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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-012458 09/04/2018

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

BOLTON ANDERSON, et al. JONATHAN A DESSAULES

v.

RECREATION CENTERS OF SUN CITY INC CHRISTOPHER A LAVOY

JUDGE BRODMAN

RULING ON PENDING MOTIONS

The Court has before it two motions: 1) plaintiffs' Motion for Partial Summary Judgment regarding Applicability of the Planned Community Act; and 2) plaintiffs' Motion for Class Certification. The Court reviewed the motions, the responses and replies. The Court held oral argument on August 21, 2018. Each of the motions will be discussed below.

I. MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs move for partial summary judgment on their claim that defendant Recreation Centers of Sun City, Inc. ("RCSC") is subject to the Arizona Planned Community Act, A.R.S. § 33-1801 *et seq*. (the Act).

No material facts are in dispute concerning this motion. RCSC owns and operates recreational facilities in Sun City. It is a nonprofit, paying the costs and expenses of managing, maintaining and improving the recreational facilities through mandatory assessments imposed on the owners of Sun City residential properties. Owners are responsible for paying assessments regardless of whether they use the facilities.

The obligation to pay assessments is expressly set forth in the Facilities Agreements that RCSC and its predecessors have required owners to sign as a condition of purchasing property in Sun City. (A copy of a typical Facilities Agreement is attached as Exhibit 2 to plaintiffs' statement of facts.) These Facilities Agreements are regularly recorded and run with the property. Even if the Facilities Agreement is not recorded, an owner must sign a Facilities Agreement as a condition to purchase or transfer.[1]

The Act applies to planned communities. Sun City is a planned community.

A.R.S. § 33-1802(1) defines "Association" to mean the following:

> "Association" means a nonprofit corporation or unincorporated association of owners that is created pursuant to a declaration to own and operate portions of a planned community and that has the power under the declarations to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration.

Here, as it relates to the plaintiffs in the instant lawsuit, RCSC is an "association" pursuant to the Act. It is a nonprofit corporation created to own and operate portions of a planned community and it has the power to assess Sun City residential property owners for the cost and expenses incurred in performance of the Association's obligations.

RCSC argues that the "declarations" do not establish RCSC or its ability to assess mandatory assessments. The Court believes RCSC's argument elevates form over substance. "Declaration" is broadly defined to mean "any instruments, however denominated, that establish a planned community and any amendment to those instruments." A.R.S. § 33-1801(3). For multiple reasons, RCSC's right to impose mandatory assessments is established by a declaration. First, "RCSC admits the section I of the Facilities Agreement states that Sun City's declarations require an owner to sign a Facilities Agreement." DSOF ¶ 25. RCSC also "admits that an owner who resides in a single-family section subject to the Amended Declarations is expected to sign a Facilities Agreement. If the lot or unit is not subject to the Amended Declarations, but the seller signed a Facilities Agreement, then RCSC expects the seller to get the buyer to sign a Facilities Agreement." *Id*. at ¶ 27.

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1. Defendants argue that "not all" owners are required by deed restriction to sign a Facilities Agreement. SOF ¶ 16. But defendant identifies no residential properties not subject to the RCSC's mandatory assessments. Defendant acknowledges that the Amended Declarations require each owner to execute a Facilities Agreement. Response 20:13-16. And even if some residential properties were exempted, RCSC cannot escape the Act for those residential owners who are subject to RCSC's mandatory assessments.

Through recorded Facility Agreements that run with each residential lot, RCSC has the ability to charge mandatory assessments against Sun City properties, and to foreclose upon a lien if those assessments are unpaid. RCSC can enforce its assessment lien even if the owner of the property does not use the recreational facilities. In fact, in litigation attempting to enforce its lien, RCSC has repeatedly invoked the lien foreclosure portion of the Act.

RCSC argues that, due to its own unique rules concerning use of the recreational facilities, property owners are not automatically members and RCSC "members" are limited to those individuals who are given a "Member Card." The Member Card allows a person to use the recreational facilities. The Court will not allow RCSC to escape the Act by its own definition of "member." RCSC has the ability to enforce mandatory assessments against Sun City residential properties, and a property owner is subject to a mandatory assessment even if he or she does not have a Member Card. (Even if a few properties are excluded, such exclusion would not prevent RCSC from being subject to the Act for the properties owned by the plaintiffs, which are all subject to RCSC's mandatory assessments.) In the Court's view, the obligation to pay assessments equates to membership on a per-property basis for the purposes of the Act. The obligation to pay assessments to RCSC under the threat of foreclosure is true for all residential property owners, including those that RCSC considers ineligible for a Member Card.

The Court rejects RCSC's "condominium" argument for reasons stated in the Reply.

In conclusion, all Sun City residential property owners are obligated to pay assessments that RCSC uses to defray the costs and expenses it incurs owning and operating recreational facilities in Sun City and, as such, are entitled to be subject to and protected by the Act regardless of whether RCSC actually characterizes those property owners as "members." RCSC is subject to the Act for the purposes of plaintiffs' instant lawsuit.

IT IS ORDERED that plaintiffs' motion for partial summary judgment on the claim that RCSC is subject to the Act is granted.

II. MOTION FOR CLASS CERTIFICATION

A. Background

Plaintiffs are homeowners in Sun City, a master planned community located in an unincorporated portion of Maricopa County, Arizona. Defendant RCSC owns and operates recreational facilities within Sun City for the benefit of Sun City homeowners.

RCSC is a nonprofit corporation with members "limited to homeowners or residents of Sun City, Arizona." The general nature of the corporation is to:

> Establish and conduct a general social, cultural, recreational and amusement enterprise for the benefit of its Members and do anything lawfully necessary or convenient to accomplish such purpose, including, but not by way of limitation, to purchase, acquire, develop, sell, lease, own, operate, and manage theaters, playhouses, agricultural projects, riding stables and corrals, libraries, opera houses, golf courses, baseball and football games, tennis courts, dancing facilities, lawn bowling rinks, horseshoe pits, croquet courts, travel clubs, card games, shuffleboard, swimming pools, skating rinks, lecture and conference rooms, and facilities and equipment for such arts and crafts as ceramic work, sewing, woodworking, leathercraft, lapidary, photography, fine arts, jewelry, shellcraft, mosaics, etc., and any and all facilities necessary or incidental to accomplish the general purposes of the Corporation.

Restated Articles of Incorporation, Article III(1), attached as Exhibit 4 to plaintiffs' motion.

To fund its activities, RCSC must charge assessments. Article VIII provides that:

> The Bylaws of the Corporation shall prescribe the qualifications of Members and the terms of admission to membership, provided that the voting rights of all Members shall be equal and all Members shall have equal rights and privileges, and be subject to equal responsibilities. Such Bylaws shall also provide the method for determining assessments to be paid by the Members.

Article VIII(5).

Plaintiffs allege RCSC charges various fees in violation of Arizona law and RCSC's governing documents. More specifically, plaintiffs challenge the Property Improvement Fee ("PIF") and other transfer fees on the grounds that such fees violate A.R.S. § 33-442 and § 33-1806. Plaintiffs also challenge RCSC's annual assessments because homeowners who purchased before 2003 are assessed at a "per person" rate, whereas homeowners who purchased after 2003 are assessed at a "per lot" rate. Plaintiffs contend that this rate structure is unequal and violates RCSC's governing documents. Plaintiffs are obliged to pay these fees under Facilities Agreements with RCSC, which plaintiffs claim they were forced to sign. They allege these Facilities Agreements are unconscionable because RCSC has the unilateral right to change the fees, the fees are not equal, and RCSC does not timely disclose the amounts of the fees to homeowners.

Based on these allegations, the Amended Complaint brings the following causes of action: Court One seeking declaratory and injunctive relief regarding application of the Planned Community Act; Court Two seeking declaratory and injunctive relief for alleged unlawful corporate acts; Court Three seeking declaratory and injunctive relief concerning the validity of RCSC's Amended Bylaws; Count Four seeking declaratory relief concerning plaintiffs' membership rights in RCSC; Count Five seeking damages for breach of contract for alleged unequal annual assessments; Count Six seeking damages for breach of the covenant of good faith and fair dealing regarding changes to the annual assessment rate; Count Seven seeking damages for breach of contract for PIF charges; Count Eight seeking damages for breach of covenant of good faith and fair dealing regarding PIF charges; and Count Nine seeking damages and penalties for violations of A.R.S. § 33-442 and § 33-1806.

In their motion for class certification, plaintiffs seek certification of two classes defined as follows:[2]

1. All current and former Sun City homeowners who have paid any PIF or transfer fee to RCSC since October 29, 2009 (the "Transfer Fee Class").

2. All current and former Sun City homeowners who have paid annual assessments to RCSC at a higher rate than any other Sun City homeowner since October 29, 2009 (the "Assessment Class").

In their Second Joint Report filed August 26, 2016, the parties agreed to limit discovery to class certification before proceeding with merits discovery.

B. Analysis

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citations omitted).[3] To come within that exception, plaintiffs "must affirmatively demonstrate [their] compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

2. Plaintiffs no longer seek certification of an ownership class consisting of all current Sun City homeowners who signed facilities agreements. Plaintiffs state that their Motion for Partial Summary Judgment regarding the applicability of the Planned Community Act, filed by plaintiffs individually, eliminates the need for certification of the proposed ownership class.
3. Because subsections (a) and (b) of Arizona Rule 23 are identical to their counterparts in Rule 23 of the Federal Rules of Civil Procedure, Arizona courts "view federal cases construing the

Certification of a class under Rule 23 is a two-step process: first, plaintiffs must satisfy all four prerequisites of Rule 23(a); and second, plaintiffs must satisfy at least one of the subsections of Rule 23(b). Rule 23 is not a pleading standard, and plaintiffs cannot meet their burden of proving each element by reciting complaint allegations. *Wal-Mart*, 564 U.S. at 350; *Lennon v. First Nat'l Bank of Ariz*., 21 Ariz. App. 306, 308 (1974). Each of Rule 23's requirements must be proven with evidentiary support. *Comcast*, 569 U.S. at 33.

The decision to certify a class action is within the Court's discretion. *Godbey v. Roosevelt Sch. Dist. No. 66 of Maricopa County*, 131 Ariz. 13, 16 (App. 1981). Nevertheless, class certification is only proper if the Court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-mart*, 564 U.S. at 350-51 (citations omitted). Rule 23(c)(1)(B) requires that the Court set forth this rigorous analysis in a detailed order that defines the class and the class claims, issues, or defenses and describes the evidence supporting the Court's decision to certify the class.

1. Rule 23(a)

Rule 23(a) requires that plaintiffs prove (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the representative parties' claims or defenses are typical of the claims or defenses of the class; and (4) the representative parties can fairly and adequately protect the interests of the class.

Defendant argues plaintiffs' "superficial, nonevidentiary approach" to class certification does not satisfy plaintiffs' burden of proving each of these prerequisites. The Court agrees. Plaintiffs' conclusory statements and recitation of complaint allegations do not constitute a rigorous analysis and do not satisfy their burden of proof. Likewise, plaintiffs have not presented sufficient evidence to support class certification for the Court to make the required findings under Rule 23(c).

Rule 23(a)'s numerosity requirement is met if the class is so numerous that joinder of all members is impracticable. "As a general rule, . . . classes of 40 or more are numerous enough." *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012) (citations omitted). Plaintiffs allege, and defendant does not deny, that the proposed class consists of thousands of current and former Sun City homeowners. Accordingly, the numerosity requirement has been met.

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federal rule as authoritative." *ESI Ergonomic Sols., LLC, United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98 n.2 ¶11 (App. 2002).

Rule 23(a)'s commonality requirement is met if there are questions of law or fact common to the class. Commonality depends upon a "common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

For the purposes of this motion, the Court concludes that the commonality requirement is satisfied. On the Transfer Fee class, there is the common question of law and fact as to whether the Transfer Fee violates Arizona law. With regard to the Assessment class, there is the common question of law and fact as to whether the per-property assessments authorized by the Board violate RCSC's Articles of Incorporation and Bylaws.

Nevertheless, the Court was not persuaded that items (3) and (4) were satisfied.

Rule 23(a)'s typicality requirement is met if the representatives' claims or defenses are typical of the claims or defenses of the class. To assess whether typicality is satisfied, the Court must examine: (1) whether common questions of law or fact exist, (2) whether the representatives' interests are antagonistic to those of the absent class members, and (3) whether the representative has suffered the same grievances as the putative class. *Lennon*, 21 Ariz. App. at 309. The typicality inquiry examines "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citations omitted). Rule 23(a)'s adequacy requirement is met if the representative can fairly and adequately protect the interests of the class. The adequacy requirement turns on two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998).

Plaintiffs assert their claims are typical because all class members have paid the alleged illegal and unequal fees and assessments. Yet plaintiffs' have not presented a rigorous analysis of this requirement. Plaintiffs offer no showing how each of their individual claims is typical of the class as a whole. Plaintiffs provide no analysis of the individual representatives, who they are and the nature of their specific claims.

As noted by defendant, several of the named plaintiffs own multiple properties in Sun City. Presumably, since a person can live in only one location, some of the plaintiffs have purchased their properties for investment purposes. The Court was not persuaded that a person who has purchased multiple properties (presumably for investment purposes) has claims and defenses that are typical to someone who owns only one property and lives there. The Court was

not persuaded that someone who collects rent on property will have the same financial interests as someone who owns one property and lives there.

Plaintiffs have failed to sufficiently account for the fact that RCSC is a nonprofit corporation. Owners of multiple properties (who have paid multiple Transfer Fees or assessments on a per-property basis) may have financial incentives that are different from a property owner who paid only one Transfer Fee. Would the recoupment of Transfer Fees paid after October 29, 2009 have to come from the pockets of those who paid the Transfer Fee before October 29, 2009? Someone who currently owns property (and would be on the hook for additional assessments to pay damages) may not have the same financial interests as a class member who no longer owns any Sun City property. The Court was not persuaded that a current property owner's interests are necessarily aligned with a class member who sold the property.

Moreover, plaintiffs allege that the Transfer Fees are unconscionable. Plaintiffs even suggest that the Transfer Fees are unknown to the purchaser and that purchasers are not fully informed about the Transfer Fees. Motion at 3:12-15. The Court struggles to understand how a first-time property purchaser closing through escrow would not have information about Transfer Fees before closing. But even if the Court accepts plaintiffs' allegations as true, the Court rejects the claim that someone purchasing a second or third Sun City property is unaware of his or her obligation to pay the Transfer Fees or assessments. In short, the defense against an unconscionability claim is much stronger when applied to a multiple purchaser.

Other non-typical issues abound. For example, at least one of the representatives purchased one parcel of Sun City property before 2003 and another parcel after 2003. What did this representative know about the assessment rate change in 2003? When did she become aware of the different assessment rates? How long did she know about the rate differences before bringing a claim? Is this representative's claim typical of all class members who paid assessments after October 2009 and purchased with the full knowledge of how assessments were determined? Several class representatives purchased multiple Sun City properties before and after the class period. What did those class representatives know about the various fees and assessments at the time of their second and third purchases?

On this record, the Court finds that the requirements for typicality and adequacy are not met.

2. Rule 23(b)

Plaintiffs' failure to meet Rule 23(a) standards dooms their class certification request. But plaintiffs also fail to make the necessary showing under Rule 23(b).

Under Rule 23(b)(1), a class action may be maintained if prosecution of separate actions would create a risk of inconsistent or varying adjudications with respect to individual members. Subsection (b)(1) class actions require mandatory membership; class members have no right to opt out. Rule 23(c)(2)(A)-(B). Because there is no opt-out right, actions involving claims for monetary damages generally do not belong under Rule 23(b)(1), but should be brought under Rule 23(b)(3) where putative class members have the right to choose how to proceed on their claims. As the United States Supreme Court explained in *Wal-Mart*, "plaintiffs with individual monetary claims" should be allowed "to decide for *themselves* whether to tie their fates to the class representatives or go it alone." *Wal-Mart*, 564 at 365 (emphasis in original).

Plaintiffs seek refund of thousands of Transfer Fees and assessment payments. Monetary relief is not incidental to the injunctive or declaratory relief. A class member who no longer owns property in Sun City probably doesn't care about injunctive relief and is much more interested in monetary damages. Because plaintiffs seek substantial monetary damages on behalf of the proposed classes, the Court finds that the classes cannot be certified under Rule 23(b)(1).

Plaintiffs ask the Court to disregard their claim for monetary damages and focus on their claims for declaratory and injunctive relief. But even disregarding the monetary claims, the lack of an opt-out procedure is a concern to the Court. Plaintiffs have not demonstrated that the absent class members, the other Sun City homeowners, agree with the positions taken in this litigation and want plaintiffs acting as their surrogates. Some of the class members may have no objection of the RCSC's fees, others may have even voted in favor of such fees. Those absent class members, if they exist, should not be forced to be included in and bound by this litigation without any right to object or opt out. Thus, for this additional reason, the Court finds that the proposed classes cannot be certified under Rule 23(b)(1).

Under Rule 23(b)(3), the common questions must "predominate over any questions affecting only individual members." It also must be shown that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3).

For the reasons stated above, plaintiffs have not demonstrated that common issues predominate. The unconscionability issue is ill-suited to be resolved by class action. Further, the Court does not believe that class action litigation is the superior method of resolving this dispute. The issue of whether the Transfer Fees are subject to the safe harbor provision of A.R.S. § 33-442 and whether plaintiffs would be entitled to damages under A.R.S. § 10-3304(B) could easily be adjudicated without the need for class certification. Plaintiffs are proceeding individually on Count One concerning application of the Planned Community Act. Plaintiffs have not provided persuasive reasons why they cannot proceed individually on their remaining claims. Injunctive and declaratory relief does not require class certification. *See James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), rev'd on other grounds 451 U.S. 3655 (1981) ("the relief sought will, as a

practical matter, produce the same result as formal class-wide relief). Plaintiffs have shown no risk that this case will "splinter into numerous trials of individuals issues" in the absence of class certification. *See Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 18 (App. 1981). Moreover, any declaratory or injunctive relief plaintiffs achieve may inure to the benefit of Sun City homeowners as a whole.

The Court finds that the requirements of Rule 23(b) are not satisfied.

To date, discovery has been limited to class certification. Upon completion of more discovery, plaintiffs may renew their motion if plaintiffs are able to present sufficient evidence to support class certification

IT IS ORDERED that plaintiffs' motion for class certification is denied without prejudice to refiling after more discovery.