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Colette McNally

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

COLETTE MCNALLY,

Plaintiff/Appellant,

-vs-

SUN LAKES HOMEOWNERS
ASSOCIATION #1, INC., an Arizona
non-profit corporation,

Defendant/Appellees.

CA-CV

MARICOPA COUNTY
SUPERIOR COURT
CASE NO. CV2014-009496

JUDGE ASSIGNED:
The Honorable James T. Blomo

**APPELLANT'S MOTION TO
EXPEDITE APPEAL PURSUANT
ARCAP 3(a)**

Appellant, Colette McNally (“Appellant”), by and through undersigned counsel, respectfully requests that this Court exercise its discretion pursuant to Arizona Rule Civil Appellate Procedure (“ARCAP”) 3(a) to impose an expedited briefing schedule and give expedited

consideration to this appeal.¹ Appellant's claim will be in danger of becoming moot and any further delay will cause Appellant and the community that elected her to the Association's Board of Directors to continue suffering severe and irreparable harm for each executive session that the rest of the Board prevents Appellant from attending. Undersigned counsel has made a good faith effort to secure a stipulation from opposing counsel to an expedited briefing schedule pursuant to ARCAP 6(b)(2) but was unable to do so. For the reasons discussed below, Appellant's Motion should be granted.

I. INTRODUCTION

Appellant is a duly elected member of the Board of Directors for appellee Sun Lakes Homeowners Association #1, Inc. (the "Association"). Since at least 2009, the Association's Board of Directors has been dysfunctional in that the Board's majority has removed fellow elected directors from the Board and has significantly impaired their directorship privileges without affording these directors any due process. In fact, even

¹ Appellant filed a Notice of Appeal in the Superior Court on October 28, 2015. She is currently waiting for the Clerk of the Superior Court to transfer the record to the Court of Appeals pursuant to ARCAP 11.1 and for the Court of Appeals to issue an appellate case number pursuant to ARCAP 12(a). Considering the time that the Superior Court has to transmit the record and for the Court of Appeals to issue a Notice of Appellant's Duties pursuant to ARCAP 12(b), the Court of Appeals has advised undersigned counsel to file the within Motion with the Court of Appeals without a docket number and with the appellate filing fee. Appellant has also filed the Case Management Statement required by ARCAP 12(d) with the Court of Appeals contemporaneously with the within Motion to explain the basis for appellate jurisdiction and to give context to the Motion.

though Appellant has been removed once already in the past, the members of the Association continue to re-elect her to the Board despite the rest of the Board persistently preventing her from participating in Board activities. The Board also admittedly continues to violate A.R.S. § 33-1804 (the “Open Meeting Law”) by regularly discussing issues in secret executive sessions rather than in open meetings with the community as required by Arizona law and has expressed no desire to change this behavior.

Once the Association’s homeowners grew tired of Board Members removing fellow elected Board members, the homeowners passed a resolution deleting a Bylaw that previously allowed this practice. However, through gamesmanship, the Board has circumvented the will of the community. Instead of removing fellow elected Board Members who they disagree with outright, the Board now screens Appellant from participating in executive sessions where the Board conducts significant Association business (in direct violation of the Open Meeting Law). This conjured procedure allows the majority to ostensibly remove fellow elected Board Members in the minority without having to actually remove these minority Board Members from the Board.

In September 2013, the Board passed a resolution banning Appellant from participating in executive session for the remainder of her term for

being a “whistleblower” when she allegedly violated executive session secrecy by reading her private e-mail during an open Association meeting that threatened to uncover the other Board Members’ possible participation in alleged misconduct. Although the Board’s resolution required its (improper) sanction to end at the conclusion of Appellant’s term in February 2014, the Board continues to screen Appellant from executive sessions to this day despite the fact that the community re-elected her in February 2014 to another three year term.

Based upon the Association’s sanction, Appellant filed a claim for declaratory/injunctive relief in the trial court seeking to restore her Board privileges and end the Association’s rampant violations of the Open Meeting Law by arguing, among other things, that the Board simply lacked legal authority to strip her of her right to participate in executive sessions without due process. As will be set forth in Appellant’s Opening Brief (which should be filed in the next week or so) and as was already set forth in her Petition for Special Action, Appellant asked the trial court multiple times to define the applicable legal standard that gave the Board the authority to screen a fellow elected director from executive sessions without due process but the Honorable James T. Blomo never articulated the applicable law.

First, Appellant filed a Motion for Summary Judgment (“MSJ”)

seeking to restore her Board privileges by arguing that, regardless of the facts, the Board simply lacked legal authority to screen her from executive sessions without providing her due process. Despite the focus of Appellant's MSJ being on the lack of legal authority, Judge Blomo denied the MSJ without oral argument based on the presence of factual issues and never defined the applicable legal standard. Similarly, after this ruling, Judge Blomo denied Appellant's Application for a Preliminary Injunction on Count One of the Complaint from the bench following the evidentiary hearing without articulating the applicable legal standard.² To this day and following these two rulings, Appellant still does not know what law Judge Blomo's decisions are based on.

After the trial court denied Appellant's Application for Preliminary Injunction, she filed a Petition for Special Action in Division One of the Court of Appeals arguing that the Court of Appeals should accept Special Action jurisdiction because her term was ending in February 2017 and her claim was in danger of becoming moot. Appellant also argued that the issue of Board Members depriving fellow Board Members of significant

² Although Appellant's Application for Preliminary Injunction expressly sought relief pursuant to Count One of her Complaint, which Count specifically included a request to enjoin the Association from violating the Open Meeting Law, Judge Blomo refused to allow Appellant to proceed on this portion of her claim at the evidentiary hearing because the Application itself did not expressly request a preliminary injunction enjoining Open Meeting Law violations.

directorship privileges without due process was a matter of statewide importance and that other elements were present for this Court to exercise Special Action jurisdiction. At the time Appellant filed her Petition for Special Action, she advised the Court of Appeals that she was waiting on the trial court to issue a signed Order denying her Application for Preliminary Injunction from which she intended to appeal from but that she filed the Petition for Special Action as suggested by the Arizona Appellate Court Handbook because of the significant need to obtain a speedy resolution. Based upon the availability of an immediate appeal, this Court declined Special Action jurisdiction in an Order dated October 26, 2015.³

As discussed below, this Court should exercise its discretion pursuant to ARCAP 3(a) and grant Appellant's Motion to Expedite the appeal. Appellant's claim to enjoin the sanction is in danger of becoming moot because her term ends in February 2017 and she is unable to run again due to term limits. The Appellant is suffering severe and irreparable harm the longer this matter is delayed because she is unable to participate in executive sessions where the Board (improperly) conducts significant Association business. In a related vein, the community as a whole is also suffering continued harm because the Board is thwarting the democratic process by

³ See Court of Appeals' Order dated October 26, 2015 in matter McNally v. The Honorable James T. Blomo, et al., Case No.: 1 CA-SA 15-0274.

preventing elected representatives of their choosing from participating in Association governance.

II. THIS COURT HAS BROAD AUTHORITY TO GRANT THE REQUESTED RELIEF

This Court should exercise its discretion pursuant to ARCAP 3(a) to expedite the Appeal process including ordering an expedited briefing schedule and expedited consideration of the Appeal. The Court of Appeals has broad authority to exercise its discretion pursuant to ARCAP 3(a) to grant expedited consideration of any appeal under appropriate circumstances. Perini Land and Dev. Co. v. Pima County, 170 Ariz. 380, 382, 825 P.2d 1, 3 (1992); *Arizona Appellate Handbook*, Volume One – A, Fifth Edition § 3.12.6. Indeed, the Court of Appeals routinely expedites the appeals process especially in injunction cases involving elections and cases where the democratic process is affected because timely resolution of such matters are of the utmost importance. See e.g., Arrett v. Bower, 237 Ariz. 74, 345 P.3d 129 (App. 2015); Parker v. City of Tucson, 233 Ariz. 422, 314 P.3d 100 (App. 2013); Turley v. Bolin, 27 Ariz. App. 345, 554 P.2d 1288 (App. 1976).

Appellant's term ends in February 2017 and her claim to have her directorship privileges restored will largely become a moot point if she is required to pursue a traditional appeal. See e.g., RPSA 1(a). Pursuant to the

Arizona Rules of Civil Appellate Procedure, which have recently been amended, the Superior Court has thirty (30) days to transfer the record to the Court of Appeals. ARCAP 11.1(b). The Clerk for the Court of Appeals then has ten (10) days to assign an appellate case number. ARCAP 12. After the Opening Brief is served, the Appellee has forty (40) days to file its Answering Brief (which may be extended). ARCAP 15(a)(2). Thereafter, the Appellant has twenty (20) days to file a Reply and once the appeal is fully briefed, the Court may hold oral argument and issue a ruling at a later date that may include remanding the case back to the trial court for further proceedings. Considering the timing of a traditional appeal, Appellant's claim will largely become a moot point if this Court denies expedited consideration of her appeal.

Appellant is also suffering severe and irreparable harm for each executive session meeting that the Association screens her from. One of the primary purposes of a preliminary injunction is to protect a party from suffering irreparable harm. Shoen v. Shoen, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). Each executive session that the Board denies Appellant access to amounts to a denial of her rights as an elected Board Member.

The parties stipulated into evidence numerous minutes of executive sessions. As these minutes and the admitted testimony of the Board's

President demonstrate, the Board does not meet in executive sessions once every few months or once a month to discuss the limited topics that the Open Meeting Law allows to be discussed in executive sessions. Instead, the Board often meets in executive session twice a month and discusses everything involving the Association's financial affairs, governance, policy and hiring practices. The Association has screened Appellant from participating in these crucial meetings for over two years now and she cannot get these meetings back.

Likewise, the Board's denial of Appellant's right to participate in executive sessions also irreparably harms the rights of those homeowners who have repeatedly elected Appellant to the Board of Directors to represent their interests. Even though the community stripped the Board's power to remove their fellow elected directors, the Board created a means to circumvent the will of the community and the democratic process by simply screening directors such as Appellant from crucial meetings. By screening Appellant from executive sessions, the Association has thwarted democracy by preventing the community from electing directors of their choosing. Each executive session that Appellant misses causes severe and irreparable harm to those homeowners' rights. The logic supporting expedited relief in cases where candidates seek to get their names on an election ballot is no

different than in this case where the homeowners' right to democratically select representatives of their own choosing is being hampered. See e.g., Moreno v. Jones, 213 Ariz. 94, 139 P.3d 612 (2006). In both instances, the harm is severe and irreparable and expedited relief is warranted to protect the democratic form.

As discussed in detail in the Petition for Special Action and soon-to-be filed Opening Brief, the Association's HOA expert, who this Court has relied on in at least one prior published opinion, has opined that the Association was authorized to sanction Appellant without due process even in the absence of law giving board members such authority. Indeed, he testified during the evidentiary hearing that due process would have been, "a waste of time." Given this opinion and the likelihood that Appellant is not the only Board member in Arizona who is suffering from the kind of abuse discussed above, this Court should exercise its discretion to expedite this appeal to prevent this damaging harm from reoccurring. See e.g., Piner v. Superior Court, 192 Ariz. 182, 185, ¶10, 962 P.2d 909, 912 (1998); Bledsoe v. Goodfarb, 170 Ariz. 256, 257, 823 P.2d 1264, 1266 (1991).

III. APPELLEE ASSOCIATION SHOULD NOT BE PREJUDICED

Appellant served her Petition for Special Action on the Association on October 23, 2015 and the arguments contained therein will essentially be the

same as those filed in the Opening Brief. Since the Appellee will effectively have had Appellant's Opening Brief and adequate time to prepare an Answering Brief, the Appellee should not be prejudiced by an expedited briefing schedule and expedited consideration of this Appeal. On the other hand, for the reasons stated above, Appellant and the community will incur significant prejudice the longer that this matter is delayed.

IV. CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court exercise its discretion pursuant to ARCAP 3(a) and order an expedited briefing schedule and hearing to allow for the expedited consideration of Plaintiff's Appeal.⁴

DATED this 10th day of November, 2015.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By: /s/ Jacob A. Kubert
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⁴ Although ARCAP 29(b)(2) allows a party to request expedited consideration of an appeal once the appeal is "at issue," Appellant submits that such a motion would be redundant and therefore requests that this Court "suspend" that rule pursuant to ARCAP 3(a) and enter a broad enough Order that would make another motion pursuant to ARCAP 29(b)(2) unnecessary.

ORIGINAL of the foregoing e-filed
with the Court of Appeals and a **COPY**
mailed and e-mailed this 10th day of November 2015, to:

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