

IN THE SUPERIOR COURT  
OF  
Gila County, State of Arizona

FILED in Court Record

10/15/2021

HON. TIMOTHY M. WRIGHT  
Div: 2

V GUADIANA  
Judicial Assistant

**BEAVER VALLEY IMPROVEMENT  
ASSOCIATION, a domestic nonprofit  
Corporation,**

Plaintiff/Counter Defendants,

vs.

**BEAVER LAND, LLC, a domestic limited  
liability company; its member MICHAEL  
ARMSTEAD; BEAVER VALLEY WATER  
COMPANY, INC., a domestic for-profit  
corporation; its sole director and president  
MICHAEL ARMSTEAD,**

Defendants/Counter Claimants.

CV201900254

**RULING ON UNDER ADVISEMENT ACTION**

This matter comes before the Court on Plaintiff's Motion for Summary Judgment filed June 24, 2021. The Court has reviewed the Motion, the Response (filed August 20, 2021), the Reply (filed September 14, 2021), and the accompanying Statements of Fact and exhibits. The Court has also reviewed the arguments of Counsel presented on September 22, 2021. Based upon the foregoing, the Court make the following findings and orders.

**I. Procedural Background.<sup>1</sup>**

Plaintiff filed its original Complaint on August 29, 2019. Since the original Complaint, there has been extensive litigation involving the charging documents. Several Counterclaims have been filed, an amended Complaint was filed and several Motions to Dismiss have been filed. Following this initial phase of the litigation, Plaintiff has four counts pending and Defendant has three remaining counterclaims.

**II. Standard for Summary Judgment.**

A party pursuing a claim is entitled to summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); See *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990). See also *Manicom v. CitiMortgage, Inc.*, 236 Ariz. 153, Par. 6 (App. 2014). Thus, if there are undisputed facts demonstrating that a plaintiff is entitled to judgment as a matter of law, a court will grant summary judgment.

<sup>1</sup> The Court does not provide a factual background here, but such factual background can be found in two of the Court's prior rulings. See the Court's October 29, 2020 Order and the Court's January 28, 2021 Order.

A party defending a claim is entitled to summary judgment when “the facts produced in support of the claim [by the claim’s proponent] . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim.” *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990); *see also* Ariz. R. Civ. P. 56(a). *See also Noriega v. Town of Miami*, 243 Ariz. 320 (App. 2018), Par. 12. This standard is similar to a court granting a defense motion for a directed verdict at trial. Thus, if a party pursuing a claim fails to produce facts to support such a claim, a court will grant summary judgment to the party defending such claim.

### III. Plaintiff’s Summary Judgment Claims

Plaintiff seeks summary judgment on the four counts in its Amended Complaint (Declaratory Judgment, Permanent Injunction, Quiet Title, Civil Racketeering) and the three remaining counts in the Counterclaim (Harassment, Tampering with Utilities Equipment, and Conspiracy in Tampering with Utilities). As the relevant facts for each of these counts are substantially different, the Court will address each count, the facts related to such count, and the application of those facts separately.

Plaintiff’s Count One - Declaratory Judgment. In Count One, Plaintiff’s seeks declaratory judgment that as to Defendants, Plaintiff is the sole owner of its property and that Defendants do not have easements of any type over the property. For the purpose of this count, the Court finds the following undisputed facts:

1. Plaintiff is the owner of record of the property.<sup>2</sup>
2. There are no recorded utility easements in Plaintiff’s property’s chain of title.
3. Defendants have not produced any records showing they have an easement on the property.
4. The Court has previously found that neither Defendants’ Gila County Franchise, the ‘Permanent Easements and Rights-of-Way’ recorded document, nor the Arizona Corporation Commission/Arizona Administrative Code provide the Defendants with any interest in Plaintiff’s property.<sup>3</sup>
5. The actual specific location of Defendants’ water line over Plaintiff’s property was unknown. There was nothing on the surface of the land that gave any indication as to the presence of an underground pipe.<sup>4</sup> One of the things that caused the conflict leading to the filing of this lawsuit was Defendant digging on Plaintiff’s property in search of the location of the waterline.

In summary, Defendant’s have brought forth no evidence to contradict Plaintiff’s position.

Despite extensive litigation and the Court making previous orders related to this issue, Defendants for the first time in their Response argue that they have an implied easement for the waterline. The elements of an implied easement are

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<sup>2</sup> Defendants allege there might have been some defect in the conveyance of the property from the prior owner to Plaintiff. This is not reflected in the chain of title. Even if there is an issue, Defendants would not have standing to raise an issue between Plaintiff and Plaintiff’s predecessor in interest.

<sup>3</sup> See Section 3 of the Court’s October 29, 2020 Order.

<sup>4</sup> In each of the Parties’ exhibits, there was an undated, unattributed, unrecorded diagram of “waterline locations.” See Plaintiff’s 14 and Defendants’ 18b. In each case, the diagram follows a 2018 letter from the Gila County Community Development Department. Because neither Party sought to date, attribute, or otherwise authenticate this document, the Court gives it no evidentiary value.

- a. The existence of a single parcel where one portion of the parcel derives a benefit from the other;
- b. The division of the single parcel into two or more separate, distinct parcels, each having separate title;
- c. Prior to such division, there was a “long, continued, obvious or manifest [use], to a degree which shows permanency; and
- d. “the use of the claimed easement [is] essential to the enjoyment of the parcel” claiming the easement. *Koestel v. Buena Vista Public Service Corp.*, 138 Ariz. 578, 580 (App. 1984)

Although some of these elements are present here (e.g., Plaintiff’s and Defendants’ property originally being one parcel and divided into two), many other elements are not. Prior to the split, it is unclear if there was a long and continued use. It is clear that any such use was not obvious or manifest to the degree showing permanency. Defendants believed there was a pipeline on the property, but they had to dig and try to find it. There is no evidence that Plaintiff, or any other person, would have any idea a pipeline existed. Additionally, the pipeline is not essential to the enjoyment of Defendants’ parcel. Rather Defendants’ claim it is essential to the entire area, i.e. essentially having 3<sup>rd</sup> party beneficiaries. Based upon this, Defendants’ argument of an implied easement fails.

Plaintiff’s Count Two - Permanent Injunction. In Count Two, Plaintiff seeks injunctive relief that Defendants are not to enter or access Plaintiff’s property, that Defendants fix, repair, and remediate the damage they caused to Plaintiff’s property through the services of qualified professionals, and that Defendants restricted from making any claims of ownership and/or interest in Plaintiff’s property. For the purpose of this Count, the Court finds the following undisputed facts:

1. Based upon its findings in Count One, Defendants have no legal interest in Plaintiff’s property.
2. Plaintiff may legally restrict access to their property.
3. Defendants caused excavations to occur on Plaintiff’s property. On February 2, 2019, Defendants excavated under and adjacent to Plaintiff’s building seeking the location of its waterlines. And on July 17, 2019, Defendants excavated and removed a portion of the concreted floor of Plaintiff’s building. Neither excavation was with Plaintiff’s permission or consent.
4. Such excavations remain open.
5. Defendants have represented to numerous persons and at least one governmental entity (i.e., Gila County) that they have some type of ownership interest in Plaintiff’s property.

Defendants have not denied that they entered Plaintiff’s property without permission or consent on two separate occasions. And on these occasion, they excavated portions of Plaintiff’s property impairing its use. Such impairment has not been remedied. The Court finds that the undisputed facts warrant granting summary judgment as to Plaintiff in the nature of injunctive relief directing Defendant’s to refrain from accessing Plaintiff’s property and remediate the damage caused by the excavation through qualified licensed professionals. The Court does not find that Plaintiff is entitled to injunctive relief relating to Defendants’ speech related to the property.<sup>5</sup>

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<sup>5</sup> The Court does note that based upon this Court’s orders, if the Defendants represent ownership to a governmental entity, that could be potentially be seen as providing false information to a governmental entity and potentially giving rise to criminal liability. Additionally, representations contrary to the Court’s order used in the context of business transactions could potentially be fraudulent.

Plaintiff's Count Three - Quiet Title. In Count Three, Plaintiff seeks Quiet Title as to approximately 246.96 square feet of land from Defendants' property. This claim is based upon adverse possession. For the purpose of this Count, the Court finds the following undisputed facts:

1. Plaintiff's building encroaches into the zoning setback on the side of its property adjacent to Defendants' property.
2. Defendants' predecessor in interest had negotiated with Plaintiff or Plaintiff's predecessor in interest to have a lot line adjustment to remedy the encroachment.
3. A full written agreement as to the lot line adjustment was never reached, but documents purporting to enact the lot line adjustment were recorded, without Defendants' predecessor in interest's permission.
4. Plaintiff or their predecessor in interest obtained a variance from Gila County to remedy the setback violation.
5. There is no evidence that the 246.96 square feet is fenced or otherwise specifically delineated.

In order to obtain property by adverse possession, a person's possession must be "actual, open and notorious, hostile, under a claim of right and was exclusive and continuous for a ten-year period." *Lewis v. Pleasant Country, Ltd.* 173 Ariz. 186, 189 (App. 1992). The Court finds that Plaintiffs have not put forth any evidence that they possessed/used the property in a manner that was actual, open, and notorious. It is unclear where this actual 296.96 square feet is in relation to the buildings, tanks, pumps, ponds, etc on the Parties' property. No evidence was presented if either Party had any improves on such area. Plaintiff may be able to make a claim that the possession was under claim of right and hostile to Defendants' title based upon the recording of the lot line adjustment without express permission. But they again have failed to prove the final element – that their use was exclusive for a ten year period. As noted above, without evidence as to the use of the exact location, Plaintiff fails in it burden to show exclusive use. Based upon this, the Court cannot grant Plaintiff summary judgment on this count.

Plaintiff's Count Four - Civil Racketeering. In Count Four, Plaintiff's seeks the restraint of Defendants' actions and damages based upon the statutory tort of racketeering. The Court finds that Plaintiff has failed to establish that it has sustained a "reasonable foreseeable injury" as required under the definition of racketeering. Additionally, each of the underlying felony offenses that provide the basis of the tort requires a specific mental state. Even if the Court were to find that the Defendants' actions meet the physical act requirements of the criminal offenses, the Court has no information as to the Defendants' intent. Based upon this, the Court cannot grant Plaintiff summary judgment on this count.

Defendants' Count Three – Harassment. In Count Three of its Counterclaim, Defendants alleges that Plaintiff's various actions, directed, or through its members harassed Defendants. The Court finds that Defendants have put forth sufficient facts to minimally establish this count and therefore summary judgment on this Count.

Defendants' Count Four - Tampering with Utilities Equipment. Defendants allege two specific actions by Plaintiff as a basis for Count Four and Count Six(a). "First, Plaintiff . . . tamper[ed] with and caus[ed] a leak in a water line on Lot 48A. On July 17, 2019 [Defendants] dug up part of the water line under Lot 48A. [Defendants] checked the line and found no leaks. [Defendants] put up caution tape with the intent to fill the excavated area. The area was under Plaintiff's exclusive control at all relevant times after the excavation. When [Defendants] returned, the water line was leaking and required

repair.”<sup>6</sup> During oral argument, counsel for Defendants argued that this is like *res ipsa loquitur*. Defendants admit they have no affirmative evidence that Plaintiff caused any damage. In summary, Defendants’ argument is: (1) Defendants had access to and dug up a pipe. (2) Defendants surrounded the pipe with tape. (3) Defendants did not backfill the excavation. (4) Despite the fact that Defendants were able to access the pipe, no one else could. (5) At some point the pipe started leaking. And (6) because the pipe is on Plaintiff’s property, Plaintiff must have damaged it. Taking Defendants’ allegations as fact, they are insufficient to give rise to liability for Plaintiff. This is not similar to *res ipsa*. There are no facts that Plaintiff had exclusive control. To the contrary, Defendants proved the opposite by their conduct.

Defendants additionally argue that “Plaintiff tampered with [Defendants’] water system by blocking and attempting to block access to Defendants’ access to its existing well and storage tanks on Lot 50 to the existing water lines on Lot 48A.”<sup>7</sup> This allegation is not based upon facts, but merely upon a conclusory statement in the Declaration of Michael Armstead. “Plaintiff blocked access to existing well and storage tanks on Tract D belonging to Defendants and blocked access to the existing water main.” There are no specifics – date, method, etc.

Based upon Defendants failing to put forward any facts to support their allegations, the Court finds that Plaintiff is entitled to summary judgment on this Count.

Defendants’ Count Six(a) - Conspiracy in Tampering with Utilities. The Court is unsure how this Count substantively differs from Defendants’ Count Four. The Court notes that Defendants did not even address this Count separately in their Response. Based upon the information contained above, the Court finds that Plaintiff is entitled to summary judgment on this Count.

Based upon the foregoing,

**IT IS ORDERED,**

1. Granting Plaintiff Motion for Summary Judgment as to Count One of its Complaint.
2. Granting Plaintiff Motion for Summary Judgment, in part, as to Count Two of its Complaint.
3. Denying Plaintiff’s Motion for Summary Judgment as to Count Three of its Complaint.
4. Denying Plaintiff’s Motion for Summary Judgment as to Count Four of its Complaint.
5. Denying Plaintiff’s Motion for Summary Judgment as to Count Three of Defendants’ Counterclaim.
6. Granting Plaintiff Summary Judgment against Defendants as to Count Four in Defendants’ Counterclaim.
7. Granting Plaintiff Summary Judgment against Defendants as to Count Six(a) in Defendants’ Counterclaim.

**IT IS FURTHER ORDERED** setting Trial Setting Conference for **Friday, December 17, 2021, at 9:30 a.m., before the Honorable timothy M. wright, in Division Two, Payson.** Counsel and parties may appear via Zoom. A Zoom link will be sent out by separate email.

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<sup>6</sup> See page 16 of Defendants’ Response, references to Statement of Facts omitted.

<sup>7</sup> See page 16 of Defendants’ Response, references to Statement of Facts omitted.

**cc:**

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