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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2015 APR 30 PM 3:20 ✓

DONNA McQUALITY, CLERK

BY: M FEICHTER

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,

15 Plaintiffs,

16 v.

17 DONALD COX and CATHERINE COX,
18 husband and wife, et al., et ux.,

19 Defendants.

Case No. P1300CV20030399

Division Pro Tem A

**DEFENDANTS' COXES OBJECTION
TO SEPARATE JUDGMENT FOR
ATTORNEYS' FEES AND COSTS IN
FAVOR OF PLAINTIFFS CUNDIFFS**

(Assigned to Honorable Jeffrey G. Paupore)

20 Defendants Donald and Catherine Cox, by and through undersigned counsel, pursuant to
21 Ariz. R. Civ. P. 58(d), object to Plaintiffs's Cundiff, Nash, and Page ("**Cundiff Plaintiffs**")
22 proposed form of Judgment lodged 04/20/15 ("**Cundiffs' proposed judgment**").

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. THE CUNDIFFS' PROPOSED JUDGMENT IS REDUNDANT OF THE 04/07/15
25 JUDGMENT. THE COURT SHOULD NOT ABIDE A DUPLICATE AWARD OF
26 FEES, AND THEREBY CREATE A WINDFALL FOR THE CUNDIFF
27 PLAINTIFFS.**

28 The Court *already* has entered judgment for fees and costs in favor of the Cundiff
29 Plaintiffs, as follows:

30 **IT IS ORDERED** attorneys' fees are awarded against Defendants
31 Cox and in favor of Plaintiffs in the amount of **\$258,986.52**, and
32 costs are awarded to Plaintiffs in the amount of **\$4,117.74**.

See 04/07/15 Judgment, p. 2.

Entry of a second, duplicative judgment, awarding attorneys' fees and costs in favor of
the Cundiff Plaintiffs would result in a windfall to the Cundiff Plaintiffs. A duplicative judgment
would work in a grave injustice to the Coxes. By way of example, if two (2) judgments were
entered and later recorded with the Yavapai County recorder, thereby attaching judgment liens to
real property owned by the Coxes, a prospective buyer, creditor, or lender would be led to believe

1 that there are two judgments for \$258,986.92 each, or *over* \$517,000.00, but this would not be
2 accurate. Certainly, the Court did not award the Cundiff Plaintiffs \$517,000.00. One of the
3 judgments would be invalid and constitute 'slander of title'. A.R.S. § 33-420. To avoid the
4 creation of such confusion and chaos, the Court should not sign or otherwise affirm the Cundiffs'
5 proposed judgment.

6 **II. MOTION FOR NEW TRIAL INCORPORATED BY REFERENCE.**

7 By this reference, the Coxes incorporate herein by reference Defendants' Coxes Motion
8 for New Trial Re: Award of Attorneys' Fees to Cundiff-Plaintiffs Pursuant to Ariz. R. Civ. P.
9 59(a) and, in the Alternative, Motion to Alter or Amend Judgment Pursuant to Ariz. R. Civ. P.
10 59(l) filed April 22, 2014. In essence, entry of judgment for attorneys' fees in favor of the
11 Cundiff Plaintiffs in the amount of \$258,986.52 would result in an inconsistent judgment for the
12 reason that non-party Alfie Ware paid all or substantially all of the Cundiff-Plaintiff's legal fees,
13 as billed by both the Coughlin law firm *and* the Wilhemsen law firm. The Court denied the
14 Coughlin-generated fees but granted the Wilhemsen-generated fees. Wilhemsen represented the
15 Cundiff Plaintiffs through approximately March of 2009, after which time Coughlin took over
16 representation. However, throughout the litigation, non-party Alfie Ware paid the Cundiff
17 Plaintiffs parties' fees. The Wilhemsen law firm fees are the subject of the Cundiffs' proposed
18 judgment.

19 **III. ALTERNATIVE GROUNDS TO DENY CUNDIFFS' PROPOSED JUDGMENT:
20 NO PRE-JUDGMENT INTEREST; FAILURE TO COMPLY WITH A.R.S.
21 SECTION 44-1201(B); IMPROPER IMPOSITION OF A LIEN ON THE COYOTE
22 SPRINGS PROPERTY.**

23 If for some reason the Court decides not to grant a new trial or alter/amend the 04/07/15
24 Judgment on the Cundiff Plaintiffs' award of attorneys' fees, the Coxes offer the following
25 additional grounds to deny the Cundiffs' proposed judgment:

26 As stated above, entry of the Cundiffs' proposed judgment would be duplicative of the
27 04/07/15 Judgment and would create a windfall for the Cundiff Plaintiffs.

28 The Coxes object to the Cundiffs' proposed judgment on grounds similar to their
29 objection to property owner Varilek's proposed judgment. *See* Defendants' Coxes Objection to
30 Property Owner James Varilek's Separate Judgment for Attorneys' Fees and Costs in Favor of
31 James Varilek Lodged April 9, 2015. The Cundiffs' proposed judgment; (i) erroneously provides
32 for prejudgment interest; (ii) fails to comply with A.R.S. § 44-1201(B); and (ii) improperly
purports to assert a lien against the Coyote Springs Property.

1 A. **There is No Prejudgment Interest Under A.R.S. § 12-341.01, Which is**
2 **Discretionary; Further the 08/25/14 Ruling Stayed the Issue of Award of**
3 **Attorneys' Fees.**

3 **First**, the well-settled law of Arizona prohibits pre-judgment interest on attorneys' fees
4 award pursuant to A.R.S. § 12-341.01(A). And, the Court's 08/25/14 Ruling stayed the issue of
5 attorneys' fees. Consequently, the Cundiff Plaintiffs are not entitled to interest effective August
6 25, 2014. *Cf.* Cundiffs' proposed judgment, p. 1, line 23.

7 Because of their discretionary nature, statutory attorneys' fees under A.R.S. § 12-
8 341.01(A) are *not* liquidated damages and, therefore, pre-judgment interest is not available, at all.

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

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

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

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

14 *Continental Townhouses East Unit One Association v. Brockbank*, 152 Ariz. 537, 545, 733 P.2d
15 at 1120, -- (App. 1986). [citations omitted] [emphasis added]. "A claim is liquidated "where the
16 evidence furnishes data, which, if believed, makes it possible to compute the amount with
17 exactness, *without reliance upon opinion or discretion.*" *Continental Townhouses*, 152 Ariz. at
18 540, 733 P.2d at -- (*citing Custom Roofing Co., Inc. v. Alling*, 146 Ariz. 388, 391, 706 P.2d 400,
19 403 (App. 1985)). [emphasis added]. If a claim is *not* liquidated, then an award of pre-judgment
20 interest is not appropriate. *Continental*, 152 Ariz. at 540-41, 733 P.2d at -- (holding claim was
21 unliquidated because "the amount of the homeowners' claim in this case was based on opinion
22 testimony and discretionary judgments . . ."). As the foregoing well-settled law of Arizona
23 makes clear, an award of attorneys' fees pursuant to A.R.S. § 12-341.01 is *discretionary*. Thus,
24 pre-judgment interest is not appropriate and interest is available only from the date of the entry of
25 judgment.

26 Next, additional grounds to deny pre-judgment interest are found in the Court's August
27 25, 2014, Ruling:

28 [A] determination regarding the proposed Final Judgment that has been filed [on
29 July 26, 2013] is hereby STAYED, pending a determination of Plaintiffs' claim of
30 attorneys' fees, as addressed at II(B), and the subsequent modification of the
31 proposed Final Judgment consistent with the rulings, herein, and those
32 anticipated, hereunder.

31 08/25/14 Ruling, page 3, § III. The foregoing Ruling staying the proceedings is contrary to an
32 award of pre-judgment interest effective 08/25/14.

1 **B. Failure to Comply with A.R.S. § 44-1201(B).**

2 Second, the Cundiff proposed judgment fails to comply with A.R.S. § 44-1201(B),
3 because it does not specifically state the statutory rate of interest. *See* Cundiff proposed
4 judgment, p.1, line 23. Arizona Revised Statutes Section 44-1201(B) provides in pertinent part
5 as follows:

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

12 [emphasis added]. The Cundiff proposed proposed judgment is defective because it does not
13 specifically state the applicable interest rate.

14 **C. If Entered, the Cundiffs' Proposed Judgment Would Improperly Impose a
15 Lien on the Coyote Ranch Property; The Plaintiffs Sought No Such Relief.**

16 Third, the Cundiff proposed judgment purports to impose a lien on the Coyote Springs
17 Ranch Property at 7325 N Coyote Springs Rd ("**Coyote Springs Property**"). The Cundiff
18 Plaintiffs did not seek any specific relief that would give rise to a lien attaching to the Coyote
19 Springs Property.

20 Importantly, in the case at bar the Cundiff-Plaintiffs elected *not* to record a *lis pendens*
21 which would have given constructive notice to property owners and prospective buyers of the
22 pending litigation which could affect title to real property situated in Coyote Springs Ranch
23 governed by the subject Declaration of Restrictions. This issue was brought to the Court's
24 attention by Counsel for the Coxes in connection with the Joinder Issue. *See, e.g.*, Transcript of
25 02/13/13 Oral Argument, pp. 31. However, for whatever reason, the Cundiff-Plaintiffs chose to
26 proceed without recording a statutory *lis pendens* pursuant to A.R.S. § 12-1191, which provides
27 in relevant part as follows:

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

31 *** The notice shall contain the names of the parties, the object of the action or
32 affirmative defense, the relief demanded and a description of the property
33 affected.

34 B. The recorder shall file the notice and record and index it in the names of the
35 parties to the action, and thereafter a purchaser or encumbrancer of the property
36 affected shall be held to have **constructive notice** of the pendency of the action
37 and the claims therein made except as prescribed in subsection D of this section.
38 ***

39 [emphasis added]. Based upon the foregoing, the Coxes' conveyance of the Coyote Springs
40 property to High C's, LLC, which in turn conveyed it to Prescott Valley Growers, LLC is not

1 subject to the Judgment which arises out of this litigation. See Book 4592, Page 104; and Book
2 4753, Page 820, Official Records of Yavapai County.

3 The third paragraph of the Cundiff proposed judgment attempts to bootstrap a lien on the
4 Coyote Springs Property based on the language of paragraph 13 of the proposed final judgment
5 that the Varilek and the Cundiff-Plaintiffs lodged on **July 26, 2013 (“Cundiff-Plaintiffs’
6 07/26/13 proposed judgment”)**. However, as discussed below, this is improper. Although the
7 Court (Judge Paupore) held that the language of paragraph 13 of the Cundiff-Plaintiffs’ proposed
8 judgment is appropriate under the circumstances, *neither* paragraph 13 thereof *nor* any other
9 language contained in the Cundiff-Plaintiffs’ 07/26/13 proposed judgment provides for the
10 imposition of a judgment-lien against the Coyote Springs Property. Furthermore, the Cundiff-
11 Plaintiffs’ First Amended Complaint is for breach of contract and injunctive relief; i.e., the relief
12 sought does *not* include the imposition of a judgment lien. See Cundiff-Plaintiffs’ Amended
13 Complaint filed 03-18-04, at p. 6.¹ Consequently, the third paragraph of the Cundiffs’ proposed
14 judgment is inappropriate and should be stricken.

15 The third paragraph of the Cundiffs’ proposed judgment is overly-broad because it
16 purports to be: (i) in favor of ‘all Plaintiffs’ without qualification²; and (ii) binding upon not only
17 the Coxes, but “any heir, successor or assign of their interest” in the Coyote Springs Property
18 without limitation. To cure the foregoing sweeping and over-broad language, Defendants Cox
19 propose the following alternative language to paragraph 3 of the Cundiffs’ proposed judgment,
20 which binds the Coxes, High C’s and Prescott Valley Growers, the current title-holder of the
21 Coyote Springs Property:

22 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
23 this Separate Judgment for Attorneys’ fees and Costs in
24 favor of Plaintiffs Cundiff, Nash, and Page, and no
25 other parties or aligned property owners, shall be
26 binding upon Donald Cox and Catherine Cox, High C’s,
27 LLC, and Prescott Valley Growers, LLC, as to their
28 respective interests in the real property described
29 below:

30 All that portion of Section 25, Township 15
31 North, Range 1 West of the Gila and Salt

32 ¹ The Cundiff Plaintiffs point 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.*

² i.e., not limited to Cundiff, Nash and Page. There are other Coyote Springs Ranch Property
owners who joined or ‘aligned’ with these Plaintiffs.

1 River Base and Meridian, Yavapai County,
2 Arizona, described as follows:

3 BEGINNING at the East quarter corner of
4 Section 25 marked with a GLO brass cap
5 monument;

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

10 Thence South 00 degrees, 04 minutes, 15
11 seconds East, 660.28 feet to a one half inch
12 rebar;

13 Thence North 89 degrees, 59 minutes, 02
14 seconds West, 1321.37 feet;
15 Thence North 00 degrees, 03 minutes, 08
16 seconds West, 660.32 feet;

17 Thence South 89 degrees, 58 minutes, 54
18 seconds East, 1321.15 feet to the TRUE POINT
19 OF BEGINNING.

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

23 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
24 this Judgment shall not entitle Plaintiffs to a
25 duplicate award of attorneys' fees which were awarded
26 in the amount of \$258,986.52 and costs awarded in the
27 amount of \$4,117.74 in that certain Judgment filed on
28 April 7, 2015. It is expressly ordered, adjudged and
29 decreed that Plaintiffs are not by this Judgment
30 entitled to another, separate award of attorneys' fees
31 and costs.

32 IV. CONCLUSION.

Defendants Cox object to Cundiffs' proposed judgment on the following grounds:

(i) entry of judgment for attorneys' fees in favor of the Cundiff Plaintiffs in the amount of \$258,986.52 would result in an inconsistent judgment, because non-party Alfie Ware paid the Cundiff Plaintiffs' legal fees that were billed by *both* the Coughlin law firm as well as the Wilhemsen law firm. The Court denied the Coughlin law firm fees. The Wilhemsen law firm fees are the subject of the Cundiffs' proposed judgment;

(ii) a duplicative judgment for the same amount of fees and costs is redundant and contrary to the precepts of justice, as it would create a windfall for the Cundiff Plaintiffs;

(iii) pre-judgment interest effective 08/25/14 is not authorized under A.R.S. § 12-341.01(A) and, further, the Court stayed the issue of attorneys' fees in its 08/25/14 Ruling;

(iv) the Cundiffs' proposed judgment fails to state the specific rate of interest pursuant to A.R.S. § 44-1201(B); and

(v) the Cundiffs' proposed judgment purports to impose a lien on the Coyote Springs Property and therefore is overly broad.

1 Alternatively, at minimum, with regard to the Cundiffs' proposed judgment, the Court
2 should: (i) clarify in unequivocal language that the Cundiff Plaintiffs are *not* entitled to duplicate
3 judgments which would result in a windfall; (ii) strike the language concerning pre-judgment
4 interest, (iii) specifically state the statutory rate of interest, and (iv) strike the third paragraph of
5 the Cundiffs' proposed judgment and, alternatively, limit said third paragraph to the Coxes, High
6 C's (former title-holders), and Prescott Valley Growers (current title-holder).

7 RESPECTFULLY SUBMITTED this 30th day of April, 2015.

9 MUSGROVE DRUTZ KACK & FLACK, PC

10 By: 

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