

FILED
SALINE COUNTY
CIRCUIT CLERK

2020 MAR 30 AM 10:12

KS

IN THE CIRCUIT COURT OF SALINE COUNTY, ARKANSAS
3rd DIVISION

HOT SPRINGS VILLAGE PROPERTY
OWNERS' ASSOCIATION

PLAINTIFF

VS.

NO. 63CV-19-292

PCBS, L.L.C.

DEFENDANT

**REPLY IN FURTHER SUPPORT OF MOTION TO
WITHDRAW JULY 5, 2019, MOTION FOR SUMMARY JUDGMENT**

Hot Springs Village Property Owners' Association ("HSVPOA"), by and through its attorneys, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., and for its Reply in Further Support of Motion to Withdraw July 5, 2019, Motion for Summary Judgment ("Reply"), states as follows:

1. PCBS filed its Response to Motion to Withdraw July 5, 2019, Motion for Summary Judgment ("Response"), making three assertions as for why the Court should deny HSVPOA's Motion to Withdraw July 5, 2019, Motion for Summary Judgment ("Motion to Withdraw"):

- (1) Discovery is not necessary because HSVPOA could search the real estate records to determine what its damages are;
- (2) Discovery is not necessary because "most" of the relevant records were filed with Defendant's Response to Motion for Summary Judgment;
- (3) Defendant has summarily concluded that it has no liability to HSVPOA for assessments because of one third-party document that it attached as Exhibit A3 to its Response to Motion for Summary Judgment.

2. PCBS's position with respect to its ownership of certain lots in Hot Spring Village is in constant flux. In its Response to Motion for Summary Judgment filed August 7, 2019, PCBS stated that it "currently owns fifty-five properties, and cannot be held liable for assessments beyond

those attributable to the fifty-five properties it currently owns.” Br. in Supp. of Resp. to Mot. for Summ. J., at 6. On March 3, 2020, however, PCBS asserted it does not own any properties in HSVPOA. By extension, then, its position now is that it cannot be held liable for any assessments.

3. PCBS's basis for lack of any liability to HSVPOA is the one document attached to its Response to Motion for Summary. See Bid4Assets Printout, attached as Ex. A and incorporated herein by reference. Notably, this alleged “contract” from a third-party bidding site does not list a buyer, the consideration paid, or otherwise evidence any acceptance. See *Bank of the Ozarks, Inc. v. Walker*, 2016 Ark. 116, at 2, 487 S.W.3d 808, 810 (providing that “the essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation.”). Furthermore, in the affidavit of Philippe Soares, attached as Ex. A to PCBS's Response to Motion for Summary Judgment, he asserts this exhibit is “an *example* of the contract between PCBS and each of the purchaser's” ¶ 5 (emphasis added).

4. HSVPOA is neither privy to how this alleged change in ownership occurred from the time of PCBS's Response to Motion for Summary Judgment to March 3, 2020, nor the circumstances by which such change occurred. Instead, it must take PCBS's word. This Court should grant HSVPOA's Motion to Withdraw so that it may establish facts in support of its claims, more properly brief this Court on the legal issues, and, ultimately, prepare this case for trial.

5. In response to PCBS's first two assertions, most simply, HSVPOA is entitled under the Arkansas Rules of Civil Procedure to conduct discovery, through deposition, interrogatory, request for production, or otherwise. While PCBS relies on what it produced as exhibits to its Response to Motion for Summary Judgment as justification for evading the discovery process, PCBS's own statement in its Response—that “*most* of the relevant records were already provided”—underscores HSVPOA's very point as for why discovery is necessary: PCBS is now

claiming that it has sold all of the properties that it owned when its Response to Motion for Summary Judgment was filed. For one, whether PCBS used the same third-party “contract” to supposedly transfer liability to the buyer of these recently sold properties is a question of fact that exists. For another, PCBS has not submitted any proof that the Court can consider on HSVPOA's Motion for Summary Judgment that these recent lots have actually been sold—indeed, only allegations in its Response. Effectively, there are too many fact issues remaining for this Court to decide summary judgment at this juncture. Furthermore, what PCBS produced as exhibits to its Response to Motion for Summary Judgment were a litany of unorganized land records, including records involving properties *not even in Hot Springs Village*.

6. The Arkansas Rules of Civil Procedure governing discovery provide for how PCBS can object to producing or otherwise responding to discovery propounded to it, and, if issues are left unresolved, this Court can take up those issues on a different day. Rule 33 states, in relevant part, as follows:

[where] the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to ***specify the records from which the answer may be derived or ascertained*** and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. ***A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.***

Ark. R. Civ. P. 33(d). Rule 34 also provides for the procedure by which a party responds to requests for production:

(3) A party who produces documents for inspection shall

(A) organize and label them to correspond with the categories in the production request or

(B) produce them as kept in the usual course of business *if the party seeking discovery can locate and identify the relevant records as readily* as can the party who produces the documents.

Ark. R. Civ. P. 34(b)(3) (emphasis added). Thus, even assuming *arguendo* that the exhibits to PCBS's Response to Motion for Summary Judgment serve as documentation supporting its position, PCBS has not complied with Rules 33 and 34.

7. Just as important is what these rules do not provide: an avenue for PCBS to impede HSVPOA's rights under Arkansas law to "obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause." Ark. R. Civ. P. 26(b)(1). Clearly, PCBS is in the best position to know what land it owned—in Hot Springs Village and not surrounding areas—when it owned such land, to whom it was sold, how the sale occurred (including the relationship between PCBS and any third-party auctioneers), and the persons involved in the sale. At this time, those questions are unanswered. It is also necessary for HSVPOA to understand who PCBS may call as a witness at the trial of this matter as well as for PCBS to identify persons with knowledge of the transactions at issue so that HSVPOA may take such persons' depositions and support its claims. It is further necessary for HSVPOA to understand what evidence PCBS may use at trial, including all documents for which PCBS claims absolves it of liability for assessments. To that end, and only after the undersigned substituted in as counsel and attempts at early resolution proved unfruitful, HSVPOA propounded discovery to PCBS contemporaneously with its Motion to Withdraw.

8. In response to PCBS's third assertion, there is no record on the current Motion for Summary Judgment or PCBS's Response that establishes that the third-party document attached as Exhibit A3 to PCBS's Response to Motion for Summary Judgment was used in each and every transaction at issue, including the lots that PCBS is now claiming it has sold since the filing of its Response to Motion for Summary Judgment. Accordingly, factual issues remain.

9. Moreover, PCBS is asking this Court to rule on this matter based upon this example "contract" without any further context. If this Court decides to absolve PCBS from liability on the basis of what is contained in this document, this Court must consider all relevant facts surrounding this document, which are unknown at this time. See *Johnston v. Curtis*, 70 Ark. App. 195, 200, 16 S.W.3d 283, 287 (2000) ("The question of whether a contract has been made must be determined from a consideration of the parties' expressed or manifested intention determined from a consideration of their words and acts."); *Crown Custom Homes, Inc. v. Buchanan Servs., Inc.*, 2009 Ark. App. 442, at 5, 319 S.W.3d 285, 289 (internal citation omitted) ("In attempting to discern the real character of a transaction, the trial court should consider all of the written and oral evidence and focus on the intent of the parties in the light of all attendant circumstances. In carrying out the true intent of the parties, the trial court properly looks beyond the mere form in which the transaction was clothed and considers all the facts and circumstances of the transaction, the conduct of the parties, and their relations to one another and to the subject matter."); Breach of Contract, 1 Arkansas Law of Damages § 17:1 ("A court looks beyond the form and the words of the agreement to determine what the parties intended.").

10. In sum, PCBS ask this Court to rule on "whether the Defendant is obligated on delinquent assessments." Resp. ¶ 9. PCBS is putting the cart before the horse. Before ever addressing issues subject to the outstanding Motion for Summary Judgment filed by previous


counsel, HSVPOA respectfully asks that this Court rule on whether it must be limited to the briefing filed by prior counsel—briefing that leaves facts in dispute, legal issues unbriefed, and filed without the aid of discovery—or whether HSVPOA's new counsel should be afforded the opportunity to prosecute its claims as it sees fit. In fact, PCBS, itself, recognizes the abundance of material issues of fact left unresolved. *See, e.g.*, Resp. to Mot. for Summ. J.; *see also* Br. in Supp. of Resp. to Mot. for Summ. J. at 6-7 (“Because there is a genuine issue of material fact as to whether PCBS is liable for breach of contract for failing to pay delinquent assessments on properties it does not own, the Plaintiff’s Motion for Summary Judgment must be denied.”; “There are Genuine Issues of Material and Disputed Fact as to the Number of Hot Springs Village Properties Owned by PCBS, the Amount of Assessments Owed by PCBS, and as to Whether the Plaintiff is Entitled to Recover its Attorney’s Fees and Costs According to the Declaration.”). By resolving these outstanding issues, this Court’s resources and time would be preserved.

11. HSVPOA denies any allegations in PCBS’s Response not specifically admitted herein.

WHEREFORE, HSVPOA respectfully requests that this Court grant its Motion to Withdraw; enter an Order withdrawing HSVPOA’s pending motion for summary judgment, reserving HSVPOA’s right to file a future motion for summary judgment, and removing the hearing currently scheduled for April 28, 2020 from the docket; and for all other just and proper relief to which it is entitled.

Respectfully submitted,

**MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.**
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201-3525
P: (501) 688-8867
F: (501) 688-8807
cmcnulty@mwlaw.com
mbrunson@mwlaw.com

By: 
Christopher A. McNulty (AR Bar No. 2008198)
Matthew L. Brunson (AR Bar No. 2016214)
*Counsel for Hot Springs Village Property Owners'
Association*

CERTIFICATE OF SERVICE

I, Matthew L. Brunson, do hereby certify that on the 30th day of March, 2020, a copy of the foregoing was sent *via* electronic mail and regular mail, postage prepaid, to the following:

Ben Honaker
Attorney at Law
124 W. Capitol, Suite 1900
Little Rock, AR 72201
ben@benhonakerlaw.com


Matthew L. Brunson