

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-050858

07/10/2013

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
M. MINKOW
Deputy

LABADI FAMILY LIMITED PARTNERSHIP, et ROGER T HARGROVE
al.

v.

BELLASERA COMMUNITY ASSOCIATION JASON E SMITH
INC

UNDER ADVISEMENT RULING

Pending before the Court is Defendant's Motion for Reconsideration Re: Minute Entry Dated January 7, 2013. The Court ordered a response, heard further oral argument and subsequently ordered further briefing. The matter is fully briefed and ready for ruling.

In the Court's January 7, 2013 minute entry, the Court concluded that there was no material question of fact that precluded summary judgment on Counts 1 and 2 of the Complaint, filed March 1, 2012. That Complaint alleged, in Count 1, quiet title for easement and, in Count 2, an implied easement. Because the Defendant's filings raised the question of easement by necessity, not an implied easement (upon which the Court relied on in the January 7th minute entry), the Court permitted Plaintiffs to amend the Complaint to allege such an easement. They also alleged damages for interference with the putative easements. Thus, with the Court's permission, the First Amended Complaint (FAC) was filed April 17, 2013.

Plaintiffs seek permanent access to their 12-acre property ("Plaintiffs' Property") from either Scottsdale Road or Lone Mountain Road and seek to confirm and enforce an easement

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through Defendant's subdivision ("Defendant's Subdivision"). Because Plaintiffs' subdivision is gated, they seek access through the guard gates through Defendants' private roads.

Background:

- In 1979, Plaintiffs' predecessors-in-interest sold property which now consists, in part, of Defendant's entire Subdivision.
- The Plaintiffs claim, and there is no factual dispute, that its predecessors-in-interest expressly reserved utilities' easement for Plaintiffs' Property.
- While the 1979 Deed transferring the property did not specifically mention the now-disputed ingress/egress easement (referred to *herein* as "Access Easement"), Plaintiffs' lawsuit claims that was precisely the intent of Plaintiffs' predecessors-in-interest.¹
- The Amended Complaint further alleges that Plaintiffs' property, prior to the 1979 transfer, was regularly accessed through west and southern portions of Defendant's Subdivision, supporting Plaintiffs' theory that there existed an implied easement.
- In November 1996, the City of Scottsdale Development Review Board, provided a preliminary plan which granted an Access Easement to Plaintiffs' Property in the Southeast corner of Defendant's Subdivision.
- In June 1997, Defendant's owner recorded plats dividing Defendant's Subdivision into 5 parcels (A-E); each of the five parcels, in turn, consisted of multiple tracts—each dedicated Tract "A" as the common roads within the parcels.
- The final Plats for Parcels A-D, through "Note 18," referred to the 1979 Deed and each state that each tract is subject to the easement "for utilities and rights incident thereto" for Plaintiffs' property.
- The final Plat for parcel E also refers to Note 18 but adds an non-exclusive easement across Tract A and the "access and utility easement as shown with Tract B" are dedicated to Plaintiffs' Property. That Access Easement is insufficient to give Plaintiffs access to the Plaintiffs' property.

Plaintiffs seek declaratory relief on their claims for express easement (FAC, I), Implied Easement (FAC, I & II) and (easement by necessity (FAC, I & V). Their claim for an express easement relies in large part on the 1979 deed, the Preliminary Plat filed with the Scottsdale Development Board and the ambiguous language platted in parcels A-E ("for utilities and rights incident thereto"). Their claim for easement by necessity rests on the allegations that their property is landlocked that requires access through Defendant's subdivision. Plaintiffs' claim for an easement by implication rests on the entirety of circumstances that they believe leaves no

¹ The utilities easement reserved "access to utilities if, as and when such utilities are provided to any other contiguous parcels or lots in Said Section 23 (with sufficient capacity reasonable to serve the 12-acre parcel for residential uses)."

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reasonable inference other than that the parties intended the Access Easement. They seek declaratory relief, injunctive relief and damages.

The Court finds that, contrary to its January 7, 2013 minute entry, there are questions of material fact that preclude summary judgment. While the Court must enforce the parties' intent with respect to the 1979 Deed and subsequent recorded plats: (1) the Court cannot find as a matter of law that recorded plats expressly created an Access Easement. While there may be very persuasive evidence (e.g., 1979 Deed, the preliminary plat and the ambiguous language in Plats A-D) that supports Plaintiff's theory of an implied easement, the parties' intent remains a material question of fact; and (2) the question of whether there exists an easement by necessity turns on whether Plaintiffs' property had access through property outside of Defendant's Subdivision when the property was sold in 1979.

This is not to say that Plaintiffs' evidence is weak, strong or otherwise. Rather, it lends itself to conflicting interpretations that the Court cannot not resolve at a summary judgment proceeding. Thus, the Court concludes that summary judgment, entered on January 7, 2013, was improvidently granted.

IT IS ORDERED THAT Defendants' Motion for Reconsideration is GRANTED.

IT IS FURTHER ORDERED setting this matter for a Telephonic Status Conference on **July 24, 2013 at 8:30 a.m. for 15 minutes** to determine: (1) whether further discovery and deadlines need to be set; and (2) to set a trial in this matter. Counsel for Plaintiff(s) shall initiate the telephonic conference by first arranging the presence of all other counsel/parties on the conference call and by calling this Division at 602-372-0762 promptly at the scheduled time.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.