

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016300

02/14/2014

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT

J. Polanco

Deputy

RYAN ZWARG, et al.

DARRIEN O SHUQUEM

v.

COUNTY OF MARICOPA, THE, et al.

JAMES W FRITZ

CHRIS H BEGEMAN

WILLIAM A NEBEKER

RULING

The Court received and considered Defendant The County of Maricopa's [County], Motion For Summary Judgment, the responsive pleadings filed by Plaintiffs [Plaintiff] and the reply brief submitted by Defendant County. The parties were scheduled for oral argument on the issues presented by this dispositive motion. However, because of an error by the Clerk's Office, Defendant County of Maricopa failed to receive notice of the scheduled oral argument. The Court finds that the briefing is sufficient, and that oral argument would not add to the Court's consideration of the issues presented. Accordingly, oral argument is waived pursuant to Ariz. R. Civ. P. Rule 7.1[c][2] to expedite the business of the Court. The Court issues the following ruling.

General Background. Plaintiff has filed various claims of negligence and nuisance against the County involving the County's Cave Creek Landfill [Landfill]. Briefly stated, Plaintiffs allege that the County negligently caused or failed to prevent the Landfill from leaking toxins into the groundwater [Count I]; failed to disclose the known information to the public [Count II]; and further that the Landfill, because of its contamination, has created a public and/or a private nuisance [Counts IV and V].

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The County seeks dismissal of all of Plaintiffs' claims asserting that it had no legal duty to disclose the condition of the Landfill to individual homeowners; that Plaintiff homeowners lack standing to bring these claims because there has been no physical impact or injury to their respective properties; that for these same reasons there exist no public or private nuisance claims; and finally, that these homeowners' claims are all barred by A.R.S. §12-821.01.

The relevant factual circumstances are largely undisputed and include the facts set forth in the County's Statement of Facts 1-35. Those facts include the following:

- The fact that the Landfill is open, obvious and notorious;
- That the existence of the Landfill was disclosed in subdivision public disclosures of Dove Valley Ranch as early as 2000;
- That the groundwater at issue is approximately 700 to 1200 feet beneath the surface;
- That these homeowners' properties do not sit over the groundwater plume;
- That there is no evidence that potential harm exists to these homeowners, i.e. the Landfill does not present a health or safety issue;
- That there is no "transmission vehicle" for the water to reach these homeowners' properties;
- That these homeowners do not use and cannot use the groundwater for any purpose; and
- That the extent of TCE in the groundwater has been determined to be within the compliance standards of Arizona Aquifer Water Quality Standards.

Standard of review. To grant summary judgment, the Court must determine that the record before it contains "no genuine issue as to any material fact" and, thus, "that the moving part is entitled to judgment as a matter of law. "Rule 56[c]. The moving party has the burden of showing that material facts are not genuinely disputed. In determining whether to grant summary judgment, the Court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. *Matsushita Elec. Co. v Zenith Radio Corp.* 475 U.S. 574, 106 S. Ct. 1348 [1986].

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When the moving party has carried its burden under Rule 56[c], the non-moving party must show that there are genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 [1986]. A genuine issue of material fact is one that a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record. *Martin v. Schroeder*, 209 Ariz. 531.

Summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 [1986].

A Court should grant summary judgment “if the facts produced in support of the claim or defense has so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme School v. Reeves*, 166 Ariz. 301.

A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. *National Bank of Arizona v. Thruston*, 218 Ariz. 112.

Discussion. Plaintiffs assert that the County had a legal duty to prevent the contamination and additionally to disclose the condition of the Landfill to individual homeowners and failed to do so. This alleged negligence and lack of disclosure forms a basis for Plaintiffs’ claims. The threshold issues are whether the County was obligated to take appropriate action to protect these individual homeowners and to disclose the condition of the Landfill to these individual homeowners. It is undisputed that there exists no federal/state statute or administrative regulation that places the responsibility on the County to provide notice of the condition of the Landfill.

Whether the County was under a common law legal duty to disclose the condition of the Landfill is an important issue in this case. Duty is the legal obligation to protect another from harm. In the absence of a duty, a defendant cannot be held liable for negligence. The existence of a legal duty, presents a question of law for the Court’s consideration.¹

Plaintiffs concur that there has been no physical damage to their individual properties. However, they argue that these claims do not require that they sustain property damage. Rather, they argue that being adjacent to the Landfill and adjacent to the alleged contaminated ground water has produced purely pecuniary loss in the value of their respective property values.²

¹ *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352 [1985].

² Plaintiffs have failed in their burden of production to establish the loss of value of their real property. Their claims of future harm are speculative.

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The Court finds that Plaintiffs lack standing to bring negligence, nuisance [stigma damages] claims because there is no evidence of physical harm or injury to their respective properties. Under these circumstances, where there is no harm and/or the potential for harm is essentially non-existent, the Court concurs with the County that it had no statutory or common law duty to disclose the Landfill's conditions directly to individual homeowners. The Court finds that the lack of injury is fatal to their negligence and nuisance claims.

The Court also concurs with the County that under these circumstances, these homeowners do not possess nuisance claims. The facts establish, and Plaintiff homeowners do not contend, that they were not provided with notice of the condition of the Landfill. These homeowners further acknowledge that their properties do not sit over the groundwater plume; that the groundwater is located a minimum of 700 to 1200 feet beneath the ground; that there exists no identifiable pathway for their property to be exposed to any contamination; and that no safety or health issues exist in connection with the Landfill.

Under these circumstances, there has been no harm or a measurable risk of harm established by these Plaintiff homeowners. In order to achieve standing to pursue nuisance claims, Plaintiffs have the burden of proving that defendants conduct caused them harm.³ This they have failed to do and the absence of this evidence is fatal to their nuisance claims.

Further, these homeowners may not proceed with a claim based on "stigma damage" [diminution damage] without first demonstrating an actual physical encroachment on their respective properties. The absence of this evidence also eliminates Plaintiffs efforts to recover "stigma damages".⁴

As stated, the Court finds these issues dispositive of this matter. In addition, the Court concurs [without discussion] with Defendant that these homeowners' claims are barred by A.R.S. §§ 12-821 and 12-821.01.

For the reasons stated and for the reasons cited in Defendant's moving papers;

IT IS ORDERED granting Defendant's Motion For Summary Judgment;

IT IS FURTHER ORDERED dismissing Plaintiffs' claims against The County of Maricopa with prejudice.

³ *Sears v. Hull*, 192 Ariz. 65 [1998].

⁴ *Nucor Corp. v. Employers Insur. Co. of Wausau*, 2012 WL5893485 [App. 2012].

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IT IS FURTHER ORDERED that the Court expressly directs the entry of final judgment and determines that there is no just reason for delay. This order is a final judgment pursuant to Ariz.R.Civ.P., Rule 58.

IT IS FURTHER ORDERED signing this minute entry as a formal written Order of the Court this 19th day of February, 2014.

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.