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' FOURTH AMENDED COMPLAINT WITH PREJUDICE

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

Introduction

1. Avatar respectfully moves this Honorable Court pursuant to *Fla.R.Civ.P.*1.140(b)(6) for an order dismissing with prejudice Counts IV and V of Plaintiffs' *Fourth Amended Complaint.*

2. As with Plaintiff's original *Complaint, Amended Complaint, Second Amended Complaint* and *Third Amended Complaint*, Plaintiffs' *Fourth Amended Complaint* fails to state a cause of action upon which relief can be granted against Avatar.

3. As it relates to Avatar, Plaintiffs' *Fourth Amended Complaint* purportedly seeks damages for breach of contract and/or breach of third party beneficiary contract, effectively the same claims as alleged by Plaintiffs in the previous complaints.

Facts and Procedural Posture

4. 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.

5. 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.

6. Notwithstanding having yet another opportunity to state a legally and technically valid cause of action, Plaintiffs failed to cure the deficiencies of 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.

7. Importantly, in dismissing the *Second Amended Complaint*, this Honorable Court made the following finding:

> After a careful review of the court record, no dismissal ordered entered by the Court clearly warned Plaintiffs that Plaintiffs risk dismissal with prejudice and without leave to amend if their subsequent amended complaint(s) continue to unsuccessfully state the same cause(s) of action. *See Feigin v. Hospital Staffing Services, Inc.* 569 So.2d 941 (Fla. 4th DCA 1990) (The appeals court affirmed the trial court's dismissal with prejudice where "the seventh complaint filed over a four-year-period and the record clearly reflects the court's warning that this was the plaintiff's 'last bite of the apple.'"). Consequently, in an abundance of caution, the Court shall permit Plaintiffs leave to amend the *Second Amended Complaint* to sufficiently state cause(s) of action.

In making this finding, the Court specifically ordered, among other things, as follows:

> 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.

8. In Plaintiffs' *Third Amended Complaint*, most of the claims remained unchanged from prior incarnations, with claims against Avatar, a developer, predicated on alleged rights under Chapter 720 *Fla. Stat.* The allegations against Avatar in that Complaint were limited to Count IV, for Breach of Contract, and Count V, Breach of Third Party Beneficiary Contract.

9. In its *Order Granting in Part Defendants' Motion(s) to Dismiss [Plaintiffs'] Third Amended Complaint*, the Court once again issued its warning to 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."

10. Curiously, on the same day as, but just prior to the February 3, 2017 hearing on Defendants' Motions to Dismiss Plaintiffs' *Third Amended Complaint,* Plaintiffs filed a Voluntary Dismissal of Count IV for breach of contract as to Avatar, as well as Count VI, breach of contract as to Village One.

11. Inexplicably, Plaintiffs have now added the claim for breach of contract back to their *Fourth Amended Complaint*, while once again alleging breach of third party beneficiary contract against Avatar. Plaintiffs' claims once again remain virtually unchanged from prior versions, with the claims against Avatar, a developer, predicated on alleged rights under Chapter 720 *Fla. Stat.*

Standard of Review

12. 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.

13. 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.

14. 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

15. 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' *Fourth Amended Complaint*, for failure to state a cause of action upon which relief can be granted.

16. 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 *Fourth Amended Complaint.*

17. Counts IV and V, Breach of Contract and Breach of Third Party Beneficiary Contract, respectively, also fail 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.

18. Moreover, Counts IV and V fail because Plaintiffs once again do not allege with any specificity or with any articulable detail of any kind how they were damaged by the claims as alleged.

19. Counts IV and V also fail 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 Defendant Avatar

20. Plaintiffs allege that Avatar breached the June 5, 1985 Agreement, and in so doing rely principally on their allegation in paragraph 74 of the *Fourth 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 *Fourth Amended Complaint* as "Exhibit A." However, that agreement clearly and expressly contradicts and disproves Plaintiffs' assertion that they were parties to this contract.

21. Amazingly, in paragraph 84 of their *Fourth Amended Complaint*, Plaintiffs expressly admit as much, in alleging "Plaintiffs are not parties to the contract."

22. "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).

23. 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 *Fourth Amended Complaint*.

24. 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.*

25. Here, Plaintiffs' claims for breach of contract are not only contradicted by the exhibits to the *Fourth Amended Complaint*, but also by their own allegations as set forth in paragraph 84.

26. Based on the foregoing and the extensive procedural history to this action, Avatar respectfully submits Count IV of Plaintiffs' *Fourth Amended Complaint* must be dismissed with prejudice.

Count V – Breach of Third Party Beneficiary Contract by Avatar

27. Exactly as they have in prior incarnations, Plaintiffs allege in paragraph 86 of their *Fourth 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.

Plaintiffs once again fail to allege any property at issue was real property owned by Avatar

28. Importantly, 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." 15.

29. As with Plaintiffs' prior efforts, the *Fourth 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.

30. Plaintiffs' failure to allege the property at issues was owned by Avatar, which they know cannot be claimed in good faith, is a decisively fatal flaw to the *Fourth Amended Complaint,* as portions of the 1985 Agreement which Plaintiffs centrally rely on in their attempts to prosecute this cause only governs Avatar if it is.

31. Based on the foregoing and in view of the extensive procedural history to this matter, Avatar respectfully submits Count IV of Plaintiffs' *Fourth Amended Complaint* must be dismissed with prejudice.

Plaintiffs fail to allege damages to sufficiently withstand scrutiny under Fla.R.Civ.P. 1.110(b)(2)

32. Plaintiffs' *Third Amended Complaint* was dismissed in part based on their failure to adequately allege damages so as to state a valid cause of action. In that version of the complaint, the allegations as to damages for breach of third party beneficiary contract by Avatar was limited to one sentence, which alleged "Plaintiffs have been damaged by Defendants breach in an unknown sum of money to be determined at trial."

33. Their *Fourth Amended Complaint* expands only minimally on such allegations, beginning paragraph 87 with "Plaintiffs have been damaged by Defendants breach of the contract and partial dissolution and removal of parcels from Village 4 and complete dissolution of Village 10 in an unknown sum of money to be determined at trial…"

34. Notwithstanding this paragraph serving as an effort by Plaintiffs to claim damages pursuant to an alleged breach of *Third Party Beneficiary* contract by Avatar, they attempt to claim damages based upon "Defendants breach of the contract." As such, Plaintiffs make no effort whatsoever to allege how they were damaged *by Avatar* in their purported capacity as Third Party Beneficiaries.

35. Moreover, in paragraphs 2, 3 and 4 of the *Fourth Amended Complaint*, Plaintiffs claim to be property and/or members of Villages 1 and 5, yet fail to allege or otherwise establish any nexus elsewhere in the Complaint between "…Defendants…partial dissolution and removal of parcels from **Village 4** and complete dissolution of **Village 10**…" and their ownership/membership status with **Villages 1 and 5**.

36. Further, the balance of paragraph 87 of Plaintiffs' *Fourth Amended Complaint* effectively serves as nothing more than a regurgitation of ***why*** Plaintiffs feel they were damaged, rather than providing any articulable basis as to ***how*** they claim to have been damaged. (See Plaintiffs' allegations in paragraph 87 which read "…by the continuous and frequent manipulation of the votes, voting procedure and number of votes apportioned to Avatar which in turn permit Avatar to silence the thousands of members of the APV membership by overriding their votes and maintaining exclusive control over the APV.")

37. The allegations as set forth above utterly fail to allege in any way whatsoever how Plaintiffs believe they were damaged relating to the claimed breach of Third Party Beneficiary contract. Further, the references to "frequent manipulation of the votes, voting procedure and number of votes apportioned" is the only reference in this Count as to any such allegations, thereby providing no context or basis for Avatar to interpret the purported claim for damages.

38. Notwithstanding the foregoing paragraph, Plaintiffs' claims relating to manipulation of votes, voting procedures, etc., can only be interpreted to relate to APV elections, which are not subject to the jurisdiction of this Court. Instead, the remedy for any adoption or implementation of allegedly improper election procedures is to petition for election arbitration pursuant to Sections 720.306(a)(c) and 720.311(1), *Fla. Stat.* through the Department of Business and Professional Regulation, Division of Condominiums, which has exclusive jurisdiction to adjudicate homeowners' association election disputes.

39. Section 720.306(9)(c) *Fla. Stat.* provides "Any election dispute between a member and an association must be submitted to mandatory binding arbitration with the Division."

40. Plaintiffs further allege in paragraph 87 of the *Fourth Amended Complaint* that "...by a lower assessment fee base due to the removal of the parcels thereby increasing fees on all membership without the members' vote or in compliance with the procedures set forth in the 1985 Agreement..." Here again, Plaintiffs fail to establish any nexus between alleged issues relating to Village 4 and Village 10 and their status as owners/members of Villages 1 and 5. Moreover, they fail to allege damages in any articulable fashion or otherwise provide a basis for this matter to, for example, be under the purview of this Circuit Court's jurisdiction as opposed to county court.

41. Plaintiffs further fail to allege how they were damaged individually, instead limiting their vague and ambiguous claims for damages to "...increasing fees on all the membership without the members' vote..."

42. Plaintiffs have been provided an abundance of opportunities to state a valid cause of action, and have failed at every turn. Given the foregoing, and extensive procedural history relating to this matter, Avatar respectfully submits Count V of Plaintiffs' *Fourth Amended Complaint* must be dismissed with prejudice.

Counts IV and V must be dismissed based on Plaintiffs' failure to offer statutorily required presuit mediation.

43. 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.

44. 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).

45. 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.*

46. The Fifth DCA has clearly held that the presuit mediation requirement applies to developers. Plaintiffs failed to satisfy that requirement in this case. Because it is a prerequisite to filing suit, Plaintiffs' *Fourth 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).

47. *Udick* serves as uncontroverted legal authority in the state of Florida, and directly pertains to Plaintiffs' claims directed against Avatar in their Fourth Amended Complaint, specifically Counts IV and V. As such, and given Plaintiffs' failure to at any time offer Avatar statutorily required pre-suit mediation, Avatar respectfully submits Counts IV and V must be dismissed with prejudice.

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 Counts IV and V of Plaintiffs' *Fourth 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 4th day of May, 2017.

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