

BULLETIN

THE CALIFORNIA COURT OF APPEAL HELD THAT A REQUIREMENT IN THE CC&RS FOR A MAJORITY VOTE OF THE HOMEOWNERS BEFORE INITIATING AN ACTION CANNOT BE CURED BY A VOTE AFTER THE ACTION IS COMMENCED

RICHARD H. GLUCKSMAN, ESQ.

BRIAN KAHN, ESQ.

Introduction

Plaintiff Branches Neighborhood Corporation (“the HOA”), filed an arbitration claim against the association’s developer, Defendant CalAtlantic Group, Inc., for construction defects claims in excess of \$5 million in damages. Branches is located in Ladera Ranch, California and consists of residential condominium units. In late 2015, the HOA gave notice to CalAtlantic that it intended to make a claim for construction and design defects. The listed defects were extensive including problems impacting both homeowners’ individual units and the common areas.

Arbitration

After the parties unsuccessful pre-litigation procedures in January 2016, the HOA filed a demand for arbitration with Judicial Arbitration and Mediation Services (“JAMS”). In its defense, CalAtlantic argued that the HOA had failed to comply with numerous provisions in the CC&Rs including, one section which requires obtaining a vote or written consent of 51 % of the HOA’s homeowners *prior* to initiating a construction defect claim. It was undisputed that before the HOA filed its construction defect claims with JAMS that no vote was held. However, several months later in October 2017, after the action was initiated, the HOA held a membership meeting and obtained a majority vote from its homeowners.

Taking into consideration these undisputed facts, the arbitrator, the Honorable James Smith, a retired judge of the Orange County Superior Court, granted summary judgment in the developer’s favor. Judge Smith determined the HOA did not obtain the majority (51%) consent of its members to authorize the legal action until after the complaint was filed, which was in direct violation of its CC&Rs. Judge Smith ultimately concluded that the CC&Rs made the majority vote a “condition precedent” to a filing a construction defect claim.

California Court of Appeal

The 4th District Court of Appeal also disagreed with the HOA's arguments and affirmed the trial court's determination. The Court of Appeal held that the plain language of the CC&Rs controls when the CC&Rs do not conflict with California law and regulations. The Court explained that HOA lost its right to sue the developer because it failed to obtain a majority vote from its homeowners to authorize a legal action until after the HOA's arbitration claim was filed. "This after the fact expression of consent cannot be transmuted into the prior consent required by the CC&Rs. This is particularly so when such a result would adversely impact the rights of a party to the agreement by which the CC&Rs were created. The Developer is such a party." *Branches* at 749.

Therefore, based on the above reasoning the Court held that the CC&R provision requiring the HOA to obtain affirmative consent of 51% of its homeowners prior to instituting a legal action is consistent with public policy, does not impede an unwaivable statutory right and cannot be cured with a vote after the action has commenced.

Impact

If an HOA's CC&Rs require a vote from a majority of its members prior to a legal action being commenced, the required vote is a condition precedent and cannot be ratified by a subsequent vote after the legal proceedings have been initiated.