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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2015 APR 20 PM 3: 58
DONNA McQUALITY, CLERK

BY: M FEICHTER

6 Counsel for Defendants Robert and Catherine Cox

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

8 **IN AND FOR THE COUNTY OF YAVAPAI**

9 JOHN B. CUNDIFF and BARBARA C.
10 CUNDIFF, husband and wife; ELIZABETH
11 NASH, a married woman dealing with her
12 separate property; KENNETH PAGE and
13 KATHRYN PAGE, as Trustee of the Kenneth
14 Page and Catherine Page Trust,

13 Plaintiffs,

14 v.

15 DONALD COX and CATHERINE COX,
16 husband and wife, et al., et ux.,

16 Defendants.

Case No. P1300CV20030399

Division Pro Tem A

**DEFENDANTS' COXES OBJECTION
TO PROPERTY OWNER JAMES
VARILEK'S SEPARATE JUDGMENT
FOR ATTORNEYS' FEES AND COSTS
IN FAVOR OF JAMES VARILEK
LODGED APRIL 9, 2015**

(Assigned to Honorable Jeffrey G. Paupore)

17 Defendants Donald and Catherine Cox, by and through undersigned counsel, pursuant to
18 Ariz. R. Civ. P. 58(d), object to property owner James Varilek's proposed form of Judgment
19 ("**Varilek proposed judgment**"). As discussed below, Varilek's proposed judgment (i)
20 erroneously provides for prejudgment interest; (ii) fails to comply with A.R.S. § 44-1201(B); (iii)
21 improperly purports to assert a lien against the Coyote Springs Property; and (iv) erroneously
22 identifies Varilek as a party-plaintiff. These defects must be cured prior to entry of Judgment.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **First**, the well-settled law of Arizona prohibits pre-judgment interest on attorneys' fees
25 award pursuant to A.R.S. § 12-341.01(A), and Varilek is not entitled to such interest from
26 August 25, 2014. *Cf.* Varilek proposed judgment, p. 2, line 1. Because of their discretionary
27 nature, statutory attorneys' fees under A.R.S. § 12-341.01(A) are *not* liquidated damages and,
28 therefore, pre-judgment interest is not available.

29 Arizona Revised statutes Section 12-341.01(A) provides as follows:

30 In any contested action arising out of a contract . . . the court *may* award the
31 successful party reasonable attorney fees.

32 [emphasis added]. Our appellate court has expressly held that such fees are discretionary:

1 Finally, we reiterate and emphasize the *discretionary* power of the trial judge in
2 awarding attorneys' fees under A.R.S. § 12-341.01."

3 *Continental Townhouses East Unit One Association v. Brockbank*, 152 Ariz. 537, 545, 733 P.2d
4 at 1120, -- (App. 1986). [citations omitted] [emphasis added]. "A claim is liquidated "where the
5 evidence furnishes data, which, if believed, makes it possible to compute the amount with
6 exactness, *without reliance upon opinion or discretion.*" *Continental Townhouses*, 152 Ariz. at
7 540, 733 P.2d at -- (citing *Custom Roofing Co., Inc. v. Alling*, 146 Ariz. 388, 391, 706 P.2d 400,
8 403 (App. 1985)). [emphasis added]. If a claim is *not* liquidated, then an award of pre-judgment
9 interest is not appropriate. *Continental*, 152 Ariz. at 540-41, 733 P.2d at -- (holding claim was
10 unliquidated because "the amount of the homeowners' claim in this case was based on opinion
11 testimony and discretionary judgments . . ."). As the foregoing well-settled law of Arizona
12 makes clear, an award of attorneys' fees pursuant to A.R.S. § 12-341.01 is *discretionary*. Thus,
13 pre-judgment interest is not appropriate and interest is available only from the date of the entry of
14 judgment.

15 **Second**, the Varilek proposed judgment fails to comply with A.R.S. § 44-1201(B),
16 because it does not specifically state the statutory rate of interest. *See* Varilek proposed
17 judgment, p. 2, line 1. Arizona Revised Statutes Section 44-1201(B) provides in pertinent part as
18 follows:

19 *** [I]nterest on any judgment shall be at the lesser of ten per cent per annum or
20 at a rate per annum that is equal to one per cent plus the prime rate as published
21 by the board of governors of the federal reserve system in statistical release H.15
22 or any publication that may supersede it on the date that the judgment is entered.
23 *The judgment shall state the applicable interest rate* and it shall not change after it
24 is entered.

25 Varilek's proposed judgment is defective because it does not specifically state the applicable
26 interest rate.

27 **Third**, the Varilek proposed judgment purports to impose a lien on the Coyote Springs
28 Ranch Property at 7325 N Coyote Springs Rd ("**Coyote Springs Property**"). Varilek did seek
29 any affirmative relief, whatever, in this litigation, let alone specific relief that would amount to a
30 lien attaching to the Coyote Springs Property. *See* Varilek Notice of Appearance filed 10-27-10,
31 a copy of which is attached hereto as **Exhibit "1"** for the Court's convenience. The Court
32 awarded attorneys' fees to Varilek, and nothing more. Certainly, Varilek is not entitled to
affirmative relief in the form of a lien attaching to the Coyote Springs Property.

Importantly, in the case at bar the Cundiff-Plaintiffs elected *not* to record a *lis pendens*
which would have given constructive notice to property owners and prospective buyers of the

1 pending litigation which could affect title to real property situated in Coyote Springs Ranch
2 governed by the subject Declaration of Restrictions. This issue was brought to the Court's
3 attention by Counsel for the Coxes in connection with the Joinder Issue. However, for whatever
4 reason, the Cundiff-Plaintiffs chose to proceed without recording a statutory *lis pendens* pursuant
5 to A.R.S. § 12-1191, which provides in relevant part as follows:

6 A. In an action affecting title to real property, the plaintiff at the time of filing the
7 complaint, or thereafter, . . . may file in the office of the recorder of the county in
8 which the property is situated a notice of the pendency of the action or defense.

9 *** The notice shall contain the names of the parties, the object of the action or
10 affirmative defense, the relief demanded and a description of the property
11 affected.

12 B. The recorder shall file the notice and record and index it in the names of the
13 parties to the action, and thereafter a purchaser or encumbrancer of the property
14 affected shall be held to have *constructive notice* of the pendency of the action
15 and the claims therein made except as prescribed in subsection D of this section.
16 ***

17 [emphasis added]. Defendants Cox were not proscribed from conveying the property to High C's,
18 LLC, which in turn conveyed the property to Prescott Valley Growers, LLC. Book 4592, Page
19 104; and Book 4753, Page 820, Official Records of Yavapai County.

20 The second paragraph of the Varilek proposed judgment attempts to bootstrap a lien on
21 the Coyote Springs Property based on the language of paragraph 13 of the proposed final
22 judgment filed by Varilek and the Cundiff-Plaintiffs filed July 26, 2013 ("**Cundiff-Plaintiffs'**
23 **proposed judgment**"). However, as discussed below, this is improper. Although the Court
24 held that the language of paragraph 13 of the Cundiff-Plaintiffs' proposed judgment is
25 appropriate under the circumstances, *neither* paragraph 13 thereof *nor* any other language
26 contained in the Cundiff-Plaintiffs' proposed judgment provides for the imposition of a
27 judgment-lien against the Coyote Springs Property. Furthermore, the Cundiff-Plaintiffs' First
28 Amended Complaint is for breach of contract and injunctive relief; i.e., the relief sought does *not*
29 include the imposition of a judgment lien. *See* Cundiff-Plaintiffs' Amended Complaint filed 03-
30 18-04, at p. 6.¹ Consequently, the second paragraph of the Varilek proposed judgment *is*
31 inappropriate and should be stricken.

32 Alternatively, the second paragraph of the Varilek proposed judgment is overly-broad
because it purports to be binding upon the Coxes and "any heir, successor or assign of their

¹ Varilek points to no authority to which permits the imposition of a lien based upon the theory of a breach of covenants. Because there is no Homeowners Association, a lien -- which requires judicial foreclosure -- is not an available remedy. A.R.S. § 33-1801, *et al.*

1 interest" in the Coyote Springs Property without limitation. Defendants Cox propose the
2 following alternative language to paragraph 2 of the Varilek proposed judgment, which binds the
3 Coxes, High C's and Prescott Valley Growers, the current title-holder of the Coyote Springs
4 Property:

5 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this *Separate*
6 *Judgment for Attorneys' fees and Costs in Favor of James Varilek* shall be
7 binding upon Donald Cox and Catherine Cox, High C's LLC, and Prescott Valley
8 Growers, LLC, as to their respective interests in the real property described below:

9 All that portion of Section 25, Township 15 North, Range 1 West
10 of the Gila and Salt River Base and Meridian, Yavapai County,
11 Arizona, described as follows:

12 BEGINNING at the East quarter corner of Section 25 marked with
13 a GLO brass cap monument;

14 Then South 00 degrees, 04 minutes, 15 seconds East, 660.28 feet
15 along the East line of Section 25 to a one half inch rebar and the
16 TRUE POINT OF BEGINNING;

17 Thence South 00 degrees, 04 minutes, 15 seconds East, 660.28 feet
18 to a one half inch rebar;

19 Thence North 89 degrees, 59 minutes, 02 seconds West, 1321.37
20 feet;
21 Thence North 00 degrees, 03 minutes, 08 seconds West, 660.32
22 feet;

23 Thence South 89 degrees, 58 minutes, 54 seconds East, 1321.15
24 feet to the TRUE POINT OF BEGINNING.

25 EXCEPT all oil, gas, coal and minerals as set forth in instrument
26 recorded in Book 192 of Deeds, Page 415.

27 **Fourth, and finally**, the Varilek proposed Judgment identifies Varilek as a plaintiff. *See*
28 Varilek proposed judgment, p. 1, line 18. As discussed at pages 6-8 of Defendants Coxes'
29 Motion for Reconsideration re: August 25, 2014 Ruling Re: Attorneys' Fees Awarded in Favor of
30 Varilek filed 11-19-14, throughout this litigation Varilek took the unwavering position that he
31 was *not* a properly joined party. *See Exhibit "2"* attached hereto (excerpt of Motion for
32 Reconsideration filed 11-19-14). As such, the Varilek proposed judgment should excise any
reference to Varilek as a party-plaintiff.

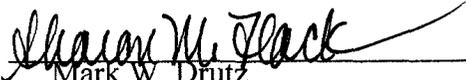
In Conclusion, Defendants Cox object to the Varilek proposed judgment because: (i)
pre-judgment interest is not authorized under A.R.S. § 12-341.01(A), (ii) the Varilek proposed
judgment fails to state the specific rate of interest pursuant to A.R.S. § 44-1201(B), (iii) the
Varilek proposed judgment purports to impose a lien on the Coyote Springs Property and
therefore is overly broad, and (iv) the Varilek proposed judgment erroneously identifies Varilek
as a plaintiff in the case at bar. The Court should: (i) strike the award of pre-judgment interest,

1 (ii) specifically state the statutory rate of interest, (iii) strike the second paragraph of the Varilek
2 proposed judgment and, alternatively, limit said second paragraph to the Coxes, High C's (former
3 title-holders), and Prescott Valley Growers (current title-holder), and (iv) strike any references to
4 Varilek as a party-plaintiff.

5 A revised proposed form of judgment is attached hereto for the Court's convenience.

6 RESPECTFULLY SUBMITTED this 20th day of April, 2015.

7 MUSGROVE DRUTZ KACK & FLACK, PC

8
9 By: 
10 Mark W. Drutz
11 Sharon M. Flack
12 Attorneys for Defendants Robert and
13 Catherine Cox

14 COPY the foregoing mailed
15 this 20 day of April, 2015, to:

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James Longman

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JEANNE HICKS, CLERK

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6 Attorneys for Property Owner James Varilek

7 **IN THE SUPERIOR COURT OF ARIZONA**

8 **COUNTY OF YAVAPAI**

9
10 **JOHN B. CUNDIFF** and **BARBARA C. CUNDIFF**, husband and wife; **BECKY NASH**,
11 a married woman dealing with her separate
12 property; **KENNETH PAGE** and **KATHRYN PAGE**, as Trustee of the Kenneth Page and
Kathryn Page Trust,
13 Plaintiffs,
14 vs.
15 **DONALD COX** and **CATHERINE COX**,
16 husband and wife, *et al.*,
17 Defendants.

Case No. P1300CV20030399

Division 1

**NOTICE OF APPEARANCE
AND
REQUEST FOR ALIGNMENT
AS PARTY-PLAINTIFF**

18 NOTICE is given hereby that the law firm of FAVOUR MOORE & WILHELMSSEN, P.A.,
19 appears as counsel of record on behalf of Property Owner, James Varilek.

20 Property Owner Varilek hereby requests alignment with parties-Plaintiff on the issues
21 remaining for adjudication pursuant to the decision rendered in this case by the Arizona Court of
22 Appeals, Division One.

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RESPECTFULLY SUBMITTED this 27th day of October, 2010.

FAVOUR MOORE & WILHELMSSEN, P.A.

By: 
David K. Wilhelmsen
Marguerite Kirk
Post Office Box 1391
Prescott, Arizona 86302
Attorneys for Property Owner Varilek

Original of the foregoing filed
this 27th day of October, 2010, with:

Clerk, Superior Court of Arizona
Yavapai County
120 S. Cortez Street
Prescott, Arizona 86302

A copy of the foregoing hand-delivered
this 27th day of October, 2010, to:

Honorable David L. Mackey
Judge, Superior Court of Arizona
Yavapai County, Division 1
120 S. Cortez Street
Prescott, Arizona 86302

And, a copy of the foregoing mailed
to lead counsel in this case
this 27th day of October, 2010, to:

J. Jeffrey Coughlin
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Prescott, Arizona 86303
Attorney for Plaintiffs Cundiff

Jeffrey Adams
ADAMS & MULL, PLLC
211 E. Sheldon St.
Prescott, Arizona 86301

By: 
David K. Wilhelmsen
Marguerite Kirk

1 **B. Varilek Cannot Be Deemed to Be the ‘Successful Party’ in a ‘Contested Action’**
2 **Pursuant to A.R.S. § 12-341.01(A). Varilek Took the Position He Was Not a**
3 **Party; Varilek Did Not Assert Any Claims Directly Against the Coxes; Varilek**
4 **Did File Any Pleadings in this Case; as Such, There Exists No Underlying Legal**
5 **Basis for an Award of Attorneys’ Fees in Favor of Varilek.**

6 Varilek’s three (3) page Motion for Award of Attorneys’ Fees rests solely on A.R.S. § 12-
7 341.01(A), which provides as follows:

8 In any **contested action** arising out of a contract, express or implied, the court may
9 award the **successful party** reasonable attorney fees. ***

10 A.R.S. § 12-341.01(A).

11 Simply put, Varilek does not meet the basic prerequisites for an award of attorneys’ fees
12 under A.R.S. § 12-341.01(A). In the case at bar, Varilek is not a “successful party” in a “contested
13 action.”

14 First, *contrary* to his Reply to Response and Objection to Plaintiffs’ Requests for Award of
15 Attorneys’ Fees⁴, filed August 19, 2014, **Varilek takes the position that he is *not* a party.** See, e.g.,
16 Varilek’s Notice of Alignment as quoted *Supra*. At the February 13, 2013, Oral Argument, counsel
17 for Varilek unequivocally took the position that Varilek was not a party:
18

19 MR. WILHEMSEN: Okay. Where I left off was our firm disassociated from this
20 case and it was largely because we felt that the procedure that Judge Mackey had
21 engineered does not comply with the Rules of Civil Procedure or the Constitution in
22 that the parties had not been properly joined as constitutionally required and made
23 parties in such a fashion that there would ultimately be a determination that would
24 be binding upon them.

25 I pointed out to ... Judge Mackey -- and we had several hearings in which
26 some of the procedural issues that this court has raised were discussed.
27 Notwithstanding that, our firm withdrew.

28 ⁴ “Defendants provide no examples of Varilek “consistently taking” such a position
because *there are none.*” Varilek Reply re: Attorneys’ Fees, p. 3:14-16, filed August 19, 2014.

1 At that time Judge Mackey gave us orders to the parties on what he believed
2 would be necessary in order to bring all the inhabitants of this subdivision before the
3 court, and that's what's been done. **And it's our position that we are not a party.**
4 **We have simply aligned with the plaintiffs.**

5 Transcript, February 13, 2013, Oral Argument, p. 44. [emphasis added].

6 Bolstering support for the foregoing, the Varilek Motion to Serve Indispensable Parties
7 "respectfully urges that the misleading and incomplete documents served by Plaintiffs on the absent
8 property owners do not satisfy due process and that the Court should order the Coxes to assemble
9 a complete and accurate list of all current property owners" Varilek Motion to Serve
10 Indispensable Parties, pp. 12-13. In its June 14, 2013, UA Ruling, the Court deemed said Motion
11 to be moot. Moreover, during the February 13, 2013 proceedings, the Court expressed its concerns
12 as to whether Plaintiffs had properly joined all Coyote Springs property owners:
13

14 THE COURT: *** When I was reading early this morning, when I was
15 reading Judge Winthrop's ruling in this Court of Appeals matters, it stated on
16 page 17, paragraph 30, the Coxes argue as they did below that all owners of the
17 property subject to the declaration must be joined as parties to this lawsuit because
18 an issue in the case is whether the declaration has been abandoned.

19 We all know the case law they cited. We all know the position they took and, in fact,
20 what it comes down to is stated at paragraph 32 – maybe not. Hang on a second.
21 Excuse me, 36. Page 21. "We conclude that the absent property owners are
22 necessary parties given the issue to be decided in this case. Under this rule, necessary
23 parties must be joined if they are subject to service of process and their joinder will
24 not deprive the court of jurisdiction over subject matter of the action."

25 ***

26 ***I had asked earlier about the issue of whether or not all parties had been joined.
27 You raised the issue of the lis pendens. Mr. Coughlin's response, as I remember, was
28 that – this was a year ago.

1 THE COURT: This wasn't seven years ago or eight years ago. This was a
2 year ago. His comment was that they had already served all the parties, that they had
3 complied with Judge Mackey's direction and that a lis pendens at this date would
4 have no effect other than to basically take every – it would require them to start over.

4 ***

5 THE COURT: So, Mr. Adams, here's my question for you – here's my
6 question for you: Your clients are sitting here asking for this matter to be concluded.
7 I don't doubt that Mr. Wilhelmsen and his client would like to see this concluded and
8 Mr. Coughlin and his client would like to see this concluded.

8 When I read the language today, I wanted to make a specific point 63 days
9 before this trial starts as to whether or not you believed the Court of Appeals'
10 determination, the memorandum decision, that the directives of that decision have
11 been met such that all of the necessary parties have now been joined in this litigation.

11 ***

12 I will tell you that something that I'll never forget from the hearing we were
13 talking about a minute ago where the lis pendens came up, the gentleman who was
14 a property owner in the subdivision by the name of Jerry Carver, who is an attorney
15 known to all of us, sat in the back of the room and I said: Mr. Carver, I realize you
16 are not here . . . as an active litigant in these proceedings. Having heard what you've
17 heard – and I asked him why he was here. And he said: Because I own property in
18 the subdivision. And I said: Do you, in fact, believe that you would be bound by a
19 judgment of this – in this litigation? And he said: Not a chance in the world.

18 February 13, 2013, proceedings, pp. 30:15-25; 31:1-5; 34: 5-25; 35: 1-7; 39: 6-18.

19 It is abundantly clear that Varilek takes the position he is not a party. Therefore, it is not
20 possible for Varilek to have standing as a "successful party" pursuant to A.R.S. § 12-341.01(A).
21 Moreover, by injecting himself into the proceedings as an 'aligned non-party', Varilek has created
22 chaos and confusion. The majority of Varilek's \$90,000.00 in legal fees may have been avoided had
23 Varilek moved to dismiss pursuant to Rule 12(b)(2) / (b)(5) (lack of jurisdiction over the person and
24 insufficiency of service of process).
25
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28