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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

CITY OF TOMBSTONE, Plaintiff, vs. BEATTY'S CHANCE, LLC, BEATTY'S CHANCE ORCHARD, LLC, THOMAS BEATTY SR., EDITH M. BEATTY, BEATTY LIVING TRUST, Defendants/ Counterclaimants		No. CV201200499 **DEFENDANTS' RESPONSE AMENDED MOTION TO DISMISS AND REPLY IN SUPPORT OF THEIR MOTION TO STRIKE** Hon. James L. Co

Due to the substantial overlap in the issues which the Plaintiff, the City of Tombstone, has raised in response to the Defendants/Counterclaimants' Motion to Strike and in Tombstone's original and amended Motions to Dismiss, to avoid unnecessary duplication, the Beattys will address each of those issues in this combined Response and Reply.

I. The Beattys Have Met the Substantial Compliance Requirements of Rule 7.1.

The Beattys' Motion to Strike is accompanied by citations to applicable rules, case law, and references to the record of this case. This fulfills the requirements of "substantial" compliance, as specified in Rule 7.1(b) of the Arizona Rules of Civil Procedure. The rule does not require that the memorandum of law be separately captioned or designated in any particular manner.

II. All Well-Pleaded Facts Are Admitted by the Default.

Tombstone continues to try to ignore the consequences of the default that has now been entered in this case. This default establishes as proven all well-pleaded facts that have been alleged in the Counterclaim. *Moran v. Moran*, 188 Ariz. 139, 146, 933 P.2d 1207, 1214 (Ariz. App. 1996); *Southern Arizona School for Boys, Inc. v. Chery,* 119 Ariz. 277, 281, 580 P.2d 738, 742 (App. 1978). As a result, there is no longer an opportunity to deny these facts or to attempt to re litigate them through an Answer or various and sundry motions. That opportunity has been lost as a result of Tombstone's failure to respond in a timely manner.

What has been established through the uncontroverted Counterclaim, among other facts, is that a federal patent was issued to the Beattys' predecessor, Mr. Tomblinson, in 1919, four years after the earlier litigation regarding land use rights; that the Huachuca Water Company took no action to develop or construct a reservoir on the area designated as its "reservoir site" associated with the McCoy Springs, either before or after this date; and that the Beattys and their predecessors have peacefully and adversely possessed this property since 1919, including the period from 1919 to 1947, before the Huachuca Water Company transferred its interests to the City of Tombstone. These facts are established as a matter of law at this point and cannot be controverted by an untimely Answer or challenged through a summary judgment action, mistakenly designated as a "motion to dismiss."

The Beattys do not deny that this Court still has the obligation to determine that the Beattys are entitled to judgment as a matter of law, prior to entering a final judgment. But that determination should be made in the context of a proceeding under Rule 55(b)(2), based upon the facts as established, and not in the manner that Tombstone has attempted to proceed here.

III. A Notice of Claim is Not Required for a Quiet Title Action.

A failure to file a proper notice of claim, as required by A.R.S. § 12-821.01, can deprive a claimant of the right to pursue a cause of action for the recovery of damages against a public entity. The Beattys' request for relief in their Counterclaim, however, is a request for a declaration of the respective rights of the parties to a particular piece of property long owned by the Beattys and a request for injunctive relief to protect that property. Counterclaim, p. 14. Our courts have consistently held that the "notice of claim" requirements of A.R.S. § 12-801.01 do not apply to requests for declaratory and injunctive relief against public entities. *State v. Mabery Ranch Co, LLC*, 216 Ariz. 233, 245, ¶¶ 48-53, 165 P.3d 211, 223 (Ariz. App. 2007); *Martineau v. Maricopa County*, 207 Ariz. 332, 335-37, ¶¶ 18-24, 86 P.3d 912,

915-17 (Ariz. App. 2004). This Court has jurisdiction to hear this Counterclaim.

The statute of limitations defense that Tombstone is attempting to raise under A.R.S. § 12-821 has now been waived by its failure to file a timely answer. In any event, should this limitation be relevant, the Beattys filed this Counterclaim within the twelve month period following Tombstone's first substantive actions to acquire title to the Beatty property, beginning with the July 2, 2012, notice submitted pursuant to A.R.S. § 12-1103, demanding the transfer of title to the property to Tombstone, and followed by the July 30, 2012, filing of Tombstone's complaint to obtain title to the subject property.

IV. The 1915 Judgment Did Not Address the Federal Patent of 1919.

If, for purposes of this motion, we do not review the validity of a Cochise County Superior Court judgment that purports to determine the rights to possess federal property, issued without the inclusion of the federal government in that litigation, we must still apply basic principles of law and logic to this issue. And we must also be constrained by what the Court itself actually said in that judgment.

The 1915 judgment could only apply to issues that "could and should have been adjudicated" in that litigation. *Casa Grande Trust Co. v. Superior Court*, 8 Ariz. App. 163, 165, 444 P.2d 521, 523 (Ariz. App. 1968). Tombstone has continued to fail to explain how, in the absence of a time shifting device, a 1915 judgment could have any application to the interpretation of the 1919 federal patent upon which the Beattys' claim is based. The nature and scope of that patent could not have been adjudicated four years prior to the date that it was issued. Its issuance in 1919 constitutes a change in circumstances, both factually and legally, that was clearly beyond the scope of what could have been adjudicated by the court in 1915.

Furthermore, Tombstone's repeated assertions that the 1915 judgment "quiets title" to the subject property are simply not supported by the language of the judgment itself. That judgment says that the Huachuca Water Company is "entitled to the possession, and that it have and recover possession, from the Defendant," and that "the Plaintiff is entitled to, and do have possession of those certain lands and premises." Judgment, November 24, 1915. It does not address the title to the subject property. What was at issue in that litigation were the conflicting use rights to certain federal property, based upon claims that had been filed by the Huachuca Water Company and the homestead application that had been submitted by Mr. Tomblinson. The resolution of these competing rights of entry on federal property, of course, did not determine the title to this property, particularly in the absence of the United States in that litigation. And notwithstanding the adjudication of the respective possessory use claims asserted before the Cochise County Superior Court in 1915, four years later, in 1919, the United States granted a federal patent to Mr. Tomblinson for the ownership of the property in question. The Superior Court judgment of 1915 had not addressed ownership, and the Huachuca Water Company did not subsequently challenge Mr. Tomblinson's patent to this property on the basis of that 1915 judgment at any time after that patent was issued. Nor does Tombstone, as the water company's successor in interest, have any such challenge to this patent at this point, more than 90 years later.

This federal patent is the "highest evidence of title" and is prima facie valid. *State v. Crawford*, 13 Ariz. App. 225, 227, 475 P.2d 515, 517 (Ariz. App. 1970), citing *U.S. v. Stone*, 69 U.S. (2 Wall) 525, 17 L.Ed. 765 (1865). The burden of proof in any challenge to a federal patent is upon the challenger, *Id.,* and Tombstone's argument based on the 1915 judgment fails to meet this burden.

V. The Issues Raised in Tombstone's Motions to Dismiss Must Be Presented, if at all, in Conformance with Rule 56, Summary Judgment.

Through its Amended Motion to Dismiss, Tombstone has again submitted a variety of documents in support of its factual contentions in this matter, all with complete disregard for the distinction between what constitutes a motion to dismiss and what is a matter for summary judgment. This Court has the authority to exclude all matters outside of the pleadings that have been presented with this motion. Rule 12(b), Arizona Rules of Civil Procedure. In the alternative, this motion may be treated as one for summary judgment and disposed of as provided in Rule 56. Id. Should the Court elect to treat this as a summary judgment motion, then Tombstone must also be required to comply with the requirements of Rule 56, including the submission of a statement of facts with specific reference to the portion of the record where such facts may be found. Rule 56(c). Tombstone must also comply with the requirements of Rule 56(e), including the requirement for demonstrating that the facts upon which it relies are admissible and that the affiant is competent to testify to the matters stated. Rule 56(e). These requirements cannot be circumvented by just filing a pile of maps, drawings, bills of sale, and other documents and calling it a "motion to dismiss," as Tombstone has repeatedly attempted to do.

The Tombstone Amended Motion to Dismiss, with regard to all issues other than the "notice of claim" issue discussed above, should be struck or denied for failure to comply with Rule 56 and Tombstone should be directed to

proceed as required by Rule 56 for all such motions that will include matters outside of the pleadings of this case. Tombstone should not be permitted to attempt to re-litigate those facts which have been resolved by its default.

VI. The Beattys Are Entitled to the Relief Requested in their Counterclaim.

The Beattys are the successors in interest to the federal patent issued to James Tomblinson in 1919 and neither Tombstone, nor its predecessor, the Huachuca Water Company, has any claim of ownership to the subject property.

The Huachuca Water Company could only obtain those interests in federal land as have been authorized under applicable federal law. No federal law permitted it to obtain a fee interest in the claimed five-acre parcel which overlaps with the Beatty property. At the time of the 1919 patent to Mr. Tomblinson, the Huachuca Water Company was making no use of McCoy Springs and Mr. Tomblinson therefore took fee title unburdened by any such use.

The Act of 1866, 43 U.S.C. §661, upon which Tombstone purports to rely, does not grant title to public land, but merely recognizes use rights in the nature of conditional easements. *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.*, 24 Idaho 63, 133 P. 655 (Idaho 1913). There is nothing in this Act which would permit federal property interests to be alienated to parties designating dry land as a "reservoir site" or claiming an arbitrary amount of acreage as "necessary grounds for the use and enjoyment" of water rights. Instead it looks to the actual use of the land. The courts have repeatedly held that use rights vest under the 1866 Act only on completion of the construction of the ditches, canals and reservoirs in question. *Bear Lake & River Waterworks & Irr. Co. v. Garland*, 164 U.S. 1, 41 L.Ed. 327, 17 Sup. Ct. Rep. 712 (1896); *Verde Water & Power Co. v Salt River Valley Water Users' Ass'n* , 22 Ariz 305, 197 P 227 (Ariz. 1921); cert den (1921) 257 US 643, 66 L Ed 412, 42 S Ct 53; *United States v Rickey Land & Cattle Co.*, 164 F 496 (CCD Cal 1908). They have likewise held that patented land cannot later be burdened under authority of the 1866 Act by any use greater than that being made at the time of the patent. *Krieger v Pacific Gas & Electric Co.*, 119 Cal App 3d 137, 173 Cal Rptr 751 (1981); *Greenley Irr. Co. v Von Trotha*, 48 Colo 12, 108 P 985 (1910); *Vestal v Young*, 147 Cal 715, 82 P 381 (1905); *Felsenthal v Warring*, 40 Cal App 119, 180 P 67 (1919). As the Huachuca Water Company was making no use of McCoy Springs at the time Mr. Tomblinson took fee title to the land, his ownership was not burdened by any such use.

The Act of 1891, 43 U.S.C. §§ 946-949, applied only to companies formed for the purposes of irrigation, and therefore not to the Huachuca Water Company. The Huachuca Water Company was specifically advised of this fact by letter from the Department of the Interior of January 27, 1909. Though subsidiary uses of water other than for irrigation may be permitted under this Act, the courts have strictly held that such uses are allowed only to companies whose primary purpose is agricultural irrigation. *Kern River Co. v United States*, 257 US 147, 66 L Ed 175, 42 S Ct 60 (1921); *Pine River Irrigation Dist. v. United States*, 656 F. Supp. 2d 1298 (2009). With respect to lands within a national forest, the Act moreover would have required a formal grant of right-of-way approved by the Department of Agriculture, which the Huachuca Water Company never obtained. Even rights-of-way properly granted under the 1891 Act are by its terms forfeited as to the portions not completed within five years. No McCoy Reservoir has ever been constructed.

The Act of 1901, 43 U.S.C. §959, empowered the Secretary of the Interior to grant permits for water conduits and reservoirs on public land, again with the condition that permits across forest land be approved by the Department of Agriculture. The Act expressly states that "any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation, or park.' The Secretary of the Interior did grant the use of a right-of-way to the Huachuca Water Company for its Tombstone pipeline on March 8, 1913. Given the absence of Agriculture Department approval, the Department of the Interior determined on August 11, 1915, that its grant did not apply to the national forest lands at issue here, and directed that any contrary notations in its records be corrected.

Tombstone points to the language of the 1919 patent itself, that it was granted subject to "any vested and accrued water rights for mining, agricultural, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States."This, of course, is language common to all federal patents. A comparison of this language with the language of the statutes analyzed above demonstrates that the first clause, regarding reservoirs used in connection with vested water rights, derives from the 1866 Act, and the second clause, regarding ditches constructed by the authority of the United States, refers to later statutes under which federal departments might expressly authorize construction of ditches. The language of the patent is therefore to be understood as the statutes have been interpreted by the courts. As stated above, at the time of the issuance of the patent to James Tomblinson, the Huachuca Water Company had no ditches or reservoirs used in connection with any alleged water rights in McCoy Springs, nor did it have any right of way across the patented land for ditches or canals constructed by the authority of the United States. Mr. Tomblinson therefore took fee title to his homestead free of any claims by the Huachuca Water Company to the so-called "McCoy Reservoir Site."

Any action to recover real property from a person in peaceable and adverse possession, and cultivating, using or enjoying the property, paying taxes thereon, and claiming under a deed or deeds duly recorded, shall be commenced within five years after the

cause of action accrues, and not afterward. A.R.S. § 12-525. This limitation barred any claim that the Huachuca Water Company may have had to the subject property prior to the time that any such alleged interest may have been transferred to the City of Tombstone.

A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward. A,R.S. § 12-526. This limitation barred any claim that the Huachuca Water Company may have had to the subject property prior to the time that any such alleged interest may have been transferred to the City of Tombstone.

For the foregoing reasons, the Beattys' Motion to Strike should be granted, both of the Motions to Dismiss filed by Tombstone must be denied, and judgment should be entered in favor of the Beattys on their Counterclaim.

Respectfully submitted on this 4th day of February, 2013.

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On the 4th day of February, 2013, a copy of the foregoing was mailed to:

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