Clerk of the Superior Court
*** Electronically Filed ***
K. Dyer, Deputy
5/26/2021 5:01:57 PM
Filing ID 12943277

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R.L. WHITMER, Plaintiff, vs. HILTON CASITAS HOMEOWNERS ASSOCIATION, also known as HILTON CASITAS COUNCIL OF HOMEOWNERS, also known as HILTON CASITAS COUNCIL OF CO-OWNERS, Defendant.	Case No. CV2021-050888 **MOTION TO DISMISS** (Assigned to Honorable Sara Agne) **Expedited Review Requested**

Pursuant to Arizona Rules of Civil Procedure 8(a) and 12(b)(6), Defendant, Hilton Casitas Homeowners Association (the "Association") hereby moves this Court to dismiss Plaintiff's Complaint for failure to state a claim. Plaintiff's Complaint fails to allege sufficient facts to support a claim under the legal theories put forth by him. Further, the facts as alleged in the Complaint conclusively establish that leave to amend the Complaint would be futile. Thus, the Association respectfully requests that the Court dismiss the Complaint, in its entirety with prejudice, without leave to amend.

This Motion is supported by the accompanying Memorandum of Points and Authorities, the pleadings, motions, exhibits and other documents of record in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

The Hilton Casitas Condominium is a condominium subject to the Arizona Nonprofit Corporation Act (A.R.S. § 10-3101, et. seq.). and the Arizona Condominium Act (A.R.S. § 33-1201, et. seq.). Complaint at ¶¶ 4, 6. Plaintiff brings the Complaint as co-owner of one of the units in the Association. *Id*. at ¶ 5. Plaintiff seeks the following forms of relief: 1) a finding that the Association is in contempt of court; 2) an injunction that the Association must comply with A.R.S. § 33-1255(A) *in the future*, and 3) an injunction for the Association to retain a certified public accountant ("CPA") to audit the Association's financial records for 2015 through 2019. *Id*. at ¶¶ 14, 18, 25; *see also* Plaintiff's Prayer for Relief.

II. LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim, the allegations of the claim are assumed to be true, and the Court gives Plaintiff the benefit of all **reasonable** inferences which can be inferred from the Complaint. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). However, the Court is limited to considering the well-pled facts and is not allowed to speculate about hypothetical facts that might entitle Plaintiff to relief. *Id*. at 420, 189 P.3d at 347. If Plaintiff is not entitled to relief under the well-pled facts, the Association is entitled to have the case dismissed. As discussed more fully below, Plaintiff's Complaint conclusively establishes that he is not entitled to relief from the Association and thus, the Court should dismiss the case.

III. LEGAL ARGUMENT

a. The Association is Not in Contempt of Court.

Plaintiff's request to hold the Association in contempt of court is based on the faulty assumptions that (1) the Administrative Law Judge Decision in Office of Administrative Hearings Case No. 14F-41415004-BFS (the "Administrative Order") is a valid order; (2) the Association is still subject to the Administrative Order that was issued in 2015; and (3) the Administrative Order, if valid, is so broad as to encompass all potential violations of A.R.S. § 33-1255(A). As explained more fully below, the Administrative Order is invalid as a matter of law and cannot form the basis for contempt of court.

i. The Office of Administrative Hearing Dispute Process is Unconstitutional.

The Administrative Order is the product of a defunct[1] administrative dispute process (the "Administrative Process") which was an unconstitutional violation of the Separation of Powers Doctrine. The Arizona Constitution provides that "[t]he powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial." Ariz. Const. art. 3. "The Arizona Constitution, written after generations of experience and experimentation under the United States Constitution, spells out the separation of powers doctrine even more specifically than does the national document." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997). Article 3 of the Arizona Constitution states the three departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. Art. 3. Despite this express directive, the powers of each department are not mutually exclusive; the Arizona Constitution allows some "'blending' of authority" among the

[1] The Arizona Legislature amended the Administrative Process to bring it under the Arizona Department of Real Estate instead of the Department of Fire, Building, & Life Safety in 2016, the year after the Administration Decision was issued.

departments. *Cactus Wren Partners v. Ariz. Dep't of Bldg. & Fire Safety*, 177 Ariz. 559, 562, 869 P.2d 1212, 1215 (App.1993) (*citing J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App.1984)).

At the time of the Administrative Order, the Arizona Legislature had vested the Department of Fire, Building, & Life Safety (the "DFBLS") with certain judicial powers. Administrative agencies "may resolve disputes between private parties if this authority is auxiliary to and dependent upon the proper exercise of legitimate regulatory power." *Id.* An agency's statutory grant of authority violates Arizona's separation of powers limitations when the agency's authority usurps the power of another department, causing "significant interference ... with the operations of another department." *J.W. Hancock*, 142 Ariz. at 405, 690 P.2d at 124.

Both *Cactus Wren* and *J.W. Hancock* set forth the analysis to determine whether a statute unconstitutionally usurps power properly belonging to another department. The analysis involves the consideration of four non-exclusive factors: "(1) the essential nature of the power exercised; (2) the degree of control exercised by the agency in the exercise of the power; (3) the [L]egislature's objective in establishing the agency's functions; and (4) the practical result of the mingling of roles." *Cactus Wren*, 177 Ariz. at 562, 869 P.2d at 1215 (internal citations omitted).

The Administrative Process involved the adjudication of a dispute between private parties over the CC&Rs. This power is judicial in nature. *See J.W. Hancock,* 142 Ariz. at 406, 690 P.2d at 125 ("Generally the adjudication of a dispute between two private parties is considered judicial.").

Although distinct, the third and fourth factors share a common element—to be constitutional, the agency's actions must be related to the agency's primary regulatory purpose. *See J.W. Hancock*, 142 Ariz. at 406, 690 P.2d at 125. That is, the agency's actions

must be "*reasonably necessary* to effectuate the administrative agency's *primary, legitimate regulatory purposes.*" *Cactus Wren*, 177 Ariz. at 562, 869 P.2d at 1215 (quoting *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91, 106 (1989)). In 2015, the Administrative Process failed to meet this standard.

The third factor looks at the "[L]egislature's objective in establishing the agency's functions." *Id.* This turns on whether the agency permissibly cooperates with the judiciary "by furnishing some special expertise" or impermissibly attempts to establish superiority over the judiciary in an area essentially judicial in nature. *J.W. Hancock*, 142 Ariz. at 405, 690 P.2d at 124 (quoting *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786, 792–93 (1976)). This factor requires a nexus between the primary regulatory purpose of the DFBLS and the adjudicatory authority granted in the Administrative Process; however, no such nexus exists. *See Cactus Wren*, 177 Ariz. at 562–63, 869 P.2d at 1215–16. The Legislature established DFBLS in 1986 "to combine the functions of the office of manufactured housing and the office of fire marshal into one department with administrative support to further the public interest of building and fire safety." Nowhere in its express purpose is the DFBLS authorized to regulate condominiums in any respect. Indeed, other than adjudication through the Administrative Process itself, there is no nexus between the regulatory authority or purpose of the DFBLS and the authority to regulate condominiums (which the DFBLS does not possess).

Given this lack of regulatory and other authority over planned community documents, statutes, or disputes, the Administrative Process does not enable the DFBLS to "furnish some special expertise" to the judiciary or otherwise. *J.W. Hancock*, 142 Ariz. at 405, 690 P.2d at 124 (quoting *Bennett*, 547 P.2d at 792). The fact that the DFBLS lacks any connection—regulatory or otherwise—to condominiums and that the DFBLS does not have any specialized knowledge or expertise in disputes over governing documents or statutes leads to the inevitable conclusion that the Administrative Process "threaten[s] the core functions of the courts." *J.W.*

Hancock, 142 Ariz. at 406, 690 P.2d at 125. Thus, the Administrative Process is unconstitutional and the Administrative Order similarly is invalid.

ii. The Administrative Process Lacked Authority to Grant Injunctions.

Even if the Administrative Process as a whole was not invalid, the Administrative Order is still invalid to the extent that it exceeded the authority of the Office of Administrative Hearings. Pursuant to A.R.S. § 41-2198.02 (2015), relief through the Administrative Process was limited to an order that a party "abide by the statute, condominium documents, community documents or contract provision at issue" in addition to a permissible civil penalty and recovery of the filing fee.

Injunctions are a form of equitable relief reserved to the courts rather than administrative bodies. *State ex rel. Corbin v. Portland Cement Ass'n*, 142 Ariz. 421, 425, 690 P.2d 140, 144 (App. 1984) ("An injunction is a decree in equity."); *see also* A.R.S. § 12-1801 (authorizing superior courts to grant injunctions); A.R.S. § 41-1001 et seq. (setting forth the rules for administrative procedure which do not include any authority to grant injunctions). Further, the coercive power of injunctions cannot be employed absent specific procedural safeguards. *See e.g.,* A.R.S. § 12-1803 ("An injunction shall not be granted on the complaint unless it is verified by the oath of the plaintiff…"; *see also Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (describing injunctions as an "extraordinary remedy…by which a court directs the conduct of a party…with the backing of its full coercive powers." (internal quotations omitted)).

The Administrative Law Judge lacked the authority and procedural safeguards to issue an injunction. Rather, the Administrative Order should be read in the context of A.R.S. § 41-2198.02 and limited to the specific facts and circumstances of the 2014 dispute. Plaintiff cannot use the Administrative Order to seek a contempt order against the Association six years after the Administrative Order and in completely distinct factual circumstances.

iii. The Association Did Not Violate the Administrative Order.

Finally, even if the Administrative Order is valid, which the Association does not concede, Plaintiff's Complaint fails to state a claim upon which this Court might grant relief, because he has failed to allege any factual allegations which, taken as true, are sufficient to state a claim that the Association violated the Administrative Order. In relevant part, the Administrative Order provides, "It is further ORDERED that Hilton Casitas shall fully comply with the applicable provisions of A.R.S. § 33-1243(D) in the future." Thus, Plaintiff must allege facts demonstrating that the Association violated A.R.S. § 33-1243(D) in order to bring a claim for violation of the Administrative Order.

By its plain language, A.R.S. § 33-1243(D) requires that the Association take the following actions: 1) provide a summary of the proposed budget for the condominium to all the unit owners within thirty days after adoption of said budget and 2) set a date for a meeting of the unit owners to consider ratification of the budget not fewer than fourteen nor more than thirty days after mailing of the summary. Neither of the requirements set forth in § 33-1243(D) apply unless and until the Association adopts or amends a budget.

Plaintiff alleges the Association has not adopted a budget. Complaint at ¶¶ 14, 17. Assuming Plaintiff's allegations as true, it is impossible for the Association to violate the requirements of A.R.S. § 33-1243(D) in the present case because the adoption of a budget is a prerequisite before § 33-1243(D) could apply. Thus, Plaintiff's claim fails as a matter of law and the Court should dismiss Count I with prejudice.

b. Arizona Revised Statute § 33-1255(A) Does Not Specify When the Annual Budget Must Be Adopted.

Plaintiff next argues that the Association violated A.R.S. § 33-1255(A) by failing to adopt an annual budget "prior to the January 1st start of the Association fiscal year." Complaint at ¶¶ 16-17. However, nothing within A.R.S. § 33-1255(A) specifies that the annual budget

must be adopted before the beginning of the fiscal year. In its entirety, A.R.S. § 33-1255(A) provides as follows:

> A. Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments shall be made at least annually, based on a budget adopted at least annually by the association.

In his Complaint, Plaintiff baldly asserts that the Association must adopt a budget before the fiscal year, but there is no such requirement by statute. All that A.R.S. § 33-1255(A) requires is that an Association adopt a budget "at least annually." Plaintiff does not allege that the Association failed to adopt a 2020 budget, so he has failed to plead facts necessary to establish that the Association has failed to adopt its budget at least annually.

To be sure, the Association does not dispute that there may be non-statutory provisions which require that the Association adopt a budget on a more specific timeline than what is required under A.R.S. § 33-1255(A); however, Plaintiff explicitly states his claims are exclusively limited to statutory compliance. *See* Complaint at Prayer for Relief ¶ E ("For the sake of order and clarity, it is expressly stated that this case and the requested relief does not arise out of contract, but rather is a matter of statutory compliance.") As such, any non-statutory requirements for the adoption of the budget are irrelevant to the substance of the Complaint. The mere fact that the Association did not adopt its annual budget prior to the fiscal does not violate A.R.S. § 33-1255(A). Thus, Plaintiff has failed to plead sufficient facts to establish a claim under § 33-1255(A), and the Court should dismiss Count II with prejudice.

c. Arizona Revised Statute § 33-1243(J) Does not Require the Association to Employ a CPA.

Finally, Plaintiff seeks an injunction requiring the Association "to retain a CPA to conduct complete audits of the 2016, 2017, 2018 and 2019 fiscal years." There are several issues with this claim for relief.

First, at least a portion of Plaintiff's requested relief is barred by the statute of limitations. Pursuant to Ariz. Rev. Stat. § 12-541, "There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, the following actions: … 5. Upon a liability created by statute, other than a penalty or forfeiture." This one-year statute of limitations applies in circumstances, "where a liability would not exist but for a statute and … does not include or extend to actions arising under the common law." *Murdock v. Balle*, 144 Ariz. 136, 138, 696 P.2d 230, 232 (App. 1985).

Here, the obligation to provide for an annual audit, review, or compilation is entirely a product of statute and thus must be prosecuted within one year of accrual. Pursuant to A.R.S. § 33-1243(J), the Association must make the audit, review or compilation available by no later than 210 days after the association's fiscal year—180 days for the completion of the report with another 30 days to make the report available. Thus, Plaintiff's cause of action accrued, at the latest, on the 211th day after the association's fiscal year. For the 2018 audit, review or compilation, the claim accrued on July 30, 2019 and the statute of limitation expired on July 30, 2020. Thus, Plaintiff's claims related to the 2018 and all prior years are barred by the statute of limitations.

Second, Plaintiff's claim ignores the plain language of A.R.S. § 33-1243, which provides as follows:

> J. Unless any provision in the condominium documents requires an annual audit by a certified public accountant, the board of directors shall provide for an annual financial audit, review or compilation of the association. The audit, review or compilation shall be completed no later than one hundred eighty days after the end of the association's fiscal year and shall be made available on request to the unit owners within thirty days after its completion.

When the language of a statute is plain and unambiguous, Arizona courts follow the text as written without resorting to other methods of construction. *E.g.*, *Indus. Comm'n of Arizona v. Old Republic Ins.* Co., 223 Ariz. 75, 77, ¶ 7, 219 P.3d 285, 287 (App. 2009). Courts read the

statute to give effect to each word and phrase and apply usual and commonly understood meanings. *Id*.

As applied here, A.R.S. § 33-1243(J) is plain and unambiguous and does not require any form of statutory construction. The default requirement is that "the board of directors shall provide for an annual financial audit, review or compilation of the association." This is a default rule that applies "[u]nless any provision in the condominium documents requires an annual audit by a certified public accountant." Plaintiff has not pointed to any provision of the condominium documents that requires a CPA because no such provision exists. Further, as discussed in Section III.b, *supra*, Plaintiff brings his claims purely on statutory compliance such that the Association's governing documents are inapplicable to the requested relief. Because there is no applicable condominium document, the default requirement controls.

In short, Plaintiff's claim for relief requests that the Court enter an injunction in direct contradiction with the statutory requirement of A.R.S. § 33-1243(J). There are no set of factual allegations that would entitled Plaintiff to this form of relief, so the Court should dismiss Plaintiff's Count III with prejudice.

d. The Association Requests Its Fees and Costs in Defending This Action.

While Plaintiff pled his Complaint as purely a matter of statutory compliance, the fact is that the relationship between Plaintiff and the Association is contractual. *See Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006) ("A deed containing a restrictive covenant that runs with the land is a contract.") As such, the Association requests its reasonable attorneys' fees pursuant to A.R.S. § 12-341.01 and costs pursuant to A.R.S. § 12-341.

Moreover, Arizona Revised Statute § 12-349 provides in relevant part as follows:

> A. [I]n any civil action commenced…in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party…if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.

…

F. For the purposes of this section, "without substantial justification" means that the claim or defense is groundless and is not made in good faith.

A claim is groundless "if the proponent can present no rational argument based upon the evidence or law in support of that claim." *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22, 335 P.3d 1122, 1129 (App. 2014) (*quoting Evergreen W., Inc. v. Boyd*, 167 Ariz. 614, 621, 810 P.2d 612, 619 (App.1991)). As demonstrated above, Plaintiff's own allegations demonstrate that his claims are groundless, futile, and unsupported by any rational application of the law or evidence. Accordingly, the Association also requests its reasonable attorneys' fees under A.R.S. § 12-349.

IV. CONCLUSION

For the reasons above, the Association respectfully requests that this Court vacate the evidentiary hearing currently set for June 11, 2021 at 1:30 p.m., dismiss Plaintiff's entire Complaint with prejudice for failure to state a claim. Considering that Plaintiff's allegations undercut his own claims, leave to amend the Complaint would be futile.

Pursuant to A.R.S. §§ 12-341, 12-341.01 and 12-349, the Association also requests its costs and attorneys' fees incurred in defending this matter and any further relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this 26th day of May, 2021.

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