

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-004184

09/01/2006

HONORABLE GLENN M. DAVIS

CLERK OF THE COURT
L. Muhammad
Deputy

FENNEMORE CRAIG P C

RICHARD A KASPER

v.

CYNTHIA WACHNER

JOHN R HOOPES

GLENN B HOTCHKISS

UNDER ADVISEMENT RULING

The Court has reviewed and considered the Defendant's Motion for Partial Summary Judgment and Motion for Order Directing Release of Lis Pendens, the Plaintiff's Response, and the Reply thereto. The Court has further reviewed and considered the Plaintiff's Cross-Motion for Summary Judgment, the Response, and the Reply thereto. Further the Court has reviewed the file, the pleadings, and the materials filed by the parties in support of their positions on the motions.

Based upon consideration of the foregoing and the arguments presented by counsel, the Court makes the following findings and enters the following Orders in this case:

This case arises out of a settlement agreement between the parties to settle litigation, with Defendant paying Plaintiff the sum of \$250,000.00. The settlement contract contemplated that the agreed upon settlement amount would be paid through the transfer of certain properties. However, the contract required Plaintiff to "pay for all appraisals necessary to determine which real properties need to be conveyed and transferred" in order to satisfy the debt. The parties agreed that one specific parcel would be appraised to see if it was sufficient to satisfy the debt; and if it was not sufficient, other parcels could be appraised.

Months passed and Plaintiff had not appraised or designated any property or properties to be transferred. In the meantime Defendant sold the property that was supposed to be appraised

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first. Plaintiff brought suit seeking to enforce the settlement agreement and filed a lis pendens as to the Plaintiff's real property.

Under the agreement the duty of the Defendant to transfer specific property to settle the debt did not arise until the Plaintiff appraised and designated specific property. There was an express agreement that a certain parcel was to be appraised first, and logically implicit in that agreement was an understanding that the property would not be sold before Plaintiff was able to appraise it. There was a further implicit agreement that the Plaintiff would not wait an unreasonable time to do the appraisal. Where no time is specified for performance, a reasonable time is implied. *Zancanaro v. Cross*, 85 Ariz. 394 (Ariz. 1959).

There is an issue as to whether the Defendant breached the duty not to sell the property until the Plaintiff had a reasonable opportunity to appraise it. If Defendant had immediately sold the subject property, this case would be much more straightforward. However, given the delay involved, there is an issue as to whether Plaintiff breached a duty to do the appraisal within a reasonable time. That would also be very straightforward if many years had passed. The Plaintiff could not just tie up the property in question forever by not doing the appraisal.

This case then turns on the reasonableness of the delay by the Plaintiff in getting the appraisal done and designating the property to be transferred. If a breach of an agreement to proceed within a reasonable time is found, Plaintiff could be liable for damages arising from the delay and it may be further found to have excused Defendant from the duty not to sell the subject parcel.

However, even if Plaintiff's delay is found to be unreasonable, it could not be found to excuse performance altogether. Had it turned out that the value of all of the property was not sufficient to satisfy the debt, that fact would not have excused Defendant from liability for the balance due. The agreement did not provide that the debt could be satisfied only by transfer of the property.

On the other hand if the Plaintiff's delay is found not to have been unreasonable, Defendant could be found to have breached the agreement by selling the subject property. In that event one remedy available under the contract is that judgment could be awarded for the full amount at issue with an order for specific performance to require Defendant to sell some or all of the other property to satisfy the debt.

What constitutes a reasonable time is ordinarily a question of fact. *Dutch Inns of Am., Inc. v. Horizon Corp.*, 18 Ariz. App. 116 (Ariz. Ct. App. 1972). Given the time frames involved in this matter there are issues of reasonableness that are questions to be decided by the trier of

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fact in this case. Therefore, summary judgment in favor of either party would not be appropriate in these circumstances.

Therefore,

IT IS ORDERED denying Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment.

As to the lis pendens, as noted, there is a possibility that specific performance may be ordered requiring the sale of some or all of the properties at issue. Since rights to property covered by the settlement agreement is at issue in this case, a lis pendens is proper as to those properties. *Evergreen West Inc. v. Boyd*, 167 Ariz. 614, 620 (Ariz.App.Ct. 1991) (finding that when deciding if a lis pendens is "groundless," the trial Court "need only find 'some basis' for concluding that the action affects title to real property; it need not ... determine which party will prevail on the merits.").

Therefore,

IT IS ORDERED denying Defendant's Motion for Order Directing Release of Lis Pendens.