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No. 21F-H2121063-REL

ADMINISTRATIVE LAW JUDGE DECISION

Respondent

APPEARANCES: Petitioner Steven Kramer appeared on his own behalf. Emily [REDACTED], Esq. appeared on behalf of Respondent Camelback House, Inc. Laura Smith [REDACTED] acted as witnesses.

After review of the hearing record in this matter, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

BACKGROUND AND PROCEDURE

2. On or about June 30, 2021, Petitioner filed a single-issue petition¹ with the Department which alleged that the Association failed properly respond to Petitioner's response to a Notice of Violation in violation of ARIZ. REV. STAT. § 33-1242(C).

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1 3. On July 16, 2021, Respondent returned its ANSWER to the Department
2 whereby it denied all of the complaint items.²

3 4. Per the NOTICE OF HEARING, the Department referred this matter to the
4 Office of Administrative Hearings ("OAH"), an independent state agency, for an
5 evidentiary hearing on September 24, 2021.³

6 **THE PARTIES AND GOVERNING DOCUMENTS**

7 5. Camelback House, Inc. ("Association") is a condominium association
8 whose members own properties in the Camelback House development located in
9 Scottsdale, Arizona. Membership for the Association is comprised of the Camelback
10 House condominium owners.

11 6. Petitioner is a Camelback House condominium owner and a member of the
12 Association.

13 7. The Association is governed by its Covenants, Conditions, and Restrictions
14 ("CC&Rs"), and overseen by a Board of Directors ("the Board"). The CC&Rs empower the
15 Association to control certain aspects of property use within the development. The
16 Association employs FirstService Residential to manage the property.

17 **HEARING EVIDENCE**

18 8. Petitioner testified on his own behalf. Respondent called Laura Smith as a
19 witness. The Department's electronic file and NOTICE OF HEARING were also admitted into
20 the record.

21 Petitioner's testimony

22 9. Petitioner testified that in 2017, he received permission to construct a patio
23 attached to his condominium unit. In August of 2017, Petitioner inquired as to whether
24 there was a policy for plants. After receiving a response in the negative, Petitioner planted
25 several Pencil Cactus plants among others.

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29 ² See Department's electronic file at HO21-21063_Response_Petition.pdf.

30 ³ See Department's electronic file at HO21-21063_Notice_Hearing.pdf.

10. Petitioner then testified that on or about July 20, 2020, he received a letter from Rick Williams, Community Manager for the Association, informing him of a potential violation for the Pencil Cactus plants.⁴

11. Petitioner testified that on August 14, 2020, he timely responded to the Notice of Violation.

12. Petitioner testified that after his response, he failed to hear from the Association until he noticed that the plant issue would be discussed at the April 21, 2021, Board of Directors meeting.

13. While the plant located in the yard of his house, was “grandfathered in” Petitioner’s testified that he believed that the Respondent violated ARIZ. REV. STAT. § 33-1242(C), as Respondent failed to properly respond to his response to the Notice of Violation.

14. The Association argued that it was not in violation of ARIZ. REV. STAT. § 33-1242(C), as the Notice of Violation met all of the requirements, thereby excusing the Association from compliance with the same.

Laura Smith

15. Ms. Smith is the current Community Manager for the Association, and had been in that position since February 2021.

16. Ms. Smith testified that although she was not employed by the Association at the time of the Notice of Violation, she testified that the same letter is still in use.

17. Ms. Smith testified that the Community Manager will walk the properties to determine if violations exist, or investigate complaints from other Association members.

18. Further, Ms. Smith testified that it is usually the Community Manager that notices the violation, and that the signature on the Notice of Violation is an automated signature.

CONCLUSIONS OF LAW

1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a

⁴ See Department’s electronic file at HO21-21063_Response_Petition.pdf. page 4.

1 planned community association. The owner or association may petition the department
2 for a hearing concerning violations of community documents or violations of the statutes
3 that regulate planned communities as long as the petitioner has filed a petition with the
4 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

5 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
6 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
7 case at bar. OAH has the authority to interpret the contract between the parties. See
8 *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App.
9 2007).

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-
12 1242(C).⁵

13 4. "A preponderance of the evidence is such proof as convinces the trier of fact
14 that the contention is more probably true than not."⁶ A preponderance of the evidence is
15 "[t]he greater weight of the evidence, not necessarily established by the greater number of
16 witnesses testifying to a fact but by evidence that has the most convincing force; superior
17 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
18 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
19 the other."⁷

20 5. ARIZ. REV. STAT. § 33-1242(C) provides, in pertinent part:

21 Within ten business days after receipt of the certified mail containing the
22 response from the unit owner, the association shall respond to the unit
23 owner with a written explanation regarding the notice that shall provide at
24 least the following information unless previously provided in the notice of
25 violation:

26 1. The provision of the condominium documents that has allegedly
27 been violated.

28 2. The date of the violation or the date the violation was observed.

29 ⁵ See ARIZ. ADMIN. CODE R2-19-119.

30 ⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁷ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

3. The first and last name of the person or persons who observed the violation.

4. The process the unit owner must follow to contest the notice.

6. Based upon a review of the credible and relevant evidence in the record, Petitioner has sustained his burden of proof.

7. Here, the material facts are not at issue.

8. After the Notice of Violation, Petitioner timely responded on or about August 14, 2020. Thereafter, he failed to receive any other response until the meeting approximately 8 months later.

9. The Tribunal does not find Respondent's argument persuasive that it was excused from complying with the statute. First, the Tribunal believes that the "unless previously provided in the notice of violation" clause, only excuses the detailed written information, not the letter itself. Thus, the Tribunal believes that the statute requires a written response within 10 days of receiving the homeowner's response to the notice of violation. How detailed that response is depends on whether or not the notice of violation contained items 1-4 in the statute. Had the legislature completely wanted to exclude a response, perhaps it would have started the section with the "unless previously provided..." language, as it did in subsection D of that statute.

10. Even if the Tribunal is mistaken at its interpretation of the statute, the Administrative Law Judge still concludes that the Notice of Violation sent to Petitioner fails to satisfy number 3 of the statute. The only time a first and last name is used is in the signature block, which Ms. Smith testified was auto-populated. Further, the only line in the Notice of Violation that references observation of the violation was, “[d]uring a recent inspection of the community, the following item was noted”. This does not state who observed the violation. Again, the only time a first and last name is mentioned (outside of Petitioner’s), is the auto-populated signature of “Rick Williams”. The Administrative Law Judge does not find this sufficient notice under the statute.

11. Therefore, the tribunal finds that Respondent has violated ARIZ. REV. STAT. § 33-1242(C), for failing to properly and timely respond once Petitioner timely submitted his response to the Notice of Violation, and is entitled to his filing fees.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner is deemed the prevailing party and is entitled to his filing fees of \$500.00, and Respondent must reimburse the same within 30 days.

NOTICE

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

Done this day, September 27, 2021.

/s/ Adam D. Stone
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile September 27, 2021 to:

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