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Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
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PAUL HORTON and JACKLYN HORTON,) 1 CA-CV 08-0095
husband and wife,)
) DEPARTMENT E
)
) Plaintiffs/Appellants,)
)
) **MEMORANDUM DECISION**
) (Not for Publication
) - Rule 28, Arizona
) Rules of Civil
) Appellate Procedure)
v.)
)
ROBERT A. HARTSOOK and MARY A.)
HARTSOOK, husband and wife; NEAL E.)
HELM and DELOIS B. HELM, husband and)
wife; PAUL SCHMIDT and E. GAYLE)
SCHMIDT, husband and wife; ALFRED)
JOSEPH BRENNEMAN and KATHY BRENNEMAN,)
husband and wife, et. al.)
)
)
) Defendants/Appellees.)
)
)

Appeal from the Superior Court in Navajo County

Cause No. CV2006-0203

The Honorable Thomas L. Wing, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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K E S S L E R, Judge

¶1 Appellants Paul and Jacklyn Horton (the "Hortons"), appeal the superior court's order dismissing their complaint and granting summary judgment to Appellees. The Hortons argue various homeowners' rental activities violate certain provisions of the Amended and Restated Declaration of Covenants, Conditions and Restrictions for Rainbow Cove at the Shores (the "Declaration") and Arizona law. For the following reasons, we affirm in part, reverse in part and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 Rainbow Cove at the Shores ("Rainbow Cove") is a residential development consisting of twenty-four townhomes. It is governed by the Declaration.² The Hortons purchased a townhome in Rainbow Cove on July 31, 2003. Robert A. and Mary A. Hartsook, Neal E. and Delois B. Helm, Paul and E. Gayle Schmidt, and Alfred Joseph and Kathy Breneman (collectively,

¹ We view the facts and the inferences drawn from those facts in the light most favorable to the Hortons as the party against whom summary judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

² The Declaration was recorded on May 19, 1989, in the Navajo County Recorder's Office. Rainbow Cove is part of a larger residential community known as The Shores at Rainbow Lake which is subject to an amended declaration recorded September 6, 2001. The two declarations are virtually identical. For purposes of this decision, we will refer only to the Rainbow Cove Declaration.

"Appellees") all own townhomes in Rainbow Cove.³ Rainbow Cove has always been promoted as a great place to own a second home. Only two units in Rainbow Cove are occupied full-time by their owners.

¶13 The Declaration provides, in relevant part:

5.1 Residential Use. All Lots shall be used, improved and devoted exclusively to Single Family Residential Use. No trade or business may be conducted on any Lot or in or from any Residential Unit, except that an Owner . . . may conduct business activities within the Residential Unit so long as (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Residential Unit, (ii) the business activity conforms to all . . . requirements for the Project, (iii) the business activity does not involve Persons coming on to the Lot . . . , and (iv) the business activity is consistent with the residential character of the Project and does not constitute

³ The Hartsooks and Helms jointly own one townhome.

Appellees filed a motion to dismiss for failure to join indispensable parties, namely Rainbow Cove at the Shores Homeowners Association (the "HOA") and all of the property owners in Rainbow Cove. The superior court subsequently ordered the Hortons to join the indispensable parties and the Hortons complied with that order. All of the homeowners and the HOA were joined in the matter and most signed a court approved "Consent to be Bound by Declaratory Judgment and Excused from Further Participation in this Action." Technically these additional defendants are parties to the appeal, but they are not participating in the action. By this decision, we amend the caption in this matter by adding the terms "et al." to reflect those individuals and the HOA who were added by the amended complaint. As to the parties who did not sign consents to be bound by the declaratory judgment and failed to file answers, we leave it to the superior court on remand to determine whether a default should be entered against them.

a nuisance or a hazardous or offensive use or threaten the security or safety of other Residents in the Project The terms "business" and "trade," as used in this Section, shall be construed to have ordinary, generally accepted meanings and shall include . . . work or activity undertaken on an ongoing basis which involves the provision of goods or services to Persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether (i) such activity is engaged in full or part time, (ii) such activity is intended or does generate a profit, or (iii) a license is required for such activity. *The leasing of a Residential Unit shall not be considered a trade or business within the meaning of this Section.* (Emphasis added).

. . . .

1.31 "Residential Unit" means any building or part of a building situated upon a Lot and designed and intended for independent ownership and for use and occupancy as a residence by a Single Family.

1.32 "Single Family" means a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of not more than three (3) persons not all so related, together with their domestic servants, who maintain a common household in a Residential Unit.

1.33 "Single Family Residential Use" means the occupation or use of a Residential Unit by a Single Family in conformity with this Declaration and the Requirements imposed by applicable zoning laws or other state, county or municipal rules and regulations.

. . . .

5.28 Leasing of Lots. All leases shall be in writing and shall provide that the terms of the leases shall be subject in all respects to the

provisions of the project Documents, and any failure by the Lessee to comply with the terms of the Project Documents shall be a default under the lease. Upon leasing his Lot, an Owner shall promptly notify the Association of (i) the commencement date and termination date of the lease, (ii) the names of each Lessee or other person who will be occupying the Lot during the term of the lease, and (iii) the address and telephone number where the Owner can be reached by the Association during the term of the lease.

. . . .

10.1 Enforcement. The Association, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. . . .

10.6 Violation of Law. Any violation of any state, municipal, or local law, ordinance or regulation, pertaining to the ownership, occupation or use of any property within the Property is hereby declared to be a violation of this Declaration and subject to any or all of the enforcement procedures set forth herein.⁴

¶4 Beginning in the 1990s the original developer and one of the first owners leased units in Rainbow Cove. Prior to purchasing their townhome, the Hortons leased a unit at Rainbow Cove on six occasions for one week periods from 1996 through 2003. Currently, Appellees advertise their units for occupancy for up to ten people for periods as short as two nights in exchange for monetary compensation. Groups of up to ten people have actually rented their units. However, the record does not

⁴ The "Project" refers to real properties at Rainbow Cove.

include evidence that any one group of renters were related or unrelated to each other.

¶15 In 2004, the Hortons complained about problems created by "strangers using the units for overnight and weekend visits." They requested that the Rainbow Cove Board of Directors (the "Board") create a committee to propose rules to regulate renters and address "short-term motel activity." The Board obtained an opinion letter from a law firm which concluded that leasing of any duration was not prohibited by the Declaration. The Hortons later sent a memorandum to the Board stating the Declaration precluded "motel" type activities.

¶16 The Hortons filed a complaint against Appellees alleging violations of both the Declaration and Arizona law. Specifically, the Hortons alleged that Appellees were: (1) conducting a prohibited trade or business by providing transient lodging services in violation of section 5.1; (2) violating the single family residential use restriction contained in section 5.1; (3) violating the Arizona Residential Landlord-Tenant Act, the Residential Rental Property Act, and the Transaction Privilege Tax statutes all in violation of section 10.6; and (4) violating section 5.28 of the Declaration concerning providing lease information to the HOA. Among other things, the Hortons requested a declaratory judgment that Appellees breached Declaration sections 5.1, 10.6, and 5.28. They also requested

injunctive relief to: (1) prohibit Appellees from conducting a trade or business from their units; (2) prohibit Appellees from using their units for anything other than single family residential use; and (3) require Appellees to comply with section 5.28.

¶7 The Hortons filed a motion for partial summary judgment arguing Appellees were violating section 5.1 of the Declaration by conducting a prohibited trade or business and using their units for purposes other than single family residential use. Appellees responded and filed a cross-motion for summary judgment on all of the Hortons' claims, stating the Declaration allows leasing and that the single family provision in section 5.1 is unenforceable because it violates the Federal Fair Housing Act ("FHA"), 42 United States Code ("U.S.C.") §§ 3602, 3604 (2009). They also claimed to be complying with, or will comply with, applicable Arizona laws. Appellees further claimed that even if they were violating the Declaration, the Hortons' claims were barred by the statute of limitations, abandonment of the Declaration, waiver, estoppel and laches.

¶8 The superior court granted Appellees' motion for summary judgment and denied the Hortons' motion. It ruled, in relevant part:

It is clear that the Declaration permits leasing of the residential units in the Cove. It also is undisputed that . . . "short-term" (1 week)

leasing began "in the mid-1990's"; and various owners of the residential units have engaged in renting/leasing of their units for short terms (1 week or less) over a period of at least ten (10) years. The plaintiffs themselves engaged in this practice as a tenant beginning in 1996, ten years before filing of the instant action. It is notable that the practice of leasing units began with the 2nd developer of the Cove and near in time to when only three (3) residential units existed.

The court finds that the provisions of sections 5.28 and 5.1 are not ambiguous when taken into consideration with the related provisions of the Declaration and its definitions in 1.31 through 1.33. *The CC&Rs contain no language which defines leasing nor [sic] any provision limiting the period to lease a unit. . . .*

There is no material issue of fact that the right to lease a residential unit is not limited by duration of the lease; nor is there a material issue of fact as to the defendants' compliance with the subsections (i) through (iii) of Section 5.28.

Based upon these findings, the court denies the plaintiffs' motion for summary judgment as to claims of violation of Sections 5.1 and 5.28 of the Declarations.

The court finds that the pleadings also do not establish an issue of fact on the claim of the defendants' violation of Section 10.6 of the Declaration

Based upon the foregoing findings, the court grants the defendant's [sic] motion for summary judgment dismissing the complaint.

(emphasis added). The court also determined that the statute of limitations, waiver, abandonment, laches and estoppel defenses were moot, but in any event summary judgment on those defenses

was precluded by issues of fact. The court granted Appellees' their reasonable attorneys' fees and costs.

¶9 A final judgment memorializing the above findings was entered. The Hortons timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).⁵

DISCUSSION

I. Standard of Review

¶10 A court may grant summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Arizona Rules of Civil Procedure ("Ariz. R. Civ. P.") 56(c). On appeal, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law. *L. Harvey Concrete, Inc. v. Agro Const. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We will affirm a grant of summary judgment if the trial court was correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 111, ¶ 14, 32 P.3d 31, 36 (App. 2001). Summary judgment is not appropriate as a substitute for a jury trial, even if a judge determines that the moving party will likely prevail at trial. *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

⁵ We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

II. Declaration, Section 5.1

¶11 The Hortons' principal argument on appeal is that Appellees have violated the Declaration's residential use provision, section 5.1. That section requires Rainbow Cove properties to be devoted solely to "single family residential use."⁶ The Hortons argue that Appellees have violated section 5.1 by leasing: (1) their properties in a non-residential fashion; (2) in a way that violates the prohibition against business use; and (3) to more than three unrelated individuals, thus violating the Declaration's "single family" requirement. We hold the superior court did not err in finding Appellees have not violated section 5.1 as to the meaning of "residential use," and, thus, we affirm. However, we hold that the Hortons are entitled to a declaration that the single family restriction is not invalid on its face and that a genuine dispute of material fact precluded summary judgment on whether the Hortons were entitled to injunctive relief to prohibit Appellees from violating the single family restriction.

A. "Residential Use" - Durational Requirement

¶12 Section 1.33 of the Declaration defines "single family residential use" as "[t]he occupation or use of a Residential Unit by a Single Family in conformity with this Declaration and

⁶ For purposes of this discussion, we shorten "single family residential use" to "residential use."

the requirements imposed by applicable zoning laws or other state, county or municipal rules and regulations." The term "residential unit" is defined under section 1.31 as a building intended "[f]or use and occupancy as a residence" Thus, "residential use" is the occupation or use of a building intended for use as a residence. The term "residence" is not defined by the Declaration.

¶13 Appellees have leased their properties to vacationers who stay for periods as short as a few days or a week. The Hortons call those short-term lessees transient occupiers, and claim they do not use Appellees' properties for "residential use" as prescribed by the Declaration. Appellees argue the Declaration's plain language does not preclude short-term leases. We hold the Declaration's language unambiguously permits the type of durational leasing engaged in by Appellees.

¶14 Arizona has adopted the Restatement approach for interpreting restrictive covenants. *Powell v. Washburn*, 211 Ariz. 553, 557, ¶ 14, 125 P.3d 373, 377 (2006). The Restatement approach recommends that "[r]estrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created." *Id.* at ¶ 1; Restatement (Third) of Property: Servitudes ("Restatement") § 4.1(1) (2000). When a covenant is expressly created, "[t]he

expressed intention of the parties is of primary importance. Their intention is ascertained from the [covenant's] language interpreted in light of all the circumstances." Restatement § 4.1 cmt. d. Restrictive covenants should be interpreted to avoid violating public policy. Restatement § 4.1(2).

¶15 It is undisputed the Declaration allows owners to lease their units; leasing is expressly permitted in section 5.28. The Declaration restricts leasing in some ways, such as, the requirement that leases be in writing and that an owner notify the HOA of a commencement date and termination date for the lease. However, there is no restriction on the duration of a lease. The Declaration does not distinguish between short-term and long-term leasing, but allows leasing in general.⁷ In addition, the Declaration's definition of "single family residential use" does not limit the duration of use or occupancy. The Declaration also exempts leasing from consideration as a prohibited business or trade under section 5.1.

¶16 Thus, by looking at the Declaration's language it is clear the Declaration permits leasing. By not including

⁷ In a memorandum from the Hortons to the Board dated August 3, 2005, the Hortons conceded that "the CC&Rs permit the 'leasing' of Rainbow Cove units. We understand that, under the CC&Rs, the 'lease' of a Rainbow Cove unit may theoretically be of any term, so long as this activity is actually a 'lease'"

language restricting lease duration, we find the Declaration does not exclude short-term leases. Since the Declaration's language is clear concerning leasing and does not offend public policy, we will not seek the guidance of extrinsic authority to determine whether short-term leases are precluded. See *Pesqueria v. Factory Mut. Liab. Ins. Co. of Am.*, 16 Ariz. App. 407, 411, 493 P.2d 1212, 1216 (1972) (citation omitted) ("[w]here the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert^[8] or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.").

¶17 Nevertheless, the Hortons argue that leasing to transient occupiers, who only stay for a few vacation days, violates the Declaration. Their argument hinges on interpreting the word "residence" as excluding short-term leasing by vacationers. They also rely on classifying short-term lessees as transients, not tenants. We are not persuaded by these arguments.

¶18 Division Two of our court distinguished a tenant from a hotel guest in *State v. Carrillo*, 26 Ariz. App. 113, 546 P.2d 838 (App. 1976). The court noted that "[a] guest is a transient

⁸ The quotation in Westlaw contains a typographical error. Accordingly, we use the language in the official reports.

who normally stays from day to day without any express contract," while a tenant "usually contracts for a specified period of time." *Carrillo*, 26 Ariz. App. at 114, 546 P.2d at 839. A guest has a right to use the premises whereas a tenant has exclusive possession and control. *Id.* Here, all of Appellees' tenants had express contracts for the duration of the stay. None of the tenants stayed day to day. Additionally, pursuant to the terms of the lease agreements contained in the record, it appears the tenants had exclusive possession and control of the leased units as opposed to merely having a right to use the units. For instance, the Schmidts' agreements provide that cleaning service is provided only after checkout, and the tenant must keep the yard "neat and tidy," wash dishes, take out the trash and wipe up spills. A guest in a hotel is under no such obligations. The Brenemans' agreements also reference that the unit must be left in good condition without "spills, stains, [or] wall markings beyond normal wear or tear." The Hartsooks/Helms' agreements also make their "guests" responsible for keeping the unit in "good order and condition." In light of the express contracts provided by the Appellees to their tenants, it is clearly the intention that these lessees are tenants and not transients.

¶19 Relying on the definitions of section 1.31 of the Declaration, the Hortons contended at oral argument that the

term for "use and occupancy as a residential unit" imposes a durational limit to exclude "transients." This argument is not persuasive. The reference to residential use can simply mean that the premises is where a person resides as opposed to storing equipment. While the Hortons contend that to be a residential use the person must be using the premises as a "home," that argument is not helpful because a "home" can simply be a place where one "resides." Webster's New Collegiate Dictionary (1981) at 542 (defining "home" as a family's place of residence") and at 977 (defining "residence" as "the act or fact of dwelling in a place for some time"). Compare *id.* (alternatively defining "residence" as "a place where one actually lives as distinguished from his domicile or a place of temporary sojourn"); and 1 The Compact Edition of the Oxford English Dictionary (1971) at 349 (defining home variously as "a dwelling-place, house, abode; the fixed residence of a family or household."). Thus, the key is not durational use but whether the use and occupancy is for the person to reside on the premises.

¶120 Moreover, the Hortons' argument does not provide a sound basis where to draw a line between "resident" and "transient" on the grounds of duration of stay. They ask us to narrowly define "residence" to exclude someone who leases for a few days or a couple of weeks, but to apparently include someone

who leases for something approximating thirty days or longer. However, a durational foundation to distinguish between resident and transient guest is simply arbitrary and ignores the fact that the Declaration's drafters could have written restrictions on lease duration or narrowly defined "residence" as they had done with other terms, but they did not. Without evidence the Declaration's drafters intended to narrowly define "residence," we will not do so.

¶21 Even if we were to assume the Declaration is ambiguous as to its meaning of "residential use," we may ascertain the intent of the Declaration's drafters from the way the properties have been used since the Declaration's creation and prior to the current dispute. Restatement § 4.1 cmt. d; *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 266, 681 P.2d 390, 418 (App. 1983) (construction or interpretation given to agreement as evidenced by acts and conduct of the parties with knowledge of its terms prior to any controversy as to its meaning is entitled to great weight and will be adopted by the court if reasonable). Since its inception, Rainbow Cove has been promoted and used as a vacation community where people stay for short-term periods. Prior to becoming owners, the Hortons themselves participated in short-term leasing at Rainbow Cove. For one week periods from 1996 to 2003, they leased the unit owned by the Hartsooks and the Helms. The Hortons' own conduct,

well before a dispute arose as to short-term leasing, reflects that a definition of "residence" based solely on duration of stay is arbitrary and would violate the intent of the parties to the Declaration.

¶122 We recognize that, as the Hortons argue, the Declaration intended to create a private, exclusive lifestyle community, which they say is eroded by short-term vacationers. We agree there is evidence showing the drafters intended Rainbow Cove to be private and exclusive, however, creating an exclusive lifestyle community is not antithetical to permitting the type of durational leasing shown in this record. Therefore, we hold Appellees' short-term leasing does not violate the Declaration.

B. "Residential Use" - Trade or Business

¶123 The Hortons also argue that Appellees' short-term leasing is a trade or business prohibited by the Declaration. The Declaration prohibits business activities that: (1) are detectable from outside the units; (2) involve people coming on to the property; (3) do not conform to the Project's requirements or are inconsistent with its residential character; (4) are a hazardous or offensive use of the property or otherwise a nuisance; or (5) threaten the security or safety of other residents. However, the Declaration expressly exempts leasing from being considered a trade or business: "[t]he

leasing of a Residential Unit shall not be considered a trade or business within the meaning of [section 5.1]."

¶24 The Hortons claim the Declaration's provision exempting leasing from being considered a prohibited trade or business does not apply to Appellees' activities because "[t]he ordinary meaning of leasing does not encompass transient rentals." They cite to dictionaries to argue the word "lease" does not encompass "short-term lease," and they claim common-sense shows that Appellees' are engaged in "renting," not "leasing." However, again the Hortons do not cite to the Declaration's language to discern whether the drafter's intended the word "lease" to exclude short-term stays. Nor have they provided evidence that the owners' use of their properties for leasing purposes has ever been restricted as a prohibited trade or business.

¶25 Finally, the Hortons argue that when considering the Declaration in its entirety, it does not allow for the short-term leasing in which Appellees engage. They conclude the superior court's order rendered meaningless the Declaration's single family residential use limitations because "[t]he judge set no conditions or limits on occupancy." The Hortons claim the court's order permits Rainbow Cove owners to use their properties as motels or other "transient-lodging business[es]." We disagree. First, the superior court was not required to set

conditions or limits on occupancy. Pursuant to a motion for summary judgment, the court was responsible for determining whether there was a material issue of fact precluding summary judgment. Second, as we explain above, the Declaration does not restrict short-term leasing of the kind engaged in by Appellees, but that does not necessarily mean it permits "transient lodging businesses" like hotels and motels. Considering the Declaration in its entirety, the Hortons have not highlighted any language which shows the drafter's intended to restrict the type of short-term leasing reflected in this record in which Appellees engage. We hold short-term leasing engaged in by Appellees as described above does not violate the Declaration. Accordingly, we affirm the superior court's order granting summary judgment to Appellees on this issue.

C. "Single Family"⁹

¶126 The Declaration defines "single family" as "[a] group of one or more persons each related to the other by blood,

⁹ The Hortons argue that the superior court ruled against them without addressing their single-family argument. The court's ruling states, "[t]he court denies the plaintiffs' motion for summary judgment as to claims of violation of Section[] 5.1" It gave reasons for its ruling regarding the residential use provision of 5.1, but not that of single-family use. Since the court is not required to explain its ruling, we assume the court ruled on all of the Hortons' 5.1 claims. See *City of Phoenix v. Geyler*, 144 Ariz. 323, 329 n.3, 697 P.2d 1073, 1079 n.3 (1985) (trial courts are not required to explain discretionary rulings).

marriage or legal adoption, or a group of not more than three [] persons not all so related” The Hortons claim Appellees have violated the single family provision in section 5.1 for three reasons: (1) their lease advertisements do not reference the occupancy restrictions; (2) they do not limit leasing to groups of three unrelated people or groups of related people; and (3) evidence shows the Hartsooks, Helms, and Brenemans have permitted groups of up to ten people to lease their units. The Hortons also argue the proscriptions against discrimination based on “familial status” in the FHA are inapplicable to section 5.1. Appellees, on the other hand, argue the single family provision violates the FHA and is, therefore, void and unenforceable.¹⁰ In the alternative, they contend there is no evidence they actually leased their units to more than three unrelated individuals.

¶127 We find the Declaration’s single family provision as written does not violate the FHA. Moreover, since there is at least some evidence several of the Appellees plan to lease their units to more than three unrelated individuals, summary judgment on this issue was inappropriate.

¹⁰ Appellees also argue the single family provision violates the Arizona Fair Housing Act, A.R.S. § 41-1491.01 (2004). However, because Appellees raise this issue for the first time on appeal, we will not address it. *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007).

¶128 As an initial matter, the Hortons contend Appellees have not alleged an FHA injury and, therefore, do not have standing to raise the FHA issue.¹¹ Standing is conferred under the FHA in a number of ways, including “[t]hrough the imminent loss of the use of [] property” *Hispanics United of DuPage County v. Vill. of Addison, Ill.*, 958 F.Supp. 1320, 1326 (N.D. Ill. 1997). In their statement of facts in support of their motion for summary judgment, Appellees stated they would be “greatly prejudiced” and in an “untenable predicament” if the court prohibited them from leasing to unrelated people. Appellees further claimed economic injury, alleging “[t]hey will be in a position where they will have to breach their leases in order to abide by any such court order . . . [and] the entire premise based on which they purchased, own and operate their units will be destroyed and [they] will be forced to sell their units” Appellees have standing because they claimed they would suffer an immediate injury if the court ruled they could not lease to more than three unrelated individuals.

¶129 We now turn to whether the single family provision in section 5.1 as written violates the FHA. Pursuant to the FHA,

¹¹ The Hortons raise the standing issue for the first time in their reply brief. Generally, an issue raised for the first time in a reply brief is waivable at our discretion. *State v. Aleman*, 210 Ariz. 232, 236, ¶¶ 9-10, 109 P.3d 571, 575 (App. 2005). In the exercise of that discretion, we will address the merits of whether Appellees have standing especially because the Appellees raised the FHA issue in the superior court.

it is unlawful to discriminate in the sale or rental of a dwelling unit because of familial status. 42 U.S.C. § 3604(b). It is also unlawful to advertise the sale or rental of a dwelling unit by indicating any preference, limitation, or discrimination based on familial status. 42 U.S.C. § 3604(c).

"Familial Status" is defined as:

[O]ne or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

42 U.S.C. § 3602(k)(1)-(2). Put simply, the FHA's familial status prescriptions prohibit housing discrimination against people with children.

¶130 Appellees argue the single family definition in section 5.1 discriminates against familial status and is, therefore, unenforceable. They also contend there is no way for the single family restriction to be enforced without violating the FHA. In essence, Appellees argue that the single family restriction is facially invalid under the FHA. To show facial invalidity, Appellees would have to show that in all cases or in the vast majority of the cases, the restriction would be invalid. *United States v. Salerno*, 481 U.S. 739, 745 (1987);

Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 895 (1992); *Phelps Dodge Corp. v. Ariz. Elec. Power Coop. Inc.*, 207 Ariz. 95, 106, ¶ 29, 83 P.3d 573, 584 (App. 2004). Compare *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality of Court calls Salerno rule into question); *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1190 (2008) (noting division of Court on Salerno rule); *Hernandez v. Lynch*, 216 Ariz. 469, 472, ¶¶ 8-9 n.4, 167 P.3d 1264, 1267 n.4 (App. 2007) (noting division of authority over Salerno test but applying it to constitutional challenge); *State v. Seyrafi*, 201 Ariz. 147, 153, ¶¶ 28-29, 32 P.3d 430, 436 (App. 2001) (*Salerno* is not binding on state courts; ordinance will be upheld on facial challenge if there is any reasonable construction that it is constitutional) (Barker, J., dissenting).

¶31 We fail to see how the restriction allowing an unlimited number of related individuals or up to three unrelated individuals to occupy a unit on its face discriminates against people with children in violation of the FHA. Appellees attempt to provide an example showing how section 5.1 discriminates against people with children, stating it “[w]ould prohibit a group of children from occupying Units at Rainbow Cove (via ownership or lease) with their parents, if their parents are merely living together and not married.” However, this

hypothetical does not prove Appellees' point; it is not prohibited by the single family provision and does not discriminate based on familial status. Two unmarried and unrelated parents can occupy a unit with a group of their children so long as the children are related to each other and the parents.

¶132 Appellees further argue there is no exemption to the applicability of the FHA's proscriptions against discrimination. Specifically, they contend 42 U.S.C. § 3607(b)(1) (2009),¹² which permits reasonable maximum occupancy restrictions to supersede other FHA provisions, does not apply to the Declaration's single family provision. They claim the exemption is inapplicable "[f]or the simple reason that the issue here is not about the reasonableness of a 'local, State or Federal restriction regarding the maximum number of occupants permitted to occupy a dwelling.'" Because section 5.1 is a land-use restriction and not a maximum occupancy restriction, we agree. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 734-35 (1995). However, the fact that the restriction does not fall within this exemption does not mean it violates the FHA. See *id.* at 738.

¹² Section 3607(b)(1) states, in pertinent part: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

¶133 In addition, Appellees appear to argue that local governments may enforce occupancy restrictions that are rationally related to restricting the number of people who occupy a dwelling unit. However, they contend section 5.1 is not rationally related to limiting the number of people who occupy a unit because an unlimited number of related people can occupy a unit. Therefore, Appellees claim the single family restriction discriminates against familial status. This argument is flawed because this case does not concern a government occupancy restriction. Therefore, we hold the single family provision does not violate the FHA's proscription against familial status discrimination.

¶134 The remaining issues are whether Appellees have violated or intend to violate the single family provision, as the Hortons accuse, by not referencing the occupancy restrictions in their advertisements and not limiting occupancy to groups of up to three unrelated people. Appellees argue there is no evidence they actually leased to more than three unrelated individuals.

¶135 While it is true Appellees did not reference the occupancy restrictions in their leasing advertisements, the Hortons do not cite any authority which requires them to do so. The Declaration only restricts actual occupancy; it does not

require leasing advertisements to expressly include notice of the occupancy restrictions.

¶136 A closer question is presented as to whether there is any evidence several of the Appellees violated or intend to violate the single family restriction by renting to more than three renters who are not related as provided by the Declaration. While the record shows the Hartsooks, Helms, and Brenemans allowed groups of up to ten people to occupy their units, the Hortons do not provide evidence that those people were unrelated. Additionally, while the Hortons assert that Appellees have not denied permitting more than three unrelated people to lease their units and the Hartsooks and the Helms have not denied having allowed unrelated groups of ten to occupy their properties, the burden of going forward did not shift to the Appellees for purposes of Ariz. R. Civ. P. 56. Appellees were only required to respond with certain evidence denying the Horton's accusations if the Hortons first satisfied their burden of showing the absence of a genuine issue of material fact. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 118, ¶ 23, 180 P.3d 977, 983 (App. 2008) (“[a] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] . . . which it believes demonstrate the absence of a genuine issue of material fact.”)

(citations omitted). The Hortons did not satisfy their burden because the only evidence they have to assert such an existing violation is citing to Paul Horton's affidavit in which he states that after reviewing Appellees' leasing advertisements "it appears to me" that Appellees allowed more than three unrelated people to lease their properties. This evidence is speculation and does not show an absence of a genuine issue of material fact. See *Thruston*, 218 Ariz. at 118, ¶ 23, 180 P.3d at 983 (conclusory statements do not satisfy the summary judgment burden) (citation omitted). Thus, there is no genuine dispute of material fact whether the Appellees had violated or were currently violating the single family restriction.

¶137 Despite this failure, there is sufficient evidence in the summary judgment record to show a genuine dispute whether the Appellees intend to lease their units to more than three unrelated individuals. As noted above, Appellees stated they would be "greatly prejudiced" and in an "untenable predicament" if the court prohibited them from leasing to unrelated people. Appellees further claimed economic injury, alleging "[t]hey will be in a position where they will have to breach their leases in order to abide by any such court order . . . [and] the entire premise based on which they purchased, own and operate their units will be destroyed and [they] will be forced to sell their units" We conclude this evidence is sufficient to

create a genuine issue of material fact that at least several of the Appellees intend to lease units to more than three unrelated individuals, thus precluding summary judgment for the Appellees on the single family usage.

¶138 Accordingly, the Hortons were entitled to declaratory relief that, on its face, the single family restriction was enforceable under the FHA. While there is no evidence of prior or current violations of that restriction, there is a factual dispute about future rentals to more than three unrelated individuals. Thus, summary judgment should not have been granted to the Appellees on the issue of whether the Hortons are entitled to injunctive relief to prevent future violations. Whether the Hortons are entitled to injunctive relief to enforce the single family restriction, subject to the affirmative defenses, is an issue left to the trier of fact on remand.

III. Violations of Arizona Law

¶139 The Hortons argue that the superior court erred in granting summary judgment on their claim that Appellees violated Arizona laws. In their amended complaint, the Hortons alleged Appellees were violating the Arizona Residential Landlord and Tenant Act, the Residential Rental Property Act, and the Transaction Privilege Tax statutes. The superior court found that the pleadings did not establish an issue of fact concerning whether Appellees violated section 10.6 by violating a provision

of law. We hold that the Hortons' reliance on the Transaction Privilege Tax statutes is misplaced, the Residential Rental Property Act does not provide the Hortons a remedy, and there is no evidence of current or alleged future violations of the Residential Landlord and Tenant Act. Thus, we affirm the grant of summary judgment on those issues.

¶140 In the superior court, the Hortons argued Appellees failed to obtain a license from the Arizona Department of Revenue as required by the Arizona Transaction Privilege Tax statute, A.R.S. § 42-5070. That statute provides that "transient lodging classification is comprised of the *business* of operating, for occupancy by transients, a hotel or motel, including . . . tourist home or house, . . . lodging house, rooming house, apartment house, . . . mobile home or house trailer at a fixed location or other similar structure." (Emphasis added). On appeal, however, the Hortons contend that they "are not trying to enforce Arizona tax law," but are only relying on the transaction privilege tax statutes to show Arizona recognizes a difference between a true lease and a business renting to transients.¹³ Regardless of Arizona tax law on the meaning of transient rentals and the meaning of

¹³ As we understand the Hortons' argument, the transaction privilege tax considers transient rentals for less than thirty days as a business for purposes of that statute while the Residential Landlord and Tenant Act exempts from its coverage transient occupancy in a hotel, motel or recreational lodging.

residential rentals under the Residential Landlord Tenant Act, the Declaration's language makes clear that the types of rentals here are not businesses. Thus, reliance on this statutory distinction to find a violation of the Declaration based on duration fails.

¶41 The Hortons also argued below that Appellees have violated the Residential Rental Property Act. This Act requires an owner of residential rental property to maintain certain information on file with the county assessor. See A.R.S. § 33-1902 (2007). They contend on appeal that the court erred in granting summary judgment on that issue. However, for purposes of this Act, residential real property is defined as property used "solely as leased or rented property for residential purposes." (Emphasis added). A.R.S. § 33-1901(2) (2007). The Hartsooks, Schmidts and Brenenmans all state that they use their units for their own vacations and lease their units the remainder of the time. The Hortons have not disputed these statements, nor have they presented any controverting evidence. Because the units are not solely used as rentals and are in fact used by the owners, the Residential Rental Property Act is not applicable. Additionally, the remedies for violations of this Act are that a tenant may terminate his or her lease and the city or town can impose a civil penalty. A.R.S. § 33-1902(C),(G). Thus, even if applicable, the Hortons have no

remedy or any damages due to a violation of this Act by Appellees.¹⁴ Accordingly, we find that the superior court properly granted summary judgment on this claim.

¶42 The Hortons also contended Appellees violated the Arizona Residential Landlord and Tenant Act, A.R.S. §§ 33-1301 - 1381 (2007), by failing to include the required content in their leases. Upon review of the leases contained in the record, there is no factual issue that both the Schmidts' and the

¹⁴ We note that the Declaration grants any owner the right to enforce all restrictions and covenants and that section 10.6 of the Declaration provides that any violation of a state or local law pertaining to use of the property is declared a violation of the Declaration. Clearly, the applicable statutes are automatically incorporated into contracts to which they apply. *Banner Health v. Medical Sav. Ins. Co.*, 216 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1100 (App. 2007). However, the entire applicable statute is so incorporated and if the statute limits remedies to persons, such as tenants under the Landlord and Tenant Act, that restriction is also incorporated into the Declaration and prohibits the homeowners from attempting to enforce the statute through the Declaration. See *1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 202, ¶ 7, 196 P.3d 222, 224 (2008) (in determining whether a contract provision is enforceable, courts balance the interest of enforcement against the public policy opposing enforcement). Permitting the Declaration to authorize a remedy not permitted by the statute would allow parties to create a private cause of action for them when the legislature has expressly limited such a remedy.

Brenemans' lease agreements comply with this act.¹⁵ The Hortons agreed that all of the Schmidts' leases and the Brenemans' most recent lease comply with A.R.S. § 33-1322. Therefore, summary judgment was appropriate on this issue. For the reasons stated in footnote 14, if either the Schmidts or Brenemans failed to comply with these provisions, any remedies would lie with their tenants, not the Hortons. See generally, A.R.S. §§ 33-1361 (Supp. 2008) through 33-1377 (describing the remedies of landlords and tenants for violations under the act).

¶43 Regarding the Hartsooks/Helms' lease agreements, the only ones contained in the record are the ones entered into with the Hortons from 2003. This issue is moot because the Hortons now own a unit and there is no evidence they will rent from the Hartsooks/Helms' again. See *Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 140-41, 761 P.2d 1041, 1044-45 (1988) (stating that generally the "mootness doctrine requires that judicial opinions not be rendered concerning issues which no longer exist

¹⁵ While the Hortons do not cite in their complaint a specific statute that the Appellees violated, they cited A.R.S. § 33-1322 (2007) in their response to the Appellees' cross motion for summary judgment. Arizona Revised Statutes § 33-1322 imposes requirements on the disclosure and tender of the rental agreements. The only additional statutes that could be applicable are A.R.S. § 33-1314 (Supp. 2008) and § 33-1315 (2007). Section 33-1314 lists terms and conditions a landlord "may" include in a rental agreement. Section 33-1315 lists prohibited provisions in rental agreements. There are no violations of these two sections in any of the leases.

because of changes in the factual circumstances."). Moreover, this act does not provide the Hortons with a remedy as to leases with other tenants because remedies are limited to those tenants.

IV. Affirmative Defenses

¶44 In their cross-motion for summary judgment, Appellees argued the Hortons' claims were barred by the statute of limitations, abandonment of the Declaration, waiver, estoppel, and laches. The superior court's order stated it was not going to address the merits of those affirmative defenses because they were moot. However, it stated if they were not moot, there was an issue of fact and it denied Appellees' motion as to those issues. Neither party has appealed that decision. On remand they are free to litigate the affirmative defenses as they relate to whether the Hortons are entitled to injunctive relief in enforcing the single family restriction.

V. Attorneys' Fees

¶45 The superior court awarded reasonable attorneys' fees and costs to Appellees. However, because we are reversing and remanding in part concerning the grant of summary judgment, we also reverse the grant of attorneys' fees and costs as premature.

¶46 Both parties request an award of attorneys' fees on appeal. At this point, we cannot say that any party is a

prevailing party for an award of attorneys' fees. At the conclusion of this litigation, the superior court may determine who is the prevailing party and consider awarding to that party the attorneys' fees they incurred on appeal. However, we award taxable costs on appeal to the Hortons upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶47 We hold the single family restriction does not violate the FHA on its face and reverse the summary judgment granted to the Appellees on the issue of the single family restriction for further proceedings consistent with this decision. We also reverse the award of attorneys' fees to the Appellees as premature. We affirm the other orders of the superior court relating to summary judgment. On remand, the superior court should also determine whether a default should be entered against various defendants.

DONN KESSLER, Judge

CONCURRING:

PATRICIA K. NORRIS, Presiding Judge

JOHN C. GEMMILL, Judge