

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-014261

03/08/2021

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
E. Wolf
Deputy

JASON KOMOROWSKI, et al.

E JEFFREY WALSH

v.

WHISPER MOUNTAIN HOMEOWNERS
ASSOCIATION

BRADLEY R JARDINE

JUDGE MIKITISH

MINUTE ENTRY

The Court heard evidence on November 5, 9, and 10, 2020 in this Trial to the Court. The Court also heard closing arguments on December 9, 2020. The parties requested an opportunity to submit proposed findings of fact and conclusions of law, which they did on January 9, 2021. Based on all of the foregoing, the Court issues the following rulings, verdict, findings of fact, and conclusions of law. As described more fully below, the Court rules in favor of the Plaintiffs Jason and Melissa Komorowski (the Komorowskis), denies the request to construct a new drainage channel, issues a permanent injunction for maintenance of the drainage ditch, and awards damages to the Komoroskis in the amount of \$17,800.01. The Komoroskis are to submit a form of order for entry of judgment in the case in accordance with the Rules.

WMHOA's Rule 50 Motion for Partial Judgment

At the close of the Komorowskis' case, the Defendant, Whisper Mountain Homeowners Association (the "WMHOA"), moved for partial judgment under Rule 50. WMHOA argues that in a nonjury trial, a Rule 50 motion is typically treated as a Rule 52 motion in which the Court may make findings in accordance with its own view of the evidence. *See Johnson v. Pankratz*, 196 Ariz. 621, ¶ 15 (App. 2000); *Ritchie v. U.S.*, 451 F.3d 1019, 1023 (9th Cir. 2006). In its proposed Findings of Fact and Conclusions of Law, WMHOA "requests the Court to grant WMHOA's

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converted ACRP 52(c) motion and enter partial judgment finding that nothing in the CC&Rs, particularly Section 10.1, limited WMHOA's discretion to repair and improve the ditch only by building a new ditch in conformity with the original development plans." WMHOA's Rule 52 Proposed Statement of Facts and Conclusions of Law, at 2.

At trial, the Court held ruling on the motion in abeyance. It now finds the issues raised in the case are best addressed by considering all the evidence presented. Therefore,

IT IS ORDERED **denying** WMHOA's Rule 50 motion.

WMHOA's Motion for Sanctions

WMHOA moved for sanctions pursuant to Rule 37 based on the Komoroskis' purported concealment and failure to disclose certain records related to certain documents for their rental of the property. WMHOA argues that these documents were contrary to the Komoroskis' interests and that the Komoroskis intentionally failed to produce them. The Court finds that the documents are not adverse to the Komoroskis' positions in the case. Therefore,

IT IS ORDERED **denying** the Motion for Sanctions.

Findings of Fact

A. Contractual Rights and Obligations Created by the CC&Rs

1. The Komoroskis purchased Lot 52 in the Whisper Mountain subdivision in Mesa, Arizona (the "Subdivision") in August 2013 and have owned it since then.
2. Lot 52 lies at the base of the north slope of Whisper Mountain. The top of the mountain is 300 feet above the elevation of the drainage easement that is the subject of this lawsuit.
3. WMHOA is a duly constituted homeowner's association, originally formed by the developer of the Subdivision, VIP Construction, Inc. ("VIP") for the benefit of owners of property in the Subdivision.
4. WMHOA has since February 2015 been operated by the homeowners of the Subdivision.
5. WMHOA is governed by the Amended and Restated Declaration of Covenants,

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Conditions and Restrictions For Whisper Mountain, trial exhibit 1 (the “CC&Rs”).

6. The CC&Rs form a binding contract between WMHOA and each of the homeowners of the Subdivision.
7. The CC&Rs, at section 10.1, obligate WMHOA to *maintain, repair and replace* all drainage facilities in drainage easements in the Subdivision in accordance with the approved Final Plat. The approved Final Plat was recorded in 2004, trial exhibit 2.
8. The Dedication on the first page of the Final Plat dedicates, among other things, a drainage easement to WMHOA over lots 42-60 “as shown hereon.” Sheet 2 of 5 of the Final Plat locates that drainage easement in a twelve-foot strip of land running across the Southern portion of Lots 52, 51, 50 and 49 which is labeled “DRAINAGE ESM’T”.
9. Note 3 on the first page of the Final Plat provides that WMHOA “will have the responsibility for maintaining the common areas to be noted as tracts or easements including landscaping and drainage facilities in accordance with Approved Plans.”
10. The Approved Plans referred to in the Final Plat are those engineering plans, consisting of drawings and specifications, prepared by Hoskin-Ryan Consultants, Inc., an engineering firm, in 2004, trial exhibit 3.
11. Hoskin-Ryan Consultants prepared the Approved Plans for the Owner/Developer VIP. Section B on Sheet 34 of the Approved Plans (“Section B”) provides an engineering drawing detail, with the specific dimensions, slopes, materials and features of a channel that VIP was to construct in the drainage easement located on Lots 52, 51, 50 and 49 (the “Channel”).
12. The purpose of the Channel is to intercept rain water flowing down Whisper Mountain and safely convey that water away from Lots 52, 51, 50 and 49.

B. WMHOA Has Failed to Protect The Komoroskis’ Property from Flooding

1. VIP did not construct the Channel in the drainage easement on Lots 52, 51, 50 and 49 to the requirements set forth in Section B.

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2. In 2014, prior to the establishment of the WMHOA, flood waters from a rain storm inundated the Subdivision, including the Komoroskis' property. Water flooded down the north slope of Whisper Mountain, across the drainage easement, and onto the Komoroskis' property.
3. In 2015, the homeowners in the Subdivision gained control of the homeowner's association from VIP by operation of law. WMHOA then made demand upon and commenced litigation against VIP in 2015, in part, over its failure to construct the Channel across Lots 52, 51, 50 and 49 in accordance with Section B. It is clear from this litigation that WMHOA was aware of the limitations of the existing ditch and its potential for flooding.
4. WMHOA and VIP settled the 2015 litigation in October 2016. The settlement provided that VIP would perform some work to improve the drainage easement but did not require VIP to construct the Channel in the drainage easement as required by Section B.
5. Thereafter, consistent with the settlement, VIP cleared the existing unlined ditch in the drainage easement, as shown in photos in trial exhibits 55 and 58. VIP did not construct the channel in the manner set forth in Section B.
6. VIP ceased work under the settlement agreement in the first half of 2017. Under the settlement agreement, WMHOA assumed sole responsibility for the improvements in the drainage easement thereafter.
7. Rain water and sediment continued to flow down Whisper Mountain and onto the Komoroskis' property.
8. Water flowing off Whisper Mountain flooded the side yard of the Komoroskis' property on July 24, 2017 and again on August 9, 2018. That flooding occurred because rain water washed sediment down the mountainside and into the existing shallow ditch in the drainage easement. That sediment formed a dam, causing water to pond in and then overflow the bank of the ditch, and flow into the Komoroskis' back yard. That water then flowed into the Komoroskis' side yard where, impeded by a wall that separates the side from the front yard, it created another pond. Water ponding in the Komoroskis' yard came to within a foot or two of the Komoroskis' house.
9. The Komoroskis introduced as trial exhibits 34 and 39 short videos showing water pouring through their dry stack wall and into their back yard.

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- 10.** According to the Komoroskis' Arizona-licensed civil engineering expert, Curt Peterson, there is an arroyo about ten to twenty feet west of the Lot 52/51 property line where a large amount of water from the mountainside behind Lot 51 enters the ditch, and deposits sediment. That sediment deposits in the ditch because the water slows down as it arrives at the ditch and turns so it can flow west in the ditch. The deposited sediment in the ditch is shown in photos in Exhibits 55, 58 and 60. Peterson testified that there are rocks and a narrowing of the ditch that create a chokepoint where the arroyo joins the ditch. That chokepoint is also evident in the photographs.
- 11.** Peterson confirmed the Komoroskis' testimony that when a dam has formed in the ditch where the arroyo joins it, water has ponded behind the dam, causing that water to back up in the ditch or Lot 52, and to spill over the side of the ditch and flood the side yard of the Komoroskis' property. Photos 5, 9 and 10 in trial exhibit 58 show the pond in the ditch.
- 12.** WMHOA's engineering expert, David Deatherage, admitted that water and sediment from a portion of the uppermost portion of mountain drains onto a fire road that crosses from east to west near the top of Whisper Mountain. The water from that fire road flows through drain pipes that empty above Lot 51. Water and sediment flows from a large area down the mountainside above Lot 51, and enters the ditch just west of the Lot 52/51 property line, where the dam forms.
- 13.** Water flowing off the mountain during a rainstorm in February 2019 threatened again to flood their property, but the Komoroskis were able by their own efforts during that rainstorm to dig through the sediment dam that had formed at the chokepoint in the ditch.
- 14.** In the first half of 2019, the Komoroskis installed sandbags between the wrought iron fence on their property and the drainage easement to provide temporary protection against further flooding of their property.
- 15.** The flooding of water from the mountain onto the Komoroskis' property deposited sediment on the property and eroded the soil behind a dry stack wall that lies between the improved portion of the Komoroskis' back yard and the drainage easement.

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C. WMHOA's Improvements

1. Commencing in September 2017, following the flooding in July of that year, the Komoroskis made repeated requests that WMHOA improve the drainage easement to provide for an effective drainage system to protect their property from flooding.
2. Jason Komorowski and Greg Wingert, president of WMHOA, consulted about ways to prevent flooding of the Komoroskis' property with Gary Stocker, a civil engineer introduced by WMHOA in 2018.
3. WMHOA failed thereafter, however, to construct the Channel, or even to make any improvements to the existing ditch.
4. The Komoroskis filed this lawsuit for equitable relief and damages in November 2018.
5. After the Komoroskis filed this lawsuit, WMHOA retained Mr. Deatherage, a geotechnical engineer, to assist it in responding to the Komoroskis' claims.
6. Mr. Deatherage does not dispute the cause of the flooding to which Mr. Peterson testified. He proposed a design for an improved ditch in the drainage easement.
7. The Deatherage Plan exceeds engineering standards for handling a 1 in 100 year rain event. The Deatherage plan did not include construction of the Channel as depicted in Section B of trial exhibit 3.
8. In early September 2020, WMHOA engaged a contractor, Tennyson Construction, Inc. ("Tennyson") to make improvements to the ditch in the drainage easement in accordance with the Deatherage Plan.
9. According to Mr. Deatherage, Tennyson graded the ditch and installed a 6 inch-9 inch masonry wall on top of the north bank. That curb is depicted in trial exhibit 86.
10. Tennyson completed its work in the drainage easement on or about October 26, 2020, and Mr. Deatherage then inspected it.
11. The Tennyson improvements were not those provided in the plans and

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specifications set forth in Section B.

12. According to Mr. Deatherage, his design will protect the Komoroskis' property from flooding if WMHOA properly maintains the ditch, which he explained would require WMHOA to clear sediment from the ditch whenever it fills at any point to 25% of volume.

D. The Komoroskis' Harm Cannot Be Remedied By Money Damages

1. From 2015 through 2020, WMHOA failed to maintain the Channel to prevent flooding of the Komoroskis' property.
2. The repair work done by Tennyson is expected adequately to protect the Komoroskis' property from further flooding and further damage, but only so long as adequate maintenance is performed.
3. Mr. Wingert admitted that WMHOA has had difficulty getting a contractor to remove sediment from the existing ditch on a timely basis.
4. Therefore, the Court finds that injunctive relief is appropriate and necessary to protect the Komoroskis' property on an ongoing basis.

E. Compensable Damages

(1) Diminished Property Value

1. The Komoroskis argue that the flooding has caused a diminution in their property value.
2. The Komoroskis' real estate expert, Matthew Potter, an Arizona-licensed real estate agent with experience in residential property sales in the East Valley market, testified that the Komoroskis' property would be considered distressed because it has suffered flooding events three times in the last 10 years. Mr. Potter expressed an opinion that the Komoroskis' property value would be 15-25% lower because of the flooding.
3. Mr. Potter testified that any mitigation work done to reduce or eliminate the potential for flooding would reduce the diminution in value, but that the diminution would never completely go away.

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4. Mr. Potter was not aware that the Komoroskis were currently renting the property. He did not do an assessment as to whether rental values decreased because of flooding.
5. Mr. Komorowski testified that he accurately disclosed to his current renter that there is no damage to the property from water or leaks.
6. Mr. Komorowski testified that he accurately disclosed to his current renter that problems exist with drainage in close proximity to the property.
7. Mr. Komorowski did not testify or offer evidence that he suffered any decrease in rental value.
8. Mr. Potter did not know whether the remedial work done by WMHOA would affect the property value. He testified that time is needed to determine if the work is successful in eliminating flooding to the property.
9. Given the remedial work done to the ditch, Mr. Potter's acknowledgment that remedial work can reduce any diminution in value from prior flooding, Mr. Komorowski's failure to note any decrease in rental value, and the Court orders for ongoing maintenance provided in this ruling, the Court finds that any diminution in the Komoroskis' property value is too speculative to be compensable.

(2) Cost for Repairs

1. Curt Peterson testified that it will cost the Komorowskis \$16,000 to regrade their yard and repair their dry-stack wall. WMHOA did not rebut that estimate, and the Court finds it credible.
2. Mr. Komorowski testified that he had spent \$1,800.01 out of pocket to install sandbags behind the property, and he submitted documentary evidence of those expenditures. The sandbags are evident in photo 5 of trial exhibit 58. WMHOA did not controvert that testimony, and the Court finds it to be credible.
3. The Court finds that the Komoroskis have suffered damages to their

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property totaling \$17,800.01 that were proximately caused by WMHOA's breach of contract from failure to maintain the Ditch to prevent flooding to the Komoroskis' property.

4. The Court finds by a preponderance of the evidence that the Komoroskis have proven these damages were proximately caused by WMHOA's breach of the CC&Rs.

I. Conclusions of Law

1. The CC&Rs are a valid and enforceable contract between the Komoroskis and WMHOA. *Johnson v. Pointe Cmty. Ass'n, Inc.*, 205 Ariz. 485, 489 (Ct. App. 2003) ("In Arizona, a recorded declaration that contains restrictive covenants common to all properties in a development forms a contract between 'the [development's] property owners as a whole and the individual lot owners.'") (quoting *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448 (App.1993)).
2. The interpretation of a contract presents an issue of law for the Court. *Dunn v. FastMed Urgent Care PC*, 245 Ariz. 35, 424 P.3d 436 (Ct. App. 2018).
3. When interpreting a contract, the Court seeks to discover and effectuate the parties' expressed intent. To do so, the Court must construe the provisions according to their plain and ordinary meaning. *Terrell v. Torres*, 248 Ariz. 47, 456 P.3d. 13 (2020).
4. The Court finds the CC&Rs to be clear with respect to the obligations imposed on WMHOA for the drainage facility at issue in this case.
5. The plain and ordinary meaning of those provisions is that WMHOA has an obligation under Section 10.1 of the CC&Rs to replace, repair and maintain the drainage facilities in the Subdivision.
6. Section 13.1 of the CC&Rs gives the Komoroskis, as homeowners, a right to pursue claims *in law or equity* to enforce those and other rights. The Komoroskis seek relief in law and equity in this proceeding.
7. The Komoroskis have proven that WMHOA has breached the CC&Rs by failing to maintain the ditch in order to prevent flooding the Komoroskis' property.
8. WMHOA has not shown that enforcement of the CC&Rs as provided for herein will impose an undue hardship on it. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v.*

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Turner, 196 Ariz. 631, 635 (Ct. App. 2000) (“Equitable considerations include the relative hardships and injustice; the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other remedies.”).

9. It would impose an undue hardship on the Komoroskis to continue to have their property flood, which would deprive them of full use and enjoyment of it, and impair their ability to sell it when they so desire. Instead, it is equitable to require WMHOA to perform its contractual obligations as agreed.
10. The Komoroskis are suffering and will continue to suffer substantial, repeated physical damage to their property that cannot be remedied by an award of damages.
11. The balance of the equities strongly favors granting the Komoroskis the injunctive relief they seek.
12. The Komoroskis are entitled to permanent injunctive relief ordering WMHOA to properly maintain the ditch so that flooding is averted.
13. Proper maintenance of the ditch shall include a documented inspection of the ditch by professional engineer or engineering firm (1) within one week after each rain event measuring .5 inches or greater during any one week period, (2) at least once annually, or (3) any time flooding is documented on a property owned by a homeowner within WMHOA. The documented inspection must include an analysis of the amount of sediment in the ditch.
14. Proper maintenance of the ditch shall include removal of sediment to return the ditch to the condition depicted in the photographs taken immediately after the Tennyson work, and included as trial exhibits 84 and 86. Such removal of sediment shall be undertaken by professional landscaping company within one week of *any* of the following events: (1) when the sediment in the ditch reaches 25% of capacity; (2) when sediment causes a chokepoint that causes or has the potential to cause flooding onto a property owned by a homeowner within WMHOA; or (3) no less than once every five years.
15. WMHOA’s failure to improve and maintain the drainage easement also proximately caused foreseeable physical damage to the Komoroskis’ property, and forced the Komoroskis to incur out of pocket costs.
16. The Komoroskis are entitled to recover the damages caused by WMHOA’s failure to fulfill the foregoing obligations pursuant to the CC&Rs.

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17. The Komoroskis are awarded damages of \$17,800.01, with interest on the foregoing as provided for by law until paid in full.