

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-006588

12/01/2008

HON. MARK F. ACETO

CLERK OF THE COURT
M. Sahli
Deputy

BARRY E LEWIN, et al.

DALE S ZEITLIN

v.

DAVID ROUSSEAU, et al.

DOUGLAS G ZIMMERMAN

MARK M MOORE

MINUTE ENTRY

MOTION TO DISMISS

Plaintiffs (the “Lewins”) have asserted a “Third Party Complaint” against the Arnolds. The Arnolds have filed a Motion to Dismiss. This motion is dated October 22, 2008. The Court has reviewed the pleadings. Pursuant to Rule 7.1, the Court declines to schedule oral argument.

The damages sought by the Lewins through their “Third Party Complaint” are “an amount equal to the diminution of value of the Subject Property”.

A claim such as asserted by the Lewins does not accrue until there has been both a breach and damages. *HSL Linda Gardens Properties v. Freeman*, 176 Ariz. 206 (App. 1993). The Lewins will be damaged only if and when the Rousseaus prevail on their adverse possession claim. Because that has not yet occurred, the Lewins’ “Third Party Complaint” against the Arnolds is premature.

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The Lewins make an anticipatory repudiation argument. Anticipatory repudiation occurs when a party expresses a positive and unequivocal manifestation that he will not render the required performance when it is due. *Oldenburger v. Del E. Webb Dev. Co.*, 159 Ariz. 129, 131 (App. 1988). While the Arnolds have stated a belief regarding the property line, they have not made the requisite positive and unequivocal manifestation.

Under the circumstances,

IT IS ORDERED granting the Arnolds' Motion to Dismiss.

ATTORNEY FEES

The Arnolds have asserted a request for an award of attorney fees. The Third-Party Complaint does arise out of contract; however, given the circumstances, the Court declines to award fees to the Arnolds.

INACTIVE CALENDAR

IT IS ORDERED placing the Lewins' "Third-Party Complaint" on the Inactive Calendar. If a proposed form of judgment is not submitted by February 2, 2009, this "Third-Party Complaint" will be dismissed without further notice.