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Penelope Johnson v. The Pointe South Mountain Residential Association, et al.
Maricopa County Superior Court Case No. CV2012-017609

JUDGMENT

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7 **SUPERIOR COURT OF ARIZONA**

8 **COUNTY OF MARICOPA**

9

PENELOPE JOHNSON, Plaintiff, vs. THE POINTE SOUTH MOUNTAIN RESIDENTIAL ASSOCIATION, an Arizona Non-Profit Corporation; JOHN DOES I through V, inclusive; JANE DOES I through V, inclusive; ABC CORPORATIONS I through V, inclusive; and XYZ PARTNERSHIPS, I through V, inclusive, Defendants.	No. CV2012-017609 **JUDGMENT**

10–19

20 The Court having considered the filings of the parties, and having conducted a bench trial on August 12 and 13, 2013, and pursuant to Rule 54 of the Arizona Rules of 21 Civil Procedure and the prior rulings of the Court,

22 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following 23 findings of fact and conclusions of law are adopted:

24

25 . . .

26 . . .

Findings of Fact

A. The Pointe South Mountain

1. The Pointe South Mountain ("The Pointe") is a planned community located on the north side of South Mountain in Phoenix, Arizona.

2. The Pointe was developed in phases and by different developers, starting with Gosnell Development Corporation ("Gosnell") in the 1980s and continued into the 1990s.

3. The Pointe South Mountain Residential Association ("Association") is an Arizona non-profit corporation and is the homeowners association for The Pointe.

4. The residence owners and Association are subject to The Pointe South Mountain Residential Association Restated Declaration of Homeowners Benefits and Assurances ("Declaration"), dated October 1, 2004, recorded at Doc. No. 2005-0139219 in the Office of the Maricopa County Recorder.

5. Three types of residences exist in the Pointe Community, namely Single Family Homes, Garden Homes, and Courthomes.

6. There are a total of 841 residential Lots in the Community, of which 405 are Courthomes.

7. The Courthomes were built by different developers and in different phases over the years, resulting in different styles of Courthomes. Courthomes are residential structures divided into two or three separate residences per structure.

8. Plaintiff Penelope Johnson ("Plaintiff") is a Courthome owner.

9. All owners in the Community pay an annual Regular Assessment in monthly installments.

B. Use of Courthome Assessments to Pay Certain Common Areas Expenses

10. Paragraph 6.3 of the Declaration provides that "[t]he Association shall be responsible for and bear the expense of the repair and maintenance of the Common Area"

1 and "all portions of the Property outside of the Exterior Residence Lines." It further
2 provides that "[t]he costs and expenses of the repair and maintenance undertaken by the
3 Association shall be a common expense to be distributed and allocated among the
4 Owners pursuant to the provisions of paragraph 7."

5 11. Paragraph 7 of the Declaration addresses the Association's use of regular
6 assessments. Subparagraph 7.3.1 provides that regular assessments are to be used for
7 "the actual cost to the Association of the repair and maintenance to be performed by the
8 Association as provided in paragraph 6.3."

9 12. "Common Area" is defined in paragraph 1.9 of the Declaration as "all
10 property to be owned by the Association for the mutual use and enjoyment of the Owners
11 together with the Improvements . . . located" thereon. Pursuant to paragraph 9.4 of the
12 Declaration, "[a]ll Common Area within the Property shall be conveyed to the
13 Association."

14 13. "Improvements" is defined in paragraph 1.18 of the Declaration as
15 including the "streets, roads, driveways, parking areas, fences, walls, docks, hedges,
16 plantings, trees and shrubs, and all other structures or landscaping of every type and kind
17 located on the Property."

18 14. A Courthome is defined as "a Residence" in paragraph 1.10 of the
19 Declaration, with the "Residences," in turn, described in paragraph 1.27 as "all of the
20 Property except the Common Area."

21 15. Paragraph 9.3 of the Declaration provides that "the existence of a common
22 driveway shall not affect ownership or maintenance rights or responsibilities and each
23 Owner (or the Association as to that portion of a common driveway located within the
24 Common Area) shall own and maintain that portion of the common driveway located
25 within the Owner's Exterior Residence Lines with no right of contribution from any other
26 Owner sharing the common driveway."

1 16. The plain language of these provisions, including the related definitions, is
2 that the Association is responsible for maintaining the Common Area using regular
3 assessments. This includes all landscaping and the watering in the Common Area, as
4 well as maintaining all streets, roads, driveways and parking areas in the Common Area.
5 17. Stuart ("Steve") Berris, one of the three founders of Gosnell Development
6 Corporation ("Gosnell") that was the original developer of this planned community (*see*
7 ¶1.14 of the Declaration defining "Developer" as Gosnell), and who was the head of
8 design and construction for the project, testified at trial that Gosnell's original intent was
9 for the Common Area to be maintained using regular assessments, not Courthome
10 Exterior Maintenance assessments.
11 18. Mr. Berris further testified that Gosnell's original intent was for Courthome
12 Exterior Maintenance assessments to be used for maintaining the exterior of the
13 Courthomes, not the Common Area.
14 19. No compelling evidence was presented at trial that the references to
15 "driveways" and "landscaping" in paragraph 6.2 of the Declaration means Common Area
16 driveways and landscaping.
17 **C. Use of Regular Assessments to Purchase Cable Television**
18 20. In 1983, Gosnell entered into a cable contract for the benefit of the
19 Community. Among other terms of that contract, American Cable Television, Inc.
20 ("ACT") agreed to install underground cable television lines in the Community in
21 exchange for the opportunity to solicit residents of the Community to subscribe to ACT's
22 cable television service. Gosnell agreed to pay ACT $1.95 per occupied residence that
23 did not subscribe to ACT's cable television service.
24 21. In 1990, Gosnell entered into a new bulk cable television agreement with
25 ACT in which Gosnell agreed to pay $9.47 per month, per residence in the Community
26 for basic cable television to all owned or occupied residences in the Community. The

cable fee was subject to increases. Financial records confirm that in 1992 Gosnell paid the cable fee from assessment funds.

22. The Association was under Gosnell's control until the Association was turned over to the Residents on or about December 15, 1992.

23. After control of the Association transferred to homeowners, the Association continued to pay the fee for the bulk basic cable from regular assessment funds.

24. When the 1990 bulk cable contract terminated in 1999, the Association entered into a new bulk cable television contract that was similar to the 1990 cable contract. The 1999 cable contract was between the Association and Cox Communications ("Cox"). Similar to the 1990 Gosnell bulk cable agreement, the Association agreed under the 1999 bulk cable agreement to pay a monthly fee to Cox for each residence of the Community, in exchange for "Cox Classic cable" to each residence. The initial fee was $18.00 per month per residence, and was subject to subsequent price adjustments. Those fees were paid from regular assessment funds.

25. When the 1999 bulk cable contract ended, the Association then entered into another bulk cable television contract with Cox, in 2008. Similar to the prior cable contracts, the Association agreed under the 2008 cable contract to pay a monthly fee to Cox for each residence of the Community, in exchange for "Cox Classic cable" to each residence. The initial fee was $25.77 per month per residence, and was subject to subsequent price adjustments. Those fees were paid from regular assessment funds.

26. When the 2008 bulk cable contract ended, the Association entered into its current bulk cable television contract with Cox, in 2013. Like the prior cable contracts, the Association agreed under the 2013 cable contract to pay a monthly fee to Cox for each residence of the Community, in exchange for "Cox TV Essential" cable to each residence. The initial fee is $30.39 per month per residence, and is subject to future price

adjustments. The cable fees paid thus far in 2013 have been paid from regular assessment funds.

27. Paragraph 3.4 of the Declaration provides that underground television lines are a Utility for purposes of the CC&Rs.

28. Paragraph 3.4 of the Declaration also prohibits television antennas that are visible from neighboring properties.

29. Paragraph 7.2 of the Declaration provides that "assessments and charges levied by the Association shall be used to promote the recreation . . . and welfare of the Owner . . . ."

30. Paragraph 7.3 of the Declaration likewise provides that "each Residence shall be subject to regular assessments in an amount to be determined by the Board," followed by a list of uses for which regular assessments may be used as set forth in Paragraphs 7.3.1 through 7.3.6 of the Declaration.

31. Pursuant to Paragraph 7.3.4 of the Declaration, entitled "Utilities," Regular Assessment funds may be used to pay for "[e]ach Residence's pro rata share of the actual cost to the Association of water and other systems and services, if any, not separately metered or charged directly to a Residence."

32. Cable television, which is a Utility for purposes of the Declaration, is not "separately metered or directly charged" to residents.

33. Pursuant to Paragraph 7.3.6 of the Declaration, entitled "Miscellaneous," Regular Assessment funds may also be used to pay for "[e]ach Resident's prorata share of such additional sums as the Board may determine to be necessary to fulfill the purposes of the Association." The existing Board of Directors has determined that the bulk cable television the Association receives from Cox provides a significant cost savings to residents for cable and is thus a benefit to the residents.

1 34. By its minute entry of April 11, 2013, the Court granted Defendant's
2 Motion for Partial Dismissal of Plaintiff's Claim for Injunctive Relief, dismissing the
3 portion of Plaintiff's Complaint that demanded Defendant to restore assessment funds.

4 **Conclusions of Law Related to Use of Courthome Assessments to Pay Certain**
5 **Common Area Expenses**

6 35. The Association may not use Courthome Exterior Maintenance assessments
7 (*see* paragraph 6.2 of the Declaration) (hereinafter "Courthome Assessments") for the
8 repair and maintenance of any portion of the Common Area (as defined in paragraph 1.9
9 of the Declaration), including but not limited to:

10 a. Using such funds to pay for the installation and maintenance of landscaping
11 in the Common Area;
12 b. Using such funds to pay for irrigation or other watering of the Common
13 Area; and
14 c. Using such funds to pay for the repair and maintenance of the streets, roads,
15 driveways and parking areas in the Common Area.

16 **Conclusions of Law Related to Use of Regular Assessments to Purchase**
17 **Cable Television**

18 36. The Declaration is a contract. *Arizona Biltmore Estates Ass'n v. Tezak*, 177
19 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993) ("The deed restrictions ... constitute a
20 covenant running with the land and form a contract between the subdivision's property
21 owners as a whole and the individual lot owners.").

22 37. The Court will not alter or rewrite the Declaration. *Goodman v. Newzona*
23 *Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966) ("It is not within the province or
24 power of the court to alter, revise, modify, extend, rewrite or remake an agreement.")

25 38. The Court concludes that the Association was at all times, and is, allowed
26 by Paragraphs 3.4, 7.2, 7.3.4, and 7.3.6 of the Declaration, to have a bulk cable contract

in which each residence in the Community receives cable television service, and to use Regular Assessment funds to pay for that service.

39. The Court further specifically concludes that cable television paid from Regular Assessment funds is not directly charged or separately metered to each residence. Black's Law Dictionary 1005 (7th ed. 1999) (defining a meter as "[a]n instrument of measurement used to measure use or consumption, esp. used by a utility company to measure utility consumption <a gas meter> <a water meter> <a parking meter>.").

40. Each of Plaintiff's claims and allegations that the Association misused Regular Assessment funds to pay for cable television to residences, are denied. Defendant is entitled to Judgment on that portion of each Count of the Complaint asserting or arising from allegations that the Association misused regular assessment funds to pay for cable television.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED based upon the foregoing findings of fact and conclusions of law and the briefing of the parties, as follows:

Declaration of Rights

41. Pursuant to the Uniform Declaratory Judgment Act, codified at A.R.S. §§ 12-1831 through 12-1846, it is hereby declared that the Association may not use Courthome Assessments for the repair and maintenance of any portion of the Common Area (as defined in paragraph 1.9 of the Declaration), including but not limited to:

a. Using such funds to pay for the installation and maintenance of landscaping in the Common Area;
b. Using such funds to pay for irrigation or other watering of the Common Area; and

c. Using such funds to pay for the repair and maintenance of the streets, roads, driveways and parking areas in the Common Area.

42. It is hereby further declared that the Association may only use Courthome Assessments for the repair and maintenance of the exterior of the Courthomes as described in paragraph 6.2 of the Declaration.

43. Plaintiff's request for a declaratory judgment that the Association is prohibited from using regular assessments to purchase cable television in bulk for residents in the community is denied.

Permanent Injunction

44. Pursuant to A.R.S. § 12-1801, the Association is restrained and enjoined from using Courthome Assessments for the repair and maintenance of any portion of the Common Area (as defined in paragraph 1.9 of the Declaration), including but not limited to:

d. Using such funds to pay for the installation and maintenance of landscaping in the Common Area;

e. Using such funds to pay for irrigation or other watering of the Common Area; and

f. Using such funds to pay for the repair and maintenance of the streets, roads, driveways and parking areas in the Common Area.

45. Plaintiff's request for an injunction prohibiting the Association from using regular assessment funds to purchase cable television in bulk for residents in the community is denied.

46. Pursuant to paragraph 6.2 of the Declaration when read in conjunction with paragraph 1.15, the Association shall repair and maintain the following exterior features of a Courthome using Courthome Assessments:

a. Courthome trellises;

b. Courthome patio covers;

c. Courthome boundary *(i.e.*, privacy) walls that enclose Courthome patios and/or backyards, including the wrought iron features and gates integrated into such walls;

d. Non-inset Courthome balconies (*i.e.*, a balcony projecting outward from the exterior wall of a Courthome); and

e. Inset Courthome Balconies (*i.e.*, a balcony projecting inward from the exterior wall of a Courthome).

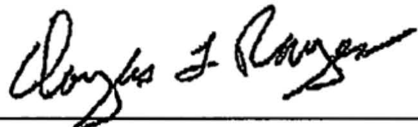
Other

47. Judgment is hereby entered in favor of plaintiff and against defendant in the amount of $ 56,000.00 for plaintiff's attorneys' fees as the prevailing party in the case, together with costs in the amount of $ 2,889.15.

48. All other relief not granted herein is denied.

49. No further matters remain pending and judgment is entered pursuant to Rule 54(c)

Dated: March 17, 2014



Hon. Douglas Rayes

The foregoing instrument is a full, true and correct copy of the original electronically filed document on file with the Clerk of the Court.

Attest MAR 2 5 2014 20

MICHAEL K. JEANES, Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa.

By ______ Deputy