Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-050453 04/13/2022

HONORABLE ALISON BACHUS

CLERK OF THE COURT
C. Lett
Deputy

VILLAGE AT GRAYHAWK OWNERS ASSOCIATION

JOSHUA M BOLEN

v.

ALAN JONES, et al.

KATHRYN MARIE JONES
1610 W ALOE VERA DR
PHOENIX AZ 85085
JUDGE BACHUS

UNDER ADVISEMENT RULING

Pending before the Court are (1) Plaintiff's Motion for Summary Judgment, filed on September 14, 2021; (2) Plaintiff's Motion to Preclude Expert Testimony of Alan Jones, filed September 14, 2021; (3) Defendant's Motion to Strike Plaintiff's Reply to its Motion for Summary Judgment, filed February 3, 2022; and (4) Defendant's Motion to Strike Plaintiff's Response to Defendant's Motion to Strike Plaintiff's Reply to its Motion for Summary Judgment, filed February 28, 2022.[1] The Court has considered the filings, including all statements of facts and exhibits thereto, and the record of this case. The Court has further considered the applicable

[1] Defendant has brought counterclaims. For ease of reading, the Court refers to the parties as Plaintiff and Defendant, rather than "Plaintiff/Counterdefendant" and "Defendant/Counterclaimant."

case law and Rules, as well as the parties' arguments presented at oral argument on January 19, 2022 (as to the Motion to Preclude) and January 28, 2022 (as to the Motion for Summary Judgment). The Court finds and orders as follows.

Motions to Strike

Defendant moves to strike Plaintiff's reply to its summary judgment motion and Plaintiff's response to the first motion to strike on timeliness grounds.

The Court first addresses the second motion to strike because it concerns the response to the first motion to strike. Defendant's first motion to strike was filed on February 3, 2022. Under Rule 7.1(f)(2)(B), "any responsive memorandum must be filed within 5 days after service of the motion." The day of filing is not counted, per Rule 6(a)(1). Five additional days are added when service is effectuated under Rule 5(c)(2)(C). Ariz. R. Civ. P. 6(c). Weekends are not counted in the calculation, under Rule 6(a)(2). Thus, Plaintiff's response to the first motion to strike was due February 17, 2022. Plaintiff did not file its response until February 22, 2022. In its response to the second motion to strike, Plaintiff concedes its response to the first motion to strike was late, but argues it was late due to a misunderstanding of the Court's order that the response time would be "governed by the Rules." 2/2/22 Minute Entry at 2. It is unclear to the Court how that statement was interpreted as indicating Rule 7.1(f) did not apply. The second motion to strike is granted as good cause appears. Plaintiff's response to Defendant's first motion to strike is stricken, and the Court has not considered it.

With respect to the motion to strike Plaintiff's reply to its summary judgment motion, Defendant's response to the motion was filed on November 24, 2021 and mailed the same day. Service "is complete upon the mailing," per Rule 5(c)(2)(C). Thus, the date of service was November 24, 2021. That day is not counted, per Rule 6(a)(1). Five additional days are added when service is effectuated under Rule 5(c)(2)(C). Ariz. R. Civ. P. 6(c). The reply was due 15 days after the response was served. Ariz. R. Civ. P. 56(c)(2). Because the deadline was more than 11 days later,

weekends and legal holidays are included in the days to be counted. Ariz. R. Civ. P. 6(a)(2). Therefore, Plaintiff's reply to the Defendant's motion for summary judgment was due December 14, 2021. The reply was not filed until December 17, 2021, and stipulation for extension of time was not granted by Defendant. Therefore, the reply was late. The Court will grant the first motion to strike as good cause appears. Plaintiff's reply to the motion to summary judgment is stricken, and the Court has not considered it.

Motion to Preclude

Plaintiff moves to preclude the expert testimony of Alan Jones under Rule 26.1 of the Arizona Rules of Civil Procedure and Rule 702 of the Arizona Rules of Evidence. Defendant opposes the motion.

Rule 26.1 requires that an expert's disclosure must comply with either Rule 26.1(d)(3) or (d)(4), depending on the tier assigned to the matter. Undersigned is not the first judicial officer assigned to this matter and reviewed the docket for the tier assignment. It is unclear that a tier was assigned to the case, which likely explains why Plaintiff made arguments under both rules in its motion. Based on the Court's review of the matter, the Court finds the case likely falls within Tier 2. In addition, the requirements of Rule 26.1(d)(3), which applies to all cases other than Tier 3, are less stringent than Rule 26.1(d)(4). Therefore, for purposes of resolving this motion, the Court applies Rule 26.1(d)(3).

Rule 26.1(d)(3) provides an expert disclosure "must state" the following:

(A) the expert's name, address, and qualifications;
(B) the subject matter on which the expert is expected to testify;
(C) the substance of the facts and opinions to which the expert is expected to testify;
(D) a summary of the grounds for each opinion;
(E) a statement of the compensation to be paid for the expert's work and testimony in the case; and

> (F) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.

Upon inquiry from the Court at oral argument and in her filings, Defendant contended she has complied with Rule 26.1. Specifically, Defendant stated that her February 28, 2020 filing and her filing "last summer" (which the Court, based on its review of the docket, has determined was the filing entered on July 13, 2020 as "supplement #2," as that is the only other filing on the docket regarding Mr. Jones' expert witness testimony filed in summer months) satisfied Rule 26.1. However, there were three specific expert witness disclosures about Mr. Jones that were filed by Defendant; they were filed on February 28, 2020; March 2, 2020; and July 13, 2020, respectively. Defendant also filed an affidavit by Mr. Jones, which was sworn on November 22, 2021 and filed as a separate document in support of Defendant's opposition to the Motion to Preclude.

The Court has reviewed all documents proffered by Defendant in support of the witness. Those documents indicate that Mr. Jones, who is Defendant's husband, is a "retired registered professional engineer." His February 2020 "preliminary report" was cursory and contained only seven points over two pages. 2/28/20 "Disclosure of areas of potential testimony & preliminary opinions of 2 experts – Alan Jones." One of those points was that he concurred fully in another expert's report and incorporated it into his report. *Id.* The final point was that "much more will be addressed in the future." *Id.* "Supplement #1," which was filed March 2, 2020, consisted of approximately 75 pages of documents regarding Mr. Jones' qualifications and background. In the July 2020 "supplement #2," Mr. Jones listed four points in addition to those contained in his preliminary report of February 2020, including one indicating that he incorporated the other expert's "updated replacement report" in its entirety. 7/13/20 "supplement #2 to expert Alan Jones preliminary report dated Feb. 28, 2020 with additional areas of potential testimony with released documents to be used as exhibits at trial." Again, the final point stated that more was to come; specifically, "much more will be addressed in the future, such as: subject matter jurisdiction, conditions precedent, violation of ADA accommodations, violation of due process rights, purposeful violation and breach of

CC&Rs, reckless & negligent acts, 27 fraudulent answers verified by the HOA board president, multiple false light actions, personal physical injuries intentionally and willfully inflicted, false testimony at hearing, and more." *Id.* No basis for his "expert" opinion on the Americans with Disabilities Act and other legal issues raised was provided.

After reviewing all of Mr. Jones' disclosures on the docket, the Court finds that the disclosures are deficient under Rule 26.1 in various respects. Most importantly among them, the disclosures are devoid of the substance of Mr. Jones' full opinions and the bases for those opinions. Although supplement #2 and the November 2021 filing contain documentation over a number of years, Mr. Jones' enumerated statements consist mostly of conclusory statements. The Court recognizes that Defendant has attested in her own November 2021 affidavit in support of her opposition to this Motion that Mr. Jones' permanent disabilities have hampered his ability to fully provide all possible information. She further attested that Mr. Jones would authenticate documents and provide further information as requested on the stand. At this juncture, based on the documents before it, the Court would be inclined to grant the Motion to Preclude. However, in light of the rulings, *infra*, the trial will be vacated, and the Motion to Preclude will be denied (without prejudice) as moot.

Motion for Summary Judgment

Rule 56(c)(3)(B) requires that a party in opposition to a motion for summary judgment "must file a statement in the form prescribed by Rule 56(c)(3)(A), specifying: (i) the numbered paragraphs in the moving party's statement that are disputed; and (ii) those facts that establish a genuine dispute or otherwise preclude summary judgment in favor of the moving party." Rule 56(c)(3)(A) states that the statement of facts must be "a statement separate from the supporting memorandum" and must set forth "the specific facts relied on," with the facts "stated in concise, numbered paragraphs" and with citations to "the specific part of the record where support for each fact may be found." Plaintiff filed its Motion for Summary

Judgment and a separate statement of facts. Defendant filed her Opposition to the Motion, but there was no separate statement of facts filed, and the Opposition appears to be a combination of argument and factual assertions. The Opposition consists of a typed cover page, 22 handwritten pages, and 12 attachments. The handwritten pages begin with Defendant's statement, "Below are the material issues that preclude an entry of summary judgment in [Plaintiff's] favor." Opp. at 1. Then, in the 22 pages that follow, Defendant apparently responded to the paragraphs of Plaintiff's Statement of Facts ("SOF") to which she did not agree. The Court presumes this because Defendant began sections of the Opposition with a cite to a number and a quote from the beginning of that number, which corresponded to paragraphs of Plaintiff's SOF. *See id.* (e.g., "#5 'In early 2015…'"). However, Defendant's narrative that follows is meandering, interspersed with facts that are not pertinent to the Motion, and challenging to distill to salient legal arguments. Defendant cited to Plaintiff's exhibits and to her Opposition's attachments. However, Defendant also inserted various bits of commentary in bracketed language such as: "[Note: When Kathryn's bathrooms were followed with raw sewage, Grayhawk refused to send ServPro – or any other similar service – to clean up the mess quickly and avoid damage to Kathryn's Unit. Kathryn herself was forced to clean and disinfect her bathrooms herself, as Alan Jones was suffering with Valley Fever.]" Opp. at 3. This is an example of Defendant including immaterial allegations of fact in her Opposition. There is no memorandum of law. There is only the 22-page statement that is essentially a disjointed factual narrative, interwoven with quotes from Black's Law Dictionary, Arizona Revised Statutes, and many of Plaintiff's previous filings in this case. Some factual assertions contain a cite; most do not. The hundred-plus pages of attachments to the Opposition range from photos, to an affidavit by her expert (Dr. Baker)[2], to text of A.R.S. § 33-1221.

[2] The Court notes that the expert affidavit regarding Dr. Baker was dated November 22, 2021, which was after the dispositive/*Daubert* motions deadline. Typically, any written statement by an expert is turned over to the other side, who then has the opportunity to have their expert review and rebut. The Court has never before seen an affidavit by an expert that was clearly prepared in opposition to a summary judgment motion. The usual course is to be presented with the expert opinions and

To be sure, affidavits and "other materials that would be admissible in evidence" are permitted. Ariz. R. Civ. P. 56(c)(5)-(6). The Court has considered those documents.

Rule 56(e) provides, "When a summary judgment motion is made and supported as provided in this rule, an opposing party may not rely merely on allegations or denials of its own pleading. The opposing party must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party."

This Court is required to hold Defendant, who is self-represented and has received disability accommodations from the Court upon her request, to the same standard as counsel. *Bloch v. Bentfield*, 1 Ariz.App. 412, 417 (1965) ("When one undertakes to represent himself that person is 'entitled to no more consideration than if' he 'had been represented by counsel.' He is 'held to the same notice of statutes of local rules as would be attributed to a duly qualified member of the bar. Such a rule is indispensable to the orderly and efficient administration of justice.'") (quoting *Smith v. Rabb*, 95 Ariz. 49, 53 (1963)); *Maher v. Uhlman*, 211 Ariz. 543, 551 (App. 2005) ("That [a party] was unrepresented did not excuse him from his burden to diligently adhere to the court's rules.") (citing *Homecraft Corp. v. Fimbres*, 119 Ariz. 299, 301 (App. 1978)). In her filings and argument to this Court, Defendant has shown she is able to understand and apply the Rules of Civil Procedure. Indeed, in her motions to strike, Defendant precisely analyzed the Rules and requested that

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rebuttal opinions. However, no objection to the affidavit was raised, and the Court has considered it as part of Defendant's Opposition. Under Rule 56(c)(5), any affidavit in support of a summary judgment filing must set out facts that would be admissible in evidence and properly authenticated copies of documents referred to therein must be included. Dr. Baker's affidavit refers to various documents not appended thereto. The Court was not provided with an expert report for Dr. Baker with the Opposition to the Motion for Summary Judgment, but his supplemental report was included as an attachment to the Opposition to the Motion to Preclude Mr. Jones, presumably because Mr. Jones adopted Dr. Baker's reports in their entirety. Therefore, Dr. Baker's report is in the record of this case.

the Court hold Plaintiff to the letter of the Rules regarding timing and length of filings. The Court applied the letter of those Rules and granted Defendant relief sought, *supra*, as good cause appeared.

Rule 56(c)(3)(B) requires an opposition to a motion for summary judgment that conforms to the structure of Rule 56(c)(3)(A). One purpose of that Rule is to provide the Court with a clear record upon which the Court may make its rulings. The record in front of this Court, in Defendant's Opposition, is unfortunately far from clear. There is no specific discussion of the claims and applicable law, supported by clear reference to admissible evidence, in front of the Court. There is no specific discussion of the counterclaims and applicable law, supported by clear reference to admissible evidence, in front of the Court. Instead, the Court has a document that touches on various issues here and there; does not clearly argue the issues before the Court; does not provide clear, admissible evidence; and includes immaterial facts.

That being said, portions of Defendant's Opposition appear to the Court to be focused on certain counts or claims, and the Court has attempted to consider those as presented by Defendant. By way of example, Plaintiff moved for summary judgment as to all of Defendant's counterclaims; Defendant's first counterclaim alleged "violations" (plural) of the Federal and Arizona fair housing statutes. Amended Ans. at 12. In her Counterclaim, Defendant alleged that Plaintiff "denied the reasonable accommodation in violation of 42 U.S.C. § 3604(f)(3)(B) and A.R.S. § 41-1491.19(E)(2)," and the reasonable accommodation she requested "was to have the Association pay for professional moving and temporary storage of personal property." *Id.* at ¶¶ 49, 53. The Court could not locate any admissible evidence in support of this claim in Defendant's opposition; for example, what would have been the reasonable amount of moving and storage costs for reimbursement? What is the basis for that sought amount? Defendant's counterclaim pleading indicated Plaintiff offered $1,200.00 and Defendant did not accept the offer, but a pleading is not evidence. Defendant provided her recitation of facts on the issue in pages 6 through 9 of her Opposition to the motion for summary judgment. The Court notes that Defendant declared under penalty of perjury that her Opposition was true and correct. Opp. at 22. It is unclear whether Defendant intended for her Opposition to

be considered as an affidavit. Under Rule 56(c)(5), any affidavit must set out facts that would be admissible in evidence and properly authenticated copies of documents referred to therein must be included. In her Opposition's discussion of the issue, Defendant directed the Court to Attachment 5 to the Opposition. The Court reviewed Attachment 5. It consists of e-mails exchanged between counsel as part of settlement negotiations. Rule 408 of the Arizona Rules of Evidence precludes the admission of such evidence. This is but one example of Defendant responding in her Opposition to the Motion for Summary Judgment with the broad statement that there are genuine issues of material fact[3], and then failing to clearly set forth those specific facts with the support of admissible evidence. The opponent of a motion for summary judgment does not raise a genuine issue of fact by merely stating in the record that one exists. "Rather, they must show that competent evidence is available which will justify a trial on the issue." *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499 (App. 1980). This brings the Court back to Rule 56(e).

"In deciding a motion for summary judgment, the trial court considers 'those portions of the verified pleadings, deposition, answers to interrogatories and admissions on file which are brought to the court's attention by the parties.'" *Tilley v. Delci*, 220 Ariz. 233, 236 (App. 2009) (quoting *Choisser v. State ex rel. Herman*, 12 Ariz.App. 259, 261, (1970)). However, the *Tilley* court acknowledged in a footnote that there are "differing views" as to whether the Court is expected to perform an "independent search" of the record for facts not presented by a party opposing summary judgment. *Id.* at n.4. In an abundance of caution, the Court has taken the time to do so; its search was unsuccessful.

[3] The Court recognizes that its consideration of Plaintiff's Motion vis-à-vis Plaintiff's own claims, versus consideration of the Motion as to the counterclaims, varies. *Compare Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213 (App. 2012) (which applies to the motion as to Plaintiff's claims) *with Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990) (which applies to the Motion as to Defendant's counterclaims). Although Plaintiff's Motion is silent on the distinction, this particular example focuses on counterclaims.

In summary, the Court finds that Defendant failed to comply with Rule 56(c) and summary judgment is appropriate; thus, per Rule 56(e), summary judgment "shall" be entered against Defendant. The Court emphasizes that its ruling is not merely a matter of "style over substance." The Court has taken great pains to parse through Defendant's filings and the record, but the many issues outlined above result in summary judgment being entered under Rule 56(e).

Finally, this is an action arising out of a contract, which entitles Plaintiff to apply for an award of attorney's fees. *Lacer v. Navajo County*, 141 Ariz. 392, 394 (App. 1984) ("A party is entitled to an award of its attorney's fees under A.R.S. §12-341.01 if judgment in its favor is based upon the absence of the contract sued upon by the adverse party"). In addition, the parties' contract indicates attorney's fees may be awarded, and costs are awarded to Plaintiff as the successful party. "[T]he superior court has no discretion to deny costs to the successful party." *Roddy v. Cty. of Maricopa*, 184 Ariz. 625, 627 (App. 1996).

Conclusion

Based on the foregoing,

IT IS ORDERED granting Defendant's Motion to Strike Plaintiff's Reply to its Motion for Summary Judgment, filed February 3, 2022. Plaintiff's reply to the motion for summary judgment, which was filed December 17, 2021, is stricken.

IT IS FURTHER ORDERED granting Defendant's Motion to Strike Plaintiff's Response to Defendant's Motion to Strike Plaintiff's Reply to its Motion for Summary Judgment, filed February 28, 2022. Plaintiff's response to the first motion to strike, which was filed on February 22, 2022, is stricken.

IT IS FURTHER ORDERED denying without prejudice and as moot Plaintiff's Motion to Preclude Expert Testimony of Alan Jones, filed September 14, 2021.

IT IS FURTHER ORDERED granting Plaintiff's Motion for Summary Judgment, filed on September 14, 2021.

IT IS FURTHER ORDERED that not later than 20 calendar days after the entry of this order, Plaintiff may submit an application for an award of attorney's fees and statement of costs. If Defendant wishes to oppose the application, a response must be filed not later than 40 calendar days after service. (This amount of time is double what would typically be allowed, per the Court's previous order regarding accommodations for Defendant.) Plaintiff's reply must be filed within 15 days from the date of service of Defendant's response.

IT IS FURTHER ORDERED that not later than 20 calendar days after the entry of this order, Plaintiff must also submit a proposed form of judgment, leaving blank spaces for attorney's fees and taxable costs. That form of judgment may incorporate by reference what is said here and should include Rule 54(c) language.