ARIZONA COURT OF APPEALS
DIVISION ONE

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	**Court of Appeals** **Division One** **Case No. 1 CA-CV 21-0275** **Maricopa County Superior Court** **Case No. CV2019-055353**

REPLY IN SUPPORT OF THE ADDITIONAL BRIEIFING OF DEFENDANTS/APPELLEES PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATION

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I. INTRODUCTION

Appellees, Dorsey Place Condominium Association and PFP Dorsey Investments, LLC, hereby submit their Reply in support of their Supplemental Brief addressing the issues raised in the Court's March 17 and March 23 Orders.

In the majority of their supplemental briefing, Appellants do not directly address the Court's questions and when they do, they misstate the facts. The central issue raised in the Court's March 17 Order is whether the Parties' contractual agreement (i.e., the Declaration) incorporates A.R.S. §33-1228, which version of the Statute it incorporated (if any), and whether Appellants have waived this argument.

As argued in Appellees' supplemental briefing, the issues are very straightforward. Not only is the Statute specifically incorporated in the Declaration, its language makes clear that the Legislature intended the 2018 version to apply to all condominiums, regardless of the language in their declarations (*See*, A.R.S. §33-1228(K)). Appellees essentially concede on the issues raised in the Order, opting instead to rehash the arguments in their Opening Brief, merely as a means to complicate this simple matter. The relevant portions of the supplemental briefing establish that Appellees used the correct version of A.R.S. §33-1228 to carry out the termination and sale process at issue, that the termination was valid and lawful; any argument to the contrary is without merit and waived.

There is danger if the Court gives merit to the position that a statute must be referenced in an association's declaration to be applicable to its members. This suggests that the members (or developers) could simply omit any reference to statute in their documents and be granted *carte blanche* to operate outside the law. This includes things like notice requirements for association meetings in A.R.S. §33-1248, voting procedures designed to protect members in A.R.S. §33-1250, or mechanisms in place to protect members' political activity in A.R.S. §33-1261. The suggestion that members are unable to avail themselves of these statutes unless they are explicitly referenced in the declaration is not a valid legal proposition. Such a finding would undermine Arizona law.

Appellants' position that an association can utilize outdated and prohibited statutory language also is not a sound legal principle. For example, a condominium association could not use proxy voting in violation of A.R.S. §33-1250(C) ("Notwithstanding any provision in the condominium documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy.") by putting proxy language in their Declaration. It is no different to suggest that the 2018 version of A.R.S. §33-1228 was not available to the Owners as a means of conducting the termination and sale of the Condominium. This is true not only because the Statute is explicitly provided for in the Declaration but also because it was available regardless of its inclusion in the document.

II. ARGUMENT

a. The Declaration Does Incorporate A.R.S. §33-1228

As noted in Appellees' supplemental briefing, the Declaration makes specific reference to the Condominium Act and the intent of the drafters that the Parties be bound thereby. However, as discussed above, whether or not the Act is included in the Declaration, it is a set of Arizona laws that apply to the Parties regardless of its incorporation in the Declaration. To say otherwise is inaccurate. See *Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, (App. 2007) ("a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract.").

Here, Declaration specifically references and incorporates the Act, and any amendments thereto. Specifically, at Article 1.1, the Declaration states:

> General Definitions. Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Arizona Condominium Act, A.R.S. §33-1201, et. seq., **as amended from time to time**. [IR 51 at Ex. 1 at 1].

[**Emphasis added**]. At Article 1.2.5, the Declaration states:

> "Condominium Act" means the Arizona Condominium Act, A.R.S. §33-1201, et. seq., as amended from time to time. [*Id*.].

Finally, at Article 6.1, the Declaration states:

> The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents

> together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act.

[*Id.* at 24]. *See*, *also*, Article 2.1.

Therefore, the Declaration clearly puts Owners on notice that the Act exists and will be followed. However, while its inclusion is certainly helpful, it is unreasonable to suggest that if the Act was not referenced, the Parties could ignore it. Perhaps even more troubling is Appellants' suggestion that these references only give the Association the ability to utilize the provisions of the Act, without giving the Owners the same right. *See*, Appellants' Supplemental Briefing at 6-7 ("This section gives on specific powers, and only to the *Association*…The Declaration gives the *Association* – not unit owners – the powers of the Act.").

The suggestion that owners do not have rights under the Act if it is not incorporated into a declaration is truly baffling. Both owners and associations, along with a number of other entities, are entitled to certain rights under the Act, whether or not those rights are documented in a declaration.

b. <u>The Declaration Does Not Proscribe Rights Under the Act</u>

Appellants argue that the owners only agreed that the Association shall have the "powers" of the Act, but not the owners. *See*, Appellants' Supplemental Briefing at 6. It is unclear what proposition Appellants are advancing in this section, as if to suggest that the Declaration somehow dictates whether a party has rights and

protections under the Act, which is clearly not true. However, Appellants do correctly note the roles of the Parties in the termination and sale process, as they agree the decision to terminate and terms of any subsequent sale are left to the Owners. *Id*. at 7.

As Appellants noted, decisions regarding condominiums are left to the owners who share an ownership interest in the project, while the association facilitates those decisions.[1] When applied to this case, the Association's role is merely to effectuate the terms of the termination and sale agreed upon by the Owners.

Appellants focus their briefing on their argument that they did not consent to a "forced sale." *See*, Appellants' Supplemental Briefing at 8. The implication being that unless something is in the Declaration, it does not apply to them, such as the provisions of the Act. Obviously, this is not accurate, as the Act applies to these Parties regardless of whether it is referenced in the Declaration.

Appellants purchased their Unit within the Association pursuant to the terms of the Declaration and Arizona law. As Appellants concede in their supplemental briefing, certainly the Act applies to the Association. *See*, Appellants' Supplemental

[1] Nothing in this process is as harsh as Appellants argue. Condominiums are merely large houses, owned by a group of individuals on a fractional basis. If the required percentage of the Owners decide to do something with the house, including sell it for a fair price, they are able to do so, pursuant to certain terms to ensure transparency and fairness. The reasons behind the scheme are well-established. It is not a process about "lurking in the dark" or surprising anyone, it is a democratic scheme and a condominium would not make logical sense without it.

Briefing at 8 ("In the alternative, even if §6.1 justifies the *Association's* actions, it does not let *Dorsey Investments* off the hook."). In terms of PFP Dorsey, Appellants argue this party has no rights under §6.1, being only applicable to the Association; however, Appellants fail to show what allegations they would have against PFP Dorsey Investments since it, like Appellants, is a unit owner and member of the Association. As a unit owner, PFP Dorsey exercised its vote to terminate and sell the Condominium.

c. There Are No Unlawful Applications of Statutory Power in This Matter

Appellants agree that contracts cannot be for unlawful purposes. In their supplemental briefing, Appellees explained why this principle requires that the Parties utilize the 2018 version of A.R.S. §33-1228 in this case. Therefore, the Parties agree that the Declaration cannot grant Appellees the ability engage in unlawful conduct.

However, illegal conduct is not at issue here. The facts demonstrate that Appellees appropriately applied the Declaration and A.R.S. §33-1228. Further, at all relevant times, A.R.S. §33-1228 was good law. Therefore, until A.R.S. §33-1228 no longer is good law, any concerns that the Declaration grants unlawful powers to Appellees are unfounded.

With regards to the alleged "big picture" goals of Appellees, those goals are not as Appellants believe. This case has always been about whether Appellees

conducted themselves in a lawful and reasonable manner under the Declaration and the Act. The trial court dismissed the case because the facts demonstrate they did. A condominium development is unique in several respects, but the law and Declaration were clear when Appellants purchased their Unit and both were a matter of public record. The possibility that other owners in a condominium may want to terminate and sell for a fair price was always an option of which Appellants were or should have been aware. As for Appellants' suggested language of what could have been included in the Declaration (A.R.S. §33-1228), such language already is incorporated by law into the Declaration.

With regards to the recent Supreme Court decision in *Kalway v. Calabria Ranch HOA, LLC*, __ Ariz. __, No. CV-20-0152-PR (2022), that case was limited to a consideration of proper amendments to an association's declaration and its relevance to this matter was thoroughly discussed in Appellees' supplemental briefing. In short, as this matter does not concern an amendment to the Declaration, *Kalway* has limited application in this case.

d. There Was No Option But To Use The 2018 Version

Appellants appear to argue that the Parties could have, or did, contracted to utilize a prior and unenforceable version of A.R.S. §33-1228. Appellants' argument ignores several facts, not the least of which is that the Declaration specifically references the Act, "as it may be amended from time to time." [IR 51 at Ex. A at 1].

They also ignore the fact that the Owners were entitled to terminate pursuant to A.R.S. §33-1228 and obviously had to do so pursuant to the version in effect at the time. Appellants ignore the fact that they purchased their Unit with knowledge, certainly with notice, of all these facts and law.

Appellants' position appears to be that community associations are free to use outdated versions of Arizona law as they see fit, since they concede they may have "consented" to having the 1986 version of A.R.S. §33-1228, but not the most recent version of the statute. Appellants' argument implies they would be more comfortable if this process had been conducted pursuant to the 1986 version, which was not in effect when the Condominium was terminated. Alternatively, Appellants might be arguing that the 1986 version no longer is in effect, but they have not consented to the most recent version. That argument implies this Condominium exists in a void and can never be terminated. Obviously, this is not a valid argument and the facts are clear that Appellees not only applied the proper version of A.R.S. §33-1228, but that they did so correctly.

e. <u>The Association Has Not Breached Any Duties</u>

Appellee's argument for this question is that the 1986 version does not apply. Parties simply cannot utilize outdated statutes, particularly when said statutes contain language making that principle obvious. *See*, A.R.S. §33-1228(K), which states:

> Beginning on August 3, 2018 [the effective date of the Statute], any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

Appellants' metaphor in this section is lengthy but inapplicable. The problem with the Jack and Jill metaphor as applied here is that its trustee role in this matter is limited only to carrying out the terms of the sale as the Owners agreed. The Association does not have dual roles, like Jack did. A.R.S. §33-1228(D) makes clear that the final decision regarding the terms of the sale is left up to the Owners, in the same voting manner as the underlying termination:

> The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B of this section.

Essentially, the Association is merely a middleman in this process, carrying out the terms of a sale agreed to by the Owners, which comports with the "big house" metaphor: the Owners are the ones with the ownership interest in the house, so they set the terms of the sale. The Association merely acts as trustee to effectuate the terms of that sale. The Association has no interest in the sale and does not receive any benefit from it (unlike Jack). Appellants have never argued that the Association did not carry out the terms of the sale as the Owners agreed. Accordingly, Appellants do not have a valid argument that the Association violated any duty to the Owners.

The Appellants' argument that the Association had a duty to market the property on its own does not work in this context; i.e. community associations. The

Condominium and Planned Community Acts exist for a reason – to provide guidance for these unique entities. The Association is a corporate entity designed to carry out certain functions, but ultimately, the Association is only the mechanism through which the Owners take action regarding the house they all share. There is no third-party corporate leadership governing the Association, its Board is comprised of volunteers from among the members of the Association who agree to carry out the terms of the Association's governing documents and Arizona law. Here, the Association's role in this sale process is delineated in A.R.S. §33-1228 and that role is limited to carrying out terms of the sale as agreed to by the Owners, nothing more, nothing less. Appellants' attempt to impose vast new duties on the Association's Board simply does not comply with the plain language of the statute.

As noted at multiple junctures in this case, Appellants had rights regarding their Unit's valuation that they did not exercise. A.R.S. §33-1228(G)(1) provides for Owners who disagree with the appraised value of their unit (i.e. contend they are not receiving just compensation for their Unit) to obtain an independent appraisal of their Unit and seek relief through arbitration.

f. Appellants' Discussion Of The 1986 Version Is Without Merit

In this section, Appellants move the goal posts and raise arguments that are not only outside the scope of this briefing, but are also completely without merit. As noted, the Court's Order asks for briefing regarding A.R.S. §33-1228(G). Even

Appellants recognize this but choose to disregard the Court's Order and instead, rehash arguments that have nothing to do with this directive. Notably, Section (G)(1) was not only amended but, during the relevant period, any language in a Declaration that conflicted with the terms of the current version of (G)(1) was void as a matter of public policy under A.R.S. §33-1228(K). Therefore, all references to the 1986 version of the statute have no bearing on the proceedings, as that version was not in effect at any relevant time. Nor are the myriad of hypotheticals Appellants present in this section, none of which represent what occurred here. Again, this simple case represents nothing more than Parties conducting themselves in line with the Governing Documents and Arizona law. Appellants have never alleged otherwise, which is why this Court should uphold the trial court's ruling.

With regard to the discussion on the 2018 version of the statute, with which Appellants have many issues, they do not articulate how their analysis of this section results in overturning the trial court's decision. Appellants merely run through the section, explaining how it calculates payouts as compared to the 1986 version. However, distribution of the funds has never been an issue in this case, as Appellants have not alleged they did not receive their fair, proportional share of the sale proceeds. Ultimately, those proceeds are the result of the sale transaction, to which the Owners agreed and the Association's limited role is to carry out the terms of that sale and distribute funds accordingly. Appellants do not argue that the Association

failed in this role, thus Appellants cannot argue that the Association breached any duty to them in this regard.

g. The Court May Not Apply The 1986 Version, Even With Appellant's Blessing

In this section, Appellants not only gloss over their obvious waiver of any argument that the 1986 version of the statute applies, they nonchalantly ask the Court to apply an outdated statute to these proceedings. Neither of these are compelling arguments. For one, as discussed in Appellees' supplemental briefing, this issue was clearly waived under Arizona law as Appellants never raised it in the trial court. This is not a "new" issue, merely a new argument that was never raised by Appellants. Accordingly, it is waived.

Second, even if not waived, this argument is quickly addressed and disposed of per Appellees' supplemental briefing. Amendments to A.R.S. §33-1228 were not only explicitly incorporated into the Declaration by its plain language, the Statute is automatically incorporated into it by Arizona law and the Parties were bound by it at all times. A finding otherwise would suggest that Parties can enter into illegal contracts at their will, which is not proper under Arizona law. See *Mountain States Bolt, Nut & Screw Co. v. Best-Way Transp.*, 116 Ariz. 123, 124, 568 P.2d 430, 431 (Ct. App. 1977).

III. CONCLUSION

Based on the foregoing and all submissions to the Court, Appellees respectfully request that this Court affirm the trial court's dismissal of this case.

RESPECTFULLY submitted this 2nd day of May 2022.

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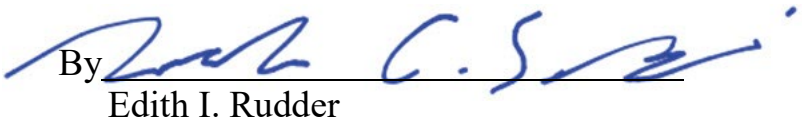
By 
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