

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-010588

11/14/2016

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
D Arrieta
Deputy

SUN GROVES HOMEOWNERS
ASSOCIATION, THE

GREGORY A STEIN

v.

MICHAEL ROBERTS

ERIN SELENE IUNGERICH

COURT ADMIN-CIVIL-ARB DESK

MINUTE ENTRY

A motion for summary judgment was filed on behalf of plaintiff The Sun Groves Homeowners Association. The motion prompted the court to convene a telephonic conference. [See Minute Entry (8/30/16)] During that conference, the court informed the parties that the submitted record did not permit the court to grant summary judgment on the issue of damages and that, because the amount claimed was much less than \$50,000.00, this matter required referral to a court-appointed arbitrator. See Ariz. R. Civ. P. 72.

Upon hearing that, the parties asked for an opportunity to submit supplemental briefing in the hope that the issue could be decided as a matter of law. To accommodate that request, the court asked counsel for the Association to "file a supplemental memorandum . . . and a supplemental statement of facts establishing the amount or amounts of damages that [the Association] would want to see in a final judgment in this case." The court reminded the parties that "if there is a dispute about damages, the motion cannot be granted." After that, plaintiff's counsel indicated that he anticipated filing a "lengthy" statement of facts to support the damages claim, and the court indicated its approval for that approach.

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Despite that, no statement of facts was filed with the Association's supplemental memorandum, even though (and leaving aside what the court requested) a statement of facts is the only recognized means by which a party seeking summary judgment may establish "the specific facts relied upon in support of the motion." Ariz. R. Civ. P. 56(c)(3); *cf. Velez v. Puerto Rico Elec. Power Auth.*, 170 F.Supp.2d 158, 162 (D.P.R. 2001) (applying rule similar to Ariz. R. Civ. P. 56(c)(3) and stating that the rule serves as a warning that failure to comply will be grounds for a ruling against the noncomplying party).

Even more problematic, no sworn statement was submitted to establish that the amount claimed by the Association is correct in all respects, including and especially that defendant Michael Roberts has been credited correctly for all payments that he has made. Indeed, in a significant sense, the Association's supplemental memorandum is self-defeating: it attempts to account for Roberts' payments with an unsworn statement (at 3 n.2) that is unsupported by a citation to anything specific in the record. That attempt is ineffective, leaving the amount that Roberts should be credited and, thus, the correct amount of the Association's claimed damages unresolved. *See e.g., Prairie State Bank v. Internal Revenue Service*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987) (recognizing that an unsworn assertion in a party's legal memorandum is not a fact that a court may consider when ruling on a summary judgment motion); *Borbon v. City of Tucson*, 27 Ariz. App. 550, 551, 556 P.2d 1153, 1154 (1976) ("Summary judgment cannot be granted on the basis of [unsworn] statements of fact in the moving party's brief even though they are uncontroverted by an opponent").

Although the Association's supplemental memorandum is accompanied by a "Business Records Affidavit" from a custodian of records for the Association's management company, that affidavit does not go far enough. To be sure, it establishes the admissibility of 50-plus pages of business records, but it does not establish which of the many numbers appearing among those pages is the amount of damages that may be awarded after Roberts has been credited.

Although the "legal defenses of mootness and impossibility" referenced in Roberts' supplemental memorandum (at 3) are ineffective because they not supported with admissible evidence or citations to applicable authority, and they otherwise do not apply to the issue of damages, nevertheless, that does not compel granting summary judgment. Because the Association has not presented admissible evidence sufficient to support the amount claimed, Roberts was under no obligation to rebut what the Association submitted. *E.g., United Bank of Arizona v. Allyn*, 167 Ariz. 191, 196, 805 P.2d 1012, 1017 (App. 1990) (stating that "when the [summary judgment] motion fails to show an entitlement to judgment, the adverse party need not respond to the motion with controverting evidence").

The court explained during the August 30 telephone conference what needed to be submitted before summary judgment on the issue of damages could be granted. That has not

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occurred. Thus, the court has no alternative: given the record presented, summary judgment must be denied and this matter must be referred to the Civil Court Arbitration Desk.

IT IS ORDERED transferring this matter to the Civil Court Administration Arbitration Desk for appointment of an arbitrator.

IT IS FURTHER ORDERED that counsel and/or the parties shall direct all future filings, except those motions listed in Ariz. R. Civ. P. 74 (c)(1), to the arbitrator for consideration and ruling.