

<b>El Paso County, CO DISTRICT COURT</b> Court address: <b>270 South Tejon St.</b> <b>Colorado Springs, CO 80903</b> Phone Number: <b>(719) 448-7632</b>	<p style="text-align: center;"><b>Court Use Only</b></p>
CHARLES WARNE, ET. AL. Plaintiff,  v. WOODMEN HILLS COVENANT MANAGEMENT BOARD Defendant.	
	Case Number: 08 CV 2923  Division 5 Courtroom 501
Order Re: MOTION FOR SUMMARY JUDGMENT	

The parties have filed cross motions for summary judgment on their claims and defenses over the issue of what, if any, enforcement mechanisms the defendant WHCMB has to compel compliance with covenants that apply to properties within Woodmen Hills filings numbers 8 and 9. The matter is ripe for ruling. This case can be resolved by summary judgment, because it involves legal interpretation of the documents that both parties agree gave rise to the legal relationships among the parties.

The Plaintiffs are homeowners whose property is contained within the boundaries of Woodmen Hills Filings numbers 8 and 9 (the "property") and also contained within the Defendant Woodmen Hills Metropolitan District. The original developer of the property created and recorded a "Declaration of Covenants and Restrictions" (the "covenants") that applied to all property sold within those filings. He later recorded amendments to the covenants. The last of the developer's properties was sold in September 2003. In 2007, the developer executed an assignment of its "Rights to Enforce Covenants" to the defendant district. The district, in turn assigned those rights to the defendant management board. The main dispute in this case is whether, and to what extent, the management board has the right to enforce the covenants, charge monthly fees and do all things that a management district is capable of doing under CRS 32-1-1005.

The first question to be answered in this case is what enforcement rights are conveyed by the covenants? The covenants establish the manner in which property can be used and the condition in which it must be kept. Even though the "Design Review Committee" was purportedly eliminated by the amendment to the covenants, the balance of the use and condition covenants remained in

effect. Any property owner within the boundaries of the district has enforcement rights contained within section VI(5), where it indicates that **(A)ny violations of any provision, covenant, condition, restriction, and equitable servitude contained in this Declaration, whether by act or omission, is hereby declared to be a nuisance and may be enjoined or abated, whether or not the relief sought is for negative or affirmative action, by any Person entitled to enforce the provision of this Declaration.** Moreover, if a party is forced to bring an action and prevails, that party is entitled to an award of attorney fees.

The second, and most hotly contested question, is who has the power to enforce the covenants? The Defendants argue that they have that power by virtue of an assignment conveyed by Melody Homes in 2007. The Plaintiffs argue that Melody Homes had nothing to convey. I agree with the Plaintiffs. Article VI reserved to the Declarant certain specific rights of control until 120 days after the last property in the development was sold. The parties agree that the last sale occurred in 2003. The Defendants argue that Melody Homes only surrendered the rights enumerated in Article VI, while maintaining the right to enforce the covenants; apparently forever. There is nothing in the covenants that would support that argument.

Article VI clearly sets forth the reservations that Melody Homes wanted known to all property owners. But that article also clearly sets forth the manner in which those various rights would either be exercised or expire. Since all lots in the development were sold, Melody Homes no longer had the right to control use of the various properties in the development. The covenants do not reserve to Melody Homes the right to stay actively involved in covenant enforcement, nor have any other say regarding activity in the development. If the creation and reservation of other rights was intended by Melody Homes, it should have been enumerated in the covenants.

I conclude that since no further reservation of rights was declared in the covenants, that the right held by Melody Homes to enforce the covenants expired with its last property sale in 2003. Accordingly, the assignment of those rights in 2007 transferred nothing.

The Plaintiffs further rely on CRS 32-1-1005 in arguing that they have enforcement power. But that statute envisions the creation of an enforcement contract between the "governing body" of the "master association" of the district. In this instance, that "contract" was the ineffective assignment of enforcement rights. Accordingly, the 2007 assignments do not satisfy the statute.

In its answer, the defendants asserted that the February 2003 amended covenants were void. While it has no impact on this ruling, I agree. Paragraph 2

of Article VI gave Melody Homes the power to unilaterally change the covenants in three distinct situations. The 2003 covenant amendments don't appear to satisfy any of those three situations. Unless Melody Homes still owned 75% of the lots at the time of the amendment, such amendment would be void. However, that has no effect on this ruling because the "Design Review Board" was not given the power to enforce any covenants beyond home design, nor was it the "governing body within the applicable master association" under CRS 32-1-1005(8)(a).

While I conclude by this order that the defendants do not **presently** have the right to enforce the restrictive covenants and impose fees for that service, the covenants provide the mechanism to do so. Paragraph 3 of Article VI provides the means by which the covenants, and thus management of the district, can be changed. A vote of 75% of the lot owners is required to change the covenants. Moreover, any lot owner can assign his/her individual right to covenant enforcement to the defendants. Such an assignment by any individual lot owner would provide the defendants the right to bring a legal action against offending lot owners, including the right to seek attorney fees. Likewise, an assignment of rights by 75% of the lot owners would give the defendants the right to change the covenants and impose fees, and conceivably, fines.

In conclusion, the covenants provide a mechanism for enforcement of its provisions. The rights to enforcement still reside with each one of the individual lot owners, who can transfer those enforcement rights to any entity they choose. The 2007 assignments were ineffective in transferring enforcement rights to the defendants. Accordingly, the Plaintiff's cross-motion for summary judgment is GRANTED. The Plaintiff's request for an award of costs is also granted. They should submit that request within 15 days of this order.

Done this 20 day of MAY 2009

BY THE COURT:

  
Larry E. Schwartz  
District Court Judge

cc:  
M. Jacqueline Gaithe  
Geoffrey Lindquist