

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
08/12/2002

08/07/2002

CLERK OF THE COURT
FORM V000A

HONORABLE JOHN A. BUTTRICK

S. McDonald
Deputy

CV 2001-014526

FILED: _____

WESLEY HARRIS

JEFFREY D BONN

v.

BEAVER CREEK EQUESTRIAN CENTER L L KENT S BERK
C, et al.

MINUTE ENTRY

8:32 a.m. This is the time set for hearing Oral Argument on Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment. Plaintiff is present with counsel, Jeffrey D. Bonn. Defendant Rick Harris is present with counsel, Kent S. Berk, also representing Defendant Beaver Creek Equestrian Center, LLC.

Court Reporter, Roger Nace, is present.

Arguments are presented to the Court.

IT IS ORDERED taking this matter under advisement.

IT IS FURTHER ORDERED extending this matter on the Inactive Calendar **until November 7, 2002.**

IT IS FURTHER ORDERED that the Court will schedule a Pretrial Conference upon request of either party and that prior to any conference setting, the parties meet and prepare a Joint

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Pretrial Statement addressing all the subjects set out in Rule 16(b), Rules of Civil Procedure.

9:25 a.m. Matter concludes.

* * *

LATER:

This case involves a dispute concerning the rights and obligations arising out of a "Lease/Option Agreement" ("Agreement"), dated August 30, 2000, entered into by the owner of certain property, Beaver Creek Equestrian Center, L.L.C. ("Beaver Creek") and Wesley Harris ("Harris").

The Agreement purports to memorialize, inter alia, the parties' intent to allow Harris to exercise an option to buy the real property in question during a four month "lease" period. It does so by providing for Harris to pay \$140,000.00 in "rent" for the four-month period.¹ [Defendants' Statement of Facts, Exhibit 1, at Sec.2] It further provides that Harris may exercise the option to purchase which may be terminated at will at Harris' sole discretion. [Id. at Secs. 16-17] Also, the Agreement calls for forfeiture of Harris' \$130,000.00, as an "earnest money deposit" should the option not be exercised and Harris then "breach" the Agreement or otherwise "default." [Id. at Sec. 18] Finally, the parties agreed the forfeiture provision was "subject to the property appraising at \$865,000.00." [Id.]

It is undisputed that Harris exercised and then terminated the option. Beaver Creek kept the \$130,000.00 and Harris brought suit. Beaver Creek now moves for Partial Summary Judgment on Harris' breach of contract claim arguing either a

¹ Only \$130,000.00 of that amount was paid by Harris. The remainder was paid by a non-party to this lawsuit.

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forfeiture took place or the \$130,000.00 is "rent." Harris cross-moves arguing that the undisputed facts show no \$865,000.00 appraisal was acquired and, therefore, the \$130,000.00 should be refunded to Harris. In addition, Harris asserts that the economic reality underlying the Agreement supports the conclusion that it was never intended to have a true "rent" component at all. Instead, Harris posits, the essence of the transaction was one solely for purchase contingent upon financing being acquired based upon the requisite appraisal. Since the appraisal was not forthcoming, the financing was not obtained and the \$130,000.00 should be returned.² Beaver Creek characterizes this scenario as pure fantasy unsupported by the language of the Agreement and which clearly should be ignored under the parole evidence rule.

The Agreement is a model of convoluted terms some of which defy logical interpretation (e.g. section 18's curious reference to an "earnest money deposit" forfeiture even where the purchase option is never exercised), but most of which do not apply directly to these facts. Here it is undisputed that Harris exercised his clear "right to terminate this option at any time in [his] sole discretion by sending a notice of termination of option to" Beaver Creek. [Agreement at sec. 17] There is no applicable penalty or other consequence stated in the Agreement in connection with that termination of right. The termination had the effect of placing Harris in the same position he would have been in had the option never been exercised, i.e. the position of "tenant."

What then to make of the Agreement's lease provisions, in particular sections 1 through 4 and 14 regarding rental payment obligations? Beaver Creek asserts that these terms, standing alone, obligated Harris to pay the whole \$130,000.00 (plus the

² Harris also argues that if the \$130,000.00 is viewed as liquidated damages for his breach it constitutes an unenforceable forfeiture in the circumstances. The Court need not and does not reach that issue on these motions.

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\$10,000.00 contributed by the non-party), the mortgage and utilities as rent for the four month rental period. Beaver Creek refers to the \$140,000.00 as a "rent/deposit" and argues it was only "refundable" under certain conditions where the purchase option had been exercised and not terminated. For support of its "rent/deposit" forfeiture theory, Beaver Creek points to the terms of Section 18 of the Agreement. But there, significantly, the \$140,000.00 is expressly referred to as an "earnest money deposit," a term normally applicable to a purchase not a lease. This ambiguity plunges us directly into the realm of parole evidence to determine whether the parties actually intended the \$140,000.00 sum to constitute a "rent/deposit" or an "earnest money deposit." On that score the parties' proffered evidence diverges significantly making it inappropriate for the Court to grant summary judgment for either party on this record.

IT IS ORDERED denying all pending motions for summary judgment.³

³ The dispute over the effectiveness of the purported lease terms also mandates the denial of that part of the motions concerning the alleged conversion of personal property.