

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-012434

07/27/2016

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
D Arrieta
Deputy

PATRICIA BOCCHINO

JONATHAN A DESSAULES

v.

FOUNTAIN SHADOWS HOMEOWNERS
ASSOCIATION

CHAD PHILIP MIESEN

DEBORA L VERDIER

MINUTE ENTRY

Motions for summary judgment were filed on behalf of plaintiff Patricia Bocchino and defendant Fountain Shadows Homeowners Association. The success of both motions turns on whether an injunction against Bocchino that the Association obtained is viable. For reasons explained below, that injunction is unconstitutionally vague and overbroad, and therefore, it is unenforceable. Because of that, the Bocchino motion must be granted, and the Association's motion must be denied.

Relevant Facts.

At an ex parte proceeding without notice, the Association persuaded the Manistee Justice Court (Surprise, Arizona) to issue an Injunction Against Workplace Harassment against Bocchino, who at the time owned and resided in a condominium unit located in a community that was governed by the Association and subject to a set of recorded covenants, conditions, and restrictions. [Def's. Fact State. (3/28/16) at 3-4, paras. 1-5, 8 and Ex. B] In support of the injunction, the Association maintained that Bocchino had violated those CC&Rs by engaging in "harassing" and "offensive behavior." [*Id.* at 4, para. 6] The injunction, among other things, prohibits Bocchino from "go[ing] . . . near" three named persons and four separate addresses, one of which is the address for the Association that is on file with the Arizona Corporation

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Commission, and another of which is the address for the main branch of the City of Glendale library (at which, the court was told at a hearing, the Association conducts meetings from time to time). [*Id.*, Ex. B]

The Association assessed Bocchino \$3,887.28 unilaterally for the attorney's fees it claims to have expended to obtain the ex parte injunction and then imposed a lien on her property in that amount. [Pltf's. Fact State, (2/9/16) at 5, para. 31; Def's. Fact State. (3/28/16) at 3/31] In doing so, the Association relied on a provision of the CC&Rs that permits the recovery of attorney's fees when the Association "prevails" in any legal proceeding that requires the Association to "employ[] an attorney or attorneys" in an effort "to enforce compliance with or specific performance of the terms and conditions of [the CC&Rs]." [Def's. Fact State. at 5, para. 33]¹

Bocchino later sold her condominium unit. Because of the lien recorded by the Association, at the closing of the sale, the assessed attorney's fees were deducted from the proceeds that she otherwise would have received. [Pltf's. Fact State. (2/9/16) at 5, paras. 29, 31; Def's. Fact State. (3/28/16) at 3, paras. 29, 31] Bocchino then filed the complaint in this action, seeking to recover the attorney's fees that the Association had assessed.²

Applicable Law.

To survive constitutional scrutiny, an injunction must be specific enough so that "uncertainty and confusion on the part of those faced with injunctive orders" is prevented, so that "the possible founding of a contempt citation on a decree too vague to be understood" is avoided, and so that a reviewing court can "know precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 475-76 (1974); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 444 (1974) ("[T]hose against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits"). "The judicial contempt power" that is available when injunctions are violated "is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). After all,

¹ Each week day that courts are open throughout Arizona, many citizens obtain injunctions against harassment and similar orders without the assistance of an attorney. The three individuals named as protected persons in the injunction faced no impediment to proceeding in the same way. The record fails to establish why, therefore, it was reasonable to retain attorneys given the nature of the conduct alleged, including why it was reasonable to send two attorneys to an uncontested, ex parte hearing and then assess Bocchino for both attorneys' time charges. Whether the attorneys' fees assessed against Bocchino were reasonable in the circumstances presented is not, however, an issue that the court must decide before reaching the result here.

² Although the amount of Bocchino's claimed damages subjects this action to compulsory arbitration, because the Bocchino motion seeks "dispos[ition] of the entire case," the motion is for the assigned judge and not the court-appointed arbitrator. Ariz. Rs. Civ. P. 72, 74(c)(1)(E).

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violation of an injunction can lead to arrest and incarceration. *E.g.*, A.R.S. §12-1810(N); *Alderwoods Group, Inc. v. Garcia*, 682 F.2d 958, 966 (11th Cir. 2012) (referring to incarceration as a “traditional sanction[] for coercing compliance with an injunction”). Thus, before a court may find one in contempt, “the underlying decree [must] set forth the terms of compliance in clear, specific and unambiguous terms so that the person charged with obeying the decree will readily know exactly what duties and obligations are imposed upon him.” *Munari v. Hotham*, 217 Ariz. 599, 604, ¶22, 177 P.3d 860, 865 (App. 2008) (*quoting with approval Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995) (alteration in original)); *see also BMO Harris Bank Nat’l Ass’n v. Bluff*, 229 Ariz. 511, 514, ¶7, 277 P.3d 216, 219 (App. 2012) (contempt requires a finding that a party “violated a specific and definite order of the court”).

Independent of that, an injunction also fails to pass constitutional muster when it proscribes activities in which people have a right to engage. *See* A.R.S. §12-1810(L)(2) (injunction against workplace enforcement may not enjoin “activities that are constitutionally protected or otherwise protected by law”); *see also Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 765 (1994); *United States v. Jones*, 677 F.Supp. 238, 240 n.2 (S.D.N.Y. 1988); *LaFaro v. Cahill*, 203 Ariz. 482, 487, ¶17, 56 P.3d 56, 61 (App. 2002).

Prohibiting Bocchino from going “near” a location fails to provide her (or anyone else, including a reviewing court) with fair, precise, definite notice about where she is and is not permitted to travel. Indeed, public records establish that the condominium unit in which she resided might reasonably be considered “near” at least one, and perhaps two, of the addresses identified in the injunction, meaning that she would have violated the terms of the injunction whenever she ate a meal, talked on the telephone, or went to sleep in her unit.

Apart from that, even if one were to assume that Bocchino engaged in conduct that violated the CC&Rs sufficient to permit the Association to seek injunctive relief, the injunction issued by the justice court goes far beyond enjoining harassing and offensive behavior. For example, the injunction prohibits Bocchino from visiting a public library, even at times when the individuals named as protected persons in the injunction are not present (as if that should matter). The injunction also prohibits Bocchino from walking back and forth in front of the Association’s office while, without impeding anyone’s ability to enter or leave, handing out leaflets that are critical of actions taken by the Association’s directors or asking passersby to join efforts to remove one of the directors. In that way, the injunction, as it is written, operates as an impermissible restriction on First Amendment rights. *See e.g., Madsen*, 512 U.S. at 765-66.

The assessment of attorney’s fees assumes that the Association was the “prevailing party” in the justice court action. [Def’s. Fact State. at 5, para. 33] In normal English usage, “prevail” contemplates some sort of resistance or opposition, which the Association did not experience when obtaining the injunction. *See e.g., Webster’s New International Dictionary of the English*

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Language (Unabridged) 1797 (3d ed. 2002) (defining “prevail” to mean “to gain victory . . . triumph – use with *over* or *against*” (italics in original)); *The American Heritage Dictionary of the English Language* 1391 (4th ed. 2000) (defining “prevail” to mean “triumph” as in “prevail[ing] against the enemy”).³ Under no relevant authority provided by the Association, nor any that the court’s own research uncovered, does success in an uncontested, ex parte proceeding for which the would-be opponent is, as here, not given notice make one a prevailing party. Second, and in any event, as a matter of mere common sense, one “prevails” only when one achieves success.⁴ The Association, however, obtained an injunction that is unenforceable. That surely was not the result that the Association was intent on achieving when it initiated the action against Bocchino, but in any event, by no recognized standard does the Association’s failure to obtain an injunction that complies with constitutional requirements transform the Association into a successful, and thus, prevailing party in that action.

In short, no sound reason permits recognizing the Association as the prevailing party for purposes of the injunction. And, if the Association is not a prevailing party, then by the express terms of the CC&Rs on which the Association relies, it has no basis for recovering any attorney’s fees incurred in connection with the injunction.

IT IS ORDERED:

1. The motion for summary judgment filed on behalf of plaintiff Patricia Bocchino is granted, and the motion for summary judgment filed on behalf of defendant Fountain Shadows Homeowners Association is denied.

2. Bocchino is entitled to judgment in her favor and against the Association in the amount of \$3,887.28.

³ The CC&Rs constitute a contract. *E.g., Ahwatukee Custom Estates Mgt. Ass’n v. Turner*, 196 Ariz. 631, 634, ¶5, 2 P.3d 1276, 1279 (App. 2000). The interpretation of a contract is a question of law. *E.g., Chandler Medical Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993). Words of a contract are given “their normal, ordinary meaning.” *Bekins Van Lines Co. v. Hartford Ins. Group*, 27 Ariz. App. 655, 659, 557 P.2d 1087, 1091 (App. 1976). When determining the ordinary meaning of contract terms, courts may rely on reputable dictionaries. *See e.g., Horton v. Mitchell*, 200 Ariz. 523, 527, ¶18, 29 P.3d 870, 875 (App. 2001) (using dictionary to assist in determination of ordinary meaning of contract terms). *Webster’s (Unabridged) New International*, cited above, is the dictionary cited most often in opinions of the United States Supreme Court. Jeffrey L. Kirchmeier and Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 Marq. L. Rev. 77, 94 (2010).

⁴ “Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons.” *UIP Ltd., L.L.C. v. Lincoln Nat’l Life Ins. Co.*, No. CV 09-0006-PHX-NVW, 2009 WL 4497233, at *9 (D. Ariz. Nov. 30, 2009) (citation, internal quotation marks, and alteration omitted).

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3. This is an action arising out of a contract. Therefore, Bocchino may, within 30 days of the entry of this order, submit an application for an award of attorney's fees and a statement of costs. If either an application or statement is submitted that the Association wishes to oppose, its response must be filed not later than 25 calendar days after service of Bocchino's papers. Bocchino may not file a reply unless requested to do so by the court.

Before submitting an application or statement, Bocchino must undertake good faith efforts to negotiate a stipulation with the Association regarding the amounts to be awarded. Such a stipulation will NOT preclude the Association from raising any issue or asserting any argument on appeal other than the reasonableness of the amounts awarded.

4. Not later than 30 days after the entry of this order, Bocchino must submit a proposed form of judgment, leaving blank spaces for attorney's fees and taxable costs. That form of judgment may incorporate by reference what is said here, but otherwise it should be confined to the amounts being awarded along with Rule 54(c) language