

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-008488

10/09/2018

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

THOMAS J ARNDT, et al.

CHELSEA HESLA

v.

PHILLIP PECORA JR., et al.

MICHAEL P FAITH

JUDGE STEPHENS

MINUTE ENTRY

East Court Building - Courtroom 712

1:30 p.m. This is the time set for Oral Argument regarding *Plaintiffs' Motion for Partial Summary Judgment*, filed on June 22, 2018; and on *Defendants' Motion for Summary Judgment*, filed on August 2, 2018. Plaintiffs, Thomas J. Arndt and Valerie A. Arndt are present and are represented by counsel, Chelsea Hesla. Defendants, Phillip Pecora and Tamra J. Cooke are present and are represented by counsel, Barry Aylstock on behalf of counsel, Michael P. Faith.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court has read all briefing on both motions for summary judgment.

The parties present arguments on the motions.

Court and counsel confer at the bench.

IT IS ORDERED taking these motions under advisement.

2:33 p.m. Matter concludes.

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LATER:

The Court has considered Defendants' Motion for Summary Judgment filed August 2, 2018, Defendants' Statement of Facts in Support of Defendants' Motion for Summary Judgment filed August 2, 2018, Plaintiffs' Response to Defendants' Motion for Summary Judgment filed September 6, 2018, Plaintiffs' Controverting Statement of Facts and Separate Statement of Facts in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment filed September 6, 2018, Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment filed September 26, 2018, and the oral argument conducted on October 9, 2018.

The Court has also considered Plaintiffs' Motion for Partial Summary Judgment filed June 22, 2018, Plaintiffs' Separate Statement of Facts in Support of Their Motion for Partial Summary Judgment, Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment filed July 27, 2018, Defendants' Controverting Statement of Facts in Response to Plaintiffs' Motion for Partial Summary Judgment filed July 27, 2018, Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment filed August 15, 2018, and the oral argument conducted on October 9, 2018.

Plaintiffs and Defendants are neighbors. Their properties are adjacent and separated by a cinder block wall. Their properties are subject to the Declarations of Covenants, Conditions and Restriction for the Litchfield Park II Homeowners Association (CCRs). In October 2016, Defendants submitted an extensive backyard renovation application to the Design Review Committee for Litchfield Park II HOA (HOA). The renovation project included construction of a pool, spa, hardscapes, water and fire features, and a large gazebo with an outdoor kitchen. On October 28, 2016, the Design Review Committee approved the application with addendums (including a three dimensional rendering). In November 2016, Defendants began renovation of their backyard. In March 2017, the HOA told the Defendants to stop all work on the raised pool. Defendants did not comply. On May 1, 2018, the HOA told Defendants to cease all work on the renovation. Defendants did not comply. On May 23, 2017, Plaintiffs filed a complaint asserting breach of contract, nuisance and sought a preliminary injunction. The HOA is not a party to this action. The request for the preliminary injunction was denied by the court on August 2, 2017. In July 2018, the Design Review Committee conducted a post-construction inspection of Defendants' backyard renovation and determined the improvements were constructed in compliance with the application previously submitted.

Plaintiffs also renovated their backyard but did not first obtain approval of the HOA. On June 21, 2018, Plaintiffs submitted an application with addendums to the Design Review Committee seeking approval for the renovations to their pool, decking, waterfall and barbecue. That approval was granted on July 12, 2018.

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In Plaintiffs' motion for summary judgment, Plaintiffs request summary judgment because Defendants did not complete their project consistent with the application and addendums submitted to the HOA design review committee. Specifically, Plaintiffs argue Defendants' hardscapes exceeded what was approved by the Design Review Committee because they are over 6" in height. Defendants responded that the HOA Design Review Committee confirmed compliance with the application submitted.

In their motion for summary judgment, Defendants contend summary judgment is appropriate on the breach of contract claim because the HOA approved their backyard project advance of construction and after construction. Since Defendants did not violate the CCRs of the HOA, there was no breach of contract. Further, the burden of proof is on Plaintiffs to show the HOA/Design Review Committee was unreasonable in approving the application and renderings and then approving the project post-construction. The issue of whether the actions of the Design Review Committee were reasonable is an issue to raise with HOA/Design Review Committee and not Defendants.

Plaintiffs responded that Defendants violated provision of the CCR's by not obtaining prior approval of modifications made to their plans, a requirement of the CCRs. Further, approval by the HOA does not excuse the violation of the requirements of the CCRs, citing to *Gfeller v. Scottsdale Vista N. Townhomes Ass'n*, 193 Ariz. 52 (App. 1998). Specifically, Plaintiffs contend Defendants hardscapes exceeded six inches in height, with some measuring almost 3 feet in height. Defendants argue they have attempted to address Plaintiffs concerns with additional landscaping.

Defendants also contend summary judgment is appropriate on the nuisance claim. On this claim, Plaintiffs must establish that Defendants actions unreasonably interfered with their use and enjoyment of their property, causing significant harm. That interference must be substantial, intentional and unreasonable under the circumstances. See *Nolan v. Starlight Pines Homeowners' Ass'n*, 216 Ariz. 482 (App. 2007). Defendants argue that the construction project was not unreasonable because it was approved by the Design Review Committee. While the project was ongoing, Defendants attempted to address concerns of Plaintiffs without success. Plaintiffs intend to call an expert witness at trial. That witness will testify the renovation caused a significant diminution in value to Plaintiffs' property because they no longer have privacy in their backyard and there is noise and light pollution. Defendants have retained an expert to refute the opinions of Plaintiffs' expert.

The pertinent CCRs (emphasis added) for the Litchfield Park II HOA follow.

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11.1 Design Review Committee. The Board may create a Design Review committee to perform the duties and exercise the power and authority imposed on or granted to the Design Review Committee by the Project Documents.

...

The Design Review Committee may adopt, amend and repeal architectural guidelines, standards and procedures to be used in rendering its decisions. Such guidelines, standards and procedure may include, without limitation, provisions regarding : (a) the size and height of residences; (b) architectural design, with particular regard to the harmony of the design with the surrounding structures and typography; (c) placement of residences and other buildings; (d) landscaping design, content and conformance with the character of the Property and permitted and prohibited plants; (e) requirements concerning exterior color schemes, exterior finished and materials; (f) signage; (g) perimeter and screen wall design and appearance (h) time periods for commencement and completion of any approved construction or modification; and (i) rules and regulations governing construction activities. . . .

11.2 Approval Required. No modification shall be made or done without the prior written approval of the Design Review Committee; provided, however, that the provisions of the Article do not apply to, and approval of the Design Review Committee shall not be required for any Modification or any other work made by, or on behalf of, the Declarant or a Developer.

Any Owner desiring approval of the Design Review Committee for any *modification shall submit to the Design Review Committee a written request for approval specifying in detail the nature and extent of the Modification which the Owner desires to perform.* The request for approval must be accompanied by plans or specifications showing the nature, kind, color, shape, height, materials and location of the Improvements and such other information as may be required by the Design Guidelines.

Any Owner requesting the approval of the Design Review Committee shall also submit to the Design Review Committee any additional information, plans and specifications which the Design Review Committee may request.

...

Each Owner agrees that the decision of the Design Review Committee shall be final on all matters submitted to it pursuant to this Declaration.

...

The Design Review Committee, by resolution, may exempt certain Modifications from the application and approval requirements of this Article, provided such Modifications are undertaken in compliance with the requirement of such resolution.

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11.4 Variances. The Design Review Committee may authorize variances from compliance with any provision of the Design Guidelines in circumstances where the design meets the intent of the provision sought to be varied and where granting of the variance would enhance design innovation and excellence, or when circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental considerations so require, and *the Design Review Committee determines, in its sole discretion, that the objective of the particular requirement can still be achieved. No variance shall be effective unless in writing and signed by an authorized representative of the Design Review Committee.* No variance may be contrary to this Declaration or estop the Design Review Committee from denying a variance in other circumstances including, without limitation, circumstances similar or identical to circumstances under which the Design Review Committee previously granted a variance.

11.6 No changes Without Approval. Any Modification approved by the Design Review Committee must be done or performed in accordance with the plans and specifications approved by the Design Review Committee. *No change, deletion or addition to the plans and specifications approved by the Design Review Committee may be made without the prior written approval of the Design Review Committee.*

9.1 Enforcement. The Association or *any Owner shall have the right to enforce the Project Documents in any manner provided for in the Project Documents* or by law or in equity, including, but not limited to, an action to obtain an injunction to compel removal of any Improvements constructed in violation of this Declaration or to otherwise compel compliance with the Project Documents. The failure of the Association or an Owner to take enforcement action with respect to a violation of the Project Documents shall not constitute or be deemed a waiver of the right of the Association or any Owner to enforce the Project Documents in the future. If any lawsuit is filed by the Association or any Owner to enforce the provisions of the Project Documents or in any other manner arising out of the Project Documents or the operation of the Association, the prevailing party in such action shall be entitled to recover from the other party all attorneys' fees, costs and expenses incurred by the prevailing party in addition to any relief or judgment ordered by the court in the action (including post-judgment attorneys' fees and costs).

1.40 Project Documents means this Declaration, the Articles, the Bylaws, the Association Rules, Design Guidelines, and the Plat.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., MacKinney v. City of Tucson, 231 Ariz. 584 (App. 2013), *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App.

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2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the 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. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011), *Andrews v. Blake*, 205 Ariz. 236 (2003), and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P. Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292 (App. 2010).

Plaintiff has the burden of establishing a contract, its breach, and damages that resulted from the breach. *Savoca Masonry Co. v. Homes & Son Const. Co.*, 112 Ariz. 392, 542 P.2d 817 (1975) and *Graham v. Asbury*, 112 Ariz. 184 (1975).

Plaintiffs contend Defendants breached the CCRs by not modifying their plans in the manner provided by the CCRs. Specifically, the CCRs state that no change, deletion or addition to the plans and specifications approved by the Design Review Committee may be made without the prior written approval of the Design Review Committee. However, the CCRs also provide that the Design Review Committee may adopt, amend and repeal architectural guidelines, standards and procedures to be used in rendering its decisions (including completion of any approved modification and rules and regulations governing construction activities) and the decision of the Design Review Committee shall be final on all matters submitted to it pursuant to the CCRs. By approving Defendants' renovation project upon completion, the Design Review Committee, using the discretion granted to it in the CCRs, amended or repealed the procedures to be used by Defendants and that decision is final according to the CCRs. Thus, Plaintiffs cannot establish a breach of the CCRs by Defendants (in failing to obtain written approval of modifications to their plans as submitted) and the contract claim fails.

As to the nuisance claim, there are issues of material fact regarding whether Defendants actions unreasonably interfered with Plaintiffs' use and enjoyment of their property, causing significant harm to Plaintiffs and thus summary judgment is not appropriate.

For the reasons stated,

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IT IS ORDERED denying Defendants' Motion for Summary Judgment as to the nuisance claim and granting Defendants' Motion for Summary Judgment as to the contract claim.

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Partial Summary Judgment.