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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07-13-2010  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

NORTH & CO., INC., formerly an ) No. 1 CA-CV 09-0652  
Arizona corporation; GERALD D.W. )  
NORTH; SHERMAN BROOK, as Trustee ) DEPARTMENT D  
of the David North II Trust; and )  
CERES INVESTMENTS LIMITED ) **MEMORANDUM DECISION**  
PARTNERSHIP, )  
) (Not for Publication -  
Plaintiffs/Appellants, ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
v. )  
)  
STEPHEN A. KOHNER and JANE DOE )  
KOHNER, Husband and Wife; JAMES )  
F. POLESE and JANE DOE POLESE, )  
Husband and Wife, )  
)  
Defendants/Appellees )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CV2007-092319

The Honorable Louis Araneta, Judge  
The Honorable Karen A. Potts, Judge

**AFFIRMED**

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Guzman PLC ) Higley  
By David Guzman )  
Attorney for Plaintiffs/Appellants North & Co., Inc., Brook,  
Ceres Investments Limited Partnership )  
  
Tiffany & Bosco PA ) Phoenix  
By Dow Glenn Ostlund )  
Attorneys for Defendant/Appellee Kohner )

Meagher & Geer PLLP  
By Kevin T. Minchey, Kurt M. Zitzer  
and Thomas H. Crouch  
Attorneys for Defendant/Appellee Polese

Scottsdale

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**B R O W N**, Judge

¶1 North & Co., Inc., Gerald North, Sherman Brook, and Ceres Investment Limited Partnership (collectively "North") appeal the trial court's dismissal of their complaint against Stephen Kohner and James Polese (collectively "Defendants") for failure to join an indispensable party. For the following reasons, we affirm.

#### **BACKGROUND**

¶2 North & Co., an Arizona corporation that held title to 206 acres of property in Bullhead City, was administratively dissolved in 1993. In 2000, Bullhead City acquired the 206 acres, plus an additional 31 acres (the "Property"), as a result of unpaid assessments. Gerald North, the David North II Trust, and Ceres Investment Limited Partnership are former shareholders of North & Co. or otherwise claim an interest in the Property.

¶3 In May 2004, Bullhead City filed an action in Mohave County to quiet title to the Property. Bullhead City obtained a Stipulation for Entry of Default and Order (the "Stipulation") from Kohner, in which Kohner agreed to an entry of default against North & Co. Polese, as Kohner's attorney, assisted

Kohner in providing Bullhead City with the Stipulation. The Mohave County Superior Court ultimately entered judgment in favor of Bullhead City.

¶4 In 2007, North filed a complaint against Defendants, alleging tortious interference with prospective economic advantage and fraud. North alleged that Kohner, a former president of North & Co., misrepresented himself as a current officer of North & Co. and Polese, an attorney who had represented North & Co. in the past, was aware of the misrepresentation and encouraged Kohner to undertake wrongful acts. North also asserted that despite knowing of Gerald North's interests in the Property, Bullhead City improperly served Kohner with the quiet title action and filed a fraudulent affidavit of service. North further alleged Bullhead City undertook the action to quiet title maliciously, "in order to wrongfully sanitize the transaction by which Bullhead City acquired the Property in 2000-2001 and to wrongfully deprive [North] of their interest in the Property." As a result of these alleged acts, North claimed that Bullhead City, Kohner, and Polese deprived it of its rights to the Property, which it estimated to be valued at approximately \$12 million at the time of the complaint.

¶5 North did not name Bullhead City as a defendant, but stated that it had "filed or will file" a separate action

against Bullhead City in federal district court. North had in fact already filed an action against Bullhead City, along with Defendants, in the United States Bankruptcy Court in 2006. North sought a determination that title to the 206 acres automatically transferred to the shareholders of North & Co. upon its dissolution in 1993 and therefore Bullhead City's quiet title action was null and void. The bankruptcy court dismissed North's claims in 2007 for lack of jurisdiction. North appealed the dismissal as to Bullhead City, but did not appeal the dismissal of the proceeding against Defendants.<sup>1</sup>

¶16 Polese moved to dismiss for failure to join Bullhead City as an indispensable party. Polese argued that, under Arizona Rule of Civil Procedure 19(a), "no final judgment could be entered against Polese and Kohner without injuriously affecting the rights of Bullhead City." Further, Polese argued that he and Kohner would be prejudiced and subject to inconsistent results if Bullhead City was not joined as a party, and that the case could not proceed in equity and good conscience without Bullhead City. Kohner joined in Polese's motion to dismiss. In response, North's only substantive legal argument was that because Defendants and Bullhead City were "joint tortfeasors" or "co-conspirators," North was not

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<sup>1</sup> According to North, the Ninth Circuit Court of Appeals upheld the decision of the bankruptcy court.

obligated to pursue its claims against all of them in the same lawsuit.

¶17 Following oral argument, the trial court found that, under Rule 19(a), "Bullhead City, as an absent party, is conditionally necessary to this action because without Bullhead City there is a substantial risk that the existing parties may be subject to inconsistent obligations." The court further noted that North alleged that "Kohner and Polese assisted Bullhead City in its improper taking of the property in the quiet title action. Therefore, no final judgment can be entered that does justice between the parties in [the] absence of Bullhead City." The court thus determined that Bullhead City could be joined as a party and ordered North to do so no later than August 19, 2008. North appealed the ruling to this court, but the appeal was dismissed for lack of jurisdiction. Defendants submitted a proposed judgment, to which North objected and moved for reconsideration of the court's prior ruling compelling North to join Bullhead City as a party. The court denied the motion and entered judgment dismissing the complaint with prejudice. North timely appealed.

#### **DISCUSSION**

¶18 North argues that the trial court erred in ruling that Bullhead City was an indispensable party and that it could be added as a defendant. Defendants counter that complete relief

cannot be accorded without Bullhead City being made a party. They assert that a finding of liability against them "would necessarily mean that Bullhead City did not properly acquire the land and that it committed fraud." Thus, according to Defendants, Bullhead City has a strong interest in the controversy. Additionally, Defendants contend that they would be subject to inconsistent results if Bullhead City is sued in federal court and the outcome is different from this litigation.

¶9 In reviewing the grant of a motion to dismiss, we accept the truth of all claims pleaded in the complaint and resolve all inferences in favor of the plaintiff. *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996). We review legal issues de novo. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006).

¶10 Pursuant to Rule 19(a), a person should be joined as a party if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or

(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede the person's ability to protect that interest (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

As explained by our supreme court, the "test of indispensability in Arizona is whether the absent person's interest in the controversy is such that no final judgment or decree could be entered, doing justice between the parties actually before the court and without injuriously affecting the rights of others not brought into the action." *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549, 490 P.2d 551, 555 (1971).

¶11 Citing *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990), North argues that Bullhead City is a joint tortfeasor or co-conspirator and therefore not an indispensable party. In *Temple*, a "plate and screw" device, manufactured by Synthes Corp., Ltd., was surgically implanted in the plaintiff's lower spine by a physician. *Id.* at 5. After the surgery, the screws from the device broke off inside plaintiff's back. *Id.* at 6. The plaintiff filed separate suits: (1) against Synthes in federal district court for defective design and manufacture of the device; and (2) against the physician and hospital for malpractice and negligence. *Id.* The district court ordered the plaintiff to add the physician and doctor to the suit against Synthes, based principally on the court's finding that "joinder was [in] the interest of judicial economy." *Id.* The plaintiff failed to join the physician and the hospital and the case was dismissed with prejudice. *Id.* The United States Supreme Court

reversed, finding that the hospital, physician, and Synthes were joint tortfeasors. *Id.* at 7. The Court recognized that “[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.” *Id.* The Court found that the physician and hospital were “merely permissive parties,” and should not have been required to be joined as parties to the suit against Synthes. *Id.* at 8.

¶12 Unlike *Temple*, here there are no separate allegations against various parties, such as the defective design allegation against Synthes and the malpractice and negligence claim against the physician and hospital; instead, all claims relate to an allegation of a fraudulent acquisition of real property through a quiet title action. Synthes and the physician were not alleged to have worked together to commit a tort, and Synthes could have been found liable for defective design regardless of whether the physician and hospital were guilty of negligence. Here, as repeatedly alleged in the complaint, Defendants assisted Bullhead City in fraudulently obtaining the Property and therefore Defendants’ liability depends on whether Bullhead City committed wrongdoing, unlike the situation in *Temple*. A finding on liability on behalf of Defendants necessarily means that Bullhead City improperly acquired the Property.

¶13 In its reply brief, North contends that it is entitled to pursue its claims against Defendants because their conduct



was "*independent of any wrong committed by Bullhead City.*" (Emphasis in original). North therefore asserts that a finding of liability against Defendants "would not necessarily establish the wrongfulness of Bullhead City's conduct, and a ruling that Bullhead City's original acquisition of the property was lawful would not absolve them of liability." But North does not direct us to any allegation or claim in the complaint against Defendants which is not tied to the alleged improper conduct of Bullhead City. Our reading of the complaint confirms that North repeatedly ties together the alleged wrongful acts committed by Defendants and Bullhead City. For example, North asserted that Bullhead City "acquired the Property through a series of improper and unlawful acts" and had "help from Kohner and Polese in accomplishing that goal." North also alleged that Bullhead City perpetrated a fraud against Mohave County Superior Court in pursuing the quiet title action, because, even though Bullhead City "knew that Kohner was not in fact an officer of North & Co.,]" it still chose to serve the action upon Kohner. Further, Polese was alleged to have been "aware of the efforts of Bullhead City to obtain [a] fraudulent Stipulation from Kohner." Regarding the Stipulation, North alleged that "Bullhead City, Kohner, and Polese knew North & Co. had been dissolved in 1993 and Kohner had no authority whatsoever to act on behalf of North & Co." North also asserted that "Bullhead City, Polese, and

Kohner intended conduct to deprive [North] of [its] interests in the Property." Additionally, North believed that "Bullhead City, Polese, and Kohner knowingly failed to disclose [] information to the Mohave County Superior Court, intending to deceive the court into signing the judgment and decree quieting title."

¶14 These specific allegations made by North separate this case from the "usual joint-and-several liability" situation such as that presented in *Temple*. See 498 U.S. at 7; Ariz. R. Civ. Proc. 19 State Bar Committee Note to 1966 Amendment (recognizing the settled principle that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party). On the record before us, we conclude that the trial court correctly determined that Bullhead City was a party that "shall be joined" under Rule 19(a).<sup>2</sup>

¶15 If a person should be joined as a party under Rule 19(a), "but cannot be . . . the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person

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<sup>2</sup> We note that North did not provide us with a transcript of the hearing on the motion to dismiss. See *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984) ("It is, of course, the duty of the appealing party to insure that all necessary transcripts of evidence find its way to this court."). In the absence of a transcript, we presume it would support the trial court's findings. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

being thus regarded as indispensable." Ariz. R. Civ. P. 19(b). Here, we need not address the Rule 19(b) factors, as North has never disputed the trial court's conclusion that it could be joined as a party.

¶16 On appeal, North suggests that adding Bullhead City as a party would be improper because of the bankruptcy court case. Citing *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93 (9th Cir. 1982), North argues that because the federal case was filed first, it created "a presumption of priority for the first-filed suit in order to avoid duplicative litigation and protect a plaintiff's choice of forum." North also suggests that Arizona's venue statutes, Arizona Revised Statutes ("A.R.S.") section 12-401(1), (12), (15), (16) (2003), would affect whether Bullhead City could be joined, as venue would be proper only in Mohave County, the county in which the municipality is located.

¶17 Neither of these arguments, however, was timely presented to the trial court. North raised them for the first time in its motion for reconsideration, which was filed more than a year after the court issued its minute entry ruling ordering Bullhead City to be joined as a party. "Generally we do not consider arguments on appeal that were raised for the first time at the trial court in a motion for reconsideration."

*Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006).

¶18 Even assuming North timely raised these arguments, we do not find them persuasive. Regarding the bankruptcy litigation, the first-filed presumption discussed in *PaceSetter* applies to federal courts of concurrent jurisdiction, not state and federal court cases. 678 F.2d 93, 94-95 ("There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district."). Moreover, as the trial court correctly noted, the bankruptcy court litigation and this litigation do not necessarily involve the same issues.

¶19 As to venue, while the statute permits the suit to be brought within the county in which the plaintiff resides, it does not preclude Bullhead City from being sued in Maricopa County. See A.R.S. § 12-401. If Bullhead City objected to venue after being joined as a party, then the court could evaluate whether venue was improper, and the appropriate remedy under Rule 19(a). The question of venue is irrelevant to determining whether a party "shall be joined." Ariz. R. Civ. Proc. 19(a) ("A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in

the action[.]"). At this point, North's arguments as to what obstacles could lay ahead with regard to proper venue are purely speculative.

**CONCLUSION**

¶20 For the foregoing reasons, we affirm the trial court's order dismissing North's complaint for failure to join an indispensable party.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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JON W. THOMPSON, Judge

/s/

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SHELDON H. WEISBERG, Judge