

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-005988

01/07/2005

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 01/12/2005

STRAWBERRY WATER COMPANY

ARTHUR J BOURQUE
SID A HORWITZ

v.

RANDALL D PAULSEN, et al.

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MINUTE ENTRY

The Court took under advisement Plaintiff Strawberry Water Company, Inc.'s (herein "Plaintiff") Motion for Partial Summary Judgment to Enforce the Law of the Case on Damages (herein "Plaintiff's Motion on Damages"), Defendants/Cross-Claimants Randy and Dana Paulsens' (herein "Defendants") Cross-Motion for Summary Judgment on the Damages Period (herein "Defendants' Cross-Motion on Damages Period") and Plaintiff's Cross-Motion for Partial Summary Judgment that Strawberry Water Company, Inc. is the Proper Real Party in Interest (herein "Plaintiff's Cross-Motion on Party in Interest"). The Court has considered the motions, arguments and case law and makes the following findings and orders:

This case arises out of the alleged misappropriation of water. The Plaintiff, a subsidiary of Brooke Utilities, Inc., is a public water utility that services customers in Strawberry, Arizona. The Defendants own property in Strawberry, Arizona. The Defendants purchased the property on March 15, 1996. On their property is a pond that is serviced by a piping system that taps into a waterline, allegedly installed by a previous owner of Defendants' property. As the result of the alleged diversion of water from the waterline into the Defendants' pond, Plaintiff commenced

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suit asserting five causes of action: (1) violation of A.R.S. § 40-491, et seq.; (2) conversion; (3) trespass; (4) negligence; and (5) unjust enrichment.

I. Plaintiff's Motion for Partial Summary Judgment to Enforce the Law of the Case on Damages

Plaintiff's Motion on Damages is premised on the Court's March 21, 2004 Ruling. In the Ruling, the Court ruled, among other things, Plaintiff's Cross-Motion for Partial Summary Judgment that under A.R.S. § 40-493 it is entitled to recover as damages three times the actual value of the water taken by Defendants. Upon a finding that the Arizona legislature enacted A.R.S. § 40-491, et. seq., to prevent pervasive problems of utility theft and to "turn a crime into a civil cause of action for the utility lawyers to pursue," Minutes of the Committee on Government of February 23, 1989, 39th Legislature, the Court granted Plaintiff's Motion for Partial Summary Judgment in that under A.R.S. § 40-493 a utility company is entitled to recover as actual damages three times the value of the water, not three times the amount of lost profits as Defendants contended.

Plaintiff's Motion on Damages raise issue with Defendants' April 28, 2004 disclosure, an expert report by Dr. Larry W. Mays that takes into consideration evaporation, subsurface runoff and seepage back into the ground in determining the actual amount of water diverted from the waterline to Defendants' pond. In addition, the report concludes that water that seeped back into the ground and subsurface runoff would have ultimately reverted back to the local aquifer (a water-bearing rock, rock formation, or group of rock formations). Plaintiff interprets the disclosure as an attempt by Defendants to offset the amount of water that may be found to have been diverted by Defendants by the amount of water that is determined to have seeped into the ground or flowed out of Defendants' pond and back to Plaintiff's aquifers in calculating damages. Under Plaintiff's interpretation of the disclosure, Defendants are implicitly arguing that Plaintiff is only entitled to the amount of evaporation. Based on its interpretation, Plaintiff requests partial summary judgment to enforce the Court's March 21, 2004 Ruling and hold that actual damages under A.R.S. § 40-493 is the amount of water wrongfully diverted not taking into consideration any offset for the amount of recharge.

In response to Plaintiff's Motion on Damages, Defendants contend that Dr. Mays' opinion is relevant and admissible as to the amount of water that may have been "misappropriated," the amount of damages that Plaintiff may be entitled under its theories of relief and their defenses.¹ Defendants concede in their response that "Mr. Mays' opinion is not

¹ In their response, Defendants contend that the imposition of treble damages under A.R.S. § 40-492, et. seq., is permissive and a question for the jury to decide. Because the nature of correspondence between the parties is with regard to the appropriateness of an offset, the Court, at this juncture, will not address this issue and will leave it for a more appropriate time, jury instructions.

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an attempt to argue that anytime someone misappropriates water from a utility that may eventually find its way back into the groundwater system a ‘setoff’ is justified.”

After hearing the parties’ arguments with respect to Plaintiff’s Motion on Damages, the Court requested the parties to submit supplemental briefs on the appropriate measure of damages for all of Plaintiff’s causes of action. The Court will address each claim individually.

A. Measure of Damages

a. A.R.S. § 40-491, et seq., & Conversion

In its April 21, 2004 Ruling, the Court held that “actual damages” under A.R.S. § 40-493 is three times the value of the revenue that a utility would have received if the utilities unlawfully taken were sold to customers. In rendering its decision, the Court relied on Arizona case law interpreting “actual damages” in an action for conversion.² Consistent with the Court’s previous ruling, “actual damages” under A.R.S. § 40-491, et. seq., and conversion is measured by the amount of water unlawfully taken. The amount of water that may have reverted back to the plaintiff through natural process is irrelevant as a “setoff.”

b. Trespass

In an action for trespass, the appropriate measure of damages due the plaintiff is the amount which will constitute just compensation for the injury done taking into consideration the purpose of the property. *Cracchiolo v. State of Arizona*, 146 Ariz. 452, 457, 706 P.2d 1219, 1224 (App. 1985) (review denied). Generally, the measure of damages for permanent injury to property is the difference between the market value of the property immediately before and immediately after the injury, but if the property may be restored to its original condition, the cost of restoration may be used as the measure provided it does not exceed the loss in the market value of the property. *Blanton & Company v. Transamerica Title Insurance Co.*, 24 Ariz.App. 185, 188, 536 P.2d 1077, 1080 (1975) (the general proposition was enunciated and applied in the context of permanent injury to land); *Cracchiolo*, 146 Ariz. at 457, 706 P.2d at 1224 (in an action for trespass asserted by the holders of a grazing lease, the proper measure of damages is difference between the value of the leasehold before the injury and its value after the injury). In limited circumstances, a property owner may be entitled to restoration costs that are above the loss of market value if the costs are reasonable and the destroyed property had intrinsic value to the plaintiff. *Dixon v. City of Phoenix*, 173 Ariz. 612, 622, 845 P.2d 1107, 1117 (App. 1992) (review denied) (destruction of trees and shrubbery as a result of trespass). Where there is total

² Under Arizona case law, “actual damages” for the unlawful taking of personal property is the value of the property taken. See, e.g., *Collins v. Dilcher*, 104 Ariz. 221, 225, 450 P.2d 679, 683 (1969) (“actual” damages for conversion of an automobile includes the value of the automobile). Water that runs through utilities’ water lines is considered personal property for purposes of assessing damages for the unlawful taking of water. See, *Clark v. State*, 170 P.275, 275-277 (Ok. 1919) (citing *Woods v. People*, 78 N.E. 607 (1906)).

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destruction, the owner is entitled to recover the entire value of the property. *Transamerica*, 24 Ariz.App. at 188, 536 P.2d at 1080 (citing *Hughett v. Caldwell County*, 313 Ky. 85, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950)).

In this case, the Plaintiff alleges that the Defendants trespassed on its property and illegally diverted water from its distribution system and utilized it for their personal benefit by means of an unauthorized piping system that tapped into its water distribution system. To the extent Plaintiff's cause of action is one for trespass and not conversion, the appropriate measure of damages is the difference in the value of the Plaintiff's water distribution system (property) before the trespass and after the trespass. *In re 1969 Chevrolet, 2-Door, I.D. No. 136379K430353, License No. PSH 616*, 134 Ariz. 357, 361, 656 P.2d 646, 650 (App. 1982) (conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights therein). Plaintiff may be entitled to the restoration costs of its distribution system if those costs do not exceed the diminution of market value. This measure does not take into consideration the amount of water that hypothetically may have reverted back to the Plaintiff's aquifer through natural process.

c. Negligence

In an action for negligence, "actual damages" due the plaintiff are those damages that follow from the nature and character of the act and are susceptible to ascertainment, designed to restore the injured party to the position he or she maintained prior to being injured. See *Farmers Insurance Company of Arizona v. R.B.L. Investment Co.*, 138 Ariz. 562, 564-65, 675 P.2d 1381, 1383-84 (App. 1983) (in an action for negligence, car dealer would be compensated for damages for loss of fair market value of the vehicle above and beyond the cost of repair where such damages were actual and provable and for out-of-pocket expense which it paid on the damaged new vehicle while it was out for repairs); *United States Fidelity & Guaranty Co. v. Davis*, 3 Ariz.App. 259, 263, 413 P.2d 590, 594 (defining "actual damages" in general). As with "actual damages" under conversion and trespass, a highly speculative amount of water that hypothetically may have reverted back to the Plaintiff's aquifer through natural process is improper as a setoff in the ascertainment of damages in an action for negligence.

d. Unjust Enrichment

Under Arizona law, restitution is the appropriate measure of damages in a claim for unjust enrichment. See *Murdock-Bryant Construction, Inc. v. Pearson*, 146 Ariz. 48, 703 P.2d 1197 (1985); Dobbs *Law of Remedies* §1.1 (2d ed. 1993). The amount of restitution is generally determined by the amount in which the Defendant has been unjustly enriched. *Id.* at 53, 703 P.2d at 1202; Dobbs at §1.1, pg. 5 (restitution is measured by the defendant's gains, not by the plaintiff's losses). As with damages in a claim for conversion and a claim under A.R.S. § 40-493, the only appropriate measure is the value of water unlawfully taken.

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e. Defenses Of Unclean Hands, Mistake and Failure to Mitigate

As to Plaintiff's claim for unjust enrichment, Defendants contend that they are entitled to the defense of unclean hands and that a finding of unclean hands by the trier of fact would render the imposition of a setoff for recharge relevant to the issue of damages. Under the maxim of unclean hands, one who seeks a judicial remedy in equity must do so with clean hands. *Dawson v. McNaney*, 71 Ariz. 79, 86, 223 P.2d 907, 911 (1950) (citing Pomeroy, *Equity Jurisprudence* (3d Ed.) par. 397)). If it is established that the plaintiff has violated conscience or good faith or any other equitable principle the court will decline to interfere on his or her behalf. *Id.* If the defense of unclean hands prevailed at trial Plaintiff would be precluded from any relief under its theory of unjust enrichment. Such a finding would not render the issue of a setoff for recharge relevant.

As to Plaintiff's claim for conversion, Defendants claim the affirmative defense of mistake. Defendants contend that a finding of mistake would render the imposition of a setoff for recharge relevant to the issue of damages for conversion. In an action for conversion, mistake can be a defense to liability if the mistake is induced by the plaintiff. *Scott v. Allstate Insurance Co.*, 27 Ariz.App. 236, 553 P.2d 1221 (1976) (review denied) (citing RESTATEMENT (SECOND) TORTS § 244 (1965)). If Defendants are successful on their defense of mistake they would not be liable for conversion. As it is for the defense of unclean hands in a claim for unjust enrichment, a finding of mistake as to Plaintiff's claim for conversion would not render the issue of a setoff for recharge relevant.

As to Defendants' defense of failure to mitigate, such a finding would not render the issue of a setoff for recharge relevant.

B. Relevance of Dr. May's Expert Opinion

Despite the Court's ruling above, Dr. Mays' expert opinion taking into consideration evaporation, subsurface runoff and seepage back into the ground in determining the actual amount of water diverted from Plaintiff's waterline to Defendants' pond remains relevant to the issue of damages. In his expert opinion, Dr. Mays references his observation that the connection to Plaintiff's mainline "included a float control valve system that would have maintained water levels in the pond to a specified elevation so that water would only flow out of the water supply line and into the pond only a small fraction at a time." The implication from the observation and his evaluation is that, assuming the float valve was in operation for the full time of the alleged misappropriation, one way of ascertaining the amount of water misappropriated is to scientifically determine the average rate of evaporation and the average rate of seepage to determine the amount of water that was pumped back into the pond. The amount of water that may have been wrongfully diverted into Defendants' pond and the appropriate method of ascertaining such amount is a question of fact for the jury. Nevertheless, this information remains relevant to the determination. Accordingly,

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IT IS ORDERED granting Plaintiff's Motion for Partial Summary Judgment to Enforce the Law of the Case on Damages in that the calculation of damages under Plaintiff's claims are not subject to a setoff for an amount of water that may have reverted back to Plaintiff's aquifer through natural process. This ruling does not, however, preclude Dr. May's testimony to the extent it relates to the determination of the amount of water misappropriated.

II. Defendants' Cross-Motion on Damages Period & Plaintiff's Cross-Motion on Party in Interest

Through their Cross-Motion on Damages Period, Defendants request summary judgment regarding the applicable period that Plaintiff may be entitled to damages. Specifically, Defendants request the Court to rule as a matter of law that, in the event liability is imposed, Plaintiff is only entitled to damages from April 1, 2000, the date Plaintiff began operating as a utility. In response, Plaintiff requests partial summary judgment that it is the real party in interest as an assignee of the predecessor water companies' assets, rights and claims and, therefore, is entitled to damages from the date Defendants closed escrow on the property, March 15, 1996.³

Arizona case law is clear in that an assignee of a chose in action may maintain suit thereon in his own name even where he is not the full party in interest. *General Accident Fire & Life Assurance Co. v. Little*, 103 Ariz. 435, 438, 443 P.2d 690, 693 (1968) (citing *United Verde Extension Mining Co. v. Ralston*, 37 Ariz. 554, 296 P. 262 (1931)).

The following facts are uncontroverted. Defendants' property, which includes the pond, is located in the locality of Strawberry Knolls in Strawberry, Arizona. United Utilities, Inc.'s

³ In a Motion to Strike before the Court and in support of its Cross-Motion On Damages Period, Defendants contend that Plaintiff should be precluded from presenting and relying on the evidence it provides in support of its Cross-Motion On Party In Interest because the Plaintiff did not previously disclose such evidence. The specific evidence is a Bill of Sale that transfers to Plaintiff the right to bring claims against third parties, which would presumably include claims arising out of the unlawful "misappropriation" of water (property). Defendants contend that a ruling of this Court precluding Plaintiff from relying on the information in support of its Cross Motion On Party In Interest entitles it to summary judgment that the earliest date in which the Plaintiff may be entitled to damages is April 1, 2000, the date Plaintiff began operating as a public utility.

In reviewing the Plaintiff's Initial Rule 26.1 Disclosure Statement, the Court finds that the explanation of Plaintiff's corporate history on which it relies in support of its Cross-Motion On Party In Interest is substantially similar to its explanation provided in its Initial Rule 26.1 Disclosure Statement and provides a basis upon which Plaintiff's claims for unlawful "misappropriation" of water on behalf of its predecessor water company may be asserted. The fact that Plaintiff did not specifically reference the Bill of Sale in its Initial 26.1 Disclosure Statement does not warrant a ruling by the Court precluding the Plaintiff from asserting its claims on behalf of its predecessor water company.

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Water Utility Annual Reports dated December 31, 1994 through 1999 filed with the Arizona Corporation Commission establish that Strawberry Knolls was a locality served by United Utilities, Inc. Brooke Utilities, Inc. purchased United Utilities, Inc., along with two additional water companies, E & R Water Company and Williamson Waterworks, Inc., on August 7, 1996. These three previously acquired water companies all serviced customers in Strawberry, Arizona. In 1998 Brooke Utilities, Inc. decided to consolidate these three water companies that serviced customers within Strawberry, Arizona, into one company, Strawberry Water Company, Inc. To effectuate the transfer, the predecessor water companies each executed a Bill of Sale, Warranty Deed and an Assignment and Assumption of Contracts, Rents and Leases. The Bills of Sale transferred "all claims of Seller[s] against third parties." In June of 1998 the Arizona Corporation Commission approved the transfer, subject to various conditions. The predecessor water companies were formally transferred to the Plaintiff in April of 2000 and were subsequently dissolved. Based on this evidence it appears that Plaintiff, through its acquisition of United Utilities, Inc., owns the water distribution system surrounding Defendants property and any claims arising out of its unlawful use. Therefore, summary judgment limiting the damages period to April 1, 2000 is improper.

In opposition to summary judgment, Defendants reference inconsistencies in Plaintiff's detailing of its corporate acquisitions. After reviewing the correspondence, the Court finds one notable inconsistency. Plaintiff claims that all of the assets in United Utilities, Inc. were transferred to Plaintiff. To the contrary, Defendants provided evidence indicating that United Utilities, Inc. transferred its assets to two additional companies, Payson Water Co., Inc. and Tonto Basin Water Co., Inc. Although Defendants' reference to inconsistencies does not directly contradict the evidence indicating that United Utilities, Inc. owned a water distribution system in the locality in which Defendants property is located and possibly the main line on which the tap is located, it raises a question of fact as to what assets of United Utilities, Inc. were transferred to Plaintiff versus Payson Water Co., Inc. and Tonto Basin Water Co., Inc. Plaintiff has not provided specific evidence establishing that the water line upon which the tap was located was transferred to Plaintiff or whether United Utilities, Inc. even owned the specific water line in question. Plaintiff's Motion On Party In Interest is premised on the assumption that, because Plaintiff obtained certain assets of United Utilities, Inc. and because United Utilities, Inc. provided service to the locality in which the water line was located, it is the rightful owner.

Defendants also contend that there is a question of fact as to whether United Utilities, Inc., the predecessor water company, owned the tap that supplemented the Defendants' pond. This contention is consistent with Defendants' claim that they have an easement for the use of the water. However, the fact that Defendants may have an easement for use of the water would not preclude summary judgment in favor of Plaintiff that it is the real party in interest. Accordingly,

IT IS FURTHER ORDERED denying Defendants' Cross-Motion for Summary Judgment on the Damages Period.

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IT IS FURTHER ORDERED denying Plaintiff's Cross-Motion for Summary Judgment that Strawberry Water Company, Inc. is the Proper Party in Interest.