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EXCEPT AS AUTHORIZED BY APPLICABLE RULES
See Ariz. R. Supreme Court 111(c); ARCAP 28
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/30/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALLEN and CAROLYN RODGERS,) 1 CA-CV 10-0539
)
Plaintiffs/Appellants,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ANTHEM COMMUNITY COUNCIL, INC.,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-002792

The Honorable J. Richard Gama, Judge

REVERSED AND REMANDED

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P O R T L E Y, Judge

¶1 Allen and Carolyn Rodgers ("Plaintiffs") appeal the dismissal of their complaint seeking an injunction and declaratory judgment against the Anthem Community Council

("ACC"). For the following reasons, we reverse and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 The ACC is a non-profit corporation which was created and is governed by the 1999 Declaration of Covenants and Easements for Anthem ("Master Declaration"). The ACC annexed Lot 2 into Anthem in 2003. The lot, which is owned by the St. Rose Philippine Duchesne Roman Catholic Parish ("Church"), became subject to the Master Declaration by a Supplemental Declaration¹ between the Church and the ACC. Subsequently, the ACC granted the Church a variance to erect five cell phone towers on the lot.²

¶13 Plaintiffs own a home subject to the Master Declaration. They sued both the ACC and the Church, and sought a declaratory judgment, injunctive relief and damages for nuisance. The ACC filed a motion to dismiss and successfully asserted that Plaintiffs lacked standing to sue. Plaintiffs appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

¹ The Master Declaration defines a Supplemental Declaration as "[a] Recorded instrument which subjects additional property to this [Master Declaration] . . . or which imposes additional restrictions and obligations on property within Anthem which is not subject to an Association Declaration."

² The Church erected one tower but removed it after discovering that all the necessary county building permits had not been secured.

DISCUSSION

¶4 Plaintiffs argue that the trial court erred because (1) they are beneficiaries under the declarations, (2) they have a statutory cause of action, and (3) they have common law standing.

¶5 We review de novo dismissal for failure to state a claim. *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006). We will affirm the "dismissal only if the plaintiffs would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996).³

I.

¶6 Plaintiffs first contend that the trial court erred when it ruled that they did not have standing to sue under the declarations. We agree.

¶7 Restrictive declarations or covenants are a "contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App.

³ Although Plaintiffs attached pleadings in response to the motion to dismiss, we will not treat the motion to dismiss as a motion for summary judgment because the pleadings are public records. See *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 13, 226 P.3d 1046, 1050 (App. 2010).

2000). The interpretation of a restrictive declaration is generally a question of law that we review de novo. *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 395-96, ¶ 11, 87 P.3d 81, 83-84 (App. 2004). And, we interpret such declarations "to give effect to the intention of the parties as determined from the language of the documents in its entirety and the purpose for which the [declarations] were created." *Powell v. Washburn*, 211 Ariz. 553, 554, ¶ 1, 125 P.3d 373, 374 (2006).

¶18 Because the Supplemental Declaration gave exclusive enforcement of the declarations to the ACC and that declaration explicitly abrogated the rights of third parties, the trial court found that Plaintiffs did not have standing to challenge the variance. The provisions, however, do not bind Plaintiffs because the Supplemental Declaration was only between the Church and the ACC.⁴ The Master Declaration does not have the additional limitations outlined in the Supplemental Declaration. Because Plaintiffs did not sign or otherwise assent to be bound to the additional property restrictions in the Supplemental Declaration, see *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997) (holding that mutual assent is an essential element of any enforceable contract), those additional

⁴ The Supplemental Declaration is titled "Supplemental Declaration of Covenants, Conditions, Restrictions and Easements for Lot 2 of Anthem Meridian Drive."

restrictions do not apply to them. Consequently, Plaintiffs have standing to challenge the variance.⁵

II.

¶9 Plaintiffs also challenge the trial court's determination that they did not have standing to sue because the ACC is not a homeowners association ("HOA"). They assert that they have standing because A.R.S. § 10-3304(B)(2) (Supp. 2010) provides a statutory cause of action. We review underlying questions of statutory interpretation de novo. *Kromko v. City of Tucson*, 202 Ariz. 499, 501, ¶ 4, 47 P.3d 1137, 1139 (App. 2002).

¶10 Section 10-3304(B)(2) provides that any member⁶ of a planned community can seek an injunction to challenge any corporate action if the corporation lacked the power to act. The ACC argued that it was not an HOA because the Master Declaration disclaims any association status and states that the

⁵ We need not address Plaintiffs' argument that they have common law standing. We also do not address Plaintiffs' argument that the trial court erred by refusing to allow them to amend their complaint.

⁶ The ACC also argues that it is not an HOA because, as a non-profit corporation, it has no members. "Member" is not defined in Title 33. "When the legislature has not defined a word or phrase in a statute, we may consider the definitions of respected dictionaries." *Rigel Corp. v. State*, 225 Ariz. 65, 69, ¶ 19, 234 P.3d 633, 637 (App. 2010). "Member" means "[o]ne who belongs to a group or organization." *Webster's II New Riverside University Dictionary* 740 (1994). Plaintiffs are homeowners in Anthem, pay assessments to the ACC and vote to elect the board of the ACC pursuant to the bylaws; they are members of the ACC.

ACC is not "subject to the Arizona Planned Communities Act, A.R.S. § 33-1801, et. seq. (1997)." The ACC, however, is an HOA.

¶11 An HOA is statutorily defined as:

a nonprofit corporation or unincorporated association of owners that is created pursuant to a declaration to own and operate portions of a planned community and that has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration.

A.R.S. § 33-1802(1) (2007). The ACC meets this definition. It is a non-profit corporation. The Master Declaration provides that the ACC can own and maintain property, has the power to levy assessments against owners, and enforce liens to secure payment for delinquent assessments.

¶12 Despite its attempt to disclaim that it is an association, the statutory definition controls. See *Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1100 (App. 2007) (explaining that a valid statute is automatically part of any contract affected by it). Consequently, because of the ACC's statutory status, Plaintiffs have standing to seek to enjoin the variance.

¶13 Both parties request attorneys' fees and costs on appeal under A.R.S. § 12-341.01 (2003). Because we are remanding this matter, the trial court can consider awarding

Plaintiffs' attorneys' fees, if they are successful at the conclusion of this case. We will, however, award costs on appeal to Plaintiffs upon compliance with ARCAP 21.

CONCLUSION

¶14 For the foregoing reasons, we reverse the dismissal of Plaintiffs' complaint and remand for further proceedings.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP Judge

/s/

ROGER BRODMAN, JUDGE*

* Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Roger Brodman, Judge of the Maricopa County Superior Court, to sit in this matter.