SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-003279 12/05/2002

HONORABLE ROGER W. KAUFMAN

CLERK OF THE COURT
W. Bobrowski
Deputy

FILED: 12/11/2002

ELAINE RICHMOND STEPHEN C LEPLEY

v.

MOUNTAIN SHADOW MOBILE HOME PARK MARK A TUCKER

THOMAS C KLEINSCHMIDT

MINUTE ENTRY

In chambers. This is the time set for Oral Argument on Judge Kleinschmidt's Orders. Plaintiff is represented by counsel, Stephen Lepley. Defendant is represented by counsel, Mark Tucker and Joseph Swan.

Court Reporter, Mike Haley, is present.

Arguments are heard.

IT IS ORDERED taking this matter under advisement.

LATER:

This case has a long and troubled discovery history. At one point, court and counsel discussed the delays occasioned by the repeated filing of motions, responses and replies, and setting matters for oral argument. Court and counsel agreed to have a discovery master appointed. Thomas Kleinschmidt was selected to be the discovery master with consent of the parties. He is experienced in these matters both as a trial court judge and as a judge of the Arizona Court of Appeals.

Over time, several matters were presented to Judge Kleinschmidt. On November 19, 2002 Judge Kleinschmidt entered an "Order Re: Plaintiff's Motion to Strike Defense for Failure

to Comply With Order Compelling Discovery." That order is incorporated, in its entirety, by this reference in this order.

The attorneys next appeared before this court for the final trial management conference. A number of management issues were addressed and counsel raised the question of the Kleinschmidt order and in particular the final paragraph of that order which reads as follows:

"THE SPECIAL MASTER RECOMMENDS that the Court grant the Plaintiff's Motion to Strike and preclude the Defendant from presenting evidence that it properly maintained the mobile home park and the Plaintiff's leased premises by entering evidence that it sought and received extensive plumbing and septic tank services."

Due to the very short time between the entry of the special master's order and the final trial management conference, the court had not read the order. A separate hearing was set for December 5, 2002 with respect to the recommendation.

Judge Kleinschmidt's earlier orders had not been contested. They became orders of the court as a result. It is only his final order that is contested.

After study of the file, oral argument, and review of Judge Kleinschmidt's order, it is clear that both Defense counsel and Defendant were involved in obstructing legitimate discovery and in violating the special master's order of September 4, 2002. His suggested remedy is a severe one. Judge Kleinschmidt explored other potential remedies and found them to be inadequate. At oral argument, this Judge explored with counsel other potential remedies. No adequate suggestion emerged. If this court were to try to craft some other remedy, it is hard to imagine what remedy would be adequate under the circumstances.

Plaintiff claims that Defendant was at fault for uncontained sewage where she lived. Defendant claims that Defendant properly maintained the mobile home park at all relevant times. Defendant produces service records. Plaintiff claims that services were not performed as indicated by the purported records and claims that they are fraudulent. The service providers refused to talk to counsel, one of them reportedly became angry and stated that he was not paid for what work he did. Plaintiff's counsel timely sought discovery, ordered by Judge Kleinschmidt.

At issue are backup payment documents with respect to maintenance of the mobile home park and its septic system. At first, Defendant claimed privilege. Judge Kleinschmidt rejected that claim. Later, Defendant claimed that there <u>were</u> records but there was too much work involved in producing them. Judge Kleinschmidt rejected that claim. Later Defendant claimed that there were <u>no</u> records (related to checks) because there were wire withdrawals from the account. More recently, Defendant has asserted that the wire withdrawals were in favor of a California bank account and checks were written on that account. At today's hearing, Defense counsel has taken the position, based on a very recent conversation with the Defendant, that the

providers of services were not paid and therefore there are no checks drawn on either account. It is now December 5, 2002. Trial is set to begin at 8:15 a.m. on December 13, 2002. There is no practical way to rectify the situation before trial. Plaintiff is deprived of all opportunities that might have been presented to discover the truth of the matter concerning (1) legitimacy of records, (2) the claimed maintenance of the mobile home park, (3) whether vendors continued to provide maintenance or refused because of non-payment for earlier services, and (4) whether other vendors were brought in or not.

Any monetary sanction would be arbitrary at best and would not allow Plaintiff to fairly present a rebuttal to the defense of adequate maintenance. It presently appears that there is evidence available which could have led to depositions, requests for production, interrogatories, or other efforts at discovery. At this point, the only alternative sanction that would make sense to this Judge would be to continue the trial for 6 or 8 months, grant monetary sanctions, and hope for the best. The court notes, however, that Plaintiff is still living in the Mountain Shadows Mobile Home Park. This case was filed relatively early in 2001 and we are now at the last month of 2002. A continuance would in itself be highly prejudicial.

The court agrees with the factual statements of Judge Kleinschmidt (noting that counsel suggest that the October 11, 2002 statement of Mr. Chan should be referred to as a "declaration" instead of an "affidavit").

The court adopts both the factual findings and the reasoning of the special master and accepts the special master's recommendation. The court also finds no acceptable alternative remedy.

IT IS HEREBY ORDERED that the Defendant is prohibited from presenting evidence that the mobile home park was properly maintained at the relevant times.

RULING ON MOTION FOR PROTECTIVE ORDER REGARDING BRYAN HARE

On agreement of counsel for Plaintiff, Bryan Hare shall not be asked questions calling for expert opinions. This agreement makes hearing on the motion for protective order unnecessary. However, if counsel wishes to be heard, he should notify the court as soon as possible.