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May 21, 2021

The Honorable Judge Patrick Sebesta
239th Judicial District
111 E. Locust, Room 310A
Angleton, Texas 77515

Filed for Record
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Rhonda Barchak, District Clerk
Brazoria County, Texas
104559-CV
Alyssa Cook, Deputy

RE: Status Conference – Case Update and Summary; *Southwyck Sec. IV Homeowners’ Association Inc. v. Southwyck Community Assoc. Inc.*, Cause No. 104559-CV; In the 239th Judicial District of Brazoria County, Texas; Our File No.: 6004.2-2019

Dear Judge Sebesta:

As ordered at the last hearing in this matter, Defendant Southwyck Community Association, Inc. (“SCA” or “master association” provides this case summary for the Court in advance of scheduled status conference in this case.

1. *Southwyck – General Background*

Southwyck is a residential subdivision in Brazoria county with a joint governance structure consisting of a master property owners’ association and multiple village property owners’ associations. The master association is Defendant Southwyck Community Association, Inc. (“master association”) and it has responsibilities and obligations to the entire subdivision as well as exclusive authority over the entire subdivision. Plaintiff Southwyck Section IV Homeowner’s Association, Inc. (“Sec. IV” or “village association”) is a village association with limited authority only over its particular section located within the greater Southwyck subdivision. The parties extensively litigated their respective rights and obligations under the Southwyck governing documents in *Southwyck I* litigated in the 412th Judicial District.¹ A final judgment and permanent injunction was issued in the 412th Judicial District on November 20, 2015, and the Court of Appeals affirmed the trial court’s judgment by opinion issued October 19, 2017.

2. *Southwyck II – Plaintiff’s claims and the Master Association’s defenses in the current lawsuit*

On September 5, 2019, the Plaintiff village association filed a new lawsuit claiming accounting irregularities in the collection and processing of assessments by the master association going back to the 2014-year time frame. Plaintiff claims the master association is wrongly collecting assessments, wrongly calculating its share of the assessments and tendering the wrong residual amount to the village association. Plaintiff village association also has claimed that the defendant master association failed to accurately maintain and produce financial records related to its obligations under the Declaration and various state

¹ *Southwyck, Section IV Homeowners’ Ass’n, Inc. v. Southwyck Cmty. Ass’n, Inc.*, No. 14-16-00139-CV, 2017 WL 4697884, at *11 (Tex. App.—Houston [14th Dist.] Oct. 19, 2017, no pet.) (mem. op.) Exhibit “A”.

statutes including the Texas Trust Code², the Texas Business Organization Code³; the Texas Property Code⁴, and breach of contract⁵(for violating the Declaration). Plaintiff seeks monetary damages of \$100,000 or less and declaratory and injunctive relief. Importantly, Plaintiff seeks a court order that strips the master association of its exclusive authority under the Declaration to levy, collect, and disburse assessments in the Southwyck development.

The Defendant master association claims that stripping the master association of its exclusive authority to levy and collect assessments is a *de facto* change to the Declaration by the village association without putting the issue to a vote of the homeowners, and it is barred by the permanent injunction from the 412th Judicial District. In addition, plaintiff's other claims are barred because there are no accounting irregularities in the collection or disbursements of assessments. The master association has adopted a Payment Priority Policy pursuant to the Texas Property Code that it follows any time deductions are made from assessments it collects. Any disbursements are authorized by either the Declaration or the Payment Priority Policy. Second, the master association has not violated any statute related to the failure to produce account records of Sec. IV homeowners. Texas Property Code Sec. 209.005 preempts every other statute related to financial records in the possession of a property owner's association. Under Sec. 209.005 only an owner of a lot in the Master Association may request association records.⁶ Despite numerous requests, the village association has refused to produce any written authorization showing that it has been authorized by any of its 755 owners to review the financial account information of each owner within Sec. IV. Without such written authorization or a court order, the master association was and remains prohibited from disclosing homeowner's account information under Sec. 209.005 of the Texas Property Code.

3. *The Motion to Enforce the Permanent Injunction and Motion for Contempt currently pending in the 412th Judicial District*

In its view, Section IV's present suit in the 239th Judicial District seeks to strip the master association of its exclusive authority to collect and disburse assessments in the Southwyck subdivision in violation of the permanent injunction ordered in the 412th Judicial District. The present suit also encompasses claims that allegedly occurred during the time frame (2014) in which the parties were litigating *Southwyck I* in the 412th. Therefore, the master association filed a Motion to Enforce the Permanent Injunction and Motion for Contempt in the 412th Judicial District while actively defending the present case. The oral hearing on that Motion was passed several times while the parties attended mediation and attempted to work out a mediated settlement agreement in the present case, but the motion is actively pending and will be reset once mediation is concluded or an impasse is declared.

² See Plaintiff's Original Petition at ¶17

³ See Plaintiff's Original Petition at ¶30

⁴ See Plaintiff's Original Petition at ¶26

⁵ See Plaintiff's Original Petition at ¶34.

⁶ Tex. Prop. Code Sec. 209.005(c) Notwithstanding a provision in a dedicatory instrument, a property owners' association shall make the books and records of the association, including financial records, **open to and reasonably available for examination by an owner, or a person designated in a writing signed by the owner as the owner's agent, attorney, or certified public accountant**, in accordance with this section. An owner is entitled to obtain from the association copies of information contained in the books and records.

4. *Discovery Efforts and Dispositive Motions*

This case is governed by a Level 2 discovery control plan. The first written discovery was served with the original petition and responses were due on November 7, 2019. Therefore, the discovery period in this case closed on August 7, 2020. Before the discovery period ended, the parties exchanged Rule 194 Requests for Disclosures, Interrogatories, and Requests for Production. In addition, the Plaintiff also served Requests for Admissions. No parties conducted depositions. If further mediation is unsuccessful in providing a resolution for this case, SCA intends to file dispositive motions on all of Plaintiff's claims.

5. *Mediation Efforts and the Proposed Mediated Settlement Agreement*

The parties mediated this case with mediator Jerry Hoover on July 1, 2020, and left mediation with a draft of a mediated settlement agreement that the parties have been trying to finalize since that date. Because the parties must continue to work together on behalf of homeowners for the foreseeable future, a unique settlement agreement was proposed akin to a parenting agreement. Some of the terms of the mediated settlement agreement include the following:

- A process to review financial records and resolve claims related to underpayments to the Sec. IV corporation, if any;
- Preparation of new administrative agreements between the master and village association to improve the parties' working relationship on matters such as boundaries, maintenance, and real estate closings;
- the creation of an internal dispute resolution process that requires face-to-face meetings and mandatory mediation before filing further litigation;

The parties have been working in good faith for at least ten months to finalize the terms of the mediated settlement agreement prior to the Plaintiff's discharge of its counsel. The master association has asked this court to order the parties back to mediation (with all of each board's members in attendance) to do the work of attempting to resolve the parties' conflicts. Mediator Jerry Hoover has indicated that he is willing and able conduct another mediation session towards that goal.

6. *The Substitution of Plaintiffs' Counsel*

The master Association has no objection to the substitution of Plaintiff's new counsel. The master association would object to any attempt by new counsel to open further discovery in this case or amend any claims due to the age of this case and its ripeness for resolution by mediation or dispositive motions.

In closing, we believe this summary covers most of the outstanding issues related to the case, and we will be prepared to address further issues to the court at the status conference hearing.

Very truly yours,



Christopher L. Nichols

CLN

Enclosure (as stated)

cc:

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