

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 03/15/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

SCOTTSDALE CONDOMINIUM) No. 1 CA-CV 11-0053
ASSOCIATION,)
) DEPARTMENT D
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.)
) Not for Publication
JOY TALAROC,) (Rule 28, Arizona Rules
) of Civil Appellate Procedure
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-002096

The Honorable J. Kenneth Mangum, Judge

AFFIRMED

Maynard Cronin Erickson Curran & Reiter, P.L.C. Phoenix
By Jennifer A. Reiter
Attorneys for Plaintiff/Appellant

Berens, Kozub, Kloberdanz & Blonstein, PLC Scottsdale
By Daniel L. Kloberdanz
Attorneys for Defendant/Appellee

_____ G E M M I L L, Judge

¶1 Scottsdale Condominiums ("the Association") appeals the grant of summary judgment in favor of Joy Talaroc. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2006, Talaroc purchased a condominium unit within

Scottsdale Condominiums and became a member of the Association. After signing the purchase contract, but prior to closing, Talaroc received an informational booklet that included the Association's Covenants, Conditions, and Restrictions ("CC & Rs") and Rules and Regulations. Talaroc contends the booklet contained "conflicting information on the pet policy." The front page of the booklet included the name CID Management and a corresponding phone number. Talaroc alleges that, prior to closing on the property, she spoke with Mike Doyle at CID Management who informed her "that as long as the dogs had a combined weight under 20 pounds, the dogs would be allowed." The content of the conversation, however, is in dispute. Talaroc was given notice of a violation of the Association's rules a few weeks following the close of the sale. She asserts that her counsel wrote to the Association, explaining that Talaroc wished to work with the Association and its Board of Directors "to agree to any reasonable rules concerning her two dogs short of giving the dogs away."

¶13 In February 2007, the Association filed a lawsuit against Talaroc, alleging that Talaroc's keeping of two dogs violated the Association's CC & Rs and Rules and Regulations. The Association argued that Scottsdale Condominiums was "a wholly pet-restricted community." Section 7.5 of the CC & Rs ("Section 7.5") provides:

No animals or birds of any kind shall be raised, bred, or kept in any Unit, or on any portion of the Property; except that usual and ordinary small household pets such as dogs, cats, or birds, may, upon approval of the Association, be kept, provided that they are not kept, bred or maintained for any commercial purposes, and they are kept under reasonable control at all times. The Board may enact reasonable rules respecting the keeping of animals within the Project and may designate certain areas in which animals may not be taken or kept. The Association reserves the right to have such pets removed if the pets' behavior becomes objectionable to the members of the Association. Approval for such pets will not be unreasonably withheld, nor will the removal of such pets be unreasonably applied.

In addition, a Rule and Regulation enacted on February 19, 2004 (hereinafter referred to as the "no pets rule") provides:

Effective February 19, 2004 animals will no longer be allowed to be kept anywhere on the Scottsdale Condominium Complex, except for those residents in the West Building that currently have an authorized animal at the time of this pet rule revision. Those residents will be grandfathered to keep one animal (dog or cat) that does not exceed twenty (20) pounds at adult weight as long as they continue to reside in the West Building and they comply with the following pet rules pertaining to the caring and keeping of an animal. All grandfathered animals must be identified and registered with the Association's Board of Directors by February 15th, 2004.

¶4 In March 2007, the Association moved for judgment as a matter of law for a permanent injunction. Talaroc filed a response to the Association's motion and filed a cross-motion

for summary judgment, arguing that the no pets rule was inconsistent with the CC & Rs.

¶15 Following oral argument, the trial court granted the Association's motion for permanent injunction and denied Talaroc's motion for summary judgment. Talaroc appealed ("first appeal"), and this court vacated the trial court's order and remanded for further proceedings, concluding, in part, that "the no pets rule is unenforceable because it conflicts with the express provisions of Section 7.5 of the CC & R's." *Scottsdale Condos. v. Talaroc*, 1 CA-CV 08-0197, 2009 WL 791294, at *1, *3, ¶¶ 1, 12 (Ariz. App. March 26, 2009) (mem. decision). This court also vacated the trial court's award of attorneys' fees and costs to the Association and denied Talaroc's request for attorneys' fees on appeal, "leaving this request to the trial court's discretion pending resolution of the case on the merits." *Id.* at *5, ¶ 22.

¶16 Approximately 11 months after this court's remand to the superior court, the Association filed a motion for voluntary dismissal pursuant to Arizona Rule of Civil Procedure ("Rule") 41(a)(2). Talaroc then moved for summary judgment, arguing again that the no pet rule was inconsistent with the CC & Rs. She further alleged that Section 7.5 was the controlling pet policy of the Association because the CC & Rs were never amended and any other rule banning pets had never been recorded. Talaroc

disputed the Association's argument in the first appeal that "there might be other rules barring the dogs," stating that "[t]o date, the Association has never identified any other such rules and, therefore, there is no reason to prevent th[e] [c]ourt from granting summary judgment." In response, the Association argued that the decision from this court in the first appeal did not resolve the case. The Association asserted that this court's decision did not address "whether or how [Talaroc] even sought approval for her pets." Specifically, the Association argues that, other than the disputed conversation between Talaroc and Doyle, "there is no evidence that [Talaroc] sought approval of her animals until after having been in violation for several months." In addition, the Association argued that Talaroc was "on constructive notice of a recorded 2000 rule amendment that also prohibit[ed] her animals." The 2000 pet rule revision (hereinafter referred to as the "one pet rule") provides:

No more than one (1) small animal (cat or dog) that does not exceed twenty (20) pounds at adult weight may be kept in the west building (units 100 through 132 and 200 through 232).^[1] Exception: any resident of the west building maintaining more than one (1) cat and/or dog at the time of this revision on 4-13-00, will be grandfathered, but they cannot replace any one of them at a

¹ Talaroc's unit number falls within this range.

later date if by their replacement it would exceed more than one (1) animal. Those residents with more than one (1) animal must notify the Association Manager of the number and description of the animals they are maintaining in their unit in order to qualify for this exception.

¶17 In August 2010, the court granted summary judgment in favor of Talaroc and denied the Association's motion for voluntary dismissal. In November 2010, the court denied the Association's motion for reconsideration and awarded Talaroc costs in the amount of \$1085.96 and attorneys' fees in the amount of \$37,000. The court concluded "that the award of reasonable fees is mandatory per Paragraph 9.1 of the CC&R's."

¶18 The Association timely appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (Supp. 2011).

DISCUSSION

¶19 The Association presents three issues on appeal. These issues include whether the trial court erred in: 1) denying the Association's motion for voluntary dismissal of its claim; 2) granting summary judgment in favor of Talaroc when Talaroc was still in violation of the Association's CC & Rs and pet rules; 3) finding a fee award to Talaroc was mandatory under the CC & Rs.

Motion for Voluntary Dismissal

¶10 Rule 41(a) permits a voluntary dismissal "by the

plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." "The right to dismiss after an answer has been filed, however, is discretionary with the trial court, and must be made by motion with notice to the defendants, a hearing and a court order." *Cheney v. Superior Court*, 144 Ariz. 446, 448, 698 P.2d 691, 693 (1985); see also Ariz. R. Civ. P. 41(a)(2).² When exercising its discretion, the trial court should "examine the facts of each case to determine whether plaintiff's dismissal would violate any of defendant's substantial legal rights." *Schoolhouse Ed. Aids, Inc. v. Haag*, 145 Ariz. 87, 90, 699 P.2d 1318, 1321 (App. 1985).

¶11 The Association argues that a voluntary dismissal was

² Rule 41(a)(2) provides:

Except as provided in paragraph 1 of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

appropriate because, following remand of the case from this court in the first appeal, "there was no clear 'winner'" and "[f]urther litigation was not in the best interests of either party." Talaroc counters that the Association's motion was "a ploy by the Association to avoid a final decision by the [t]rial [c]ourt and inevitable reimbursement to Talaroc for her attorney[s'] fees and costs."

¶12 The Association requested, in the motion for voluntary dismissal, that each side bear its own fees and costs. The Association filed its motion for voluntary dismissal over three years after it filed its complaint and nearly a year after this court ruled against it on appeal. On this record and in light of Talaroc's opposition to the dismissal and potential claim for attorneys' fees and costs, the trial court acted well within its discretion in denying the Association's motion for voluntary dismissal.

Summary Judgment

¶13 We review a grant of summary judgment *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment may be granted when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate only "if the facts produced in

support of the [other party's] claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶14 The Association's complaint alleged that "Talaroc's refusal to comply with the pet restriction [was] a continuing violation of the CC&Rs." And in response to Talaroc's motion for summary judgment, the Association argued that the one pet rule was applicable and that Talaroc, with two dogs, was in violation. The Association's theory is that when the no pet rule from 2004 was declared unenforceable by this court in the first appeal, the one pet rule from 2000 became applicable to Talaroc, who has two dogs.

¶15 We are not immediately persuaded that this court's determination in the first appeal that the no pet rule was unenforceable magically breathed life into the previously superseded one pet rule, but we do not need to reach this issue. It is sufficient that we determine that Talaroc was entitled to summary judgment on the issues framed by the pleadings in this case.

¶16 The Association, in its complaint, alleged that Talaroc was in violation of the CC & Rs and Rules and Regulations because she was violating the no pets rule. This

court determined in the first appeal that the no pets rule was unenforceable. Talaroc eventually moved for summary judgment, pointing out that the no pets rule is unenforceable and that she is not in violation of Section 7.5.

¶17 In response to the motion for summary judgment, the Association asserted for the first time that Talaroc was in violation of the one pet rule from 2000. During oral argument before the trial court on the motion, Talaroc explained that the complaint filed by the Association "clearly states no pets are allowed. There was no notice of this one dog, one pet rule anywhere in the pleadings." In response, the Association conceded:

[I]f you go back to the complaint, I'll give you that it doesn't cite the one pet rule because that wasn't - as far as counsel knew, that wasn't the rule in effect.

So I guess we all assume that logically, if the no pets rule has been struck down, and if the Association, of course, has to comply with the CC & Rs, which do allow it to enact reasonable rules and regulations, as far as we know, I guess the prior version of the rule logically would still be in effect, but it wasn't cited earlier in this case because we didn't know about it.

. . .

We knew about it, but we didn't know that it was going to become the operative rule as a result of the no pets rule being struck down.

¶18 Consistent with the Association's acknowledgement, the one pet rule was not cited in the original complaint as a basis

for any alleged violation by Talaroc. The Association has not moved to amend the complaint, and the one pet rule was not asserted until after this court found the no pet rule to be unenforceable and Talaroc moved for summary judgment.

¶19 Although the Association has now asserted the applicability of the one pet rule from 2000, the applicability of the one pet rule is not before this court, based on the pleadings. Section 7.5 of the CC & Rs is the controlling pet policy. This court previously concluded, in the first appeal, that Section 7.5 "provides [that] the board cannot unreasonably withhold its approval of an owner's request to keep household pets. . . . Notwithstanding the desires of the board or the membership, the CC & Rs currently in place require that the board give reasonable consideration to each request for the keeping of pets, which did not occur here." *Scottsdale Condos.*, 1 CA-CV 08-0197, 2009 WL 791294 at *4, ¶ 14.

¶20 Talaroc requested approval for her two pets but was met with a lawsuit. This court declared the no pet rule unenforceable and remanded. *See id.* at *1, *3, ¶¶ 1, 12. The record does not reflect that the Association took any further action regarding Talaroc's dogs until the Association filed its motion for voluntary dismissal, which signaled its intention to be finished with this litigation, and thereby impliedly acknowledged approval for Talaroc's two dogs. In addition,

Section 7.5 of the CC & Rs provides that “[a]pproval for such pets will not be unreasonably withheld, nor will the removal of such pets be unreasonably applied.” Because approximately 11 months passed after the first appeal without the Association taking any further action, we conclude that Talaroc’s compliance with Section 7.5 is established.

¶21 Because Talaroc is not in violation of Section 7.5 of the CC & Rs, she is entitled to summary judgment. The trial court correctly granted summary judgment in favor of Talaroc.

Attorneys’ Fees Award

¶22 The Association challenges the trial court’s award of attorneys’ fees in favor of Talaroc. We review the grant or denial of attorneys’ fees for an abuse of discretion, but we review the interpretation of a contract *de novo*. *Ahwatukee Custom Estates Mgmt. Ass’n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). “CC & Rs constitute a contract between the subdivision’s property owners as a whole and individual lot owners.” *Id.* When interpreting CC & Rs, we give effect “to the intention of the parties as determined from the language, as well as the circumstances and purposes relating to its creation.” *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners’ Ass’n*, 225 Ariz. 533, 537, ¶ 11, 241 P.3d 897, 901 (App. 2010) (citing *Powell v. Washburn*, 211 Ariz. 553, 556-57, ¶ 13, 125 P.3d 373, 376-77 (2006)). “We are not bound by the

'strict and technical meaning of the particular words' in the declaration." *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 297, ¶ 31, 257 P.3d 1168, 1177 (App. 2011) (quoting *Powell*, 211 Ariz. at 556, ¶ 10, 125 P.3d at 376). Unlike attorneys' fees awarded pursuant to A.R.S. § 12-341.01 (2003), the trial court may not refuse to award fees under an applicable contractual provision. *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994). Talaroc sought fees based on Section 9.1 of the CC & Rs and, alternatively, under A.R.S. § 12-341.01(A).³ The trial judge evidently granted fees under Section 9.1 because he stated his conclusion that "the award of reasonable fees is mandatory per Paragraph 9.1 of the CC & R's."

¶23 Section 9.1 of the CC & Rs provides, in pertinent part:

The Association, [and] any Owner, . . . shall have the right to enforce, by any proceeding at law or in equity, all [CC & Rs], and in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court.

The Association argues that this provision is not applicable to Talaroc because she did not bring an action to "enforce" the CC & Rs.

³ Because we determine that attorneys' fees are mandatory pursuant to the CC & Rs, *infra* ¶ 25, we need not address whether fees should have been awarded under an applicable statute. See A.R.S. § 12-341.01.

¶24 We conclude, however, that Talaroc was, as an "Owner," seeking to "enforce" the CC & Rs in her favor, and we therefore conclude that Section 9.1 is applicable in favor of Talaroc and authorizes an award of fees against the Association. The language of Section 9.1 provides that the Association and any Owner "shall have the right to enforce" the CC & Rs "by any proceeding at law or in equity." In this litigation, Talaroc has achieved the functional equivalent of a declaratory judgment in her favor, rendering the 2004 no pets rule unenforceable with the result that Section 7.5 is applicable in her favor. The mere fact that Talaroc did not initiate this litigation and did not counterclaim for declaratory judgment does not preclude the application of Section 9.1 to her benefit. Certainly CC & Rs are often enforced by homeowners associations against owners, but it is also true that owners may enforce CC & Rs against their associations or other owners. Here, the Association started a fight and lost on the basis of its own CC & Rs, specifically Section 7.5, which trumped the no pets rule. Talaroc successfully "enforced" Section 7.5.

¶25 The next question we must resolve is whether Section 9.1 imposes a mandatory award of fees. We agree with the trial court that it does because the language provides that the Association or an Owner who enforces the CC & Rs "shall be entitled to recover costs and reasonable attorneys' fees as are

ordered by the Court." The word "shall" as used here is mandatory. See *Phoenix Newspapers, Inc. v. Superior Court*, 180 Ariz. 159, 161, 882 P.2d 1285, 1287 (App. 1993) ("The word 'shall' certainly implies a mandatory provision.")

¶26 For these reasons, we conclude that the trial court did not err in its award of attorneys' fees in favor of Talaroc.

Attorneys' Fees on Appeal

¶27 Talaroc requests that she be awarded her attorneys' fees and costs pursuant to Arizona Rules of Civil Appellate Procedure ("ARCAP") 21, A.R.S. §§ 12-341.01 and 12-349 (2003), and Section 9.1 of the CC & Rs. Because we have determined that Section 9.1 is applicable in favor of Talaroc and imposes a mandatory award of fees, we will award Talaroc an amount of reasonable attorneys' fees and costs upon her compliance with ARCAP 21.

CONCLUSION

¶28 For these reasons, we affirm.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge