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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 21 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| MIDVALE PARK MASTER REVIEW |) | 2 CA-CV 2010-0082 |
| BOARD HOMEOWNERS |) | DEPARTMENT A |
| ASSOCIATION, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| Plaintiff/Appellee, |) | Not for Publication |
| |) | Rule 28, Rules of Civil |
| v. |) | Appellate Procedure |
| |) | |
| CACTUS COMMUNITY CHURCH OF |) | |
| THE NAZARENE, |) | |
| |) | |
| Defendant/Appellant. |) | |
| _____ |) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20085911

Honorable Stephen C. Villarreal, Judge

AFFIRMED

The Brown Law Group, PLLC
By Philip Brown

Tucson
Attorneys for Plaintiff/Appellee

Good Law, P.C.
By Gregory E. Good, Robert J. Curtis, and
Wesley P. Mehl

Tucson
Attorneys for Defendant/Appellant

HOWARD, Chief Judge.

¶1 Appellant Cactus Community Church of the Nazarene (CCCN) appeals from the superior court’s entry of summary judgment in favor of appellee Midvale Park Master Review Board (Review Board). For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered.¹ *Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09 (1990). CCCN owns property located in Midvale Park, a planned community located in Pima County. CCCN’s property, along with the other properties located within the Midvale Park community, is subject to the community’s covenants, conditions and restrictions (CC&Rs).

¶3 Before CCCN acquired the subject property, Midvale Park recorded its original CC&Rs. The original CC&Rs provided for specific methods of calculating property assessments that are used to provide, inter alia, “funds to perform the maintenance, care and repair functions” necessary to maintain Midvale Park. Any property located within the Midvale Park community exempt from ad valorem taxes, such as CCCN, was granted a cap on the assessment rate not applicable to other

¹Both parties’ statements of facts contain insufficient citations to the record. It is unhelpful to this court when the parties cite to unlabeled exhibits contained in a nearly 200-page document, and it is inappropriate for the parties to cite to a trial court summary judgment as support for a factual assertion. *See* Ariz. R. Civ. App. P. 13(a)(4) (statement of facts shall contain appropriate references to the record). We remind counsel that it is not the responsibility of this court to search the record for appropriate facts and relevant documents whose citations should have been provided by the parties. “Judges are not like pigs, hunting for truffles buried [in the record].” *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, n.2, 972 P.2d 658, 659-60 n.2 (App. 1998), *quoting United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (alteration in *Ramirez*).

properties within the community. The original CC&Rs also stated that anyone maintaining a class B membership in the Review Board could amend the CC&Rs “at any time . . . in any manner . . . deem[ed] fit, notwithstanding the fact that such amendment may have a significant impact upon any property within Midvale Park or shall affect a substantial or vested property right of any person holding any ownership interest in any property within Midvale Park.” The Estes Company was guaranteed the class B membership under the original CC&Rs, and therefore was given the right to amend the CC&Rs, as well as increased voting power, until it no longer held an ownership interest in Midvale Park, until it relinquished its class B status, or until December 31, 1991, whichever occurred first.

¶4 The CC&Rs have been amended several times since they were originally recorded and after CCCN acquired its interest.² These amendments include: (1) the “Fourth Amendment,” made in 1984, which changed the mechanism for calculating the assessments and also eliminated the cap on the assessment rate for properties, such as the CCCN lot, exempt from ad valorem taxes, (2) the 1990 “Sixth Amendment,” which eliminated the Estes Company’s 1991 class B status expiration date, extending Estes’s ability to amend the CC&Rs, and (3) the “Seventh Amendment,” also made in 1990, which completely eliminated the assessment obligation of one property owner but continued to collect assessments from other owners, such as CCCN, in the manner prescribed in the Fourth Amendment.

²For purposes of this decision, we assume CCCN acquired its interest when its affiliated entities acquired title.

¶5 Due to the amendments made to the CC&Rs, CCCN “disputed all assessments that the [Review Board] . . . claimed [to be] due.” The Review Board forgave all assessments it had claimed were due before 2005 and claimed CCCN was indebted to it for the assessments it had accrued since that year. The Review Board then sued CCCN, alleging it had failed to pay its assessments as required.³ The Review Board later filed a motion for summary judgment on its complaint, which the trial court granted. CCCN appeals from this judgment.

Discussion

¶6 On appeal, CCCN argues the trial court erred in granting summary judgment in favor of the Review Board, claiming that the Fourth, Sixth, and Seventh Amendments to the CC&Rs are invalid as violating § 6.10(2) of the Restatement (Third) of Property (Servitudes) (2000) and the case law regarding “reasonableness, fairness and equity.”⁴ But CCCN did not raise these arguments in the trial court.⁵ Litigants are

³This court has been unable to locate the complaint in the record on appeal. Nonetheless, there appears to be no dispute as to its allegations.

⁴CCCN argues in a footnote that all arguments relating to the Seventh Amendment “apply equally to [a 1993] Memorandum and [a 1982] Second Amendment” and that “[t]hese items, like the Seventh Amendment, should also be remanded to the Trial Court with direction that they not be enforceable against [CCCN]” However, the only citation to the record that CCCN provides does not include the 1982 amendment, and our search of the record did not reveal this document. Furthermore, CCCN has presented this court with insufficient argument regarding the 1993 Memorandum and any harm CCCN suffered as a result of its recording. Therefore, any argument with respect to these documents is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (“An argument . . . shall contain 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.”); *see also Polanco v. Indus. Comm’n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2

required to raise a specific argument before the trial court to provide it an opportunity to rule on the matter before an appellant claims the issue as error in this court. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). And “arguments not made at the trial court cannot be asserted on appeal.” *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991). Thus, these two arguments are waived.

¶7 CCCN’s remaining arguments are also based upon the alleged invalidity of various amendments to the CC&Rs. But the Review Board claims in its answering brief that CCCN has not established that it suffered any damages as a result of the adoption of any of the amendments.⁶ If that is true, even if the trial court erred in determining that the amendments were permissible, invalidating the amendments would have no effect on CCCN because it would not provide a defense to the claims brought by the Review Board below. An issue is moot on appeal when “action by the reviewing court would have no effect on the parties.” *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). We discuss each contested amendment in turn.

(App. 2007) (appellant’s failure to develop and support argument waives the issue on appeal).

⁵In its response in opposition to the Review Board’s motion for summary judgment, CCCN made a passing reference to § 6.10(2) of the Restatement (Third) of Property (Servitudes), but it did not provide sufficient argument to allow the trial court to rule on the matter.

⁶CCCN counterclaimed for declaratory judgment relief, but that counterclaim was dismissed, and CCCN does not challenge that dismissal on appeal.

Fourth Amendment to the CC&Rs

¶8 CCCN asserts that the Fourth Amendment negatively affected its assessment because it eliminated the separate assessment rate contained in the original CC&Rs for properties exempt from ad valorem taxes and because it changed the formula it used to calculate assessments, “increasing the assessments against [CCCN] by 600%.” CCCN also states, in its reply brief, that it was negatively affected by the Fourth Amendment’s provision for a flat rate assessment, whereas the language of the original CC&Rs provided a cap on the assessment. The Review Board claims, however, that even if the trial court erred in determining that the Fourth Amendment to the CC&Rs was permissible, the amendment did not “affect the amount of assessments levied . . . or CCCN’s obligation to pay” them. The Review Board therefore asserts that CCCN’s arguments as to the validity of the Fourth Amendment are “immaterial and moot.” *See id.* As explained above, CCCN’s argument that the Fourth Amendment was invalid, if correct, only establishes a defense to their failure to pay assessments due if they can demonstrate that the adoption of the amendment harmed them by increasing their assessments.

¶9 The Review Board correctly points out that the calculation of assessments introduced via the Fourth Amendment yields an assessment per parcel that is either the same as or lower than the assessment for ad valorem tax-exempt properties under the original CC&Rs. CCCN does not meaningfully dispute this in its reply. Additionally, CCCN does not assert that it is presently assessed at a rate in excess of the cap, which would be necessary to demonstrate harm by its removal; it merely contends that the

difference in the language is itself sufficient harm. Accordingly, CCCN has failed to show that its assessment rate had been increased by the adoption of the Fourth Amendment. With no proven negative effect upon CCCN, it has failed to establish that invalidating the Fourth Amendment would be a valid defense to its failure to pay the assessments due. Thus, CCCN's Fourth Amendment challenge is moot. *See id.* (issue moot when action by reviewing court would not affect parties).

¶10 In its reply brief, however, CCCN claims that the Review Board's mootness argument is invalid because it was not raised below and, therefore, "is based on numerology[,] not a developed factual record." But we will uphold the trial court if the summary judgment is correct for any reason. *Sanchez v. Tucson Orthopaedic Inst., P.C.*, 220 Ariz. 37, ¶ 7, 202 P.3d 502, 504 (App. 2008). And as we explained above, CCCN has failed to advance a valid defense because it has not shown that its assessment increased due to the Fourth Amendment.

¶11 CCCN further claims the mootness argument was based upon "inaccurate financial calculations,"⁷ asserting that under the original provision the church owes \$2,765.40 but the Review Board is seeking \$10,678.57. But because CCCN does not explain how it arrived at its figure or how the Review Board's calculations were in error,

⁷CCCN also contends it was harmed by the Fourth Amendment because Article III, § G(1)(b) of the original CC&Rs provided an assessment cap based on assessed property value. But CCCN did not make this argument in its opening brief—rather it specifically noted that this section was for non-tax-exempt properties, and we do not consider new arguments presented in the reply brief. *See State v. Aleman*, 210 Ariz. 232, ¶ 9, 109 P.3d 571, 575 (App. 2005). Moreover, the only support CCCN provides for this argument is an appendix with documents that are not in the record on appeal, which we do not consider. *LaWall v. Pima County Merit Sys. Comm'n*, 212 Ariz. 489, n.3, 134 P.3d 394, 397 n.3 (App. 2006). Therefore, we do not address this argument.

CCCN's response to the Review Board's mootness allegation does not change the fact that CCCN has failed to show harm that would establish a defense. Accordingly, we conclude CCCN's argument that the Fourth Amendment was invalid is moot, and we need not address it.

Seventh Amendment to the CC&Rs

¶12 The Review Board also claims CCCN's challenge to the Seventh Amendment is moot because that amendment, like the Fourth Amendment, had no negative effect on CCCN. As discussed above, without a harm, CCCN would not have a valid defense arising from the adoption of the Seventh Amendment. CCCN argues, however, that its challenge to the amendment's validity is not moot because the Seventh Amendment's adoption, which waived the assessment for one parcel of land in Midvale Park, caused it harm by increasing the assessments on the remaining parcels, including the parcel owned by CCCN.

¶13 The Seventh Amendment to the CC&Rs exempted one commercial parcel in Midvale Park from paying its assessment. In return, however, it withdrew the owner's voting rights on matters pertaining to assessments and their use and placed the burden of paying for maintenance and utilities for certain areas squarely on that owner. And, as noted earlier, paying for maintenance and utilities for common spaces are among the primary reasons for collecting the assessment. Because the requirement that the owner provide maintenance services and pay for utilities reduces the financial burden on the remaining owners, CCCN has not adequately demonstrated that exempting the one parcel from the assessments caused it any harm.

¶14 Moreover, the Fourth Amendment established a flat assessment rate based on parcel size, not on a percentage of overall costs incurred. And the Seventh Amendment did not change this rate. Although CCCN asserts that the Seventh Amendment “disproportionately spread the [Review Board’s] costs . . . across the remaining owners,” it does not explain how this happened or what extra costs it incurred as a result of the Seventh Amendment. Nor does CCCN allege that any subsequent amendments changed the assessment rate as a result of the Seventh Amendment. Without a showing of an increased assessment to demonstrate that CCCN was damaged, invalidating the Seventh Amendment would not establish a defense to the Review Board’s underlying action. Therefore, CCCN’s challenges to the validity of the Seventh Amendment are moot.

Sixth Amendment to the CC&Rs

¶15 The Review Board finally contends that CCCN’s attempts to invalidate the Sixth Amendment on appeal are moot because “invalidating the Sixth Amendment would have no effect on CCCN or Midvale Park.” As explained above, CCCN complains that the Sixth Amendment to the CC&Rs affected it by eliminating Estes Company’s December 1991 class B expiration date, thereby extending Estes’s ability to amend the CC&Rs, increasing Estes’s percentage of votes on the Review Board, and decreasing CCCN’s voting power on the board. But, as the Review Board points out, Estes’s class B membership terminated on or before December 31, 2005, and its voting rights and amendment power were therefore no longer expanded after that date. The only board action CCCN challenges between April 30, 1990, the date of the Sixth Amendment, and

December 31, 2005, the latest date Estes's class B membership could have expired, is the Review Board's enactment of the Seventh Amendment.⁸ And, as we explained above, CCCN has not demonstrated it suffered any harm resulting from the adoption of the Seventh Amendment. Accordingly, the Sixth Amendment had no effect on CCCN, and CCCN's arguments as to its validity are therefore moot. *See Vinson*, 159 Ariz. at 4, 764 P.2d at 739.

Attorney Fees

¶16 Both parties request attorney fees on appeal. Because the CC&Rs provide that, if successful, the Review Board is entitled to its attorney fees, because this action arises out of a contract, and because the Review Board is the prevailing party in this action, we grant its reasonable attorney fees upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.01. Conversely, CCCN's request is denied.

Conclusion

¶17 CCCN's appeal is based upon its challenges to the validity of the Fourth, Sixth, and Seventh Amendments to the CC&Rs, but CCCN has failed to show how these amendments caused it harm. We therefore conclude CCCN's arguments on appeal are moot and affirm the trial court's decision granting summary judgment to the Review

⁸Although CCCN also briefly mentions in its reply brief that the 1993 Memorandum, enacted between 1990 and 2005, also caused it harm, as we explained above, it has failed to present any argument demonstrating why that amendment harmed it, and any argument concerning the Memorandum is therefore waived. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain 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.").

Board. We also grant the Review Board reasonable attorney fees upon its compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge