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| DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon, P.O. Box 2980 Colorado Springs, CO 80901-2980 Phone: (719) 448-7650 | EFILED Document CO El Paso County District Court 4th JD Filing Date: Aug 12 2008 2:44PM MDT Filing ID: 21041320 Review Clerk: Donna Maes |
| Plaintiffs: CHARLES WARNE, BRIDGET WARNE, BRANDON CUFFE, NORMAN VILLANUEVA, NANCY VILLANUEVA, HOWARD SURBER, and LUANA SURBER Defendants: WOODMEN HILLS COVENANT MANAGEMENT BOARD, a Colorado nonprofit corporation and WOODMEN HILLS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado | <p style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p> <hr style="width: 20%; margin: auto;"/> Case Number: 2008CV2923 Division: 5 |
| Attorneys for Defendants: SUSEMIHL, McDERMOTT & COWAN, P.C. Jason W. Downie, Reg. # 27256 Geoffrey L. Lindquist, Reg # 38290 660 Southpointe Court, Suite 210 Colorado Springs, CO 80906 Phone Number: (719) 579-6500 Fax Number: (719) 579-9339 E-mail: jdownie@smmclaw.com | |
| DEFENDANTS WOODMEN HILLS COVENANT MANAGEMENT BOARD AND WOODMEN HILLS METROPOLITAN DISTRICT'S MOTION TO REQUIRE JOINDER PURSUANT TO C.R.C.P. 19, C.R.C.P. 57(j), and C.R.S. § 13-51-115 | |

DEFENDANTS Woodmen Hills Covenant Management Board (the "WHCMB") and Woodmen Hills Metropolitan District (the "WHMD"), by and through their counsel, Susemihl, McDermott & Cowan, P.C., by Jason W. Downie and Geoffrey L. Lindquist, submit their Motion to Require Joinder pursuant to C.R.C.P. 19, C.R.C.P. 57(j), and C.R.S. § 13-51-115:

RULE 121 CERTIFICATION

Defendants' counsel has conferred in good faith with Plaintiffs' counsel about this Motion pursuant to C.R.C.P. 121 § 1-15, ¶8. Plaintiffs' counsel does not necessarily oppose joinder of the property owners as requested herein, but takes the position that Defendants, and not Plaintiffs, must amend the pleadings and serve the property owners.

MOTION

1. The subject matter of this action concerns the following real property:

LOTS 298 THROUGH 303 AND LOTS 362 THROUGH 498
INCLUSIVE, WOODMEN HILLS FILING NO. 8, EL PASO COUNTY,
COLORADO, and

LOTS 503 THROUGH 544 INCLUSIVE, WOODMEN HILLS FILING
NO. 9, EL PASO COUNTY, COLORADO

2. Plaintiffs' Second Amended Complaint seeks declaratory relief that certain documents recorded in the real property records of El Paso County, Colorado are unenforceable or invalid, and these documents concern the property mentioned above.

3. Plaintiffs' Second Amended Complaint seeks declaratory relief concerning the Woodmen Hills Covenant Management Board's authority to enforce covenants and the ability of Woodmen Hills Metropolitan District to assess fees associated with the same.

4. Plaintiffs' Second Amended Complaint also seeks declaratory relief that the Covenants have no mechanism for enforcement and that the amended Covenants are the controlling documents for all the owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9.

5. Pursuant to Colo. R. Civ. Pro. Rule 57(j) and Colo. Rev. Stat. § 13-51-115, when declaratory relief is sought, all persons who have or claim any interest which would be affected by the declaration shall be made a party. Clearly given Plaintiffs' sweeping claims for declaratory relief, all 185 lot owners have an interest which would be affected by the declaration.

6. In *Good v. Bear Canyon Ranch Assn, Inc.*, 160 P.3d 251, 256-57 (Colo.App. 2007), the Colorado Court of Appeals refused to overturn a trial court's ruling that all homeowners within a development be joined as indispensable parties. *Id.* at 256. In that case, a homeowner commenced an action against a homeowner's association claiming that an amendment to the declaration was invalid. *Id.* at 253. The interests of all property owners in the development were affected. *Id.* at 257. The case at bar is no different; it concerns the validity of an amendment and whether any valid enforcement mechanism exists in the governing documents. Property owners not parties to the above-captioned litigation should not have their interests adversely affected without notice or the opportunity to be heard regarding this matter.

7. Likewise, in *Dunne v. Shenandoah Homeowner's Assn, Inc.*, 12 P.3d 340, 344-45 (Colo.App. 2000), the court held joinder of all property owners within the development was proper under C.R.C.P. 19, C.R.C.P. 57(j); and C.R.S. §13-51-115. The issue in *Shenandoah* also involved the enforcement of restrictive covenants and a unilateral attempt by the developer to

revoke those covenants after selling one or more lots. In *Shenandoah* the court held revocation of the covenants by the developer after selling lots was invalid since those who purchased previously did so upon the expectation and benefit of the covenants. *Id.* Similarly, in the above-entitled action the developer tried to amend the covenants after having sold lots. All property owners in the development, including those that purchased before such amendments and their successors have an interest that may be adversely affected given the nature of the relief requested by Plaintiffs.

8. Injury to an absent party is the most important factor in considering whether a party is indispensable, but the court should also consider the danger of inconsistent decisions, avoidance of multiplicity of suits, and the reluctance of a court to render a decision which will not settle the controversy before it. *Shenandoah* at 344. Joinder of all the property owners is feasible as they are all property owners within El Paso County, Colorado.

9. As was done in *Shenandoah* and *Good*, Plaintiffs should be required to join all the property owners, not the Defendants; it is the Plaintiffs' requested relief as set forth in the Second Amended Complaint that compels joinder. It is the Plaintiffs' obligation to amend the complaint and serve the property owners. If Plaintiff fails to timely join the property owners, their Complaint should be dismissed. *See, Potts v. Gordon*, 525 P.2d 500 (Colo.App. 1974) (action may be dismissed if plaintiff fails to join the absentee within a reasonable time after a decision by the court that the absentee's presence is required).

10. All owners of the lots listed above have an interest in this action and would be affected by this action and should be joined as indispensable parties.

WHEREFORE, based on the foregoing, the Defendants, WHMD and WHCMB request this Honorable Court to require Plaintiffs to join all owners of the lots listed above.

Dated this 12th day of August, 2008.

SUSEMIHL, MCDERMOTT & COWAN, P.C.

*Original signature on file at offices of
Susemihl, McDermott & Cowan, P.C.*

By: /s/ Geoffrey L. Lindquist
Jason W. Downie, #27256
Geoffrey L. Lindquist, #38290

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2008, a copy of the foregoing **ANSWER, COUNTERCLAIM, CROSS-CLAIMS AND JURY DEMAND** was served via Lexis/Nexis File & Serve to the following:

M. Jacqueline Gaithe, PC
M. Jacqueline Gaithe
111 South Tejon Street, Suite 202
Colorado Springs, CO 80903

*Original signature on file at the offices of
Susemihl, McDermott & Cowan, P.C.*

/s/ AE Howard
AE Howard, Paralegal Geoffrey L. Lindquist