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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 2003-0399

Division No. 4

MOTION FOR RECONSIDERATION/ MOTION FOR CLARIFICATION RE: RULING ON DEFENDANTS' MOTION IN LIMINE RE: ROBERT CONLIN

(Assigned to the Hon. Kenton Jones)

(Oral argument requested)

Defendants, by and through undersigned counsel, hereby move the Court to reconsider and/or clarify its ruling on Defendants' Motion in Limine seeking to preclude Plaintiffs from utilizing the affidavit of Robert Conlin as evidence in this case or for purposes of interpreting the subject Declaration of Restrictions. This Motion to Reconsider/Motion to Clarify are supported by the accompanying Memorandum of Points and Authorities and the record on file.

MEMORANDUM OF POINTS AND AUTHORITIES

As stated during oral argument on Defendants' Motion *in Limine*, Defendants oppose the use of Robert Conlin's affidavit ("**Conlin Affidavit**") to insert additional language into the subject Declaration of Restrictions that does not exist and to specifically narrow the specific language used by Mr. Conlin when the subject Declaration of Restrictions were drafted and ultimately recorded. In its March 6, 2013, Under Advisement Ruling containing the Court's denial of Defendants' Motion, the Court relied heavily upon the Arizona Court of Appeals' March 24, 2007, Memorandum Decision, quoting extensively from the same. However, we believe that the Court inadvertently overlooked the portions of the Memorandum Decision that specifically addressed paragraph 2 of the Declaration of Restrictions and which, we believe, settles the issue of whether the Conlin Affidavit may be used to narrow the language of paragraph 2 of the Declaration of Restrictions.

In addressing paragraph 2 of the Declaration of Restrictions, the Court of Appeals had much to say and concluded as a matter of law that that paragraph must be read and interpreted broadly. In this regard, the Court stated:

> ¶14 In this case the Declaration does not define the terms "business" or "commercial" used in section two of the restrictions. However, "[w]ords in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning." *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 396, 87 P.3d 81, 84 (App. 2004); *see also Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) ("The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable.").
>
> ¶15 Nothing in the record suggests a specialized meaning for the words "business" and "commercial" in the Declaration, and the ordinary meaning of these terms will be utilized in characterizing the activity that is undisputedly occurring on the subject property.

* * *

> ¶17 . . . [N]othing in the Declaration suggests that any one type of business was intended to be excluded from section two of the restrictions. On the contrary, the wording used in the restriction is broad, prohibiting ***any*** "trade, business, profession or any other type of commercial or industrial activity."

See March 24, 2007, Memorandum Decision (emphasis added). In considering the Memorandum Decision, this Court has stated in its March 5, 2013, Ruling as follows: "As a result of the Memorandum Decision, the provisions of the Declaration have been provided focus...." And in considering that focus, the Court of Appeals determined that, with respect to paragraph 2 of the Declaration, it must be read broadly and to prohibit any "trade, business, profession or any other type of commercial or industrial activity" regardless of its type, nature or scope and regardless of where on, within or about that activity occurs within Coyote Springs Ranch.

The Court of Appeals conclusion as to paragraph 2 of the Declaration of Restriction as being broad and prohibiting any type of trade, business, profession, commercial or industrial activity in Coyote Springs Ranch is consistent with the law in Arizona as set forth in *Employers Mut. Cas. Co. v. DGG & CAR*, Inc., 218 Ariz. 262, ¶ 24, 183 P.3d 513, 518 (2008). Therein, the Arizona Supreme Court held as follows:

> When "the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there."

Id. at 218 Ariz. 262, ¶ 24, 183 P.3d 513, 518, *quoting D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co. of Wis.*, 96 Ariz. 399, 403, 396 P.2d 20, 23 (1964).

As stated in Defendants' Motion *in Limine* and has been made obvious from Plaintiffs' portions of their draft of the Joint Pretrial Statement, Plaintiffs seek to use Mr. Conlin's affidavit at

paragraph 5 to supplant, vary and contradict the plain and ordinary meaning of the terms "trade", "business", "commercial", and "industrial enterprise" contained within the subject Declaration of Restrictions with more restrictive language as opposed to the broad language actually employed by Mr. Conlin when he originally drafted and recorded the Declaration. In other words, Plaintiffs are seeking to use the Conlin Affidavit to "pervert" and "do violence" to the actual language employed by Mr. Conlin and expand paragraph 2 of the Declaration "beyond its plain and ordinary meaning" that the Court of Appeals has already ruled must be applied in this case.

In considering the foregoing and Defendants' request to preclude the Plaintiffs' use of Mr. Conlin's affidavit, especially when considering with what the Court of Appeals has stated already concerning the expansive nature of paragraph 2 of the Declaration, we again direct the Court's attention of the 2011 decision in *IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd. Partnership*, 228 Ariz. 61, 263 P.3d 69 (Ct.App. 2011). *Rancho* involved a dispute about an easement among owners of a three-phase apartment complex. *Id.* at 228 Ariz. at 63, 263 P.3d at 71. The easement in dispute in *Rancho* stated specifically as follows:

> Grantor hereby grants and conveys to Grantee and its successors and assigns a [ ] pedestrian and passenger vehicle easement over entranceways and vehicle driveways located on Phase I ... as they may exist from time to time, for the purposes of providing pedestrian ingress and egress and passenger vehicle ingress and egress to and from Phase II–III, all as hereinafter limited.

Id. at 228 Ariz. at 67, 263 P.3d at 75 (emphasis added). The two owners of the general partner for the Defendant/Appellant offered affidavits as evidence that provided that "when the easement was granted the parties intended that, if an access point was constructed from the [subject apartment] complex to [a public street called] Bilby Road, access would be blocked by a locked gate and be limited to emergency vehicle use only...." *Id.* Defendant/Appellant also contended that additional

language of the easement provided for restricted use of the easement. *Id.* That language provided: "[i]t is the intention of the parties that they grant each other reciprocal easements for the sole purpose of limited ingress and egress upon the terms, provisions, conditions, and covenants contained in th[e] agreement." *Id.* Relying on the foregoing provision, Defendant/Appellant contended that the scope of the easement was reasonably susceptible to the interpretation it offered because the easement was intended to be "limited," and that limitation was for emergency vehicle access only. *Id.*

In finding the affidavits of the owners of the Defendant's/Appellant's inadmissible parol evidence, the Court ruled as follows:

> The parol evidence rule renders inadmissible the evidence Rancho offers because it is offered solely to vary or contradict the plain meaning of the easement, not to interpret one of its terms. The proffered evidence merely seeks to supplant the terms "pedestrian" and "passenger vehicle" with the term "emergency vehicle." Although we first must consider Case and Breen's affidavits and their "allegations made ... as to the appropriate interpretation of the [easement] in light of the extrinsic evidence" offered, we also must consider the language of the writing to determine if it is reasonably susceptible to the suggested interpretation. The only argument Rancho offers indicating the easement's language suggests it is reasonably susceptible to another meaning is the provision of the easement stating it is for "limited ingress and egress." However, the limitation referred to is clear—the easement is limited by "the terms, provisions, conditions, and covenants contained in th[e] agreement," none of which limit the easement to emergency vehicle use only. And Rancho has offered no explanation why a reciprocal easement that permitted access to emergency vehicles only would have been either necessary or desired by RTC.
>
> Here, no interpretation of the easement is required because the meaning of its terms is clear. Even in light of the evidence Rancho proffered, the contract language is not "reasonably susceptible" to the interpretation it offered. Thus the evidence cannot be admitted to determine the parties' intended meaning. Moreover, "one cannot claim that one is 'interpreting' a written clause with extrinsic evidence if the resulting 'interpretation' unavoidably changes the meaning of the writing." And although Rancho contends the trial court "could not resist the temptation to interpret the language in the Easement according to how it understood the words," the words "pedestrian" and "passenger vehicle" require no interpretation. "At what point [the court] stops 'listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense.'" Therefore, the court

did not err in refusing to admit the proffered extrinsic evidence and in concluding the parties "would be bound by the written agreement."

Id. at *Rancho*, 228 Ariz. at 67-68, 263 P.3d at 75-76 *citing Taylor*, 175 Ariz. at 152-53, 854 P.2d at 1138-39, *Long v. City of Glendale*, 208 Ariz. 319, ¶¶ 28-29 and 34, 93 P.3d 519, 528 (App.2004), *quoting* 6 Arthur L. Corbin, Corbin on Contracts § 579, at 127 (interim ed.2002).

Herein, the language of paragraph 2 of the Declaration of Restrictions is clear and unambiguous and it prohibits ***all*** "trade", "business", "commercial", and "industrial enterprise" activities without limitation. In this case, the Court of Appeals agreed with the foregoing. Nothing about the foregoing language "requires interpretation"; nor is the foregoing language "reasonably susceptible" to the interpretation offered by Plaintiffs through the use of Mr. Conlin's affidavit; to the contrary, the language is global in nature and covers all types of "trade", "business", "commercial", and "industrial enterprise" activities regardless of their nature or type, whether large or small. And the Declaration most certainly does not state anything about allowing any ***particular*** type of "trade", "business", "commercial", and "industrial enterprise" use of Coyote Springs Properties to the exclusion of any others; nor does it allow the use of the properties in the subdivision as a storage facility for a "trade", "business", "commercial", and "industrial enterprise" regardless of its shape or form and whether operated on, in or out of the properties in the subdivision or at any other location.

Put simply, Plaintiffs' effort to use Mr. Conlin's affidavit, as parol evidence, is virtually identical to the effort to use the affidavits sought to be admitted in *Rancho*. Plaintiffs seek to "vary or contradict" the "plain meaning" of paragraph 2 of the Declaration, "not to interpret [] its terms." *Rancho*, 228 Ariz. at 67, 263 P.3d at 75 (emphasis added). Rather, Plaintiffs seek to "supplant"

paragraph 2 of the Declaration which states "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof" with the phrase "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof with the exception of home based business and property owners shall be allowed to use their properties as storage yards for any trade, business, commercial or business enterprises they so wish to operate be it at, on or in their properties" of something of the like, which would be tantamount to a complete re-write of the restriction itself, which this Court cannot allow through parol evidence. Rather, this Court must adopt and adhere to the ruling of the Court of Appeals holding that paragraph 2 of the Declaration bars any type of business, commercial or industrial use of the property in Coyote Springs Ranch regardless of the nature, scope or extent of that use.

Based upon the foregoing, this Court must reconsider its ruling on the Defendants' Motion in Limine and at a minimum, it must limit the use of Mr. Conlin's affidavit to providing evidence that when Coyote Springs originally was established, it was established as a rural residential community and nothing more which would include paragraph 3 of Mr. Conlin's affidavit. Thus, Defendants request that any copy of Mr. Conlin's affidavit that Plaintiffs seek to use during trial be redacted including the entirety of paragraph 5. We also ask that the Court Order that those portions of Mr. Conlin's affidavit that constitute legal statements of interpretation or his opinions including the entirety of paragraph 6 of his affidavit be redacted to ensure that the terms and conditions of paragraph 2 of the Declaration be given its ordinary and plain meaning as required and ruled by the Court of Appeals, which this Court has held is, in part, the law of the case.

Respectfully submitted this 28 day of March, 2013.

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