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SEP 14 2022

SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF NAVAJO

JUDGE: MICHALA M. RUECHEL

DATE: September 14, 2022

DIVISION: IV

ISSUED BY: Glenda Walters

RULING

GORDON AND LILIANA GROSS, et al,

Plaintiff,

vs.

**THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION,**

Defendant.

Case No. S -0900 -CV202200042

**RULING ON MOTION AND CROSS
MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed a Motion for Partial Summary Judgment on April 24, 2022, and Defendants filed a Cross Motion for Partial Summary Judgment on the same issues on May 31, 2022. The Court held oral arguments on July 19, 2022. The Court has considered the Motions, Responses, Reply, oral argument, statutes and case law and rules as follows:

FACTUAL BACKGROUND:

1. Plaintiffs, hereinafter referred to as "Homeowners", own residences located in a subdivision called The Shores at Rainbow Lake. The properties are located in Navajo County, Arizona.
2. The property is in a planned community. The property is subject to a CC&R. The HOA is operated by the Defendants, The Shores at Rainbow Lake Community Association.

3. At the time Plaintiff purchased the property, the property was subject to the 2001 Amended and Restated Declaration, which was properly recorded.
4. The Plaintiffs are not full-time residence or occupiers of their property, rather they all use their properties as a second home for a vacation and/or rental purposes.
5. For the purposes of the Motion for Summary Judgment only, it is presumed that the Association properly obtained a 67% supermajority to amend the 2001 Amended and Restated Declaration as required by 9.2 of the 2001 Declarations and in compliance with the Arizona Planned Community Act §33-1801 et seq.¹
6. The Shores at Rainbow Lake 2001 Amended and Restated Declaration states in pertinent part:

EXCERPTS FROM 2001 AMENDED AND RESTATED DECLARATIONS

Section 1.29

1.29 "Lessee" means the lessee or tenant under a lease, oral or written, of any Lot or Parcel including an assignee of a lease.

Section 1.36

1.36 "Owner" means the record owner, whether one or more Persons, or beneficial or equitable title *(and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest of a Lot or Parcel. Owner shall not include (i) Persons having an interest in a lot or Parcel merely as security for the performance of an obligation, or (ii) a lessee or tenant of a Lot or Parcel., Owner shall include a purchaser under a contract for the conveyance of

¹ Plaintiffs in their combined Reply and Response argued for the first time that Defendants would have to have gained unanimous consent from the Townhouse portion of the The Shores. None of the Plaintiffs own property in the Townhouse portion of The Shores.

real property, a contract for deed, a contract to convey, an agreement for sale or any similar contact through with c a seller an conveyed to a purchaser equitable title in a Lot or Parcel under which the seller is obligated to convey to the purchaser the remainder of seller's title in the Lot or Parcel, whether legal or equitable, or payment in full of all monies due under the contract. Owner shall not include a purchaser, under a purchase contract and receipt, escrow instructions or similar executory contacts which are intended to control the rights and obligations of the parties to the executory contracts pending the closing of a sale or purchase transaction. In the case of Lots or Parcels the fee simple title to which is vested in a trustee pursuant to Arizona Revised States, Section 33-801, et seq, the Trustor shall be deemed to be the Owner. In the case of the Lots or Parcels the fee simple title to which is vested in a trustee pursuant to a subdivision trust agreement or similar agreement the beneficiary of any trust who is entitled to Possession of the trust property shall be deemed to be the Owner.

Section 1.47

1.47. "Single Family" means a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of persons not all so related, who maintain a common household in a Residential Unit.

Section 2.18

2.18. Residential Use. All Lots and Parcels shall be used, improved and devoted exclusively to Single Family residential use. No gain occupation, profession, trade, business or other nonresidential use shall be conducted on any Lot or Parcel or in or from any residence, except that an Owner or other resident or a residence may conduct a business activity within a residence so long as: (i) the existence or operation of the business activity is not apparently or detectable by sight, sound or smell from outside the residence; (ii) the business activity confirmed to all applicable zoning ordinances or requirements for the property; (iii) the business activity does not involve persons coming onto the lot

or the door-to-door solicitation of owners or other residence in the property; and (iv) the business activity is consistent with the residential character of the property and does not constitute nuisance or a hazardous or offensive use or threaten security or safety of other residents in the property, as may be determined from time to time in the sole discretion of the board. The terms "gainful occupation," "profession," "trade," "business" and "nonresidential use" as used in this section shall be construed to have ordinary, generally accepted meanings, and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involved the provisions of goods or services to person other than the provider's family and for which the provide receives a fee, compensation or other form of consideration, regardless of whether: (a) such activity is engaged in full or part time; (b) such activity is intended or does generate a profit; or (c) a license is required for such activity. The leasing of a residence by the Owner thereof shall not be considered a trade or business within the meaning of this section. Property classified as "Detached Residential Use" under this Declaration or a Tract Declaration may be used only for the construction and occupancy of Detached Residential Units and typical residential activities incidental thereto, such as the construction and use of a family swimming pool, and no structure whatever, other than one private Detached Residential Unit, together with a private garage for not more than three (3) cars, a guest house or servant quarters, shall be erected, placed or permitted to remain on any such Lot.

Section 2.30

2.30 Leasing of Lots. No Owner may lease less than his entire Lot. Upon leasing his Lot, and Owner shall promptly notify the Association of the commencement date and termination date of the lease and the names of each lease or other person who will be occupying the Lot during the term of the lease.

Section 3.0(B) and (C)

(B) If a Lot or Parcel is leased or rented by the Owner thereof, the Lessee and the members of his family residing with such Lessee shall have the right to use the Common Area during the time of the lease, and the Owner of such Lot and Parcel shall have no right to use the Common Area until the termination or expiration of such lease.

(C) The guest and invitees of any Member or other person entitled to use the Common Area pursuant to this Declaration may use the Common Area provided they are accompanied by a Member or other person entitled to use the Common Area pursuant to this Declaration. The Board shall have the right to limit the number of guests and invitees who may use the Common Area at any one time and may restrict the use of the Common Area by guests and invitees to certain specified times.

Section 3.3(E)

3.3 Easement in Favor of Association. The Lots, Parcels and Neighborhood Common Area are hereby made subject to the following **easements in favor of the Association** and its directors, officers, agents, employees and independent contractors.

.....
(E) For inspection of the Lots, Parcels and Neighborhood Common Area in order to verify that the provisions of the Project Documents are being complied with by the Owners, their guests, tenants, invitees and other occupants of the Lot, Parcel or Neighborhood Common Area.

Section 4.2

4.2 The Association Rules. The Board may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal rules and regulations to be known as the Association Rules. The Association Rules may restrict and govern the use of any area by any Member, Lessee or Resident, by the family of such Member, Lessee or Resident and by the guests and invitees of a Member, Lessee, or Resident; provided, however, that the Association Rules shall not

unreasonably discriminate among Members and shall not be inconsistent with the Declaration, the Articles and Bylaws. Upon adoption, the Association Rules shall have the same force and effect as if they were set forth in and were a part of this Declaration.

Section 4.5

4.5 Members. Every Owner of a Lot or Parcel shall automatically be a Member of the Association.

Section 4.6

4.6 Voting Rights. The Association shall have two classes of Members:

Class A. Class A Members shall be all Owners of Lots or Parcels restricted by this Declaration or a Tract Declaration to Cluster Residential Use. Each Class A Member shall be entitled to the following votes:

- (i) One vote for each Lot owned by the Member which is restricted to Cluster Residential Use;

Residential Use;

- (ii) In the case of a Parcel restricted to Cluster Residential Use, one vote for each Residential Unit permitted upon the Parcel under the zoning ordinances of Navajo County or the municipally having jurisdiction over such Parcel, the number of such Residential Units to be determined on the assumption that the number of Residential Units within the density classification , if a plat, condominium map or other instrument creating Lots is recorded covering less than all of the Parcel, the number of votes attributable to such Parcel shall be reduced by the number equal to the number of Lots shown on the recorded plat.

Class B. Class B Members shall be all Owners of Lots or Parcels restricted by this Declaration or a Tract Declaration to Detached Residential Use. Each Class B Member shall be entitled to the following votes:

- (i) One vote for each Lot owned by the Member which is restricted to Detached Residential Use;

In the case of a Parcel restricted to Detached Residential Use, one vote for each Residential Unit permitted upon the Parcel under the zoning ordinances of Navajo County or any municipality having jurisdiction over such Parcel, the number of such Residential Units to be determined on the assumption that the number of Residential Units within the density classification under the zoning ordinances will be spread evenly over all land within the density classification, in a plat, condominium map or other instrument creating Lots is recorded covering less than all of the Parcel, the number of votes attributable to such Parcel shall be reduced by the number equal to the number of Lots shown on the recorded plat.

Section 4.7

4.7 Voting Procedures. No change in the ownership of a Lot or Parcel shall be effective for voting purposes unless and until the Board is given actual written notice of such change and is provided satisfactory proof thereof. The vote for each such Lot or Parcel must be cast as a unit, and fractional votes shall not be allowed. In the event that a Lot or Parcel is owned by more than one person or entity and such Owners are unable to agree among themselves as to how their vote or votes shall be cast, they shall lose their right to vote on the matter in question. If any Member casts a vote representing a certain Lot or Parcel, it will thereafter be conclusively presumed for all purposes that he was acting with the authority and consent of all other owners of the same Lot or Parcel unless objection thereto is made at the time the vote is cast. In the event more than one vote is cast by a Class A Member for a particular Lot or Parcel, none of the votes shall be counted and all of the votes shall be deemed void.

Section 9.2

9.2 Amendments.

(A) Except for amendments made pursuant to Subsection (B) of this Section, the Declaration or Project Plat may only be amended by the written approval or affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership.

(B) The Board may amend this Declaration or the Project Plat, without obtaining the approval or consent of any Owner or First Mortgagee, in order to conform this Declaration or the Project Plat to the requirements or guidelines of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the Veterans Administration or any federal, state or local governmental agency whose approval of the Project, the Project Plat or the Project Documents is required by law or requested by the Board.

(C) Any amendment approved pursuant to Subsection (A) above or by the Board pursuant to Subsection (B) above shall be signed by the President or Vice President of the Association and shall be recorded with the County Recorder of Navajo County, Arizona. Any such amendment shall certify that the amendment has been approved as required by the Section.

7) In 2021 the old Section 2.30 was amended with the following language:

2.30. Leasing of Lots:

(A) After December 31st, 2021, no Lot may be leased for a term less than thirty (30) days.

(B) No portion of a Lot may be leased, other than the entire Lot, and then only to a Single Family. For purposed of this Section:

2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption.

(C) An Owner who leases his Lot shall provide the following information to the Association at least ten (10) days before the commencement of the lease term.

- (i) the commencement date and expiration date of the lease term;
- (ii) the names and contact information of any adults occupying the Lot during the lease term; and
- (iii) the address and telephonic number at which the Owner (or Owner's agent) can be contacted by the Association during the lease term.

(D) Any agreement for the lease of a Lot shall provide that the term of such lease shall be subject in all respects to the provisions of the Project Documents and that any failure by the Lessee to comply with the terms of the Project Documents shall be a default under the lease. Any Owner who leases a Lot must provide the Lessee with copies of this Declaration, the Architectural Committee Rules and the Association Rules and is responsible for assuring the Lessee's compliance therewith. The Owner shall be liable for any violations of this Declaration, the Architectural Committee Rules or the Association Rules by the Lessees or other persons residing in the Lot and their guests or invitees and, in the event of any such violation, the Owner, upon demand of the Association, shall immediately take all necessary actions to correct any such violations.

ISSUES:

- 1) Does the Association for a Planned Community, that has common areas and deed restrictions, who passes an amended declaration in compliance with the Planned Community Act have to also comply with the holdings in Dreamland Villa Community Club, Inc., v Raimey 224 Ariz. 42, 226 P.3d 411 (App 2010) and Kalway v Calabria Ranch HOA, LLC., 252 Ariz 532, 506 P.3d 18 (2019)?
- 2) If the Dreamland Id., and Kalway requirements apply to this set of facts, do the amendments to the Declaration unreasonably alter the nature of the previous restrictive covenants?

Issue 1

The Arizona Supreme Court stated in Kalway, Id at 23:

“Arizona law permits the amendment of CC&Rs by a majority vote if such voting scheme is specified in the original declaration. But §33-1817(A) does not displace the common law, which prohibits some amendments even if passed by a majority vote.” Defendants point out that the facts of Kalway and Dreamland were distinguishable from this case because the Association in Kalway a) only refers to a simple majority (51%) instead of a super majority of 67%; and b) Kalway does not reference any common areas established and maintained by the Association. The Court does not find that these distinctions require this Court to determine that those cases are not applicable to this set of facts.

Defendants urges this Court to look to the analysis of the Court of Appeals’ unpublished opinion in Nicdon 10663, LLC v Desert Mountain Master Association, 2021 WL1691532. In that case the Court of Appeals upheld an amendment to the restrictive covenants granting temporal restrictions for short term rentals. The Court of appeals did find that the Master Association’s amendments complied with both the requirements of its CC&R as well as ARS 33-1801-1818. The Appellate Court did not, however, determine whether Dreamland would still apply where ARS 33-1801-1818 and the

planned community's amendment procedure were complied with. In fact, the Court of Appeals stated "We decline to decide this question because the amendment at issue here withstands scrutiny under Dreamland."

Defendants have not shown precedent or statute that convinces this Court that Dreamland and Kalway are not applicable simply because the CC&R amendments are approved by 67% (as required in the 2001 Amended Declaration) and the planned community has common use areas.

Because this Court finds that further analysis under Dreamland and Kalway are appropriate, the Court looks to the second issue.

Issue 2: Were the amendments reasonably foreseeable?

Kalway affirms the ruling in Dreamland that even a broad grant authority to amend an original declaration is insufficient to allow a majority of property owners to adopt and enforce restrictions on the minority without notice. Kalway, id at 24. Kalway went on to "hold that an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." Id. at 24.

The Arizona Supreme Court in Kalway stated at paragraph 17 that "the restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way".

Applying Kalway and Dreamland to the facts of this case, the Court looks at each of the amendments.

- 1) The 2021 amended section 2.30 (B) requires that a Lot may be leased to a single family and defines single family. The 2021 amendment states that "a single family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption." The 2001 Amended and Restated Declarations section 2.18 states that "all Lots and Parcels shall be used, improved and devoted exclusively to single family residential use." (emphasis added). Section 1.47 of the 2001 Declaration states "Single family means a

group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of persons not all so related, who maintain a common household in a Residential Unit. This Court finds that the language in the 2001 Declaration is sufficient to put future owners on notice that the term may be defined or amended in the future. This Court finds that placing the definition in Section 2.30 and applying the term to leases is still sufficient notice to future owners' that the Association intends to be able to define the term in the future.

- 2) The 2021 amended section 2.30 (C) states that "an owner who leases his Lot shall provide the following information to the Association at least ten (10) days before the commencement of the lease term (i) commencement and expiration date of the leasing term; (ii) the names and contact information of any adults occupying the Lot during the lease term; and (iii) the address and telephone number at which the Owner (or Owners' agent) can be contacted by the Association during the lease term."

The 2001 Declaration required that the Owners are to "promptly" notify the Association of the commencement date and termination of the lease and name of lessee or other persons occupying the Lot. This Court finds that the Owners had sufficient notice that the Association would require notice of leases and information about those who are leasing the property. The 2021 amendment defines or amends "prompt" notice. The Court finds that amendment meets the requirement of Kalway.

The 2021 Section 2.30 (iii) requirement that Owners provide address and telephone number where they can be contacted is foreseeable to allow for the Association to advise Owners of violations. Likewise, Because the 2001 declaration restricts activities and use of property by Owners it is foreseeable that the CC&R might be amended to clarify who would be responsible for violations by the lessees and how the owners/lessors would be contacted as was done in Section 2.30 (C).

3) The 2021 amended declaration states “(A) after December 31, 2021, no Lot may be leased for a time less than 30 days.” Clearly the 2001 declaration address the issue of leasing and placed some restrictions on the manner and requirements for leasing. The original declaration did not address any time restriction on leasing. At the time the properties were purchased, the 2001 Amended Declaration allowed all Owners to lease the property for any duration they deemed appropriate. This Court finds that placing term restrictions on leases under these circumstances does create an entirely new and different restriction on the Owners’ use of their property in a manner that was unforeseeable at the time the original and 2001 amended declarations were made.

Based on the foregoing, the Court grants partial summary judgment on Counts I and II in favor of Defendants regarding Section 2.30(B)(C) and (D) of the 2021 amended declarations and grants partial summary judgment on Counts I and II in favor of Plaintiffs regarding Section 2.30(A) of the 2021 amended declarations.

The Court, in its discretion, denies Defendants’ request for attorney fees.

The Defendants are directed to file a form of judgment, consistent with the Court’s ruling, within 20 days of todays date.

Sept. 14, 2022
Date

Michala Ruechel
Michala M. Ruechel, Superior Court Judge

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at:
<http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.

Copies to: CFM; Matthew Klopp, James Sontos, Stockton Bandfield