

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

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

Plaintiffs,

Case No.: 2015-CA-004499

Section: 07

v.

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

Defendants.

**ORDER GRANTING IN PART DEFENDANTS' MOTION(S) TO DISMISS
[PLAINTIFFS'] THIRD AMENDED COMPLAINT**

THIS CAUSE came before the Court on Defendants,' ASSOCIATION OF POINCIANA VILLAGES, a Fla. not-for-profit corporation, *Motion to Dismiss with Prejudice Plaintiff's Third Amended Complaint*, filed November 14, 2016, and *Memorandum of Law in Support of Its Motion*, filed December 6, 2016; AVATAR PROPERTIES, INC., a Fla. corporation, *Motion to Dismiss Plaintiff's Third Amended Complaint with Prejudice*, filed November 14, 2016; and POINCIANA VILLAGE ONE ASSOCIATION, a Fla. not-for-profit corporation, *Motion to Dismiss Third Amended Complaint*, filed November 14, 2016. The Court, having reviewed the Motion(s) and Memorandum, the record for the instant action, applicable statutory and case law, having heard the arguments of the Parties at a hearing on February 3, 2017, and is otherwise fully informed in the matter, finds as follows:

1. Per their *Third Amended Complaint*, filed November 4, 2016, Plaintiffs, as individual home owners within the subject community and members of Defendant ASSOCIATION OF POINCIANA VILLAGES, generally alleged damages from Defendants' varied violations of certain governing documents for the subject residential community development, being the AGREEMENT (hereafter the "1985 Agreement") and the ARTICLES OF INCORPORATION AND BY-LAWS OF ASSOCIATION OF POINCIANA VILLAGES, INC. AND POINCIANA VILLAGE ASSOCIATION, INC. (hereafter the "Association of Poinciana Village(s) By-Laws and Articles of Incorporation"); pleading breach of contract, breach of fiduciary duty, and injunctive relief with Plaintiffs as third party beneficiaries of

the 1985 Agreement and Association of Poinciana Village(s) By-Laws and Articles of Incorporation. *See generally* Third Am. Compl. & Exs. A & F.

2. Plaintiffs voluntarily withdrew Counts I, IV, VI, breach of contract claims, against all Defendants. *See* Notice(s) of Voluntary Dismissal of Count(s) [I, IV, & VI] of Third Am. Compl. (filed Dec. 30, 2016 & Feb. 3, 2017 respectively).
3. As to Count III, breach of third-party beneficiary contract against Defendant ASSOCIATION OF POINCIANA VILLAGES, the Court finds that Plaintiffs failed to sufficiently allege how Plaintiffs, homeowners in “Village One” and “Village Five,” were damaged by removal of parcels of “Village Four” from ASSOCIATION OF POINCIANA VILLAGES. *See* Fla. R. Civ. P. 1.110(b)(2) (2017).
4. As to Count V, breach of third-party beneficiary contract against Defendant AVATAR PROPERTIES, INC., the Court finds that Plaintiffs failed to sufficiently allege how Plaintiffs, homeowners in “Village One” and “Village Five,” were damaged by failing to turn over control of Defendant ASSOCIATION OF POINCIANA VILLAGES to its members, removal of parcels of “Village Four” in the year(s) 2011-2012, dissolution of “Village Ten,” and partial dissolution of “Village Four.” *See* Fla. R. Civ. P. 1.110(b)(2).
5. A. As to Count VII, breach of fiduciary duty against Defendant POINCIANA VILLAGE ONE ASSOCIATION, the Court first finds that Plaintiffs failed to A) distinguish Plaintiff PETER JOLLY’s, as the only member of POINCIANA VILLAGE ONE ASSOCIATION, claim(s) against Defendant POINCIANA VILLAGE ONE ASSOCIATION from that of Plaintiffs VICTOR DESTREMPES and ANNETTE BROWN, who are not members thereof; B) distinguish which of the general allegations, paragraphs one through fifty-two of the *Third Amended Complaint* incorporated into Count VII, applied to Defendant POINCIANA VILLAGE ONE ASSOCIATION; C) and, specifically, distinguish which of the paragraphs forty-one through forty-five (titled “Financial and Fiduciary Duties Breached”) applied to Defendant POINCIANA VILLAGE ONE ASSOCIATION. *See* Fla. R. Civ. P. 1.110 (b)(2).
- B. Second, paragraphs thirty-one and thirty-two referenced “Article V of the Village One By-Laws” as providing notice to members of certain meetings. In paragraph twenty-nine, Plaintiffs referenced Exhibit “F,” the Association of Poinciana Village(s) By-Laws and Articles of Incorporation which does not provide for such notice. In paragraph twenty-nine, Plaintiffs referenced Fla. Stat. sec. 702.306(5) which generally provides for notice to members. The Court finds Plaintiffs failed to sufficiently allege failure of required notice to members of certain meetings, considering the controlling documents attached to the *Third Amended Complaint*. *See Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240, 1242 (Fla. 2000).

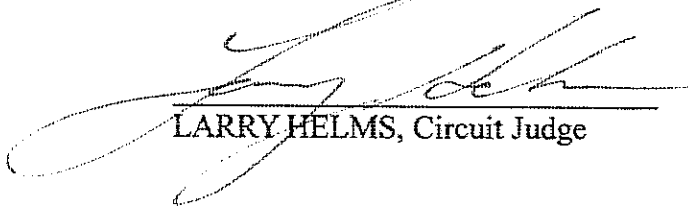
- C. Third, the Court finds that Plaintiffs failed to distinguish the acts/omissions in paragraphs thirty-five and thirty-seven through thirty-nine from what is reasonably understood to constitute an “election dispute” under Fla. Stat. sec. 720.306(9)(c) (2017) which is subject to mandatory binding arbitration by an administrative agency.
6. A. As to Count VIII, preliminary injunction against Defendants ASSOCIATION OF POINCIANA VILLAGES and POINCIANA VILLAGE ONE ASSOCIATION, the Court first finds the allegations of “no adequate remedy at law” and “irreparable harm” in paragraphs ninety-five and ninety-six of the *Third Amended Complaint* to be conclusory and contingent. *See generally First National Bank in St. Petersburg v. Ferris* (156 So. 2d 421 (Fla. 2d DCA 1963)).
- B. Second, the Court finds that Plaintiffs failed to allege the “effective date of the root of title” from which to measure Defendants’ failure to renew their covenants, conditions, and restrictions every thirty years by filing for record a written notice. *See Fla. Stat. sec. 712.305(1)* (2017).
7. Considering that Plaintiffs’ status has changed from that of members of an association to individual Plaintiffs in their *Third Amended Complaint*, the Court finds appropriate to allow Plaintiffs leave to amend their complaint.

Therefore, it is **ORDERED AND ADJUDGED**, pursuant to the Court’s findings and law above, as follows:

- A. Defendants, ASSOCIATION OF POINCIANA VILLAGES, a Fla. not-for-profit corporation, *Motion to Dismiss with Prejudice Plaintiff’s Third Amended Complaint*; AVATAR PROPERTIES, INC., a Fla. corporation, *Motion to Dismiss Plaintiff’s Third Amended Complaint with Prejudice*; and POINCIANA VILLAGE ONE ASSOCIATION, a Fla. not-for-profit corporation, *Motion to Dismiss Third Amended Complaint* are hereby **GRANTED in part**.
- B. Counts III, V, VII, and VIII of the *Third Amended Complaint* of Plaintiffs, PETER JOLLY, an individual, VICTOR DESTREMPS, an individual, and ANNETTE BROWN, an individual, are hereby **DISMISSED without prejudice** for failing to state cause(s) of action. Plaintiffs shall have thirty (30) days from the date of this Order to amend their *Third Amended Complaint*.
- C. Again, the Court warns Plaintiffs that failure to sufficiently state cause(s) of action and cure pleading deficiencies in accord with the minimal pleading standards of Fla. Rule Civ. P. 1.110 (2016) in any subsequent amended complaint risks dismissal with prejudice and no leave to amend.

The Court reserves jurisdiction of the subject matter and of the Parties for such other purposes as may be necessary and proper.

DONE AND ORDERED in Bartow, Polk County, Florida, on this 23rd day of March, 2017.


LARRY HELMS, Circuit Judge

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