

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 8/13/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

EMPIRE WEST TITLE AGENCY, L.L.C.) No. 1 CA-SA 13-0107
f/k/a EMPIRE TITLE AGENCY OF)
ARIZONA, L.L.C., an Arizona)
limited liability company,) DEPARTMENT E
)
Petitioner,) Maricopa County
) Superior Court
v.) No. CV2011094829
)
THE HONORABLE DAVID M. TALAMANTE,)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for) **DECISION ORDER**
the County of MARICOPA) **(Modified)**
)
Respondent Judge,)
)
DOS LAND HOLDINGS L.L.C., an)
Arizona limited liability)
company; CHESTER & SHEIN, a)
professional corporation;)
DAVID JEMMET, a member of Grant)
Houston Development, L.L.C.,)
)
Real Parties in Interest.)
_____)

This special action came on regularly for oral argument and conference on May 22, 2013, before Judge Patricia K. Norris, presiding, and Judges Michael J. Brown and Diane M. Johnsen, participating.

Empire West Title Agency, L.L.C. ("Empire West") and DOS Land Holdings L.L.C. ("DOS") are parties to a lawsuit over

whether a purportedly abandoned easement providing access to certain real property is covered by a title insurance policy. DOS, the purchaser, sent Empire West, the title company, a closing instructions letter ("CIL") asking Empire West to insure title to property with a legal description that included the easement. Empire West agreed to the CIL, but the policy that issued omitted the easement from the formal legal property description.

Empire West seeks relief from the superior court's April 4, 2013 ruling denying its motion to compel discovery of attorney-client communications to or from DOS that concern the issue of access to the property.

Empire West argues that DOS impliedly put the attorney-client communications at issue by alleging in its breach-of-contract claim that, in agreeing to purchase the property, "DOS relied on the Closing Instructions Description and reasonably believed that it was represented in all documents used at the closing based upon Empire's agreement to accept and comply therewith."

In response, DOS contends its claim of "reasonable belief" is based only on the CIL and does not implicate any communication with its lawyers. It argues that under *State Farm Mutual Auto Insurance Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169

(2000), the attorney-client privilege is not waived absent "an affirmative act of putting the privileged materials at issue."

Lee is distinguishable. The issue in that case was whether an insurer reasonably evaluated and responded to a demand for coverage. Here, on the other hand, the issue is a party's reasonable belief about a particular situation. By pleading a contract claim based on its "reasonable belief," DOS put in issue all information in its possession at the time, including information obtained or imputed to it from any joint venture partners, all of which bear on the reasonableness of its belief that Empire West agreed to provide coverage of the easement.

Accordingly,

IT IS ORDERED that, in the exercise of its discretion, the court accepts jurisdiction of the special action petition. See *Sun Health Corp v. Myers*, 205 Ariz. 315, 317, ¶ 17, 2, 70 P.3d 444, 446 (App. 2003).

IT IS FURTHER ORDERED vacating the superior court's order denying Empire West's motion to compel.

IT IS FURTHER ORDERED that real parties in interest DOS and Chester & Shein shall provide the superior court for its *in camera* inspection the attorney-client communications between Chester & Shein and DOS listed on the privilege log(s) produced in response to Empire West's document request(s).

IT IS FURTHER ORDERED that the superior court shall determine whether Grant Houston and DOS were joint venture partners with respect to the real estate at issue;

IT IS FURTHER ORDERED that if the superior court finds that Grant Houston and DOS were joint venture partners, then real parties in interest Chester & Shein and David Jemmet shall provide the superior court for its *in camera* inspection the attorney-client communications between Chester & Shein and Jemmet listed on the privilege log(s) produced in response to Empire West's document request(s).

IT IS FURTHER ORDERED that the superior court shall, in its discretion, determine which of the communications, if any, are relevant to the issue of the reasonableness of DOS's belief in coverage, and after ordering any redactions it deems appropriate, shall order the disclosure of those communications.

IT IS FURTHER ORDERED that the Clerk of this Court shall provide a copy of this Decision Order to the Honorable David M. Talamante, a Judge of the Superior Court, and to each party appearing herein.

_____/s/_____
DIANE M. JOHNSEN, Chief Judge