

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Ronna Biesecker,
4 Petitioner,
5 vs.
6 6100 Fifth Condominium Homeowners
 Association,
 Respondent.

No. 20F-H2020050-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7
8 **HEARING:** June 5, 2020

9 **APPEARANCES:** Petitioner Ronna Biesecker appeared on her own behalf.
10 Robert Eric Struse, Statutory Agent, appeared on behalf of Respondent 6100 Fifth
11 Condominium Homeowners Association.

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

13 **FINDINGS OF FACT**

14 **PETITIONER'S CLAIM**

15 1. Respondent is a condominium unit owners' association whose members
16 own condominiums in a community in Tucson, Arizona.

17 2. Petitioner owned condominium unit A113 in the community and was a
18 member of Respondent.

19 3. On March 10, 2020, Petitioner filed a two issue petition with the Department
20 alleging that Respondent had violated its Covenants, Conditions, and Restrictions
21 (CC&Rs) § 10(c) and A.R.S. § 33-1247 by failing to maintain all Common Elements,
22 Petitioner provided a timeline of events surrounding water leaks in her unit with her
23 Petition.

24 4. Respondent filed a written answer to the petition, denying that it had violated
25 the statute or any CC&Rs because the source of the water leaks was the upstairs unit's
26 sliding doors or track assemblies, which were the responsibility of that unit's owner to
27 maintain.

28 5. The Department referred the petition to the Office of Administrative
29 Hearings, an independent state agency, for an evidentiary hearing.

1 6. A hearing was held on June 5, 2020. Petitioner submitted five exhibits and
2 testified on her own behalf. Respondent presented the testimony of its Statutory Agent,
3 Robert Eric Struse.

4 **REFERENCED COMMUNITY DOCUMENTS AND STATUTE**

5 7. Article II.E, Section 1 of the Bylaws provides, in pertinent part, as follows:

6 All owners are obligated to pay monthly, on the first of each month in
7 advance, assessments imposed by the Association to meet all common
8 expenses, which shall include, but not be limited to, a liability insurance
9 policy premium and an insurance premium for a policy to cover repair and
10 reconstruction work in case of hurricane, fire, earthquake, or other hazard,
and maintenance, upkeep, care, repair, reconstruction, taxes and
assessments, gas and electricity for the common elements.

11 8. Article C of the CC&Rs provides, in pertinent part, as follows:

12 All owners are obligated to pay monthly, on the first of each month in
13 advance, assessments imposed by the Association to meet all common
14 expenses, which shall include, but not be limited to, a liability insurance
15 policy premium and an insurance premium for a policy to cover repair and
16 reconstruction work in case of hurricane, fire, earthquake or other hazard,
and maintenance, upkeep, care, repair, reconstruction, taxes and
assessments, gas and electricity for the common elements.

17 9. A.R.S. § 33-1247 provides, in pertinent part, as follows:

18 A. Except to the extent provided by the declaration, subsection C of this
19 section or section 33-1253, subsection B, the association is responsible for
20 maintenance, repair and replacement of the common elements and each
21 unit owner is responsible for maintenance, repair and replacement of the
22 unit. On reasonable notice, each unit owner shall afford to the association
23 and the other unit owners, and to their agents or employees, access through
24 the unit reasonably necessary for those purposes. If damage is inflicted on
the common elements or any unit through which access is taken, the unit
owner responsible for the damage, or the association if it is responsible, is
liable for the prompt repair of the damage.

25 **HEARING EVIDENCE**

26 10. On or about January 5, 2019, Petitioner experienced a water leak in her unit
27 in the area around her sliding glass door. Petitioner contacted the company that installed
28 the door, Olander's, to have it repair the leak and assess the source of the leak.
29
30

1 11. On or about January 18, 2019, an employee of Olander's caulked the air
2 pockets and assessed the door and exterior areas. The employee indicated his opinion
3 that the leak was coming from the unit above Petitioner and that the sliding door above
4 Petitioner's unit had large gaps under the threshold which allowed water to get in and run
5 down the wall into Petitioner's unit.

6 12. In January or February 2019, Petitioner observed more leaks and cracks in
7 the plaster at both upper corners of her sliding door. Petitioner reported the leak to her
8 insurance company.

9 13. On or about February 8, 2019, Nathan's Handyman Service repaired the
10 plaster on both corners around Petitioner's sliding glass doors and stated in a report that
11 the damage was the result of an old leak coming from above Petitioner's unit. The report
12 also noted that the repaired area had been repaired previously based on the presence of
13 rusted wire mesh in the repair.

14 14. On or about February 11, 2019, Petitioner reached out to the owner of the
15 unit above hers requesting that the owner make repairs under the threshold of her sliding
16 glass door. Petitioner did not receive a response.

17 15. In March or April 2019, Petitioner asked Respondent's Property Manager to
18 help mediate the issue between Petitioner and the owner of the unit above hers in an effort
19 to fix the leak under the sliding glass door. Respondent's Property Manager responded
20 that it would not arbitrate, mediate, or serve as a third party to the dispute.

21 16. On or about May 1, 2019, Petitioner emailed Respondent's Property
22 Manager and the Respondent requesting that they repair the exterior leaks. Petitioner
23 observed new cracks in the stucco in the pop-out surrounding the sliding doors at the roof
24 level that were not there when she moved into the unit in April 2017 and posited that the
25 cracks could be a source of the leak. Petitioner noted that all the sliding doors in the unit
26 above Petitioner had missing caulking under the threshold, but only one was leaking.

27 17. On or about October 28, 2019, Roof Savers Locke Roofing provided
28 Petitioner with a Roof Opinion Report. The report noted that "[t]here are no repairs
29 needed at this time. There is server cracking at the stucco." The overall recommendation
30 was "[c]ontact a stucco contractor or Window Company."

18. On or about November 27, 2019, Petitioner's unit had another leak in the same area. Petitioner contacted Respondent's Property Manager regarding the leaks.

19. On or about December 9, 2019, Petitioner's Property Manager and an inspector assessed the water damage in Petitioner's unit.

20. A December 23, 2019 invoice from the inspector noted that "[a]fter inspecting the shared roof and building interior/exterior it appears the water damage to the lower unit is coming from the upstairs unit sliding doors or their track assemblies."

21. Respondent determined it was not responsible for the leak or the resulting damage.

22. At hearing, Petitioner stated that it was "obvious" that the leak is coming from the crack in the stucco and Respondent was responsible for the repair to the stucco.

23. At hearing, Mr. Struse testified that if water was leaking through the crack in the stucco, the upstairs unit would have also had internal damage, which was not happening. Mr. Struse confirmed that the December 2019 inspection included the inside of the upstairs unit.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199.01 permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association's alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department's jurisdiction. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent violated applicable statutes or CC&Rs by a preponderance of the evidence. See A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952). Respondent bears the burden to establish affirmative defenses by the same evidentiary standard. See A.A.C. R2-19-119(B)(2).

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not." MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960). A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact

1 but by evidence that has the most convincing force; superior evidentiary weight that, though
2 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
3 fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW
4 DICTIONARY at page 1220 (8th ed. 1999).

5 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
6 effect to the intent of the parties. See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125
7 P.3d 373, 376 (2006). “Restrictive covenants must be construed as a whole and
8 interpreted in view of their underlying purposes, giving effect to all provisions contained
9 therein.” *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867
10 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

11 5. Article II.E, Section 1 of the Bylaws and Section C of the CC&Rs provides
12 that Respondent is responsible for the maintenance, upkeep, care, and repair for the
13 common elements.

14 6. A.R.S. § 33-1247 provides that Respondent is responsible for the
15 maintenance, repair, and replacement of the common elements while each unit owner is
16 responsible for maintenance, repair, and replacement of the unit.

17 7. If the damage from the water leak was caused by damage to or a flaw in the
18 common elements, Respondent would be responsible for the repair of the common
19 elements and the resulting damage to Petitioner’s unit. However, Petitioner failed to
20 establish by a preponderance of the evidence that the water leak and damage was
21 attributable to the condition of the common elements. Rather, the opinions of the
22 companies that inspected the area concluded that the leak was coming from the sliding
23 glass door of the unit above Petitioner’s.

24 8. Therefore, based on a review of the credible and relevant evidence on the
25 record, it is held that Petitioner failed to establish by a preponderance of the evidence that
26 Respondent violated the provisions of the CC&Rs or Arizona statutes.

27 **ORDER**

28 **IT IS ORDERED** that Petitioner’s petition is dismissed.

29 Done this day, June 25, 2020.

/s/ Tammy L. Eigenheer
Administrative Law Judge

NOTICE

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.

Transmitted by either mail, e-mail, or facsimile May 26, 2020 to:

Judy Lowe, Commissioner
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