DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way Castle Rock, CO 80109-7546 Phone Number: (303)663-7200	**EFILED Document** **CO Douglas County District Court 18th JD** **Filing Date: Apr 24 2009 10:49AM MDT** **Filing ID: 24857374** **Review Clerk: N/A** **▲ COURT USE ONLY ▲**
Plaintiff(s): MARK HESSE, CAROL KUMPOST AND CECELIA J. MEYER, individually and on behalf of SAGEPORT HOMEOWNERS ASSOCIATION, INC., a Colorado non-profit corporation **Defendant(s):** WILLIAM SMALLWOOD, JOHN S. KOLLER, PATRICIA RYAN, SANDRA ANDERSON, CLIFFORD NICHOLS, and GREAT AMERICAN INSURANCE COMPANY, an Ohio corporation	Case Number: 08cv2244 Division/Courtroom: 6
ORDER REGARDING DEFENDANTS SMALLWOOD, KOLLER, RYAN AND ANDERSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR A DETERMINATION OF A QUESTION OF LAW	

Defendants Smallwood, Koller, Ryan and Anderson (Defendants) bring this Motion for Partial Summary Judgment on the issue of the applicability of the Colorado Common Interest Ownership Act (CCOIA). C.R.S. § 38-33.3-101, et. al. Defendants have asserted in a counterclaim that the statute does not apply. After reviewing Defendants' Motion, Plaintiffs' Response, Defendants' Reply, along with supporting affidavits and exhibits, the Court hereby finds and orders as follows:

I. Standard of Review

A case is properly determined on a motion for summary judgment where the pleadings and supporting documentation filed in the matter show that no genuine issue of material fact exists and that the moving party is entitled to judgment as matter of law. *Miller v. Curry*, 203 P.3d 626, 629 (Colo. App. 2009).

The burden to demonstrate that no issue of material fact exists, and thus summary judgment is appropriate, is on the moving party, and the nonmovant is entitled to all favorable inferences. *Terry v. Sullivan*, 58 P.3d 1098, 1100 (Colo. App. 2002). "A motion for summary judgment supported by an affidavit, to which no counteraffidavit is filed, establishes the absence of an issue of fact, and the court is entitled to accept the affidavit as true." *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008). Once the movant for summary judgment "has made a convincing showing that genuine issues of fact are lacking, the non-moving party must

demonstrate by admissible facts that a real controversy exists." *Hauser v. Rose Health Care Sys.*, 857 P.2d 524, 527 (Colo. App. 1993).

II. Factual Background

All individual parties to this proceeding are owners of real property in Sage Filing #2, Douglas County, Colorado (hereinafter, Sage #2). This subdivision is governed by a declaration, written and recorded in 1971, that creates an Architectural Control Committee. (Ex. A Pls.' Resp. to Mot. Part. Summ. J.)

In 1986, certain individuals incorporated the Sage Port Homeowner's Association (hereinafter, SPHA) as a not-for-profit corporation. The Articles of Incorporation of the Association purported to make every landowner of Sage #2 a member of the SPHA provided he or she paid dues to SPHA. The Articles do not specify how often dues are to be paid. The SPHA pays no real estate taxes, insurance premiums, maintenance fees, or other obligations for improvement of real estate in Sage #2.

Both the SPHA and Sage #2 were formed prior to the passage of CCIOA. Neither the owners of individual units in Sage #2 nor the SPHA have opted to be governed by CCIOA according to the rules set forth in CCIOA. Neither the SPHA nor Sage #2 owns any property that is owned in common with all owners of Sage #2.

III. Discussion and Conclusions of Law

A.

CCIOA was passed by the Colorado General Assembly in 1991, and made effective in 1992, in order "to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities." C.R.S. § 38-33.3-101. CCIOA "applies to all common interest communities created within this state on or after July 1, 1992," C.R.S. § 38-33.3.-115, although certain provisions of CCIOA apply to all "common interest communities" regardless of when they were created. *See* C.R.S. § 38-33.3-117. First, it is clear that a community must be a "common interest community" in order to be governed in any way by CCIOA. C.R.S. § 38-33.3-103(8) provides guidance:

> "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration.

The statutory definition of "common interest community" provides three requirements relevant to this case: (1) an obligation to pay for (2) real estate taxes, insurance premiums, maintenance, or improvement (3) of other real estate. According to this definition, the declaration is controlling. With regard to the above definition and the application of CCIOA to the current case, the factual disputes presented by the parties are immaterial. The Defendant has made a convincing showing that genuine issues of fact are lacking, and the Plaintiff has not

presented any material facts that require the Court to dismiss this Motion. Whether Sage #2 is a common interest community, or CCIOA governs either Sage #2 or the SPHA, is a matter of law.

In this case, the requisite "declaration" is the document entitled "Protective Covenants" (hereinafter, Covenants). Interpretation of a covenant is a question of law. *Evergreen Highlands Ass'n v. West*, 73 P.3d 1, 3 (Colo. 2003). Likewise, statutory interpretation is a question of law. *Francis ex rel. Goodridge v. Dahl*, 107 P.3d 1171, 1176 (Colo. App. 2005). "When construing statutes, a court's primary purpose is to effectuate the intent of the General Assembly. To determine that intent, courts look to the statutory language, giving words or phrases their commonly accepted meaning." *Id.*

Plaintiffs would like the Court to conclude that the statutory language -- which necessitates an obligation to pay fees incurred by other real estate -- includes an implied obligation to pay fees for the purpose of regulating use restrictions and design controls of other real estate, and that such an obligation creates a common interest community. Thus, Plaintiffs argue that Sage #2 is a "common interest community by implication." (Pls.' Resp. 4.)

B.

This Court does not reach the same conclusion. Plaintiffs' analysis is derived solely from *Evergreen Highlands Association v. West*. In that case the Colorado Supreme Court held that the homeowner's association had an implied power, derived from the community's declarations, to impose fees or dues. The declarations provided "that a homeowners association existed, it owned and maintained the park area, and it had the power to impose annual membership or use fees on lot owners." *Id.* at 9.

The Supreme Court reasoned that the "declarations were sufficient to create a common interest community by implication," *id.* at 2, more specifically:

> An implied obligation may ... be found where the declaration expressly creates an association for the purpose of managing common property or enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions. When such an implied obligation is established, the lots are a common-interest community within the meaning of this Chapter.

Id. at 9 (quoting Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000)).

Importantly, the Supreme Court's ruling was rooted in the common law. The association in *Evergreen* was formed prior to, and as a result, not *necessarily* governed by CCIOA. The Court's holding was not predicated on finding that CCIOA was controlling. The Court merely reasoned that its decision was *consistent with* CCIOA. Yet, a reference to CCIOA was only applicable because the declarations explicitly named real estate common to the association and the homeowners, in addition to granting power to the association to impose fees for, among other things, maintaining a park.

In the current case, the Covenants do not name common real estate, nor do the Covenants grant the Architectural Control Committee any power to assess fees. While the comments to the Restatement suggest that the power to enforce use restrictions and design controls without a mechanism for funding creates a common interest community, CCIOA, giving the words and phrases of the statute their commonly accepted meaning, provides a narrower definition.

The Restatement explicitly defines "common interest community" as one in which individual units are burdened by a servitude which may include an obligation "to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood." Restatement (Third) of Property: Servitudes § 6.2(1)(a)-(b). However, the phrase "common interest community" may have multiple definitions depending on the context. One definition has been developed through the common law. The definition that the Colorado General Assembly adopted in CCIOA is not as expansive.

C.

This Court finds that CCIOA requires both an obligation to pay and common real estate. Because Sage #2 and the SPHA have no property in common with landowners of SPHA, and because the declarations do not provide for a power to impose fees or dues, neither Sage #2 nor the SPHA may be governed by CCIOA. In other words, they are not common interest communities within the statutory definition.

Even if the Court were to find an implied obligation to pay fees despite the explicit voluntary nature of the SPHA's fee structure, there is no common real estate. Labeling each individual unit as common real estate because each unit is governed by a restrictive covenant is outside the commonly accepted meaning of the words used by the General Assembly.

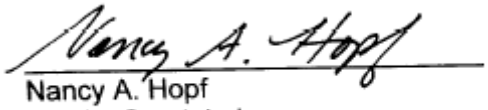
Finally, regardless of the foregoing analysis, any fees voluntarily paid by a Sage #2 landowner are not used for "real estate taxes, insurance premiums, maintenance, or improvement." Any fees paid are used, at best, to enforce the Covenants, which are not costs contemplated by the statute. Moreover, the Covenants in no way suggest that anyone other than an individual homeowner is responsible for paying the costs incurred by their individual unit with regard to real estate taxes, insurance premiums, maintenance, and improvements.

IV. Order

For the reasons set forth, the Defendants' Motion for Partial Summary Judgment and for Determination of a Question of Law is granted: neither Sage #2 nor the SPHA is governed in any respect by the terms of CCIOA.

Dated: April 24, 2009

BY THE COURT:



Nancy A. Hopf
District Court Judge