DISTRICT COURT, LAKE COUNTY, COLORADO 505 Harrison Avenue; PO Box 55 Leadville, CO 80461 Phone: (719) 293-8100	DATE FILED: March 10, 2020 1:52 PM CASE NUMBER: 2019CV30016 ▲ COURT USE ONLY▲
LARREE MORGAN, et al., Plaintiffs, v. **EMPIRE LODGE HOMEOWNERS ASSOCIATION**, Defendant.	Case Number: 19CV30016 Div. C
ORDER GRANTING DEFENDANT'S MOTION FOR DETERMINATION OF LAW PURSUANT TO C.R.C.P. 56(h)	

THIS MATTER comes before the Court on *Defendant's Motion for Determination of Law Pursuant to C.R.C.P. 56(h)* ("Motion"), submitted by Empire Lodge Homeowners Association ("Defendant") on January 15, 2020. Plaintiffs, Larree and Katherine Morgan ("Plaintiffs"), submitted their response ("Response") on February 5, 2020. Defendant then submitted their reply ("Reply") on February 19, 2020.[1] The Court, after reviewing the Motion, Response, Reply and applicable law, hereby GRANTS the Motion for the reasons that follow:

I. BACKGROUND

In this matter, Plaintiffs are homeowners within the common interest community of Beaver Lakes Estates. Am. Compl. at 1, Sept. 5, 2019. This action stems from a recent

[1] Plaintiffs filed *Plaintiffs' Objection to Defendant's Reply in Support of Motion for Determination of Law Pursuant to C.R.C.P. 56(h) and Motion to Strike Same* on February 21, 2020. Plaintiffs contend that Defendant filed their Reply late, and therefore, the Reply should be struck. Defendant responds that there was some conflict in the Court's orders that created some confusion. Though the Court expressly ordered a reply within seven days, the Court acknowledges that the Case Management Order issued that same day could have caused confusion. Further, Plaintiffs have not demonstrated any prejudice that resulted from the delayed filing of the Reply. Accordingly, the Court denies Plaintiffs' request to strike the Reply.

amendment to the community's declaration that purports to prohibit short-term rentals. Id. Plaintiffs assert that "The implementation of the STR [short-term rental] prohibition was illegal as violative, inter alia, of C.R.S. § 38-33.3-217(4.5) and otherwise not in compliance with Association's governing documents." Id.

Defendant now seeks a ruling from the Court that Beaver Lakes Estates and Beaver Lakes Estates No. 2 were established as common interest communities prior to implementation of the Colorado Common Interest Ownership Act ("CCIOA"), and therefore, CCIOA does not apply to this action except as expressly provided for in C.R.S. § 38-33.3-117.

II. STANDARD OF REVIEW

C.R.C.P. 56(h) provides:

> **Determination of a Question of Law.** At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

"The purpose of Rule 56(h) is to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds." Bd. of Cnty. Comm'rs v. United States, 891 P.2d 952, 963 n. 14 (Colo. 1995) (quoting 5 Robert Hardaway & Sheila Hyatt, Colorado Civil Rules Annotated § 56.9 (1985)).

"An order deciding the question is proper '[i]f there is no genuine issue of any material fact necessary for the determination of the question of law.'" Henisse v. First

Transit, Inc., 247 P.3d 577, 578 (Colo. 2011) (citing C.R.C.P. 56(h)). On a motion for determination of a question of law, a nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. Stapleton v. Public Employees Retirement Association, 412 P.3d 572, 576 (Colo. App. 2013).

Where a motion pursuant to C.R.C.P. 56(h) seeks a determination of the applicability of a statute, standard rules of statutory interpretation apply. "In interpreting a statute, we look to the entire statutory scheme to give consistent, harmonious, and sensible effect to all parts and apply words and phrases according to their plain and ordinary meaning." Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n, Inc., 382 P.3d 821, 826 (Colo. 2016). "Where the statute's language is clear, we apply it as written." Id. It is the Court's responsibility to interpret statutes to give effect to the General Assembly's intent. Giguere v. SJS Family Enterprises, Ltd., 155 P.3d 462, 467 (Colo. App. 2006), as modified on denial of reh'g (Sept. 26, 2006).

III. FINDINGS

CCIOA, C.R.S. § 38-33.3-101 *et seq*., is limited in scope by its own provisions. Pursuant to C.R.S. § 38-33.3-117(3), "Except as expressly provided for in this section, this article shall not apply to common interest communities created within this state before July 1, 1992." Further, C.R.S. § 38-33.3-115 describes the scope of CCIOA as applying to all common interest communities created in Colorado after July 1, 1992. In order for a pre-1992 common interest community to become subject to the provisions of CCIOA not expressly listed in C.R.S. § 38-33.3-117, specific procedures enumerated in

C.R.S. § 38-33.3-118 must be followed. In summary, those procedures entail the governing board adopting a resolution dictating that the community accept and become subject to CCIOA, submitting the resolution to a vote by association members, obtaining at least sixty-seven percent (67%) approval, and recording a clear statement of election to be treated as a common interest community subject to the provisions of CCIOA with the county clerk and recorder.

The uncontested evidence before the Court establishes that the common interest communities of Beaver Lakes Estates and Beaver Lakes Estates No. 2 (collectively "Beaver Lakes") were fully established in 1976 with the recordation of two separate, but similar declarations containing covenants limiting homeowner activity, an association to govern enforcement of the covenants among other duties, and assessments taxed against homeowners to fund communal property and the common interests of the community. See Def.'s Ex. 2-4, Jan. 15, 2020; see also Pulte Home Corp., 382 P.3d at 829 ("Thus, for one or more documents to create a common interest community (and hence amount to a declaration), they must, at a minimum, (1) establish an obligation to pay for various expenses associated with common property and (2) attach that obligation to individually owned property."). Further, Plaintiffs do not contest Defendant's assertion that neither community has formally accepted the applicability of CCIOA pursuant to the procedures enumerated in C.R.S. § 38-33.3-118. Such evidence on its face appears to demonstrate that the bulk of CCIOA does not apply to the Beaver Lakes communities. However, Plaintiffs contend that two separate occurrences since the formation of Beaver Lakes renders the communities subject to CCIOA as if they were formed post-1992.

First, Plaintiffs assert that Beaver Lakes recorded a deed and assignment on June 7, 1993 which amounts to a declaration, and therefore, the formation of a common interest community pursuant to C.R.S. § 38-33.3-201. The referenced deed and assignment transfers the common property and duties held by the former homeowner's association, Empire Lodge, Inc., to the new homeowner's association, Empire Lodge Homeowners Association. Def.'s Ex. 7; Pl.s' Ex. B. Pursuant to C.R.S. § 38-33.3-117, section 38-33.3-201 is not applicable to common interest communities created prior to July 1, 1992. Thus, a common interest community in existence prior to 1992 does not invoke the applicability of CCIOA simply by amending its declaration or by transferring property and governance to a new homeowner's association. To read otherwise would render C.R.S. § 38-33.3-118 meaningless or discourage communities from updating their declarations or homeowner's associations to conform with the needs of the community. Accordingly, the Court finds that the recordation of the deed and assignment on June 7, 1993 did not render the already formed common interest communities of Beaver Lakes subject to CCIOA.

Plaintiffs' second asserted basis for applying CCIOA to Beaver Lakes is the amended declaration recorded in 1998. Plaintiffs assert that this amended declaration created a new common interest community pursuant to C.R.S. § 38-33.3-221(1) by combining two or more communities. Plaintiffs further assert that the language of the amended declaration also supports treating the amendment as creating a new community by voiding all prior declarations. The Court disagrees.

Much like Plaintiffs' first argument, Plaintiffs' second argument fails under a plain reading of CCIOA. C.R.S. § 38-33.3-221(1) is not one of the provisions listed in C.R.S. § 38-33.3-117 applicable to common interest communities that predate CCIOA. Thus, Plaintiff cannot rely on that statute to argue that CCIOA now applies. Further, the evidence suggests that Beaver Lakes Estates and Beaver Lakes Estates No. 2 have operated as one community long prior to the 1998 amendment and prior to CCIOA's passage in 1992. Not only did they have nearly identical declarations, they also operated under the same homeowner's association and appear to have shared common property. See Def.'s Ex. 2-4, 7. An amendment to the declarations of the communities to eliminate duplication makes perfect sense. This is not the case of two wholly separate communities joining to make one.

Finally, the language in the 1998 amended declaration indicating that the amended declaration supersedes all prior declarations and amendments does not convince the Court that a new common interest community was created under the terms of CCIOA. Not only have these communities operated jointly since 1976, but the 1998 amendment also still refers to the communities separately as Beaver Lakes Estates and Beaver Lakes Estates No. 2, much as has always been done. There is no mention in the amendment of any intent to join the two communities or otherwise comply with the requirements of C.R.S. § 38-33.3-221(2). Further, nowhere in the amended declaration is there any reference to CCIOA. Rather, the declaration repeatedly presents itself as an amendment to the prior declarations of the Beaver Lakes communities. There can only be so many amendments to a document before a clean, new document must be drafted

that supersedes all prior versions. Otherwise, keeping track of the current governing document and applicable provisions would be too cumbersome. Accordingly, the Court finds that the 1998 amendment is just that, an amendment to existing common interest communities' declarations, and does not render CCIOA applicable to the Beaver Lakes communities.[2]

IV. ORDER

Based upon the above findings, the Court GRANTS *Defendant's Motion for Determination of Law Pursuant to C.R.C.P. 56(h)*.

SO ORDERED this March 10, 2020.

BY THE COURT:

Catherine J. Cheroutes
District Court Judge

[2] The Court notes that C.R.S. § 38-33.3-120 governs amendments to declarations and applies to common interest communities formed prior to 1992 pursuant to C.R.S. § 38-33.3-117(1). Under C.R.S. 38-33.3-120, certain amendments prohibited by law prior to CCIOA, but permissible under CCIOA, may be made pursuant to CCIOA and attach the rights as well as the obligations instituted by CCIOA. However, it is not before the Court to decide whether certain amendments were made pursuant to pre-CCIOA law or pursuant to CCIOA. Accordingly, the Court makes no findings regarding that issue.