R. L. Whitmer
6333 N. Scottsdale Rd.
Casita 21
Scottsdale, Arizona 85250
602.531.2615
Pro Per

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R. L. WHITMER,

Petitioner.

v.

HILTON CASITAS HOMEOWNERS ASSOCIATION, also known as HILTON CASITAS COUNCIL OF HOMEOWNERS, also known as COUNCIL OF CO-OWNERS, also known as HILTON CASITAS COUNCIL OF CO-OWNERS; and MICHAEL BENGSON, President of the named Respondent;

Respondents.

CV2016-055080

PETITIONER'S REPLY IN SUPPORT OF THEIR MOTION TO VACATE JUDGMENT

(Assigned to the
Hon. Aimee L. Anderson)

The Respondents in this case arguing in their response to Petitioner's Rule 59(a)1(H) motion to vacate the judgment that because they were successful in convincing the Court that the Court has no jurisdiction, then even if that conclusion is "contrary to law" the Court should deny the Rule 59(a)1(H) motion, because the motion for reconsideration has been denied "for lack of new evidence." The Respondents are wrong. The dismissal in this case is a matter of law, namely the court ruling that the Superior Court has no jurisdiction over contempt of court proceedings of administrative law orders. Because the Superior Court has jurisdiction pursuant to Article 6, Section 14.1 of the Arizona Constitution, the dismissal of this case in contrary to law, and the Court has the authority and the obligation to grant the motion to vacate the judgment.

The Respondents do not dispute in their response the argument of the Petitioner that the Court has jurisdiction under the Constitution purposely, because it is clear that such jurisdiction does exist. The Respondents, now contrary to their previous argument no longer claim that an administrative judge has jurisdiction in contempt of court proceedings, because they know that has been proven untrue.

While the Respondents attack the Petitioner for not doing his homework, they do not support their argument on the law as they falsely did before and were successful in misleading the Court as to the law in this matter. The Respondents' attorney is building his argument on the speculation that most judges give substantial weight and trust to statements made by attorneys instead of plaintiffs who represent themselves. He is now refraining from explaining the law anymore and claims that the Court's ruling (which he obtained by the false statement of the law) is the law.

The Respondents are absolutely wrong in their argument that Rule 59(a)1(H) does not allow the Court to vacate the judgment unless the Petitioner has "new legal justifications, arguments, or evidence." The Respondents wrongly argue that "the Court should hold, as it did regarding the motion to reconsider, that the Petitioner "failed to present newly discovered evidence that would change this Court's prior ruling, failed to show that this Court's prior ruling was manifestly unjust; or presented any evidence of an intervening change in controlling law has occurred." (P. 3:L. 13-18).

First, Rule 59(a)1(H) is not the same as Rule 7.1(E), and a motion for reconsideration is not the same as a motion to vacate under Rule 59(a)1(H). The standards are different and the requirements are different. Rule 59(a)1(H) authorizes the Court to vacate a judgment if it is contrary to the law, as it is in this case, namely that the Court has jurisdiction pursuant to Article 6, Section 14.1 of the Arizona Constitution, and the dismissal was based on the wrong assertion

that the Court lacks contempt of court proceedings jurisdiction over administrative law orders, and that the jurisdiction is vested with the administrative tribunals.

Second, that a motion under Rule 59(a)1(H) is not a motion for reconsideration and the Court has the authority to revisit its judgment and find if that judgment is contrary to law. The suggestion that the Court cannot do so, even if the judgment is contrary to the law unless a "new" legal justification is argued is a plainly wrong interpretation of the law. To the contrary, the Court is obligated to vacate its judgment if that judgment is contrary to law.

The Respondents do not deny the fact that this case does not arise out of contract, and in fact it is an admission that they are not entitled to attorney fees and costs. The Respondents also do not deny the fact that the prerequisites requirements for an award of attorney fees are not present, but their attorney claims that they are "reasonable" and because they are reasonable the award is justified. Obviously that is wrong, because absent any evidence which justify "sanctionable" fees (in contrast to a case arising out of contract!!) the prevailing party is not entitled to an award of attorney fees at all, whether they are reasonable or not.

The Arizona Legislature intended for an order of an administrative judge to be enforced by "contempt of court proceedings" under ARS §32-2199.02.B, and only the Superior Court has jurisdiction under Article 6, Section 14.1 of the Constitution, and should hear this case, in order to follow the law. Accordingly the judgment should be vacated.

The Respondents suggestion that the Petitioner would abandon the enforcement of an existing administrative law order, that "Hilton Casitas shall fully comply with the applicable provisions of A.R.S. § 33-1243(D) in the future."**(Ex. 7,** P.3:L.26-27**)**, and again file a petition for the same statutory violation in not only absurd, and defies common sense, but also is contrary to the

Office of Administrative Hearing's ("OAH") directions to homeowners:

> Has the dispute been previously adjudicated?
>
> If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. **(Ex. 5**, P.2**)**

It is obvious that the Respondents' attorney's new argument is as bogus as his recently abandoned position that administrative judges have contempt proceedings jurisdiction as he argued in his response to the motion for reconsideration:

> "Pursuant to R2-19-102(C), an Administrative Law Judge may issue a contempt order over contempt proceedings of the Administrative Orders, using the Arizona Rules of Civil Procedure and related local rules for guidance." (P. 3:L. 6-10)

Just as OAH advises the public that "OAH has no authority for contempt proceedings or enforcement of prior decisions", this was confirmed recently in 17F-H1716005-REL, where the administrative judge ordered:

> "... the motion for contempt is denied as the Administrative Law Judge does not have contempt powers." **(Ex. 8,** P. 1:L. 21-22**)**

CONCLUSION

While the Respondents do not argue that Article 6, Section 14.1 of the Arizona Constitution does not empower the Superior Court with jurisdiction to conduct the contempt of court proceedings. They ask the Court to preserve its judgment, only because the motion for reconsideration was denied, falsely arguing that Rule 59(a)1(H) requires new evidence or a new legal theory, thus, they do not contradict the legal argument except that it does contradict the Court ruling (which the Respondent ask to preserve). Obviously this argument is not logical, because the Rule 59(a)1(H) motion is about that judgment being wrong and "contrary to the law."

The Respondents' argument that if the attorney fees are reasonable, they are not obligated to show any evidence that justify a sanctionable award, if false and contrary to ARS §12-12-349 and *Brown v. Terravita Cmty. Ass'n, Inc.*[1] (No. 1 CA-CV 14-0455, Ariz. Ct. App. Memorandum Decision Jul. 30, 2015).

Here, as in *Brown*, there is no support or evidence proving any of the four prerequisites in ARS §12-349. Without any of the four prerequisites in ARS §12-349, an award of attorney fees and costs based on ARS §12-350 and Rule 11 is unsupportable as an application of law. A sanctionable award is obviously not justified in this case.

Because the Court's ruling that the Superior Court has no jurisdiction in this case is contrary to the law, and the award of attorney fees (which does not arise from a contract!) is contrary to the law, because the prerequisite requirements of ARS §12-349 do not exist in this case, the Petitioner respectfully requests that the Court vacate its judgment and grant a new trial.

If this Court rules that Article 6 Section14.1 of the Arizona Constitution does not grant jurisdiction to the Superior Court, and decides *not* to vacate its judgment and order a new trial, it should clearly state its rationale in a detailed minute entry so that said order may be reviewed by the Court of Appeals.

As stated in the Rule 59(a)1(H) motion, if the Court finds that Article 6 Section14.1 of the Arizona Constitution does not apply, the Court will have effectively rendered ARS §32-2199 et seq. meaningless without any means of enforcement, thus eliminating the legislative intent of "resolution of these common interest community disputes without the expense, formality and difficulty of requiring a trial in the superior court." As a public service, if the Court denies this Rule 59 motion, it should notice the Legislature, the Arizona Department of Real Estate, and OAH that orders from administrative law judges have effectively been ruled unenforceable.

---

[1] In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C). **(Ex. 6)**

Dated this 16th day of June, 2017.

R. L. Whitmer

ORIGINAL filed this
16th day of June, 2017, with the Court;

and a COPY mailed the 17th day of June, 2017 to:

Augustus Shaw, and Nicole Payne
Shaw & Lines Law Firm
4523 E. Broadway Rd.
Phoenix, AZ 85040

Courtesy copies to:

The Honorable Steve Yarbrough
Arizona State Senate President
1700 W. Washington Street
Phoenix, AZ 85007;

The Honorable Javan Mesnard
Speaker of the Arizona House of Representatives
1700 W. Washington Street
Phoenix, AZ 85007;

Ms. Judy Lowe, Director/Commissioner
Arizona Department of Real Estate
2910 N. 44th Street
Phoenix, AZ 85018;

Mr. Greg Hanchett, Acting Director
Arizona Office of Administrative Hearings
1700W. Washington Street
Phoenix, AZ 85007; and

Mr. William M. Brown
6751 E. Amber Sun Drive
Scottsdale, AZ 85266
VIA: Email

Exhibit 5

Arizona Office of Administrative Hearings

Homeowner Petitions Against An Association [1]

By Cliff J. Vanell

Note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Overview

In Laws 2006, Chapter 324, the Arizona Legislature created a revolutionary system of adjudication of disputes between homeowners [2] and their associations as an alternative to filing an action in court. Filing a petition with the Department of Fire, Building and Life Safety, the means by which such a matter is brought before the Office of Administrative Hearings (OAH), is a less costly and faster method of resolving disputes. Harnessing the advantages of streamlined procedures and a fast track which has proven itself since January 1996, disputes are resolved at OAH in generally less than 90 days. The OAH Administrative Law Judges have a great deal of leeway to consider evidence and to craft pre-hearing orders so as to maximize efficiency. However, there are costs to the process, some apparent, others less so.

There is an immediate cost to the homeowner in the nature of a filing fee.[3] Defending even a non-meritorious petition can be costly for an association, and the expense is ultimately borne by the association members, including the homeowner, through assessments. A homeowner will be reimbursed the filing fee by the association only if the homeowner is determined by the Administrative Law Judge to be the prevailing party. The homeowner therefore has an immediate interest in filing a valid petition, and one that can be proven. An unsubstantiated or invalid petition will result in the loss of the filing fee. Likewise, the association has an economic interest in evaluating the homeowner's petition to determine to what extent the alleged facts are really in dispute and whether the allegations have merit. What follows is offered in the way of a checklist to guide both homeowner and association.

Homeowner

1. Do I have a valid petition?

- **Am I alleging a violation of a statute in Title 33 or the community documents?**

  Only disputes that allege a violation of the provisions of A.R.S. Title 33 Chapter 9 (condominium associations) or Chapter 16 (planned community associations), or the provisions of the condominium or planned community documents can be heard by the OAH. For example, if the association is required to provide 24 hours notice of a Board meeting according to the association governing documents, and held a meeting without doing so, one would have a valid petition. Allegations of criminal acts, libel, slander, etc. which constitute violations of the criminal statutes of Title 13, or which constitute civil torts are not within the jurisdiction of the OAH.

- **Is the violation by the association?**

  The petition must deal with a dispute between a homeowner and a condominium or planned community association. Disputes between two homeowners or with an individual board member of an association cannot be heard by the OAH.

- **Is it your dispute?**

  A homeowner has no standing to pursue a dispute on behalf of another homeowner. For example, if another homeowner is aggrieved by the denial of an architectural modification in violation of the association guidelines, only the aggrieved homeowner may bring a petition against the association.

- **Is it a current dispute?**

  There must be a current dispute. For example, if board meetings were held without notice but the practice has now been conformed to notice requirements and prior actions taken in violation of the notice requirements subsequently ratified, there may have been a technical violation of the association's governing documents, but it is no longer in dispute. Another way to look at it is to ask yourself whether a remedy can be fashioned by the Administrative Law Judge? If there is no remedy, or the situation has already been remedied, it is probably not a current dispute.

- **Has the dispute been previously adjudicated?**

  If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court

2. Can I prove my petition?

The homeowner bears the burden of proving the allegations of the petition. Therefore, it is incumbent on the homeowner to have evidence to substantiate each allegation in the petition. Alleging counts that were not proven at hearing will be taken into account when determining whether the homeowner was the prevailing party and is entitled to reimbursement of the filing fee. Limiting the petition to strong allegations with good evidence maximizes the chances of having the filing fee reimbursed.

3. Are my expectations realistic about what I can accomplish?

The availability of the OAH hearing process ideally should result in compliance with statutes and association documents without the need to file a petition. The possibility of civil penalties together with the relative ease of bringing an action can provide motivation for an association to take the necessary action to comply with the applicable statutes and/or governing documents.

On the other hand, the Administrative Law Judge has no power to undo the passage of time or undo hurt feelings. The Administrative Law Judge cannot order damages or restitution. Civil penalties are reserved for situations where it can be demonstrated that an association has acted punitively or in bad faith.

Association

1. Could the association have done a better job of communicating with the homeowner? If not in time to avoid a petition now, can a better job be done in the future?

Conflict is unavoidable. Credible dispute resolution systems at the association level can go a long way toward relieving tensions and fostering mutual trust. The best way to avoid a petition is to become aware of what the statutes and the community documents require. Associations should then either conform to them or follow the necessary procedures to change them.

2. Can the association rectify any deficiencies before the hearing?

Mistakes can occur, but many errors or omissions can be rectified. Doing so can avoid petitions being filed to compel such action. Correcting errors or omissions before hearing goes a long way toward streamlining the process and avoids expense to the association in the long run. Voluntarily rectifying errors may also avoid civil penalties as it demonstrates good faith.

3. Does the association have any valid defenses?

When a petition is filed, a response is required within 20 days. This is the time to begin examining the association's procedures to determine if the homeowner's points are well taken. Proceeding to hearing when there is no valid defense may factor into whether a civil penalty is appropriate.

4. Are there facts that can be agreed to?

Often the disagreement is not about the facts of the case so much as the interpretation of a statutory requirement or a provision of the association documents. If the association is willing to stipulate to a fact, proof of the fact then becomes unnecessary. This saves time and costs and allows the Administrative Law Judge to concentrate on the parties' arguments.

Conclusion

The OAH process provides a speedy and cost-effective method for resolving disputes that in the past might have taken years and tens of thousands of dollars in fees and costs. The filing fee creates economic incentive for a homeowner to bring meritorious petitions and potential civil penalties discourage vindictive behavior by an association. Unlike most litigation, these parties must continue to live with each other, literally. Associations that are diligent in acting appropriately under the community documents and law and who communicate well with homeowners can avoid unnecessary expense and acrimony. Because the expenses associated with hearings, be it reimbursement of the filing fee or incurring attorneys fees and costs, are ultimately passed on to the homeowners, both parties' interests are inextricably linked. The OAH process provides fair, impartial, and prompt hearings, and, in a sense, is like the ideal health care provider - approachable, affordable, user-friendly. But no matter how much you may like your doctors, the best course is not to need them.

Footnotes

1. Although an association can also file a petition against a member, this article is written from the point of view of a homeowner bringing a petition.

2. The term "homeowner" is used as a general term to include both homeowners and condominium owners.

3. The filing fee pays for the costs of sustaining the hearings program.

Author

Exhibit 6

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

WILLIAM M. BROWN, *Plaintiff/Appellant,*

v.

TERRAVITA COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation, *Defendant/Appellee.*

No. 1 CA-CV 14-0455
FILED 7-30-2015

Appeal from the Superior Court in Maricopa County
No. LC2012-000699-001
The Honorable Crane McClennen, Judge

VACATED

COUNSEL

William M. Brown, Scottsdale
Plaintiff/Appellant

Ekmark & Ekmark, L.L.C., Scottsdale
By Curtis S. Ekmark
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

S W A N N, Judge:

¶1 William M. Brown appeals the superior court's judgment granting attorney's fees to Terravita Community Association, Inc. ("the Association"). We hold that the fee award was not authorized under any of the four bases presented to the superior court. Accordingly, we vacate the award.

FACTS AND PROCEDURAL HISTORY

¶2 Brown initiated this action after the Arizona Department of Fire, Building and Life Safety rejected his complaint that the Association, which governs the planned community in which Brown is a homeowner, violated A.R.S. § 33-1805(A) by refusing to produce certain records. The superior court affirmed the administrative ruling, and the Association sought its attorney's fees. The Association moved for fees under A.R.S. § 12-341.01 and an attorney's fees provision in the community's Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). Brown opposed the motion on the grounds that his administrative complaint did not arise out of contract as required by A.R.S. § 12-341.01 and that, at the time he filed the complaint for judicial review, the governing community documents did not provide for an award of attorney's fees in an administrative action. In reply, the Association cited A.R.S. § 12-349 and Ariz. R. Civ. P. 11 as additional grounds for an award of fees. The court awarded the Association a portion of the fees it requested, but did not specify the statutory or other basis for the award. Brown timely appeals.

DISCUSSION

¶3 Brown contends that the superior court erred by granting attorney's fees to the Association under A.R.S. § 12-341.01 because his appeal of an administrative decision did not arise out of contract. The applicability of § 12-341.01 is a question of statutory interpretation that we review de novo. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App. 2000).

¶4 Section 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." The statute permits an award of fees only in actions that could not exist but for the breach of contract and does not apply to "purely

statutory causes of action," or when a contract serves as the factual predicate of an action but is not the essential basis of it. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, ¶ 11 (App. 2009) (citation omitted). To determine whether an action arose out of contract for purposes of § 12-341.01(A), we consider "the nature of the action and the surrounding circumstances" and decide if the contract is the "cause or origin of the dispute." *Id.* at ¶ 10 (citations omitted). *See also A.H. ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 529 (1997) (stating that when an action arises from statutory obligations, "peripheral involvement of a contract does not require the application of § 12-341.01(A)"). For example, in *Keystone*, we held that an administrative proceeding before the Registrar of Contractors and the subsequent action for judicial review did not arise out of contract under § 12-341.01(A) because it focused on the contractor's statutory duties, not its contractual obligations to the homeowner, even though those duties and obligations overlapped. 223 Ariz. at 31-32, ¶¶ 14-20.

¶5 Similarly, in this case the administrative proceeding and judicial review action concerned the Association's statutory obligation to produce records under A.R.S. § 33-1805(A). The fact that the Association's CC&Rs purportedly contain similar terms[1] does not change the nature of the underlying action. Neither the administrative proceeding nor the action for judicial review constituted an action "arising out of a contract" for purposes of applying § 12-341.01(A).

¶6 We reject the Association's contention that such a ruling is contrary to *A.H.*, in which our supreme court held that an action arises out of contract for purposes of § 12-341.01 when a statutory obligation is imputed as part of the parties' contract. 190 Ariz. at 530. The court in *A.H.* noted that it had previously examined the relevant statute (A.R.S. § 20-673(C)) and determined that it was "the functional equivalent of an 'other insurance' clause typical in insurance contracts," and, therefore, it was designed to be statutorily imputed to an insolvent insurer's contract when a statutory fund assumed its rights and obligations. 190 Ariz. at 530. Here, by contrast, we have found no authority -- including the plain language of the statute -- to support the notion that the Legislature intended to integrate A.R.S. § 33-1805 as part of the declarations, bylaws, articles of incorporation, and rules of all planned communities.

¶7 We also reject the Association's argument that Brown's complaint for judicial review arises out of contract based on § 12-341.01's policy to "mitigate

---

1 The relevant portions of the CC&Rs are not part of the record on appeal.

the burden of the expense of litigation to establish a just claim or defense." The Association correctly identifies the policy of the statute as set forth in § 12-341.01(B). But, as discussed above, Arizona law is clear that the statute does not apply to all actions that tangentially involve a contract. Further, we observe an equally compelling policy argument that homeowners who initiate administrative actions to enforce their statutory rights should not confront potential liability for attorney's fees simply because a planned community association has chosen to restate its statutory obligations in its governing documents. We hold that the Association was not entitled to recover fees under § 12-341.01.

¶8 We further hold that the Association was not entitled to an award of fees based on the attorney's fees provision of the CC&Rs. That provision authorized fee awards to prevailing parties in actions instituted to enforce the CC&Rs.[2] As we have already discussed, Brown's action arose out of statute and was not an action to enforce any of the provisions of the CC&Rs.[3] The attorney's fees provision of the CC&Rs therefore did not apply. Further, because the superior court did not make the findings required for an award of sanctions, we reject the Association's contention that we may affirm the fee award as appropriate under A.R.S. § 12-349 or Rule 11.[4] *See* A.R.S. § 12-350 ("In awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award . . . ."); *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014) (holding that statutory findings for an award of fees under § 12-349 must be sufficiently specific to allow a reviewing court to test the validity of the judgment); *Wells*

---

2 The CC&Rs were amended during the pendency of Brown's action to allow the Association to recover fees incurred defending administrative claims and related appeals. We reject the Association's argument that it was entitled to recover the fees it incurred in the already-pending action after the effective date of the amendment. *Cf. Bouldin v. Turek*, 125 Ariz. 77, 78 (1979) (holding that A.R.S. § 12-341.01 does not apply to actions commenced before its effective date because it is similar to a statute changing the measure of damages, a substantive provision that cannot be applied retroactively).

3 The Association claims in its answering brief that the CC&Rs also provide for an award of attorney's fees to the prevailing party in an action "arising out of . . . the operations of the Association," citing, for the first time, Article XVII, Section 17.05(iii) of the CC&Rs. That provision does not, however, appear in the record on appeal.

4 We decline the Association's invitation to find that Brown has waived the issue of the award's propriety under § 12-349 and Rule 11.

Fargo Credit Corp. v. Smith, 166 Ariz. 489, 497 (App. 1990) (vacating Rule 11 sanctions because, *inter alia*, trial court failed to "make specific findings to justify its conclusion").

CONCLUSION

¶9 We determine that the Association was not entitled to an award of attorney's fees on any of the four bases it cited in the superior court. We vacate the award.

¶10 Because this action does not arise out of contract, we deny the Association's request for an award of attorney's fees on appeal under § 12-341.01. In addition, we determine that the prerequisites to an award of fees under § 12-349 are not present, and therefore deny the Association's request for fees under that statute. As the prevailing party on appeal, Brown is entitled to an award of his appellate costs upon his compliance with ARCAP 21.

Ruth A. Willingham · Clerk of the Court
FILED: RT

Exhibit 7

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

R.L. Whitmer, Petitioner, vs Hilton Casitas Council of Co-Owners, Respondent.	**No. 14F-H1415004-BFS** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: December 23, 2014, at 8:00 a.m.

APPEARANCES: R. L. Whitmer (hereinafter "Mr. Whitmer" or "Petitioner") appeared on his own behalf. Hilton Casitas Council of Co-Owners (hereinafter "Hilton Casitas" or "Respondent") was represented by Robert Anderson, Esq.

ADMINISTRATIVE LAW JUDGE: M. Douglas

Evidence and testimony were presented and the following Findings of Fact, Conclusions of Law, and Recommended Order are made:

FINDINGS OF FACT

Background and Procedure

1. The Department of Fire, Building and Life Safety (the "Department") is authorized by statute to receive Petitions for Hearings from members of homeowners' associations and from homeowners' associations in Arizona.
2. Hilton Casitas is a homeowners' association located in Scottsdale, Arizona.
3. Petitioner owns a percentage of a residence in and is a member of Hilton Casitas.
4. Petitioner filed a petition with the Department alleging that Hilton Casitas had violated the provisions of A.R.S. § 33-1243(D). Petitioner specifically alleged as follows:

> Mrs. Karatz has ignored A.R.S. § 33-1243(D) in overspending more than the budgeted legal expenses in 2013 and 2014. The 2013 budget for legal was $2,500 and 2014 was $1,000 for a total of $3,500.00. Mrs. Karatz has misused her position as President to spend over $9,250 for legal expenses without proper ratification.

5. Respondent's Answer to the Petition provided, in relevant part, as follows:

> **There has been no violation of A.R.S. § 33-1243**.
>
> The [Hilton Casitas] consists of twenty-nine (29) homes located behind the Scottsdale Hilton. In large part, the majority of the maintenance and management of the Casitas is taken care of by the hotel. The Association adopts its proposed budget at the annual meetings and adopted a proposed budget for 2013 at the annual meeting. The proposed budget was insufficient because Mr. Whitmer has made multiple legal challenges requiring the Association's counsel to respond.

TESTIMONY

Testimony of Michael Bengson

6. Michael Bengson (hereinafter "Mr. Bengson") testified that he was elected to be a member of the Board for Hilton Casitas in October 2014. Mr. Bengson stated that there has been no Board meeting since October 15, 2014. Mr. Bengson testified that he retained Respondent's counsel, Robert Anderson, Esq., as a friend to help Hilton Casitas out. Mr. Bengson stated that he wanted to resolve the chaos that Hilton Casitas was currently involved in. Mr. Bengson testified that Hilton Casitas' prior counsel had resigned and that he felt it was imperative for Hilton Casitas to have legal representation at the hearing.

7. Mr. Bengson testified that he had been a member of the association since May 2011. Mr. Bengson stated that there had not been a meeting of the Board since his election to the Board on October 15, 2014. Mr. Bengson testified that the Board was aware of the budget problems and intended to meet soon to adopt an amended budget.

8. Mr. Bengson testified that the amended budget would ratify the increased legal expenses incurred by Hilton Casitas. Mr. Bengson stated that he and the new Board wanted to "get everything on the right track."

Testimony of Esther Sue Karatz

9. Esther Sue Karatz (hereinafter "Mrs. Karatz") testified that she had previously been president of the Board for Hilton Casitas. Mrs. Karatz stated that Hilton Casitas' prior legal counsel was hired on January 31, 2013. Mrs. Karatz acknowledged that there was no record of the Board's decision to retain legal counsel.

10. Mrs. Karatz testified that Hilton Casitas had suffered a computer crash and that there were no records for meetings or actions of the Board for Hilton Casitas after January 10, 2013, and that there were no records regarding the retention of Hilton Casitas' prior legal counsel. Mrs. Karatz said that the majority of the Board approved the hiring of the prior legal counsel by "a telephone vote."

11. Mrs. Karatz acknowledged that Hilton Casitas' legal fees in 2014, substantially exceeded the amount of money that had been budgeted for legal fees in 2014. Mrs. Karatz testified that the increased legal expenses were incurred because Petitioner had filed two or three law suits against Hilton Casitas and that the law suits necessitated increased legal fees. Mrs. Karatz stated that the increased legal fees had not been anticipated by Hilton Casitas.

PROVISIONS OF LAW REFERENCED AT HEARING

1. A.R.S. § 33-1243(D) provides as follows:

> Except as provided in the declaration, within thirty days after adoption of any proposed budget for the condominium, the board of directors shall provide a summary of the budget to all the unit owners. Unless the board of directors is expressly authorized in the declaration to adopt and amend budgets from time to time, any budget or amendment shall be ratified by the unit owners in accordance with the procedures set forth in this subsection. If ratification is required, the board of directors shall 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. Unless at that meeting a majority of all the unit owners or any larger vote specified in the declaration rejects the budget, the budget is ratified, whether or not a quorum is present. If the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the board of directors.

CONCLUSIONS OF LAW

1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. That

statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. The burden of proof at an administrative hearing falls to the party asserting a claim, right, or entitlement and the standard of proof on all issue in this matter is by a preponderance of the evidence. *See* A.A.C. R2-19-119.

3. Proof by "preponderance of the evidence" means that it is sufficient to persuade the finder of fact that the proposition is "more likely true than not." *In re Arnold and Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

4. A.R.S. § 33-1243(D) provides that within thirty days after adoption of any proposed budget for the condominium, the Board shall provide a summary of the budget to all the unit owners and that unless the Board is expressly authorized in the declaration to adopt and amend budgets from time to time, any budget or amendment shall be ratified by the unit owners in accordance with the procedures set forth in this subsection. Mrs. Karatz acknowledged that Hilton Casitas' legal fees in 2014 exceeded the amount of money that had been budgeted for legal fees in 2014. Mr. Bengson stated that there had not been a meeting of the Board since his election to the Board on October 15, 2014. Mr. Bengson testified that the Board was aware of the budget problems and intended to meet soon to adopt an amended budget. Mr. Bengson stated that the amended budget would ratify the increased legal expenses incurred by Hilton Casitas. Hilton Casitas has not ratified the increased expenses and adopted an amended budget as required by applicable statute. This Tribunal concludes that Hilton Casitas failed to comply with the applicable provisions of A.R.S. § 33-1243(D).

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing party in this matter.

It is further ORDERED that Hilton Casitas shall fully comply with the applicable provisions of A.R.S. § 33-1243(D) in the future.

It is further ORDERED that Hilton Casitas shall pay Petitioner his filing fee of $550.00, to be paid directly to Petitioner within thirty (30) days of this Order.

It is further ORDERED that no civil penalty shall be imposed in this matter.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of this Order will be five (5) days from the date of that certification.

Done this day, January 7, 2015.

/s/ M. Douglas
Administrative Law Judge

Transmitted electronically to:

Gene Palma, Director
Department of Fire Building and Life Safety

Exhibit 8

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

William M. Brown Petitioner, vs. Terravita Country Club, Inc. Respondent	No. 17F-H1716005-REL **ORDER**

On May 1, 2017, Respondent filed an objection to the April 12, 2017 subpoena that requested documents directly from Frances Eleanor Wylie. Respondent contended that the subpoena was sent personally to Ms. Wylie and not to Respondent or Respondent's attorney. Respondent also contended that Ms. Wylie has no authority over the documents requested in her personal capacity. On May 1, 2017, Petitioner filed a Motion for Contempt against Respondent for failing to comply with the subpoena.

Considering the Petitioner's motion and the objection to the subpoena, the portion of the subpoena which requests documents from Frances Eleanor Wylie in her personal capacity is quashed. Furthermore, the motion for contempt is denied as the Administrative Law Judge does not have contempt powers.

IT IS ORDERED quashing the portion of the April 12, 2017 subpoena that requests documents maintained by an entity other than the named party.

IT IS FURTHER ORDERED denying Petitioner's motion for contempt. The Administrative Law Judge does not have contempt powers.

IT IS FURTHER ORDERED that all filings be sent to Respondent's attorney.

Done this day, May 3, 2017.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

/s/ Velva Moses-Thompson
Administrative Law Judge

Copy mailed/e-mailed/faxed May 3, 2017 to:

William M. Brown
6751 E. Amber Sun Drive
Scottsdale, AZ 85266

Carpenter, Hazlewood, Delgado & Bolen, PLC
1400 E. Southern Ave., Suite 400
Tempe, AZ 85282

Terravita County Club, Inc.
34034 N. 69th Way
Scottsdale, AZ 85266

Judy Lowe, Commissioner
Arizona Department of Real Estate
2910 North 44th Street, Room 100
Phoenix, AZ 85018

By M. Johnson