

**IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA**

NORMAN GUNDEL,
WILLIAM MANN and
BRENDA N. TAYLOR,
individually and on behalf
of all similarly situated persons,
Plaintiffs,

v.

Case No.: 2017-CA-001446
Section: 11

AV HOMES, INC. AND
AVATAR PROPERTIES, INC.,
Defendants.

**ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT ON AVATAR'S THIRD AFFIRMATIVE DEFENSE BASED ON
SECTION 720.302(3)(b), FLORIDA STATUTES**

THIS MATTER is before the Court upon Plaintiffs' Motion for Partial Summary Judgment on Avatar's Third Affirmative Defense based on section 720.302(3)(b), Florida Statutes, filed on June 2, 2021 and Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment on Avatar's Third Affirmative Defense, filed on July 15, 2021. The Court, having reviewed the submissions, pleadings, court file, applicable case law, and having heard and considered the arguments of the parties at the hearing conducted by the Court on July 19, 2021 and otherwise being informed in the matter, independently finds as follows:

The Court is reviewing the motion under the new summary judgment standard. The parties agree and the Court finds the applicability of section 720.302(3)(b), Fla. Stat., is strictly an issue of statutory interpretation that must be resolved as a matter of law by the Court. Again, this Court does not rely on any previous rulings or court decisions in making this determination.

At issue is applicability of section 720.302(3)(b), Fla. Stat. Plaintiffs assert on pages six, seven, and eight of their motion that Avatar is the developer of a community known as Solvita; Solvita's governing documents require members of the Solvita Association pay Club Dues; and Solvita's governing documents create a lien for unpaid Club Dues which may be recorded against the association member's residential parcel and foreclosed. Avatar at page five and six of its opposition argue the legislature carved out an exception to the HOA Act for commercial parcels intended for commercial use such as the Solvita Club; Club Dues collected by the Solvita Club are exempt from the application of the HOA Act; and If Chapter 720 does not apply to the Club Facilities by

virtue of their status as commercial property then Chapter 720's subparts don't apply, including section 720.308, also do not include Club Facilities. Avatar's Third Affirmative Defense states in part, "API is a for-profit corporation and operates the Club Facilities as a for-profit commercial enterprise..." Avatar asserts the Club Plan is not subject to the provisions of the HOA Act. Plaintiffs request this Court find section 720.302(3)(b), Fla. Stat., does not bar their Class certified claims.

Section 720.302(3)(a) and (b), provides in part, (3) This ***chapter*** does not apply to: (a) A community that is composed of property **primarily intended for commercial...use**; or (b) The **commercial...parcels** in a community that contains **both residential parcels and parcels intended for commercial...use**.

Avatar's third affirmative defense asserts chapter 720 does not apply because the Club is "for profit commercial enterprise" for which the exception of "commercial or industrial parcels" under section 720.302(3)(b) applies. The Plaintiff's position is that the commercial exception does not apply to the \$35 million in Club Membership Fees that Avatar has collected from the Class.

The plain reading of 720.302(3)(b), Florida Statutes, dictates the commercial exception applies only to *commercial parcels in a community*. The Act defines parcels as real property. Real property encompasses the club property and the club facilities. The fees and fee obligations are intangible personal property. The text of (3)(b) supports the interpretation that its exception applies only to a community's commercial parcels and not to the entire community. The commercial exception does not apply to a community's residential parcels or their owners. If a community contains a commercial parcel, then the HOA Act still applies to the community's residential parcels and the governing documents recorded against those residential parcels. The Court finds this be true as the Club Plan is a governing document that binds residents. Membership in the Club is mandatory. Avatar employs chapter 720 to enforce assessments on the community's residential parcels. If those Club Membership Fees go unpaid Avatar records a lien and forecloses. Thus, the exception of commercial parcels found in section 720.302(3)(b), does not apply to Avatar's collection of for-profit assessments from residential parcel owners under the compulsion of foreclosure of a lien created under the community's governing documents. The commercial-parcel exception does not apply to the \$35 million in Club Membership Fees that Avatar has collected from the Class. As a matter of law, Plaintiffs and the Class are entitled to partial summary judgment that section 720.302(3)(b) does not bar the Class certified claims.

Therefore, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Partial Summary Judgment on Avatar's Third Affirmative Defense based on section 720.302(3)(b), Florida Statutes is hereby **GRANTED**.

DONE AND ORDERED in Bartow, Polk County, Florida on this 12th day of October, 2021.



WAYNE DURDEN, Circuit Court Judge

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