

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-005568

04/09/2019

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
K. Cabral/S. Brown
Deputy

JAMES D SMITH, et al.

MARK BAINBRIDGE

v.

SAGUARO VIEW MANAGEMENT INC

EDWARD D OBRIEN

JUDGE COURY

UNDER ADVISEMENT RULING

Following the evidentiary hearing and oral argument held on April 8, 2019, with respect to Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction, the Court had an opportunity to review and consider all of the evidence and arguments further.

THE COURT FINDS as follows:

1. Pursuant to the Bylaws of Saguaro View Management, Inc. (the "Association"), the annual meeting of the Members are required to be held during the month of March or April of each year. BYLAWS, § 2.1
2. "The business of the Association shall be managed by a Board of seven (7) directors, unless the Board shall establish a lesser number which in no event shall be less than three (3) directors." BYLAWS, § 3.1.
3. "The directors shall serve staggered terms of two (2) years each in the manner set by the Board." BYLAWS, § 3.2. The terms of the directors typically begin after the election results are announced at the annual meeting held in March or April each year.

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4. In 2017, three directors of the Association were elected: Rick Molera, Michael Shove, and Doug Villa.
5. At the April 14, 2018, annual meeting, two directors of the Association were elected: Newilda Sosa and Martin Rankin.
6. At the April 14, 2018, annual meeting, one of the directors elected in 2017 – Mr. Molera – verbally stated that he was resigning from the Board. Mr. Molera did not tender his resignation in writing, as required by § 3.5 of the Bylaws.
7. “If the office of any director becomes vacant, the remaining directors in office, may appoint, by a majority vote, any qualified person to fill such vacancy for the unexpired term.” BYLAWS, §3.6.
8. Upon Mr. Molera’s verbal resignation, the remaining directors decided to have another election to fill the seat vacated by Mr. Molera. Essentially, the remaining directors agreed that the person elected by the Association’s members would serve as a director for the one-year remainder of Mr. Molera’s term.
9. An election was held on May 8, 2018. In that election, Mark Greenawalt was selected to fill Mr. Molera’s seat on the Board. The election ballot for the May 8, 2018 election did not permit votes to be cast in person at the time of the special meeting.
10. A.R.S. § 33-1812(A) provides in pertinent part: “The association *shall provide for votes to be cast in person* and by absentee ballot and, in addition, the association may provide for voting by some other form of delivery, including the use of e-mail and fax delivery.” (Emphasis added.)
11. Plaintiff does not challenge the 2017 election of Mr. Molera, Mr. Shove, or Mr. Villa. The terms of these three directors expire at the earlier of (i) a validly-conducted election of directors in March or April 2019, or (ii) April 30, 2019.

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12. Plaintiff does not challenge the April 2018 election of Ms. Sosa and Mr. Rankin. They continue to serve until their terms expire at the earlier of (i) a validly-conducted election of directors in March or April 2020, or (ii) April 30, 2020.
13. Plaintiff does challenge the May 2018 election of Mr. Greenawalt. Plaintiff contends that, because the ballots could not be cast in person, the election of Mr. Greenawalt failed to comply with Arizona law. Plaintiff, however, did not commence any action with respect to the election of Mr. Greenawalt until March 2019 – i.e. until the final 60 days of the term.
14. Plaintiff has identified no irreparable injury from Mr. Greenawalt completing the term that will end no later than April 30, 2019.
15. Plaintiff's challenge of the May 2018 election of Mr. Greenawalt is barred by the doctrine of laches. Simply put, Plaintiff waited nearly one year to seek relief due to the form of the ballot, and the prejudice of "undoing" Mr. Greenawalt's election for this replacement term cannot be justified. Plaintiff is not entitled to injunctive relief as to Mr. Greenawalt's election for the completion of Mr. Molera's replacement term at this late date. This conclusion is strengthened by the fact that Mr. Greenawalt has agreed that his term expires no later than April 30, 2019. The Association bears the balance of the hardships. Indeed, an order invalidating the May 2018 election so that the replacement term for Mr. Molera's directorship seat can be filled for approximately 14 days after the election can be held (after issuing ballots) is unduly burdensome, particularly in light of the fact that there are four other validly-elected directors serving the Association until April 30, 2019. Moreover, the Association pays for the cost of administering the election.
16. Plaintiff also challenges the March 23, 2019 election because (a) the ballots did not identify three open director seats, and (b) the ballots could not be cast in person. This challenge is timely.
17. Plaintiff is correct in both regards:

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- a. Mr. Greenawalt served in a replacement capacity. His director seat is due to be elected in 2019. The Association's failure to place this seat up for election in 2019 was erroneous and failed to comply with the Bylaws.
 - b. Election of two other directors – Mr. Shove and Mr. Villa – in the March 23, 2019 election did not comply with Arizona law. The ballots required submission by March 17, 2019 – six (6) days in advance of the March 23, 2019 election. The ballots could not be cast in person at the March 23, 2019 meeting. Consequently, the Association's March 23, 2019, election failed to comply with Arizona law and is invalid. Mr. Shove and Mr. Villa, the two directors selected on March 23, 2019, were not validly elected.
18. The Association's failure to conduct an election that complied with Arizona law prejudiced Plaintiff. Plaintiff mailed his completed ballot on March 16, 2019. The ballot was not received by March 17, 2019, but was received before March 23, 2019. Even though Plaintiff's ballot was received before the March 23, 2019 meeting date, the ballot was not counted.
19. Plaintiff, however, is not entitled to injunctive relief *at this time* because the Association is able to comply with both Arizona law and the Association's Bylaws by April 30, 2019, in one of two ways:
- a. The Association can hold an election before April 30, 2019. The election must comply with both the Bylaws and Arizona law – including but not limited to utilizing ballots that comply with A.R.S. § 33-1812(A) – insofar as they can be turned in at the annual meeting.
 - b. The directors can decide to have only three directors serve the Association and comply with the Bylaws. BYLAWS, § 3.1. If such a decision is made, *and* if the Association proceeds to hold a valid election for one director on April 27, 2019, the Association will have three validly-elected directors: the two directors whose terms expire in 2020, and the director who will be elected on April 27, 2019.

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20. *At this time*, Plaintiff has demonstrated no imminent breach of the Bylaws or Arizona law, and consequently, Plaintiff cannot show a strong likelihood of success on the merits, nor irreparable injury (i.e. no showing of a violation of an easement or restrictive covenant). A different conclusion likely is unavoidable, however, if the Association fails to have three validly-elected directors in place by April 30, 2019.
21. Although the Court believes that the Association would be wise to maintain five (5) validly-elected directors, the Court declines to mandate such a result because there is more than one way for the Association to comply with its Bylaws, and the Court should not issue advisory decisions.
22. The Association has filed a Motion to Dismiss, challenging the standing of Plaintiff due to the lack of compliance with the requirements set forth in Arizona law to bring a derivative action. The Court need not address that argument at this time because the issue of injunctive relief can be decided without such consideration. As stated on the record at the hearing held on April 8, 2019, although the Court believes that there may be some merit to the Association's derivative action argument, Plaintiff also has articulated injury sufficient to establish standing by virtue of the Association's failure to count his ballot mailed on March 16, 2019.
23. Recognizing that there is some merit to the Plaintiff's position, and in the exercise of the Court's discretion, each party should bear his / her / its own attorneys' fees, costs and expenses associated with the injunction proceedings.

Good cause appearing,

IT IS ORDERED denying without prejudice Plaintiff's request for a Temporary Restraining Order and Preliminary Injunction.