Fees have been on her account since May 2015.
15 See Pl. SOF ¶ 14. Plaintiff entered into a binding contract for the sale of her Unit in
16 August 2015. On September 18, 2015, a check was tendered to the Association for
17 “Owners Current Balance.” See Pl. SOF at ¶ 30. Prior to the sale of her Unit, Plaintiff did
18 not restrictively endorse the check or otherwise communicate to the Association that she
19 disputed the amounts sought by the Association for her breach of the Declaration. Plaintiff
20 chose not to take the opportunity to contest or otherwise negotiate the legal fees prior to
21 close of escrow. Plaintiff chose to pay the legal fees and costs in full.

1 **VI. Plaintiff Fails to Meet The Burden of Proving the Legal Fees are Clearly**
2 **Excessive**

3 To establish a claim that the Association is not entitled to all of its legal fees
4 pursuant to a provision in the Declaration awarding the Association all of its attorneys'
5 fees, a homeowner has the burden of showing that the attorneys' fees were clearly
6 excessive, and if such showing was not made, then association would be entitled to receive
7 the full amount of requested attorney fees. *McDowell Mountain Ranch Community v.*
8 *Simons*, 216 Ariz. 266, 270, ¶ 16, 165 P.3d 667, 671 (App.2007).

9 An agreement by the parties as to the amount of attorneys' fees is not contrary to
10 public policy and is analogous to a contract for indemnity and a contractual fee provision
11 stipulating to a certain amount or percentage of attorneys' fees "is binding only to the
12 extent that it is reasonable; however, where the services have been rendered, and the
13 amount stipulated is not obviously excessive, the stipulation as to the amount should
14 govern." *Elson Dev. Co. v. Ariz. Sav. & Loan Ass'n*, 99 Ariz. 217, 407 P.2d 930 (1965).

15 Plaintiff has failed to provide any evidence to support that the legal fees incurred by
16 the Association for her harassing and offensive behavior is clearly excessive. In fact,
17 Plaintiff paid in full all of the legal fees incurred by the Association and did not contest the
18 amounts prior to payment.

19 **VII. Conclusion**

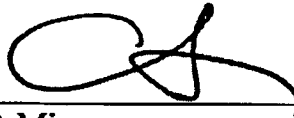
20 It is important to keep in mind the reason the parties are in this Court. Plaintiff was
21 acting in such a manner as to justify a court to issue an injunction against harassment. The
22 court that issued the injunction against harassment, which was never disputed by Plaintiff,

1 clearly determined that harassment was occurring. Harassment is inherently offensive and
2 violative of the Declaration. The Declaration imposes a duty upon the Association to
3 enforce its terms. *See* Declaration at 24 [Art. XVII, Sec. 2]. As a result, the Association
4 was obligated by law to enforce the Declaration, which it did. *See Johnson v. Pointe Cmty.*
5 *Ass'n, Inc.*, 205 Ariz. 485, 490, 73 P.3d 616, 621 (Ct. App. 2003). The Association is
6 entitled to be reimbursed for expenses incurred in taking action required of it by law. The
7 party that must be held responsible for reimbursement is appropriately and fairly the party
8 that acted in violation of the Declaration and that necessitated the incurrence of those
9 expenses.

10 For the reasons stated herein and in the Association's Cross Motion, along with the
11 matters of record in this case, the Association respectfully requests that the Court grant its
12 Cross-Motion for Summary Judgment in favor of the Association.

13 RESPECTFULLY SUBMITTED this 9th day of May, 2016.

14 **Carpenter, Hazlewood, Delgado & Bolen, PLC**

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19 ORIGINAL of the foregoing filed
20 this 9th day of May, 2016 with:

21 Clerk of the Court
22 Maricopa County Superior Court
www.AZTurboCourt.gov

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