

DISTRICT COURT, LAKE COUNTY, COLORADO 505 Harrison Ave.; PO Box 55 Leadville, CO 80461 Phone: (719) 293-8100	DATE FILED: August 20, 2020 10:39 AM CASE NUMBER: 2019CV30016 ▲ COURT USE ONLY ▲
<b>LARREE MORGAN, et al.,</b> Plaintiffs,  v.  <b>EMPIRE LODGE HOMEOWNERS ASSOCIATION,</b> Defendant.	Case Number: 19CV30016  Div. C
<b>ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON          FIRST CLAIM FOR RELIEF</b>	

THIS MATTER comes before the court on *Plaintiffs' Motion for Summary Judgment on First Claim for Relief* filed by Plaintiffs Larree and Katherine Morgan ("Plaintiffs") on July 6, 2020 ("Motion"). Defendant, Empire Lodge Homeowner's Association ("Defendant" or the "Association") filed a response on July 27, 2020 ("Response"). Thereafter, Plaintiffs filed a reply on August 10, 2020 ("Reply"). 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. Plaintiffs assert three claims for relief: (1) Declaratory Judgment; (2) Injunctive Relief; and (3) Breach of Fiduciary Duty. Id. at 7-8. Plaintiffs' claims arise from a recent amendment to the community's declaration ("Declaration") that purports to prohibit short-term rentals. Id. at 1. Plaintiff seeks to

invalidate the amendment and enjoin Defendant from enforcing the prohibition on short-term rentals. Id. at 9.

The amendment consists of three separate additions or deletions to the community's 2012 Declaration. First, the amendment added section 6.22 which reads:

Section 6.22 Short Term Rentals. Short Term Rentals, as defined by Lake County, Colorado, shall be prohibited in the Community. Upon the effective date of this amendment, Owners renting their Lots on a short term basis shall have 90 days to comply with this amendment. For any Owner found to be operating a short-term rental after this time frame they are subject to fine up to a maximum of \$1,500 per violation.

Second, the amendment deleted the following language from section 6.3: "This provision shall in no way be deemed to restrict or prevent short-term or vacation style rentals of the Lots within the Community." Finally, the amendment deleted "vacation rental" from the permitted uses listed in section 7.2 of the Declaration. Compare Ex. 4&5, Sept. 4, 2019.

The amendment was passed by a mail-in ballot vote of the lot owners/members as permitted in section 4.10 of the Association's Bylaws. However, in their first claim for relief, and the instant Motion, Plaintiffs assert that Defendant failed to follow all rules governing the mail-in ballot procedure, including those outlined by the Bylaws and those enumerated in C.R.S. § 7-127-109, and therefore, the amendment must be invalidated.

## II. STANDARD OF REVIEW

The purpose of summary judgment is to "permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail." A-1 Auto

Repair & Detail, Inc. v. Bilunas-Hardy, 93 P.3d 598, 603 (Colo. App. 2004) (quoting Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231, 238 (Colo. 1984)). Summary judgment should be granted only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Peterson v. Halsted, 829 P.2d 373, 375 (Colo. 1992). A material fact is a fact that will affect the outcome of a case. Id. (citing Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231, 239 (Colo. 1984)).

The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. Civil Serv. Comm'n v. Pinder, 812 P.2d 645, 649 (Colo. 1991) (citing C.R.C.P. 56(c); Continental Airlines, Inc. v. Keenan, 731 P.2d 708 (Colo.1987)). Once the moving party has met this initial burden, the burden shifts to the non-moving party to establish a triable issue of fact. Id. In making this showing, the party opposing the motion for summary judgment may not rest upon the mere allegations or denials of his or her pleading, but must demonstrate by admissible evidence that a real controversy exists. Smith v. Mehaffy, 30 P.3d 727, 730 (Colo. App. 2000). A genuine issue cannot be raised simply by means of argument. A-1 Auto Repair & Detail, Inc., at 603 (citing Hauser v. Rose Health Care Sys., 857 P.2d 524, 527 (Colo.App.1993)).

### III. FINDINGS

#### A. Applicable Law

Plaintiffs assert several bases for which to invalidate the amendment. Some bases rely on the Association's Bylaws. Others rely on C.R.S. § 7-127-109 of the Colorado Revised Nonprofit Corporation Act ("CRNCA") governing mail-in ballot votes for nonprofit corporations. In their Response, Defendants raise yet another statute, C.R.S. §

7-127-107 as justification for not meeting some of the requirements set forth in C.R.S. § 7-127-109 and the Bylaws. To start, the Court finds it necessary to determine which law to apply.<sup>1</sup>

Pursuant to section 4.10(a) of the Association's Bylaws,<sup>2</sup>

In case of a vote by mail or electronic means in lieu of a meeting, the secretary shall mail or deliver written notice to all Members at each Member's address as it appears in the records of the Association given for notice purposes. The notice shall include: (i) a proposed written resolution setting forth a description of the proposed action, (ii) a statement that Members are entitled to vote by mail or electronic means for or against such proposal, (iii) a date at least 10 days after the date such notice shall have been given on or before which all votes must be received at the office of the Association at the address designated in the notice, and (iv) the number of votes which must be received to meet the quorum requirement and the percentage of votes received needed to carry the vote. Voting by mail or electronic means shall be acceptable in all instances in the Governing Documents requiring the vote of Members at a meeting.

Thus, the Bylaws not only permit the use of mail-in ballot voting in lieu of a meeting, they also layout a full and complete procedure to be followed by the Association.

On the other hand, both C.R.S. §§ 7-127-107 & 109 start with the language qualifier "Unless otherwise provided by the bylaws..." before going into specific procedures to be followed when taking an action without a meeting or voting by mail-in ballot. The

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<sup>1</sup> As established in the court's March 10, 2020 *Order Granting Defendant's Motion for Determination of a Question of Law Pursuant to C.R.C.P. 56(h)*, the Beaver Lakes Estates community does not fall under the Colorado Common Interest Ownership Act ("CCIOA") found at C.R.S. § 38-33.3-101 *et. seq.* Thus, CCIOA does not apply in this matter except as expressly stated in C.R.S. § 38-33.3-117.

<sup>2</sup> The Bylaws are found in Plaintiffs' Exhibit 6 filed on September 4, 2019. Neither party disputes that these were the Bylaws in effect at the time of the amendment vote. Because there is no dispute, the court finds it appropriate to resolve the applicable law as a question of law.

provisions of C.R.S. §§ 7-127-107 & 109 are not identical to the Bylaws in this case and in several instances directly conflict. The court finds, by the express language of the statutes, that where an association's bylaws have specific procedures laid out for taking actions or voting by mail-in ballot without holding a meeting, the provisions of C.R.S. §§ 7-127-107 & 109 do not apply. Therefore, in this instance, the court looks to the Amended and Restated Bylaws of Empire Lodge Homeowners Association ("Bylaws") when determining if the Association acted in accordance with the rules in conducting the mail-in ballot vote on the amendment at issue.

B. Alleged Violations

Plaintiffs assert several instances in which the Association failed to follow the rules governing mail-in ballot votes.<sup>3</sup> The court will go through each allegation in turn.

1. Incomplete description of amendment.

Plaintiffs contend that the ballot only included the language of section 6.22 to be added to the Declaration and did not include a description of the amendments to sections 6.3 and 7.2. Defendants do not contest the omission, but state that the omission was harmless in that the amendments to sections 6.3 and 7.2 were merely meant to remove conflicting language and make the Declaration clear. The court finds that the omission of two out of three parts of the amendment violates the first requirement of the Bylaws that the notice provide a description of the proposed action. The ballot's failure to include the

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<sup>3</sup> Plaintiffs attached a copy of the ballot mailed to all members for purposes of voting on the amendment as Exhibit 1 to their Motion. Defendant does not contend that the ballot attached was not the ballot used. Further, the ballots attached to *Defendant's Motion for Summary Judgment*, addressed in a separate order, are identical except for those ballots were completed rather than blank. Accordingly, the court finds no dispute as to the contents of the ballot that would prevent summary ruling.

removal of language from sections 6.3 and 7.2 not only renders the description of the action incomplete, but it also makes the purpose of the amendment less clear. The language included in the ballot merely discusses short-term rentals as defined by Lake County, Colorado – it does not go on to provide that definition. Without that definition, or a description of the removal of language in the Declaration that previously permitted use of lots for vacation rentals, the members were left to guess what was included in the short-term rental ban. Accordingly, the court finds that the Association did not comply with the Bylaws in providing a full description of the proposed action.

2. Failure to include resolution.

Plaintiffs take issue with the language and format used by the Association and claim the Association failed to include “a proposed written resolution setting forth a description of the proposed action.” The court does not find that a specific format or language must be used in relaying the description of the proposed action. However, to the extent Plaintiffs contend the description was insufficient, the court agrees. The insufficiency of the included description is addressed in the discussion of other alleged violations.

3. Failure to notify of entitlement to vote by mail

Plaintiffs assert that the ballot failed to include a statement notifying members that they were entitled to vote by mail. The court finds no merit in this argument. While the ballot did not mirror the exact language of the Bylaws, or the language as proposed by Plaintiffs, the ballot did include the following statement:

NOTICE IS HEREBY GIVEN that the Empire Lodge Homeowners Association (the 'Association') Board of Directors solicits your vote by written ballot (in lieu of conducting a meeting of the Members), for the purpose of voting on a proposed Limited Amendment to the Amended and Restated Declaration of Restrictive and Protective Covenants ('Declaration') for Beaver Lakes Estates and Beaver Lakes Estates Filing #2 (collectively 'Community').

Thus, the intent, and entitlement, of Members to vote by mail-in ballot in lieu of other methods was clearly stated. Further, it was clearly delineated in the ballot that Members could either vote for or against the proposal. Accordingly, the court finds that the Association did not violate section 4.10(ii) of the Bylaws.

4. Failure to include due date

Plaintiffs next contend that the Association failed to include "a date at least 10 days after the date such notice shall have been given on or before which all votes must be received at the office of the Association at the address designated in the notice." A review of the ballot reveals no mention of a date by which the ballots must be received in order to count. Defendant contends that they were unable to do so because of the ruling in The Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colorado, Inc., 328 P.3d 275, 279, (Colo. App. 2013) which applied the directives of C.R.S. § 7-127-107(2) and found that the association was required to adhere to the 60-day (from receipt of first consent) deadline. Here, the court has already determined that the directives of C.R.S. § 7-127-107 do not apply, rather, the Bylaws control. Pursuant to the Bylaws, the Association was required to provide a date at least 10 days out by which ballots must be received to count.

They failed to do so. Therefore, the court finds the Association violated the provisions of section 4.10(iii).

5. Failure to include quorum requirements

Plaintiffs contend, and Defendants do not dispute, that the Association failed to include the number of votes needed to meet the quorum requirements. However, Defendant contends that such inclusion was unnecessary here because the votes needed to pass the amendment exceeded the number needed to meet the quorum requirement. The court finds such argument unpersuasive. If that were the case, there would almost never be a need to include quorum requirements, yet the Bylaws, and otherwise governing statutes all require the number to meet quorum be included. Further, whether quorum was met during the vote has implications for how the issue is readdressed, if at all, in the future. Accordingly, the court finds that the Association's failure to include the number of member votes needed to meet the quorum requirement violates section 4.10(iv) of the Bylaws.

6. Failure to include votes needed to pass amendment

Plaintiffs argue that the statement "The proposed amendments shall be approved if at least a majority of all Owners (greater than 50%) of Lots in the Community" was confusing and failed to fulfill the requirement that the Association provide the percentage of votes needed to carry the vote. The court disagrees. While the statement is incomplete and perhaps a little confusing, it is clear that the intent behind it is to convey that 50% of voters must approve the proposal for it to pass. The court finds that this meets the requirements of section 4.10(iv).



7. Insufficient information to make informed decision

Finally, Plaintiffs assert that the ballot included insufficient information needed to make an informed decision on the proposal. While this requirement stems from C.R.S. § 7-127-109(4)(d), it is arguably also inherent in section 4.10(i) of the Bylaws. Section 4.10(i) requires a description of the action proposed. Such description must be complete and relay sufficient information for the voter to understand the proposal. Here, as discussed *supra*, the ballot excluded any reference to two of the three proposed amendments and failed to provide the definition of short-term rentals as defined by Lake County, Colorado. Without such information, it is reasonable that some voters would not have sufficient information to fully understand the proposal and make an informed vote. Accordingly, the court finds that the Association failed to include sufficient information to fulfill their duties under section 4.10(i).

C. Substantial Compliance

Though Defendant admits that the Association did not strictly comply with the provisions of the Association's Bylaws, they argue that they substantially complied, and therefore, the amendment should be upheld. The court disagrees. Where the ballot failed to fulfill the requirements of providing a full description of the proposal, the quorum requirements, the due date, and sufficient information for a voter to make an informed decision, it cannot be said that the Association complied with the spirit of the Bylaws. Further, simply because the vote passed does not mean the ballot was sufficiently clear

to provide adequate notice of exactly what the Members were voting on.<sup>4</sup> The court finds that Plaintiffs have met their burden in showing that the Association failed to follow the requirements of the Association's Bylaws. Accordingly, the court finds in favor of Plaintiffs on their first claim for relief and declares the amendment invalid *ab initio*.<sup>5</sup>

#### IV. ORDER

Based upon the above findings, the Court GRANTS *Plaintiffs' Motion for Summary Judgment on First Claim for Relief*.<sup>6</sup>

SO ORDERED this August 20, 2020.

BY THE COURT:



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Catherine J. Cheroutes  
District Court Judge

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<sup>4</sup> Defendant asserts, without evidentiary support that 86% of Members voted. The court cannot consider such argument without evidentiary support. Further, though Defendant argues that it is undisputed that the proposal passed, the Plaintiffs are disputing the validity of several ballots, that, if invalidated, would give the Association too few approval votes to pass the amendment.

<sup>5</sup> Plaintiff's first claim for relief has two parts: (1) the applicability of CCIOA and (2) the validity of the amendment. This ruling only pertains to the second part of the claim as the court previously ruled that the community is not subject to CCIOA except as expressly provided in C.R.S. § 38-33.3-117.

<sup>6</sup> Nothing in this ruling prevents the Association from submitting the issue of short-term rentals to the Member for vote in the future. Rather, this ruling merely declares their previous attempt invalid for failure to comply with the requirements of the Association's Bylaws.