FILED BY CLERK
AUG -5 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHNSON UTILITIES, L.L.C., dba JOHNSON UTILITIES COMPANY, Plaintiff/Counterdefendant/Appellant, v. PECAN CREEK COMMUNITY ASSOCIATION, INC., an Arizona corporation, Defendant/Counterclaimant/Appellee.	2 CA-CV 2008-0151 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. CV-200801966 and CV-200802104 (Consolidated)

Honorable Robert Carter Olson, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a bench trial, the superior court found appellant Johnson Utilities, L.L.C., had no right to possess land in a wash that Johnson had leased from appellee Pecan Creek Community Association, Inc. ("the association"), and the court entered judgment in favor of the association in its forcible entry and detainer action. On appeal, Johnson claims the trial court applied an incorrect legal standard and lacked sufficient evidence to find the property at issue was "recreational," thereby allowing the association to terminate the lease. Johnson further claims the court erred in rejecting its equitable defenses of laches and estoppel. We affirm the trial court's judgment for the reasons set forth below.

Factual and Procedural Background

¶2 The dispute in this case concerns land in Pinal County in the Queen Creek Wash, which runs through the southern end of the Pecan Creek North subdivision. The evidence presented at trial, viewed in the light most favorable to upholding the trial court's judgment, establishes the following. *See Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 148, 920 P.2d 26, 28 (App. 1996). When the development was begun, in late 2002 or early 2003, the developers planned to turn this portion of the property into a landscaped recreational area with multipurpose trails running along both sides of the wash. To this end, they planted trees, installed irrigation lines, created walking trails, and "buil[t] shaded areas [and] concrete pads" for picnic tables and rest stops. During the construction process,

however, the developers removed the structures due to erosion, and many of the trees were later lost to flooding.

¶3 Near the end of 2005, when it became clear the developers did not intend to complete the wash improvements as originally planned, the association filed a civil complaint against them. In the fall of 2006, the association erected fences that limited access points to the wash from the community. Yet even after these fences were installed, Pecan Creek residents continued to use the wash for recreational activities such as walking, jogging, driving off-road vehicles, and riding bicycles.

¶4 In March 2006, the association leased over one hundred acres in the wash to Johnson, which owned and operated a nearby waste-water treatment plant. Johnson intended to create an underground recharge facility in the wash and began obtaining the necessary permits to do so. Subsequent correspondence from Johnson to the association suggests the parties understood the wash was ultimately going to be used as a "park" and that Johnson was responsible for "the maintainence of the landscape improvements" there under the terms of their open space lease agreement. Numerous planned communities in Arizona have used washes as parks or recreational areas, and Johnson's underground project would not have prevented the wash from being developed or utilized in this fashion.

¶5 Preliminary construction for the recharge facility began in December 2007. The first of two sewage spills in the Pecan Creek community also occurred that month; the second happened in May 2008. Johnson's spills added to an ongoing dispute concerning the

terms of the lease, and the association sent a letter to Johnson in June 2008 purporting to terminate the lease under § 3.11(i) of the community's declaration of covenants, conditions, and restrictions ("CC & Rs"). That provision allowed the association to terminate any lease of "recreational . . . areas or facilities," subject to other conditions not disputed on appeal. The association also alleged the lease was properly terminated as a result of Johnson's various breaches.

¶6 Johnson then filed a complaint for declaratory and injunctive relief allowing it to enter and improve the wash property as permitted by the lease. Several weeks later, the association filed a forcible entry and detainer complaint against Johnson alleging it had breached the lease and illegally retained possession of the premises. The cases were consolidated into one cause number, and the court held an expedited bench trial on the association's forcible entry and detainer claim.

¶7 During the first day of trial, the court told the parties that the § 3.11 termination issue appeared to be dispositive of the forcible entry and detainer claim. The next day, the court continued the trial at the parties' request and bifurcated the issues of breach and termination of the lease pursuant to Rule 42(b), Ariz. R. Civ. P. At the continued trial on the termination issue, the court ordered the association's complaint amended to conform to the

evidence presented and to allege that the lease had been terminated pursuant to § 3.11 of the CC & Rs.[1] The court then found, in relevant part, as follows:

> As to [§ 3.11] subsection (i), the Court takes notice that the purpose of the lease is not for recreational purposes[,] but this does not answer the question under section 3.11 because the question revolves around the purpose of the land as [a] common area of the Association. The terms ["]recreational area["] and ["]recreational facility["] are not defined in the lease[,] so we look to the ordinary and customary meaning of the terms. To this end the court finds the subject property clearly qualifies as a recreational area or facility within the meaning of subsection [(i)]. The Association, therefore, has the right to terminate the lease on 30 days['] notice. The court further notes the prospect of termination pursuant to subsection (i) was raised in correspondence from the Association [to] Johnson Utilities as early as January 2007.
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> Finally, the court finds the Association did i[n] fact give notice of termination pursuant to Section 3.11 no later than receipt by Johnson Utilities of the Association's notice of June 27, 2008 and the tenancy was terminated 30 days thereafter.

¶8 The trial court rejected Johnson's equitable defenses, finding that the association had taken reasonable and diligent steps to assert its rights under § 3.11 and that Johnson had received actual notice the association might do so before construction began in the wash. Having determined the association properly terminated the lease pursuant to § 3.11, the court found Johnson guilty of forcible entry and detainer and entered judgment

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[1]The trial court also permitted Johnson to assert its equitable defenses of laches and estoppel. Johnson does not challenge these orders amending the complaints on appeal.

in favor of the association pursuant to Rule 54(b), Ariz. R. Civ. P. Notwithstanding Johnson's premature filing of its notice of appeal, we have jurisdiction pursuant to A.R.S. § 12-2101(B). *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1194 (2006) (notice of appeal effective when filed before formal entry of final judgment when court's decision final and mere ministerial tasks remain); *Comeau v. Ariz. Bd. of Dental Exam'rs*, 196 Ariz. 102, ¶ 16, 993 P.2d 1066, 1070 (App. 1999) (same).

Lease Termination

¶9 Johnson concedes "the developers originally intended to develop the Wash as a park, and . . . they made some early effort do so." Nonetheless, Johnson argues the relevant period of time for determining the use or purpose of the wash was the date the lease was executed, and "no evidence indicat[ed] . . . the property was or could be used for recreational purposes" at that time. It follows, Johnson contends, that the trial court erred either by concluding "the original purpose of the land determined whether the land was a recreational area" or by "incorrectly appl[ying] legal standards and definitions" to find the wash was a recreational area.

¶10 We review a trial court's interpretation of CC & Rs de novo, but we will accept a trial court's findings of fact unless they are clearly erroneous. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1278-79 (App. 2000). "Factual findings are not clearly erroneous if substantial evidence supports them, even if there is substantial conflicting evidence." *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 9, 18

P.3d 85, 89 (App. 2000). "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999).

¶11 Here, the CC & Rs allowed the association to terminate a lease of a "recreational . . . area[]." CC & Rs are contracts, *see Powell v. Washburn*, 211 Ariz. 553, ¶ 8, 125 P.3d 373, 375-76 (2006), and as with all contracts, we accord the language in CC & Rs its ordinary meaning unless the circumstances show a different meaning applies. *Horton v. Mitchell*, 200 Ariz. 523, ¶ 17, 29 P.3d 870, 874 (App. 2001). The parties agree that no special meaning was intended for the phrase "recreational . . . area[]" as it appears in the CC & Rs. Thus, the trial court did not err by interpreting this phrase as it is commonly understood.

¶12 As a threshold matter, we decline Johnson's invitation to assess whether the wash property was a recreational area based on objective indicia of its use at the time the lease was executed. Although Johnson suggested at oral argument that such an approach would be appropriate to protect a prospective lessee from unexpected risks of termination based on non-apparent uses of property, the relevant provision enforced by the trial court here, § 3.11(i), was designed to protect the interests of prospective homeowners, not future lessees. As the Restatement observes, such provisions are included in CC & Rs to ensure homeowners' associations have control of their common areas and to prevent developers from burdening residents with unsatisfactory, long-term contractual arrangements. *See*

Restatement (Third) of Prop.: Servitudes § 6.19 cmt. d (2000) (observing "[t]he developer's duty to turn over control can be thwarted if the developer obligates the association to long-term arrangements that effectively deprive the owners of control of the common property" and that "[w]hile the association is under the developer's control, the members have little opportunity to protect themselves"). Moreover, the intentions and beliefs of the developers and Johnson when executing their lease in 2006, and the objective conditions of the property at that time, could not have affected the intentions and expectations of the developers and homeowners at the time the CC & Rs were recorded in 2003, the relevant time for determining what specific interests of the homeowners the language in § 3.11(i) protected. Further, and as Johnson conceded at oral argument, it was fully aware of the existence of the CC & Rs before entering the lease and assumed any risk that § 3.11(i) might adversely impact its rights as a leaseholder.

¶13 Nevertheless, we need not decide what specific time frame controls the characterization of the property here, because the evidence established the wash was a recreational area at all potentially relevant times. The developers' original plans, as illustrated by the Pecan Creek Conceptual Wash plan, demonstrated their intention to provide hiking trails and picnic areas on the property; residents used the wash as a recreational area, even after the lease was executed and after the fencing was installed; other washes in planned communities are used as recreational areas; Johnson acknowledged the wash ultimately would be used as a recreational area after the lease was signed; and nothing prevented the

Queen Creek wash from being used as a recreational area once Johnson installed its underground effluent recharge system. Accordingly, the trial court did not apply an incorrect legal standard or definition in reaching its conclusion that the subject property was a recreational area permitting the lease to be terminated. And, because the court's findings are supported by the record, they are not clearly erroneous.

¶14 Pointing to evidence in the record supporting its position, Johnson claims the plan to develop the wash as a recreational area was "abandoned" before the lease was executed, the leased property was "undevelopable" as a park, and the wash could not be a recreational area given that the association limited access to it. But we will not reweigh the evidence on appeal. *See Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986). And because the record supports the trial court's finding that the wash was a recreational area, we will affirm the court's ruling notwithstanding the existence of conflicting evidence. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 535 (App. 2004).

¶15 Nor did the trial court err to the extent it implicitly rejected Johnson's suggestion that the association had abandoned the property as a recreational area before Johnson entered the lease. Johnson points to evidence that the association deliberately restricted residents' access to the wash by installing a fence. Indeed, the association's property manager testified the association erected the fence partly out of concern for residents' safety in the wash. But she also testified "[a]esthetic" considerations played a role

and some of the dangers presented by the wash were due to the developers' failure to complete the planned improvements there. And, as noted, the association presented evidence that homeowners continued to use the wash as a recreational area even after installation of the fences. Thus, the evidence regarding the fencing allowed an equally plausible inference that the wash was a recreational area that simply had yet to be completed. The evidence did not compel the conclusion that the association had abandoned the wash as a recreational site or restricted access to the wash such that it could no longer be characterized as a recreational area.

¶16 In a similar vein, Johnson notes several signs were posted in the wash prohibiting trespassing and warning of a dangerous open pit. From this fact, Johnson apparently concludes that "[a]nyone entering the leased property [wa]s trespassing." Yet the record suggests these signs predate the subdivision itself and were placed there by gravel miners who formerly operated in the wash. Nothing in the record suggests the association installed these signs, nor does the record clearly establish that the association regarded its residents who went into the wash as trespassers. But even if the association had wished to prohibit all access to the wash while its litigation with developers was pending or while the underground recharge facility was being installed, such a restriction would not render the

wash a non-recreational area or constitute abandonment of the association's future development plans.[2] Finding no legal error, we therefore affirm the trial court's judgment.

Equitable Defenses

¶17 Johnson also argues the trial court erred by rejecting its equitable defenses. Johnson contends it "presented overwhelming evidence that the [association] acted in bad faith in its efforts to cancel the lease, such that it should have been prevented by the doctrines of laches and estoppel from being allowed to cancel the Lease."

¶18 We review a denial of equitable relief for an abuse of discretion. *McCloud v. State*, 217 Ariz. 82, ¶ 10, 170 P.3d 691, 695-96 (App. 2007); *see also Korte v. Bayless*, 199 Ariz. 173, ¶ 3, 16 P.3d 200, 201 (2001); *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App. 2007). In so doing, we defer to a trial court's factual findings, whether explicitly or implicitly made, and we will not disturb its ruling unless it is based on clearly erroneous findings. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 65, 181 P.3d 219, 237 (App. 2008); *McComb v. Superior Court*, 189 Ariz. 518, 525, 943 P.2d 878, 885 (App. 1997).

¶19 Laches is an equitable defense that may be raised when one party's unreasonable delay in asserting his or her rights results in prejudice to another party. *See*

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[2]The association has asserted, and Johnson has not contested, that Johnson did not have exclusive possession of the wash under the terms of the lease. Hence, Johnson's own attempts to prevent residents from using the wash as a recreational area are not dispositive in an analysis of the purpose or use of this property.

League of Ariz. Cities & Towns v. Martin, 219 Ariz. 556, ¶ 6, 201 P.2d 517, 519 (2009); *Hull v. DaimlerChrysler Corp.*, 209 Ariz. 256, ¶ 15, 99 P.3d 1026, 1029 (App. 2004). Whereas laches concerns nonaction, estoppel involves affirmative conduct that misleads another. *Decker v. Hendricks*, 97 Ariz. 36, 40, 396 P.2d 609, 611 (1964). Estoppel applies when one party acts inconsistently with a position later adopted, and another party reasonably relies on those actions and suffers substantial injury as a result. *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, ¶¶ 35, 37, 38, 959 P.2d 1256, 1267-68 (1998).

¶20 Here, the record showed and the trial court found that the association terminated its lease as expressly authorized by § 3.11(i) of the CC & Rs, and the association had warned Johnson that it might exercise this option in January 2007—nearly one year before Johnson began construction activities in the wash. Under these circumstances, we do not conclude the trial court erred in implicitly finding Johnson's reliance on the lease unreasonable and rejecting its estoppel defense. Likewise, we cannot conclude the trial court abused its discretion in determining "the Association took reasonable and diligent steps to assert its right under Section 3.11." *See McComb*, 189 Ariz. at 525, 943 P.2d at 885 ("A finding of laches is within the sound discretion of the trial court."). The association attempted to resolve its disputes with Johnson through negotiation, and it terminated the lease six months after construction in the wash first began, shortly after the second sewage spill in the community. Finding no abuse of discretion, we cannot say the trial court erred when it rejected Johnson's equitable defenses.

Disposition

¶21 For the foregoing reasons, we affirm the trial court's judgment finding Johnson guilty of forcible entry and detainer. Johnson has conceded that the prevailing party in this appeal is entitled to an award of reasonable attorney fees and costs pursuant to the lease agreement; hence, we award these fees and costs to the association, provided it complies with Rule 21(c), Ariz. R. Civ. App. P.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge