

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-052655

07/08/2019

HONORABLE CYNTHIA J. BAILEY

CLERK OF THE COURT
W. Tenoever
Deputy

MICHAEL BERENT, et al.

KRISTIN M. ROEBUCK

v.

GRAZYNA MROCZKOWSKA, et al.

KEVIN M ARNOLD
NANCY BERENT
17974 N 167TH DR
SURPRISE AZ 85374
DEBRA S BROCKWAY
JUDGE BAILEY

UNDER ADVISEMENT RULING

The Court has read and considered:

- Defendant Bell West Ranch Homeowners Association's Motion for Summary Judgment, filed December 7, 2018 and the attachments and statement of facts.
- Plaintiffs' Response to Defendant Association's Motion for Summary Judgment, filed February 1, 2019 and controverting statement of facts and exhibits.
- Defendant Bell Well Ranch Homeowners Association's Reply to Plaintiffs' Response to Motion for Summary Judgment, filed January 23, 2019.

AND

- Plaintiffs' Motion for Partial Summary Judgment, filed December 7, 2018 and the attachments and statement of facts.
- Defendant/Cross Defendant Bell West Ranch HOA's Response to Plaintiffs' Motion for Partial Summary Judgment, filed December 17, 2018 and exhibits.

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- Defendant Mroskowska's (Corrected) Response to Plaintiffs' Motion for Partial Summary Judgment, filed January 22, 2019 and Separate and Controverting Facts in Support of Response to Plaintiffs' Motion for Partial Summary Judgment and exhibits.
- Plaintiffs' Reply in Support of Plaintiffs' Motion for Partial Summary Judgment (Defendant Association), filed February 1, 2019.
- Plaintiffs' Reply in Support of Motion for Summary Judgment (Defendant Mroczkowskas), filed March 4, 2019.
- Plaintiff Michael Berent's Legal Brief on *Res Judicata* Supplementing His Response to the Association's Motion for Summary Judgment ("Supplement"), filed May 31, 2019.

The Court has considered all of the filings and the oral argument presented on May 21, 2019 and has made the following findings and orders:

Brief Facts

Plaintiffs Michael and Nancy Berent ("Berents") and Defendants Grazyna and March Mroczkowska ("Mroczkowskas") are neighbors in Defendant Bell West Ranch Homeowners Association ("HOA"), a community within the boundaries of the City of Surprise. The Covenants, Conditions and Restrictions ("CC&Rs") of the HOA specify that "all structures must be constructed on the Property in accordance with any county or municipal zoning regulations applicable to the property". See CC&R §8.02. The parties agree that the CC&Rs constitute an enforceable contract between the Plaintiffs and the HOA.

On July 5, 2015, the HOA approved, through its management company Vision Management Company, an application from the Mroczkowskas to build a driveway extension on their property. The application did not include the identification of a fire hydrant on the Mroczkowskas' property. The HOA approval letter stated that "the edge of the driveway can be no closer than 13 inches from the property line (City Requirement)" and "You must also follow all local building codes and setback requirements, if applicable".

However, the City of Surprise requires the nearest edge of any driveway curb to be a minimum of five (5) feet from the property line or any public utility, including a fire hydrant. Ordinance Part II, Chapter 122, Article VII, Section 122-12(h)(3)(b). The ordinance further requires that the driveway shall not comprise more than 30% of the front yard lot area of a detached single family home". Ordinance Part II, Chapter 122, Article VII, Section 122-12(h)(3)(c).

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The Mroczkowskas' driveway extension is less than 36 inches from both the property line and a fire hydrant. It is approximately 13 inches from the Berents' property line and exceeds 30% of the total area of the front yard.

Plaintiffs filed a claim with the Registrar of Contractors. An Administrative Law Judge (ALJ) concluded that the evidence did not support a finding that the HOA violated §8.02 or §8.06 of the CC&Rs.

The appeal of the ALJ decision was dismissed prior to the oral argument herein.

Defendant HOA's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment both address similar issues.

Defendant HOA Motion for Summary Judgment

Plaintiff's Third Amended Complaint seeks claims for relief against the HOA for Breach of Contract and Negligence arising out of the approval of the Mroczkowskas driveway and failure to follow and/or enforce the CC&Rs.

Defendant HOA argues that:

- 1) The HOA did not breach the CC&Rs by approving a driveway that violated City of Surprise Ordinances.
- 2) The HOA was not negligent.
- 3) The Berents' claims are barred by res judicata.
- 4) The Mroczkowskas are not entitled to indemnification.

The parties agree that the legal standard regarding the HOA's approval of the driveway is "reasonableness". See *Tierra Ranchos H.O.A. v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (2007). *Tierra Ranchos* makes clear that the question of reasonableness is a question of fact that is generally left to the jury. To the extent that both Plaintiffs and the HOA seeks summary judgment on the breach of contract issue, it is clear that the determination of a breach is dependent upon the finding of material facts that are in dispute.

Plaintiffs' contend that res judicata is inapplicable here because the finding of the Administrative Law Judge was predicated on a "conclusion of law" that the driveway was not a "structure" under the purview of the CC&Rs. They argue that this conclusion is in contradiction to *Horton v. Mitchell*, 200 Ariz. 523, 527, 29 P.3d 870, 874 (App. 2001).

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For the reasons stated in Plaintiff's Supplement, the Court finds that res judicata does not preclude Plaintiff's claims in the Third Amended Complaint.

Plaintiffs' Motion for Summary Judgment

Plaintiffs contend that because the driveway violates two city ordinances, the Berents "de facto" violated the CC&Rs. Plaintiffs assert that they are entitled to judgment as a matter of law that the CC&R violations constitute a breach of contract and therefore summary judgment should be granted in their favor on that issue.

Plaintiffs further allege that the HOA breached the CC&Rs by approving the construction of the Mroczkowskas driveway extension and failed to enforce §8.02 of the CC&Rs, (wherein homeowners are required to abide by the City of Surprise ordinances), constituting a breach of contract as a matter of law. The City of Surprise did not cite Plaintiffs after an investigation.

Based on the allegations of both parties, there are clearly issue of facts surrounding the alleged violations of the City of Surprise ordinances.

"If the moving party on a motion has made a prima facie showing that no genuine issue of material fact exists, the opponent of the motion has the burden to produce sufficient evidence that there is indeed an issue." *W.J. Kroeger Co. v. Travelers Indem. Co.*, 112 Ariz. 285, 286 (1975). A motion for summary judgment should not be denied simply on the speculation that some doubt, scintilla of evidence, or dispute over irrelevant or immaterial facts might blossom into a controversy in the middle of trial. *Shaw v. Petersen*, 169 Ariz. 559, 560-61 (App. 1991) quoting *Orme Sch.*, 166 Ariz. at 309. "The court does not try issues of fact, but only whether the same are genuine and in good faith disputed. The mere general statement in a pleading, when attacked by such motion supported by proof of specific facts in the form of affidavit or deposition, places on the author of the statement the obligation to present something which will show that when the date of trial arrives, he will have some proof to support the allegation in the pleading." *Stevens v. Anderson*, 75 Ariz. 331, 334 (1953).

"[A] party opposing a motion for summary judgment may not rest on the pleadings; it must respond with specific facts showing a genuine issue for trial." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287 (App. 2000), citing *Doe v. Roe*, 191 Ariz. 313, 323 (1998). The opponents of a motion for summary judgment do not raise a genuine issue of fact by merely stating in the record that such an issue 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). Determining credibility, weighing the evidence, and drawing legitimate inferences from the facts are functions for a jury, not the judge. *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 444 (App. 2007) (citations omitted).

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On summary judgment, the court must view the evidence and all reasonable inferences that such evidence will permit in the way that is most favorable to the party opposing summary judgment and must assume the truth of that party's allegations. *Esplendido Apartments v. Olsson*, 144 Ariz. 355, 361, 697 P.2d 1105, 1111 (App. 1985); *Airfreight Express Ltd v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 106, ¶2, 158 P.3d 232, 235 (App. 2008). Taken in the light most favorable to the respective party in each Motion,

THE COURT FINDS that there are genuine issues of material facts that preclude the granting of the each motion for summary judgment. The issues include the determination of facts surrounding the approval of the driveway and the reasonableness of the decisions made by the HOA in regards to the CC&Rs. Specifically, was the HOA's decision not to enforce the CC&Rs reasonable in light of the City of Surprise failing to enforce the city ordinances at issue in the CC&Rs.

IT IS THEREFORE ORDERED denying Defendant Bell West Ranch Homeowners Association's Motion for Summary Judgment, filed December 7, 2018.

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Partial Summary Judgment, filed December 7, 2018.