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

Case No: 2015CA-004499-0000-00

PETER JOLLY, an individual,
VICTOR DESTREMPS, an individual,
and ANNETTE BROWN, an individual

Plaintiffs,

v.

ASSOCIATION OF POINCIANA VILLAGES, Inc.,a
Florida not-for-profit corporation, AVATAR PROPERTIES
INC., a Florida corporation, and
POINCIANA VILLAGE ONE ASSOCIATION, INC., a Florida
not-for-profit corporation,

Defendants.
_______________________________________/

DEFENDANT AVATAR PROPERTIES INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT WITH PREJUDICE

Defendant, AVATAR PROPERTIES, INC. ("Avatar"), by and through undersigned counsel, hereby files this Motion to Dismiss Plaintiffs' *Third Amended Complaint* pursuant to Florida Rule of Civil Procedure 1.140 and in support thereof states:

Facts and Procedural Posture

1. The original Complaint to this action was filed on December 22, 2015, and the singular Plaintiff asserting claims in it was Friends of Poinciana Village ("FOPV"). Motions to Dismiss filed on behalf of the Defendants in response to that Complaint were based principally on lack of standing and failure to comply with statutory prerequisites, and were granted without prejudice by the Court, allowing leave to amend, which resulted in Plaintiff's *Amended Complaint* being filed on April 26, 2016.

2. In the *Amended Complaint,* specific individuals were added to the style of the case – Peter Jolly, Victor Destremps, and Annette Brown, et al. – who were described "as members of the Friends of Poinciana Villages, Inc., and property owners under the Association of Poinciana Villages, collectively as the FOPV." However, insofar as the Plaintiff effectively remained Friends of Poinciana Village, Defendants again filed Motions to Dismiss based in part on lack of standing. Thereafter, pursuant to stipulations reached between the parties and the Court's June 9, 2016 Agreed Order, Plaintiffs again amended the Complaint.

3. Notwithstanding having yet another opportunity to state a legally and technically valid cause of action, Plaintiffs failed to cure deficiencies found in their prior efforts, and in their June 20, 2016 *Second Amended Complaint* filed yet another Complaint subject to dismissal. This resulted in the Court's October 14, 2016 Order granting Defendants' Motions to Dismiss.

4. In Plaintiffs' *Third Amended Complaint,* most of the claims remain unchanged from prior incarnations, with claims against Avatar, a developer, predicated on alleged rights under Chapter 720 *Fla. Stat.* The allegations against Avatar in this latest Complaint are limited to Count IV, for Breach of Contract, and Count V, Breach of Third Party Beneficiary Contract. Here, Plaintiffs once again have failed to state a legally sufficient cause of action, and as such Avatar respectfully submits a dismissal with finality is warranted.

Standard of Review

The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022 (Fla. 4th DCA 1996). In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all

well-pleaded allegations. *City of Gainesville v. State Dept. of Transp.*, 778 So. 2d 519 (Fla. 1st DCA 2001); *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-61 (Fla. 5th DCA 1996); *Provence,* 676 So. 2d at 1024. It is not for the Court to speculate whether the allegations are true or whether the pleader has the ability to prove them. *City of Gainesville,* 778 So. 2d at 519; *Provence,* 676 So. 2d at 1022. Thus, "[t]he question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the Plaintiff would be entitled to the relief requested." *Cintron*, 681 So. 2d at 860-61. While lack of standing is an affirmative defense ordinarily not appropriately raised in a Motion to Dismiss, "an exception is made when the face of the complaint is sufficient to demonstrate the existence of the defense." *Wildflower, LLC v. St. Johns River Water Mgmt. Dist.*, 179 So. 3d 369, 373 (Fla. 5th DCA 2015).

Summary of Argument

Avatar respectfully moves this Honorable Court pursuant to *Fla.R.Civ.P. 1.140(b)* for an Order Dismissing with Prejudice Counts IV and V of Plaintiffs' *Third Amended Complaint,* for failure to state a cause of action upon which relief can be granted.

Count IV, Breach of Contract, fails to state a cause of action against Avatar because Plaintiffs have at no time been parties to the June 5, 1985 Agreement-which they attached to their *Third Amended Complaint.*

Count V, Breach of Third Party Beneficiary Contract also fails to state a cause of action against Avatar, as there are no allegations by Plaintiffs that the property removed was "real property owned by Avatar" subject to the property removal restriction contained in section 3(b) of the June 5, 1985 Agreement.

Moreover, Count V fails because Plaintiffs do not allege with any specificity whatsoever, or with any articulable detail of any kind, how they were "damaged" by the claims as alleged.

Count V also fails because Plaintiffs did not comply with Section 720.311, *Fla. Stat.*, which requires mandatory pre-suit mediation requirements before filing suit against Avatar. Therefore, Plaintiffs have no authority whatsoever to file this lawsuit against Avatar, as set forth in Section 720.311(2)(a) *Fla. Stat.* and as explained in *Udick v. Harbor Hills Dev., L.P.*, 5D15-1062, 2016 WL 3654376, at *1 (Fla. 5th DCA July 8, 2016).

Count IV – Breach of Contract by Defendants Avatar

Plaintiffs allege that Avatar breached the June 5, 1985 Agreement, and in so doing rely on their allegation in paragraph 73 of the *Third Amended Complaint* that "Plaintiffs and Defendants entered into a valid, binding, and enforceable contract." In an effort to validate that claim, they attach the 1985 Agreement to the *Third Amended Complaint* as "Exhibit A." However, that agreement clearly and expressly contradicts and disproves Plaintiffs' assertion that they were parties to this contract. In fact, in paragraph 79 of their *Third Amended Complaint*, they expressly admit as much, in alleging "Plaintiffs are not parties to the contract."

"Any exhibit attached to a pleading shall be considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b) (2015). In considering a motion to dismiss, the trial court must consider all exhibits attached to and incorporated in the complaint. *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So. 2d 736, 736 (Fla. 3d DCA 1971). Where allegations in the complaint are contradicted by exhibits attached to it, the plain meaning of the exhibits control and may be the basis for a motion to dismiss. *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So. 2d 399, 401 (Fla. 2d DCA 2000).

Exhibit "A" reflects the 1985 Agreement was entered into between Avatar and the Association of Poinciana Villages and Villages One through Nine. A plain reading of the document reflects there can be no argument that Plaintiffs or any individual owners were parties

to the contract. The plain meaning of this Exhibit necessarily controls and provides the basis for dismissal of Count IV of the *Third Amended Complaint.*

Moreover, Fla. Jury Inst. 416.4 *Breach of Contract – Essential Factual Elements,* reads in pertinent part: "[t]o recover damages from (defendant) for breach of contract, (claimant) must prove all of the following: 1. (Claimant) and (defendant) entered into a contract;..." None of the three Plaintiffs entered into the June 5, 1985 Agreement, and as such they cannot possibly state a valid cause of action for breach of contract against Avatar. While Plaintiffs might argue in the alternative, as they have attempted to, that as homeowners they are third party beneficiaries pursuant to paragraph 6 of the 1985 Agreement titled "Third Party Beneficiaries," which reads: "the parties acknowledge that this Agreement is intended to inure to the benefit of all owners of property within Poinciana," they may not use their third party beneficiary status to assert that they personally entered into the 1985 Agreement. This is inarguable, in that the jury instruction for third party beneficiary claims sets forth that an essential element of third party beneficiary claims is that (plaintiffs) not be a party to the contract. See Fla. Jury Inst. 416.2, *Third Party Beneficiary.*

<u>Count V – Breach of Third Party Beneficiary Contract by Avatar</u>

Plaintiffs allege in paragraph 81 of their *Third Amended Complaint* that Avatar materially breached the contract by failing to turn over control of the APV to its members as required in paragraph 4 of the 1985 Agreement, by failing to comply with paragraph 3 of the 1985 Agreement which prohibits Avatar's participation in dissolution of Village 10 and the partial dissolution of Village 4, removing land from the effects of the APV restrictions, and failing to properly amend the 1985 Agreement when Avatar took part in wrongfully removing parcels/acreage/land from Village 4 in 2011 – 2012.

Importantly, while Section 3(b) of the 1985 Agreement, pertaining to removal of land, reads: "Avatar shall take no action, not consent to or agree to any action, which would result in any real property owned by Avatar being removed from the effect of the restrictions." However, the *Third Amended Complaint* is utterly and completely devoid of any allegations whatsoever that any property removed was "real property owned by Avatar," and as such Plaintiffs fail to state a valid claim as third party beneficiaries.

Further, Plaintiffs fail to provide a short and plain statement as to how they were damaged by Avatar's "failing to turn over control of the APV to its members as required...," or Avatar's "...participation in the dissolution of Village 10 and the partial dissolution of Village 4 removing land from the effects of the APV restrictions, and failing to properly amend the 1985 Agreement when Avatar took part in wrongfully removing parcels/acreage/land from Village 4 in 2011-2012." This is particularly problematic for Plaintiffs when under scrutiny for a Motion to Dismiss in part pursuant to Fla.R.Civ.P. 1.110(b)(2), when paragraphs two, three and four of the *Third Amended Complaint* reflect Plaintiffs are owners in Villages 1 and 5, not Village 4.

Plaintiffs failed to offer the statutorily required presuit mediation

Plaintiffs' claims are subject to the mandatory alternative dispute resolution provisions of Florida statute section 720.311, which imposes a condition precedent to Plaintiffs filing their suit against Avatar. Section 720.311(2)(a) states, "[a]n aggrieved party shall serve on the responding party a written demand to participate in pre-suit mediation." The section goes on to provide the written form used for demanding such mediation. Here, Plaintiffs have never demanded pre-suit mediation from Avatar in writing or otherwise.

In a similar case, a homeowner sued a developer for breach of contract, unlawful amendment to the governing documents, and breach of fiduciary duty. *See Udick v. Harbor Hills*

Dev., L.P., No. 2010-CA-5134 (Fla. 5th Cir. Ct. 2010). In that case, the homeowner offered the developer pre-suit mediation, but the developer declined to attend. *Udick v. Harbor Hills Dev., L.P.*, 5D15-1062, 2016 WL 3654376, at *1 (Fla. 5th DCA July 8, 2016). After the developer prevailed on the merits, it moved for attorney's fees, which the trial court granted. The Fifth District Court of Appeal held it was not entitled to attorney's fees because it failed to attend the offered presuit mediation as required by section 720.311. *Id.* The Fifth DCA has held that the presuit mediation requirement applies to developers, and Plaintiffs failed to satisfy that requirement in this case. Because it is a prerequisite to filing suit, Plaintiffs' *Third Amended Complaint* must be dismissed as to Avatar. *See Conrad v Hidden Lakes Homeowners Association, Inc.*, No. 502004CC013458XXXXSB (Fla. 15th Cir. Ct., July 13, 2007)(stating the presuit mediation requirement is a condition precedent to filing the complaint).

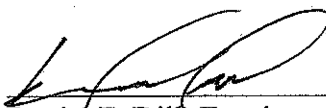
Demand for Attorneys' Fees and Costs

DEMAND FOR ATTORNEYS' FEES & COSTS – Avatar has hired undersigned counsel and his law firm to represent and defend it against the claims made by Plaintiff and has agreed to pay a reasonable attorney fee for his and his law firm's services; therefore, Avatar demands Plaintiff reimburse it for its reasonable attorneys' fees and costs.

WHEREFORE, Defendant AVATAR PROPERTIES, INC. moves this Honorable Court to dismiss Plaintiffs' *Third Amended Complaint* based on the foregoing reasons and respectfully requests an Order be entered awarding attorney's fees and costs incurred in defending against claims asserted by Plaintiffs, and for whatever other remedy deemed just and proper by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been presented to the Clerk of Court for filing and uploading to the eFiling Portal. I further certify that a copy of the foregoing was sent to: Jennifer A. Englert, Esquire, via email at JEnglert@theorlandolawgroup.com, Brian J. Moran, Esq., via email at bmoran@morankidd.com, Christopher R. Parkinson, Esq., via email at cparkinson@morankidd.com and Thomas R. Slaten, Jr., Esq., via email at pleadings@larsenandassociates.com this 14th day of November, 2016.



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