

BAYS LAW PC

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FILED
2013 JAN 24 PM 3:30
MARY ELLEN DUNLAP
CLERK OF SUPERIOR COURT
STATE OF ARIZONA
SV

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

CITY OF TOMBSTONE,)
)
Plaintiff,)
)
v.)
)
BEATTY'S GUEST RANCH AND)
ORCHARD, LLC, THOMAS BEATTY SR,)
EDITH M BEATTY, BEATTY LIVING)
TRUST,)
)
Defendants.)

NO. CV201200499

RESPONSE TO MOTION TO STRIKE

Assigned to the Honorable
Div V

Plaintiff, CITY OF TOMBSTONE, by and through its attorney, P. RANDALL BAYS, responds to Defendants' MOTION TO STRIKE PLAINTIFF'S ANSWER TO THE COUNTERCLAIM AND IT'S MOTION TO DISMISS and states that the Defendants have not complied with Rule 7.1(a) in that it is accompanied by a memorandum indicating, as a minimum, the precise legal points, statutes and authorities relied on, citing the specific portions or pages thereof. Therefore, the Defendant's Motion to Strike must be denied. This Response is supported by the attached memorandum of points and authorities.

DATED this 24 day of January, 2013.

BAYS LAW, P.C.


P. RANDALL BAYS
Tombstone City Attorney

Original of the foregoing
mailed this 24
day of January, 2013, to:

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Attorney for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

¶ 1. Rule 7.1, ARCP provides: “All motions made before or after trial shall be accompanied by a memorandum indicating, as a minimum, the precise legal points, statutes and authorities relied on, citing the specific portions or pages thereof, and shall be served on the opposing parties.” Tombstone contends that the Defendants’ Motion is not *accompanied by a memorandum* nor does the Motion provide precise legal points supporting its position.

¶ 2. Defendants assert that Tombstone’s Answer and Motion to Dismiss should be stricken under Rule 12(f), ARCP, because neither pleading is authorized to be filed after the effective date of the default that has been entered against the City of Tombstone on the Counterclaim. Yet, the Defendants do not provide any legal authority which supports their position that Tombstone is prohibited by some law from filing an Answer to a counterclaim or a Motion to Dismiss after a default has been entered.

¶ 3. Defendants’ only case to which they cite for any legal authority is *Moran v. Moran*, 188 Ariz. 139, 146, 933 P.2d 1207, 1214 (App. 1996). In *Moran*, the appellant argued that the trial court should have granted him a default judgment because default was entered against Braun, and she did not show good cause for failing to timely answer the complaint. *Id.* However, the Court of Appeals concluded that the trial court was correct in refusing to enter judgment for Moran, despite the entry of default, because Moran was not legally entitled to the declaratory judgment he sought. *Id.*

¶ 4. In this case, the Defendants are not legally entitled to the relief they seek. As stated in Tombstone’s Motion to Dismiss, a prior final decree granting possession and quieting title to the land in a suit between same parties or their privies jurisdictionally bars the Defendants from pursuing the same issues in a subsequent suit. *Lee v Johnson*, 70 Ariz. 122, 127, 216 P.2d 722, 726 (1950); *Casa Grande Trust Co. v. Superior Court In and For Pinal County*, 8 Ariz.App. 163, 165, 444 P.2d 521, 523 (App. 1968); *State ex rel. Lassen v. Self-Realization Fellowship Church*, 21 Ariz.App. 233, 236, 517 P.2d 1280, 1283 (App. 1974); and see, *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992)(compulsory counterclaims are subject to the principles of res judicata). Additionally, Tombstone asserted that, under A.R.S. §

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1 12-510, municipalities are immune from the bar of limitations when acting in a governmental
2 capacity as agents of the State in matters of state-wide concern.¹ *City of Bisbee v. Cochise*
3 *County*, 50 Ariz. 360, 72 P.2d 439 (1937). Subject matter jurisdiction is never waived, can be
4 raised at any time, including after a judgment or during an appeal. *Swichtenberg v. Brimer*, 171
5 Ariz. 77, 82, 828 P.2d 1218, 1223 (App.1991); *Glover v. Glover*, 231 Ariz. 1, ¶ 8, 289 P.3d 12,
6 14 (App. 2012)(a court's subject matter jurisdiction can be challenged for the first time on appeal
7 even if it is never raised in the superior court). Subject matter jurisdiction can be raised even if a
8 court had entered a default judgment. *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 157, ¶ 57, 211
9 P.3d 16, 35 (App. 2009). In *Green*, the Court of Appeals reversed the trial court's decision to
10 enter a default judgment because the court lacked jurisdiction to enter a judgment. *Id.*, ¶ 58.

11 ¶ 5. Additionally, the Defendants failed to provide Tombstone with a Notice of Claim
12 as required by A.R.S. § 12-821.01 or file their complaint against Tombstone within one year after
13 the cause of action accrued as required by A.R.S. § 12-821. Both statutes are also jurisdictional.

14 ¶ 6. Finally, *Moran* does not hold that a default prohibits a party from filing an
15 Answer to a counterclaim or a Motion to Dismiss after a default has been entered as the
16 Defendants seem to suggest in their Motion. Instead, the Defendants' cite to *Moran* simply to
17 state that "an entry of default establishes as proven all well-pleaded facts." However, the very
18 next sentence of *Moran* states, "the defendant is not held to have admitted conclusions of law."
19 *Id.* "In exercising discretion as to the entry of a default judgment, the court may consider the
20 merits of the plaintiff's substantive claims." *Id.*

21 ¶ 7. The Defendants request, in the event the Court sets aside the default, that they be
22 permitted to treat their Motion to Strike as a Motion for Summary Judgment because Tombstone
23

24
25 ¹ On this issue, the Defendants acknowledge Tombstone's immunity, however, they
26 claim their predecessors acquired their interest through adverse possession when Tombstone's
27 rights were held by the Huachuca Water Company, a company. First, the Defendant's lack
28 standing to assert a claim for a predecessor-in-interest. *State ex rel. Winkleman v. Arizona*
Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (App. 2010). Second,
adverse possession requires continuous, uninterrupted adverse use for a period of ten consecutive
years. A.R.S. §§ 12-521, 12-526. Tombstone's Motion to Dismiss shows a number of facts
demonstrating interruptions and permissive use prior to 1915. *Spaulding v. Pouliot*, 218 Ariz.
196, 181 P.3d 243 (App. 2008).

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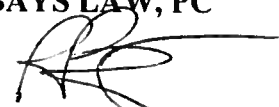
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is presenting matters outside the pleadings in connection with its Motion to Dismiss. Tombstone is uncertain as to which matters the Defendants believe are outside of the pleadings. If there are matters outside the pleadings in the Motion to Dismiss, Tombstone respectfully requests leave to amend the pleadings to address the Defendants' concerns.

WHEREFORE, Tombstone requests that this Court:

- 1) DENY Defendants' Motion to Strike.
- 2) DENY Defendants' Request to Treat their Motion to Strike as a Motion for Summary Judgment.
- 3) Should this Court determine that Tombstone is raising matters outside the pleadings in connection with its Motion to Dismiss, that Tombstone be GRANTED leave to Amend its pleadings to address the Defendants' concerns.

RESPECTFULLY submitted this 24 day of January, 2013.

BAYS LAW, PC


P. Randall Bays
Tombstone City Attorney