

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2003-022603

03/28/2005

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT  
L. Muhammad  
Deputy

FILED: 03/30/2005

RICHARD DES MARAIS, et al.

SCOTT R FERRIS

v.

FRANCIS A COSENTINO, et al.

MICHAEL V MOORE

**MINUTE ENTRY**

1:30 p.m. This is the time of continued hearing on defendants' motion to set aside entry of default (on basis the action is between family members and settlement negotiations were going on and appraisers appointed and a default filed almost one year after the case began and was done by Surprise).

Plaintiff Kathryn Des Marais is present with counsel Scott R. Ferris. Defendant is present with counsel Michael V. Moore.

Court reporter: Rochelle Dobbins 602-506-7877.

Plaintiff's Case:

Francis A. Cosentino resumes the stand and testifies further.

2:28 p.m. Court stands at recess.

2:42 p.m. Court reconvenes with respective counsel and parties present.

Court reporter: Rochelle Dobbins.

Francis A. Cosentino resumes the stand and testifies further.

Defendant's exhibit 22 is marked for identification and received in evidence.

Plaintiff rests.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2003-022603

03/28/2005

Both sides rest.

Closing arguments are presented.

3:49 p.m. By Mr. Moore.

3:55 p.m. By Mr. Ferris.

4:05 p.m. By Mr. Moore.

IT IS ORDERED taking this matter under advisement.

4:08 p.m. Hearing concludes.

**LATER:**

After further consideration, the court now grants defendant's motion to set aside entry of default. This is a difficult case and plaintiffs' counsel has treated defendant at all times with the utmost professionalism and courtesy.

The court believes, however, giving defendant the benefit of the doubt that he did not believe a default would be entered against him in view of the almost two-year period of negotiation, first between plaintiffs and defendant and then for approximately one year after the complaint was filed, between plaintiffs' counsel and defendant (see exhibit 7, attachments A through N for the series of negotiations). Even the last letter by plaintiffs' counsel to defendant (exhibit N, supra) dated September 3, 2004, which was in effect an attempt to reinstate time is of the essence and require defendant to file an answer to the complaint, still allowed defendant to contact counsel by September 10, 2004 (letter reflects August 10, 2004, but both parties stipulate September 10, 2004 was meant); this was consistent with all other correspondence between counsel and defendant, at least since January 5, 2004 (exhibit 7, attachment I), wherein certain action such as filing an answer or responding (meaning by telephone usually, as defendant had a pattern of telephoning plaintiffs' counsel in response to his letters) by a certain date was set forth.

It would have been much better, giving the pattern of conduct between plaintiffs' counsel and defendant for plaintiffs' counsel to state in the September 3, 2004 letter (attempting to reinstate time is of the essence and you had better file an answer to the complaint) something like:

“You must answer the Complaint now within \_\_ days. Do not call me or correspond with me further in response to this letter. Either file an answer at the courthouse by \_\_ or a default will be entered against you by me on behalf of my clients for your failure to answer the complaint.”

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2003-022603

03/28/2005

This would have clearly given notice to defendant that the prior course of dealing was broken off and ended. Defendant contends he did telephone plaintiffs' counsel on two occasions when he received attachment N to exhibit 7 and did so within the period prescribed, but plaintiffs' counsel did not return the calls. Admittedly under other circumstances, it would be no excuse for defendant, as he testified, to not open his mail containing the entry of default for a number of days after receipt. Given the parties prior course of dealing, however, the court accepts defendant's position that he did not believe a default would be entered against him and that the case was proceeding as it had in the past.

Finally, the court notes the motion to set aside was filed promptly (affidavit on default filed November 10, 2004; 10-day period to respond expired November 21, 2004; and motion to set aside filed December 7, 2004). There is a defense on the merits, i.e. defendant contends there was a subsequent agreement entered into by the parties after the date of the original agreement (date of original agreement is February 21, 1998) wherein the plaintiffs agreed to buy out defendant's interest in the subject home based on a fair market value appraisal of the property.

The court notes that under Arizona law, even if a contract provides that it may only be amended by a writing (see paragraph 7 of exhibit 1), the parties may subsequently agree to orally modify it. Peairs (164 Ariz. 54, 57, 790, P.2d 752, 755 (App. 1989), rev. denied May 8, 1990).

**TELEPHONIC STATUS CONFERENCE SET**

IT IS FURTHER ORDERED setting a telephonic status conference on **May 17, 2005 at 9:00 a.m. (15 minutes)** to set a trial date and deadlines.

Defendant shall file an answer **within 14 days** of receipt of this minute entry Order.

FILED: ETS Worksheet.

FILED: Hearing Worksheet.

Beginning Monday, April 18, 2005, due judicial rotation, this calendar will be heard by:

**HONORABLE PETER B. SWANN  
MARICOPA COUNTY SUPERIOR COURT  
OLD COURT HOUSE  
125 W. WASHINGTON  
2<sup>nd</sup> FLOOR, COURTROOM 202  
PHOENIX, AZ 85003  
602-506-7959 TEL**