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ADMINISTRATIVE LAW JUDGE DECISION

The Residences at 2211 Camelback
Condominium Association, INC

2023¹

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer²

and written arguments of the parties, makes the following findings of fact, conclusions of law and order.

BACKGROUND AND PROCEDURES

for hearings from members of homeowners' associations and from homeowners' associations in Arizona.

issue Homeowners Association (HOA) Dispute Process Petition with the Arizona Department of Real Estate (Department) in which Petitioner alleged that the 2211 Camelback Condominium Association Inc. (Respondent or Association) failed to provide

² The administrative law judge who conducted the hearing on December 8, 2023 was unable to complete the written decision in this matter. Judge Tammy L. Eigenheer was assigned to listen to the recording of the hearing (which she did) and then write the decision, all in accordance with the procedure noted in *Minch v. Arizona Board of Nursing*, 1 CA-CV 16-0152 (May 16, 2017), ¶ 11.

1 or make reasonably available for examination requested financial records/documents in
2 response to his July 10, 2023 request and violated Section 8.1 of the Declaration of
3 Covenants, Conditions, Restrictions, and Easements (CC&Rs) regarding required
4 insurance coverage.

5 3. Petitioner owned and resided in a condominium in the Association located in
6 Phoenix, Arizona.

7 4. On or about August 29, 2023, Respondent returned its ANSWER to the
8 Department whereby it denied Petitioner's claims.

9 5. On or about August 31, 2023, the Department referred this matter to the
10 Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary
11 hearing to address the issues as set forth above.

12 Records Request

13 6. On July 10, 2023, Petitioner submitted a request to Respondent to provide
14 to him or make available for his examination certain financial records and documentation
15 maintained by Respondent.³

16 7. At 2:10 p.m. on July 24, 2023, ten business days after his initial request,
17 Petitioner sent an email to Allison Preston, Esq., Respondent's representative, which
18 provided as follows:

19 I have heard nothing from management regarding my records request. I and
20 my designees will review this Friday during normal operating hours.
21 Let me know where my information will be.

22 Please make sure the following specific items are available:

- 23 -6 months bank statements for all accounts are available for review.
- 24 -Fidelity bond for FirstService Residential naming the HOA as insured
- 25 -Balance sheet, Profit and loss statements for May/June 2023
- 26 - Maintenance items outstanding with Engineering
- 27 -Last Reserve study
- 28 - Building valuation report
- 29 - All Residences 2211 insurance contracts
- 30 - Epic Valet Contract⁴
- Janitorial Contract

³ The actual July 10, 2023 request was not admitted during the hearing. Respondent did not deny that Petitioner, as stated in his petition, made a records request on July 10, 2023.

1 -Landscaping Contract
2 -FirstService Residential contracts.
3 -Coffee vendor contract.
4 - Any Police reports given to FirstService Residential since contracted with
5 2211.⁵

6 8. Ms. Preston replied by email that same day at 4:44 p.m. with an attached
7 letter purporting to be Respondent's response to Petitioner's July 10, 2023 request.⁶ The
8 email indicated that "the vast majority" of the documents that Petitioner had requested
9 were available on the Association's online portal. She also noted as follows:

10 As for a few of the records that are not available through the portal, please
11 let me know some dates and times that you are available to review those
12 records. Frank Durso will have them ready for you at FirstService
13 Residential's office. I do know that Mr. Durso has availability July 31 –
14 August 4, as well as August 14 – 18. He is unavailable August 7 – 11.⁷

15 Ms. Preston also noted that Petitioner had requested some new items in his email and
16 Respondent may be able to combine both requests into one sitting.

17 9. By August 3, 2023, Petitioner still had not received all of the documents that
18 he had requested (specifically, the vendor contracts) from Respondent. He had not
19 received the landscaping contract, the Epic Valet contract, or the FirstService Residential
20 Management contract. On that date, he emailed Ms. Preston, stating:

21 Despite weeks and numerous emails as well as your professional
22 assurance and recommendations, it is apparent our document request has
23 been ignored by FirstService Residential. To substantiate this statement I
24 am attaching several documents, although not exhaustive, include: Excel
25 spread sheet for landscaping projections (not contract), Incomplete service
26 agreement for the Coffee Vendor (the budget is \$22,000/yr and cost shown
27 are about \$300); Payment increase for cleaning company (not contract); No
28 Epic Contract; No FSR Contract. Please note the dates provided on the
29 screenshot of the association's portal. We find this a travesty that this is
30 costing people time and the association money as we are simply trying to
make sure no other negligence has occurred.⁸

⁴. According to Petitioner's testimony, Epic Valet was the onsite staff that Respondent hired that come into residences at the Association, park the residents' cars, and carry house keys to each of the residents' units.

⁵ Respondent's Exhibit 1.

⁶ *Id.*

⁷ *Id.*

⁸ Respondent's Exhibit 2.

1 Petitioner also included a screenshot for Ms. Preston to demonstrate that specific
2 contracts he had previously requested and not been provided were also not uploaded to
3 Respondent's online portal.⁹

4 10. At 3:35 p.m. on August 4, 2023, Ms. Preston responded to Petitioner via
5 email with the following:

6 I was able to get access to the Association's portal, **and I too could not**
7 **find the contracts**. I understand that there was an internal switch or
8 authorization that needed to be "clicked" with respect to posting the
9 contracts. This has been done and you should now see the contracts with
10 the other documents. The only exception is the FSR contract. This will be
11 available for your records review at FSR's office.¹⁰

12 Ms. Preston also confirmed that the additional records requested would be available at
13 FirstService Residential's Office on August 11, 2023 for Petitioner to review.

14 11. Petitioner took August 11, 2023, off from work to attend the mutually agreed
15 upon appointment at the FirstService Residential Office to review the documents that had
16 not been provided. Petitioner met with FirstService Residential personnel, but they did not
17 have the majority of the information that Petitioner had requested and they were
18 apologetic about that.¹¹

19 12. On August 23, 2023, Ms. Preston sent Petitioner an email stating the
20 following:

21 I am following up on your concerns with the Association's insurance
22 coverage. I am still waiting on information from Jonathan Henley, the
23 Association's insurance broker; however, FSR's team member who assists
24 with association insurance policies, Jamie George, provided the following
25 with respect to the per occurrence and aggregate limits for the Association's
26 general liability policy:

27 As for the 3 million aggregates, you more than meet this requirement,
28 you carry underlying limits of \$1,000,000 per occurrence /\$2,000,000
29 aggregate and you also carry a \$50,000,000 umbrella! Which gives
30 you \$51,000,000 per occurrence and \$52,000,000 aggregate limit.

⁹ Hearing recording file 1, 45 Minutes, 54 seconds to 46 minutes, 51 seconds.

¹⁰ Respondent's Exhibit 4 (emphasis added).

¹¹ Hearing recording file 1, 50 Minutes, 51 seconds to 51 minutes, 6 seconds.

1 I have included Jamie on this email and she is happy to speak with you
2 about the Association's insurance requirements and the coverage it
currently has in place. . . .

3 Lastly, the Association is approaching its deadline to respond to your ADRE
4 complaint. Have you given any consideration to withdrawing the complaint?
5 I am happy to discuss the complaint and options with you if you would like.¹²

6 13. Petitioner responded to Ms. Preston's email later that afternoon stating:

7 I will await the response from the association's licensed broker regarding
8 general liability, building coverage and the D&O coverage and how these
9 coverages align with the CCRs. In the meantime, the second complaint for
10 failure to provide records . . . I have yet to receive the contracts, bank
11 statements or monthly financials for the last 3 months as discussed weeks
ago. Once I have received this information I may be able to provide you
some options.¹³

12 14. On September 25, 2023, Ms. Preston sent Petitioner the following email:

13 The May and June financial reports are uploaded to the ShareFile link
14 included below. Please note the Association removed the homeowner
15 delinquency report and redacted bank account numbers. I have not yet
16 received the approved July financial reports, but I have requested both
17 July's and August's (assuming both were approved at the September
meeting).

18 All of the insurance documents were previously made available. I have also
19 uploaded them to the ShareFile link below if you would like to review them
20 again.

21 As for the Mastercorp and Encore contracts, I understand that what the
22 Association has uploaded to the portal and what was previously made
23 available is what it has in its records. The Association has reached out to
24 both vendors to see if it can obtain copies of the fully executed contracts.
25 The Association cannot provide records that it does not have. If and when it
receives fully executed contracts, I expect they will be uploaded to the
portal.¹⁴

28 ¹² Petitioner's December 7, 2023 filing to OAH.

29 ¹³ *Id.*

30 ¹⁴ Respondent's Exhibit 4.

15. Petitioner recalled getting this email and testified “I remember her providing me the ShareFile links to documents that as she clearly outlined were not the documents that I needed.”¹⁵

16. As of December 8, 2023, the hearing date, Petitioner had not received any signed contract that he had requested from Respondent. In addition, the requested contracts had not been uploaded and were not available on Respondent’s online portal. In addition, Mark Teman, the Association president, had access to the Epic Valet contract and the FirstService Residential Management Contract prior to the time Petitioner filed his petition in this case.¹⁶

17. During his testimony at hearing, Mr. Teman confirmed that there were signed contracts for both the Epic Valet and FirstService Residential contracts.¹⁷ In fact, Mr. Teman confirmed that the Epic Valet contract had been in existence for several years.¹⁸

Insurance Coverage

18. Section 8.1.1 of Respondent’s CC&Rs provides in pertinent part:

Section 8.1.1 Commencing not later than the date of the first conveyance of a Unit to a Purchaser, the Association shall maintain, to the extent reasonably available, the following insurance coverage:

(a) A blanket causes of loss - special form policy of property insurance with sprinkler leakage, debris removal and water damage endorsements, insuring the entire Condominium Such property insurance shall cover the interests of the Association . . . in an amount equal to one hundred percent (100%) of the then current replacement cost of the Condominium

(b) Broad form comprehensive general liability insurance, for a limit to be determined by the Board, but not less than \$3,000,000 for any single occurrence with an aggregate of \$3,000,000.

. . . .

(d) Directors’ and officers’ liability insurance in an amount not less than \$5,000,000, covering all the directors and officers of the Association

¹⁵ Hearing recording file 1, 53 Minutes, 5 seconds to 54 minutes, 10 seconds.

¹⁶ Hearing recording file 3, 13 minutes, 16 seconds to 13 minutes, 34 seconds.

¹⁷ Hearing recording file 2, 11 minutes, 41 seconds to 11 minutes, 50 seconds.

¹⁸ Ms. Preston testified that the only copy of the Epic Valet contract that the Association had was not fully executed, but had only been signed by Mark Teman but was not fully executed. Hearing recording file 3, 23 minutes, 20 seconds to 24 minutes, 15 seconds

19. Respondent's January 4, 2023 Certificate of Liability Insurance¹⁹ showed that for each occurrence, there was \$1,000,000 in coverage per occurrence with an aggregate of \$2,000,000. Respondent also had an umbrella policy of \$50,000,000 per occurrence and in the aggregate.²⁰ According to Mr. Teman's testimony, that umbrella policy added onto the \$1,000,000 per occurrence and brought the total of liability coverage for Respondent to \$51,000,000 per occurrence and \$52,000,000 in the aggregate.²¹

20. In 2022, Respondent became aware that the total insured cost of the building might be as much as \$14,000,000 below the appraised value. This happened when Respondent was renewing its insurance and decided to get an appraisal of the building done as well. The appraisal showed the replacement cost of the building was valued at \$73,000,000. The insurance coverage was only for \$59,000,000. Mr. Teman candidly acknowledged at hearing that he was not aware of Section 8.1.1(a) of the CC&Rs that required coverage for 100 percent of the building's value.²² Mr. Teman testified that he called Respondent's insurance broker and was assured by the broker that he felt the \$59,000,000 insurance coverage was adequate.²³ Respondent was aware of the \$73,000,000 appraisal in 2022, but did not increase the insurance coverage to reflect 100 percent of that replacement cost valuation until after the petition in this matter was filed.²⁴

CONCLUSIONS OF LAW

1. The Department has jurisdiction to hear disputes between a property owner and a condominium unit owners' association.²⁵

¹⁹ Exhibit 5.

20 *Id.*

²¹ Hearing recording file 2, 21 minutes, 23 seconds to 21 minutes, 34 seconds.

²² Hearing recording file 2, 25 minutes, 6 seconds to 25 minutes, 14 seconds.

²³ Hearing recording file 2, 26 minutes, 20 seconds to 26 minutes, 31 seconds.

²⁴ Hearing recording file 3, 2 minutes, 3 seconds to 2 minutes, 7 seconds.

²⁵ A.R.S. § 32-2199 *et seq.*

1 2. In this proceeding, Petitioner bears the burden of proving by a
2 preponderance of the evidence that Respondent violated A.R.S. § 33-1258 and the
3 Association's governing documents.²⁶

4 3. A preponderance of the evidence is "[e]vidence which is of greater weight or
5 more convincing than the evidence which is offered in opposition to it; that is, evidence which
6 as a whole shows that the fact sought to be proved is more probable than not."²⁷

7 Records Request

8 4. A.R.S. § 33-1258 provides, in relevant part, as follows:

9 A. Except as provided in subsection B of this section, all financial and other
10 records of the association shall be made reasonably available for
11 examination by any member or any person designated by the member in
12 writing as the member's representative. The association shall not charge a
13 member or any person designated by the member in writing for making
14 material available for review. The association shall have ten business days
15 to fulfill a request for examination. On request for purchase of copies of
16 records by any member or any person designated by the member in writing
17 as the member's representative, the association shall have ten business
18 days to provide copies of the requested records. An association may
19 charge a fee for making copies of not more than fifteen cents per page.

20 5. When construing a statute, the primary goal is to ascertain the legislature's
21 intent.²⁸ This is accomplished by first looking to the text of the statute.²⁹ If the language is
22 clear, its plain meaning is ascribed, unless it would lead to absurd results.³⁰ If ambiguity
23 exists, secondary principles of statutory construction are used to determine the intent.³¹

24 6. A.R.S. § 33-1258 requires that association documents, with certain
25 identified exceptions, "shall be made reasonably available for examination by any
26 member".

27 7. Respondent did not provide Petitioner with the documents he requested
28 within 10 business days of his July 10, 2023 request. Further, Respondent failed to
29 provide all of the documents Petitioner requested in his July 24, 2023 email within 10
30

²⁶ A.A.C. R2-19-119.

²⁷ BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

²⁸ *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App. 2007).

²⁹ *Id.*

³⁰ *Id.*; *Marsoner v. Pima County*, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991).

³¹ *Contes*, 216 Ariz. at 527.

business days of that request.

8. Respondent did not assert or establish that any of the requested documents were subject to any of the exceptions provided for in statute. Accordingly, Petitioner was entitled to examine those documents.

9. Such a failure to provide the documents requested was a violation of A.R.S. § 33-1258.

Insurance Coverage

10. Section 8.1.1 of Respondent's CC&Rs required that Respondent maintain property insurance equal to 100 percent of the current replacement cost of the Condominium and general liability insurance of at least \$3,000,000 for a single occurrence and in the aggregate.

11. Respondent's January 4, 2023 Certificate of Liability Insurance³² showed that for each occurrence, there was \$1,000,000 in coverage per occurrence with an aggregate of \$2,000,000. While Respondent had an umbrella policy in addition to the general liability insurance, Respondent's general liability insurance was not in compliance with the applicable CC&Rs.

12. As to the property insurance, the 2022 appraisal showed a replacement cost of \$73,000,000, but the insurance coverage was only \$59,000,000. Accordingly, Respondent's property insurance was not in compliance with the applicable CC&Rs at the time the petition was filed.

13. Based on the facts presented, the Administrative Law Judge finds no civil penalty is appropriate in this matter.

ORDER

IT IS ORDERED that Petitioner's petition is granted.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner his \$1,000.00 filing fee.

IT IS FURTHER ORDERED that Respondent comply with A.R.S. § 33-1258 and Section 8.1.1 of the CC&Rs going forward.

³² Exhibit 5.

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NOTICE³³

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

Done this day, January 11, 2024.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile January 11, 2024 to:

Susan Nicolson, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007

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By: OAH Staff

³³ At the hearing on December 8, the administrative law judge incorrectly advised the parties that a recommended decision in this matter would be sent to the Arizona Department of Real Estate, which then had the authority to accept, reject, or modify that recommendation within 30 days and that, if the Department failed to take any action within 30 days, the recommendation would become the final administrative order in this matter. The parties are hereby advised that the contents of this NOTICE are a correct statement of the parties' options going forward.