DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF PHOENIX, a municipal corporation, Plaintiff/Appellee, v. JOHN E. GARRETSON, as Trustee of The EMERY E. OLDAKER TRUST, dated July 30, 1966; JOHN E. GARRETSON, an unmarried man, Defendant/Appellant.	No. 1 CA-CV 10-0620 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-004793

The Honorable John A. Buttrick, Judge (*Retired*)

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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B R O W N, Judge

¶1 John Garretson, as Trustee of the Emery E. Oldaker Trust and individually, appeals the trial court's order finding

(1) he was entitled to compensation only for the period during which a temporary construction easement ("TCE") was in place; and (2) the City of Phoenix's ("the City") settlement offers made before filing a condemnation action qualified as offers of compromise under Arizona Rule of Evidence 408. For the following reasons, we affirm the court's determination of compensation for the TCE but we vacate the court's order relating to the settlement offers and remand for further proceedings.[1]

BACKGROUND

¶2 Garretson owns a parcel of real property ("the Property") in downtown Phoenix, consisting of roughly 36,000 square feet and currently used as a commercial parking lot. The Property abuts Jefferson Street to the north, 1st Street to the east, and Madison Street to the south.

¶3 From March 20, 2006, to March 14, 2007, the City was involved in construction of the Central/East Valley Light Rail ("the Project"). The rail tracks were placed on the south side of Jefferson Street between the one-way eastbound traffic lanes and Garretson's property. Upon completion of the Project, the City placed a concrete barrier along the south side of the light

[1] We address the trial court's ruling on Garretson's claim for loss of access damages by separate opinion filed herewith. Additional background is set forth in the opinion.

rail tracks, which cut off Garretson's ability to use two driveways on his Property that previously permitted access to Jefferson Street.

¶4 In February 2005, the City offered Garretson $1,968 to purchase a TCE on 492 square feet of the Property. The offer explained that the TCE would be for one year or "upon completion of construction," whichever occurred first, and would begin when Garretson received notification of the start of construction along the Property frontage. In July, the City amended the offer to include "damages and cost to cure valuations" stemming from the elimination of the Property's access to Jefferson. The offer valued the damages for the lost access at $196,870, the cost to cure (which it defined as "Addition of Entrance, Parking lot painting, Reconfigure fence and bumpers") at $9,250, and the TCE at $1,968, for a total of $208,088. The appraisal underlying the amended offer explained that after access to Jefferson was terminated, the Property would lose seven parking stalls and the parking lot would have to be reconfigured to allow for traffic flow and access from 1st Street.

¶5 In August 2005, Garretson signed an Irrevocable Right of Entry Agreement ("IREA") granting an "irrevocable right of entry to the City of Phoenix . . . to enter upon [the TCE] for purposes relating to the design, construction, and operation of the Light Rail Transit Project[.]" Garretson agreed not to

"convey by any means, encumber or lease any portion of the [TCE]." The IREA further provided that the City was to negotiate with Garretson to reach agreement on the terms of compensation and if negotiations were unsuccessful, the City would commence an eminent domain proceeding to have compensation judicially determined.

¶6 By letter dated March 1, 2006, Garretson received notice that use of the TCE would commence on March 20, 2006, and that it would be used for the previously agreed upon timeframe. In March 2007, the City notified Garretson's attorney that "the City no longer need[ed] the Irrevocable Right of Entry for the temporary construction easement" on the Property, as construction on the light rail Project was completed. The City stated: "Your client may consider the [IREA] as over. Of course, the City is committed to justly compensating your client for the full year of use of his property along with any other attendant damages as may be warranted." Shortly thereafter, the City filed a complaint in eminent domain to determine the just compensation to be paid to Garretson for the TCE and any damage to "the property and property rights[.]" In his answer, Garretson claimed the right to be compensated for the loss of the Property's access to and from Jefferson Street as well as for damages for the duration of the IREA.

¶7 The City moved for partial summary judgment on damages resulting from the TCE, arguing that a taking commences when the condemning authority takes possession of the property, and therefore Garretson was entitled to compensation only for the one-year period during which the TCE was actually in use. Garretson responded by suggesting that the taking began when the City had the right to enter and occupy the Property and Garretson lost the ability to alienate it or exclude the City from it. Garretson alleged he was entitled to damages for the time between when the IREA was recorded on August 31, 2005, until the time the release was recorded on September 5, 2008, noting that during that time the IREA was a "recorded legal encumbrance" against the Property. The court granted the City's motion, finding that "damages are recoverable only during the period of actual use of the TCE."

¶8 The City also moved for partial summary judgment on the admissibility of its offer letters and supporting appraisals, arguing that because they were offers to settle or compromise under Rule 408 and Arizona Revised Statutes ("A.R.S.") section 12-1116 (2012),[2] they were inadmissible.[3]

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[2] Absent material revisions after the relevant date, we cite a statute's current version.

[3] Prior to filing its motion for partial summary judgment on the admissibility of the offers, the City had filed a "Motion To Exclude Evidence Of City's Pre-Filing Offers To Purchase And

Garretson argued the offers were not made in the context of settlement negotiations, but were a determination of just compensation made by the City, noting they were required to do so under A.R.S. § 12-1116(A). The court granted the City's motion, concluding the evidence was inadmissible under Rule 408.

¶9 Based on the court's rulings, the parties entered into a stipulated judgment against the City in the amount of $7,134 plus interest calculated from March 16, 2007, "as and for full settlement for the [TCE] over the Subject Property and other damages, if any, arising from this action." The judgment provided that Garretson reserved the right to appeal from the partial summary judgment rulings, which he did. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2012).

DISCUSSION

¶10 Summary judgment should be granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).[4] In reviewing a motion for

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Supporting Appraisals." The trial court denied the motion without prejudice because the City failed to comply with procedural requirements governing (1) a motion in limine, *see* Rule 7.2(a) (requiring the parties to confer), or (2) a motion for summary judgment, *see* Rule 56.

[4] Effective January 1, 2013, Rule 56(c)(1) was renumbered as Rule 56(a) as part of a non-substantive reorganization of Rule 56. *See* Ariz. R. Civ. P. 56(h) cmt. Thus, we cite the version currently in effect. *See* Ariz. R. Civ. P. 81.

summary judgment, we determine de novo whether any genuine issue of material fact exists and whether the trial court properly applied the law. *Ochser v. Funk*, 228 Ariz. 365, 369, ¶ 11, 266 P.3d 1061, 1065 (2011).

I. TCE Damages

¶11 Garretson argues the trial court erred in finding that he was entitled to damages only for the period in which the TCE was actually in use and not for the three-year period in which the IREA was in effect. The IREA was recorded on August 31, 2005. Garretson was then notified that use of the TCE would begin on March 20, 2006, and would be used for one year after which time a letter of termination would be sent. One year later, on March 14, 2007, another letter informed Garretson that the IREA for the TCE was no longer needed and that Garretson could consider both terminated. The City did not file a release of the IREA until September 5, 2008. The parties agree that Garretson is entitled to damages for the one-year period in which the TCE was in effect.

¶12 The IREA gave the City of Phoenix, its agents, and representatives an irrevocable right to enter on the Property "for purposes relating to the design, construction, and operation of the Light Rail Transit Project and its related activities." It precluded Garretson from conveying, encumbering or leasing any portion of the Property. Garretson argues that a

"taking" occurred when the IREA was recorded because, at that point, he lost the ability to exclude the City from the Property and lost the right to sell the Property. Citing *Gardiner v. Henderson*, 103 Ariz. 420, 443 P.2d 416 (1968),[5] Garretson argues that a "taking" begins when the government has the right to enter the property.

¶13 Even if we assume Garretson is correct, he has failed to establish a disputed issue of material fact as to damages. Garretson has not identified any injury arising from the IREA as opposed to the TCE. The record does not show that the IREA interfered with the Property or Garretson's use of it, nor is there evidence that the IREA prevented a sale of the Property or that the City used its right to enter the Property outside the timeframe of the TCE, causing disruption resulting in damages.

¶14 Garretson did submit a "Summary Appraisal" as evidence of the amount of damages for the period of the IREA. The appraiser, however, based his calculations on the typical compensation for a TCE. He reported that "just compensation for a [TCE] is based upon a reasonable return for the value of the

[5] In *Gardiner*, which concerned an order for immediate possession, the court held: "While a taking may not be complete until after final judgment and vesting of title, a taking nevertheless commences with an order of immediate possession which permits the condemnor to enter the land, demolish the improvements, and commence the erection of public improvements." 103 Ariz. at 424-25, 443 P.2d at 420-21.

land utilized over the estimated time period for which the land will be encumbered." The appraiser concluded that the reasonable rate of return for a land lease on the Property was twenty percent and then calculated a monthly rate based on that figure. He then applied that rate to the entire time of the IREA, declaring that the TCE had run for that period. That calculation did not take into account whether the IREA actually had any impact on the Property beyond the TCE period. Therefore, we find the court did not err in granting the City's motion for summary judgment on this issue.

II. Admissibility of Offer Letters and Appraisals

¶15 Garretson argues the trial court erred in finding that Rule 408 bars the admission of any offer letters or appraisals made pursuant to A.R.S. § 12-1116(A). Because we are unable to conduct a proper review of the trial court's ruling, we find it necessary to vacate the court's grant of summary judgment on the issue and remand for further consideration.

¶16 "The purpose of the summary judgment rule is to enable trial courts to rid the system of claims that are meritless and do not deserve to be tried." *Orme School v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990). Thus, a trial court should grant a motion for summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that

reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Id.* at 309, 802 P.2d at 1008. A party may therefore seek summary judgment to resolve a claim or defense without the necessity of a trial. *See* Ariz. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."). Notably absent from *Orme School* or Rule 56 is any suggestion that evidentiary matters, such as considerations under Rule 408, are appropriately resolved in a motion for summary judgment.[6] Indeed, Rule 7.2 clearly contemplates resolution of evidentiary matters instead through motions *in limine* and requires that the parties "confer" prior to filing such motion. *See* Comment to Ariz. R. Civ. P. 7.2 ("Subsection (a) of the rule imposes a requirement that the parties meet and confer about evidentiary issues likely to arise at trial.") Nothing in the record before us suggests that the City complied with Rule 7.2(a) when it

[6] We recognize that a party may properly seek summary judgment on the grounds that no admissible evidence exists to support the claim or defense at issue. *See State ex rel. Corbin v. Sabel*, 138 Ariz. 253, 257, 674 P.2d 316, 320 (finding a party's controverting evidence inadmissible and upholding entry of summary judgment). The City's motion for partial summary judgment regarding the settlement offers, however, was not directed at any claim or defense but merely sought to have the court determine the admissibility of the City's pre-filing offers and supporting appraisals.

filed its motion for partial summary judgment seeking to preclude the offer letters.

¶17 Additionally, were we to try to evaluate the trial court's entry of summary judgment on an evidentiary matter, we would be forced to apply mutually exclusive standards of review. *Compare Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 316, ¶ 8, 965 P.2d 47, 50 (App. 1998) ("On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law.") *with Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000) ("We review the trial court's evidentiary rulings for a clear abuse of discretion; we will not reverse unless unfair prejudice resulted, or the court incorrectly applied the law." (internal quotations and citations omitted)). Accordingly, we lack any meaningful standard by which to evaluate the trial court's entry of summary judgment on an evidentiary matter.

CONCLUSION

¶18 For the foregoing reasons, we affirm the trial court's ruling related to compensation regarding the period of time for which Garretson is entitled to damages for the TCE but we vacate the court's ruling on the admissibility of the City's offer letters. We therefore remand for further proceedings consistent with this decision and the opinion filed herewith.

_____/s/_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
PHILIP HALL, Judge