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 DENYING DEFENDANTS' RENEWED MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

THIS MATTER is before the Court upon Defendants' Renewed Motion for Final Summary Judgment and Incorporated Memorandum of Law, filed on July 8, 2021; Plaintiff's Opposition to Avatar's Fourth Motion for Summary Judgment (titled Defendants' Renewed Motion for Final Summary Judgment and Incorporated Memorandum of Law), filed on July 29, 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 September 20, 2021, and otherwise being informed in the matter, rules 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."

In this case, Defendants are entitled to file a renewed summary judgment motion under the new Rule 1.510. See In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d 72, 77–78 (Fla. 2021) ("In cases where a summary judgment motion was denied under the pre-amendment rule, the court should give the parties a reasonable opportunity to file a renewed summary judgment motion under the new rule.").

At the hearing, counsel for Defendants stated that Defendants' Renewed Motion for Final Summary Judgment does not require the Court to revisit any of the findings or conclusions of the previously assigned judge in the Order Granting in Part and Denying in Part Defendants' Motion for Final Summary Judgment entered on January 23, 2018. Counsel for Defendants stated that Defendants' Renewed Motion for Final Summary

Judgment only requires the Court to revisit the Order Denying Defendants' Amended Motion for Final Summary Judgment on the Remaining Certified Counts of Plaintiffs' Second Amended Complaint and Incorporated Memorandum of Law entered by the Court on January 11, 2021.

The Court now considers Defendants' Renewed Motion for Final Summary Judgment under the new Rule 1.510. Defendants request summary judgment on the remaining certified counts of Plaintiffs' Second Amended Class Action Complaint: Counts 2, 5, 6, and 8, which were certified as class action claims against Defendant Avatar Properties, Inc. ("Avatar"). The determination of whether Defendants are entitled to judgment as a matter of law requires the Court to interpret and apply several provisions of the Homeowners' Association Act, chapter 720, Florida Statutes. All parties agree that the interpretation and application of chapter 720 is an issue of law for the Court to determine.

The Court first addresses section 720.305, which requires members of an association to comply with the Homeowners' Association Act and authorizes an action to be brought against a member "at law or in equity, or both, to redress alleged failure or refusal to comply with [the Homeowners' Association Act]." § 720.305(1)(b), Fla. Stat. Defendants argue that section 720.305(1) does not authorize an action to be brought against Avatar for violation of the Homeowners' Association Act. However, section 720.305(1) does authorize an action to be brought against Avatar. Avatar is a "member" of Solivita Community Association, Inc. ("Solivita Association"). Avatar recorded the governing documents of Solivita Association, including the Amended and Restated Master Declaration for Solivita, recorded in the Polk County Official Records at Book 9142, Page 1843. Under these governing documents, Avatar is defined as the Club Owner, see Page 13 of 176, which is a "member" of Solivita Association, see Page 59 of 176. Avatar is also defined as the Developer, see Page 14 of 176, which is a "member" of Solivita Association, see Page 102 of 176; Page 112 of 176. There is no dispute that Solivita Association is an "association" under the Homeowners' Association Act. See § 720.301(9), Fla. Stat. As a "member" of Solivita Association under the governing documents that Avatar recorded, Avatar is subject to an action for failure or refusal to comply with the Homeowners' Association Act under section 720.305(1).

The Court next addresses section 720.302, which provides that the Homeowners' Association Act does not apply to "commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use." § 720.302(3)(b). Defendants argue that section 720.302(3)(b) bars the certified counts of Plaintiffs' Second Amended Complaint. However, the Court rules that section 720.302(3)(b) does not bar the certified counts. Avatar recorded the Amended and Restated Master Declaration for Solivita in the Polk County Official Records at Book 9142, Page 1843, which defines the "Club" as "the Solivita Club, including the land and club facilities provided for the Owners pursuant to the provisions of the Club Plan." See Page 13 of 176. The previously assigned judge ruled that the Club Plan is a "governing document" subject to the Homeowners' Association Act. See Order Granting in Part and Denying in Part Defendants' Motion for Final Summary Judgment entered on January 23, 2018, at ¶ 17. The previously assigned judge also ruled that the land and club facilities included in the Club are commercial parcels under section 720.302(3)(b). See Order

Granting in Part and Denying in Part Defendants' Motion for Final Summary Judgment entered on January 23, 2018, at ¶ 24. Defendants argue that this prior finding that the land and facilities are commercial parcels bars the certified claims. However, the previously assigned judge ruled to the contrary and concluded the claims remained viable and should be certified. See Order Granting in Part Plaintiffs' Amended Motion for Class Certification, at 2–3. The Court has independently reviewed the arguments on this point and similarly concludes that the certified claims are viable. The Club Plan is a "governing document" subject to the Homeowners' Association Act. See § 720.301(8)(a). The Club Plan is not subject to section 720.302(3)(b)'s exception of commercial parcels from the Homeowners' Association Act. Avatar recorded the Club Plan against the community's residential parcels, which are subject to chapter 720 and do not fall within section 720.302(3)(b)'s exception of commercial parcels. Ownership of a residential parcel in the community subjects the residential parcel owner to the compulsory payment of Club Dues, including Club Expenses and Club Membership Fees. See Page 138 of 176. This payment of assessments for Club Dues by residential parcel owners is subject to chapter 720 and is not subject to section 720.302(3)(b)'s exception of commercial parcels. If a residential parcel owner fails to pay Club Dues, then the owner's residential parcel is subject to the recording of a lien. See Page 141 of 176. This recording of a lien for unpaid Club Dues against a residential parcel is subject to chapter 720 and is not subject to section 720.302(3)(b)'s exception of commercial parcels. Furthermore, a lien for unpaid Club Dues is subject to foreclosure. See Page 142 of 176. The record shows that Avatar has recorded liens and filed foreclosure actions against residential parcels to collect unpaid Club Dues, and that Avatar cited the Homeowners' Association Act as the basis for its entitlement to foreclose. The foreclosure of a lien on a residential parcel is subject to chapter 720 and is not subject to section 720.302(3)(b)'s exception of commercial parcels.

The Court next addresses section 720.308, which applies to assessments levied under the Homeowners' Association Act. The certified claims include Count 6, which seeks to enjoin Avatar from violating section 720.308, and Count 8, which 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 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, and 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 argue that section 720.302(3)(b)'s exception of commercial parcels from the application of

chapter 720 prevents "Club Dues" from meeting the statutory definition of "assessment." The Court disagrees. Section 720.302(3)(b)'s exception of commercial parcels from the application of chapter 720 does not prevent chapter 720's protections from applying to the *residential* parcels whose owners must pay Club Dues, which if unpaid result in a lien against the residential parcel. Defendants further 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 finds the Club Membership Fee is an "assessment" subject to section 720.308's limitation of assessments to a proportionate share of expenses. The collection of the Club Membership Fee that does not pay any "expenses" and consists entirely of pure profit to Avatar violates section 720.308, Fla. Stat. Thus, the Club Membership Fee is an illegal assessment.

The Court having found the Club Membership Fee as an illegal assessment necessarily finds Avatar cannot avoid compliance with the Act by disclosing an intent to profit from assessments that would violate the statutory protections afforded to members by the Act. Thus, Avatar's waiver and release and estoppel clauses are unenforceable against the members. The Court realizes it denied the Plaintiffs' motion to strike the Defendant's Seventh, Eighth, and Ninth affirmative defenses which deal with waiver, release, and estoppel. However, that ruling was issued before the Court ruled on the pending summary judgment motions. By separate Orders the Court has now granted Plaintiff's Motions for Partial Summary Judgment re: Sections 720.308 and 720.302(3)(b), is herein denying the Defendant's Renewed Motion for Summary Judgment, and concurrently concluding that the waiver, release and estoppel clauses are unenforceable. Thus, the Court now strikes the affirmative defenses based on same.

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 the certified claims. 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).

Defendants are not entitled to judgment as a matter of law on the certified class action claims against Avatar. That does not change under the new Rule 1.510. The claims against Avatar are authorized by section 720.305. The claims are not barred by section 720.302(3)(b)'s exception of commercial parcels. Club Dues are an "assessment" subject to section 720.308's limitation of assessments to a 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.

Therefore, it is **ORDERED AND ADJUDGED** that Defendants' Renewed Motion for Final Summary Judgment is hereby **DENIED**.

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

WAYNE DURDEN, Circuit Court Judge

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