Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-012458 10/08/2019

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

RULING ON PENDING MOTIONS

The Court has before it three motions: (1) defendant's Motion for Partial Summary Judgment filed August 10, 2018; (2) plaintiffs' Motion for Partial Summary Judgment filed April 9, 2019; and (3) plaintiffs' Amended Motion for Class Certification filed April 9, 2019. The Court has reviewed the motions, responses and replies. The Court held oral argument on August 22, 2019. The Court also considered the supplemental briefing regarding S.B. 1094 amending the Planned Community Act submitted by the parties following oral argument.

I. THE EFFECT OF S.B. 1094 AND THE APPLICABILITY OF THE PLANNED COMMUNITY ACT

A threshold question in this case is whether 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"). On September 6, 2018, this Court ruled that RCSC was an "association" within the meaning of the Act and was therefore subject to the Act for purposes of this lawsuit. 9/4/2018 Ruling on Pending Motions at 1-3. In response to that ruling, RCSC successfully lobbied the Legislature to adopt S.B. 1094, which amended several provisions of the Act, including the

definition of "association." S.B. 1094 became effective August 27, 2019. There is little doubt that S.B. 1094 was enacted to legislatively overrule this Court's interpretation of the Act.

Plaintiffs move for summary judgment on their claim for an injunction requiring RCSC to comply with the Act.

RCSC claims it is not subject to the Act because it is not an "association" as newly defined. As amended, A.R.S. § 33-1802(1) excludes certain nonprofit corporations from the definition of "association." The amended portion of the definition of "association" states as follows:

> Association does not include a nonprofit corporation or unincorporated association of owners that is created or incorporated before January 1, 1974 and that does not have authority to enforce covenants, conditions or restrictions related to the use, occupancy or appearance of the separately owned lots, parcels or units in a real estate development, unless the nonprofit corporation or unincorporated association of owners elects to be subject to this chapter pursuant to section 33–1801, subsection D.

A.R.S. § 33-1802(1) (amended). The amended Act further provides that it does not apply to nonprofit corporations excluded from the definition of association. A.R.S. § 33-1801(C)(2). Thus, RCSC is subject to the Act if it is not excluded as an "association" under the amended Act.[1]

Under the amended Act, a nonprofit corporation is not an "association" if (1) it was incorporated before January 1, 1974, and (2) it "does not have authority to enforce covenants, conditions or restrictions related to the use, occupancy or appearance" of lots within a real estate development. It is undisputed RCSC was incorporated prior to January 1, 1974. RCSC argues that it is not an association because it is charged with operating the recreational facilities within Sun City and has no enforcement authority with respect to the "use, occupancy or appearance" of the homes in Sun City.

Plaintiffs argue that RCSC is an association claiming it has authority to enforce the 55-or-over Maricopa County zoning ordinance. Plaintiffs contend that the Facilities Agreements give RCSC such enforcement authority specifically relying on the following provision:

1. The sole question here is whether RCSC is now excluded as an "association" as defined by the amended Act for purposes of this case. The Court expresses no opinion on whether Sun City is a planned community under the Act or whether the Act applies to any other governing body within Sun City.

> Residential property located in the area entitled "Sun City General Plan, Maricopa County, Arizona" is subject to Maricopa County Senior Citizen Overlay Zoning Ordinance § 1501A, et seq., as amended. As of October 1, 1993, at least one occupant of said Property must be fifty-five (55) years of age or older, and no one under the age of nineteen (19) years may be a resident for more than ninety (90) days.

This provision of the Facilities Agreements is in the "Agreed Facts" section and merely recites the fact that the property is subject to certain zoning restrictions related to the age of occupants. The Facilities Agreements do not give RCSC any authority to enforce the zoning ordinance. Plaintiffs may be correct that Maricopa County does not have exclusive authority to enforce its zoning ordinances, but they have cited no authority giving RCSC such power.

Moreover, RCSC has no authority to enforce the "use" and "appearance" restrictions of the homes within Sun City. The Facilities Agreements give RCSC authority collect certain fees and assessments related to its operations of recreational facilities. The Agreements do not give RCSC authority over the use and appearance of individual homes.

Based on the materials submitted to the Court, only the Sun City Home Owners Association and the condominium boards of management have the authority to enforce "use" and "appearance" restrictions. The Declarations of Restrictions for several of the properties within Sun City set forth numerous restrictions concerning the use and appearance of the subject properties. For example, the Declarations dictate the type of dwelling that can be erected, the location of the building on the lot, and the building materials allowed. These Declarations expressly state that the "Sun City Home Owners Association may, but shall not be obligated to, enforce these restrictions upon receipt of a written request from the owner or owners of one or more of the lots covered hereby. The Association shall have the right to enforce these restrictions in its own name on behalf of the owner or owners who submitted the request to the Association." C. LaVoy Declaration, Ex. 8, Declaration of Restriction dated August 17, 1976, at ¶ 10; Ex. 11, Declaration of Restriction dated November 18, 1977, at ¶ 10.

Similarly, the Declaration of Restrictions governing the condominium associations establish a board of management which has the "right and power" "to enjoin or seek damages from the owners of the units for violations of the covenants herein contained on the part of the owners to be performed, or for violation of the rules hereinafter referred to." C. LaVoy Declaration, Ex. 3, Declaration of Restrictions dated April 4, 1974, ¶ 12.I. The Declarations also give the board of management the right to approve or disapprove of any new purchaser, tenant or subtenant of any unit. Ex. 3 at ¶ 19. The Declarations further give the Sun City Home Owners Association the authority to enforce the restrictive covenants. Ex. 3 at ¶ 23. None of these Declarations of Restrictions mention RCSC or give RCSC any authority to enforce the restrictive covenants concerning the "use, occupancy or appearance" of property within Sun City.

RCSC is now excluded from the definition of "association" and is not subject to the Act as of the effective date of the amendment.[2] This is clear from the language of the amendment and the purpose of S.B. 1094. The Court cannot compel RCSC's compliance with a statute that no longer applies. Thus, plaintiffs' request for a permanent injunction compelling RCSC to prospectively comply with the Act is denied.

The Court's prior ruling that pre-amendment RCSC was subject to the Act still stands. Thus, plaintiffs' damage claims for violations of the Act which accrued prior to the effective date of the amendments are unaffected. Indeed, RCSC acknowledged that the passage of S.B. 1094 "does not abrogate plaintiffs' statutory damage claim under A.R.S. § 33-1806 asserted in Count Nine of the Amended Complaint." Defendant's Notice of Position Regarding Retroactivity Issue at 1-2.

IT IS ORDERED that, as of August 29, 2019, RCSC is not an "association" within the definition of A.R.S. § 33-1802(1), as amended, and is not subject to the Act.

IT IS FURTHER ORDERED that the portion of plaintiffs' motion for summary judgment seeking an injunction to compel RCSC's compliance with the Act is denied.

IT IS FURTHER ORDERED that plaintiffs' claim seeking a permanent injunction to compel RCSC's compliance with the Act is dismissed.

II. RCSC'S MOTION FOR SUMMARY JUDGMENT

RCSC moves for summary judgment on plaintiffs' damage claims premised on unlawful transfer fees in violation of A.R.S. § 33-442 and § 33-1806 (Count Nine). RCSC also moves for summary judgment on the damage claims for alleged violations of the equal responsibilities clause in RCSC's Articles of Incorporation (Counts Five and Six). RCSC argues that the only remedy available to plaintiffs for any of these alleged violations is declaratory and injunctive relief, not damages.

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2. Plaintiffs suggest that RCSC is hypocritical when it comes to the Act. There is merit to this position. Although now RCSC claims the Act does not apply to it, plaintiffs note that in lawsuits filed in superior court RCSC has availed itself of select provisions of the Act, such as the right to foreclose under A.R.S. § 33-1807. Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment at ¶ 57. RCSC's historic invocation of the Act when it was beneficial for RCSC to do so was one of the reasons the Court found that RCSC was subject to the Act in the first place. *See* 9/04/2018 Ruling at p. 3.

A. Damages for PIF and Transfer Fees

Every Sun City homeowner must sign a Facilities Agreement at the time of purchasing property. The Facilities Agreement requires each owner pay to RCSC a transfer fee in the amount of $3800 at the time of closing. The fee is broken into two components: a $3500 Capital Preservation and Improvement Fee ("PIF") and a $300 transfer fee (the "Transfer Fee"). From an accounting standpoint, RCSC transfers the PIF funds to a restricted account once per month while the $300 Transfer Fees remain commingled with RCSC's other revenue sources in the operating account.

Plaintiffs allege in Court Nine of the Amended Complaint that the PIF and Transfer Fee violate A.R.S. § 33-442 and § 33-1806. They seek damages and civil penalties.[3] RCSC moves for summary judgment arguing that plaintiffs have no claim for damages or civil penalties even if the fees are unlawful.

1. The Action under A.R.S. § 33-442

As a rule, Arizona law prohibits the collection of transfer fees from subsequent purchasers of real property. A.R.S. § 33-442(A) states that any document purporting to impose transfer fees on subsequent purchases of real property is "not binding or enforceable." Subsection (B) provides that a transfer fee provision is "unenforceable" and any lien to collect a prohibited transfer fee is "invalid and unenforceable." A.R.S. § 33-442(B).

The statute does not provide a right of action for damages. The statute plainly states that transfer fees provisions are "not binding or enforceable" and that a lien to collect a prohibited fee is "invalid and unenforceable." Thus, a purchaser could seek a declaration or injunction to avoid paying prohibited fees. However, the statute provides no right to recover damages for the payment of prohibited fees. Plaintiffs have not pointed to any part of the statute or other authority which would entitle them to pursue a claim for damages under this statute. "It is well settled that if the legislature creates a right of action, it may circumscribe that right by denying or limiting damages for a violation of the statute." *Goodman v. Samaritan Health System*, 195 Ariz.

3. RCSC argues that the validity of the $300 Transfer Fee is not alleged in the Amended Complaint. The Court agrees that the Amended Complaint is not a model of good draftsmanship but will not dismiss the claim on that basis. RCSC has been aware for a long time that plaintiffs dispute the validity of the Transfer Fee. Of course, by giving plaintiffs some latitude on this claim, the Court will give RCSC some latitude in asserting its statute of limitations and voluntary payment defenses.

502, 507, ¶ 21 (App. 1999). Even assuming the PIF and Transfer Fee are prohibited by § 33-442(A), plaintiffs have no private right of action for damages.

Thus, the Court concludes that plaintiffs have no claim for damages based on the allegations that the PIF and Transfer Fees violate A.R.S. § 33-442.

Plaintiffs' claim for damages under A.R.S. § 33-442 fails for a second reason. Subsection (C)(7) provides an exception for "[a]ny fee or charge that is imposed by a document and that is payable to a nonprofit corporation for the sole purpose of supporting recreational activities within the association."

RCSC falls squarely within the (C)(7) safe harbor. RCSC is a nonprofit that provides recreational activities.

The evidence is undisputed that RCSC's mission and function is to support recreational activities. Yet plaintiffs claim that RCSC is using some portion or the $300 Transfer Fee to support administrative costs or other activities that do not fall under the definition of "recreational activities." Even if the allegation was true, plaintiffs would not be entitled to damages for such a violation of § 33-442. Nothing in the statute provides that if a portion of the fee is used to support something other than recreational activities the entire fee becomes recoverable as liquidated damages. Rather, the possible relief might be a request to enjoin RCSC from improperly spending the money or, perhaps, enjoining the portion of the fee improperly spent.

In conclusion, the PIF and Transfer Fee result in a $3800 transfer fee each time a Sun City property changes hands. For the purposes of this motion, there is no distinction between the PIF and the Transfer Fee. Both are authorized under A.R.S. § 33-442 provided they are used to support recreational activities. While it is possible that a plaintiff might have a cause of action to enjoin a transfer fee improperly used to fund non-recreational activities, there is no action for monetary damages, and nothing suggests plaintiffs would be entitled to a return of all their fees as liquidated damages. The Court finds that plaintiffs have no cause of action for monetary damages under A.R.S. § 33-442.

IT IS ORDERED that RCSC's motion for partial summary judgment regarding plaintiffs' claim for damages for violations of A.R.S. § 33-442 is granted.

2. Damages and Civil Penalties under A.R.S. § 33-1806

Plaintiffs further claim that the $300 Transfer Fee violates A.R.S. § 33-1806 and seek damages and civil penalties. A.R.S. § 33-1806 is part of the Planned Community Act. The Court

has ruled that the Act only applies to RCSC prior to August 29, 2019. Any claims for damages which accrued prior to that date are governed by the Act.

A.R.S. § 33-1806 applies to "planned communities" and prohibits the association from charging a fee of more than $400 "to compensate the association for the costs incurred in the preparation and delivery of a statement or other documents furnished by the association pursuant to this section for the purposes of resale disclosure, lien estoppel and other services related to the transfer or use of the property." A.R.S. § 33-1806 is essentially a limited exception to the transfer fee prohibition that permits a planned community association to recoup the cost of providing statutorily required disclosures. The fee is not mandatory; the association may charge a fee if it chooses to do so.

The Court rejects RCSC's argument that plaintiffs' claim should be dismissed because the transfer fee is paid by the buyer of the unit. The transfer fee is a fungible part of the monetary portion of a real estate transaction. One cannot avoid the statute simply by defining the party who pays the transfer fee to be the buyer.

RCSC's other arguments are more persuasive. Plaintiffs argue that the $300 Transfer Fee is improper because RCSC did not provide the required resale disclosures. Although RCSC admits that it did not provide all of these disclosures, RCSC asserts that it did not comply with § 33-1806 because it is not subject to the Act. RCSC states that it charged the Transfer Fee to cover "administrative costs, for recording the facilities agreement, for cards, et cetera, for the cost of changing ownership." Jan Ek depo. at 9:16-19.

The Court rejects plaintiffs' damages claim for several reasons. First, while § 33-1806(B) creates a claim for damages caused by the failure of the association "to disclose the information required by subsection A," plaintiffs' claim is not for damages caused by RCSC's failure to disclose. There is no suggestion that any plaintiff was damaged because he or she did not receive proper disclosure.[4] Nothing in § 1806(D) creates a liquidated damages award in the amount of the transfer fee in the event appropriate resale disclosures are not made.

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4. Plaintiffs have not asserted a claim for damages under subsection (B). Subsection (B) provides for damages for failure to provide the required resale disclosures. The subsection states: "A purchaser or seller who is damaged by the failure of the member or the association to disclose the information required by subsection A of this section may pursue all remedies at law or in equity against the member or the association, whichever failed to comply with subsection A of this section including the recovery of reasonable attorney fees." Arguably damages under this provision would be limited to the costs incurred by a homeowner in obtaining the resale disclosure documents on their own. Subsection (B) does not support recovery of the full amount of any fee paid under subsection (C). Thus, in this case, any claim for damages under subsection

Second, § 1806 must be read in conjunction with § 33-442. Section 442 has a safe harbor for associations like RCSC that provide recreational facilities. Since specific statutes control general statutes, § 442(C)(7) applies to RCSC's activities and trumps the $400 limit imposed by § 1806. *See Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 171 (1962). A.R.S. § 33-442(C)(7) specifically applies to transfer fees for associations supporting recreational facilities. The section applies to the entirety of the $3800 fee. It applies in lieu of the more general restrictions set forth in § 33-1806.

Perhaps due to the recognition that a one-year statute of limitations applies to statutory damage claims, plaintiffs do not seek damages under A.R.S. § 33-1806, but instead seek only a statutory penalty. But the claim for a penalty fails.

Subsection (D) provides for civil penalties. It states: "An association that charges or collects a fee in violation of this section is subject to a civil penalty of not more than one thousand two hundred dollars." Any claim for statutory penalty under A.R.S. § 33-1806(D) evaporated when the Legislature changed the law. The Court agrees with RCSC that plaintiffs have no vested property right to a penalty. *See* RCSC's Supplemental Pleading at p. 5. Plaintiffs argue that "[f]or years RCSC willfully violated the only duty the Arizona Legislature deemed important enough to warrant the imposition of a $1,200.00 civil penalty, the duty to not collect fees relating to services relating to the transfer of property except as specifically authorized in A.R.S. § 33-1806." Supplemental Response at 6:14-17. But this argument is not logical or persuasive. The civil penalty in § 1806(D) is a maximum of $1200. The fine is discretionary. In addition, if the Legislature felt that an entity like RCSC's collection of a transfer fee was inappropriate, it would not have exempted RCSC from the entirety of § 1806 -- including the civil penalty provision -- through S.B. 1094.

IT IS ORDERED that RCSC's motion for partial summary judgment related to plaintiffs' claim for damages and civil penalties for violations of A.R.S. § 33-1806 is granted.

(B) would be quite limited because it is undisputed that most, if not all, of the materials required to be disclosed under subsection A were available on RCSC's website or for review in its corporate offices. Certification of a class for damages under subsection (B) would not be appropriate because such damages would require individualized proof that could not be calculated on a class-wide basis.

Moreover, the civil penalties are not available for not providing resale disclosures. The civil penalty in subsection (D) applies only if fees are charged or collected in violation of the statute, not for failure to provide required disclosures.

B. Damages for Alleged Violation of Articles

In their response, plaintiffs acknowledge that they are not seeking damages for alleged violations of the Articles of Incorporation. *See* Response at 7:23-24 and 9:1-5.

IT IS ORDERED that defendant's motion for partial summary judgment on plaintiffs' claim for monetary damages for alleged violations of the Articles of Incorporation is granted.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment. Plaintiffs allege: 1) the $300 Transfer Fee is invalid; 2) the $3500 PIF is invalid; 3) RCSC's change of owner assessment rates for three plaintiffs is invalid; 4) RCSC is not complying with the Planned Communities Act; and 5) RCSC is not complying with its own governing documents.

A. Additional Issues Concerning PIF and the Transfer Fee

Plaintiffs do not seek injunctive relief in Count Nine for the violations of A.R.S. § 33-442 and § 33-1806. Injunctive relief is not available to compel compliance with § 33-1806 because RCSC is no longer subject to the Act. Plaintiffs' motion for summary judgment on the PIF and Transfer Fee is denied.

The Court will address some of the additional issues raised relative to plaintiffs' motion for summary judgment concerning the PIF and Transfer Fee. Of course, summary judgment is inappropriate where material facts are disputed. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

1. "Recreational Activities"

A.R.S. § 33-442(C) enumerates nine exceptions to the prohibition on transfer fees. The pertinent exception is found in subsection 7 and provides that the prohibition on transfer fees does not apply to "[a]ny fee or charge that is imposed by a document and that is payable to a nonprofit corporation for the sole purpose of supporting recreational activities within the association."

It is beyond dispute that RCSC provides substantial recreational activities within Sun City. RCSC owns and operates seven recreational centers, eight golf courses, five snack shops, two bowling centers, and a lake, among other things. RCSC contends that the PIF and Transfer Fee are valid because the funds support the recreational activities it provides to the community. RCSC claims that "PIF funds are exclusively spent on recreational facility improvements and

nothing else." Ek Supp. Decl. RCSC provides evidence that the Transfer Fees are charged new owners to cover various administrative costs, including costs associated with issuing new membership cards and related expenses.

Plaintiffs allege that some portion of the PIF and Transfer Fees are diverted to purposes that are not "recreational" and move for summary judgment on this basis. Summary judgment is not warranted because plaintiffs have not demonstrated as a matter of law that these fees are spent on anything other than to support the recreational activities.

The statute does not define "recreational." When a term is not defined by statute, the court can consider accepted dictionary definitions. *State v. Wise*, 137 Ariz. 468, 470 n. 3 (1983) (referring to "established, widely respected dictionary" because terms were not defined in the statute and there was "no indication that the Legislature intended that either word be given an extraordinary meaning"). Plaintiffs suggest the definition set out in Merriam-Webster.com, which defines "recreation" as "refreshment of strength and spirits after work" or "a means of refreshment after work." Using this definition, the term "recreation" is quite broad and could encompass virtually any activity an individual might engage in outside of work. Because the Legislature did not narrow the definition of "recreational", the Court believes that the Legislature intended this broad definition for purposes of this statute.

Plaintiffs complain that RCSC hosts more than 120 clubs that are social, cultural, political and educational in nature. The Court cannot say as a matter of law that the clubs are not recreational. Indeed, clubs such as the computer club, the Illinois Club, the Lifelong Learning Club and the Spanish Club, etc. are activities outside of work and certainly could fall within the definition of recreation. Charitable work might also be considered recreational.

Plaintiffs complain that some recreational facilities are not restricted to use by Sun City residents but are open to the public for a fee. RCSC states that the additional fees help defray operating costs. The statute does not state that every dollar of a transfer fee must be spent strictly on recreational activities open to only residents.

Recreational facilities necessarily have operating and administrative expenses, legal fees and related expenses. Monies used for these purposes could be considered "supporting" recreational activities and fall within the exception. The statute would also seem to allow RCSC to hold PIF funds in an account to cover unexpected repairs of recreational facilities and as a reserve to prepay future recreational projects.

Even if some of the expenditures plaintiffs complain about do not fall within the "recreational activities" exception, plaintiffs overlook the fact that RCSC also collects annual assessments which are not restricted to recreational activities. It would be appropriate under the

statute for RCSC to use funds from these assessments and other sources of revenue for expenditures that do not fall within the recreational activities exception.

The Court concludes that plaintiffs have not established as a matter of law that RCSC is diverting PIF and Transfer Fees to activities that do not support recreational activities within Sun City.

2. Voluntariness Doctrine

RCSC contends that plaintiffs knowingly and voluntarily paid the PIF and Transfer Fees before purchasing their properties in Sun City. Thus, it asserts the claims are barred under the voluntary payment doctrine.

The voluntary payment doctrine holds that:

> Except where otherwise provided by statute, a party cannot by direct action or by way of set-off or counterclaim recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed.

Moody v. Lloyd's of London, 61 Ariz. 534, 540 (1944) *quoting Merrill v. Gordon*, 15 Ariz. 521, 532 (1941). As the court explained in *Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership*, 649 N.W.2d 626 (Wis. 2002), the voluntary payment doctrine requires the party objecting to the legality of a charge "to make the challenge either before voluntarily making payment, or at the time of voluntarily making payment." *Id.* at 631, ¶ 13. The doctrine allows the entity that receives a payment without objection "to rely upon these funds and to use them unfettered in future activities." *Id.* at 633, ¶ 16.

Plaintiffs have not established as a matter of law that their payments were not voluntary. Plaintiffs each signed a Facilities Agreement agreeing to pay a PIF and a Transfer Fee prior to or at closing. They paid these fees without objection. Several plaintiffs purchased multiple properties and paid the fees repeatedly. Plaintiffs' claim that they did not know the fees were improper does not excuse their failure to object at the time of payment. *See Brown v. Zoley*, 2017 WL 4127701, *1, ¶ 6 (Ariz. Ct. App. Sept. 19, 2017) ("Ignorance of the law does not toll the running of the statute of limitations.").

The questions concerning the application of the voluntary payment doctrine are additional reasons for denying plaintiffs' motion.

3. Statute of Limitations

An additional reason for denying plaintiffs' motion is that the damage claims may be barred by the statute of limitations. A.R.S. § 12-541(5) provides for a one-year statute of limitations for damages based "upon liability created by statute, other than a penalty or forfeiture."[5] Thus, the damage claims for fees paid before 2014 may be barred by the statute of limitations.

For all of the foregoing reasons,

IT IS ORDERED that plaintiffs' motion for summary judgment concerning the invalidity of the PIF and Transfer Fee (Count Nine) is denied.

B. Change of Owner Assessments

Three individual plaintiffs, Ms. Baughman, Ms. Johnson-Traver and Ms. Mercer, claim the 2003 Owner Assessment Rate is invalid as to them. These claims are based on breach of contract. RCSC presents admissible evidence suggesting that the per-property rate was changed when it was discovered that these three plaintiffs were not occupying the property as their primary residence.

RCSC points to a provision in the Facilities Agreements that reserves the unilateral ability to change, alter, or amend its terms to the RCSC. In the reply, plaintiffs argue that, "[o]nce RCSC learned that these women do not occupy their property, it stripped them of their voice and doubled their assessments. It is clear that the covenant of good faith and fair dealing provides inadequate restraint." Reply at 8:22-25.

The change in assessment rates appears to be consistent with the Restatement, which provides that "assessments may be allocated among the individually owned properties on any reasonable basis." *Restatement (Third) of Property (Servitudes)* § 6.5(1)(b); *see also Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201-02, ¶ 26 (App. 2007) (holding that decisions by association's board are valid unless the actions were unreasonable). The Board's decision to change from per-person to per-property assessments is not unreasonable as a matter of law. It also seems reasonable to grandfather the prior homeowners so that their rates do not increase until there is a change in ownership or occupancy. Plaintiffs have not established as a matter of law that the decision was unreasonable, unfair or unequal.

5. The Court is not persuaded that the statute of limitations and voluntary payment doctrine defenses were waived. In any event, the Court need not decide the issue because plaintiffs have no damage claims for invalid payments of PIF or Transfer Fees.

A finding as a matter of law that RCSC violated the covenant of good faith and fair dealing cannot be made on this record.

IT IS ORDERED that plaintiffs' motion for summary judgment on the three individual plaintiffs is denied.

C. The Planned Community Act

Plaintiffs complain that RCSC is not complying with the Act. Plaintiffs seek an order enjoining RCSC from operating in violation of the Act. As noted above, the Arizona Legislature amended the law and exempted RCSC from the Act. An injunction requiring RCSC to comply with the Act would violate the Legislature's recent amendment.

IT IS ORDERED that plaintiffs' request for an injunction requiring RCSC to comply with the Act is denied.

D. Injunctive Relief for Violations of RCSC's Governing Documents

Plaintiffs seek declaratory and injunctive relief for several alleged violations of RCSC's Articles of Incorporation and Bylaws in Counts Two and Three of the Amended Complaint. Plaintiffs seek a declaration that RCSC exceeded its authority by: (1) charging some homeowners an annual assessment at a "per-person" rate and others at a higher "per-property" rate; (2) undertaking recreational facility construction projects costing more than $750,000; and (3) amending the bylaws to increase the quorum requirement for membership meetings from 100 members to 1,250 members. Plaintiffs also seek an injunction to stop the Board from engaging in these practices. Amended Complaint at ¶¶ 116, 122.

Plaintiffs' claim for injunctive relief must be considered in light of A.R.S. § 10-3304. That statute provides that:

> A. Except as provided in subsection B of this section, the validity of corporate action shall not be challenged on the ground that the corporation lacks or lacked power to act.
>
> B. A corporation's power to act may be challenged by any of the following:
>
> > 1. In a proceeding by members of a corporation that is not a condominium association as defined in § 33-1202, or a planned community association as defined in § 33-1802, having at least ten percent or more of the voting power or

> by at least 50 members, unless a lesser percentage or number is provided in the articles of incorporation, against the corporation to enjoin the act.
>
> 2. In a proceeding by any member of a condominium or a planned community association against the corporation to enjoin the act pursuant to title 12, chapter 10, article 1.

Section 10-3304 must be read in conjunction with S.B. 1094. RCSC is no longer subject to the Act. As a result, any action for injunctive relief against RCSC must be brought under A.R.S. § 10-3304(B)(1) which requires "at least ten percent of the voting power or by at least 50 members." Plaintiffs' counsel admits that this action does not meet the threshold requirement. Plaintiffs lack standing to challenging the validity of the RCSC Board's decisions. Summary judgment is denied on this basis alone.

There are additional reasons to deny the motion for summary judgment. As noted above, evidence supports RCSC's position that changing the assessment rate was fair and reasonable. There is insufficient evidence to find that RCSC violated the equal responsibilities clause as a matter of law.

Nor could the Court conclude as a matter of law that RCSC violated the provision in the Articles requiring the Board obtain membership approval before incurring "indebtedness or liability" in excess of $750,000. According to RCSC, it has money set aside in advance to cover the costs of construction and improvement projects. RCSC does not incur any debt for major improvements. Rather, it pays the construction invoices in full as they become due with the funds set aside in reserve. There is no evidence RCSC has incurred debt or liability in excess of the limit. Again, summary judgment as a matter of law is not warranted.

Finally, plaintiffs have not established as a matter of law that the change in the quorum requirement was improper. Plaintiffs object to RCSC Board's decision in 2010 to amend the Bylaws to increase the quorum from 100 to 1,250 members. Five years later plaintiffs filed this lawsuit asking for an injunction to change the Bylaws back to the 100 member quorum requirement.

A.R.S. § 10-3722 states that "the bylaws may provide the number or percentage of members . . . that shall constitute a quorum" unless the quorum requirements are provided for in the articles of incorporation. RCSC's Articles do not have a quorum number or percentage. Rather, Article VIII § 4 states that "[t]he Bylaws may be amended, modified, revised, or revoked by the Directors or by the Members. In the event of conflict concerning the Bylaws as amended, modified, revised, or revoked by the Directors, the action of the Members shall prevail." Thus, the Articles allow the Board to amend the Bylaws, including the quorum requirement.

RCSC's Board's decision to increase the quorum does not run afoul of A.R.S. § 10-11023(B). Subsection A allows members to set a "greater quorum or voting requirement for members, or of classes of members, than is required by chapters 24 through 40 of this title." Subsection (B) provides that a "bylaw that fixes a greater quorum or voting requirement for members under subsection A shall not be adopted, amended or repealed by the board or directors." RCSC's members did not set a quorum, the Board did. Section 10-11023(B) only prohibits the Board from changing a quorum set by the members. It does not prevent the Board from changing a quorum established by the Board in the first place.

IT IS ORDERED that plaintiffs' motion for summary judgment as to Counts Two and Three of the Amended Complaint is denied.

III. PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

In the September 4, 2018 ruling, the Court denied plaintiffs' motion for class certification but granted plaintiffs leave to renew the motion if plaintiffs were able to present sufficient evidence to support class certification. In their amended motion for class certification plaintiffs seek certification of a single class comprised of every current and former Sun City homeowner who paid the $300 Transfer Fee since October 29, 2009. Plaintiffs seek damages and civil penalties.[6] They do not seek injunctive relief as a class.

The Court has now granted RCSC's motion for partial summary judgment on the Transfer Fee claim and dismissed the claim for damages and civil penalties. The Court has determined that plaintiffs have no cause of action for damages or civil penalties for the alleged unlawful Transfer Fees. Plaintiffs' remedy is limited to declaratory and injunctive relief. This is reason enough to deny plaintiffs' class certification motion.

Plaintiffs' proposed class does not meet the requirements for class certification in any event.

In order for a class to be certified, plaintiffs must demonstrate that all four requirements of Rule 23(a) and at least one of the three requirements of Rule 23(b) are met. Rule 23(a) requires that plaintiffs prove (1) the class is so numerous that joinder of all members is

6. RCSC is correct that plaintiffs' Amended Complaint does not plead certification of a class comprised of Transfer Fee payees. However, RCSC's objection is not well taken. RCSC is well aware that the validity of the Transfer Fee is an issue in this case and plaintiffs sought to include the Transfer Fee payees in the class in their prior motion. *See* 9/4/2018 Ruling at 5.

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.

In the September 4, 2018 ruling, the Court found that the numerosity and commonality requirements had been satisfied. These elements are also satisfied for the proposed class of Transfer Fee payees.

The typicality and adequacy requirements have not been satisfied. Only eight of the named plaintiffs paid the Transfer Fee within the class period. But none of the named plaintiffs paid the fee within the one-year statute of limitations. A.R.S. § 12-541(5).[7] Plaintiffs are not typical or adequate to represent the proposed class.

The voluntary payment doctrine is a significant issue here. Named plaintiffs who purchased multiple properties have a different level of understanding of the Transfer Fees than those class members who only purchased one property. The claims are not typical.

Plaintiffs also have not demonstrated that under Rule 23(b)(3) common questions predominate. For instance, application of the discovery rule pertaining to the statute of limitations would require an examination of each class member's understanding of the Transfer Fees on a case-by-case basis. The voluntary payment doctrine would require each class member to demonstrate his or her payment was not voluntary.

The Court adopts by reference its analysis in the September 6, 2018 ruling. The Court has never been persuaded that the named plaintiffs have interests that are not antagonistic to the class members as a whole. This is a nonprofit corporation. The named plaintiffs are essentially suing themselves to seek a transfer from people who currently own one property and bought prior to 2009 to those who own multiple properties or to people who have already sold their property. While plaintiffs argue that payment of the $300 Transfer Fee affects everyone the same, paying damages from a nonprofit would not. The money would need to come from additional assessments on existing property owners or from reserves. Former owners have no interest in supporting recreational facilities they no longer use. As noted in its earlier ruling:

> 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

7. Plaintiffs' argument that the 6-year limitations for breach of contract applies is without merit. Plaintiffs' claim not for breach of contract. Rather, their claim is based on the Transfer Fee being illegal under A.R.S. § 33-442 and 33-1806.

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 interest as someone who owns one property and lives there.

Plaintiffs have failed to sufficiently account the fact that RCSC is a nonprofit corporation. Owners of multiple properties (and who 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 (who 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 owner's interests are necessarily aligned with a class member who sold property.

The Court finds that the requirements for typicality and adequacy are not met.

Class certification is simply not appropriate in this case. Because the defendant is a nonprofit, the class members are suing themselves. Plaintiffs are asking for over $5 million in damages. The nonprofit gets most of its revenue from its members in the form of assessments and fees. Thus, any damage award here would be paid by the class members themselves through higher assessments, depleted reserves and/or reduced services and amenities. The only class members who would benefit are those who no longer live in Sun City, and their attorneys. The Court finds that this is not an appropriate use of class action procedure.

IT IS ORDERED that plaintiffs' amended motion for class certification is denied.

IV. FUTURE ACTIONS

The Court's rulings significantly impact this case. As a result, the Court will set a status/trial setting conference. Before the conference, the parties are to confer concerning a plan to resolve remaining issues.

IT IS ORDERED that the Court will hold an in-person Status/Trial Setting Conference on **October 29, 2019 at 9:30 a.m.**, (time allotted: 30 minutes) in this division, before:

The Honorable Roger E. Brodman
Maricopa County Superior Court
East Court Building, Fourth Floor
101 West Jefferson, Courtroom 413
Phoenix, AZ 85003
Phone: 602-372-2943

IT IS FURTHER ORDERED that the parties will confer concerning the unresolved issues in this case. At least three business days before the status/trial setting conference, the parties will submit a joint report on remaining unresolved issues and their proposals for how and when those issues are to be finally resolved. Counsel shall also email the joint report to the Court's Judicial Assistant, Lora Gilbert, at gilbertl@superiorcourt.maricopa.gov