

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-008955

01/24/2019

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
L. Stogsdill
Deputy

SUNRISE DESERT VISTAS PROPERTY
OWNERS ASSOCIATION INC

GUY W BLUFF

v.

DONA LISA JOHNSON

DANIEL R SALLUS

COURT ADMIN-CIVIL-ARB DESK

MINUTE ENTRY

Courtroom 914 - ECB

9:40 a.m. This is the time set for Oral Argument re: Plaintiff/Counterdefendant's Motion for Partial Summary Judgment. Plaintiff/Counterdefendant is represented by counsel, Bruce A. Smidt (appearing in place of Guy W. Bluff.) Defendant/Counterclaimant is represented by counsel, Daniel R. Sallus.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court outlines the pleadings which have been reviewed in preparation for the oral argument.

Oral argument is presented.

The Court outlines its inclinations with regard to the motion.

For the reasons stated on the record,

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IT IS ORDERED taking the matter under advisement.

The Court inquires if counsel has participated in mediation.

Counsel advises the Court that mediation has not been conducted.

The Court notes that the deadline for mediation was August 1, 2018 and no written request for an extension of that date was filed with the Court.

Good cause appearing,

IT IS FURTHER ORDERED the Court finds both parties in contempt of Court for knowingly failing to participate in mediation despite the Court's express order to do so.

IT IS FURTHER ORDERED assessing a sanctions in the amount of \$50.00 per day for every day from and after **February 15, 2019** that the parties do not participate in mediation. The Court reserves the right to impose additional sanctions against the parties for every day that the do not participate in mediation in good faith.

IT IS FURTHER ORDERED that the parties shall participate in mediation by **March 11, 2019**.

IT IS FURTHER ORDERED vacating the Final Trial Management Conference on **April 12, 2019 at 9:00 a.m.** and the 4 day Jury Trial on **June 4, 2019 at 9:00 a.m.** in this division.

IT IS FURTHER ORDERED placing this matter on the Dismissal Calendar for dismissal without further notice on **March 28, 2019**. If the parties have completed the mediation and if the case needs to be set for trial, the parties shall file a motion to set a Trial Setting Conference by this **March 28, 2019** deadline.

10:11 a.m. Matter concludes.

LATER:

ORDER

The Court has reviewed and considered the following:

A. *Plaintiff's Motion for Partial Summary Judgment*, filed November 20, 2018;

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- B. *Separate Statement of Facts In Support of Plaintiff's Motion for Partial Summary Judgment*, filed November 20, 2018;
- C. *Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment; Declaration of Dona Lisa Johnson*, filed December 21, 2018;
- D. *Defendant's Request for Judicial Notice*, dated December 21, 2018;
- E. *Defendant's Opposing Response to Statement of Facts*, dated December 21, 2018; and
- F. *Reply in Support of Plaintiff's Motion for Partial Summary Judgment*, dated January 10, 2019; and
- G. The authorities and arguments raised during the oral argument of January 24, 2019.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Rule 56(a), *Arizona Rules of Civil Procedure*; *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990); *Hourani v. Benson Hosp.*, 211 Ariz. 427, 432, 122 P.3d 6, 11 (App. 2005). All facts must be viewed in the light most favorable to the nonmoving party. *See Grain Dealers Mutual Insurance Co. v. James*, 118 Ariz. 116, 575 P.2d 315 (1978); *Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 448, 675 P.2d 703, 708 (1983). The moving party bears the burden of demonstrating through admissible evidence that no genuine issue of material fact exists. *See Nat'l Hous. Indus., Inc. v. E.L. Joes Dev. Co.*, 118 Ariz. 374, 377, 576 P.2d 1374, 1377 (App. 1978); *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, P7, 953 P.2d 168, 170 (1998); *Nat'l Bank of Ariz. v. Thurston*, 218 Ariz. 112, 180 P.3d 977, 981 (Ariz. App. 2008).

Summary judgment is not appropriate if there is a genuine disputed issue of material fact or even the "slightest doubt" as to the facts. *Vagnozzi*, 138 Ariz. at 448, 675 P.2d at 708. Additionally, "summary judgment is not proper where possible inferences to be drawn from the circumstances are conflicting." *Executive Towers v. Leonard*, 7 Ariz. App. 331, 439 P.2d 303 (App. 1968).

Here, Plaintiff seeks dismissal of the four counterclaims asserted by Defendant, namely: (1) Nuisance; (2) Breach of Contract; (3) Breach of the Duty of Good Faith and Fair Dealing; and (4) Easement by Prescription.

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THE COURT FINDS as follows:

1. Defendant previously filed two lawsuits against Plaintiff in the Superior Court of Arizona, in and for Maricopa County, namely: CV 2014-011845 and CV 2014-012173. Claims included both Nuisance and Breach of Contract.
2. On June 20, 2016, Defendant and Plaintiff resolved their claims. Defendant signed a Settlement Agreement and Release (the "Release") which provided, in pertinent part, that Defendant did "release, acquit, and forever discharge" Plaintiff "from any and all claims of damage of any sort whatsoever arising out of, or related in any way to, the claims made" by Defendant in CV 2014-011845 and CV 2014-012173.
3. Defendant's present counterclaims of Nuisance, Breach of Contract, and Breach of the Duty of Good Faith and Fair dealing are claims arising out of and/or are related to the claims made by Defendant in CV 2014-011845 and CV 2014-012173.
4. The Release did not purport to extinguish future liabilities between the parties. Consequently, Defendant's counterclaims for Nuisance, Breach of Contract, and Breach of the Duty of Good Faith and Fair Dealing for acts occurring on and after June 21, 2016 are outside the scope of the Release.
5. Defendant, however, has predicated her Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing claims on a violation of the terms of Defendant's "easement". There is no evidence of the existence of any contract creating an easement in favor of Defendant. Moreover, Defendant did not assert a breach of the Condominium Association's CC&Rs – which would have legally supported a contract claim – as she had done in the 2014 lawsuits. Consequently, there is no genuine issue of material fact requiring a trial on Defendant's Breach of Contract counterclaim, nor on Defendant's Breach of the Duty of Good Faith and Fair Dealing Counterclaim, based on the written terms of the easement. Counterclaims two and three have no merit, irrespective of the terms of the Release.
6. Defendant's counterclaim for Easement by Prescription was not subject to the Release.
7. To prove a claim for Easement by Prescription, the party claiming such easement must show, by clear and convincing evidence, that the use of the property on which the party claims a prescriptive easement was actual, open and notorious, hostile, under a claim of right and continuous for a period of ten (10) years. *Inch v. McPherson*, 176 Ariz.

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132, 859 P.2d 755 (App. 1992); *Sabino Town & Country Estate Assoc. v. Carl*, 186 Ariz. 146, 920 P.2d 26 (App. 1996).

8. Possession or use of another's property that is initially permissive does not become hostile without a clear disclaimer to the property owner by the party claiming a prescriptive easement. *Leon v. Byus*, 115 Ariz. 451, 565 P.2d 1312 (App. 1977); see also *Gospel Echo Chapel, Inc. v. Wadsworth*, 19 Ariz. App. 382, 507 P.2d 994 (1973) (Possession of another's property that at the beginning is permissive cannot subsequently become hostile without a clear disclaimer of the true owner's title and the assertion of an adverse right that is brought home to the owner of the property.)
9. Use of another's property that is initially permissive, will not be deemed to be hostile to the owner unless it is clearly brought home to the owner that the use going forward will be under a claim of right and that fact is clearly brought home to the owner. *England v. Ally Ong Hing*, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969) ("Unless notice of such use, hostile to the owner, is clearly brought home to the true owner, such use will be deemed permissive."); *Spaulding v. Pouliot*, 218 Ariz. 196 181 P.3d 243 (App. 2008).
10. Where one occupying the land of another acknowledges or recognizes the title of the real owner and does it before the statutory period has run, he thereby shows that his possession is not adverse. The applicable statute of limitation will not begin to run against the owner unless and until the claimant of a prescriptive easement repudiates the owner's title. *Combs v. DuBois*, 135 Ariz. 465, 662 P.2d 140 (App. 1982).
11. The mere use of another's property is insufficient to create a prescriptive easement without some additional acts or circumstances indicating that the use of the other's property is not merely permissive but hostile and adverse to the owner's rights. *Herzog v. Boykin*, 148 Ariz. 131, 713 P.2d 332 (App. 1985).
12. A use acquired merely by consent, permission or indulgence of the owner can never ripen into a prescriptive easement unless the user expressly abandons and denies his rights under the license or permission and openly declares his claim to be adverse to the title of the owner of the property he is using. *LaRue v. Kosich*, 66 Ariz. 299, 187 P.2d 642 (1947).
13. A use of the property of another that begins permissively cannot ripen into a prescriptive easement by the mere passage of time. *Etz v. Mamerow*, 72 Ariz. 228, 233 P.2d 442 (1951).

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14. Use of another's property by consent, permission or indulgence of the owner can never ripen into a prescriptive easement unless the user of the property expressly abandons and denies his right under the consent, permission or indulgence and openly declares his right to be adverse to the owner of the property being used. *LaRue v. Kosich*, 66 Ariz. 299, 187 P.2d 642 (1947); *Spillsbury v. School Dist. No. 19 of Maricopa County*, 37 Ariz. 33, 288 P. 1027 (1930).
15. Defendant has failed to provide admissible evidence that a genuine issue of material fact exists as to her Easement by Prescription claim. Defendant concedes that the easement was created by the recorded plat. She, consequently, recognizes the easement. In fact, Defendant has sued Plaintiff previously for nuisance and lack of compliance with CC&Rs relating to, among other things, the easement. There is no admissible evidence of repudiation of the easement or of hostile use. Defendant has not expressly abandoned her right to use the easement property permissively, nor declared her right to be adverse to all others entitled to use the easement. The record before the Court fails to identify a genuine issue of material fact on Defendant's counterclaim for Easement by Prescription.
16. Additionally, at oral argument, Defendant stated that the action commencing the prescription period in question was Plaintiff's installation of landscaping on easement property in 2011. This occurred less than ten years ago. Moreover, it was *Plaintiff's* possession, not Defendant's possession, that is being relied upon. If Defendant is attempting to use Plaintiff's possession, the period from 2011 to the present is not ten years. On the other hand, if Defendant is attempting to use her predecessor's possession of the easement from 2004 to 2011 (as stated in paragraph 54 of the Counterclaim), that also does not amount to the necessary ten year period for a prescriptive easement.

Good cause appearing,

IT IS ORDERED granting Plaintiff's *Motion* as to Defendant's Nuisance, Breach of Contract and Breach of Duty of Good Faith and Fair Dealing counterclaims that are predicated in any way on acts occurring before June 21, 2016. Defendant's First, Second and Third Counterclaims are dismissed in part to the extent that they assert claims for acts occurring before June 21, 2016.

IT IS FURTHER ORDERED, in the alternative, granting in part Plaintiff's *Motion* as to Defendant's Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, and Easement by Prescription counterclaims. Defendant's Second, Third and Fourth Counterclaims are hereby

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dismissed in their entirety. Attorneys' fees and costs will abide the final determination of this matter.

IT IS FURTHER ORDERED denying Plaintiff's *Motion* as to Defendant's Nuisance, counterclaim to the extent that the act constituting the alleged nuisance on or after June 21, 2016.

IMPORTANT NOTICE REGARDING ONLINE PROFILE

Judge Coury maintains an online profile that answers many questions about courtroom and division procedures. Litigants and their attorneys should familiarize themselves with the online profile. You can find the online profile at the following link:

<http://www.superiorcourt.maricopa.gov/JudicialBiographies/judges/profile.asp?jdgID=272&jdgUSID=9683>.