

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Nancy L Babington,
4 Petitioner,
5 vs.
6 Park Scottsdale II Townhouse Corporation,
7 Respondent.

No. 20F-H2020064-REL-RHG

ADMINISTRATIVE LAW JUDGE
DECISION

8 **HEARING:** March 4, 2021

9 **APPEARANCES:** Petitioner Nancy L. Babington appeared on her own behalf.
10 Respondent Park Scottsdale II Townhouse Corporation was represented by Mark K. Sahl
11 and Scott B. Carpenter.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

13 **FINDINGS OF FACT**

14 1. Park Scottsdale II Townhouse Corporation (Respondent) is an association
15 of condominium owners located in Scottsdale, Arizona.

16 2. On or about May 28, 2020, Nancy L. Babington (Petitioner) filed a petition
17 with the Arizona Department of Real Estate (Department), alleging that Respondent had
18 violated the provisions of A.R.S. Title 33, Chapter 16, Section 33-1258. Petitioner
19 specifically alleged, in relevant part, as follows:

20 After repeated attempts since the beginning of this year to get information,
21 on April 29, 2020 I emailed Associa Arizona and the Board of Directors of
22 Park Scottsdale II formally requesting records per ARS 33-1258 and to date,
23 May 25, 2020, I have not received anything.

24 3. On or about June 1, 2020, the Department issued a notice to Respondent
25 regarding the petition.

26 4. On or about June 25, 2020, Respondent filed an answer to the petition
27 denying all allegations.

28 5. On or about July 1, 2020, the Department issued a Notice of Hearing to the
29 parties notifying them that a hearing on the petition would be conducted by the Office of
30 Administrative Hearings.

1 6. On August 28, 2020, a hearing was held on the petition and the parties
2 presented evidence and argument regarding the violation alleged in the petition.

3 7. Based on the evidence presented at the hearing, the Administrative Law
4 Judge concluded that the following events occurred:

- 5 a. By letter dated June 28, 2019, Community Management & Consulting,
6 LLC (CMC) provided notice to Respondent that it intended to terminate
7 the Management Agreement at the end of August 2019.
- 8 b. By letter dated July 16, 2019, CMC notified Respondent that it was
9 "immediately terminating" the Management Agreement.
- 10 c. Respondent hired Associa Arizona (Associa) as its new management
11 company. Associa attempted to obtain Respondent's records, including
12 financial records, from CMC to enable it to engage in a smooth transition
13 of the management services.
- 14 d. Respondent retained counsel to assist in its efforts to obtain the records
15 CMC was withholding due to a financial disagreement.
- 16 e. On or about April 8, 2020, Petitioner sent an email to Associa with a list
17 of questions for the Board to address at its annual meeting.
- 18 f. On or about April 11, 2020, Petitioner sent an email to Associa indicating
19 she had asked a question in the prior email and until she received an
20 answer to the question, she would continue paying maintenance fees of
21 the prior amount.
- 22 g. On or about April 29, 2020, Petitioner sent an email to Associa stated
23 that Respondent and/or Associa had not responded to her request for
24 information sent by email. Petitioner wrote as follows:

25 I am formally requesting from the Board of Directors of Park
26 Scottsdale II, Debbie Schumacher, Marty Shuford, Joe
27 Silberschlag, Angelina Rajenovich, Dermot Brown, Lori Nusbaum
28 and Associa all Park Scottsdale II records as required per ARS
29 33-1258.

30 I know that Associa's contract with this Board started Sept 1,
2019. I am requesting records from September 1, 2019 through
April 28, 2020. I have requested answers to questions that are in

1 these documents numerous times since there is no answer.
2 Either the Board and/or Associa is refusing to answer my
3 requests for information.

- 4 h. On or about May 1, 2020, Linda Parker, Director of Client Services with
5 Associa, responded to the email and wrote as follows:

6 Thank you for reaching out to Associa Arizona with your records
7 request for Park Scottsdale II. Ms. Evelyn Shanley and Ms. Laura
8 Smith have previously been in communication with you directly
9 via email and telephone and attempted to answer any and all
10 questions possible.

11 Your email below does not indicate any specific record request.
12 Please identify what you are specifically requesting, and Associa
13 Arizona will be glad to respond and provide any and all records
14 within our possession on behalf of the association, as permitted
15 by law.

- 16 i. On May 1, 2020, Petitioner responded to Ms. Parkers email as follows:

17 This is the list of records I am requesting:

- 18 1. All bank statemetns with copies of cancelled checks since
19 Sept 1, 2019.
- 20 2. Any and all financial statements since Sept 1, 2019.
- 21 3. Any and all 1099s issued for 2019.
- 22 4. Any and all Executive Session meeting minutes conducted in
23 2020, excluding the exemptions listed in the statute.
- 24 5. Any and all contracts signed in 2020.
- 25 6. Any and all outstanding invoices that have a due date that is
26 over 45 days.
- 27 7. Any documentation regarding the legality of the \$204.75
28 maintenance fee.
- 29 8. Any proof of Stephen Silberschlag's liability insurance.
- 30 9. Any landscaping plans.

- 31 j. On May 4, 2020, Ms. Parker responded to Petitioner's email indicating
32 that she understood Petitioner's request, but that Associa could only
33 provide records within Associa's possession.

- 34 k. On or about May 14, 2020, Petitioner emailed Ms. Parker noting that she
35 had yet to receive any response to her document request.

- 36 l. On or about May 15, 2020, Ms. Parker emailed Petitioner and wrote as
37 follows:

1 Please know that we have scheduled a meeting with the board for
2 this coming Wednesday evening, May 20th to discuss further any
3 details or information that Associa Arizona still needs in order to
4 answer questions. I am hopeful that following the meeting we are
5 able to answer your questions more thoroughly.

6 8. At the initial hearing, Petitioner acknowledged that her formal request was
7 made on May 1, 2020, and no one with Respondent or Associa ever said they would not
8 give her the requested documents.

9 9. At the initial hearing, Joseph Silberschlag, Secretary of Respondent's Board
10 of Directors, testified that because of the issues with CMC, neither Respondent nor
11 Associa had possession of a number of documents. Mr. Silberschlag also indicated that
12 because Respondent did not have the previous financial documents, Respondent did not
13 have the starting balances necessary to create current financials.

14 10. Respondent argued that it was unable to provide documents not in its
15 possession and that it was under no statutory obligation to create documents to respond
16 to Petitioner's request.

17 11. On or about September 18, 2021, the Administrative Law Judge Decision
18 resulting from the initial hearing was issued. The decision was in favor of Respondent and
19 the petition was denied.

20 12. Following the issuance of the Administrative Law Judge Decision,
21 Respondent provided Petitioner with some of the documents she had requested.

22 13. Upon review of those documents, Petitioner realized Respondent had been
23 in possession of the documents prior to her formal request on May 1, 2020, and had failed
24 to provide the documents to her as required.

25 14. Petitioner filed a Homeowner's Association (HOA) Dispute Rehearing
26 Request (Request) with the Department citing newly discovered material evidence that
27 could not with reasonable diligence have been discovered and produced at the original
28 hearing.

29 15. The Commissioner of the Department granted the Request and a rehearing
30 was held by the Office of Administrative Hearings on March 4, 2021.

16. At the rehearing, Petitioner specifically addressed the bank statements,

1 contracts, and 1099s. Petitioner testified that when she received the requested
2 documents in September 2020, she realized the bank statements had been sent to
3 Associa starting in August 2019. Petitioner also noted that she received two contracts
4 signed by members of the Board of Directors on March 27, 2020, and March 31, 2020.
5 Petitioner testified that one document indicated four vendors were eligible for 1099s and
6 questioned if those had been issued prior to her document request.

7 17. At the rehearing, Respondent explained that Associa is part of a national
8 company and all bank statements for HOAs it managed were sent to a central office in
9 Richardson, Texas. Evelyn Shanley, Community Director, testified that the bank records
10 would be forwarded to the local offices as an attachment to the financial packet when
11 those documents were prepared monthly, but because Associa did not have a starting
12 balance from CMC, it was unable to prepare the financial packet. Ms. Shanley admitted
13 that she did not contact the Richardson, Texas office to determine if the bank statements
14 could be obtained by the local office in response to Petitioner's request. Ms. Shanley
15 stated that the local office started receiving the bank statements in May or June of 2020.
16 Ms. Shanley denied that any 1099s were issued even those four vendors were eligible to
17 receive those. Ms. Shanley admitted that there were two signed contracts that were not
18 provided to Petitioner, but indicated that the contracts had not been provided by the
19 members of the Board of Directors to Associa.

20 18. Counsel argued that the documents requested were not in the "immediate
21 possession" of Associa such that it could properly respond to Petitioner's request.
22 Counsel acknowledged during closing arguments that "one could concede" the bank
23 statements located in Richardson, Texas were in the possession of Associa and should
24 have been provided to Petitioner in response to her request. Counsel asserted that the
25 matter was now moot because, as of the date of the rehearing, Petitioner had received all
26 the documents she requested. Counsel argued that "worst case scenario," Petitioner
27 could get her \$500.00 filing fee reimbursed, but that a civil penalty was not appropriate
28 because Petitioner did not indicate in her petition that she was seeking a civil penalty.

29 **CONCLUSIONS OF LAW**

1 1. The Department has jurisdiction to hear disputes between a property owner
2 and a condominium owners association. A.R.S. § 32-2199 *et seq.*

3 2. In this proceeding, Petitioner bear the burden of proving by a
4 preponderance of the evidence that Respondent violated A.R.S. § 33-1258. A.A.C. R2-
5 19-119.

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

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

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

22 5. There was no dispute that Respondent did not provide the requested
23 documents within 10 days. While Respondent represented to the Administrative Law
24 Judge during the initial hearing that Respondent did not have possession of any of the
25 documents requested at the time of Petitioner's request, the evidence presented during
26 the rehearing was directly contradictory to that as it related to the bank statements and
27 contracts. Thus, Petitioner established by a preponderance of the evidence that
28 Respondent violated A.R.S. § 33-1258(A).

29 6. A.R.S. § 32-2199.02 provides, in pertinent part, that “[t]he administrative law
30 judge may levy a civil penalty on the basis of each violation.”

 7. Respondent argued that Petitioner “could ask for a civil penalty” pursuant to
A.R.S. § 32-2199.02, but the rehearing process was “not designed for Petitioner to
change the relief requested along the way or at the last minute.” Respondent asserted

1 that because Petitioner did not check the box on the Petition indicating she was seeking a
2 civil penalty, the Administrative Law Judge could not award one as a result of the
3 violations established during the rehearing

4 8. Respondent erroneously interpreted A.R.S. § 32-2199.02 to require a
5 petitioner to identify the requested relief in the petition when the plain language of the
6 statute provides that the Administrative Law Judge may levy a civil penalty for violations
7 that are established. Nothing in the statute limits the available remedies to those
8 specifically requested by a petitioner.

9 9. Given the specific facts established in the rehearing, the Administrative Law
10 Judge finds that a civil penalty is appropriate in this matter.

11 **ORDER**

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

15 **IT IS FURTHER ORDERED** that within 30 days of the mailing date of the
16 Administrative Law Judge Decision entered in this matter, Respondent shall pay to the
17 Department of Real Estate a civil penalty in the amount of \$2,500.00, and such payment
18 shall be made by cashier's check or money order made payable to the Department.

19 **NOTICE**

20 **This administrative law judge order, having been issued as a result of**
21 **a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party**
22 **wishing to appeal this order must seek judicial review as prescribed**
23 **by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such**
24 **appeal must be filed with the superior court within thirty-five days**
from the date when a copy of this order was served upon the parties.
A.R.S. § 12-904(A).

25 Done this day, March 24, 2021.
26

27 /s/ Tammy L. Eigenheer
28 Administrative Law Judge
29

Transmitted by either mail, e-mail, or facsimile March 24, 2021 to:

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