

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA

CASE NO.: 53-2021CA-001075
SECTION: 04

BRENDA HOSLER,
JOHN CASE, and
DOLORES DIANA,
Plaintiffs,

v.

SWEETWATER EAST INVESTMENT CO. d/b/a
LAKE HENRY ESTATES,
Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came on to be heard before the Court on February 24, 2023, on the Plaintiffs' *Motion for Final Summary Judgment*, filed October 26, 2022 ("Motion"), and the Defendant's *Response in Opposition to Plaintiffs' Motion for Final Summary Judgment*, filed February 6, 2023 ("Response"). There appeared before the Court Robert C. Chilton, Esquire, counsel for the Plaintiffs, and Cynthia M. Dennen, Esquire, counsel for the Defendant. Having reviewed the Motion, Response, all legally sufficient exhibits and attachments to the Parties' respective filings, including but not limited to all *Affidavit(s)* and *Supplement Notice(s) of Authority*, the court record, and applicable statutory and case law, and having considered the arguments of counsel, and otherwise being fully advised in the premises, the Court finds as follows:

Pertinent Background

Defendant is a 55-years or older, adult residential community structured as a for-profit corporation. Each home owner has at least one share in the corporation. The corporation is run by a Board of Directors, elected by majority vote of shareholders. Homeowners/Shareholders pay periodic assessments and are subject to Defendant's continuing liens against the residences and, therefore, subject to foreclosure. Collectively as "governing documents," see April 13, 2021, V. Compl., Ex. C (BYLAWS [of] SWEETWATER EAST INVESTMENT CO. D/B/A LAKE HENRY ESTATES, approved Nov. 16, 2010), Ex. D (SUPPLEMENTAL AND AMENDED DECLARATION AND RESTRICTIONS RELATED TO: SWEETWATER GOLF AND TENNIS CLUB, SECOND ADDITION...and SWEETWATER AND TENNIS CLUB, THIRD ADDITION..., recorded April 3, 1998), Ex. E (CORRECTED SUPPLEMENTAL AND AMENDED DECLARATION OF RESTRICTIONS RELATED TO:..., recorded Jan. 12, 1999), & Ex. F (AMENDED AND RESTATED DECLARATION OF RESTRICTIONS

RELATED TO:..., recorded Dec. 19, 2019); Def.'s Aug. 23, 2021, Am. Aff. Defenses, Ex. A (same).

Plaintiffs have pled declaratory relief. While also raising related arguments, the Parties principally dispute whether Defendant is a homeowners' association that falls under Fla. Stat. ch. 720 (2023). Defendant argues that Fla. Stat. sec. 720.302(5) (2023), the 2007 statutory amendment applying chapter 720 to for-profit corporate-residential communities, is not retroactively applicable to Defendant. *See* V. Compl. at ¶ 4 & 26-29; Pls.' Mot. at pages 7-12; Def.'s Resp. at pages 9-12; section 720.302(5) ("Unless expressly stated to the contrary, corporations that operate residential homeowners' associations in this state shall be governed by and subject to part I of chapter 607, if the association was incorporated under that part,..., and this chapter. This subsection is intended to clarify existing law."); 2007 Fla. Sess. Law Serv. ch. 2007-173, secs. 8 & 17 (West) ("Expect as otherwise expressly provided in this act, this act shall take effect July 1, 2007," amending section 720.302 to add for-profit corporate-residential communities.). There is no dispute that Defendant is subject to Fla. Stat. ch. 607 (2023) as a for-profit corporation.

As a threshold issue, during the hearing Plaintiffs objected to the Defendant's Response on the grounds that (1) the Response was untimely, and (2) the Defendant did not plead as an affirmative defense the non-retroactive application of section 720.302(5) and thus cannot argue the issue in opposition to Plaintiffs' Motion.

Legal Standard

As to summary judgment standard, see Fla. R. Civ. P. 1.510; *Bensen v. Privilege Underwriters Reciprocal Exchange*, 2023 WL 3668085 (Fla. 6th DCA 2023).

Analysis

Plaintiffs have failed to show that Defendant is a homeowners' association subject to chapter 720 based on section 720.302(5), and that they are therefore entitled to summary judgment as a matter of law

First, the Court finds that Defendant's Response was not timely filed. It was e-filed and e-served on February 6, 2023 (a Monday). Starting on the following day, only 17 days passed between February 7th (a Tuesday) and February 23rd (a Thursday), with the summary judgment hearing occurring on February 24th (a Friday). *See generally*, Fla. R. Gen. Prac. & Jud. Admin. 2.514 (2023). However, the Court does have the discretion to consider Defendant's untimely Response. *See*, Fla. R. Civ. P. 1.510(e); *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1136 (Fla. 4th DCA 2022); *also see*, *Butts v. CentiMark Roofing Corp.*, 2022 WL 950938 (11th Cir. 2022) ("A district court's refusal to consider an untimely opposition to a summary judgment motion is not an abuse of discretion."); *Young v. City of Palm Bay, Fla.*, 358 F.3d 859 (11th Cir. 2004) (same).

Regardless, the Defendant's untimely filed response is of no consequence here because this Court's decision is one of law not fact. It is Plaintiffs' burden to establish applicability of chapter 720 as a matter of law, of which retroactive application of section 720.302(5) is a critical legal factor. Even without a response from the Defendant the Court must still consider Plaintiffs' Motion on the merits. *As insightful, see Universal Ins. Co. of North America v. Llerena*, 2016 WL 754 0519 (S.D. Fla. 2016) (Even where the nonmovant fails to respond, "the district court...must consider the merits of the motion'...While failure to respond 'allow[s] the district court to accept movant's factual assertions as true...the moving party must still establish that the undisputed facts entitle him to a judgment as a matter of law.'" (citations omitted)); *Hornbeck v. Club Madonna, Inc.*, 2010 WL 11505218 (S.D. Fla. 2010) (same).

Second, as to Defendant failing to clearly plead an affirmative defense, Defendant did assert in its Amended Affirmative Defenses that section 720.302(5) was not "retrospectively" (i.e. retroactively) applicable against it as a for-profit corporation. Plaintiffs were certainly put on fair notice of the nature of the defense and the grounds upon which it rests. However, it was not necessary for Defendant to plead non-retroactive application of section 720.302(5) as an affirmative defense because, in its Answer, Defendant did not "concede the correctness of the allegation" that Defendant is subject to chapter 720 at all. Elements of a cause of action for declaratory relief must include that "some immunity, power, privilege or right of the complaining party is dependent upon...the law applicable to the facts; ... [and] there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law." *See City of Hollywood v. Petrosino*, 864 So. 2d 1175 (Fla. 4th DCA 2004); *Riverside Avenue Property, LLC v. 1661 Riverside Condominium Association, Inc.*, 325 So. 3d 997 (Fla. 1st DCA 2021) (same). Per their Verified Complaint, Plaintiffs seek a declaration that they have "rights, powers, and privileges" under chapter 720 because Defendant, even as a for-profit corporation, is a homeowners' association subject thereto. Defendant, in its Answer, challenges Plaintiffs' position on this element. *Also see, Citizens Property Insurance Corporation v. Kings Creek South Condo, Inc.*, 300 So. 3d 763 (Fla. 3d DCA 2020) ("An affirmative defense does not concern itself with the elements of the [claim] at all; it concedes them but asserts a good excuse or reason.") (citations omitted).

Forging ahead on the merits of the Plaintiff's Motion. the Court finds no indication that the Legislature intended section 720.302(5) be applied retroactively. *See, Cole v. Universal Prop. & Cas. Ins. Co.*, 363 So. 3d 1089, 1091 (Fla. 4th DCA 2023) ("The 'general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively.'" (quoting, *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995)).¹

¹ No argument was made by Plaintiffs in their Motion that the 2007 amendment to §720.302, Fla. Stat, was procedural as opposed to substantive. "[S]ubstantive law prescribes duties and rights' as opposed to procedural law which concerns itself with 'the means and methods to apply and

The record evidence shows that Defendant's SUPPLEMENTAL AND AMENDED DECLARATION AND RESTRICTIONS was recorded April 3, 1998, and predates the 2007 statutory amendment expanding application of chapter 720 to for-profit corporate-residential communities. The governing documents entail preexisting contractual rights between the Parties, including but not limited to foreclosing on a continuing lien. The governing documents lack any reference to chapter 720, let alone state "or as [chapter 720] may be amended from time to time" (or words to that effect, i.e., the "*Kaufman* language")². Consequently, absent "*Kaufman* language," subsequently enacted subsection 720.302(5) cannot "supersede" the preexisting governing documents and "impair" said preexisting contractual rights. See *Tropicana Condominium Association v. Tropical Condominium, LLC*, 208 So. 3d 755 (Fla. 3d DCA 2016), citing *Kaufman v. Shere*, 347 So. 2d at 627; *Cohn v. Grand Condominium Ass'n, Inc.*, 26 So. 3d 8 (Fla. 3d DCA 2009); and *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774 (Fla. 1979) (for "public welfare"/constitutional considerations when retroactively applying a statutory provision, three-prong test for "weigh[ing]...degree" of "tolerable" impairment of preexisting contractual rights); see *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n, Inc.*, 169 So. 3d 145 (Fla. 4th DCA 2015); *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Properties, L.P.*, 223 So. 3d 292 (Fla. 4th DCA 2017); *In re Adam*, 646 B.R. 846 (Bkrtcy. S.D. Fla. 2022); see also *De Soleil South Beach Residential Condominium Association, Inc. v. De Soleil South Beach Association, Inc.*, 322 So. 3d 1189 (Fla. 3d DCA 2021) (addressed other issues, but detailed the trial court's order regarding lack of *Kaufman* language).

In conclusion, the Court finds no legal basis for retroactive application of section 720.302(5) against Defendant and, therefore, no legal basis to conclude that Defendant is a homeowners' association under chapter 720. Defendant's governing documents, entailing preexisting contractual rights, predate said 2007 amendment expanding applicability of chapter 720 to for-profit corporate-residential communities. The governing documents lack *Kaufman* language. No arguments were raised in favor of retroactive application under *Pomponio*. Accordingly, based upon the above findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED that Plaintiffs,' BRENDA HOSLER, JOHN CASE, and DOLORES DIANA, *Motion for Final Summary Judgment* is hereby **DENIED**.

enforce those duties and rights.'" *Cole*, 363 So. 3d at 1191 (*quoting, Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994)).

² *Kaufman v. Shere*, 347 So. 2d 627 (Fla. 3d DCA 1977)

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DONE AND ORDERED in Bartow, Polk County, Florida, on Tuesday, September 26, 2023.

53-2021-CA-001075-0000-00 09/26/2023 12:00:05 PM



Michael McDaniel, Circuit Judge
53-2021-CA-001075-0000-00 09/26/2023 12:00:05 PM

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