DIVISION ONE
FILED: 09/20/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | | |
|---|---|---|
| MERITAGE HOMES OF ARIZONA, INC., | ) | No. 1 CA-CV 11-0373 |
| | ) | |
| Plaintiff/Appellee, | ) | DEPARTMENT E |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| WESTON RANCH PROPERTY OWNERS ASSOCIATION, INC., an Arizona corporation; BILLY JOHNSON; TINA MARKOWSKI; and MARC NASSOS, in their capacities as purported members of the Board of Directors for Weston Ranch Property Owners Association, | ) | Rule 28, Arizona Rules of Civil Appellate Procedure) |
| | ) | |
| Defendants/Appellants. | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-023498

The Honorable John A. Buttrick, Judge

**AFFIRMED**

---

Fennemore Craig, PC — Phoenix
By Douglas C. Northup
Todd S. Kartchner
Jason D. Specht
Attorneys for Plaintiff/Appellee

Maxwell & Morgan, PC — Mesa
By Charles E. Maxwell
Attorneys for Defendants/Appellants

---

**O R O Z C O**, Judge

**¶1** Weston Ranch Property Owners Association and purported members of the association's Board of Directors (collectively, Weston POA) appeal the trial court's Rule 54(b) judgment filed on May 13, 2011 and the trial court's denial of Weston POA's motion to vacate or set aside judgment. For the reasons that follow, we affirm.

## Factual and Procedural Background

**¶2** Weston Ranch Development, L.L.C. (WRD) began developing the Weston Ranch community in January 2005. WRD pledged all of its interest in the community to Guaranty Bank, which was later acquired by Compass Bank, for the purpose of obtaining financing. The interests pledged included: "all of [WRD's] rights . . . under any contracts relating to the Real Property (Weston Ranch)"; "all rights . . . pertaining to [Weston Ranch]"; and "other interests of every kind and character that [WRD] now has or at any time hereafter acquires in and to [Weston Ranch]."

**¶3** Prior to selling any lots in the community, WRD prepared and recorded the Declaration of Covenants, Conditions, and Restrictions for Weston Ranch (CC&Rs). The CC&Rs formed the Weston Ranch Property Owners Association[1] and established special

[1] The association adopted its bylaws pursuant to statutory authority shortly after incorporation.

Declarant rights. In section 1.14 of the CC&Rs, "Declarant" is defined as

> [WRD] or any successor, successor-in-title, or assign who takes title to any portion of the Property for the purpose of development and/or sale and who is designated as Declarant in a recorded instrument executed by the immediately preceding Declarant; provided there shall be no more than one Declarant at any time.

The CC&Rs also created two classes of association membership: Class A membership for individual property owners and Class B membership for the Declarant. The Class B member "may appoint a majority of the members of the Board of Directors as long as Declarant has any right, title, or interest in any portion of the Property." Additionally, the CC&Rs provide for the transfer of Declarant rights. Section 12.1 states, "No such transfer or assignment [of Declarant rights] shall be effective unless it is in a written instrument signed by Declarant and duly recorded in the Public Records."

**¶4** WRD filed for bankruptcy on December 31, 2009. Subsequently, on May 10, 2010 Compass Bank held a trustee's sale to sell WRD's collateral. Meritage Homes of Arizona, Inc. (Meritage) purchased fifty-one of the fifty-five lots for sale. The lots Meritage purchased were all undeveloped, whereas the remaining four lots had already been developed. Two trustee's deeds were executed on May 12, 2010: one for Meritage's fifty-one

undeveloped lots and one for the four developed lots to Compass Bank.

**¶5** On June 14, 2010, Meritage called a community meeting, where it purported to have assumed WRD's Declarant rights and appointed new members to the association's Board of Directors (Board). However, the Board appointed by WRD refused to recognize the new Board or Meritage's status as Declarant.

**¶6** On July 9, 2010, Meritage sent a letter to the Weston Ranch Property Owners Association, citing Arizona Revised Statutes (A.R.S.) section 33-1813 (2007) and calling for a "special membership meeting to vote on the removal of any and all non-Meritage Homes purported members of the Board of Directors of the Weston Ranch Property Owners Association." The association refused to acknowledge the letter as a valid petition to remove its Board members.

**¶7** On August 10, 2010, Meritage filed its initial Complaint for Special Action and Declaratory Relief and Application for an Order and Expedited Hearing to Show Cause Why Relief Should Not Be Granted. The trial court granted the order to show cause (OSC) and set a hearing for August 20, 2010.

**¶8** At the August 20 OSC hearing, the court ordered Meritage to file and serve an amended complaint by August 27, 2010 and to file a motion for declaratory relief by September 10, 2010. The court also ordered Weston POA to file any motion to

dismiss by September 10, 2010 and an answer by September 17, 2010. Oral argument on the motions was set for October 14, 2010.

**¶9** The parties exchanged numerous pleadings over the next few weeks leading up to the October 14 oral argument.[2] In the court's unsigned October 20 ruling, it concluded that resolution of all of the motions hinged on whether Meritage qualifies as a "Declarant" for purposes of the CC&Rs. The court found that Meritage is the Declarant because in the recorded trustee's deed and bill of sale "WRD expressly assigned all 'interest of any kind and character' to Meritage," which included Declarant rights. The court also found that the WRD-appointed Board was subject to removal because WRD was no longer the Declarant. The court denied Weston POA's motion to dismiss and motion to strike.

**¶10** Weston POA filed a motion for new trial. The court denied the motion because it failed to meet the requirements of Arizona Rule of Civil Procedure 59(a). In a motion for clarification/reconsideration, Weston POA asked the trial court to identify the specific Rule 59(a) requirements its motion for

[2] Meritage filed its amended complaint on August 27, followed by a "Brief in Support of Declaratory Judgment" on September 10. Weston POA filed a motion to dismiss the amended complaint and a "Motion to Strike [Meritage's] 'Brief' Dated September 10, 2010 – In the Alternative – Response to [Meritage's] Brief Dated September 10, 2010." Meritage followed with an opposition to Weston POA's motion to dismiss and a response to the motion to strike/reply in support of its September 10 brief. Finally, Weston POA filed a reply in support of its motion to dismiss.

new trial had failed to meet, but the court denied the motion for clarification/reconsideration.

**¶11** Meanwhile, Meritage filed an application for supplemental relief and order to show cause, alleging Weston POA refused to comply with the court's October 20 ruling. An OSC hearing was held over three days in March 2011. During the first day, counsel for Weston POA repeatedly objected to Meritage's examination of its sole witness on the grounds that Meritage failed to provide any disclosure. Meritage argued that neither party had made disclosures, and disclosure was not required at this stage in the proceedings, as the dispositive issue in the case had already been resolved. The court stated that it would limit the witness's testimony and would not allow counsel to introduce documents that had not been disclosed during the course of the litigation.

**¶12** The court issued a signed ruling on April 14, 2011, granting Meritage's application for supplemental relief. The order granting supplemental relief established that (1) Meritage properly appointed a majority of the Weston Ranch Property Owners Association Board on June 14, 2010; (2) Michael IlesCremieux, Fil Hirohata, and Lori Crabtree were the Declarant-appointed Board members; and (3) the WRD-appointed Board members were no longer members of the Declarant-appointed Board. The order also prohibited the WRD-appointed Board from interfering with the

transition of the Weston Ranch Property Owners Association from themselves to Meritage-appointed Board members.

**¶13** On May 13, 2011, the trial court signed and filed a Rule 54(b) judgment incorporating its prior rulings.

**¶14** Weston POA timely appealed the Rule 54(b) judgment and subsequently filed a motion to suspend the appeal and revest jurisdiction in the trial court for the limited purpose of considering a motion to vacate or set aside the judgment. This court granted the motion.

**¶15** The trial court heard oral argument on Weston POA's motion to vacate or set aside judgment on December 22, 2011. Weston POA argued that it had recently discovered a document that had not been disclosed, justifying a new trial. The court denied the motion because the document was not directly relevant to the issue of Declarant rights and would not have been material to the court's decision. Weston POA timely appealed from that ruling.

**¶16** We have jurisdiction under A.R.S. § 12-2101.A.1 and A.2 (Supp. 2011).

## DISCUSSION

### I. The October 20, 2010 Declaratory Judgment

#### A. Procedural Basis for the Ruling

**¶17** Weston POA argues that the October 20 ruling "violated all notions of due process and fair play" because the trial court ruled in favor of Meritage based on its "Brief in Support of

Declaratory Judgment" before discovery took place and prior to Weston POA filing an answer to the amended complaint.[3] Arizona Rule of Civil Procedure 12(c) allows a judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." Also, Rule 57 allows the court to "order a speedy hearing of an action for a declaratory judgment" and "advance it on the calendar." Ariz. R. Civ. P. 57.

**¶18** The trial court did not violate Weston POA's due process rights in establishing Meritage's Declarant status at an early stage in the litigation. Weston POA claims that the trial court could not have entered judgment on the pleadings under Rule 12(c) because the pleadings were not yet closed. But, as to the discrete issue of Declarant status, the pleadings were indeed closed. The trial court granted Meritage's request for expedited relief and set an expedited schedule for dispositive motions. Accordingly, both parties filed dispositive motions on September 10, 2010. Weston POA filed its motion to dismiss, arguing that Meritage could not be the Declarant as a matter of law. Meritage then filed its response in opposition to the motion to dismiss and Weston POA filed its reply. Simultaneously, pleadings regarding Meritage's "Brief in Support of Declaratory Judgment" were exchanged. Meritage filed its brief, arguing that Meritage

[3] Although Weston POA was ordered to file an answer by September 17, 2010, it did not file one until January 21, 2011.

has Declarant rights; Weston POA filed its motion to strike Meritage's brief/response to Meritage's brief; and Meritage filed its response to the motion to strike and reply in support of its brief.[4] Judgment on the pleadings as to Declarant rights under the relevant documents was not procedurally improper here.

**¶19** Moreover, the purpose of the Rules is to "obviate delay and administer speedy justice," and thus the Rules should be construed liberally. *Union Interchange, Inc. v. Benton*, 100 Ariz. 33, 36, 410 P.2d 477, 479 (1966); *see also* Ariz. R. Civ. P. 1 (stating that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action"). The court was therefore authorized to order an expedited schedule for dispositive motions and to rule on those motions in the interest of speedy justice.

**¶20** Weston POA also argues that the declaratory judgment was substantively improper for several reasons, which we address in turn.

**B. Alleged Factual Disputes**

**¶21** Weston POA asserts the court could not have declared Meritage the Declarant on the "undeveloped and disputed" record.[5]

---

[4] The trial court gave Weston POA the option of filing a reply brief to Meritage's "Response to Defendant's Motion to Strike," but Weston POA declined.

[5] We note that during the briefing of the declaratory judgment and motion to dismiss, Weston POA admitted there were

"On a motion for judgment on the pleadings, all of the allegations of the opposing party's pleadings must be accepted as true and the moving party is entitled to judgment only if the position of the opposing party, as stated in its pleadings, clearly entitles the moving party to judgment." *Wenrich v. Household Fin. Corp.*, 5 Ariz. App. 335, 338, 426 P.2d 671, 674 (1967).

**¶22** On appeal, Weston POA raises two categories of "disputed facts" that it claims prevented the trial court from ruling on the issue of Declarant rights. The first category of "disputed facts" is the purported changes Meritage made to the CC&Rs. However, if indeed changes have been made, that had nothing to do with whether Meritage acquired Declarant rights under the trustee's deed and deed of trust. The second set of "disputed facts" involves the intent of the parties to the trustee's deed. Weston POA argues that the transfer of rights under the trustee's deed and bill of sale is ambiguous because the word "Declarant" was not used in the documents. Therefore, they contend discovery regarding the parties' intent and a jury finding on the issue of intent were required.

---

no factual disputes. It was only after the trial court determined that Meritage acquired Declarant rights through the trustee's deed and deed of trust that Weston POA alleged there were factual disputes.

**¶23** When interpreting a contract, the court must attempt to give effect to the intent of the parties at the time the contract was entered. *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975). In determining the parties' intent, "we first consider the plain meaning of the words in the context of the contract as a whole." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). The court will only accept extrinsic evidence of the meaning intended by the parties if the court determines that the contract language is "reasonably susceptible" to the interpretation suggested by the proponent of the extrinsic evidence. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993). Whether the contract language is reasonably susceptible to more than one interpretation is a question of law we review de novo. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005); *see ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290, ¶ 15, 246 P.3d 938, 941 (App. 2010). We interpret the contract in light of the surrounding circumstances and are guided by experience and common sense. *See Miller v. Hehlen*, 209 Ariz. 462, 466, ¶ 12, 104 P.3d 193, 197 (App. 2005).

**¶24** Weston POA contends that the Arizona Supreme Court's holding in *Taylor* required discovery regarding the parties' intent and the surrounding circumstances and a factual finding on intent before the court could make its ruling on Declarant

rights. *Taylor*, however, does not *require* discovery on intent but would allow extrinsic evidence to be used in interpreting the deed of trust if the court found the contract language "reasonably susceptible" to the meaning suggested by Weston POA — that transfer of "all rights" and "other interests of every kind and character" did not include Declarant rights. *See Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. Here, the court could determine as a matter of law what the parties meant by "all rights." We agree that this inclusive language could not reasonably be interpreted to include all rights *except* Declarant rights. Thus, there is no factual issue to resolve regarding the parties' intent.

**C. Plain Language Interpretation of the CC&Rs**

**¶25** Weston POA also claims Meritage cannot be the Declarant based on the plain language of the CC&Rs because Weston POA never expressly designated Meritage as Declarant in a recorded instrument. However, the CC&Rs do not require an express designation. Section 1.14 of the CC&Rs defines "Declarant" as "[WRD] or any successor, successor-in-title, or assign who takes title to any portion of the Property for the purpose of development and/or sale and who is designated as Declarant in a recorded instrument executed by the immediately preceding Declarant." Section 12.1 of the CC&Rs governs the transfer of Declarant rights, and it states, "No such transfer or assignment

[of Declarant rights] shall be effective unless it is in a written instrument signed by Declarant and duly recorded in the Public Records." The written instrument in this case was the deed of trust, which is a recorded document that assigned all of WRD's rights in Weston Ranch to Compass Bank and then later to Meritage through the trustee's sale. Nothing in the CC&Rs requires a separate document specifically for the purpose of transferring Declarant rights, nor is use of the term "Declarant" mandatory.

**D. Assignment of Rights**

**¶26** Next, Weston POA argues that the trial court erroneously deemed Meritage an assignee of WRD. The trial court relied on *Bd. of Managers of Medinah on Lake Homeowners Ass'n v. Bank of Ravenswood*, 692 N.E.2d 402 (Ill. App. 1998), in finding the broad language contained in the deed of trust shows the parties intended for WRD to assign its Declarant rights. Whether the court correctly interpreted the contracts in finding Meritage the Declarant is an issue of law we review de novo. *See* *Miller*, 209 Ariz. at 465, ¶ 5, 104 P.3d at 196.

**¶27** In *Bank of Ravenswood*, after both the declarant and developer became insolvent, Ravenswood acquired from the foreclosure sale purchaser three undeveloped lots that were part of an unfinished condominium project. 692 N.E.2d at 404. The condominium owners argued that Ravenswood was not an assignee of

the declarant because Ravenswood did not possess a written assignment of interest from the declarant or developer. *Id.* at 405. The court found that an express assignment of declarant rights was not necessary, stating, "[W]hen the intention of the parties to assign property rights is manifested in an executed instrument and the surrounding circumstances, the transfer of some identifiable property to the assignee will create an assignment." *Id.*

**¶28** The *Ravenswood* court then reviewed the relevant documents to ascertain the parties' intent. *Id.* at 405-06. In the collateral agreement the developer assigned all of its rights, powers, and interests under the trust, without limitation, as security. *Id.* at 406. Upon default, the foreclosure sale purchaser purchased the lots and collateral as trustee of the trust agreement, and the subsequent conveyances provided that the successors "were fully vested with all the title, estate, rights and powers of its predecessor in trust." *Id.* The court concluded:

> Thus, it was the intent of each subsequent purchaser of the lots to purchase all the rights and obligations enjoyed by Heritage Bank as the declarant and A.P. Ross as the beneficiary developer. Accordingly, based on the intent of the parties as articulated in the mortgage agreement and the deeds in trust, we hold that Ravenswood is an assignee of the declarant and the developer.

*Id.*

**¶29** Weston POA contends this language required the trial court to consider extrinsic evidence of the parties' intent. *See Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. We disagree. The *Ravenswood* court determined intent based solely on the language contained in the relevant documents. *See Bank of Ravenswood*, 692 N.E.2d at 405-06. Here, the trial court did not err in determining intent based on the language assigning "all rights" and "other interests of every kind and character" as security in the deeds of trust.[6]

**¶30** Even assuming the trustee's deed assigned Declarant status to Meritage, Weston POA claims that Meritage cannot be the Declarant because both Compass Bank and Meritage would be Declarants and under the CC&Rs there cannot be more than one Declarant at a time.[7]

---

[6] Nor did the court err in relying on *Ravenswood* although it is an out-of-state case and the community at issue was a condominium and not a planned community. We find the analysis of the Illinois Court of Appeals persuasive and applicable to the situation at hand. We also reject Weston POA's argument that developers' rights cannot be implied from broad language contained in a deed. Weston POA relies on *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627 (Mo. App. 2005). That case involved language contained in the habendum clause of a general warranty deed, not a deed of trust, and the property at issue was not collateral purchased through foreclosure proceedings. Therefore, we find *Scott* inapposite.

[7] Section 1.14 of the CC&Rs states that "there shall be no more than one Declarant at any time."

**¶31** Two trustee's deeds containing the exact same language were executed on May 12, 2010. The first deed of trust conveyed four developed lots to Compass Bank. The second deed conveyed the remaining fifty-one vacant, undeveloped lots to Meritage. Both deeds conveyed all of WRD's rights pertaining to the property being conveyed in that deed.

**¶32** Declarant rights include control over the development of the community, and the CC&Rs provide that the Board cannot impede the Declarant's right to develop Weston Ranch. Declarant rights are intended to protect a developer that has invested money in completing the development of the community, not a bank selling individual homes at a foreclosure sale. The bank could not have been declared the Declarant because the four lots conveyed to the bank had homes and were developed. We therefore conclude Compass Bank could not have been assigned WRD's Declarant rights when the trustee's deed for the developed lots was executed.[8]

**E. Removal of WRD-appointed Board**

**¶33** Weston POA also argues the trial court incorrectly determined that the Board members appointed by WRD could be

[8] Compass Bank does not contest Meritage's Declarant status and was not a party to this lawsuit. Moreover, counsel for Weston POA told the trial court, "[T]he bank wasn't interested in being declared a declarant. Banks don't want to be declarants."

removed under A.R.S. § 33-1813.A. However, this issue is now moot, as the trial court later ruled in its April 2011 order granting supplemental relief that the WRD-appointed Board members had already been removed in accordance with the CC&Rs without resort to statutory removal.[9]

**II. Motion for New Trial**

**¶34** Weston POA claims the trial court erred in denying its motion for new trial and refusing to identify the basis for the denial. Weston POA does not argue how the court erred but instead refers this court to prior briefing. Therefore, we conclude this argument has been waived. *See* ARCAP 13(a)6 (appellant's brief must include "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (finding the failure to properly develop argument on appeal results in waiver).

**III. The April 2011 Supplemental Relief**

**A. Failure to Disclose Witness Testimony**

[9] Weston POA also contends that the trial court should have granted its motion to dismiss. However, its arguments depend on a finding that Meritage is not the Declarant, which is essentially the same argument it makes in appealing the declaratory judgment. Because we have already addressed these issues in relation to the declaratory judgment, we do not re-analyze these issues.

**¶35** Weston POA argues that Meritage never disclosed the witness testimony and exhibits it offered at the OSC hearing on supplemental relief and thus the trial court erred in refusing to exclude Meritage's evidence. The trial court has broad discretion in ruling on disclosure matters, and an appellate court will not disturb its ruling unless there was an abuse of discretion. *Reid v. Reid*, 222 Ariz. 204, 206, ¶ 8, 213 P.3d 353, 355 (App. 2009).

**¶36** Rule 26.1(b) of the Arizona Rules of Civil Procedure requires parties to make initial disclosures within forty days after the filing of a responsive pleading to the complaint unless the parties otherwise agree or the court shortens or extends the time for good cause shown. Rule 37(c)(1) mandates that "[a] party who fails to timely disclose information required by Rule 26.1 shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion, the information or witness not disclosed, except by leave of court for good cause shown."

**¶37** Weston POA filed an answer to the amended complaint in January 2011 — three months after the dispositive issue (who held Declarant rights) had been decided. At this stage in the proceedings, when a party is merely seeking enforcement of a prior ruling, discovery does not serve its intended purpose. *See Bryan v. Riddel*, 178 Ariz. 472, 476 n.5, 875 P.2d 131, 135 n.5

(1994) ("The object of disclosure, as with all discovery, is to permit the opponent a reasonable opportunity to prepare for trial or settlement—nothing more, nothing less.").

**¶38** Moreover, although Weston POA complains it did not receive disclosures from Meritage, it also failed to timely provide its own disclosure statement. As a result, the court ruled "the parties' mutual failure to exchange disclosures before the hearing began could be interpreted as a tacit agreement to postpone formal disclosures until a date to be agreed upon."

**¶39** In any event, Weston POA has failed to demonstrate how it was prejudiced by Meritage's failure to disclose its witness. The court ruled that the witness's testimony would be limited and refused to allow the introduction of any documents unless they were "attached to a prior filing in the case, pleadings or memorandum of one sort or another, or literally created by the other side."

**¶40** The court did not abuse its discretion in failing to exclude Meritage's evidence.

**B. Appointment of Board**

**¶41** Weston POA argues the court erred in granting supplemental relief to Meritage because Meritage did not legally appoint its new Board members.[10] Meritage responds that it

[10] Weston POA also argues that "the admissions by [Meritage's] sole witness and its broker that any transfer of Declarant

properly appointed its Board members under § 3.3 of the CC&Rs. We review the trial court's legal conclusions de novo. *Motel 6 Operating Ltd. P'ship v. City of Flagstaff*, 195 Ariz. 569, 571, ¶ 7, 991 P.2d 272, 274 (App. 1999).

**¶42** The CC&Rs provide that the Declarant "may appoint a majority of the members of the Board of Directors." However, the CC&Rs do not describe how or when the Declarant can exercise this authority. Weston POA contends that Meritage did not meet the requirements of A.R.S. § 33-1813.A for removing board members. Weston POA alleges that Meritage never held a removal meeting and therefore could not replace the WRD-appointed Board members with Meritage-appointed Board members.

**¶43** However, pursuant to the bylaws governing the Weston Ranch Property Owners Association, the WRD-appointed members were automatically removed from the Board before Meritage made its appointments. It is undisputed that WRD no longer owns any property in Weston Ranch. Section 4.4 of the bylaws provides that membership in the Weston Ranch Property Owners Association "is inextricably and irrevocably connected with ownership" of property in the community, and section 6.2 provides that a director who no longer qualifies as a member will "cease to be a

---

rights had to be express" mandated a motion for directed verdict in Weston POA's favor. The issue of Declarant rights, however, had already been decided in favor of Meritage and was not the subject of the OSC hearing.

Director and his or her place on the Board shall be deemed vacant." Section 7.3 further provides that "[a]ny officer who ceases to be a Member of the Association or who ceases to be in good standing shall be automatically removed from office." In accordance with the bylaws, the WRD-appointed Board members were automatically removed when WRD lost its rights in the property following the May 2010 trustee's sale. Thus, Meritage did not remove the WRD-appointed board; it merely filled vacancies with its appointments.

**¶44** The WRD-appointed Board members claim they were not automatically removed because they individually owned property in Weston Ranch through an employee retirement plan. Weston POA misses the point — the directors who were appointed as representatives of WRD ceased to be directors when WRD lost the property in Weston Ranch through foreclosure. The WRD appointees cannot be Declarant appointments and then remain on the Board in some other capacity after the Declarant that appointed them lost all interest in the community. We find no error.

**IV. Rule 60(c) Motion**

**¶45** Finally, Weston POA argues the trial court erred in denying its motion to vacate or set aside judgment.[11] A party may seek relief from a final judgment under Rule 60(c) of the Arizona

[11] This issue was considered based on the parties' briefs to the superior court, pursuant to this court's order dated January 11, 2012.

Rules of Civil Procedure for several reasons, including the following alleged by Weston POA: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) or any other reason justifying relief from the judgment. "[T]he standard we apply to the review of a trial court's order granting or denying relief under Rule 60(c) is whether the court abused its discretion." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985).

**¶46** Weston POA claimed that it discovered a document in September 2011, some four months after the Rule 54(b) judgment was entered, requiring the court to vacate or set aside the judgment. The document in question was an amendment to the architectural standards section of the CC&Rs Meritage recorded in June 2010. The court determined that the amendment, which reduced the required minimum residential square footage and altered other design standards, was not directly relevant to the identity of the Declarant or a determination of Declarant rights and thus denied Weston POA's motion. We agree with the trial court that whatever minimal relevance this document may have had, it was not material to the court's determination of who held

Declarant rights, the subject of this litigation. The trial court did not abuse its discretion in denying the motion.

## V. Attorney Fees

**¶47** Both parties seek recovery of costs and attorney fees on appeal under A.R.S. §§ 12-341 (2003) and -341.01 (2003).[12] In addition, Meritage seeks fees under § 4.3.1 of the CC&Rs.[13] Weston POA is not entitled to fees and costs because it is not the prevailing party.[14] However, Meritage, as the prevailing party, is entitled to costs on appeal upon its compliance with ARCAP 21. We also award Meritage its reasonable attorney fees pursuant to both § 12-341.01.A and § 4.3.1 of the CC&Rs upon compliance with ARCAP 21.

---

[12] Weston POA also requests fees pursuant to Arizona Rule of Civil Procedure 11 and A.R.S. §§ 12-349 (2003) and -350 (2003).

[13] Section 4.3.1 states, "In any action to enforce the provisions of [the CC&Rs], the prevailing party shall be entitled to recover all costs, including, without limitation, attorneys fees and court costs, reasonably incurred in such action."

[14] Weston POA also asks this court to award attorney fees and costs incurred below "as a result of and in conjunction with a reversal of the October 20 Ruling." Because we affirm the court's October 20 ruling, we decline the request.

## CONCLUSION

**¶48** For the foregoing reasons, we affirm the trial court's Rule 54(b) judgment and its denial of Weston POA's Rule 60(c) motion.

/S/

_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge