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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JAN 05 2018

BY
ROBERT MITTAN, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ARROWHEAD WOODS ARCHITECTURAL COMMITTEE, INC., a California corporation,

Plaintiff

vs.

HERMINE MURRA, et al.,

Defendant

Case No.: CIVDS 1405048

DEFENDANT'S MANDATORY SETTLEMENT CONFERENCE STATEMENT [CRC 3.1380; LR 601]

Date: January 12, 2018
Time: 10:00 a.m.
Dept.: S-26

TO THE HONORABLE PRESIDING JUDGE OF THE SAN BERNARDINO SUPERIOR COURT:

Pursuant to California Rule of Court, Rule 3.1380, and San Bernardino Local Rule 601, Defendant Hermine Murra submits the following statement for the mandatory settlement conference scheduled for January 12, 2018 in the above-referenced action.

I. INTRODUCTION

Plaintiff has brought suit against Defendant for cutting her own trees on her own property based upon alleged authority to enforce restrictions it conjures from a tenuous paper

trail of deeds intended to benefit a community it claims to represent. Yet, as fully developed herein, Plaintiff has no standing to enforce these restrictions. First, with respect to Tract 7074, its representations that it validly extended the Declaration of Restrictions upon which it rests its authority are facially and legally false. Second, because Plaintiff has no standing, its breach of contract cause of action fails to state a valid claim. Plaintiff had no legal authority to enter into contracts on behalf of the community, and could not, based on misrepresentations of its authority, coerce or wrongfully induce Defendant to enter into a binding contract with it. Third, with respect to Tract 53, Plaintiff claims authority based upon a grant deed in which the grantor specifically and expressly reserves all powers regarding tree removal and development. Moreover, this Court has already held that Plaintiff is not "a valid successor or assignee to Title Insurance and Trust Company" – the grantee in the deed upon which Plaintiff seeks to seat its authority in this case. Finally, this Court has already held that tree removal does not give rise to damages *per se*, and refused to award the damages to Plaintiff on facts analogous to the instant case.

II. STATUS OF SETTLEMENT NEGOTIATIONS

Prior to the preparation of this settlement conference statement, attorneys for Plaintiff and Defendant have communicated in writing, by telephone and in person to discuss resolution of this action without the necessity of trial. As of the preparation of this statement, the parties have not reached a settlement agreement that would result in a dismissal of the action.

III. STATEMENT OF FACTS AND LAW

Defendant is the owner of Lot 289, Tract 7074, 27568 North Bay Road, which she purchased in June 2013, and Lot 18, Tract 53, 27981 Lakes Edge Rd., which she purchased in March 2014. Both properties are located in Lake Arrowhead, CA. After purchasing the North Bay Road property, Defendant performed landscaping work which involved the removal of some trees. Approximately one year later, Defendant had similar work done on her Lakes Edge Road property.

Plaintiff brought suit in April 2014 based upon its "title" in the properties. In order to sue Defendant for her landscaping efforts on her North Bay Road property, Plaintiff asserted standing as the successor to the "Architectural Committee" and grantor referenced in a "Declaration of Restrictions" recorded in May 1964. In order to sue Defendant for her landscaping efforts on her Lakes Edge property, Plaintiff asserted standing as the successor to the "Architectural Committee" and grantor referenced in a "Grant Deed" recorded in August 1922. In its Answer to Plaintiff's Complaint, Defendant timely challenged Plaintiff's authority to enforce the restrictions over Tract 7074. Additionally, in the course of its investigation in this case, Defendant has uncovered facts and legal decisions which totally undermine Plaintiff's standing to bring suit in this case.

A. The Declaration Of Restrictions And Certification Of Amendment Do Not Authorize Plaintiff To Enforce Restriction Over Tract 7074.

The Declaration of Restrictions and related Certification of Amendment are the lynchpin of Plaintiff's standing to sue Defendant for landscaping her North Bay Road property. Plaintiff claims it is the "successor" to the "Architectural Committee" and grantor referenced in the 1964 Declaration of Restrictions. The Declaration of Restrictions, Article VII, prohibits anyone who owns a lot on Tract 7074 from removing trees without the prior consent of an "architectural committee acting in its assigned capacity." The North Bay Road property is located on Tract 7074. However, Article XI states that the restrictions contained therein shall only "be binding and in force and effect until December 31, 2010." Under Article XI, the term of the restrictions could be extended until December 31, 2025, but only if the "owners of record of lots or building sites in [the] Tract subject to [the] Declaration, *having an aggregate area equivalent to not less than 55% of the total area of all of said property* . . . . execut[e] and *acknowledge[e]* an instrument in writing to that effect which shall be *duly recorded* with the County Recorder of San Bernardino County, California." Ms. Murra acquire the North Bay Road property in 2013, which means the restrictions governing Tract 7074 only apply to her if they were *extended*.

In 2005, Plaintiff AWAC began collecting signatures on forms it labeled "CC&R Renewal Ballots." The "Renewal Ballots" contained the following language:

> "The owner(s) of record of lot __________, a lot in Tract __________ irrevocably appoint(s) Arrowhead Woods Architectural Committee President, Vice President and Secretary or their successors to exercise their power to extend the term of said Declaration of Restrictions to December 31, 2025 as set forth in Article XI of said Declaration of Restrictions and extend the powers of the Architectural Committee as set forth in Article III of said Declaration of Restrictions. Said Appointees shall have the power to execute and record any document on my/our behalf to extend the term of said Declaration of Restrictions and the powers of the Architectural Committee as set forth in said Declaration of Restrictions."

The "Renewal Ballots" were not acknowledged or recorded.

On December 15, 2010, just 15 days before the Declaration of Restrictions was to expire, Plaintiff recorded a two-page document entitled "Certification of Amendment of Declaration of Restrictions For Tract 7074, San Bernardino County." The Certification of Amendment, which purports to amend Articles III and XI of the Declaration of Restrictions to extend the term of the Declaration of Restrictions and the powers of the Architectural Committee to December 31, 2025, states, in pertinent part,

> "The undersigned, being member of the Arrowhead Woods Architectural Committee appointed in writing by the record owners of lots numbered 1 to 339, inclusive, in Tract 7074, in the County of San Bernardino having an aggregate area equivalent to not less than 55% of the total area of said Tract, do hereby certify that said record owners have executed an acknowledged written instrument appointing the undersigned to execute and record any document on their behalf to amend said Declaration of Restrictions pursuant to Article XIV of said Declaration of Restrictions, recorded on May 6, 1964, at Book 6142, Page 857."

The Certification of Amendment was signed and acknowledged, but only by the President, Vice President and Secretary of the Arrowhead Woods Architectural Committee.

The very case which Plaintiff cites for the validity of its extension mechanism points out all of the deficiencies in Plaintiff's arguments. In *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, the Court stated that "[t]he language of the CC&R's governs if it is clear and explicit, and we interpret the words in their ordinary and popular sense unless a contrary intent is shown. The parties' intent is to be ascertained from the writing alone if possible. Where the language of a contract is clear and not absurd, it will be followed." Here, the language of the Declaration of Restrictions could not be more "clear and explicit." Therefore, it governs. As such, Plaintiff's efforts to seat itself as the successor in Declaration of Restrictions is fatally defective in the following respects.

1. The CC&R Renewal Ballots are not a "written instrument" within the ordinary meaning of the Declaration of Restrictions.

The Certification of Amendment states that said record owners have executed "an acknowledged written instrument" appointing the undersigned to execute and record any document on their behalf. Yet the CC&R Renewal Ballots are not a "written instrument" within the meaning of the Declaration of Restrictions. They are not "executed and acknowledged." Neither the Court nor the jury can verify who signed the ballots, or whether those who signed were authorized to do so. The meaning of "executed and acknowledged" is manifest in the Declaration of Restrictions itself. Under the Declaration of Restrictions, the owners of the lots comprising not less than 55% of the total area of the tract could extend the restricting only by "executing and acknowledging an instrument in writing to that effect *which shall be duly recorded . . .*" Here, the ballots could not be recorded because they were not "acknowledged," i.e., *notarized*. Plaintiff acknowledges as much in its Motion in Limine when it states, "Signatures for such properties were difficult, if not almost impossible, to obtain. Most signatures were obtained by mail. It was not practical to ask property owners to have their signatures notarized. It is difficult enough to ask a property owner to sign a ballot,

much less go to a notary, pay a notary, and then return a CC&R Renewal Ballot." Yet the language of the Declaration of Restrictions is "clear and not absurd," and therefore must be followed. Presumably the Declaration of Restrictions required verification in order to assure that the fate of an entire tract of land was decided by a free and fair process. Plaintiff was not authorized, in the name of convenience, to record its own acknowledged document and proclaim by fiat that it now had the authority to record documents on the record owners' behalf.

2. The Certification of Amendment is not a "written instrument" within the ordinary meaning of the Declaration of Restrictions.

Under Article XIII of the Declaration of Restrictions, only the "*owners of record* of lots or building sites in said Tract having an aggregate area equivalent to not less than 55% of the total area of all of said property may . . . modify, amend, cancel or annul, with respect to all of said Tract, all or any of the covenants, conditions and restrictions contained in this Declaration and any supplement or amendment thereto, *by instrument in writing signed by said owners and acknowledged by them so as to entitle it to be recorded in the office of the County Recorder of San Bernardino County, California*." Here, the manifest intent of the Declaration of Restrictions could not be more "clear and explicit." Per the express terms of the Declaration of Restrictions, *any* modification of the terms of the Declaration must be made by instrument in writing "*signed by said owners and acknowledged by them so as to entitle it to be recorded*." Here, *no* document purportedly signed by the owners of record over the five-year period was "acknowledged by them so as to entitle it to be recorded." This fact alone frustrates the clear and explicit intent of the original Declarant and demonstrates why Plaintiff should not be allowed to enforce restrictions over Defendant's land.

3. *Costa Serena* is inapposite because the CC&R Renewal Ballots were not recorded.

Plaintiff cites *Costa Serena*, *supra*, for the general proposition that single a document signed by an architectural committee will always suffice to extend an expiring declaration of restrictions. Plaintiff is in error. *Costa Serena* involved a planned development governed by a "Declaration of Restrictions" that was set to expire at the end of 2006. The Declaration

1 provided that the restrictions could be extended if the owners of a majority of the lots executed
2 and recorded "in the manner required for a conveyance of real property, a writing in which they
3 agree[d] that said Conditions and Restrictions [would] continue for a further specified period."
4 *Id.* at 1181. A group of homeowners led by the Costa Serena Architectural Committee
5 attempted to extend the life of the Declaration of Restrictions. The Committee collected 375
6 "Consents to Extension" forms over a three-month period. Each form was signed and
7 acknowledged – i.e., notarized. It then recorded a document entitled "Extension of Declaration
8 of Restrictions" by attaching the notarized consent documents to the Extension. *Id.* at 1184. A
9 coalition of homeowners challenged the extension on the grounds that the information in each
10 consent form was not *identical* to that found in the deeds to the lots owned by consenting
11 homeowners. *Id.* at 1199. The court rejected the challenge, holding that the language in the
12 Extension of Declaration of Restrictions was sufficient provided that it "sufficiently evidenced"
13 agreement by a majority of the owners. *Id.* The *notarized* consent forms, the court concluded,
14 were relevant in determining the sufficiency of the evidence.
15 Here, unlike in *Costa Serena*, the CC&R Renewal Ballots were not notarized.
16 Therefore, Plaintiff cannot analogize with *Costa Serena*. Absent a basis for verification,
17 Plaintiff's Certification of Amendment cannot fairly be characterized as a "certification." This
18 is all the more true in that Plaintiff sought to extend the restrictions by having the owners of
19 record "appoint" it to extend the restrictions on their behalf. Any durable power of attorney
20 must be acknowledged before a notary public or signed by at least two qualified witnesses. *See*
21 Prob. Code § 4121(c). Here, unlike in *Costa Serena*, Plaintiff made no attempts to even
22 substantially comply with recording requirements and the express terms of the Declaration of
23 Restrictions. Therefore, *Costa Serena* is inapposite, and the Declaration of Restrictions and
24 Certification of Amendment are invalid and cannot serve to seat Plaintiff's powers.
25
26 **4. *Costa Serena* is inapposite because Plaintiff makes no offer of proof that the CC&R Renewal Ballots comprise at least 55% of the *total area* of the tract.**
27 A fatal oversight hangs over Plaintiff's efforts to prove it extended the Declaration of
28 Restrictions. It is even present on the second page of Plaintiff's Motion in Limine when it

1 states, "Plaintiff recorded a Certification of Amendment of Declaration of Restrictions, which
2 recited that *55% of the property owners* had voted to extend the Declaration of Restrictions."
3 The Declaration of Restrictions requires more than a 55% *property owner* vote for extension or
4 amendment. Rather, the Declaration plainly states that any such amendment is effective only if
5 the owners of the lots "having an aggregate area equivalent to not less than 55% of the *total*
6 *area* of all of said property" execute and acknowledge a recordable written instrument.
7 Plaintiff makes no offer of proof the non-notarized, non-recorded "renewal ballots" it collected
8 represent at least 55% of the land of Tract 7074. As Plaintiff admits in its Motion in Limine,
9 "In 2007 and 2008, the recession began. Lake Arrowhead was hit particularly hard. Many
10 second home owners gave up their properties. Some of properties were in foreclosure, were
11 bank owned, or the owners imply had lost interest." Given the shifting property interests in the
12 tract, only verification by title examination on some precise date would reveal whether the
13 requisite acreage was ever obtained. Plaintiff offers zero evidence.
14 Defendant, by contrast, has investigated this critical issue. Based on Defendant's
15 investigation, the renewal ballots do not make up the requisite 55%. In fact, Defendant has
16 identified at least 16 ballots in which the signatory was no longer in title when Plaintiff
17 recorded its Certificate of Extension in December 2010. *See* Defendant's proposed Exhibit 104.
18 As such, Plaintiff's powers to enforce the restrictions expired on January 1, 2011.
19
20 **5. Because it lacks standing to enforce restrictions, Defendant has no standing to bring a claim for breach of contract.**
21 Because Defendant lacks standing to enforce restrictions, its breach of contract cause of
22 action fails on its face. Plaintiff had no legal authority to enter into contracts on behalf of the
23 community. Rather, based on misrepresentations of its authority, it has wrongfully induced
24 homeowners and contractors to sign papers that it claims are valid contracts. These contracts
25 are not valid. *See Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 (unilateral mistake may
26 invalidate the contract when the other party to the contract knows, or has reason to know, of a
27 mistaken belief and unfairly utilizes that mistaken belief in a manner enabling him or her to
28 take advantage of the other party).

6. Defendant's challenge to Plaintiff's authority to enforce is not time-barred.

Plaintiff cites *Costa Serena* and *Schuman v. Ignatian* (2010) 191 Cal.App.4th 255, 256-57 for the proposition that the four-year time limit to challenge an extension of CC&Rs found in Code of Civil Procedure Section 343 prevents Defendant from bringing the present Motion. Plaintiff errs in two respects. First, since the language in the Certification of Amendment misrepresents the provisions of the Declaration of Restrictions and Plaintiff's powers to amend them, any claim against the Certification of Amendment should be tolled to account for the time it took to discover the fraud. Second, Defendant did challenge the validity of the extension within the four-year limit. In *Schuman*, the defendant had filed an answer with affirmative defenses, none of which challenged the validity of the CC&Rs or the amendment. Here, Defendant's June 4, 2014 Answer contains an *express* affirmative defense to enforcement based upon the expiration of the covenants and restrictions. *See* June 4, 2014 Answer, p. 2, ln. 18-24. As such, *Schuman* is inapplicable, and Defendant's challenge is valid.

B. The 1922 Grant Deed Does Not Authorize Plaintiff To Enforce Restrictions Over Tract 53.

1. Plaintiff has no legal authority to enforce restrictions over Tract 53.

Plaintiff has no textual or legal authority to enforce restrictions over Tract 53. First, the 1922 "Grant Deed" which Plaintiff cites as authority to police land use over the Lakes Edge Road property specifically reserves and withholds from the grant "(g) All the trees, and all the roots, branches and parts thereof, growing on or that may hereafter grow, stand or be upon any part of said Lot A, and Lots 1 to 95 both inclusive, and Lot A, and Lots 1 to 117, both inclusive, together with each and every right-of-way, easement and servitude which is necessary for the maintenance, care, growth, removal and development of each and every such tree, whether the same be standing or fallen, alive or dead, *together with the right to remove any of said trees whenever*, in the opinion of said Grantor or his successor in interest, *the removal of any tree, or trees, is necessary for the improvement of the landscape, for the pretention or reasonable use of improvements and/or buildings on any of said lots, and/or for the location or construction of buildings or improvements on any of said lots.*" Here, the deed

perfectly describes Defendant's endeavors – *removing trees for the improvement of the landscape and/or for the . . . construction of . . . improvements on any of said lots* – and specifically reserves this right to the grantor. The grantor's intent could not be any clearer. Therefore, Plaintiff has no authority to enforce any such restrictions over Tract 53.

2. Plaintiff is collaterally estopped from claiming it has authority to enforce restrictions over Tract 53.

This Court, in *Lake Arrowhead Property Owners Association v. Sammy Davis* (1982), Case No. 191469, Superior Court of California, Central Division, San Bernardino County, held that Plaintiff was not "a valid successor or assignee to Title Insurance and Trust Company." *See* Defendant's Request for Judicial Notice of Exhibit 102. Title Insurance and Trust Company is the grantee in the deed upon which Plaintiff seeks to seat its authority in this case. The language in both deeds is identical with respect to the who may enforce the restrictions – i.e., only "the Grantor, his heirs, successors and assigns, or by Title insurance and Trust Company, on his or their behalf, and/or upon proceedings instituted by not less than three owners of lots or portions thereof above described." *See* Defendant's Request for Judicial Notice of Exhibit 103. The court in *Davis* found that "[n]either Plaintiff, Lake Arrowhead Property Owners Association nor its committee known as the Arrowhead Woods Architectural Committee has any right whatsoever to seek enforcement of any provisions of said Corporation Grant Deed, including any covenants, conditions or restrictions found therein." Due to collateral estoppel, Plaintiff cannot litigate this issue again. Because of this, it has no legal basis upon which to sustain its claim. As such, this suit must be dismissed.

C. Plaintiff Has No Damages.

Crucially, this very Court, in *Arrowhead Woods Architectural Committee, Inc. v. Hatt* (2015), Case No. CIVDS 1400240, Superior Court of California, Central Division, San Bernardino County, held, on substantially similar facts as here, that damages do not lie *per se* when a property owner removes his or her *own* trees. This Court refused to award the damages sought in that case due to its stated inability to evaluate, in the absence of evidence, "incremental damage to the forest as a whole." *See* Defendant's Request for Judicial Notice of

Exhibit 101 at 6-7. Thus, assuming *arguendo* that Plaintiff *did* have the authority to enforce restrictions, the suit would still be moot due to insufficient evidence that the *community* sustained damages due damage to *Defendant's own trees*.

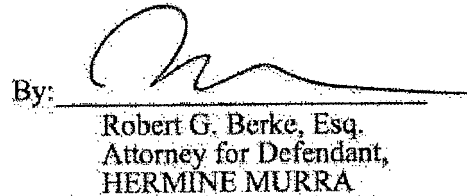
IV. CONCLUSION

For all of the foregoing reasons, Plaintiff's allegations are insufficient as a matter of law to prove a prima facie case, and Plaintiff faces an insurmountable legal hurdle to establish the monetary damages it claims are due.

Respectfully submitted,

DATED: January 5, 2018

BERKE LAW OFFICES, INC.



By:__________________
Robert G. Berke, Esq.
Attorney for Defendant,
HERMINE MURRA

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, California. I am over the age of 18 and not a party to the within action; My business address is: 21911 Sherman Way, Canoga Park, CA 91303.

On January 5, 2018 I served the foregoing document described as:

DEFENDANT'S MANDATORY SETTLEMENT CONFERENCE STATEMENT [CRC 3.1380; LR 601]

on the interested parties in this action by:

[X] (BY MAIL) I placed a true copy thereof enclosed in a sealed envelope addressed and caused such envelope with postage thereon fully prepaid to be placed in the United States Mail and/or Federal Express and/or Express Mail at Los Angeles, CA addressed as follows:

Law Offices of John G. Würm
27321 North Bay Road
P.O. Box 1875
Lake Arrowhead, CA 92352

[ ] (BY EMAIL) I also caused an electronic copy of the foregoing document to the address at the following e-mail address which was obtained from correspondence received from the addressee:

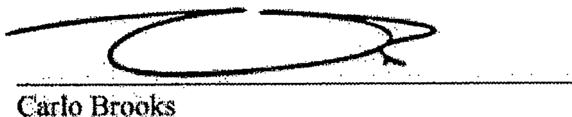
[ ] (BY PERSONAL SERVICE) I caused such document to be delivered by hand to the addressee.

[ ] (BY FAX) I caused a copy of such document to be faxed to the offices of the addressees at the following Fax Numbers:

[X] (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed this 5th day of January 2018 at Canoga Park, California.



Carlo Brooks