

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-006271

02/11/2020

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
C. Avena  
Deputy

HOLLIS E CROWE II

MATTHEW J PALMER

v.

CAROL F BRACALE

GUY W BLUFF

JUDGE KEMP

MINUTE ENTRY

The Court has reviewed Plaintiff's Motion for Summary Judgment, Defendant's Response, and Plaintiff's Reply. The Court has also reviewed Defendant's Motion for Summary Judgment, Plaintiff's Response and Defendant's Reply. The parties take the same position on the same issues in all of the above pleadings and both parties seek to prevail as a matter of law. This opinion will therefore resolve all of the pleadings.

The case involves two parcels of real property that were owned by the respective parties. Defendant Bracale owned their property prior to September of 2000 when Plaintiff Crowe purchased the adjoining property from Defendant Bracale. The purchase contract, which is the subject of this lawsuit, contained a number of provisions.

The relevant provision states that "The sellers will extend to buyer first right of refusal as detailed in the following two paragraphs in the event sellers decide at a future date to sell the property." The second paragraph states "Sellers agree to offer buyer an additional first option to purchase lot 388A and the cabin should they decide to sell the property. Sellers will have the right to offer the property for sale on the open market. Buyer has the first option to purchase the property at the fair market value."

On May 16, 2012, Defendant Bracale notified Plaintiff, via email, that Defendant intended to sell the property. The email stated Defendant was offering the property to Plaintiff

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and asking \$190,000. Six days later, Plaintiff responded he was not interested in any purchase price over \$170,000. Another email in July stated Defendant reduced the price to \$169,900 to which Plaintiff responded "If you can get over 150K, I will be happy for you. Good luck."

In July of 2013, Defendant emailed Plaintiff that she had a cash offer of \$108,000. Defendant asserts that Plaintiff responded with "that sounds like a reasonable price for the buyer. For \$108,000 I will pass on though. Thanks and good luck." Plaintiff maintains that he has no recollection of sending this email and has been unable to find any record of it. One week later, Defendant sold the property.

The Court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). In determining whether there are any factual disputes to resolve, the Court is to view the matters of record in the light most favorable to the party opposing the motion. *Espinoza v. Schulenberg*, 212 Ariz. 215, 129 P.3d 937 (2006). If there is a genuine issue or dispute as to a material fact to be resolved, or any doubt as to whether such a material factual issue is present, the motion should be denied. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 821 P.2d 725 (1991). The burden of persuasion on the party seeking summary judgment is heavy. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 292 P.3d 195 (2012).

Plaintiff's position is that the purchase contract granted him the right to match any offer made to any third-parties. This required Defendant to offer the property to Plaintiff on any terms given by a bona fide potential buyer. Defendant acknowledges as much when she emailed Plaintiff regarding the \$108,000 offer. "Due to the fact you have a first right of refusal I am contacting you at this time to see if you want the property or not." This appears to be a meeting of the minds.

Defendant's position is that Plaintiff did not have an ongoing right to match any third-party offers and that the option to purchase arose when Defendant notified Plaintiff she intended to sell the property. Further, this interpretation is in conflict with the contractual language that Plaintiff is to pay "fair market value" for the property. She asserts that her obligation was fulfilled when she first notified Plaintiff in May of 2012 that the property would be listed. Plaintiff could have purchased the property for fair market value at that time.

The Court agrees. The contract does not give Plaintiff the right to match *any* purchase offer. When Defendant first notified Plaintiff that the property was up for sale, Plaintiff had the opportunity to purchase the property at fair market value *at that time* before the property was put on the open market.

However, it appears that Defendant believed Plaintiff had a right to purchase the property under the right of first refusal provision in the July 10, 2013 email. She acknowledged the right of first refusal and asked "whether he wanted to [sic] property or not." This supports the notion

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that she thought the contract required her to offer Plaintiff the property prior to a sale to a third-party.

A material fact question then arises as to whether Plaintiff responded “For 108,000 I will pass on though [sic]. Thanks and good luck.” Plaintiff denies sending this and claims he cannot find a record of it. If both of these emails exist, it would apparently be a waiver by both parties as to the particular requirements of the contract. Plaintiff waived his right to a formal written offer to be made by certified mail and Defendant waived her argument that she had fulfilled her obligations by the initial notice in May of 2012. The existence or non-existence of this email is a fact question for a jury.

There is also a fact question regarding damages should a jury find in favor of Plaintiff. Are damages the difference between the sale price of \$108,000 and the appraised value of \$159,000 in May of 2019, or the appraisal value of \$135,000 in August of 2015? Should damages be assessed as the difference between the sale price of \$108,000 and the fair market value at the time of sale and \$150,000 which is what Defendant believed to be the fair market value? Did Plaintiff suffer any damages?

Further, were Defendant’s obligations met as of May of 2012 with the initial notice of intent to sell? Who was responsible for sending a tendered offer by certified mail – Defendant every time she received a bona fide offer or Plaintiff when he made a bona fide offer? Was this notification requirement waived by the parties in light of the email exchanges?

Both motions for Summary Judgment are denied.