

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

ROBERT R. HAWK and CECILIA J.
HAWK, husband and wife,

Plaintiff/Counter Defendants,

vs.

Case No. CV 2011-00775

PC VILLAGE ASSOCIATION, INC., an
Arizona corporation,

Defendant/Counter Plaintiff.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ORAL ARGUMENT/UNDER ADVISEMENT

FLAGSTAFF, ARIZONA
February 28, 2012
9:58 o'clock a.m.

BEFORE: HONORABLE MARK R. MORAN
Judge of the Superior Court

PREPARED FOR: J. Gary Linder, Esq. (Certified Copy)

Jonna E. Baker, RPR
Certified Reporter
Certificate Number: 50480
Official Reporter

1 APPEARANCES:

2 LAW OFFICE OF TEVIS REICH
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6 Appearing on behalf of Plaintiff/Counter
7 Defendants.

8 JONES, SKELTON & HOCHULI, P.L.C.
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12 Appearing on behalf of Defendant/Counter
13 Plaintiff.

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P R O C E E D I N G S

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2 THE COURT: Good morning to both counsel.
3 This is Division 3, Coconino County Superior Court.
4 I'm Judge Moran. Time set for oral argument on
5 motions for summary judgment. CV 2011-775. Hawk
6 versus PC Village Association, Inc.

7 Mr. Reich is present on behalf of
8 plaintiffs/counter-defendants. Good morning,
9 Mr. Reich.

10 MR. REICH: Good morning, your Honor.

11 THE COURT: Mr. Linder on behalf of the
12 corporation; is that correct, counsel?

13 MR. LINDER: Yes, your Honor. Thank you.

14 THE COURT: Thank you. Good morning. Thanks
15 for being here.

16 MR. LINDER: Thanks for having me.

17 THE COURT: I'm surprised that you're actually
18 physically present, but that's okay.

19 MR. LINDER: Yeah. I'm actually surprised. I
20 made a bad decision this morning, your Honor.

21 THE COURT: All right. We can always
22 accommodate in the future, if you and your partners
23 need to appear telephonically we have no problem with
24 that. Okay.

25 I have read the motion, the

1 cross-motion, the response, reply, so I'm ready to go.
2 So argument, we'll start with Mr. Reich.

3 Mr. Reich, go ahead.

4 MR. REICH: Thank you, your Honor. I'd first
5 like to ask if there's any specific areas of ambiguity
6 or inquiry that the Court would like us to hone in on.

7 THE COURT: No.

8 MR. REICH: Okay. I think that the briefs are
9 very well done in this case and I think that it's
10 self-explanatory. The main issue that I think the
11 Court has to resolve is whether or not there were
12 vested contractual rights in this particular case.
13 There are two things that are not really challenged or
14 responded to by the defendants in this case. The first
15 one is the retroactivity argument. And I think -- and
16 it's the plaintiff's position that there is no
17 retroactivity here. And the reason is is because in
18 retroactivity the fact that future matters may relate
19 to past events does not create retroactivity itself. I
20 actually quote Hall when it says, in Arizona it's
21 conclusively settled that the laws are not retroactive
22 simply because they relate to past events. We have
23 previously stated that in Arizona statutes dealing with
24 civil matters may not be applied retroactively in the
25 absence of the specific provisions that affect A.R.S.

1 1-244, but no such prohibition however applies to laws
2 that operate on pre-existing conditions and such laws
3 are not retrospective by their mere relation to
4 antecedent conditions.

5 That's very important because what we
6 have here and the facts that we have here is the CC&Rs
7 were recorded in 2002, admitted in 2004. A.R.S. 33-441
8 was enacted in 2007. A.R.S. 33-1808 was enacted in
9 2009. And the acts of posting a for sale sign here
10 occurred in 2011. These are all undisputed facts. So
11 the fact is that the posting of the for sale sign
12 occurred after both statutes were enacted.

13 Importantly, what is argued by the
14 defendant is is and I think that the quote is in this
15 case for a sale sign -- excuse me -- in this case the
16 for sale sign obligations were immediate, they prohibit
17 the display of such signs and their authority did not
18 depend upon a contingent event. Plaintiffs are arguing
19 that this contractual right did not vest until they
20 actually breached the contract.

21 I point you to Hall again, which lays
22 out three different types of rights. The first one is
23 a vested right. And I quote: They are vested when the
24 right to enjoyment, present or prospective, has become
25 the property of some particular person or persons as a

1 present interest. We expect and write, quoting again,
2 is when they are dependent upon the continued existence
3 of the present condition of things -- of things until
4 the happening of some future event. And the third is
5 the contingent right, quoting again, when they are only
6 to come into existence on an event or condition which
7 may not happen or be performed until such event may
8 prevent their vesting. The Court goes on to say, and
9 this is the key to the entire case right here is, we
10 believe that rights vest only when it is actually
11 assertable as a legal cause of action to the defense.
12 This is Hall. I'll repeat it again; rights vest only
13 when it's actually assertable as a legal cause of
14 action or defense.

15 So what we are dealing with here is when
16 the legislation was enacted, could the HOA bring suit
17 against the plaintiff or vice versa for the posting of
18 the for sale sign. The answers are equivocally no.
19 The acts that we're dealing with, posting of the two
20 for sale signs, occurred in 2011, four years after the
21 statute A.R.S. 1808 was enacted.

22 Particularly I would like to point out
23 another area that's not challenged and this is with
24 respect to A.R.S. 33-441. And this is the statute that
25 deals with the restrictive deed. And it's argued by

1 the defendants that this statute pertains solely to
2 conveying instruments.

3 Simply put, the deed at issue is a
4 conveying instrument that incorporates by reference the
5 CC&Rs. It expressly notes that it is subject to the
6 conditions, restrictions and obligations that may
7 appear of record. That include the CC&Rs. That
8 statute also notes that the CC&Rs are incorporated and
9 part of that because it is a contract. And there's no
10 dispute between the plaintiffs and defendants with
11 respect to that. The CC&Rs are a contract that each
12 homeowner or property owner becomes obligated and bound
13 to when they purchase the property.

14 Even if that wasn't the case, the
15 catchall phrase in that statute notes that the CC&Rs is
16 a document that affects an interest in property.
17 Again, I don't think this is a dispute. But the most
18 important and significant thing is as the Garden Lakes
19 case, 204 Ariz 238, and in that particular case it's
20 the exact same statute but dealing with solar panels.
21 And in the context of dealing with solar panels, the
22 Court found that the CC&Rs -- well, excuse me. I got
23 ahead of myself.

24 The CC&Rs allowed for the enactment of
25 guidelines which restricted the solar panels. And the

1 guidelines are one step removed from the CC&Rs by that
2 virtue. And the Court found in that particular case
3 that those guidelines were a document that affected an
4 interest in real property. It would be illogical to
5 think that if guidelines which are one step removed and
6 do affect the interest in real property that the CC&Rs
7 would not have the same effect.

8 If the Court finds that there are no
9 vested rights, contractual rights here, the inquiry
10 ends there. There's no reason to go on any further and
11 engage in a constitutional analysis that the defendants
12 raise. But -- and for argument sake, assuming that
13 there were contractual vested rights, the Court goes on
14 to ask whether or not those rights were impaired and
15 impaired substantially.

16 The Court then is tasked with the
17 obligation of weighing the reasonable expectations of
18 the parties.

19 It has been cited to, and one of the
20 things that the Court had to look is whether or not
21 this is an area of regulation by the legislature. And
22 simply put, HOAs are a creature of statute. The powers
23 that they are allowed to -- or the powers that they are
24 given are given specifically by the authority of the
25 legislature. It seems to reason that those rights can

1 either be expanded or reduced, retracted; and,
2 therefore, no person has a reasonable expectation that
3 the laws are going to remain the same. And there's no
4 reasonable expectation that the laws would not change
5 as they did.

6 The second important area is the
7 severability clause in the CC&Rs, and that's section
8 18.3. That severability clause essentially says that
9 if for any reason, and I quote, under any circumstance,
10 end quote, the CC&Rs become invalid or any portion of
11 the CC&Rs become invalid, then it's severed from the
12 agreement. That portion of the CC&Rs indicates that
13 there's a recognition that the laws change and that
14 they can be changed. And because of that, an HOA
15 member does not have a reasonable expectation that the
16 laws will not change.

17 I end with the quote again from Hall,
18 which states that if contracts were allowed to be in
19 perpetual existence and that the laws could not change,
20 the Court says, if the rule were otherwise, our
21 continually changing landscape of ideas and laws would
22 resemble a petrified forest populated by the outmoded
23 concepts of the past.

24 The courts essentially acknowledge that
25 the laws change, must evolve, and that you cannot make

1 a contract which prevents the laws from evolving.

2 Thank you, your Honor.

3 THE COURT: Okay. Thank you, Mr. Reich.

4 Mr. Linder, you may argue.

5 MR. LINDER: Good morning, your Honor. Thank
6 you for your time.

7 THE COURT: Good morning. You bet.

8 MR. LINDER: Yeah, I agree with Mr. Reich that
9 we do have a lot more agreement in this case than I
10 originally thought in terms of how the issues actually
11 are -- most of the facts are agreed upon. I think that
12 the first thing to discuss, and I'd like to respond to
13 his arguments, I can limit my argument just to
14 responding to those things and then rest upon my brief
15 and other topics.

16 I believe what's happening here is the
17 plaintiff is confusing the idea of tort based claims
18 versus contract based claims. As pointed out in my
19 papers, the idea of a vested right, those cases that
20 are cited all come in the context of tort based claims
21 in which people are choosing their remedies at a later
22 date. For example, the idea that the application of
23 contributory negligence was one of the cases that was
24 set forth.

25 Your Honor, I would submit to you that

1 those are completely distinct concepts from contractual
2 rights. And I think that the plaintiffs here are
3 creating in a way a fiction to suggest that someone's
4 contractual rights don't vest until such time that a
5 breach occurs. That doesn't make any sense to me, and
6 I don't think it makes any sense to the world, where if
7 you sign a contract those rights vest at the time that
8 you actually enter into that contract. And so here
9 there's no dispute, we have a contract, which is the
10 CC&Rs, and those CC&Rs contain contractual rights that
11 are held by the homeowners and the association
12 themselves and between the homeowners. It's sort of a
13 tripartite relationship. And in that situation, those
14 contractual rights are, again, they vest when you buy
15 your home. You have certain rights you can exercise
16 against the association or against your neighbors.

17 So, with that in mind, there is no
18 dispute it seems from the plaintiffs that the statute
19 in question, 1808, 33-1808 does not contain any
20 retroactivity language in it. The statutory scheme of
21 the State of Arizona, there's another statute that says
22 that if the legislature wants something to be
23 retroactive, all they have to do is put it in the
24 statute to make it retroactive. In fact, one of the
25 other statutes in issue here in fact contains a

1 retroactivity provision for the Court's reference. So
2 I don't understand the argument that somehow a
3 contractual right wouldn't be vested at the time that
4 you actually entered into that contract.

5 The second component to this in terms of
6 the application to the second statute, which is 33-441,
7 your Honor, I looked at that statute. I read it many
8 times. I don't see any other legitimate reading of it
9 than what it actually says, which is that it relates to
10 the deeds themselves, to the conveyances of real
11 property. It doesn't relate to other recorded
12 documents. There's no statutory history to suggest
13 that or any other case law that I was able to find. To
14 interpret it any other way would actually in a way
15 destroy the entire meaning of the statute, which is to
16 control what's in the conveyance, the deeds themselves,
17 is what's in these restrictions. So I just don't think
18 it applies. I don't see how it could possibly apply.
19 I just simply rest upon the language in the statute in
20 that regard.

21 The third component, I'm not exactly
22 sure, this is where I'm a little confused what
23 Mr. Reich just argued, is the idea that if -- somehow
24 they're arguing that if the rights aren't vested then
25 the constitutionality arguments don't apply. I think

1 we're in opposite in that respect. And then of course
2 what we're saying in our briefing is that if the Court
3 were to find that they weren't vested, then that the
4 next step would be to read arguments regarding the
5 unconstitutionality of the statute.

6 And, your Honor, I believe that our
7 arguments with respect to the constitutionality
8 arguments are very straight-forward. Ask yourself the
9 question, had the state law operated as a substantial
10 impairment of a contractual relationship? We -- as we
11 set forth in the affidavits, as well as our motions,
12 this is a provision of the contract. It's something
13 people relied upon when they purchased homes or lots in
14 the subdivision that this was something that the
15 architectural review committee of the association would
16 be able to control, the appearance of the association.

17 Then the question is, is there a
18 significant or legitimate public purpose behind the
19 legislation? I don't see an argument from the
20 plaintiffs in that regard. I don't see them putting
21 forth anything to suggest that this is something that
22 is a significant and legitimate public purpose behind
23 the legislation.

24 In the papers you'll see I think an
25 example of the statute in which the court system has

1 found a significant public interest which had to do
2 with a -- some statutes associated with sign or signage
3 associated with racial integration, where some of the
4 statutes -- I can't remember the exact case off the top
5 of my head but it's in the papers.

6 Then, three, if a legitimate public
7 purpose is identified, is the adjustment of the rights
8 and responsibilities of the contracting parties based
9 upon reasonable conditions and of the character
10 appropriate for the public purpose justifying the
11 adoption of legislation.

12 Again, I don't see any arguments from
13 the plaintiffs regarding that, regarding number three.
14 This is a situation, and then I'll circle back to my
15 original argument, which is that this is a contractual
16 right that vested prior to the enactment of the
17 statute. The statute in question does not contain a
18 retroactivity clause in it. And, as such, it's a right
19 these folks owned. And to trump upon those rights
20 would be in violation of the case law set forth in my
21 papers regarding constitutionality. And that's all I
22 have, your Honor.

23 THE COURT: Okay. The only question I have is
24 a lot more fundamental than the very technical
25 arguments you're both making. Mr. Linder, can't a

1 government at some point in time pass a law which
2 actually takes away or adds specific rights which
3 affect private contracts? Isn't that possible?

4 MR. LINDER: Oh, certainly, your Honor.

5 THE COURT: Okay. There are many examples I
6 can think of where the government said, you know, for
7 the good of the people or for the good of X, Y or Z,
8 we're going to go ahead and pass this law. And private
9 contracts to the contrary which have been previously
10 entered into which are contrary to that law are no
11 longer valid because, for whatever reason, their
12 perception, public perception, public policy has
13 changed in the last 10 years, 50 years, whatever. So
14 we're going to just by fiat say, I'm really happy that
15 you have the right to contract but that's not going to
16 be a valid or enforceable contract any longer. It was
17 when you entered into it and you had that expectation,
18 but now you can't do it anymore. So why isn't that
19 this case here?

20 MR. LINDER: Well, your Honor, I guess first
21 and foremost, because the -- as you stated, I think the
22 State of Arizona has an absolute right to enact
23 retroactive statutes. And 1-244 says that if you do
24 that, you have to say it in the statute. And so my
25 first argument would be, they didn't do that. It's not

1 retroactive. That's a relatively simple argument.

2 And then the second argument would be
3 that what you described in terms of each of those
4 examples that we can all think about in terms of
5 governmental entities passing statutes or laws or the
6 judiciary for that matter entering opinions, I should
7 say, that affect contractual rights go into the test
8 set forth in our papers. And I would rest on our
9 papers regarding, you know, that test in terms of
10 whether or not this statute is a constitutional or
11 unconstitutional interference with the past contractual
12 relationship.

13 THE COURT: Do I have to weigh the promotion
14 of either of the public policies which might be
15 furthered by either applying the contract or saying,
16 no, the statute is vacating or invalidating that
17 contractual right? Do I have to weigh those public
18 policies as to each of the parties in this case?

19 MR. LINDER: I believe that's what the case
20 law sets forth, your Honor, if you get that far, if you
21 determine that the statute in question is, in fact,
22 retroactive.

23 THE COURT: And I wish the legislature in its
24 wisdom would be as specific as you're arguing in every
25 single case. That would be wonderful for judges. But

1 I appreciate it. You answered my questions. Thank
2 you.

3 MR. LINDER: Okay. Thank you, your Honor.

4 THE COURT: All right. Any rebuttal,
5 Mr. Reich?

6 MR. REICH: Very brief, your Honor. Back to
7 retroactivity. I think that analysis is unnecessary in
8 this particular case because, again, we're dealing with
9 acts that occurred after the legislation was enacted.
10 It relates to antecedent events, but that itself does
11 not make it retroactive. So for both statutes it's not
12 retroactive. But under particularly statute A.R.S.
13 33-441, this is the statute that the defendants argued
14 pertains solely to deeds of conveyance. That does have
15 retroactivity language. So even if a retroactivity
16 analysis is necessary, it does apply to more than just
17 deeds of conveyance. And I'll read for you the very
18 first sentence. A covenant, restriction or condition
19 contained in any deed, contract, security instrument,
20 or other instrument affecting the transfer or sale of
21 an interest in real property -- and it goes on to
22 basically say, cannot prohibit a for sale sign.

23 There are several words contained within
24 that statute that apply to the CC&Rs, but even more so
25 apply to the very deed that we're talking here because

1 the deed expressly notes that it's subject to items of
2 record, which includes the CC&Rs. But other things
3 that could be construed as also incorporating the CC&Rs
4 is the word contract. The other words are covenant,
5 restriction or condition. This is not some misnomer or
6 some mistake, but the very general term that's used for
7 CC&Rs is covenant, condition, restriction; the very
8 words that are used in this statute here.

9 Finally, it references, or other
10 instrument, a very broad catchall. And, again, CC&Rs
11 do affect the transfer in real property. So this
12 statute, even for retroactivity analysis, is necessary,
13 should apply.

14 Addressing the defendant's argument
15 about a tort base claim versus a contract base claim,
16 I'd like to note for the Court that each of the cases
17 that we're talking about here and that are cited in the
18 briefs reference contractual impairment, and it's an
19 analysis based on impairment of contractual rights.
20 It's addressing the very issues that we are dealing
21 with here, but more so, it's addressing rights
22 fundamentally rooted in contract or rights that are
23 already vested. So we get back to the analysis of what
24 are and what are not vested rights.

25 We are not arguing that at the point in

1 time a contract is executed that it's automatically --
2 that it automatically creates vested rights in every
3 respect. What we're arguing is is that in this
4 particular case, there are not rights vested as the
5 Court requires for the filing of a lawsuit. And that's
6 the trigger. So there are certain instances that I
7 think that we can all think of where a contract, an
8 executory contract possibly is executed and that that
9 immediately vests certain rights. There are other
10 rights which may be expected, meaning that the
11 continued existence of the present condition must
12 remain in order for those rights to become vested, and
13 there are other rights which are contingent. Again,
14 it's all explained by Hall.

15 Unless you have any questions for me, I
16 think that the brief -- the briefs are very adequate
17 and sufficient. And I have nothing further, your
18 Honor.

19 THE COURT: Okay. Thank you, Mr. Reich.
20 Appreciate it.

21 All right. The Court will take the
22 motions under advisement and issue a written ruling
23 with findings of fact and citing the law that the Court
24 applies. So thank you both very much for being here.

25 MR. LINDER: Thank you, your Honor.

1 THE COURT: Yep. And we'll probably just need
2 to set the case, just set it out 60 days, just so we
3 have it on my docket. And based upon the Court's
4 ruling, we can decide at that time what we want to do.

5 Did they give you a date, Kassey?

6 THE CLERK: No..

7 THE COURT: All right. We'll do it by minute
8 entry. We'll send it out.

9 Thank you, counsel. We're adjourned.
10 All right. Have a safe trip back.

11 (The proceedings adjourned at 10:22 a.m.)

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1 STATE OF ARIZONA)
 2) ss. REPORTER'S CERTIFICATE
 3 COUNTY OF COCONINO)
 4


5 I, Jonna E. Baker, do hereby certify that I am a
 6 Registered Professional Reporter and Certified Reporter
 7 in and for the State of Arizona.

8 I further certify that these proceedings were
 9 taken in machine shorthand by me at the time and place
 10 herein set forth, and were thereafter reduced to
 11 typewritten form; that the foregoing constitutes a true
 12 and correct transcript.

13 I further certify that I am not related to,
 14 employed by, nor of counsel for any of the parties or
 15 attorneys herein, nor otherwise interested in the result
 16 of the within action.

17 In witness whereof, I have affixed my signature
 18 this 8th day of June, 2012.

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 JONNA E. BAKER, RPR
 Certified Reporter
 Certificate Number: 50480
 Official Reporter