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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARK KRIG, *Plaintiff/Appellant*,

v.

BOULDER CITY AERO CLUB INC., "The Association," A Nevada
Corporation Registered as an Arizona Non-Profit,
Defendant/Appellee.

No. 1 CA-CV 17-0382
FILED 9-27-18
AMENDED VIA ORDER FILED 11-2-18

Appeal from the Superior Court in Mohave County
No. S8015CV201600047
The Honorable Richard Weiss, Judge

REVERSED AND REMANDED

COUNSEL

Mark Krig, White Hills
Plaintiff/Appellant

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By Kimberly P. Stein, Pro Hac Vice
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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kent E. Cattani joined.

P E R K I N S, Judge:

¶1 Appellant Mark Krig appeals the superior court’s order granting summary judgment in favor of Appellee Boulder City Aero Club (“BCAC”). For the following reasons, we reverse the superior court’s order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Krig purchased real property in White Hills in 2005. Krig’s property is located within Triangle Airpark, a community managed by BCAC, subject to Covenants, Conditions, and Restrictions (“CC&Rs”) recorded in 1984. The 1984 CC&Rs state “[n]o person may purchase, own or retain ownership of any [l]ot, who is not a Member in good standing in [BCAC].” The 1984 CC&Rs were amended in 1998; however, prior litigation between Krig and BCAC resulted in a declaratory judgment ruling the 1998 CC&Rs defective, rendering the 1984 CC&Rs the operative document.

¶3 In 2016, BCAC held an association meeting in Las Vegas, Nevada. In response, Krig filed suit against BCAC seeking declaratory judgment that BCAC is subject to the requirements of the Arizona Planned Community Act (the “Act”), codified in Arizona Revised Statutes (“A.R.S.”) §§ 33-1801 to -1818. Krig further sought an injunction preventing BCAC from holding its meetings outside of Arizona and requiring BCAC to comply with the Act. In his complaint, Krig alleged BCAC was violating the Act by holding meetings outside of Arizona, failing to provide notice of meetings, and failing to hold proper meetings. Krig further alleged that BCAC allowed non-property owners to vote on homeowners’ association matters in violation of the 1984 CC&Rs and the Act.

¶4 In early 2017, after extensive litigation, BCAC and Krig each filed cross motions for summary judgment. In May 2017, the superior court issued an order granting BCAC’s motion for summary judgment, denying Krig’s cross motion, and awarding BCAC attorney’s fees and costs. In June 2017, the superior court signed BCAC’s proposed form of judgment and

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awarded BCAC \$1,387 in costs and \$50,000 in attorney's fees. Krig now appeals.

DISCUSSION

¶5 Summary judgment is proper where the moving party is entitled to judgment as a matter of law and no genuine issues of material fact remain. Ariz. R. Civ. P. 56(a). We review entry of summary judgment *de novo*. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 16 (App. 2010). We will affirm summary judgment if the superior court was correct for any reason, and view the facts in the light most favorable to the party against whom judgment was entered. *Id.*

¶6 For the following reasons, we reverse the superior court's order granting summary judgment, which was predicated entirely on its findings that BCAC is not a "planned community" and that the Act cannot apply to BCAC because it is not retroactive. Accordingly, we also vacate the superior court's award of attorney's fees and remand the case to the superior court for further proceedings.

I. Standing

¶7 On appeal, BCAC contends Krig lacks standing. BCAC did not raise this issue at the superior court. Thus, under Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(b)(2), we need not consider BCAC's argument. Furthermore, BCAC has pointed to no evidence in the record showing Krig no longer owns property within Triangle Airpark, nor has it offered anything to indicate Krig is no longer a member of BCAC. Having failed to raise this standing issue before the superior court and failed to provide that court with any evidence Krig no longer owns property within the bounds of Triangle Airpark, we decline to entertain BCAC's argument.

II. Failure to Join Indispensable Parties

¶8 BCAC also argues, for the first time on appeal, that Krig failed to join indispensable parties, namely all the members of BCAC. As with the standing argument, BCAC did not raise this issue before the superior court, and we need not consider it pursuant to ARCAP 13(b)(2). In any event, BCAC's argument fails. Arizona Rule of Civil Procedure 19(a) requires joinder of persons who are necessary parties for the court to grant complete relief among the existing parties. Krig's suit against BCAC seeks declaratory and injunctive relief requiring BCAC to abide by the Act. The dispute is between Krig and BCAC, the entity, not its individual members.

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¶9 Relying on *Dreamland Villa Cmty. Club, Inc.*, 224 Ariz. at 51, ¶ 36, BCAC argues that its members are indispensable parties because any declaration that BCAC must abide by the Act would violate its members' due process rights. In *Dreamland*, this Court held that the operative declaration did not allow a simple majority of lot owners to require that all lot owners become association members or pay dues for activities that benefitted only some of the members. *See id.* Nothing in *Dreamland* suggests that when, as here, a homeowner's association is sued, the individual members of the association must also be named parties to the litigation. Thus, BCAC has not established that its members are indispensable parties.

III. Application of the Act

¶10 The superior court granted BCAC's motion for summary judgment based on its conclusion that: (a) the Act does not apply retroactively to BCAC and (b) Triangle Airpark is not a planned community under the Act. As to retroactivity, any newly enacted statute in Arizona is presumed to have prospective application absent an express statement to the contrary. A.R.S. § 1-244; *see Rodriguez v. Terry*, 79 Ariz. 348, 350 (1955). Here, the complained of conduct occurred in 2016, well after the Act was enacted in 1994. Assuming BCAC would otherwise be governed by the Act, the fact the Act is not retroactive is irrelevant. The Act "applies to all planned communities" and thus governs all of BCAC's conduct after the Act's effective date in 1994. A.R.S. § 33-1801(A).

¶11 We now turn to the superior court's ruling that Triangle Airpark is not a planned community because "membership in [BCAC] is not mandatory since the [CC&Rs] provide[] for modification of the deed restriction." Under the Act, a "[p]lanned community" is

a real estate development that includes real estate owned and operated by or real estate on which an easement to maintain roadways or a covenant to maintain roadways is held by a nonprofit corporation or unincorporated association of owners, that is created for the purpose of managing, maintaining or improving the property and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the association for these purposes.

A.R.S. § 33-1802(4). Under this definition, Triangle Airpark is a planned community subject to the provisions of the Act. Pursuant to the 1984 CC&Rs, BCAC is the association that manages Triangle Airpark. Per the

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CC&Rs, any owner of a lot within the boundaries of the community must either be a member or transfer ownership of the lot to a member of BCAC. Moreover, under the CC&Rs, all members must pay assessments for the purpose of managing, maintaining, or improving certain common areas owned by BCAC.

¶12 In support of its finding that Triangle Airpark is not a planned community, the court relied on our holding in *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 44–46, ¶¶ 9–18 (App. 2003). But in *Shamrock* we held that “[i]n order to impose automatic membership on owners of property located within a neighborhood or community development, this requirement must appear in a deed restriction embodied within a recorded instrument.” 206 Ariz. at 45, ¶ 14. And here, Section 4 of the 1984 CC&Rs states: “No person may purchase, own or retain ownership of any Lot, who is not a Member in good standing in the Association.” This section clearly requires all property owners to be members in BCAC. That another provision provides that a majority of the members may, by 2/3 majority vote, alter the CC&Rs to no longer require membership in the future, does not change this fact. An association that currently requires membership as a condition of property ownership is *ipso facto* an association with mandatory membership.

¶13 BCAC further argues it is not an “association” under the Act because it was not created to own, operate, manage, maintain, or improve a planned community. Instead, BCAC asserts it was first created in 1964 as a social club. BCAC’s argument ignores its subsequent decision, in 1984, to record a set of CC&Rs creating common area easements in Triangle Airpark and setting forth, among other things, covenants for maintenance assessments to be levied against BCAC members for the purpose of “the improvement, maintenance, and repair of the Common Area.” Moreover, the 1984 CC&Rs define “Common Area” as “all property . . . owned by the Association for the common use and enjoyment of the Members.” Thus, BCAC’s argument fails. Since at least 1984, BCAC has managed and maintained property within Triangle Airpark, a planned community under the Act.

¶14 Finally, BCAC argues Triangle Airpark is not a planned community because it does not meet other elements of a “planned community” aside from the mandatory membership provision. BCAC first asserts Triangle Airpark is not a real estate development and that the only common area within Triangle Airpark is a runway. Despite this assertion, Triangle Airpark is a collection of privately owned parcels of real property

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organized around commonly owned real property: at a minimum, a runway. Thus, BCAC's assertions are incorrect.

¶15 BCAC next asserts that property owners have never paid assessments to BCAC for managing, maintaining, or improving Triangle Airpark and that BCAC does not levy assessments exclusively against property owners. Under the operative CC&Rs, BCAC has the power to levy assessments against owners of real property within Triangle Airpark for the purposes of maintaining common areas—BCAC owned real property. Nothing in the Act requires assessments to be levied exclusively against property owners or prohibits associations from levying assessments against non-owners who are voluntary members. *See* A.R.S. §§ 33-1801 to -1818. In addition, BCAC's two assertions about its assessments are incompatible. BCAC's admission that it levies assessments against owners and some non-owners to maintain the Triangle Airpark runway is inconsistent with its claim that BCAC has never levied such assessments. Moreover, BCAC's assertion that Krig is no longer a member because of his failure to pay dues belies this argument. Thus, BCAC's alternative arguments that Triangle Airpark is not a planned community fail.

¶16 Having concluded that the Act applies to BCAC, we reverse the superior court's grant of summary judgment in favor of BCAC.

IV. Harmless Error and Attorney's Fees

¶17 BCAC argues that, even if the superior court erred by ruling the Act does not apply, the error is harmless because Triangle Airpark's property owners will vote to amend the CC&Rs to make membership in BCAC optional, not mandatory. But legal error is not harmless merely because the harm might be alleviated by some future action. Here, Krig has petitioned the superior court for declaratory and injunctive relief related to certain current and on-going actions by BCAC. It is of no moment that property owners in Triangle Airpark could, at some point in the future, alter the status quo to place BCAC and the park outside the Act's reach. As with BCAC's argument about purported statutory retroactivity, the legal questions on appeal must be resolved based on current facts, not speculative future conduct. For these reasons, the court's error was not harmless.

¶18 Because we reverse the superior court's order granting summary judgment, BCAC is no longer the prevailing party below. Accordingly, we vacate the superior court's award of attorney's fees and costs to BCAC.

CONCLUSION

¶19 Under the operative 1984 CC&Rs, Triangle Airpark is a planned community whose lot owners are required to be members of BCAC. Even though the Act is not retroactive, it has applied to BCAC and Triangle Airpark since its enactment. Accordingly, we reverse the superior court's order granting summary judgment in favor of BCAC, vacate the superior court's award of attorney's fees and costs, and remand for further proceedings consistent with this decision. Krig may seek costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: JT