

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-006584

08/03/2020

HONORABLE MARGARET R. MAHONEY

CLERK OF THE COURT
K. Ballard
Deputy

CHARLES A LINAKER JR.

ALAN A MEDA

v.

JOHN J MATALONE, et al.

MICHAEL J VINGELLI

JOHN N VINGELLI
JUDGE MAHONEY

MATTER TO BE TAKEN UNDER ADVISEMENT

Courtroom: ECB-411

Prior to the commencement of the hearing, Defendants' Exhibits 1-9, 9.001, 10, 11, and 43 and Plaintiff's Exhibits 12-42 are marked for identification.

10:18 a.m. This is the time set for an Evidentiary Hearing on Defendants' Amended Application for Appointment of a Receiver, filed 5/21/2020. Plaintiff Charles A. Linaker, Jr. is present and represented by Counsel Alan A. Meda and Aaron M. Duell. Defendant John J. Matalone is present and represented by Counsel Michael J. Vingelli and John N. Vingelli, who also represent Defendant Riviera Homes, LLC. All appearances are virtual through the GoToMeeting platform and/or telephonic.

A record of the proceedings is made digitally in lieu of a court reporter.

LET THE RECORD REFLECT the following potential witnesses are also present virtually and/or telephonically via the GoToMeeting platform: Zach Bunch and Mike Figueroa. Also present is a non-witness observer with Mr. Linaker, Jennifer Yanez.

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The parties have invoked the Rule of Exclusion of Witnesses. As potential witnesses are present, counsel must ensure that the witnesses are appropriately excluded from the hearing until they are called to testify.

The Court has considered the following in conjunction with today's hearing:

1. Defendants' Amended Application for Appointment of a Receiver and Request to Set Expedited Hearing, filed 5/21/2020;
2. Plaintiff's Response and Objection to Amended Application for Appointment of Receiver, filed 6/5/2020;
3. Defendants' Reply to Response and Objection to Amended Application for Appointment of Receiver, filed 6/22/2020;
4. Defendants' Notice of *Errata* and Filing Sub-Exhibits to Defendants' Exhibit A to Defendants' *Amended Application for Appointment of Receiver*, filed 7/1/2020;
5. The Joint Prehearing Statement, filed 7/27/2020;
6. Plaintiff's Motion to Exclude Defendants/Counterclaimants' Expert Witness R. Douglas Zirkle, filed 7/31/2020;
7. Plaintiff's Motion to Reconsider Motion to Exclude Defendants/Counter-claimants' Expert Witness R. Douglas Zirkle, filed 7/31/2020; and
8. Defendants' email Response, as requested by the Court, dated 7/31/2020.

LET THE RECORD REFLECT that upon receipt of Plaintiff's Motion to Exclude Defendants/Counterclaimants' Expert Witness R. Douglas Zirkle, filed 7/31/2020, the Court instructed Court staff to email counsel in the case to advise that the Court would not be considering the Motion due to its untimeliness as it was filed and received less than one business day before the start of this Evidentiary Hearing. Thereafter, Plaintiff filed the Motion to Reconsider. Upon receipt of that filing, the Court's staff, at the Court's direction, requested an informal, brief emailed Response from Defendants, which is referenced as item 8 above.

The Court inquires if the parties have resolved the dispute as to Mr. Zirkle based on the briefing. Plaintiff's counsel advises the Court that to save time, counsel agree to address this issue at the time Mr. Zirkle is called to testify, if he is called.

The Court addresses counsel as to Plaintiff's objections that (1) the Receivership Application does not join all the necessary parties as there is a second lienholder, Spiritu Sancto, which is not in this case and has not been joined for purposes of the Receivership Application; and (2) as to Defendants' contention that there was a joint venture formed by the parties, Plaintiff disagrees, contending that out of the five necessary joint venture elements (*Waterman v. Rabinovitz*, 161 Ariz. 511, 513 (App. 1989)), two elements are missing: the equal right of control, and participation in both profits and losses.

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By agreement of counsel, these legal issues will be addressed in counsel's closing arguments.

By stipulation, Defendants' Exhibits 1-8, 9.001, 10, and 11 and Plaintiff's Exhibits 12-42 are received in evidence.

Counsel are advised that this hearing is scheduled to conclude by noon today, and the remaining available time will be divided equally between parties (45 minutes per side).

Opening statements are waived.

Defendants' case:

Charles Alan Linaker is sworn and testifies.

Zach Bunch (appraiser) is sworn and testifies.

Discussion is held as to the parties' time usage.

By agreement of the parties, the witness is excused.

John J. Matalone is sworn and testifies.

Discussion is held as to the submission of closing arguments.

By agreement of the parties,

IT IS ORDERED that counsel shall simultaneously submit written closing arguments, no longer than 10 pages in length, excluding exhibits, by no later than the close of business on **8/19/2020**.

IT IS FURTHER ORDERED that the parties shall contemporaneously email same to the opposing party and the Court at the time of filing the closing arguments. Email addresses for Court staff: Jennifer.Sommerville@jbazmc.maricopa.gov and Ana.Meza@jbazmc.maricopa.gov.

IT IS FURTHER ORDERED Defendants' Amended Application for Appointment of a Receiver, filed 5/21/2020, shall be deemed under advisement upon receipt of the parties' closing arguments.

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Discussion is held as to Exhibits 9 and 43. The parties are in agreement that these two Exhibits were not offered in evidence during today's hearing.

LET THE RECORD REFLECT, pursuant to the close of evidence and this matter having been deemed under advisement upon receipt of the parties' written closing briefs, and there being no further need to retain the Exhibits not offered in evidence in the custody of the Clerk of Court, Defendants' counsel indicates on the record that the courtroom clerk may dispose of Exhibits 9 and 43, which were not offered or received in evidence.

Plaintiff's counsel addresses the Court as to the parties' pending Cross-Motions for Summary Judgment. Counsel are advised that the Court intends to set Oral Argument on the Motions by separate Minute Entry in the near future.

12:21 p.m. Matter concludes.

PLEASE NOTE: This Division requires that all motions, responses, replies and other Court filings in this case must be submitted individually. Counsel shall not combine any motion with a responsive pleading. All motions are to be filed separately and designated as such. **No filing will be accepted if filed in combination with another. Additionally, all filings shall be fully self-contained and shall not "incorporate by reference" other, separate filings for review and consideration as part of the pending filing.**

ALERT: Due to the spread of COVID-19, the Arizona Supreme Court Administrative Order 2020-79 requires all individuals entering a Court facility to wear a mask or face covering at **all times** while they are in the Court facility. With limited exceptions, the Court will not provide masks or face coverings. Therefore, any individual attempting to enter the Court facility must have an appropriate mask or face covering to be allowed entry to the Court facility. Any person who refuses to wear a mask or face covering as directed will be denied entrance to the Court facility or asked to leave. In addition, all individuals entering a Court facility will be subject to a health screening protocol. Any person who does not pass the health screening protocol will be denied entrance to the Court facility.