

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-008696

12/14/2020

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

PALMORE PROPERTIES ARIZONA L L C, et
al.

DANIEL G DOWD

v.

J D M GOLF L L C

CASSANDRA H AYRES

LEO R BEUS
JUDGE DANIEL MARTIN

UNDER ADVISEMENT RULING

Pending before the Court is Counterdefendants/Homeowners' Motion to Dismiss First Amended Counterclaim Pursuant to A.R.S. § 12-752, and Counterdefendants/Homeowners' Motion to Dismiss First Amended Counterclaim Pursuant to Rule 12(b)(6), both filed on May 18, 2020. The Court heard oral argument on October 15, 2020, at which time the matters were taken under advisement. Having considered the arguments presented, and for the reasons set forth herein, the Court enters its ruling granting the motion under A.R.S. § 12-752, and granting the motion under Rule 12(b)(6).

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a dispute among JDM Golf, LLC ("JDM"), the owner and operator of the Adobe and Links Golf Courses in Phoenix, Arizona, and a group of neighboring homeowners (the "Homeowners").¹ The core of the dispute involves the manner and extent to

¹ The party designations are somewhat confusing. As between the litigants, the "Homeowners" include Plaintiffs Palmore Properties Arizona, LLC, The Richard D. Arroyo Family Trust, The Murray L. and Ina J. Manaster Trust, The Rosensteel Family Living Trust dated February 21, 2011, McQueen Farm LLC, Yastrow Family Trust dated

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which JDM may use the golf course property. Those matters will be resolved at a later stage in this litigation. The question presently before the Court is whether JDM's amended counterclaim against the Homeowners should be dismissed. The Homeowners advance two theories in support of dismissal. First, the Homeowners contend that JDM filed the amended counterclaim in violation of A.R.S. § 12-752, Arizona's "anti-SLAPP" statute.² Second, the Homeowners urge that JDM's amended counterclaim fails to state a claim for which relief can be granted, and accordingly should be dismissed under Rule 12(b)(6) of the Arizona Rules of Civil Procedure.

STANDARD OF REVIEW

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the Complaint. In ruling on the motion, the Court will "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). The Court will grant the motion only if the plaintiff is not entitled to relief "under any facts susceptible of proof in the statement of the claim." *ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 289, ¶ 5, 246 P.3d 938, 940 (Ct. App. 2010) (quoting *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996)).

On a motion pursuant to A.R.S. § 12-752, "the court shall consider the pleadings and supporting and opposing affidavits stating facts on which the liability or defense is based." A.R.S. § 12-752(B).

DISCUSSION

*Counterdefendants/Homeowners' Motion to Dismiss
First Amended Counterclaim Pursuant to A.R.S. § 12-752*

A.R.S. § 12-752 (Strategic lawsuits against public participation; motion to dismiss) provides:

A. In any legal action that involves a party's exercise of the right of petition, the defending party may file a motion to dismiss the action under this section.

December 2, 1998, Russoniello Revocable Trust and DDM Enterprises LLC. The counterdefendants also include a group referred to as the "Biltmore Residents". They are Michael Ahearn, Gayle Ahearn, JoAnne Rosensteel, Richard Arroyo, Murray Manaster, Ina Manaster, John Vance, Denise Vance, Shelby Yastrow, Sybil Yastrow, Joseph Russoniello, Moira Russoniello, Joseph Pellillo, and Leslie Pellillo. Additional counterdefendants include Rana Lashgari, Michael Withey, and Arizona Biltmore Neighborhood Association, Inc. (the "AZBNA Counterdefendants"). Both the Biltmore Residents and the AZBNA Counterdefendants joined in the motions to dismiss. For ease of reference herein, the Court employs the short form "Homeowners" to encompass all of the various individuals and entities.

² "SLAPP" is an acronym for Strategic Lawsuits Against Public Participation.

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When possible, the court shall give calendar preference to an action that is brought under this subsection and shall conduct an expedited hearing after the motion is filed with the court and notice of the motion has been served as provided by court rule.

B. The court shall grant the motion unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating facts on which the liability or defense is based. At the request of the moving party, the court shall make findings whether the lawsuit was brought to deter or prevent the moving party from exercising constitutional rights and is thereby brought for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the court finds that the lawsuit was brought to deter or prevent the exercise of constitutional rights or otherwise brought for an improper purpose, the moving party is encouraged to pursue additional sanctions as provided by court rule.

C. The motion to dismiss may be filed within ninety days after the service of the complaint or, in the court's discretion, at any later time on terms that the court deems proper.

D. If the court grants the motion to dismiss, the court shall award the moving party costs and reasonable attorney fees, including those incurred for the motion. If the court finds that a motion to dismiss is frivolous or solely intended to delay, the court shall award costs and reasonable attorney fees to the prevailing party on the motion. For the purposes of this subsection, "costs" means all costs that are reasonably incurred in connection with a motion to dismiss pursuant to this section and includes filing fees, record preparation and document copying fees, documented time away from employment to confer with counsel or attend case related proceedings, expert witness fees, travel expenses and any other costs that the court deems appropriate.

E. This article does not:

1. Affect, limit or preclude the right of the moving party to any remedy otherwise authorized by law.
2. Apply to an enforcement action that is brought in the name of this state or a political subdivision of this state.

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3. Create any privileges or immunities or otherwise affect, limit or preclude any privileges or immunities authorized by law.
4. Limit or preclude a legislative or executive body or a public agency from enforcing the rules of procedure and rules of order of the body or agency.

The thrust of the Homeowners' argument under A.R.S. § 12-752 is that JDM filed its amended counterclaim in an effort to prevent them from challenging JDM's actions through the exercise of their right of petition. More specifically, the Homeowners urge that JDM's amended counterclaim is a direct response to their having sought guidance from the City of Phoenix (the "City") as to the uses permitted under the zoning for the golf courses, having expressed to the City their opposition to the manner in which JDM was using the property, having publicly opposed JDM through the creation of websites and the posting of signs, and finally through the filing of the present lawsuit.

JDM responds that the Homeowners' motion "is fatally flawed because it does not satisfy the basic requirements of A.R.S. § 12-752. [The Homeowners'] argument turns on the incorrect presumption that the [amended counterclaim] is premised on their petitioning activities to [the City] and Zoning Administrator. It is not." Response, at page 2.

Having carefully considered the positions of the parties, the Court is persuaded that each claim in JDM's amended counterclaim is based, at least in part, on the Homeowners' exercise of their right of petition. *See generally* Motion, Exhibit C. Accordingly, the burden shifts to JDM to show "that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law *and* that the moving party's acts caused actual compensable injury to the responding party." A.R.S. § 12-752(B) (emphasis added). JDM is unable to meet this burden. The record before the Court is plain that the Homeowners' exercise of their right of petition was reasonably based in both fact and law (and this being the case, the Court need not reach the "actual compensable injury" prong).

Further to its request for dismissal under A.R.S. § 12-752, the Homeowners request a finding pursuant to A.R.S. § 12-752(B) that JDM brought the amended counterclaim for an improper purpose. The Court agrees, and adopts the Homeowners' reasoning:

JDM's actions warrant findings that the Amended Counterclaim was brought to deter or prevent Homeowners (and others) from exercising constitutional rights, and thus, for an improper purpose, including to harass and cause unnecessary delay and expense. . . . The Amended Counterclaim arises entirely from neighborhood opposition to JDM's proposed development and expanded uses of the Golf Courses. Each claim is expressly premised, at least in part, on protected petitioning activity. Moreover, as set forth more fully in Homeowners' Motion to Dismiss pursuant to

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Rule 12(b)(6), the Amended Counterclaim is so lacking in merit that it cannot be explained without reference to JDM's improper purposes. . . . Pursuant to A.R.S. § 12-752(B), JDM's actions warrant findings that the Amended Counterclaim was brought for an improper purpose.

Motion, at page 16.

*Counterdefendants/Homeowners' Motion to Dismiss
First Amended Counterclaim Pursuant to Rule 12(b)(6)*

The Homeowners' motion to dismiss under Rule 12(b)(6) is premised on two arguments: (1) the amended complaint is barred by the *Noerr-Pennington* doctrine; and (2) the individual claims should be dismissed for a variety of additional reasons. The Court addresses each argument in turn.

The Noerr-Pennington Doctrine

The First Amendment of the United States Constitution protects a person's right to petition the government to seek redress of grievances. *See, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). The right of petition is "among the most precious of the liberties safeguarded by the Bill of Rights." *See White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (quoting *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967)). The principle that a person cannot be held liable as a result of filing a good-faith lawsuit or otherwise seeking government redress is known as the Noerr-Pennington doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *see also United Mine Workers of America v. Pennington*, 381 U.S. 657, 669 (1965).

Noerr-Pennington exists "to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014). "Noerr-Pennington is a label for a form of First Amendment protection; to say that one does not have Noerr-Pennington immunity is to conclude that one's petitioning activity is unprotected by the First Amendment." *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) (quoting *White*, 227 F.3d at 1231). The Arizona Supreme Court recognizes the Noerr-Pennington line of cases as binding precedent. *See Ruiz v. Hull*, 191 Ariz. 441, 457, ¶ 61 (1998) (*en banc*) (citing Noerr-Pennington cases and stating that "[t]he right to petition bars state

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action interfering with access to the legislature, the executive branch and its various agencies, and the judicial branch.”)

Motion, at page 4.

Here, the *Noerr-Pennington* doctrine applies as a backstop to the application of A.R.S. § 12-752, and similarly bars the amended counterclaim as to those claims that seek redress based on protected petitioning activities. *See* Motion, Exhibit 3. JDM’s arguments that the doctrine has not been adopted in Arizona, that it is inapplicable to the claims alleged, and that the sham litigation exception applies are unpersuasive.

The Individual Claims

The Court agrees with and adopts the Homeowners’ additional grounds for dismissal of the contract claims (Counts One, Two, and Four):

The breach of contract claims must be dismissed because: (1) Homeowners (but not the other Counterdefendants) are “Benefited Parties” or third party beneficiaries under the 2003 CC&Rs and cannot be sued thereunder; and (2) JDM has not alleged an actual breach of the 2003 CC&Rs or the Kabuto Settlement by any Counterdefendant. The plain language of the 2003 CC&Rs and the Kabuto Settlement (ignored by JDM) compel dismissal of these claims.

See Reply, at page 5.³

The Court further agrees that JDM’s claim for tortious interference (Count Three) must be dismissed because “the restrictions on uses of the Golf Courses found in both the Kabuto Settlement and the 2003 CC&Rs do not create a right in favor of JDM and they do not establish contract obligations owed by Homeowners (or any Counterdefendant).” Reply, at page 7.

JDM’s claim for abuse of process (Count Five) fails on several grounds. First, the claim fails as to the non-Plaintiff counterdefendants (*viz.*, the Biltmore Residents and the AZBNA Counterdefendants), inasmuch as none of those persons has used process. As to the remaining counterdefendants, JDM fails to support the claim with other than generalized allegations of using litigation in a wrongful manner.

³ The Court accepts, for purposes of the 12(b)(6) analysis, that Plaintiff Palmore Properties Arizona, LLC is a party to the Kabuto Settlement, but it remains that JDM has failed to plead a viable breach of contract claim against Palmore.

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As to JDM's claim for false light (Count Six), the Court agrees with the Homeowners that as an entity, JDM is unable to assert such a claim. *See* Motion, at pages 13-14. Further, as to JDM's claim for defamation (Count Seven), the Court agrees with the Homeowners that dismissal is required by application of the absolute privilege against a defamation charge in the context of a judicial proceeding. *See id.* at pages 14-15.

Finally, and in the light of the above findings, JDM's claim for punitive damages also fails and will be dismissed.

DISPOSITION

IT IS ORDERED granting the Homeowners' Motion to Dismiss First Amended Counterclaim Pursuant to A.R.S. § 12-752, with prejudice.

IT IS FURTHER ORDERED granting the Homeowners' Motion to Dismiss First Amended Counterclaim Pursuant to Rule 12(b)(6), with prejudice.

IT IS FURTHER ORDERED finding, pursuant to A.R.S. § 12-752(B), that JDM brought the amended counterclaim for an improper purpose.

IT IS FURTHER ORDERED awarding the Homeowners their costs and reasonable attorney's fees pursuant to A.R.S. § 12-752(D).