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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 AS TO LIABILITY FOR VIOLATION OF § 720.308, FLORIDA STATUTES

THIS MATTER is before the Court upon Plaintiffs' Motion for Partial Summary Judgment as to Liability for Violation of § 720.308, Florida Statutes, filed on July 8, 2021; Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment as to Liability for Violation of § 720.308, Florida Statutes, filed on July 28, 2021; Plaintiffs' Reply Brief Supporting Their Motion for Partial Summary Judgment as to Liability for Violation of § 720.308, Florida Statutes, filed on August 10, 2021; and Defendant's Notice of Filing Supplemental Authority, filed on August 27, 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 August 18, 2021 and otherwise being informed in the matter, independently finds as follows:

The new Rule 1.510 provides that "The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"; and that "The Court shall state on the record the reasons for granting or denying the motion."

Plaintiffs request summary judgment as to the liability of Defendant Avatar Properties, Inc. ("Avatar") for violating section 720.308, Florida Statutes. There is no genuine dispute as to any material fact, and all parties agree that the interpretation and application of the Homeowners' Association Act, chapter 720, Florida Statutes, is an issue of law for the Court to determine.

Plaintiffs' Second Amended Complaint includes four counts certified as class action claims against Avatar. Two counts are relevant here. Count 6 seeks to enjoin Avatar from violating section 720.308, and Count 8 seeks damages for Avatar's past violation of

section 720.308. Defendants do not dispute that section 720.308 prohibits assessments that exceed a member's proportionate share of expenses. Nor do Defendants dispute that Club Dues include Club Membership Fees that by definition exceed a member's proportionate share of expenses. Defendants argue that Club Dues are not an "assessment" subject to section 720.308. However, the Club Plan, Club Membership Fee and Avatar are all subject to or governed by the Act. In fact, Avatar represents itself to members as an association collecting assessments under the Act. The monthly statements in the record reveal all monthly charges are listed as assessments. Thus, the Court rules as a matter of law and based on the undisputed facts that Club Dues are an "assessment" subject to section 720.308.

The Homeowners' Association Act defines an "assessment" as "a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel." § 720.301(1). "Club Dues" are sums of money payable to the developer, Avatar, by residential parcel owners, as authorized in the governing documents included in the Amended and Restated Master Declaration for Solivita, which Avatar recorded in the Polk County Official Records at Book 9142, Page 1843. Those governing documents authorize Avatar to record and foreclose a lien for unpaid Club Dues. See Page 138 of 176; Pages 141–142 of 176. Thus "Club Dues" meet the statutory definition of "assessment." See § 720.301(1).

Defendants alternatively argue that "Club Dues" are not subject to section 720.308 because they are not payable to an association. The Court disagrees. Section 720.308's limitation of assessments to a proportionate share of expenses is not confined to assessments payable to an association. The statutory definition of "assessment" is not confined to sums payable to an association. See § 720.301(1) (quoted above). Nor is the statutory limitation of assessments to a proportionate share of expenses confined to assessments payable to an association. See § 720.308(1)(a) ("ASSESSMENTS.–For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. (a) Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document."); see also § 720.308(3) ("MAXIMUM LEVEL OF ASSESSMENTS.— . . . assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate share of the expenses as described in the governing documents."). The statutory text shows legislative intent for section 720.308's limitation of assessments to apply to all types of assessments. The protection afforded to homeowners by section 720.308's limitation of assessments would be rendered meaningless if it were interpreted to allow a developer to avoid this protection by simply recording governing documents that make assessments payable to an entity other than the association.

Defendants argue that the reference to an "annual budget" in section 720.308 confines the limitation in section 720.308 to assessments payable to an association. However, the Court does not find that argument persuasive. If the Legislature had intended

to limit section 720.308's applicability to assessments payable to an association, then the Legislature would have expressly done so, either in the definition of "assessment" in section 720.301(1) or in the operative provisions of section 720.308. It would be absurd to interpret the reference to an annual budget as somehow indirectly confining section 720.308's applicability to assessments payable to an association when the Legislature could have expressly done so, but did not, and particularly when such an interpretation would undermine the purpose of section 720.308. Regardless, in this case, the Club Dues are levied pursuant to an annual budget. Solivita Association's governing documents provide that "Club Dues shall be established by the adoption of a projected operating budget," see Page 141 of 176, which a management company (for the Solivita Association and Solivita Club) prepares on an annual basis to determine the monthly amount of assessments to charge homeowners.

The Court also rejects Defendants' argument that the certified claims are barred because Avatar disclosed its plan to profit from Club Membership Fees to the Plaintiffs and each class member by recording the Amended and Restated Master Declaration for Solivita in the Polk County Official Records at Book 9142, Page 1843. The Club Plan does disclose that the members of Solivita Association "shall collectively bear all expenses associated with the Club so that Club Owner shall receive the Club Membership Fees without deduction of expenses or charges in respect of the Club." See Page 138 of 176. The Club Plan also includes a "RELEASE" that attempts to prospectively bar any legal challenge to the Club Plan. See Page 149 of 176. However, the Court rules that the Club Plan does not bar a claim for violation of section 720.308. If the developer of a community forms a homeowners' association and records governing documents that are subject to the Homeowners' Association Act, then the developer must comply with the Act. The developer cannot avoid compliance with the Act by disclosing an intent to profit from assessments that would violate the Act. Furthermore, the developer of a community cannot prospectively avoid liability for violating the statutory protections that the Act provides for association members. To rule otherwise would render meaningless the protections that the Act provides to homeowners' association members and the public. This is consistent with other Florida cases holding that a release or exculpatory clause that attempts to prospectively insulate a party from liability for violating a statute is unenforceable against the persons that the statute is designed to protect. See JM Family Enterprises, Inc. v. Winter Park Imports, Inc., 10 So. 3d 1133 (Fla. 5th DCA 2009) (and cases cited therein). Although the enforceability of a homeowner's prospective waiver of statutory protection of the Homeowners' Association Act does not appear to have been the subject of any appellate court decisions in Florida, the Second District Court of Appeal has held that a condominium owner's waiver of a statutory protection of the Condominium Act is unenforceable. See Asbury Arms Dev. Corp., v. Florida Dept. of Bus. Regulations, Div. of Florida Land Sales & Condominiums, 456 So. 2d 1291, 1293 (Fla. 2d DCA 1984).

As a matter of law, Club Dues are an "assessment" subject to section 720.308's limitation of assessments to a proportionate share of expenses. Avatar violated section 720.308 by undisputedly collecting assessments in amounts that exceed association members' proportionate share of expenses. The claims for violation of section 720.308 are not barred by Avatar's disclosure of its plan to profit from Club Dues in the governing

documents of Solivita Association, nor are they barred by the prospective release that Avatar included in those governing documents.

Nothing in the Act contemplates association governing documents requiring association members to make a pure profit mandatory payment to a developer in addition to having paid all "expenses as described in the governing document." The Club Dues include Club Expenses and a Club Membership Fee payable to Avatar by HOA members. The Club Expenses covers all of the expenses of the Club. The Club Membership Fee does not pay any of the expenses of the Club but instead is strictly a fee generating pure profit avenue for Avatar. In fact, the Club Membership Fee as described in the Club Plan states in part, the Club Owner shall receive the Club Membership Fees without deduction of expenses. Clearly, the retained fees are pure profit as they are not expended for expenses to the detriment of the members. The Court finds Club Membership Fee is an illegal assessment. The collection of a Club Membership Fee that pays no "expenses" and consists entirely of pure profit to Avatar violates section 720.308, Fla. Stat. as a matter of law. Thus, the Court grants partial summary judgment as to Avatar's liability for violating section 720.308, Fla. Stat. in class-certified Counts VI and VIII of the Second Amended Complaint.

Therefore, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Partial Summary Judgment as to Liability for Violation of § 720.308, 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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