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

CORTEZ ENTERPRISES, INC., an Arizona corporation, Plaintiff-Counterdefendant-Appellant, v. THE TOWN OF CHINO VALLEY, ARIZONA, a municipal corporation, Defendant-Counterclaimant-Appellee.	1 CA-CV 09-0466 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CV-0020061407

The Honorable Michael R. Bluff, Judge

REVERSED AND REMANDED

Bonnett Fairbourn Friedman & Balint PC — Phoenix
by Jerry C. Bonnett
Christina L. Bannon
Attorneys for Appellant

Moyes Sellers & Simms LTD — Phoenix
by Jeffrey T. Murray
Travys Harvey
and
Musgrove, Drutz & Kack, PC — Prescott
by Mark W. Drutz
Sharon Sargent-Flack
Co-Counsel for Appellee

W E I S B E R G, Judge

¶1 Cortez Enterprises, Inc. appeals from the grant of summary judgment to the Town of Chino Valley based on a finding that a contract between Cortez and the Town was unenforceable. For the following reasons, we reverse and remand for further proceedings.

BACKGROUND

¶2 Cortez owns 440 acres of property in Yavapai County, Arizona, and in 2001, the Town attempted to annex Cortez's property. Cortez initially opposed annexation. However, apparently in part because its property was landlocked and had no direct access to a public road, the Town and Cortez entered a Pre-Annexation Development Agreement on September 27, 2001, after which Cortez signed a petition for annexation.

¶3 Paragraph 12 of the Agreement provides:

> The parties acknowledge the need for the eastward extension of Road 4 South to serve the Cortez Enterprises property as well as other properties in the area. *The Town hereby agrees to use its powers of Eminent Domain, if necessary, to acquire*, within 12 months from the completion of the annexation process *a public right-of-way as needed in the general vicinity of the township line dividing Township 16 North*, Range 2 West *from Township 15 North*, Range 2 West and dividing Township 16 North, Range 1 West from Township 15 North, Range 1 West. Cortez may develop a road without permit in the public right-of-way of sufficient

> quality and width to serve its purposes. The Town, either alone or in cooperation with Yavapai County and the Arizona Department of Transportation, will be responsible for widening and improvement of the road beyond the needs of the Cortez Enterprises proposed development.

(Emphasis added.) The Town also agreed to zone the Property for industrial use, to grant a conditional use permit for a sand and gravel operation; and if asked, to rezone the property for residential use. If Cortez withdrew its support of annexation, the Agreement would not bind the Town.

¶4 In November 2001, Assistant Public Works Director Larry A. Wright conferred with the Arizona State Land Department ("SLD") about the process required to obtain the desired right-of-way. Again in May 2003, Wright met with both the right-of-way administrator of SLD, who said the process would take six to ten months, and with the Yavapai County right-of-way specialist, who said the process would take twelve months.

¶5 On June 25, 2003, the Town submitted to SLD an application for a right-of-way over approximately forty-two acres of state trust land. Two nearby land owners objected. In February 2004, the manager of the SLD right-of-way section suggested that the Town instead seek a ten-year easement twenty to twenty-five feet wide and asked for additional information. The Town did not offer evidence that it ever supplied the requested additional information. In October 2004, the parties

extended the Town's time for performance to December 31, 2004. In April 2005, the parties agreed to a second extension to December 31, 2005. In June 2006, the Town asked for another extension to September 30, 2006 because an appraisal using either a fifty or two hundred-foot width was "ridiculously high" and the Town was negotiating with SLD for a lease or easement.

¶6 Also in June 2006, Cortez filed a notice of claim with the Town for breach of the Agreement, and in December 2006 filed suit for specific performance, breach of contract, negligent misrepresentation, and promissory estoppel. Cortez alleged that the parties had contemplated use of Cortez's land for a sand and gravel operation, that its sand and gravel deposits were worth approximately $2.7 million, and that the deposits were "unavailable" because of the Town's breach. The Town answered and by counterclaim sought a declaratory judgment that its performance was impossible because it could not condemn state land; that the Agreement was voidable due to mutual mistake of fact; that the Town had never adopted a budget to pay for any right-of-way and thus could not legally spend money for such a purpose; and that due to the impossibility of the Town's performance, it received no consideration, rendering the contract unenforceable.[1]

[1]In June 2007, the acting manager of the SLD right-of-way section notified the Town that he would recommend denial of the

¶7 Cortez moved for partial summary judgment on its breach of contract and promissory estoppel claims. It also sought judgment on the Town's defense of lack of consideration and its counterclaims of mutual mistake and illegality. The Town responded and cross-moved for summary judgment based on mutual mistake and impossibility. It argued that its good faith efforts to obtain a right of way had been futile, that Cortez had not addressed the Agreement's "fundamental illegality" based on a constitutional prohibition of condemnation of state trust land, and because of that bar, specific performance would be impossible and illegal.[2] In addition, the Town argued that providing the right of way for Cortez's benefit was an illegal gift of public funds and that Cortez's consideration for the Agreement was illusory.

¶8 After hearing argument, the superior court concluded that a basic assumption of the Agreement was the acquisition of some portion of state trust land, that the Town could not condemn that land, that SLD had refused to convey any State

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application as not being in the State's best interest. He termed the road "premature" and noted safety risks to adjoining landowners and grazing operations. A road would divide existing pastures and create "potential issues with cattle movement, drainage, crossings, and availability of water for the ranchers. The SLD denied the application in July 2007.

[2]The Town argued that a promise to change the property's zoning to residential if Cortez were to request such a change was an illegal delegation of zoning power to a private entity. The record indicates Cortez has not requested a change.

land, and thus that the Agreement was unenforceable due to mutual mistake of fact and the impossibility of the Town's performance. The court granted summary judgment to the Town. Cortez moved for reconsideration, which the court denied. Cortez timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶9 This court reviews the grant of summary judgment *de novo*. *Modular Mining Sys., Inc. v. Jigsaw Tech.s, Inc.*, 221 Ariz. 515, 518, ¶ 9, 212 P.3d 853, 856 (App. 2009). Although we will affirm if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is not appropriate if the superior court must weigh conflicting evidence or resolve questions of credibility. *Orme Sch. v. Reeves*, 166 Ariz. 300, 311, 802 P.2d 1000, 1011 (1966). Interpretation of the Agreement presents a question of law for our independent review. *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 395, ¶ 11, 87 P.3d 81, 83 (App. 2004). We turn first to Cortez's assertion that the Town was equitably stopped from asserting various defenses to enforcement of the Agreement.

Equitable Estoppel

¶10 To establish equitable estoppel, Cortez had to show that the Town committed acts inconsistent with a position the Town later adopted; that Cortez relied on the Town's prior

conduct; and that Cortez was injured by the Town's repudiation of its prior conduct.[3] *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 576-77, ¶ 35, 959 P.2d 1256, 1267-68 (1998). Furthermore, Cortez's reliance had to be actual and reasonable under the circumstances. *Id*. at 577, ¶ 37, 959 P.2d at 1268.

¶11 In moving for summary judgment, Cortez asserted that it irrevocably gave up its right to object to the annexation in exchange for the Town's promise to provide the needed right of way and that it relied upon that promise in accepting extensions of the Agreement. As an example of the Town's failure to exert a good faith effort to perform its obligations, Cortez presented evidence showing that the SLD had requested specific information from the Town in February 2004 but that the Town failed to respond. Cortez also noted that the Town had reiterated its promise to perform as required by the Agreement in July 2003, in August 2004, and again in June 2006 when the Town stated that the SLD was "agreeable to [a] long term lease."

¶12 Furthermore, the Town offered a declaration by the Town Engineer, Ron Grittman, that "as early as November 2001,

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[3]Cortez might have asserted a breach of the covenant of good faith and fair dealing, which is implied in every contract and requires each party to act so as not to impair the other party's right to the benefits of their agreement. *Maleki v. Desert Palms Prof. Prop.s, L.L.C.*, 222 Ariz. 327, 333, ¶ 28, 214 P.3d 415, 421 (App. 2009). Such a contention presents a question of fact, which may preclude summary judgment. *Id*.

the Town met with the [SLD] to determine the criteria and process of acquiring the needed right of way" and that in May 2003, the Town again met with SLD for the same purpose. A factfinder thus might conclude that the Town took no action whatsoever in the eighteen-month interval between these meetings. Next, in June 2003, the Town filed an application for right of way over 42 acres of state land, and in February 2004, but when SLD suggested an alternative ten-year lease for a twenty to twenty-five foot easement, the Town apparently took no action to investigate that option. According to Grittman, the Town did nothing else until September 2006 when the Town requested an appraisal of the cost of either a fifty foot or two hundred foot right of way.

¶13 Without explanation, the superior court's ruling did not address Cortez's estoppel argument. Nevertheless, a factfinder could reasonably determine from the cited facts that the Town had not met its duty of good faith to earnestly attempt to secure the promised right of way, that Cortez had reasonably relied upon repeated assurances that the Town was trying to obtain the right of way, and that Cortez had been damaged by that reliance. If so, the Town would be equitably estopped from asserting the defenses of impossibility, commercial frustration, and illegality and could not have prevailed on its request for

summary judgment on those grounds. Accordingly, we reverse the grant of summary judgment to the Town.

¶14 Moreover, for reasons that follow, we conclude that the superior court erred in ruling that the Agreement was unenforceable due to mutual mistake of fact and impossibility of performance.

Mutual Mistake and Impossibility of Performance

¶15 Mutual mistake of fact occurs when the contracting parties have a meeting of the minds and enter an agreement "but the agreement in its written form does not express what was really intended by the parties." *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990). "The mistake must be as to a 'basic assumption on which both parties made the contract.'" *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998) (quoting Restatement (Second) Contracts § 152 comment (b)). Accordingly, the mistake must "upset the very bases of the contract." *Id*. at 513, ¶ 15, 968P.2d at 586. *Emmons* also noted that Restatement § 152 provides that the mistake cannot be one for which the party seeking relief bore the risk and that one seeking to rescind an agreement "must show by clear and convincing evidence that the agreement should be set aside." *Id*.

¶16 Here, the Town promised "to use its powers of Eminent Domain, if necessary, to acquire . . . a public right-of-way as

needed *in the general vicinity* of the township line dividing Township 16 North," Ranges 1 and 2 West from Township 15 North, Ranges 1 and 2 West. (Emphasis added.) The Town offered no evidence, however, that the Agreement failed to express what was really intended in 2001 or that both parties held a mistaken belief about a material term. In its statement of facts, the Town merely said that "both parties believed that the right-of-way necessary for construction of the road across State Land could be acquired either in fee, or though a State Land Roadway Easement, or by eminent domain. However, despite extraordinary efforts, the Town was unable to obtain the necessary right-of-way from the State Land Department." This does not demonstrate a mutual mistake of fact.

¶17 The Town did not allege that at the time of formation, both parties mistakenly believed that the Town could condemn State owned land. Instead, the parties apparently understood that private land owners were in the vicinity of Cortez's property, and in 2003, two of them expressed concern about the Town's request to SLD and one said that it anticipated condemnation of some of its land for a roadway. Furthermore, nothing in the Agreement identified a single and specific route for the right-of-way or suggested that the Town would attempt to place the entire right-of-way across state trust land or that it

could do so.[4] Even if the SLD later declined to give the Town forty-two acres, the Town did not offer evidence that no other route was possible or that it could not at least partially acquire a right-of-way by purchase or condemnation of a private interest. For example, it did not offer evidence that it had tried and failed to acquire a minimal "butterfly" easement across state land to connect a route acquired by condemnation of privately owned land. Therefore, the Town did not establish mutual mistake of fact as a matter of law, and the superior court improperly granted summary judgment on this basis.

¶18 For similar reasons, the court incorrectly found that "there [were] no disputed facts concerning whether it is impossible for the Town to acquire State Trust Land to extend Road 4 South." A claim of impossibility in a commercial setting may be regarded as the existence of "commercial frustration" that prevents a party's performance. Under this doctrine, if performance becomes impossible due to circumstances beyond the parties' control, the non-performing party may be exonerated. *Garner v. Ellingson*, 18 Ariz. App. 181, 182, 501 P.2d 22, 23 (1972). Impossibility may encompass "extreme or unreasonable

[4]Eminent domain generally refers to the government's taking privately owned property for public use. *See* Ariz. Const. Art. 2, § 17; A.R.S. § 12-1111 (2003); *Orsett/Columbia L.P. v. Superior Court*, 207 Ariz. 130, 132, ¶ 8, 83 P.3d 608, 610 (App. 2004) (eminent domain power belongs to the State and may be delegated to other entities, such as a county or city, who act as agent of the sovereign).

difficulty or expense," *id*., but courts often require "proof . . . that the supervening frustrating event was not reasonably foreseeable." *Id*. at 183, 501 P.2d at 24.

¶19 Here, the Town simply alleged that it lacked authority to condemn state land and thus that it was impossible to perform "because it cannot acquire by eminent domain or otherwise the necessary right-of-way." The Town offered no evidence that inability to condemn state land was "not reasonably foreseeable" or that it was extremely difficult or expensive to otherwise acquire the needed land. The Town tried, once, to acquire forty-two acres from the SLD but did not show that it was impossible to secure the needed right-of-way by reducing the requested road width, as SLD had suggested, or by selecting another route that largely traversed private land, which may have required exercise of its eminent domain powers to acquire private land rights and a concomitantly smaller easement over state land. Therefore, the Town did not demonstrate that it was entitled to judgment as a matter of law for either of the reasons relied upon by the superior court.

CONCLUSION

¶20 We reverse the summary judgment in the Town's favor and remand for further proceedings in the superior court. In addition, we award costs and a reasonable attorney's fee to Cortez pursuant to paragraph 10 of the Agreement, contingent

upon its compliance with Arizona Rule of Civil Appellate Procedure 21(c).

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Presiding Judge

/s/_____
JON W. THOMPSON, Judge