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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STARCREST, INC., a California) 1 CA-CV 11-0395
corporation,)
) DEPARTMENT D
Plaintiff/Counterdefendant/)
Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
DOUGLAS MILLER,) Procedure)
)
Defendant/Counterclaimant/)
Appellant.)
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20080464

The Honorable David L. Mackey, Judge

AFFIRMED AS MODIFIED

Suits Law Firm, P.L.C. Prescott
By Douglas J. Suits
Attorneys for Plaintiff/Counterdefendant/Appellee

Douglas E. Miller Prescott
Defendant/Counterclaimant/Appellant
In Propria Persona

T H O M P S O N, Judge

¶1 Douglas Miller (Miller) appeals from the trial court's
ruling granting summary judgment to Starcrest, Inc. on

Starcrest's claim to quiet title to its private property and on Miller's claims for access to and use of that property, based on a contract for sale of a ranch from Starcrest to Richard Nelson, from whom Miller subsequently purchased the ranch. For the following reasons, we affirm as modified, holding Miller is entitled to use Starcrest's private property until it is sold to a buyer outside the family.

FACTUAL AND PROCEDURAL HISTORY

¶2 In June 1995, Starcrest entered into a real estate purchase contract (the Purchase Contract) with non-party Richard Nelson by which Starcrest agreed to sell and Nelson agreed to buy the JV Bar Ranch, described as comprising 103 deeded acres in Yavapai County,¹ the JV Bar brand, a State of Arizona grazing lease, a Bureau of Land Management grazing lease, and personal property in the form of range improvements, wells, windmills, corrals, and livestock handling equipment located on the real property and the grazing leases.

¶3 The Purchase Contract also included the following provisions:

Transfer of Water. Seller agrees to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such additional documents and instruments, including without limitation, any deeds,

¹ The 103 acres is also referred to as the "Black Rock" parcel.

assignments, grants or conveyances of water rights, use rights, vested rights, licenses, easements or rights of way necessary for Buyer to acquire the rights to use any water rights and any wells which serve or are located on the Property . . . as well as all easements, licenses or rights of way which may be necessary or convenient for the use of such water rights or wells. Neither any Broker no [sic] the Seller is making any representation or warranty, expressed or implied, concerning rights to, adequacy of or quality of any water supply or water rights with respect to the Property.

Documents and Escrow.

...

C. If there is a conflict between the provisions of the Contract and any escrow instructions executed pursuant hereto, the provisions of this Contract shall be controlling.

ADDITIONAL REQUIREMENTS:

A) Seller will allow Buyer use of and access to livestock facilities and waters so long as title of that parcel remains in Seller's name of Starcrest, Inc. and or family.

¶4 The parties executed Escrow Instructions, which included substantially the same provisions in an attached exhibit. The Escrow Instructions differed from the Purchase Contract, however, in providing that:

Seller will allow buyer use of and access to livestock facilities and waters so long as title of that parcel remains in seller's name of Starcres [sic] Inc. their heirs, successors or assigns.

It also stated that, in the event of a conflict, the provisions of the "real estate contract" would be controlling. As part of the transaction, Starcrest transferred various water rights to Nelson.

¶5 During Nelson's ownership of the ranch, he routinely accessed private lands Starcrest still owned and the waters and livestock facilities on those lands, because he had Starcrest's express permission to do so.

¶6 Miller acquired the ranch from Nelson in December 1999. Miller used Starcrest lands to access the State and BLM leased lands as well as various water rights. He also used Starcrest lands to perform maintenance on wells and storage tanks.

¶7 In March 2008, Starcrest filed a complaint against Miller for quiet title and declaratory relief. Starcrest alleged that Miller refused to recognize that his use of Starcrest's private property, based on an alleged assignment from Nelson, was permissive and was limited in its nature and temporal scope. Starcrest sought a declaration that Miller was entitled to enjoy permissive use of Starcrest's real property limited to "use of and access to livestock facilities and or waters" and only "so long as title of that parcel remains in seller's name of Starcrest, Inc. and or family."

¶8 Miller answered and filed a counterclaim. In his amended counterclaim, Miller alleged that Starcrest had not delivered to Nelson documents necessary to use various water rights, as required by the contract, and that easements or rights of way over Starcrest's private property were necessary to continue his ranching operation on the purchased property. Miller sought specific performance to require Starcrest to provide easements or rights of way over several parcels of real property it owned to access water rights appurtenant to the grazing leases as well as to access water rights on Starcrest's own land. He also sought specific performance to require Starcrest to execute the necessary documents to permit Miller to access and use all livestock facilities and waters on Starcrest property for as long as the parcels are in the name of "Starcrest [sic] Inc. their heirs, successors or assigns," as stated in the Escrow Instructions with Nelson. Alternatively, Miller sought easements by estoppel, prescription, or necessity.

¶9 Each party submitted a motion for summary judgment. Starcrest argued that the only real property sold to Nelson was the 103-acre Black Rock parcel, that the Purchase Contract provided Nelson permissive use of Starcrest's private lands, waters, and livestock facilities "so long as title of that parcel remains in Seller's name of Starcrest Inc. and/or family," and that the language of the Purchase Agreement

controlled over the different language in the Escrow Instructions. Starcrest further argued that Miller was not entitled to specific performance on numerous grounds, including that the claim was time barred, that Miller lacked standing as Nelson's successor-in-interest, and that Miller's reliance on the language in the Escrow Instructions was improper because the instructions had never been recorded. Starcrest also asserted that the term "Property" in the Purchase Contract "Transfer of Water" provision requiring Starcrest to provide access to any wells or water rights that served the "Property" unambiguously referred to only the 103 acres known as the Black Rock parcel and did not apply to the water rights on the grazing leases. Starcrest argued that it had fully performed the purchase contract with Nelson, executed all required transfers, and was not required to provide access across its private lands for Miller to use the leasehold water rights on the State or BLM leased lands. Starcrest disputed that Miller was entitled to any form of easement.

¶10 Miller argued that the Purchase Contract could not be enforced against him because it was unrecorded and he had no notice of the agreement, but that he was entitled to enforce the unrecorded Escrow Instructions because he had actual notice of that document prior to his purchase from Nelson. Consequently, he argued, Starcrest was required to allow him to

use and access livestock facilities and water on its property as long as the parcel was in the name of Starcrest or its "heirs, successors and assigns." Miller also argued that "Property" in the "Transfer of Water" section, was not unambiguously defined in either the Purchase Contract or the Escrow Instructions as limited to the Black Rock parcel, but instead referred to the Black Rock parcel with the two grazing leases. Given that interpretation, Miller argued, Starcrest was required to execute easements and rights of way necessary for Miller "to acquire the rights to use any water rights and any wells which serve or are located on" not just the Black Rock parcel, as argued by Starcrest, but also on the grazing leases.

¶11 After oral argument, the court granted Starcrest's motion for summary judgment. The court found that, regardless of whether the Purchase Contract or the Escrow Instructions controlled, the language of the provision allowing the use of the livestock facilities and water was permissive.

The Court interprets both the Purchase Contract and the Escrow Instructions to provide for a permissive use of Plaintiff's livestock facilities and water. The provisions of both documents start with the phrase "Seller will allow buyer use of and access to" Using the plain meaning of that phrase, the Court concludes that no matter which document is controlling or which document provided notice, the Plaintiff only agreed to provide permissive use of its property for "access to livestock facilities and water". No matter whether

the term of permissive use is modified by the language of the Purchase Contract, i.e. "so long as title of that parcel remains in Seller's name of Starcrest, Inc. and or family." or by the different language of Escrow Instructions, i.e. "so long as title of that parcel remains in seller's name of Starcres [sic] Inc. their heirs, successors or assigns" the use is nothing more than permissive and can be revoked by the Plaintiff or their heirs, successors or assigns at any time. That permissive use ends at any time Plaintiff or Plaintiff's heirs, successors or assigns terminates that permissive use. Under Arizona law, Defendant/Counterclaimant has no right to enforce a permissive use since such use by its very nature can be terminated at any time.

The court rejected Miller's arguments regarding easements by estoppel, prescription, and necessity. The court awarded attorneys' fees to Starcrest pursuant to Arizona Revised Statutes (A.R.S.) section 12-341.01 (2003), on the theory that Miller's counterclaims arose out of contract. The court noted, but declined to address, Starcrest's request for fees pursuant to A.R.S. § 12-1103 (2003).

¶12 Starcrest filed its application for attorneys' fees and accompanying affidavit. Miller did not respond. The court subsequently entered judgment quieting title in favor of Starcrest and awarding fees and costs in the entire amount requested by Starcrest.

¶13 Miller filed a motion for new trial, arguing that the word "will" in the Purchase Contract and the Escrow Instructions

was mandatory and that the court therefore erred in concluding that the language was permissive only and that Starcrest could terminate Miller's use of its property at any time. Miller also argued that he had had no opportunity to respond to Starcrest's application for attorneys' fees because he had never received the application. He contended that he did not have the ability to pay the fees ordered and that such a judgment would impose an extreme hardship.

¶14 The court denied the motion for new trial, stating:

The Court's decision did not turn upon the interpretation of just the word "will." The Court's decision was based upon an interpretation of the entire contract as set forth in both documents as well as property law regarding the permissive use of land.

The court also rejected Miller's arguments regarding the attorneys' fees, stating that the new information would not have changed the court's decision. Miller filed a timely notice of appeal from the judgment and the denial of the motion for new trial. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and (5)(a) (Supp. 2011).

DISCUSSION

¶15 Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). In reviewing a motion for summary judgment, we

determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We review issues of law de novo. *Corbett v. Manorcare of Am., Inc.*, 213 Ariz. 618, 623, ¶ 10, 146 P.3d 1027, 1032 (App. 2006). We may affirm the trial court's judgment on other grounds if we determine that the court reached the correct result for the wrong reason. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 18, 109 P.3d 959, 963 (App. 2005).

¶16 Miller argues that the court wrongly interpreted the word "will" as permissive rather than mandatory in the provision in both the Purchase Contract and the Escrow Instructions that provides that Starcrest "will allow" Nelson the use of and access to the livestock facilities and waters on Starcrest property.

¶17 Interpretation of a contract is a question of law or a mixed question of law and fact, either of which we review de novo. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 257, 681 P.2d 390, 409 (App. 1983). We presume that the parties intended the words used to have their ordinary meaning.

Tucker v. Byler, 27 Ariz. App. 704, 707, 558 P.2d 732, 735 (1976).

¶18 We agree with Miller that the word "will" generally denotes a mandatory intent. See Black's Law Dictionary 1598 (6th ed. 1990). In addition, Nelson testified that he inserted the language because he wanted to establish that he had use of the property until Starcrest sold it. The provision represents an affirmative commitment by Starcrest to permit Nelson's limited use of its land and that commitment is a term of the contract, which is inconsistent with the court's determination that Starcrest could unilaterally terminate Nelson's use of their property.² However, we do not find that this requires reversal of the court's decision in favor of Starcrest.

¶19 The issue presented by the parties was whether the use of Starcrest's private property was allowed only while Starcrest or a family member retained ownership, as stated in the Purchase Contract, or whether the use continued to be permitted even after the property was sold outside the family, as stated in the Escrow Instructions. Both parties to the original transaction,

² We note, too, that Starcrest did not seek such a broad determination. Starcrest's complaint acknowledged that Miller held "an allegedly assigned right of limited permissive use," and sought a declaration that Miller was "entitled to enjoy" the permissive use of Starcrest's real property only so long as it was titled in the name of "Starcrest, Inc. and or family." Starcrest did not take the position that that use, although characterized as permissive, could be terminated at any time.

Jack Stanaland, on behalf of Starcrest, and Richard Nelson, testified that the intent of the parties was to allow Nelson to use Starcrest's private property as long as title to the property was held by Starcrest or the family. Nelson testified that he wanted to ensure that he had use of Starcrest's property "unless they sold it"; he testified that he would have had no legal right to access Starcrest's private property if Starcrest sold the property to someone other than family, but that he could have approached the new owner to reach a separate arrangement. The record contains no contrary evidence as to the intent of the parties in the original transaction, which corresponds to the language in the Purchase Contract.

¶20 In addition, the Purchase Contract declares that, in the event of a conflict between the Purchase Contract and any Escrow Instructions, "this Contract" controls. The Escrow Instructions similarly declare that in the event of a conflict, the "real estate contract" controls.

¶21 Although at one point Nelson testified that he believed the Escrow Instructions constituted the final contract and that he did not know to which document "real estate contract" referred in the Escrow Instructions, he also testified that he had understood that the Escrow Instructions and the Purchase Contract were two separate documents, that the Purchase Contract was the real estate contract, and that the transaction

did not involve any other real estate contract. Stanaland also testified that the Purchase Contract was the only purchase contract involved in the transaction between Starcrest and Nelson. The two documents, taken together, as well as the original parties' understanding, establish that the Purchase Contract controls.

¶22 Miller has argued that questions of fact remain regarding the meaning of the "use" provision and as to whether the Purchase Contract or Escrow Instructions constituted the contract. We find neither issue presents a question of material fact.

¶23 To the extent that the trial court's ruling held that the right to use Starcrest's private property is entirely permissive and could be terminated at any time, we modify that ruling. The use of Starcrest's property ceases upon the sale of the property to a buyer other than a family member as stated in the Purchase Contract. Having determined that Miller's interests are limited in scope to the period when the property is owned by Starcrest, we need not consider Miller's claims regarding missing documentation, easements or specific performance.

ATTORNEYS' FEES

¶24 Miller argues that the trial court abused its discretion in awarding the full amount of attorneys' fees to Starcrest pursuant to A.R.S. § 12-341.01, which authorizes a discretionary award of reasonable attorneys' fees to the successful party in a contested action arising out of contract. A.R.S. § 12-341.01(A) (2003). We find no abuse of discretion in the award below. That award is affirmed.

¶25 Starcrest's request for fees on appeal is denied.

CONCLUSION

¶26 We find that the contract provides for a right to use Starcrest's private property until Starcrest sells the property to a buyer outside the family.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

MICHAEL J. BROWN, Judge