

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-052924

07/05/2020

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

3603 CAMPBELL L L C

ARI RAMRAS

v.

WOODSIDE ENCORE AT SUNSET RANCH L
L C, et al.

JEFFREY D. HARRIS

JONATHAN D EBERTSHAUSER
JUDGE VIOLA

UNDER ADVISEMENT RULING

The Court has received and considered the following:

1. Plaintiff's Motion for Partial Summary Judgment (Liability) filed January 9, 2020 and the related Statement of Facts;
2. Woodside Encore at Sunset Ranch, LLC's ("Woodside) Response filed March 25, 2020 and the Controverting and Separate Statement of Facts;
3. Encore at Sunset Ranch Community Association's ("Association") Response and Controverting and Separate Statement of Facts;
4. Woodside's Cross Motion for Summary Judgment filed March 25, 2020;
5. Plaintiff's Reply and Response to Woodside's Motion for Summary Judgment filed April 14, 2020; and
6. Woodside's Reply filed April 29, 2020.

The Court further considered the arguments of counsel on Wednesday, July 1, 2020.

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Plaintiff's Motion

Plaintiff asks the Court to grant judgment in its favor as to liability only. Specifically, Plaintiff asks the Court to find that Woodside and the Association breached the easement and the implied covenant of good faith and fair dealing and committed a trespass. The Court concludes issues of fact preclude the entry of judgment in Plaintiff's favor.

This matter arises from a dispute over an easement. Plaintiff purchased an access easement over a neighboring parcel. The grantor later sold the servient property to a developer, Woodside. Woodside discovered the easement and attempted to have it removed. Woodside was unsuccessful and proceeded with developing the property into a planned community. Woodside later transferred the servient property to the Association. The area of the servient property that Plaintiff claims under the easement has been developed as a retention basin for the planned residential community.

Analysis

According to the Commercial Reciprocal Access Easement and Non Barrier Agreement ("Agreement"), Plaintiff and the Presbytery of Grand Canyon ("Church) agreed to grant each other reciprocal easements for ingress and egress on certain terms and conditions ("Easement"). Those terms included: "Subject to Section 3, below, . . . a nonexclusive perpetual easement for vehicular and pedestrian ingress and egress on, over and across any access drives, driveways or drive arises from time to time located on that portion of the [Church property] shown on the Site Plan attached hereto as Exhibit C "Presbytery Drive Area." The Drive Area contained approximately 4,767 square feet of land. The Site Plan was not attached to the Agreement that was recorded.

Section 3 of the Easement includes the following: "[a]s a condition to either party using the easements set forth in Section 1 and Section 2 above, Campbell shall cause the following improvements to be made to the Presbytery Drive Area, together with the construction of the following wall adjacent to the Presbytery Drive, together with the delivery of certain following utilities. . ." In summary, Plaintiff was required to install new paving, curb, and landscaping. Additionally, Plaintiff was required to install a screen wall and an electronic gate. Plaintiff was also required to pay for the related electrical service. Plaintiff did not cause any of the improvements above to be made. The Court finds this fact to be fatal to Plaintiff's Motion.

Plaintiff asserts that it was prevented from performing the condition set forth in Section 3 of the Easement. Plaintiff has not set forth facts to establish that it was prevented from performing. Plaintiff merely cites to cases discussing the doctrine of prevention and the testimony of Plaintiff's principal that by the time Plaintiff had a tenant and was ready to improve the drive area, it was too late because Woodside had already developed over it. But Plaintiff presents no evidence that it was prevented from doing so or even that it tried to do so. As noted in *Sec. Nat. Life Ins. Co. v.*

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Pre-Need Camelback Plan, Inc., 19 Ariz. App. 580, 582 (App. 1973), the general rule is that if one prevents fulfillment of a condition precedent one cannot thereafter rely on such failure of the condition to defeat the agreement. Here, the factual issue remains that Plaintiff has not established that Defendants prevented Plaintiff from performing the improvements. There is no question that the evidence supports a conclusion that the servient property was developed over the ten plus years since the Easement was entered. The Easement expressly contemplated that the surface and sub-surface drainage/retention systems would traverse across the Church property. At this point, a drainage/retention system traverses the property. The Easement further expressly contemplated that the general improvements that Plaintiff was required to make “shall take into account and not impair such systems.”

Paragraph 4 of the Easement gives Plaintiff the right to determine when to make the improvements, but the Easement does not become effective until they are made. The Easement therefore remained only conditional as of the time Woodside built its improvements, and so at that time Woodside did nothing wrong. Woodside remains obligated to allow Plaintiff to build the required items and thereby activate the Easement. The question of who will have to pay for any increased expense brought by Woodside’s construction is not raised in this motion.

Simply, Plaintiff has not carried its burden because it has not established that it is prevented from making the improvements contemplated either because Defendants built over the Easement or because Defendants have refused to allow Plaintiff to make the improvements. For this reason alone, the Court concludes that Plaintiff’s Motion must fail.

IT IS ORDERED denying Plaintiff’s Motion for Partial Summary Judgment (Liability) filed January 9, 2020.

Woodside’s Motion

Woodside asks the Court to grant summary judgment in its favor for three reasons: 1) the Easement is void and unenforceable against Woodside; 2) Plaintiff has no contract with Woodside; and 3) Woodside cannot be liable for trespass.

Enforceability

The record presented to the Court confirms that Woodside had actual notice of the Easement. *See Onekama Realty Co. v. Carothers*, 59 Ariz. 416, 424 (1942) (“the only purpose of recording is to give constructive notice, and constructive notice is never required when actual is had”). The record also establishes that Exhibit B to the Easement described the burdened servient property which is what is required for a valid Easement. See Restatement (Third) of Property (Servitudes) § 2.7, cmt. f. To the extent Woodside’s request is based on a claim that the reciprocal

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right is uncertain, that is not a basis to conclude that the Easement is unenforceable to the extent that the servient property was described – which it was in this case. *See* Exhibit A to Easement. Because the Easement was not one of necessity, the existence of alternate access is immaterial.

Woodside has not established as a matter of law that the Easement is void or unenforceable.

Contract

There is no question that Woodside is no longer the owner of the property. Woodside was the owner of the property after the Easement was granted and while it was developed. To the extent that the Court finds the Easement to be enforceable, it can be enforced as a contract between land owners. *See Ellerman v. Snyder*, 2013 WL 636728, at *23 (App. Feb. 21, 2013).

Trespass

A trespass is an invasion of another's property right. 74 C.J.S. *Trespass* § 1 (2013). In order to establish a claim of trespass against another, the claimant must possess a legal interest in the land against which the trespass is alleged. *See, e.g.*, Restatement (Second) of Torts § 161 cmt. b (1965) (“The actor's failure to remove from land *in the possession of another* a structure, chattel, or other thing which he has tortiously erected or placed on the land constitutes a continuing trespass”) (emphasis added); *Mountain States Tel. & Tel. Co. v. Kelton*, 79 Ariz. 126, 134-135 (1955) (defendant's interference with plaintiff's express easement over defendant's property amounted to trespass). Here, as outlined above, as a condition to Plaintiff using the Easement, Plaintiff was required to make certain improvements. If Plaintiff had no present right to use the Easement then Woodside cannot be deemed to have trespassed. Whether or not Plaintiff was prevented from making the improvements as a result of Woodside's actions remains a question of fact.

IT IS ORDERED denying Woodside's Cross Motion for Summary Judgment.