DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TIFFANY PLACE HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation, Plaintiff/Appellee, v. REBECCA FUHRER, an unmarried woman, Defendant/Appellant.	No. 1 CA-CV 11-0671 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-090698

The Honorable Emmet J. Ronan, Judge

AFFIRMED

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T H U M M A, Judge

¶1 This case arises out of appellant Rebecca Fuhrer's refusal to pay assessments levied on her townhome. Fuhrer does not challenge the amount or validity of the assessment, or that the funds assessed are for the benefit of the community. Instead, Fuhrer claims that the only entity with the power to enforce the assessment was dissolved years ago and has not been reinstated, effectively meaning no assessments on her townhome can be enforced by any individual or entity.

¶2 Fuhrer appeals from the superior court's grant of Tiffany Place Homeowners Association's (2004 Corporation) motion for summary judgment and denial of Fuhrer's cross-motion for summary judgment. Fuhrer argues the superior court erred in finding the 2004 Corporation has the authority to collect assessments and commence foreclosure proceedings based on her failure to pay assessments because the corporate status of a prior homeowners' association was dissolved and never properly reinstated. For reasons that follow, the judgment of the superior court is affirmed.

FACTUAL AND PROCEDURAL HISTORY[1]

¶3 In January 2007, Fuhrer purchased a condominium unit in Tiffany Place, subject to the Declaration of Covenants, Conditions and Restrictions for Tiffany Place (CC&Rs). The CC&Rs established a homeowners' association, which takes action through a board of directors. As set forth in the CC&Rs, "'Association' shall mean and refer to the Owners' homeowners association, to be incorporated as an Arizona non-profit corporation following recordation of [the CC&Rs] . . . under the name Tiffany Place Homeowners' Association, or such other name as the Declarant deems appropriate, and such Association's successors and assigns."

¶4 The CC&Rs vest within the association the duty to, among other things, maintain common elements within the property and obtain property and liability insurance. To fund these duties, the CC&Rs grant the association power to levy assessments against the owner of each townhome (Owner). Owners covenant to pay these assessments and agree that unpaid assessments become a lien. Owners also covenant to pay the costs, including reasonable attorneys' fees, incurred by the association in collecting unpaid assessments. The CC&Rs provide

[1] In reviewing a grant of summary judgment, this court views the evidence and makes reasonable inferences in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

the association has the express power to bring personal actions against an Owner for nonpayment, "including foreclosure by an action brought in the name of the Association."

¶5 The CC&Rs were signed on February 24, 1981 and recorded on March 10, 1981 and, as relevant here, remain in full force and have never been amended. In accordance with the CC&Rs, Tiffany Place Homeowners' Association (1981 Corporation) was incorporated as an Arizona non-profit corporation on March 16, 1981. The board hired a management company to manage the property and a member of the management company served as statutory agent for the 1981 Corporation. The management company, however, failed to file the 1981 Corporation's annual reports with the Arizona Corporation Commission (ACC). As a result, the ACC administratively dissolved the 1981 Corporation on November 1, 2000.

¶6 From the record, it is unclear precisely when the management company learned of this dissolution.[2] It is undisputed that, for several years, the management company did not inform anyone associated with Tiffany Place of the November 1, 2000 dissolution of the 1981 Corporation. During those years,

[2] The record does not contain any notice from the ACC to the 1981 Corporation of grounds for administrative dissolution or proof of perfection of service. Ariz. Rev. Stat. (A.R.S.) § 10-11421(A)-(B). In this appeal, the parties have not disputed the fact of the dissolution of the 1981 Corporation.

management of Tiffany Place and the work of the board continued as usual, consistent with what occurred prior to the dissolution of the 1981 Corporation.

¶7 Although the precise date is unknown, it is undisputed that the management company became aware of the dissolution of the 1981 Corporation at some point. When that happened, the management company did not attempt to seek reinstatement of the 1981 Corporation.[3] Instead, the management company formed a new Arizona non-profit corporation called Tiffany Place Homeowners Association (2004 Corporation) in February 2004 and filed Articles of Incorporation for the 2004 Corporation with the ACC. The management company did not inform the board about the creation of the 2004 Corporation. Again, however, management of Tiffany Place and the work of the board continued as usual, consistent with what occurred prior to the creation of the 2004 Corporation.

¶8 Fuhrer purchased her townhome in Tiffany Place in January 2007 and served as a member of the board from August 2007 through March 2008. The board apparently was not notified

[3] Until 2007, an administratively dissolved corporation could obtain reinstatement by curing the grounds cited for dissolution and applying for reinstatement within three years after the effective date of dissolution. A.R.S. § 10-11422(A) (2004). The creation of the 2004 Corporation fell just outside of this three-year limit, which the legislature later extended to six years. 2007 Ariz. Sess. Laws, ch. 110, § 3 (codified at A.R.S. § 10-11422(A) (2007)).

of the dissolution of the 1981 Corporation until December 2007 when Fuhrer discovered the dissolution of the 1981 Corporation and the creation of the 2004 Corporation. Fuhrer brought these matters to the attention of the board, which retained counsel to review the situation in February 2008.

¶9 In March 2009, the board informed each Tiffany Place homeowner of the situation, and held a vote of the Owners to amend and restate the 2004 Corporation's Articles of Incorporation to conform to the Articles of Incorporation for the 1981 Corporation. The amended and restated Articles subject to this vote state the 2004 Corporation "[i]s and was organized to assume and succeed to all rights, responsibilities and legal obligations, without limitation, accruing to and/or owed by the 'Association' formed under and defined by [the CC&Rs,] . . . including the predecessor corporation formerly known as [the 1981 Corporation], administratively dissolved by the [ACC] on November 1, 2000." In voting that closed on April 30, 2009, the Owners approved these amended and restated Articles by a vote of twenty-three to one.

¶10 Although owning a townhome unit in Tiffany Place continuously since January 2007, Fuhrer has not paid any monthly assessment since April 2009. The 2004 Corporation, relying on sections 4.6 and 12.1 of the CC&Rs, filed this action against Fuhrer to foreclose upon the lien created by the unpaid

assessments. After disclosure and discovery, including Fuhrer's deposition, both parties moved for summary judgment.

¶11 The superior court granted summary judgment to the 2004 Corporation on all claims, finding: (1) the CC&Rs created a covenant running with the land that required Fuhrer to pay assessments; (2) Fuhrer has not paid accrued assessments, creating a lien on her property; and (3) the CC&Rs and Arizona law permit the 2004 Corporation to foreclose on the lien. In doing so, the superior court found the 2004 Corporation "is a continuation, i.e. a successor, to" the 1981 Corporation and that "the Tiffany Place Homeowners Association has acted as the property's [homeowners' association] for thirty years. During that time, the homeowners have collectively accepted and endorsed the [homeowners' association's] authority." The court noted Fuhrer acknowledged the board without regard to any corporate status issue and "has accepted and benefited from the services provided by" the association, including by participating in the affairs of the association and serving as a member of the board.

¶12 After the court entered judgment in favor of the 2004 Corporation on all claims, Fuhrer timely appealed.[4] This Court

[4] Although the superior court's judgment adjudicates all claims and counterclaims brought by both parties, Fuhrer appeals only from the superior court's decision granting the 2004 Corporation's motion for summary judgment finding the 2004

has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1).[5]

DISCUSSION

¶13 This court reviews a grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Duly recorded restrictive covenants running with the land create binding contracts, and "[t]he interpretation of a contract is generally a matter of law" also reviewed de novo. *Powell v. Washburn*, 211 Ariz. 553, 555-56, ¶ 8, 125 P.3d 373, 375-76 (2006). A restrictive covenant "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Id*. at 557, ¶ 13-14, 125 P.3d at 377 (quoting and adopting approach of Restatement (Third) of Property: Servitudes § 4.1(1) (2000)).

¶14 Fuhrer admits that, as an Owner of a townhome in Tiffany Place, she is bound by the terms of the CC&Rs. Fuhrer also acknowledges the CC&Rs directed the creation of an

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Corporation properly could levy assessments and enforce and seek foreclosure of the lien on her property.

[5] Absent material revisions since the relevant dates, statutes cited refer to the current version unless otherwise indicated.

association, and shortly after the CC&Rs were recorded, the 1981 Corporation was formed. Fuhrer apparently admits the 1981 Corporation may impose assessments on Owners and foreclose on units should Owners fail to pay their assessments. Fuhrer also admits that the 1981 Corporation "does have the legal authority to act as representative of the community." Finally, Fuhrer concedes the association remained in existence after the dissolution of the 1981 Corporation.

¶15 However, Furher argues the 1981 Corporation cannot enforce assessments after its dissolution and that no proper entity exists to enforce and collect assessments due. Fuhrer also argues the 2004 Corporation cannot enforce assessments because the 2004 Corporation is neither a successor to the 1981 Corporation nor the proper entity contemplated by the CC&Rs. In essence, Fuhrer argues there is no individual or entity that can levy and enforce assessments, seek foreclosure or otherwise enforce any provisions of the CC&Rs.

¶16 Arizona has adopted, as amended, the Uniform Condominium Act (UCA), which the parties concede applies here. *See* 1985 Ariz. Sess. Laws, ch. 192, § 3 (codified at A.R.S. §§ 33-1201 to -1270); *see also* A.R.S. § 33-1201. The UCA "is intended as a unified coverage of its subject matter" and sets forth comprehensive directives for the creation and management of Arizona condominiums. 1985 Ariz. Sess. Laws, ch. 192, § 6(B).

Unless expressly allowed by specific statutory exception, the provisions of the UCA "shall not be varied by agreement and rights conferred by [the UCA] shall not be waived." A.R.S. § 33-1203. Applying the UCA, there are two independent sources directing the structure, management and power of a condominium association and related participants: the UCA itself and the CC&Rs. *See Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 78, 847 P.2d 117, 123 (App. 1992) (noting UCA and declaration provision both provide authority for condominium association action); Patrick J. Rohan & Melvin A. Reskin, Real Estate Transactions: Condominium Law and Practice § 1.06 (2008) ("[T]he condominium statute or condominium instruments, or both, grant certain powers to the association.").

¶17 The UCA mandates that a condominium homeowners' association "shall be organized" and the association is authorized to "[i]nstitute, defend or intervene in litigation . . . in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." A.R.S. §§ 33-1241, -1242(A)(4). To allow for maximum flexibility, the UCA provides that the association may take the form of "a profit or nonprofit corporation or as an unincorporated association." A.R.S. § 33-1241. Regardless of the form used, the UCA directs that the association acts through a board of directors, which is "given

general management powers to act on behalf of the association." A.R.S. § 33-1202(5). With exceptions not relevant here, the UCA empowers the board to "act in all instances on behalf of the association." A.R.S. § 33-1243(A). Consistent with these directives, the CC&Rs state the association would take the form of "an Arizona non-profit corporation" (one of the forms permitted by the UCA) and take action through a board (also as directed by the UCA). Until November 1, 2000, the 1981 Corporation acting through the board served as this association.

¶18 Because the 1981 Corporation was dissolved on November 1, 2000 and has never been reinstated, Fuhrer correctly notes the 1981 Corporation has not been able to manage Tiffany Place from November 1, 2000 to the present. *See* A.R.S. § 10-11421(C) (dissolved corporation "may not carry on any activities except those necessary to wind up and liquidate its affairs . . . and notify its claimants"). That does not mean, however, that no other individual or entity had or has management powers at Tiffany Place.

¶19 Under the UCA, the board had and has management powers to act on behalf of the association, even though the 1981 Corporation could not do so after the dissolution. *See, e.g.*, A.R.S. §§ 33-1243, -1202(5). Indeed, that continuity of management is precisely what occurred here, albeit apparently without knowledge of the dissolution of the 1981 Corporation.

From November 1, 2000 onward, the board held regular meetings, obtained necessary insurance on behalf of Tiffany Place Owners, maintained communal property, prepared annual budgets and reports, levied assessments and sought to enforce liens.[6]

¶20 Although the board's actions were not in conformity with the corporate form stated in the CC&Rs, they were consistent with the powers granted to the board by the UCA. *See, e.g.*, *id.* Indeed, a board acting on behalf of all owners without any operative corporate form is an expressly authorized option under the UCA. *See* A.R.S. § 33-1241 (authorizing, inter alia, "an unincorporated association"). Accordingly, under the UCA, the board properly (and by necessity) had management powers to act on behalf of the association after the dissolution of the 1981 Corporation on November 1, 2000. In an analogous case, the highest court in Maryland came to this same conclusion.

¶21 Chronologically, in *Pines Point Marina v. Rehak*, a condominium homeowners' association was formed as a corporation; the corporate charter was forfeited for failure to pay taxes;

[6] This continuity is in stark contrast to the out-of-state authority cited by Fuhrer, where there was "no continuity between" the two associations; the parties involved had "no direct ties to [and were not assignees or successors of] the original developer and property owners' association" and the court apparently was not asked to consider the force of the applicable version of the Uniform Condominium Act. *Valley View Vill. S. Improve. Ass'n, Inc. v. Brock*, 272 S.W.3d 927, 928, 930 (Mo. Ct. App. 2009).

the homeowners' association sued a supplier and the homeowners' association then "revived its corporate status." 961 A.2d 574, 576-77 (Md. 2008). The issue in *Rehak* was whether the association could press the suit while the association's corporate charter had been forfeited. *Id.* at 576. In that procedurally distinct context, construing a Maryland statute substantively similar to the UCA, *Rehak* held that when the corporate charter was revoked, the association through its board defaulted to the status of an unincorporated association that could sue through its governing body. *Id.* at 588 ("[I]f an incorporated council of unit owners forfeits its corporate charter, it defaults to the status of an unincorporated association, with the right to sue and be sued intact . . . ."). In doing so, *Rehak* found that councils of unit owners (boards of directors in Arizona) derive their existence and powers from statute, not solely from the act of incorporation or from the CC&Rs. *Id.* at 588.

¶22 Consistent with *Rehak*, and given the statutory directives set forth in the UCA, from November 1, 2000 forward, the board was authorized under the UCA to take the actions challenged here, even if the association was not a functioning "Arizona non-profit corporation" as directed by the CC&Rs. *See* A.R.S. §§ 33-1202(5), -1242, -1243. Given this statutory

authority, we reject Fuhrer's argument that only the 1981 Corporation could impose or collect assessments.[7]

¶23 Notwithstanding this statutory authority and continuity, the board took further action to have the governance of the condominium comply with both the UCA *and* the CC&Rs. The CC&Rs provide that Tiffany Place shall be governed by an association, "to be incorporated as an Arizona non-profit corporation following recordation of [the CC&Rs] . . . and such Association's successors and assigns." The 1981 Corporation was created soon after the CC&Rs were recorded. When, in late 2007, Fuhrer brought to the board's attention the dissolution of the 1981 Corporation and creation of the 2004 Corporation, the board sought legal counsel.

¶24 In March 2009, the board informed each Tiffany Place Owner of the situation, and called for a vote of the Owners to amend and restate the 2004 Corporation's Articles of Incorporation. The board recommended the Owners approve the amended and restated Articles of Incorporation to make plain that the 2004 Corporation "[i]s and was organized to assume and succeed to all rights, responsibilities and legal obligations,

[7] Factually, Fuhrer's argument that the CC&Rs give "the 1981 [Corporation], and only the 1981 [Corporation], the right to impose or collect assessments" fails because, among other things, the 1981 Corporation did not exist until *after* the CC&Rs were signed and recorded.

without limitation, accruing to and/or owed by the 'Association' formed under and defined by" the CC&Rs, including the 1981 Corporation. In April 2009, the Owners approved the amended and restated Articles by a vote of twenty-three to one.[8]

¶25 Upon learning of the dissolution of the 1981 Corporation, Tiffany Place Owners made no move to replace the board or form any rival homeowners' association. Instead, Tiffany Place Owners looked to the board for continuity, governance and maintenance of the property and, in accepting the board's recommendation, voted overwhelmingly to amend and restate the articles of incorporation for the 2004 Corporation to mirror the 1981 Corporation. There is no claim that this approval did not comply with statutory requirements for such an amendment. *See, e.g.*, A.R.S. §§ 10-11001 to -11009. On this record, given the board's action to ensure both continuity and

[8] This was a vote to amend and restate articles of incorporation, not to amend the CC&Rs. Accordingly, the vote required was two-thirds of the votes cast, *see* A.R.S. § 10-11003(A)(5), not the different standard applicable to amend the CC&Rs. A quorum clearly existed for this vote, whether measured by statute or bylaw. Viewed most favorably to Fuhrer, sixty percent of the Owners (24 of a maximum of 40 Owners) voted. Under the UCA, A.R.S. § 33-1249(A), unless bylaws provide otherwise, a quorum of the association is established by the presence of twenty-five percent of the eligible votes. Under the association's bylaws, a quorum is established by the presence of ten percent of the eligible votes. *See also* A.R.S. § 10-3722 (under general non-profit corporate law, a quorum is established by presence of "one-tenth" of eligible votes, unless otherwise stated in articles or bylaws).

that the association complied with both the UCA and the CC&Rs, the superior court properly held the 2004 Corporation "is a continuation, i.e. a successor" to the 1981 Corporation.[9]

¶26 Fuhrer argues that she cannot be compelled to be a member of an Arizona non-profit corporation. By statute, Arizona law provides that "[n]o person shall be admitted as a member [in a non-profit corporation] without that person's consent. Consent may be express or implied." A.R.S. § 10-3601(B). Fuhrer concedes that, as an Owner, she is bound by the CC&Rs. The CC&Rs, in turn, provide that (a) the association would take the form of a not-yet-created "Arizona non-profit corporation;" (b) upon purchase of a condominium unit, each Owner would automatically be a member of that association; and (c) each Owner agrees to be

[9] Given the express assumption and succession by the 2004 Corporation of "all rights, responsibilities and legal obligations" of the 1981 Corporation, this court need not address the authority cited by the parties discussing situations where a subsequent corporation seeks to *avoid* responsibility for a prior entity. Even if that authority applied here, the 2004 Corporation admits that there is substantial similarity in ownership and control between the two corporations, and Fuhrer states there is no evidence that any consideration exchanged between the two corporations. *See Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, 191-92, ¶ 18, 195 P.3d 645, 650-51 (App. 2008) (citing authority). Tiffany Place Owners continued paying their assessments in order to fund the association. Owners, including Fuhrer, attended meetings and submitted requests for maintenance and Fuhrer served on the board. Accordingly, even if the *Higgins* test applied, the 2004 Corporation is the successor to the 1981 Corporation.

bound by the CC&Rs. Accordingly, Fuhrer expressly consented to membership in the governing association of Tiffany Place.

¶27 Fuhrer also claims *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 75 P.3d 132 (App. 2003), mandates a different result. *Shamrock* held that, "to impose automatic membership on owners of property located within a neighborhood or community development, [such a] requirement must appear in a deed restriction embodied within a recorded instrument." *Id.* at 45, ¶ 14, 75 P.3d at 135. Because the declaration did not require automatic membership in that homeowners' association, such membership could not be compelled. *Id.* at 45-46, ¶¶ 14-16, 75 P.3d at 135-36. Here, by contrast, the CC&Rs have a mandatory and automatic membership provision and Fuhrer admits she is bound by the CC&Rs. Such express, written consent complies with Arizona law regarding membership in non-profit corporations. A.R.S. 10-3601(B).

¶28 The superior court correctly found the 2004 Corporation is the successor to the 1981 Corporation and correctly found the board properly exercised its rights under the UCA. Accordingly, the superior court properly found the assessments levied on Fuhrer were proper and Fuhrer's failure to pay the assessments created a lien upon which the 2004 Corporation could foreclose. As such, the superior court

properly granted summary judgment to the 2004 Corporation and properly denied Fuhrer's cross-motion for summary judgment.

CONCLUSION

¶29 For the foregoing reasons, the judgment of the superior court is affirmed. As the prevailing party on appeal, Appellee is awarded costs and reasonable attorneys' fees on appeal upon compliance with ARCAP 21 and in accordance with A.R.S. §§ 12-341 and -341.01 and section 4.6 of the CC&Rs.

/s/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
PETER B. SWANN, Judge