IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

VILLAGE OF OAKCREEK ASSOCIATION, Plaintiff/Appellant, v. LANCE E. BONHAM, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 22-0780 Yavapai County Superior Court Case No. V1300-CV2022-80081

APPELLEE LANCE E. BONHAM'S ANSWERING BRIEF

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I. INTRODUCTION

Appellee Lance Bonham ("Bonham"), by and through undersigned counsel, hereby submits his Answering Brief.

This case concerns the validity of a rental restriction ("Amendment") which was recorded by the Village of Oak Creek Association ("Association") in 2016 approximately fourteen (14) years after Bonham acquired an interest in the property. Prior to recording the Amendment in 2016, there was not a restriction on short-term rentals. Since there was not a restriction on short-term rentals, the Association cannot insert one. An Association can only amend provisions "for which the HOA's original declaration has provided significant notice." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 536, ¶ 1 (2022). An Association cannot adopt amendments which are "entirely new and different in character untethered to an original covenant." *Id.* at 529, ¶ 17. Based on the facts as pled by the Association and basic recorded documents, the trial court determined that there was no set of circumstances in which the Amendment was valid as applied to Bonham.

The Association's appeal is based primarily on the incorrect assertion that the trial court based its ruling on the date of the re-recorded Amendment. The Amendment was recorded on November 17, 2016 and re-recorded for the purposes of deleting two irrelevant sections on May 3, 2017. The Association hypothesizes

that the Court adopted the May 3, 2017 date. The Association then alleges this is significant because the most recently recorded deed was a Quit Claim Deed in which Bonham, as a trustee of his mother's trust, deeded the property to Bonham as an individual. The Quit Claim Deed was recorded on January 17, 2017, after the November 17, 2016 Amendment but before the May 3, 2017 re-recording.

The trial court, however, did not base its ruling on the timing of the Amendment. Rather, the trial court acknowledged Bonham's argument that he had been an equitable title holder of the property for years before the Amendment. The Court went on to correctly analyze the notice requirement established by the pertinent case law was not met and determined that the Amendment is "not tethered" to the Declaration and it "fails the sufficient notice test of *Kalway* and *Dreamland*." (IR 25). The Court's analysis was correct and the Association has failed to identify any error.

II. STATEMENT OF THE CASE AND STATEMENT OF FACTS

Bonham owns Lot 75 ("Subject Property") in the satellite association known as Cathedral View. (IR 1 at ¶ 3). Bonham's mother, Bette Simmons, purchased the Subject Property in 1989. (IR 37 at Exhibit 1). In 2003, the Subject Property was transferred into Ms. Simmons' Trust with Mr. Bonham named as a trust beneficiary. (IR 13 at Exhibit 2). Bonham took sole title to the Subject Property as an individual in 2017 by Quit Claim Deed where he, as the sole Trustee of the

Bette Simons Living Trust, deeded the Subject Property to himself as an individual. (IR 1 at Exhibit A). Bonham or his mother, through a trust or otherwise, have owned the Subject Property since 1989. (IR 37 at Exhibit 1; IR 13 at Exhibit 2; IR at Exhibit A). Bonham has been the holder of equitable title since 2003. (IR 13 at Exhibit 2).

The Master Declaration of Restrictive Covenants for all Property in the Village of Oakcreek was originally recorded in 1981. ("Original Declaration")(IR 14 at Exhibit 3). After a few minor amendments, The Village of Oakcreek Association Master Declaration of Restriction Covenants For All Property in the Village of Oakcreek, Restated and Amended was recorded on May 13, 2014. ("Declaration").[1] (IR 1 at Exhibit B). The Original Declaration and the Declaration do not restrict rentals. (IR 37 at Exhibit 3; IR 1 at Exhibit B).

The Association recorded the Amendment to The Restated and Amended Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek on November 17, 2016 ("Amendment")(IR 1 at Exhibit C). The Amendment added *Section 4.3, Lease of Lots and Units; Restrictions and*

[1] The Association's Complaint does not reference the Original Declaration. The Association references the Declaration as the basis for its Complaint. The differences between the Original Declaration and Declaration are minimal and irrelevant to this dispute.

Limitations. (IR 1 at Exhibit C). The Association re-recorded the Amendment on May, 3, 2017.[2]

The Amendment defines "Lease" as "all agreements, contracts, grants, memorandums, conveyances, lets, assignments, or rents that give a non-Owner of a Lot or Unit access to or right to use a Lot or a Unit." (IR 1 at Exhibit C). The Amendment then states, "No Owner shall lease a Unit for a Lease term of less than thirty (30) days." The Amendment further states that "An owner may lease his Lot or Unit only to a Single Family." (IR 1 at Exhibit C).

In 2021, the Association began attempting to enforce the Amendment and prohibiting Mr. Bonham from renting his unit on a short-term basis (IR 1 at ¶ 24). The Association filed an action seeking a preliminary and permanent injunction on April 5, 2023. (IR 1). Bonham filed a Motion to Dismiss on May 24, 2022. (IR 13). After briefing, the trial court issued a ruling granting the Motion to Dismiss on September 8, 2022. (IR 25). The Association filed a Motion for Reconsideration on September 21, 2023 (IR 26). The Motion for Reconsideration was denied. (IR 32). An Application for Attorney's Fees and related documents were filed on September 28, 2022. (IR 27-31). Judgment was entered declaring Bonham's property was not subject to the rental restriction in the November 17, 2016

[2] The May 3, 2017 Re-Recording removed Paragraphs 6 & 7 of *Section 4.23, Leasing of Lots and Units; Restriction and Limitations*. Those paragraphs are titled Tenant Registration Form and Grandfather Provision. Although referenced in the pleadings, the May 3, 2017 Re-recording has never attached to any pleading because it is largely irrelevant to the analysis. (Yavapai County Recorder, Document No. 2017-0021951).

Amendment or the May 3, 2017 re-recording. (IR 36). The Judgment also awarded attorney's fees and costs in the amount of $11,927.56. (IR 36).

III. STATEMENT OF THE ISSUES

The issues on appeal are as follows:

1) Whether the trial court erred in the application of the law based on the wrong recording date of the Amendment.
2) Whether the trial Court erred in granting Bonham's Motion to Dismiss and entering judgment that the Subject Property is not bound by the Amendment.

IV. STANDARD OF REVIEW

This Court reviews the dismissal of a complaint under Rule 12(b)(6) *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355 (2012).

This Court reviews an order denying relief under Rule 60 for an abuse of discretion. *City of Phoenix, v. Geyler*, 144 Ariz. 323, 328 (1985).

V. ARGUMENT

A. THE RENTAL RESTRICTION IS INVALID BECAUSE BONHAM WAS NOT ON SUFFICIENT NOTICE THAT SUCH A RESTRICTION COULD OCCUR.

The Arizona Supreme Court recently espoused a "sufficient notice test" declaring that only reasonable amendments can be effectuated if the homeowner

was on sufficient notice of the possibility of a future amendment. Specifically, the court stated,

> The original declaration must give sufficient notice of the possibility of a future amendment; that is, amendments must be reasonable and foreseeable. *See Dreamland*, 224 Ariz. at 51 ¶38; *see also Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 45-46 ¶14 (App. 2003); *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513 ¶7 (App. 2005).
>
> *Kalway* at 537-538.

"[A]n HOA cannot create new affirmative obligations where the original declaration did not provide notice to homeowners that they might be subject to such obligations." *Id*. "Instead, it must give notice that a restriction 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. But future amendments cannot be 'entirely new and different in character,' untethered to an original covenant." *Id.* (Internal Citation and Quotation Omitted).

The Association has admitted that sufficient notice is required. In its Motion for Reconsideration (IR 26), the Association states, "The Court is correct that *Kalway v. Calabria Ranch HOA, LLC*, 2022 506 P.3d 18 (Ariz. 2022) and *Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz 42, 226 P.3d 411 (App. 2010) require that homeowners have sufficient notice that such a restriction could occur." (IR 26 at p. 3. Lines 11-14).

Finally, the case law in Arizona is consistent with the Restatement. Amendments to deed restrictions that are "substantial and unforeseeable" must be made with the approval of all the members in a deed restricted community such as the Association. *Restatement (Third) of Property; Servitudes § 6.10(3)(a)(2000).* ("[U]nanimous approval is required…. to prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units….").

Here, there is not sufficient notice because: 1) the Declaration prior to the Amendment did not restrict rentals; and 2) the Amendment itself cannot serve as notice to Bonham because he acquired his interest in the property over a decade before the Amendment was recorded. Thus, the Amendment is not reasonable, foreseeable or tethered to an existing restriction.

1. The Declaration Prior to the Amendment did Not Restrict Rentals.

Nothing contained in the Declaration prior to the Amendment suggests the intent of the documents was to limit short-term rentals, limit the ability to allow any guest to utilize your property or restrict property with respect to rentals in any regard. To the contrary, the Declaration allows guests and tenants. The Declaration at *Section 2(G)* defines "guest" to include tenants, lessees, invitees, and licensees. (IR 1 at Exhibit B). The Declaration at *Section 4.02, Residential Use*, allows an Owner, his family, and *guests* to utilize the property for unrestricted

residential purposes. (IR 1 at Exhibit B). Further, the Declaration at *Section 4.18, Licenses to Guests,* grants guests (which includes tenants) revokable licenses for the use of the common areas.

The Declaration does not restrict rentals. *Section 4* of the Declaration contains General Land Use Regulations regulating such things as commercial use, animals, drilling, laundry areas, and the like. (IR 1 at Exhibit B). If the intention was to restrict rentals, there could have been a provision regarding rentals. There is no reference to a restriction on rentals, short-term or otherwise. A provision similar to the Amendment and *Section 4.23, Leasing of Lots and Units; Restriction and Limitations*, did not exist in the Declaration. There are twenty-two (22) General Land Use Regulations in the Declaration. The Association did not amend a section but instead, since there was no remotely similar provision, adopted an entirely new provision. The Declaration does not contemplate in any way that such a rental restriction could be imposed. The entirely new section is untethered and does not meet the notice requirements as confirmed by the trial court.

As a final gasp, the Association attempts to tether the rental restriction to the restriction related to commercial business. *Section 4.03* of the Declaration does not restrict rentals. *Section 4.03* is entitled "Commercial Business" and states,

> No store, office or other place of business of any kind and no hospital, sanitorium or other place for the care or treatment of the physically or mentally ill shall be erected or permitted, and no business of any kind

> or character whatsoever shall be conducted from or located on any lot or unit….

This provision restricts commercial activities, not residential rentals. There is no business being conducted from or located on Bonham's property. Bonham is simply using the property consistent with the Declaration which allows "residential purposes by the Owner, his family or guests." (IR 1, Exhibit C at p. 7).

When drafting the Original Declaration, the Association could have stated that rentals are considered a business and prohibited the same. The Association did not include any such language and there cannot be a judicial expansion of the scope of a restriction. Moreover, the Association's position that rentals are businesses is inconsistent with its own policy which allows rentals of greater than thirty (30) days.

2. The Amendment Itself Was Not Sufficient Notice because Bonham had a Title Interest in the Property that Predates the Amendment.

The Association's primary argument is that the trial court erred because it did not recognize that the Amendment was recorded prior to Bonham taking title as an individual. That, however, is not the case. Plaintiff's [Association's] Response in opposition to Defendant's Motion to Dismiss addressed this argument in length. (IR 22). After briefing concluded, the trial court issued a minute entry which: 1) accurately identifies Bonham's main arguments; 2) accurately identifies the

standard for a motion to dismiss; 3) accurately recites the facts as pled by the Association; 4) acknowledges the Association's defense to the Motion to Dismiss regarding the date of the Amendment and the date title was acquired; 5) analyzes the facts and law; 6) concludes that the Amendment fails the sufficient notice test; and 6) rules that the Amendment does not apply to Bonham. (IR 25).

The trial court's comprehension of the Association's argument that the Amendment provides sufficient notice simply because it was recorded prior to the January 2017 Quit Claim Deed is articulated in the Minute Entry. The trial court stated,

> Plaintiff urges denial of the Motion because Defendant obtained title to the Property after the 2017 Amendment was recorded. Defendant disputes the timing of the equitable title to the Property as he obtained it through his mother's trust as a beneficiary, and his mother obtained title to the property in 1989.
>
> (IR 25).

The Court went on to state, "The court finds that Defendant *did not purchase the property after* recording of the 2017 Amendment such that he would be bound by it without review as to whether the notice requirement was met." (IR 25)(emphasis added). The emphasized portion of the statement is true. Bonham, in fact, never purchased the property. Bonham became an equitable title holder in 2003 as the beneficiary of his mother's trust and became the legal title holder in January 2017 when the trust deeded him the property.

B. DISMISSAL PURSUANT TO RULE 12(B)(6) WAS CORRECT.

An order granting a motion to dismiss pursuant to Rule 12(b)(6) is reviewed *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-356 (2012). When adjudicating a Rule 12(b)(6) motion, "Arizona courts look only to the pleading itself. *Cullen*, 218 Ariz. at 419, ¶ 7. However, '[a] complaint's exhibits, or public records regarding matters referenced in a complaint, are not 'outside the pleading,' and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion." *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63-64, ¶¶ 10, 13 (App. 2010).

Evaluating solely the Association's Complaint and public records, it is evident Bonham had an equitable interest in the property before the Amendment was recorded. Thus, the Amendment itself cannot serve as notice to a potential change in his interest because his interest was already acquired. The thrust of the Association's argument is that the trial court incorrectly establishes that Bonham "acquired" the property after the Amendment was recorded. However, through public documents, it is apparent that Bonham acquired an interest as a trust beneficiary over a decade before the Amendment.

"In a trust, the trustee holds legal title and the beneficiaries hold equitable title." *Williamson v. PVOrbit, Inc*., 228 Ariz. 69, 72 (App. 2011). Pursuant to the Declaration at *Section 2(L)*, ""Owner" means the record owner, whether one or

more persons or entities of legal, beneficial or equitable title fee simple interest to a Lot or Unit. (IR 1 at Exhibit C, p. 4). Thus, Bonham, as equitable title holder, was an owner nearly fifteen (15) years before the Amendment was recorded.

Moreover, Bonham is a successor in interest and retains the rights acquired by his mother in 1989. A successor in interest is one who follows another in ownership or control of property and retains the same rights as the original owner. *Home Builders Ass'n v. City of Maricopa*, 215 Ariz. 146, ¶ 18 (App. 2007). A successor in interest retains the same rights as the original owner, with no change in substance. *Miller v. Hehlen*, 209 Ariz. 462 (App. 2005). Bonham is also the successor in interest and is afforded all the rights of the original owner.

Contrary to the Association's assertions, the trial court understood the date of the Quit Claim Deed and the issue of equitable title. The trial court stated in its ruling, "Plaintiff urges denial of the Motion because Defendant obtained title to the Property after the 2017 Amendment was recorded. Defendant disputes the timing of equitable title to the Property as he obtained it through his mother's trust as a beneficiary, and his mother obtained title to the Property in 1989." The trial court then stated that because the property was not ***purchased*** after the recording of the notice requirement, *Kalway* and *Dreamland* applied. Then, the trial court concluded that the Amendment was not sufficiently tethered and it cannot apply to Bonham.

VI. NOTICE PURSUANT TO RULE 21(a).

Bonham requests an award of attorney's fees under Arizona Rule of Civil Appellate Procedure 21(a), A.R.S. §§ 12-341 and 12-341.01, as well as *Section 9.05* of the Declaration. (IR 38 at p. 32).

VII. CONCLUSION.

For the reasons stated in the trial court's Minute Entry and for reasons provided herein, this Court should affirm the trial court's granting of Defendant's Motion to Dismiss.

RESPECTFULLY SUBMITTED this 14th day of April, 2023.

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