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Virginia Guest

Bella Tierra Community Association

ADMINISTRATIVE LAW JUDGE DECISION

APPEARANCES: Virginia Guest appeared on her own behalf. Nicholas Nogami, Esq., represented Bella Tierra Community Association.

FINDINGS OF FACT

2. On or about January 12, 2022, Virginia Guest (Petitioner) filed a three issue petition with the Arizona Department of Real Estate (Department). First, Petitioner alleged Respondent violated the provisions of their Covenants, Conditions, Restrictions and Easements (CC&Rs) § 9.1.1¹ when they issued her violation notices for owning chickens. Next, Petitioner alleged Respondent failed to engage in mediation regarding her alleged violation of CC&Rs § 3.3 in violation of CC&Rs § 9.15.² Finally, Petitioner alleged

² CC&Rs § 9.15 Dispute Notification and Resolution Procedure states as follows:

[s]ubject to the provisions of Section 9.16 below, all actions or claims (i) by the Association against any one or more of the Declarant Parties, (ii) by any Owner(s) against any one or more of the Declarant Parties, or (iii) by both the Association and any Owner(s) against any one or more of the Declarant Parties, arising out of or relating to the Project, Including the Declaration or any other Project Documents, the use or condition of the Project or the design or construction of or any condition on or affecting the Project, Including construction defects, surveys, soils conditions, grading, specifications, installation of Improvements (Including Residential Units) or disputes that allege negligence or other tortious conduct, fraud, misrepresentation, breach of contract or breach of implied or express warranties as to the condition of the Project or any Improvements or any other legal theories whatsoever (collectively, **“Dispute(s)”**) shall be subject to the provisions of this Section 9.15. Declarant and each Owner acknowledge that the provisions set forth in this Section

Respondent violated CC&Rs § 5.1³ and ARIZ. REV. STAT. § 33-1803 when Respondent forwarded the cost of sending certified letters to Petitioner in response to her appeal. Petitioner specifically alleged, in relevant part, as follows:

The rule against animals (which they claim I am violating) is as follows: “3.3 Animals. No animal, bird, fowl, poultry, reptile or livestock may be kept on any Lot, except that a reasonable number of dogs, cats, parakeets or similar household birds may be kept on a Lot if they are kept, bred or raised thereon solely as domestic pets and not for commercial purpose”. I have a reasonable number of pet chickens that are similar to parakeets, so there is no grounds for the harassment against me

When I reminded them of the mediation requirement their attorney Sean Moynihan stated “. . . dispute provision does not apply to claims against you.” Hence, the declarant (KB Home) is in violation of 9.15 because the declarant still controls the HOA.

Furthermore, the association assessed a fine against me (categorized as a “balance forward” on my quarterly statement) because they sent me a certified letter to demand that I remove an assembly from my back yard that they assumed was related to the chickens, even though I already had permission to keep it (pursuant to a previous request), and the assembly is not under architectural control. There is no provision for assessing fines in exchange for sending letters. Fines are to be assessed only for violations of the project documents, as follows: “5.1 Power of Board to Impose Fines. Pursuant to the power granted to the Board by the Declaration and by A.R.S. § 33-1803, after notice and opportunity to be heard, the Board shall have the right to impose reasonable fines against an Owner for a violation of any provision of the Project Documents by the Owner, a Lessee of the Owner, any Resident or any guests or invitees of an Owner, Lessee or Resident.” When I asked them to reverse the fee, they refused. Hence, the association is in violation of 5.1.

All errors in original.

3. On or about August 2, 2023, the Department issued a notice to Respondent regarding the petition.

9.15 shall be binding upon current and future Owners of the Project and upon the Association, whether acting for itself or on behalf of any Owner(s).

³ CC&Rs § 5.1 provides as follows:

5.1 Formation of Association. The Association shall be a nonprofit Arizona corporation charged with the duties and invested with the powers prescribed by law and set forth in the Articles, Bylaws, this Declaration and the other Project Documents.

1 4. On or about August 10, 2023, Respondent filed an answer to the petition
2 denying all allegations.

3 5. On or about September 21, 2023, the Department issued a Notice of
4 Hearing to the parties notifying them that a hearing on the petition would be conducted by
5 the Office of Administrative Hearings.

6 6. On October 17, 2023, a hearing was held on the petition and the parties
7 presented evidence and argument regarding the violation alleged in the petition.

8 7. Based on the evidence presented at the hearing, the following events
9 occurred:

10 a. On April 28, 2023, Respondent sent a Notice of Violation to Petitioner
11 informing her the presence of chickens in the back yard was a violation
12 of CC&Rs § 3.3; the notice requested the removal of the chickens within
13 thirty (30) days.

14 b. On June 7, 2023, Respondent sent Petitioner a letter informing her she
15 was in violation of CC&Rs § 3.3 for owning chickens.

16 c. On July 6, 2023, Respondent sent a Second Notice of Violation to
17 Petitioner concerning the presence of chickens giving her again another
18 thirty (30) days to remove the chickens.

19 d. On June 16, 2023, Respondent's representative, emailed Petitioner
20 reiterating ownership of chickens is a violation of the CC&Rs § 3.3 and
21 the cost of sending a certified letter to respond to her appeal was
22 forwarded onto her.

23 e. On July 13, 2023, Petitioner emailed Respondent's representative
24 requesting her challenge of the CC&Rs § 3.3 be sent to mediation.

25 f. On July 14, 2023, Respondent's representative replied to Petitioner's
26 email informing her there was nothing further to be disputed and the
27 chickens must be removed by August 5, 2023. Petitioner replied she
28 disagreed and the next step in the dispute was mediation.

29 g. On July 17, 2023, Respondent's general counsel issued a Cease and
30 Desist Letter to Petitioner regarding the chickens on her premises. The

letter demanded the chickens be removed by August 7, 2023.

8. Petitioner testified at hearing she did not believe a chicken fell within the CC&Rs § 3.3. Instead, she believed the chickens are pets more akin to the exceptions to the animal provision. Petitioner argued the chickens are not poultry because she does not intend to butcher them and she argued the chickens are not fowl.

9. Respondent's counsel argued chicken are fowl and are therefore explicitly banned by the CC&Rs § 3.3. Regarding the demand for mediation, Respondent's counsel argued the language within the CC&Rs § 9.15 restricts its application to disputes involving the Declarant Parties, particularly those arising from or related to construction defects or conditions of the Project and not homeowner disputes. Finally, Respondent's counsel stated no fine was levied for a violation of the CC&Rs or ARIZ. REV. STAT. § 33-1803.

CONCLUSIONS OF LAW

1. The Department has jurisdiction to hear disputes between a property owner and a condominium owners association. ARIZ. REV. STAT. § 32-2199 *et seq.*

2. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated CC&Rs § 3.3, CC&Rs § 9.15, CC&Rs § 5.1 and ARIZ. REV. STAT. § 33-1803.

3. A preponderance of the evidence is "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

4. ARIZ. REV. STAT. § 33-1803 provides, in relevant part, as follows:

B. After notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association.

5. Respondent did not violate the CC&Rs § 9.1.1 because Petitioner admitted she kept chickens as pets at her home in violation of CC&Rs § 3.3. Notwithstanding Petitioner's argument that her chickens are akin to parakeets, an exception to the no animal rule in the CC&Rs, birds and fowl are explicitly banned. Petitioner subjectively believes her chickens are pets and therefore qualify for the pet exception of the animal

1 policy; however the CC&Rs plain language objectively bans not only birds but fowl.
2 Chickens are both birds and fowl therefore, homeowners may not have live chickens on
3 their property. Therefore, Respondent had the authority to issue two Notices of Violation
4 and a Cease and Desist letter for violations to their animal policy.

5 6. Petitioner is not a Declarant Party as defined by CC&Rs § 9.15 and
6 therefore mediation was not required in this matter. CC&Rs § 1.20 defines “Declarant
7 Party or Declarant Parties” as collectively Declarant, the shareholders of the Declarant,
8 the parent, Affiliates and subsidiaries of Declarant, the officers, directors and employees
9 of all the foregoing, and as to Section 9.15, to the extent such Persons agree to be bound
10 by Section 9.15, any contractors, subcontractors, suppliers, architects, engineers,
11 brokers, and any other Person providing labor, work, materials or services in connection
12 with the construction of any Improvement upon or benefitting the Project.

13 7. The CC&Rs § 9.15 restricts its application to disputes involving the
14 Declarant Parties, particularly those arising from or related to construction defects or
15 conditions of the Project and not homeowner disputes. Because Petitioner is not a
16 Declarant Party CC&Rs § 9.15 does not apply.

17 8. Nothing in the CC&Rs empowers Respondent to forward the cost of the
18 Petitioner’s appeal directly upon Petitioner. Respondent’s representative admitted the
19 charges on Petitioner’s assessment were due to the cost of submitting certified letters to
20 respond to her appeal. Respondent failed to establish their CC&Rs empower them to
21 forward the cost of litigation onto Petitioner prior to the completion of hearing. Therefore,
22 Petitioner established Respondent violated CC&Rs § 5.1 and ARIZ. REV. STAT. § 33-1803

23 **ORDER**

24 **IT IS ORDERED** that Petitioner’s petition is denied in part and granted in part.

25 **IT IS FURTHER ORDERED** Respondent is ordered to pay Petitioner \$500.00 of
26 her \$1500.00 filing fee within 30 days of the mailing date of the Administrative Law Judge
27 Decision entered in this matter.

28 **IT IS FURTHER ORDERED** the balance forward associated with the cost of
29 mailing the certified letters is to be removed from Petitioner’s assessment.
30

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2 **NOTICE**

3 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
4 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
5 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
6 **must be filed with the Commissioner of the Department of Real Estate**
7 **within 30 days of the service of this Order upon the parties.**

8 Done this day, November 8, 2023.

9 /s/ Brian Del Vecchio
10 Administrative Law Judge

11 Transmitted by either mail, e-mail, or facsimile November 8, 2023 to:

12 Susan Nicolson
13 Commissioner
14 Arizona Department of Real Estate
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16 Phoenix, Arizona 85007
17 Attn:
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