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SUPERIOR COURT OF ARIZONA

YAVAPAI COUNTY

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate properly; 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.

P1360
Case No. CV 2003-0399

Division 4

(Assigned to Hon. Kenton Jones)

VARILEK'S REPLY TO DEFENDANTS' RESPONSE TO HIS MOTION TO REQUIRE DEFENDANTS COX TO SERVE THE INDISPENSABLE PARTIES WITH DOCUMENTS COMPORTING WITH DUE PROCESS AND VARILEK'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE OF PLAINTIFFS TO JOIN INDISPENSABLE PARTIES

Property Owner James Varilek replies and responds as follows:

Defendants either completely misunderstand or willfully mischaracterize the Court of Appeals' decision

Defendants inexplicably continue to argue that the joinder of the other property owners in Coyote Springs Ranch is required on two bases: (1) because Plaintiffs have sought a declaratory judgment that the Declaration of Restrictions is enforceable against the Coxes; and (2) because the Coxes have asserted an affirmative defense that the Declaration of Restrictions has been abandoned and thus is unenforceable against them.

Defendants are simply *wrong* in regard to the supposed first basis, and the Court of Appeals' memorandum decision of May 24, 2007 makes clear that they are.

Plaintiffs' *First Amended Complaint* is against the Coxes for a violation of paragraph 2 of the Declaration of Restrictions on the Coxes' property. The declaratory judgment that Plaintiffs seek is in this narrow context – *i.e.,* they seek a judgment that the Declaration of Restrictions remains enforceable against the Coxes for purposes of establishing a violation of paragraph 2. Despite Defendants' repeated use of the term "global," there is nothing global about Plaintiffs' complaint. It is simply a suit by one property owner against another. As the Court of Appeals recognized, a declaratory judgment that the Declaration of Restrictions remains enforceable will have no binding effect on anyone except the Coxes: "Because none of the absent property owners is a party to this action, the doctrines of *res judicata* and collateral estoppel could not be employed to limit their claims or defenses in a subsequent case." Mem. Op. at 19, ¶ 32.

In contrast, the Coxes' affirmative defense of abandonment is, *by definition,* "global" in nature. A judgment of abandonment would require a determination that wholesale violations of the Declaration of Restrictions have been ignored to such an extent that the character of *the entire subdivision* has changed. In other words, that *all* of the restrictions have been violated *throughout the subdivision* to such an extent that *none* of them should be enforced *anywhere in the subdivision.*

Here is what the Court of Appeals said about abandonment and why it requires joinder:

> The Coxes argue, as they did below, that all owners of property subject to the Declaration must be joined as parties to this lawsuit because an issue in the case is whether the Declaration *has been abandoned.*
>
> . . .
>
> A ruling in this case that the restrictions *have been abandoned* and are no longer enforceable against the Coxes' property would affect the property rights of all other owners subject to the Declaration.

> [A North Carolina case held that] all property owners subject to the restrictions at issue in that case were necessary parties in the plaintiffs' suit to enforce the restrictions because the defendant had asserted a change-of-circumstances defense. . . . *That defense is, essentially, the abandonment defense the Coxes assert here.*
>
> . . .
>
> However, even if a ruling *in favor of the Coxes on their affirmative defense of abandonment* were to apply only to the Coxes' property, all property owners' rights would still be affected simply by the Coxes' continued use of their property, or by any future use adverse to the restrictions. . . .
>
> We conclude that the absent property owners are necessary parties *given the issue to be decided in this case* [*i.e.,* whether the Declaration has been abandoned].

Mem. Op. at 17-21, ¶¶ 30-36 (emphasis added).

For Defendants to keep suggesting that Plaintiffs' complaint precipitated the need for joinder flies in the face of logic and the Court of Appeals' decision. The need for joinder was precipitated *solely* by the Coxes' abandonment defense. It was for this reason that Plaintiffs did indeed vociferously argue to Judge Mackey that the Coxes should bear the burden of serving the other property owners, going so far as to file a special action when Judge Mackey assigned this burden to them, and that Varilek continues to urge this in his pending motion.

Defendants' characterization of Varilek's "higher stakes" argument (*i.e.,* his argument that the stakes are now even higher than when the Court of Appeals issued its opinion) as a "red herring" is likewise predicated on a misunderstanding (or willful misuse) of the Court of Appeals' decision. Contrary to what Defendants suggest, a straightforward ruling *against* Plaintiffs on their declaratory judgment claim (*i.e.,* a ruling that the Declaration of Restrictions is *not* enforceable against the Coxes for some reason) would have no effect on other property owners. As the Court of Appeals noted, the Coxes could not satisfy the elements of *res judicata* or collateral estoppel so as to assert such a favorable ruling offensively against another property owner in a different case. Defendants themselves state, "nothing would [prevent] any of the Absent Owners from filing an action of their own against Defendants Cox seeking the same relief sought by

Plaintiffs" (*Defendants' Response* at 9). This is certainly true – but it is true of every case in which the party who prevailed in an earlier case might like to offensively assert *res judicata* or collateral estoppel in a subsequent case but cannot satisfy the required elements. It is by no means a basis on which to require Plaintiffs to join all of the other property owners in Coyote Springs Ranch. Defendants' weird logic would *require* every property owner who wants to enforce a declaration of restrictions against a neighbor to either bring a class action or name every other owner in the subdivision as a defendant!

No, it is *only* the Coxes' affirmative defense of abandonment that makes this a "global" case and necessitates the joinder of the other property owners. Precisely as is stated in the "higher stakes" portion of Varilek's pending motion, the stakes *are* now higher than when the Court of Appeals issued its opinion because at least some of the other property owners *have* been served and *res judicata* or collateral estoppel *will* now apply. The critical questions are whether all current owners have been served and whether they have been served with documents comporting with due process. Varilek respectfully urges that the answer to both questions is no.

Defendants' "notice pleading" argument is fundamentally flawed in at least two respects

Arizona is indeed a notice pleading state, but Defendants' argument that the documents served on the other property owners are adequate is flawed in at least two respects. First, Defendants believe that service of the *First Amended Complaint* was adequate *only because they erroneously believe that the necessity for joinder arises out of the First Amended Complaint, which it clearly does not.* For the reasons set forth in Varilek's pending motion and the first section above, the necessity for joinder arises solely out of the affirmative defense of abandonment that the Coxes asserted in their answer. Once the Court of Appeals issued its opinion, waiver and abandonment were the only issues remaining in this case. Nothing served on the other property owners gave them any notice of this fact or alerted them to the potential ramifications of a judgment of abandonment.

Second, mere procedural rules concerning notice pleading cannot trump the constitutional requirement for due process. Indeed, the requirement for due process is implicit in Plaintiffs' quotation from *Cullen v. Auto-Owners Insurance Company* concerning the purpose of notice pleading – *i.e.,* to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." In light of the peculiar posture of this case, with the violation alleged in the *First Amended Complaint* already having been established at the appellate level and the Coxes' affirmative defenses of waiver and abandonment being the only matters remaining to be decided, "giving fair notice of the nature and basis of the claim and indicating generally the type of litigation involved" is precisely what the documents served on the other property owners did *not* do and why Varilek respectfully urges that due process has not been satisfied.

Lastly, the decisions cited by Varilek in his pending motion concerning the requirements of due process are most certainly *not,* as Defendants impertinently suggest, a "renewed effort on Mr. Wilhelmsen's part to reargue class certification" (*Defendants' Response* at 14, n.1). Decisions involving notices in a variety of contexts are cited for the principle that misleading or inadequate notices do not satisfy due process. It simply happens to be true that the notices sent to inform potential class members of a class action (or of a class action settlement) are closely analogous to those sent to indispensable parties in circumstances such as these (*i.e.,* where the central allegation of the *First Amended Complaint* has already been decided in Plaintiffs' favor at the appellate level and all that remain to be decided is an affirmative defense with potentially "global" ramifications for the indispensable parties).

Defendants' *Motion to Dismiss* is groundless and based on logic that can only be described as bizarre

Defendants attempt to "up the ante" by arguing that instead of requiring all current property owners to be served with documents comporting with due process, the Court should take the considerably more drastic step of dismissing the *First Amended Complaint*

for failure to join indispensable parties. Because Varilek was not a party when Plaintiffs served (or attempted to serve) the other property owners and is not fully informed about all of their efforts, he will limit his response to the *Motion to Dismiss for Failure of Plaintiffs to Join Indispensable Parties* to general observations.

First, and with all due respect, much of the "joinder brouhaha" and resulting delay was attributable to Judge Mackey. If Judge Mackey had not made an incorrect ruling on the Coxes' motion in 2005, joinder could have been addressed at a much earlier stage of this litigation and the case would not have been in the peculiar posture that it is now. After the Court of Appeals' mandate came down, Plaintiffs strongly believed (and Varilek still believes) that Judge Mackey erred in not recognizing that the Coxes' abandonment defense was the only reason joinder was required and in assigning the burden of service to Plaintiffs. This caused Plaintiffs to file a special action, with the Court of Appeals declining to accept jurisdiction. Judge Mackey then took it upon himself to craft the notice dated June 15, 2010 that was served on the other property owners and that Varilek respectfully urges was inadequate to satisfy due process.

Although Judge Mackey did – as Defendants delight in pointing out – evidence a certain amount of pique toward Plaintiffs in his minute entry ruling of August 25, 2008, that ruling was entered before Plaintiffs had undertaken any efforts to serve the other property owners and even before Judge Mackey had made the finding of indispensability under ARCP 19(b) that the Court of Appeals had directed him to consider making. Indeed, it was *in* the ruling of August 25, 2008 itself that Judge Mackey finally made the finding of indispensability. After this, he expressed no dissatisfaction with Plaintiffs' efforts at service, finding in his minute entry ruling of January 26, 2011 that "Plaintiffs have taken substantial steps to join all necessary and indispensable parties *in a timely manner;* however, after *due diligence* there still remains a number of parties to be served" (emphasis added). He thus approved alternative methods of service and granted Plaintiffs 90 additional days to complete service. On April 18, 2011 – well within the 90 days – Plaintiffs filed their notice of compliance, describing their extensive efforts at service.

For Defendants to argue that Plaintiffs failed to comply with Judge Mackey's orders, or that Plaintiffs engaged in unwarranted delaying tactics and are to blame for the fact that this case has been pending for a decade, seems nothing short of bizarre to Varilek. Plaintiffs appear to have proceeded diligently and in complete good faith. Moreover, Defendants' *Motion to Dismiss* reads as though they were oblivious to the joinder brouhaha when in fact they participated at every hearing and received every filing and order. If they were concerned at any point with Plaintiffs' efforts at service, they should have expressed their concerns to the Court. This is especially true inasmuch as the Coxes' abandonment defense was the only reason joinder was required at all. (In contrast, Defendants themselves admit that it was only at the status conference on April 16, 2013 that the issue of due process first surfaced. Varilek immediately undertook the research culminating in his pending motion.)

Equally bizarre is Defendants' suggestion that Plaintiffs should have sought leave to amend the *First Amended Complaint* to add the other property owners as parties. *Why* should Plaintiffs have done this, when nothing in the *First Amended Complaint* required joinder at all? If anything in this vein should have been done, it should have been done by the Coxes since their abandonment defense was essentially a claim against all of the other property owners.

Even more bizarre is Defendants' suggestion that Plaintiffs should have recorded a notice of *lis pendens* pursuant to A.R.S. § 12-1191(A). A notice of *lis pendens* is authorized only if an action affects the *title* to real property. The *First Amended Complaint* does not affect the title to the Coxes' property. Plaintiffs would have exposed themselves to liability under A.R.S. § 33-420 (imposing a minimum $5,000 penalty for the recording of groundless documents) if they had recorded such a notice. Moreover, it is not clear why Defendants think that the recording of such a notice would have "put all of the Absent Owners and/or their successors and assignees on notice that this case was pending before the Court and that the title to their properties could be affected by the outcome herein" (*Defendants' Response* at 7-8). Are Defendants seriously suggesting that

they think the Coxes' abandonment defense affects the *title* to all property in Coyote Springs Ranch, or that Plaintiffs could have recorded a "global" notice of *lis pendens* against 400+ parcels without exposing themselves to massive liability under § 33-420? Moreover, for Defendants to suggest that the recording of a notice of *lis pendens* would somehow have been adequate service, but that the extensive efforts undertaken by Plaintiffs pursuant to the Arizona rules and Judge Mackey's orders were wholly inadequate, seems to Varilek to be beyond bizarre.

The fact is, Defendants are not really arguing that Plaintiffs have failed to join indispensable parties. They, like Plaintiffs, are really arguing that there has been insufficient service. The appropriate solution is *not* to dismiss a case that has been actively litigated for a decade. The appropriate solution is to correct the errors by granting Varilek's pending motion and requiring the Coxes to undertake service that comports with due process on all current property owners.

For the foregoing reasons, Varilek urges the Court to grant his pending motion and to deny Plaintiffs' *Motion to Dismiss for Failure of Plaintiffs to Join Indispensable Parties.*

RESPECTFULLY SUBMITTED April 30, 2013.

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