

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-019511

10/10/2022

HONORABLE JOAN M. SINCLAIR

CLERK OF THE COURT  
S. Motzer  
Deputy

JENNIFER DUNCAN, et al.

RODNEY GALARZA

v.

LABLONDE DEVELOPMENT  
CORPORATION, et al.

BENJAMIN J BRANSON

HAIDYN DILORENZO  
DOCKET CV TX  
JUDGE SINCLAIR

MINUTE ENTRY

Defendant Talus Homeowners' Association ("HOA") filed a Motion to Dismiss along with supporting exhibits on June 3, 2022. This is relative to count 5 of the Plaintiff's First Amended Complaint ("FAC"). Plaintiffs filed their Response on July 11, 2022. Defendant HOA then filed its Reply on July 18, 2022. Neither party requested oral argument. With the matter being fully briefed, the Court now rules.

In count 5 of the FAC, the Plaintiffs requested injunctive relief against the HOA. Plaintiffs seek a preliminary injunction to stop the HOA "from taking any action against the Plaintiffs regarding construction of their home." FAC, ¶ 63. The HOA is assessing fines and demanding "repairs to the grading and drainage *now*." FAC, ¶¶ 50, 53 (emphasis in original). The other claims in the FAC are against the builder and its president for construction defects. These defects include grading and drainage issues. FAC, ¶ 47.

This motion is a Rule 12(b)(6) motion alleging the failure to state a claim upon which relief can be granted. Rule 12(b)(6), Ariz. R. Civ. P. "The general rule in deciding a motion to dismiss is that all of the material allegations of the pleadings of the nonmoving party are taken as true."

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-019511

10/10/2022

*Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284 (1966) (citations omitted). “[M]otions to dismiss [for failure to state a claim] are not favored” in Arizona. *Folk v. City of Phoenix*, 27 Ariz. App. 146, 151 (1976) (“*Folk*”). Such motions should not be granted unless it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated. *Folk*, *id.* at 151 (citations omitted).

The Plaintiffs argue that it would be unrealistically expensive to make repairs now since the entire house may need to be razed and rebuilt, and because the house is the subject of litigation, the property cannot be altered or destroyed in any way. The HOA counters that it is seeking only temporary repairs that would alleviate any damage to the common areas or other properties and there are ways to document the current status of the property so that there is minimal change from any temporary repairs. The Court is mindful that on a motion to dismiss, the Court must accept the material allegations of the nonmoving party as true. Homeowners and HOAs have in fact sued each other in Arizona and requested injunctive relief. See *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309 (App. 2011) and *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195 (App. 2007).

The HOA argues that because it is acting within its authority, the Plaintiffs cannot seek to enjoin the HOA. Plaintiffs want to stop the HOA from taking any enforcement action against them while their lawsuit against the builder goes forward. Both parties argue the relative strength of their cases vis-à-vis the criteria for determining whether a preliminary injunction should be issued. The narrow issue presented here is whether the Plaintiffs can bring a preliminary injunction action against the Defendant HOA. The Court clarified at a recent status conference that the parties wish the Court to make a determination on the preliminary injunction solely based on the pleadings. The Court concludes that the Plaintiffs should not obtain a preliminary injunction in this situation and therefore grants the HOA’s motion to dismiss.

The Declaration of Covenants, Conditions and Restrictions (“CC&Rs”) of the HOA form a contract between the individual homeowners and other homeowners and the HOA. See *Powell v. Washburn*, 211 Ariz. 553, 555-56, ¶ 8 (2006). “[W]here the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.” *D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co. of Wisconsin*, 96 Ariz. 399, 403 (1964) (citations omitted).

Under the “Special Assessments” section of the CC&Rs, the Board may make a finding that an owner is failing to perform any of its obligations where that owner’s property “is maintained so as to present a public or private nuisance or to substantially detract from the appearance or quality of the Property... .” Exhibit B to Motion (“CC&Rs”), Section 6.05, p. 9. The Board then may require corrective action within 14 days after providing notice to the owner.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-019511

10/10/2022

According to the Motion, “due to improper and unapproved grading on Plaintiffs’ Lot, the surface draining off of Plaintiffs’ Lot drains to Adjacent Lots, Common Areas or open spaces and causes a health, safety and erosion issue on other Lots and the Association’s common areas in violation of Article 6, Section 6.05(a) of the Declaration.” Motion, p. 5; see also photos in Exhibit C to the Motion. The HOA has the duty and obligation to enforce the restrictions of the CC&Rs. Article 11 § 11.01 of the CC&Rs (“These restrictions may be enforced by the Association, which shall have the right and duty to enforce the same...”). Actions taken by the HOA to enforce its restrictions are therefore within its authority under the CC&Rs.

“A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction.” *Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, \*12, ¶ 12 (App. 2009) (citation omitted); *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

Because Plaintiffs seek to enjoin the HOA from taking action that it is required to take, the likelihood of success on the merits by the Plaintiffs is not high. This factor favors the HOA. “A court should not wield its injunctive power to disrupt the settled rights of others without first requiring from the applicant significant evidence that he is on legally solid ground.” *P & P Mehta LLC v. Jones*, 211 Ariz. 505, 507, ¶ 9 (App. 2005).

As to the possibility of irreparable injury, if the HOA cannot take action against the Plaintiffs to protect other lots or the common areas, this opens the HOA up to lawsuits by other owners for violating its duty under the CC&Rs. Taking temporary remedial measures to address a drainage problem should not be a crushing financial burden. Moreover, if a spoliation motion is filed by LaBlonde, the Plaintiffs can simply point to the Court allowing the enforcement of the CC&Rs. This factor favors the HOA.

There is a sizeable factual dispute about the balance of hardships. The Plaintiffs argue that the cost of remediating the drainage condition would be upwards of \$2 million—the cost of rebuilding the *entire* home. FAC, ¶ 57. The HOA claims that the cost of temporary remedial measures could be no more than the price of a sump pump. Reply, page 3. The Court presumes that an expert would be needed to determine the cost of the minimally necessary temporary repairs. Assuming that the material allegations of the Plaintiffs are true, and that the costs will be substantial, this factor favors the Plaintiffs.

There is no public policy interest in not enforcing CC&Rs or contracts between parties. There is a public policy in enforcing contracts. “Society... broadly benefits from the prospect that bargains struck between competent parties will be enforced.” *1800 Ocotillo, LLC v. WLB Group*,

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-019511

10/10/2022

*Inc.*, 219 Ariz. 200, 202, ¶ 8 (2008) (citation omitted). This factor favors the HOA. It is uncertain how long the litigation against the other Defendants may last, so it is unreasonable to enjoin the HOA from enforcing the CC&Rs for the foreseeable future. The HOA must enforce its rules and must treat all members fairly. Ultimately, the Plaintiffs' rights do not trump the HOA's rights or the rights of other property owners in the HOA.

**IT IS ORDERED** granting the HOA's Motion to Dismiss. Count 5 of the First Amended Complaint is now dismissed. Since this is the only claim against the HOA, the HOA is dismissed from this case.