

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, et al.,

Defendants.

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**DEFENDANT ASSOCIATION OF POINCIANA VILLAGES, INC.'S MOTION TO  
DISMISS WITH PREJUDICE PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendant, ASSOCIATION OF POINCIANA VILLAGES, INC. (hereinafter "APV"),  
by and through its undersigned attorney, hereby files this Motion to Dismiss with Prejudice  
Counts I, II, III and VIII of Plaintiffs' Third Amended Complaint pursuant to Fla. R. Civ. P.  
1.140 and in support thereof states as follows:

1. APV moves this Court pursuant to Fla. R. Civ. P. 1.140(b)(6) for an order  
dismissing with prejudice Counts I, II, III and VIII of Plaintiffs' Third Amended Complaint  
because, like all of the prior complaints, Plaintiffs' Third Amended Complaint fails to state any  
claims upon which relief can be granted against Defendant APV.

2. Plaintiffs seek damages from Defendant APV for Count I, breach of contract;  
Count II, breach of fiduciary duty; and Count III, breach of third-party beneficiary under a  
contract.

3. Plaintiffs also seek a "preliminary injunction" against Defendant APV in Count

VIII, “preliminary injunction against Defendant APV and Defendant Village One”.

### **Summary of Arguments**

4. Count I, breach of contract, fails to state a cause of action against APV because the Plaintiffs are not parties to the June 5, 1985 Agreement attached to the Third Amended Complaint; therefore Plaintiffs may not make a claim for breach of the Agreement.

5. Count II, breach of fiduciary duty, fails to state a cause of action against APV because the statute cited by the Plaintiffs, Section 720.303(1), Fla. Stat., only creates a fiduciary relationship between the Plaintiffs and “[t]he officers and directors of an association”, not APV.

6. Count III, breach of third-party beneficiary contract, fails to state a cause of action against APV because the June 5, 1985 Agreement does not prohibit APV from removing property from its jurisdiction.

7. Count III also fails because it does not allege or evidence 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.

8. Count III further fails because Plaintiffs do not allege with any specificity, or even the barest of details, how they were “damaged” by the “Amendment to 1985 Agreement”.

9. In addition, Count III fails because Plaintiffs did not comply with Section 720.311, Fla. Stat.’s mandatory pre-suit mediation requirements before filing suit against APV and thus Chapter 720, Fla. Stat. did not authorize Plaintiffs to file suit against APV.

10. Count VIII fails to state a cause of action against APV for a preliminary or temporary injunction because Plaintiffs do not allege any “immediate” harm as required by Fla. R. Civ. P. 1.610(a)(1)A.

11. Count VIII further fails because, although paragraph 95 claims that Plaintiffs lack any adequate remedy at law, paragraphs 96, 97 and 98 of Count VIII seek to temporarily enjoin APV's collection of "fees and assessments", "collection actions" and "additional fees and penalties", for a \$232.34 bill which is a money damage claim, for which there is a remedy at law.

12. Count VIII also fails because Plaintiffs fail to identify or attach the covenants, conditions or restrictions Plaintiffs allege are subject to renewal or revival under Chapter 712, Fla. Stat.

### **Count I – Breach of Contract by Defendant APV**

13. Plaintiffs allege that Defendant APV breached the June 5, 1985 Agreement, which is attached to the Third Amended Complaint as "Exhibit A".

14. Paragraph 54 of the Third Amended Complaint claims that "Plaintiffs and Defendants entered into a valid, binding and enforceable contract."

15. However, the June 5, 1985 Agreement clearly and expressly contradicts and disproves Plaintiffs' assertion that Plaintiffs entered into the June 5, 1985 Agreement.

16. In addition, paragraph 68 of Plaintiffs' Third Amended Complaint states, "Plaintiffs are not parties to the contract."

17. The parties to the June 5, 1985 Agreement are identified in the first paragraph of the Agreement and include Defendant APV, Defendant AVATAR PROPERTIES, INC. and Defendant POINCIANA VILLAGE ONE ASSOCIATION, INC. but none of the three Plaintiffs.

18. Where allegations in a complaint are contradicted by its exhibits, the plain meaning of the exhibits control and may be the basis for a motion to dismiss per *Hunt Ridge at*

*Tall Pines, Inc. v Hall*, 766 So.2d 399, 401 (Fla. 2d DCA 2000). *See also, Franz Tractor Company v J.I. Case Company*, 566 So.2d 524 (Fla. 2d DCA 1990) (Action dismissed because agreement attached to complaint contradicted allegations in complaint.)

19. Fla. Jury Inst. 416.4 Breach of Contract – Essential Factual Elements, states that, “[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; . . .”

20. As none of the three Plaintiffs entered into the June 5, 1985 Agreement none of the three Plaintiffs can state a cause of action for breach of contract against Defendant APV.

21. Plaintiffs may argue that as homeowners they are third party beneficiaries per paragraph six of the Agreement titled “Third Party Beneficiaries”, which states, “The parties acknowledge that this Agreement is intended to inure to the benefit of all owners of property within Poinciana.”

22. However, Fla. Jury Inst. 416.2, Third Party Beneficiary, declares that an essential element of this claim is “(Claimant) is not a party to the contract”; therefore, Plaintiffs may not use their third party beneficiary status to assert that they entered into the June 5, 1985 Agreement.

23. In summary, Count I should be dismissed because Plaintiffs did not enter into the June 5, 1985 Agreement, which is an essential element of their breach of contract claim.

### **Count II – Breach of Fiduciary Duty by Defendant APV**

24. Paragraph 60 of Count II of the Third Amended Complaint asserts that “Defendant, APV, owed Plaintiffs a fiduciary duty of care as expressly stated in pertinent part in Fla. Stat. 720.303(1): ‘The officers and directors of an association have a fiduciary relationship to the members who are served by the association.’”

25. While the quoted statute creates a “fiduciary relationship” between the “officers and directors” of APV “to the members who are served by the association”, it does not create a fiduciary relationship between APV and its members or APV and the three individual Plaintiffs.

26. Furthermore, as a matter of law, a homeowners’ association does not owe a fiduciary duty to individual members of its association. *Harvick v Oak Hammock Preserve Community Owners Association, Inc.*, 2015 WL 667985 (M.D. Fla. 2015) (An individual homeowner cannot impose a liability against a homeowners’ association for breach of fiduciary duty solely due to his or her status as a member of the association.)

27. As the plain and unambiguous language in Section 720.303(1), Fla. Stat. does not create a fiduciary duty by APV in favor of the individual Plaintiffs; Plaintiffs fail to state a valid cause of action for breach of Section 720.303(1), Fla. Stat. fiduciary duty against APV.

**Count III – Breach of Third-Party Beneficiary Contract by Defendant APV**

28. Paragraph 70 of Count III claims that “Defendant APV materially breached the contract when APV wrongfully removed parcels of Village 4 from the APV in January of 2012 without properly achieving the votes necessary from the various Village Directors consenting to such amendment to the 1985 Agreement.”

29. Regarding removal of land from APV, Section 3(b) of the June 5, 1985 Agreement, titled “Removal of Land”, states, “**Avatar** shall take no action, nor 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.” (Emphasis added)

30. As evidenced by the plain meaning of Section 3(b), the June 5, 1985 Agreement does not prohibit APV from removing real property from APV’s restrictions.

31. As addressed above regarding Count I, where allegations in a complaint are

contradicted by its exhibits, the plain meaning of the exhibits control and may be the basis for a motion to dismiss per *Hunt Ridge at Tall Pines, Inc. v Hall*, 766 So.2d at 401.

32. In addition, Plaintiffs fail to allege that the property removed from APV's restrictions was "real property owned by Avatar", and thus Plaintiffs fail to state a valid claim.

33. Furthermore, Plaintiffs fail to provide a short and plain statement regarding how they were damaged by the removal of "parcels of Village 4 from the APV", which is required by Fla. R. Civ. P. 1.110(b)(2), especially when paragraphs 2, 3 and 4 of the Third Amended Complaint show that Plaintiffs are owners in Villages One and Five, not Village Four.

34. Additional grounds to dismiss Count III include that the alleged breach of contract was the January 2012 "amendment to 1985 Agreement" attached to the Third Amended Complaint, which subjects Plaintiffs' Count III claims to Section 720.311, Fla. Stat.'s mandatory pre-suit mediation process.

35. Section 720.311(2)(a), Fla. Stat. provides in part regarding pre-suit mediation,

**Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of a demand for presuit mediation served by an aggrieved party before the dispute is filed in court.**  
(Emphasis added)

36. Paragraph 70 of Count III states that the removal of property from Village Four was an "amendment to the 1985 Agreement", which constitutes "amendments to the association documents" subject to Section 720.311(2)(a), Fla. Stat.

37. In addition, the allegations related to the executive committee meetings and vote for removal of property described in paragraphs 16 – 27 of the Third Amended Complaint under

the heading “Wrongful Removal of Village 4 Property from the APV” all involve “meetings of the board and committees appointed by the board.”

38. Furthermore, Count III’s claims concerning “when APV wrongfully removed parcels of Village 4 from the APV”, relate to the “use of or changes to the parcel or the common areas”.

39. Plaintiffs’ Count III claims therefore must be submitted to pre-suit mediation per Section 720.311(2)(a), Fla. Stat., which further provides, “[a]n aggrieved party shall serve on the responding party a written demand to participate in presuit mediation” in substantially the following form . . .”

40. Paragraph 12 of the Third Amended Complaint states that “Plaintiff (sic) served upon Defendants, APV and Village One, Inc., the statutory offer to mediate in accordance with 720.311 on April 20, 2016. Mediation subsequently occurred with Plaintiffs, APV and Village One, resulting in an impasse.”

41. While at first glance the statement in paragraph 12 would seem sufficient to fulfill Plaintiffs’ Section 720.311, Fla. Stat. pre-suit mediation obligations, this Court’s record incontrovertibly disproves Plaintiffs followed the requirements of Section 720.311, Fla. Stat.

42. The statutory form letter contained in Section 720.311(2)(a), Fla. Stat. states that APV, as the responding party, must respond within 20 days from the date of the Plaintiffs’ letter offering pre-suit mediation or Plaintiffs, as the aggrieved party, “will be authorized to proceed with the filing of a lawsuit . . .”.

43. Instead of giving APV the required 20 days to respond to Plaintiffs’ April 20, 2016 pre-suit mediation offer, Plaintiffs filed suit against APV on April 26, 2016 as evidenced by this Court’s docket.

44. The plain meaning of Section 720.311(2)(a), Fla. Stat. provides that Plaintiffs were not “authorized to proceed with the filing of a lawsuit ” against APV until APV was given 20 days to respond.

45. A common definition of “authorized” is “having official permission or approval.”

46. In the instant case, Plaintiffs’ April 26, 2016 lawsuit against APV was not “authorized” as it was filed less than 20 days after Plaintiffs’ April 20, 2016 pre-suit mediation letter; therefore, Plaintiffs did not have “official permission or approval” to sue APV on April 26, 2016.

47. The obvious purpose of giving APV 20 days to respond is to allow APV to engage in pre-suit mediation to avoid a lawsuit, a purpose which Plaintiffs thwarted when they filed their “unauthorized” suit six days after offering pre-suit mediation.

48. As evidenced by paragraph 12 of Plaintiffs’ Third Amended Complaint, “mediation subsequently occurred” between Plaintiffs and APV because APV responded to Plaintiffs’ Section 720.311, Fla. Stat. pre-suit mediation letter.

49. Upon APV accepting pre-suit mediation, Section 720.311, Fla. Stat. provides, “The mediation conference must be held within ninety (90) days of” the date of the Plaintiffs’ letter, “unless extended by mutual written agreement.”

50. Although APV and Plaintiffs had 90 days from Plaintiffs’ April 20, 2016 letter to mediate, this Court’s docket shows that Plaintiffs filed an amended lawsuit against APV on June 20, 2016, which was within the 90 day time period for APV to participate in pre-suit mediation with Plaintiffs.

51. Pursuant to *Conrad v Hidden Lakes Homeowners Association, Inc.*, (Circuit



Court, 15<sup>th</sup> Judicial Circuit, Case Number 502004CC013458XXXXSB, July 13, 2007), Plaintiffs were required to comply with all Section 720.311, Fla. Stat. “mandatory presuit mediation” requirements as a condition precedent to filing their lawsuits against APV.

52. In *Conrad*, a homeowners’ association filed suit for injunctive relief against a homeowner without submitting the required Section 720.311, Fla. Stat. pre-suit demand for mediation, the homeowner filed a motion to dismiss and the Circuit court, in its appellate capacity, held that the trial court had no choice but to dismiss the suit for failure to comply with a condition precedent to filing suit.

53. In the instant case, the Plaintiffs circumvented the mandatory pre-suit mediation process and in so doing, were not authorized and thus did not have statutory permission to sue APV until after they had fully complied with all Section 720.311, Fla. Stat. requirements, subjecting their Count III claims to dismissal per *Conrad*.

54. Plaintiffs may argue that they should be allowed to proceed because they mediated with APV after suit was filed, however, *Conrad* stands for the proposition that Plaintiffs’ suit should be dismissed for failure to comply with a condition precedent to filing suit.

55. In summary, Count III should be dismissed because (a) APV is not barred from removing land from its restrictions; (b) Plaintiffs fail to allege that the Village Four parcels removed “was real property owned by Avatar”; and (c) Plaintiffs failure to comply with the mandatory pre-suit mediation requirements of Section 720.311, Fla. Stat. warrants dismissal.

### **Count VIII – Preliminary Injunction Against Defendant APV and Defendant Village One**

56. Count VIII of the Third Amended Complaint seeks a “preliminary injunction” against APV.

57. A “preliminary injunction” is synonymous with a temporary injunction per *Hu v*

*Hu*, 942 So.2d 992 (Fla. 5<sup>th</sup> DCA 2006) and *Yardley v Albu*, 826 So.2d 467 (Fla. 5<sup>th</sup> DCA 2002), both of which use the terms “preliminary injunction” and “temporary injunction” interchangeably.

58. Plaintiffs fail to comply with the basic pleading requirements in Fla. R. Civ. P. 1.610 for a temporary injunction.

59. Fla. R. Civ. P. 1.610 provides that a temporary injunction may be granted only if “(A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant . . .” (Emphasis added)

60. Plaintiffs fail to plead that “immediate” injury, loss or damage “will result to the movant”.

61. Instead, paragraph 96 of Count VIII of the Third Amended Complaint claims that “Plaintiffs will incur irreparable harm absent entry of an injunction . . .” because APV “**eventually** will foreclose on its members’ homes for failure to pay unlawful fees and assessments.” (Emphasis added)

62. Paragraph 96 and the rest of Count VIII completely omit the required allegation of “immediate” harm and instead allege possible future harm.

63. Furthermore, paragraphs 96 and 98 of Count VIII, which allege “harm will be done to thousands of members of APV . . .” fail to allege harm to the “movants”, i.e. the Plaintiffs, and instead claim harm to “its members” and “thousands of members of APV”.

64. Plaintiffs also fail to show why they do not have an adequate remedy at law despite their allegation in paragraph 95.

65. Paragraphs 96, 97 and 98 of Count VIII all claim the need for a preliminary

injunction in order to stop APV from attempting “to collect unlawful fees and assessments” and “wrongfully initiate collection actions” or APV “eventually will foreclose on its members’ homes for failure to pay . . .” and injunctive relief will stop APV from continuing “to unlawfully collect assessments and fees” and avoid “wrongful additional fees and penalties against each of their respective members.”

66. As all of the claims are quantifiable for purposes of a money damage award, i.e. the May 5, 2016 \$232.34 bill alleged in paragraph 46 of the Third Amended Complaint, there is an adequate remedy at law barring a preliminary injunction. *Hu v Hu*, 942 So.2d at 995 (Fla. 5<sup>th</sup> DCA 2006).

67. Finally, Plaintiffs fail to state with any specificity or detail why APV’s “covenants conditions and restrictions” are subject to the renewal or revival process in Chapter 712, Fla. Stat. as claimed in paragraph 94 of Count VIII and paragraphs 46 – 52 of the Third Amended Complaint under the heading “Injunctive Relief Claim”.

68. Paragraph 47 of Plaintiffs’ Third Amended Complaint quotes Section 712.05(1), Fla. Stat. for the proposition that “a homeowners’ association desiring to preserve a covenant or restriction may preserve and protect same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a written notice in accordance with this chapter.”

69. However, Plaintiffs completely fail to allege “the effective date of the root of title” in order to calculate “the 30-year period” to determine if any APV’s covenants, conditions and restrictions are subject to the renewal or revival requirements in Chapter 712, Fla. Stat.

70. In addition, Plaintiffs fail to identify or attach the covenant or restriction that is supposedly subject to extinguishment, and thus Plaintiffs fail to state a valid cause of action

under Chapter 712, Fla. Stat.

71. Finally, Plaintiffs fail to address why the many exceptions to Chapter 712, Fla. Stat. do not apply to APV's covenants and restrictions.

72. In summary, Count VIII should be dismissed because (a) Plaintiffs fail to allege immediate harm to themselves; (b) The basis of Plaintiffs' preliminary injunction is a \$232.34 bill and/or undescribed assessments, which is / are quantifiable money damage with an adequate remedy at law; and (c) Plaintiffs fail to state which of APV's covenants, conditions and restrictions are subject to the renewal or revival process in Chapter 712, Fla. Stat.

### **Conclusion**

This Court should dismiss Counts I, II, III and VIII against APV because (a) Plaintiffs are not parties to the June 5, 1985 Agreement; therefore, cannot state a Count I cause of action for breach of contract; (b) Plaintiffs' Section 720.303(1), Fla. Stat. breach of fiduciary duty claim cannot be brought against APV because the statute creates a fiduciary relationship between "officers and directors" and members, not homeowners' associations and members and, as a matter of law, Plaintiffs may not bring individual breach of fiduciary duty claims against APV; (c) Plaintiffs' Count III claims fail because APV is not barred by the June 5, 1985 Agreement from removing property, Plaintiffs fail to allege the property removed was owned by Avatar, Plaintiffs fail to state how they were damaged and Plaintiffs failed to follow the Section 720.311, Fla. Stat. pre-suit mediation requirements; and (d) Count VIII fails to comply with the basic pleading requirements for preliminary injunctions imposed by Fla. R. Civ. P. 1.610.

### **Demand for Attorneys' Fees & Court Costs**

Defendant ASSOCIATION OF POINCIANA VILLAGES, INC. (APV) has agreed to pay its undersigned attorneys a reasonable attorney and paralegal fee for their services and

hereby demands entitlement to and reimbursement of its attorneys' fees, paralegal fees and costs from Plaintiffs pursuant to Chapter 720, Fla. Stat. and APV's governing documents, including APV's covenants, conditions and restrictions, all of which entitle the prevailing party in this litigation to recover its reasonable attorneys' fees and costs from the non-prevailing party.

WHEREFORE, Defendant ASSOCIATION OF POINCIANA VILLAGES, INC. moves this Court to dismiss Counts I, II, III and VIII of the Third Amended Complaint, with prejudice, and award this Defendant its reasonable attorneys' fees and court costs and grant such other relief as this Court finds just and equitable.

#### **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, Esq., via email at JEnglert@theorlandolawgroup.com and cneedham@theorlandolawgroup.com, Christopher R. Parkinson, Esq., Moran Kidd Lyons Johnson, P.A., via email at cparkinson@morankidd.com, and Daniel F. Dill, Esq., The Dill Law Group, via email at ddill@dillawgroup.com and pleadings@dilllawgroup.com, this 14<sup>th</sup> day of November, 2016.

By: **/s/ Thomas R. Slaten, Jr.**  
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