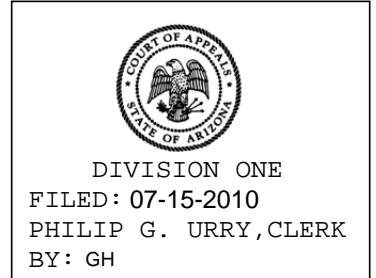


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



KINGMAN AIRPORT AUTHORITY, INC.,) 1 CA-CV 08-0817
an Arizona corporation,)
) DEPARTMENT E
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
CARL W. HAYS and JILL GERNETZKE-) of Civil Appellate
HAYS, husband and wife, dba CARL) Procedure)
W. HAYS ENTERPRISES; M-14P,)
INC., an Arizona corporation,)
)
Defendants/Appellants.)
)

Appeal from the Superior Court in Mohave County

Cause No. CV 2007-0818

The Honorable James Chavez, Judge, Retired

AFFIRMED

Fennemore Craig P.C. Phoenix
By Andrew M. Federhar, Theresa Dwyer-Federhar, and
Al Arpad
Bruno, Brooks & Goldberg, PC Kingman
By Jeffery A. Goldberg
Attorneys for Plaintiff/Appellee

K E S S L E R, Judge

¶1 Carl Hays, Jill Gernetzke-Hays, and M-14P, Inc. (collectively "Hays") appeal from the superior court's grant of summary judgment and preliminary injunction in favor of Kingman Airport Authority, Inc. ("KAA"). We hold that the superior court correctly applied the unambiguous language creating Hays' easement as a matter of law and affirm the superior court's entry of summary judgment.

FACTUAL AND PROCEDURAL HISTORY

¶2 KAA filed suit against Hays in May 2007 seeking declaratory relief and to enjoin Hays from using KAA's airfield for commercial aeronautical purposes without entering a licensing agreement and paying KAA's standard fees. Along with the complaint, KAA filed an application for a temporary restraining order ("TRO") and preliminary injunction. The superior court denied the TRO and ordered an evidentiary hearing on the preliminary injunction. Hays then filed counterclaims based on his claim to access to the airstrip, alleging three claims under 42 United States Code section 1983, breach of contract and negligent misrepresentation and requesting declaratory relief that he had unrestricted rights to access the

airstrip. The evidence at the preliminary injunction hearing showed that KAA required persons or entities conducting off-site commercial aeronautical operations ("through-the-fence") to enter a licensing agreement to use the airfield and runway for commercial aeronautical operations and pay fifty dollars per aircraft per month. The superior court also found that Hays had used the runway four times in connection with work on customer aircraft, that Hays had been invoiced for two hundred dollars, and that Hays had refused to pay the invoice.

¶3 The evidence also included Article XIII, Section L of the conditions, covenants, and restrictions ("CC&Rs") applicable to Hays' property and all property within the industrial park abutting the airport in which Hays' property is situated. The relevant section of the CC&Rs reads as follows:

Certain roads or portions of roads within the Industrial Park are designated as aircraft easements and as such vehicular traffic is required to yield right of way when aircraft are present in the easement. The following roads are designated as aircraft easements: Flightline Drive from the south intersection of Olympic Way to the north intersection of Olympic Way; Finance Way from the intersection of Olympic Way to the intersection of Flightline Drive.

Defendant Carl Hays testified that he believed this section of the CC&Rs memorializes his right to use of the runway. He also believed he had the right to use the airstrip for commercial aviation purposes because of his negotiations with Robert Riley, KAA's director of economic development. Hays also presented

evidence that KAA had consistently allowed commercial aeronautical use of the airstrip to other industrial park landowners without requiring a licensing agreement and fee, and that Hays knew about this practice and relied on it in deciding to purchase property at the industrial park for his business.

¶4 In closing, KAA argued that it could require the license agreement and fee arrangement because of its power to control access to the airfield, that it would suffer substantial harm if it did not receive an injunction, including the potential loss of FAA funding, and that protecting KAA's control over the airfield is a public good because it improves the safety of air travel. Hays argued that he possessed an easement whose scope included use of the airfield and that KAA would suffer little, if any, harm from its inability to collect fee revenue from Hays. The superior court granted a preliminary injunction prohibiting Hays from engaging in "through-the-fence" commercial aeronautical operations of aircraft they do not personally own without first entering a written licensing agreement with KAA.

¶5 KAA filed a motion for summary judgment on its request for declaratory relief relying in part on the evidence and findings at the preliminary injunction hearing. The separate statements of facts regarding the summary judgment motion reveal that each party rested its case on a competing interpretation of

two documents: 1) The CC&Rs incorporated into Hays' deed; and 2) a resolution by the Mohave County Board of Supervisors setting aside certain roads as "airport access roadways." The latter resolution provided that "certain roadway right-of-ways are necessary to provide access to the airport facilities and to serve utilities to the incoming industries [in the Industrial Park]". It then provided a limited right-of-way on Flightline Drive, described as "Airport Access Roads" for the purpose of a "public roadway right-of-way with uses normally attributed to a Dedication of right-of-way for public road and utility purposes," and clarifying that the road was a part of the airport facilities. KAA contended that these documents allow use of the roads to travel to and from the airport, but not unrestricted use of the runway to take-off and land aircraft. Hays argued that he had a right "to gain access from [his] property along Flightline Drive" and onto the airstrip." Hays supported his interpretation of the easement with an affidavit from Robert Riley stating that the intent of several deeds issued to nearby landowners several decades prior to Hays' purchase were intended to include an implied right to gain access to the airstrip.

¶16 The superior court found that the documents did not give Hayes a property right to access the airfield through the fence for providing off-airfield aeronautical-related commercial

services to the public or to access the airfield through the fence for such purposes and granted summary judgment to KAA. The superior court first expressed its judgment in a minute entry with no Rule 54(b) language. The superior court later issued a second order holding that there was "no just reason for delay" and entered a Rule 54(b) final judgment in favor of KAA. The order incorporating the Rule 54(b) language was never received by Hays. Without knowledge of the Rule 54(b) judgment, new counsel associated with Hays filed a motion for reconsideration, rearguing the claim that Hays had a valid easement. The superior court denied the motion for reconsideration, holding that Hays' easement rights permitted access to the airport gate but that Hays needed permission to pass through the gate. Hays also filed a motion for extension of time to appeal, citing lack of knowledge regarding the Rule 54(b) judgment as good cause to extend the time for filing a notice of appeal. The superior court granted the motion pursuant to Arizona Rule of Civil Appellate Procedure 9(a). Hays filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 12-2101(B) (2003).

ANALYSIS

¶17 On appeal, Hays contends that the superior court erroneously entered summary judgment against him because it improperly found that his easement does not include a right of access to and from the runway and that the superior court abused its discretion by entering a preliminary injunction against him. KAA argues that Hays waived his argument concerning the scope of his easement by failing to adequately raise it below, that the scope of the easement does not include unrestricted access to the runway, and that the superior court was within its discretion to enter the preliminary injunction. We hold that Hays raised the easement issue in his separate statement of facts but that the superior court correctly concluded that the scope of Hays' easement does not include access to the runway and other facilities at the airport for through-the-fence operations. We decline to decide whether the superior court abused its discretion by entering a preliminary injunction because we lack jurisdiction to review the preliminary injunction. Moreover, our resolution of the summary judgment moots the issue.

I. The Easement Issue Was Not Waived

¶18 KAA contends that this Court should not consider Hays' contention that an easement permits him access to the airfield including the airstrip because he did not raise the issue below.

Our review of the record reveals that the issue was thoroughly litigated below. Therefore, we will consider the issue on the merits.

¶19 Hays raised his claim to an easement in his separate statement of facts. When a nonmoving party denies a claim in a statement of facts in support of a summary judgment, the denial raises the issue for summary judgment purposes. See *Tobel v. State*, 189 Ariz. 168, 171, 939 P.2d 801, 804 (App. 1997) (holding that the denial of specific facts is sufficient to dispute the facts). KAA's statement of facts in support of summary judgment asserted that Hays' deed does not grant him the right to "unrestricted through-the-fence operations." Hays' statement of facts objected to KAA's assertion regarding the deed and asserted that the property deed in the adjacent industrial part required him to use the property for aircraft restoration and warehousing so that a reasonable person purchasing the property would expect to be able to "access the airfield without further restrictions." Hays also contended that since the easement on Flightline Drive was part of the airport facilities and he had an aircraft easement for taxiing on Flightline Drive, the easement must extend onto the airstrip. The separate statement of facts also attached and cited the two documents Hays relies on to show the scope of his easement. Moreover, at the oral argument Hays stated that the "main issue"

in the case was the scope of his easement. Hays sufficiently raised his easement argument to preserve it on appeal, therefore we will consider it on the merits.

II. Hays' Easement Does Not Include Runway Access

¶10 Hays claims that the superior court erroneously granted summary judgment because his easement allows him airstrip or runway access and the easement cannot end at the gate that blocks further airfield access. We disagree. The plain unambiguous language of the easement allows aircraft use of certain roadways. It does not allow Hays access to the runways or other airport facilities without a licensing agreement.

¶11 We review the superior court's grant of summary judgment *de novo*. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). Summary judgment is appropriate when the record reveals that there are no genuine issues of material fact. Ariz. R. Civ. P. 56(c)(1). We will affirm the superior court's grant of summary judgment for any basis apparent from the record. *Logerquist*, 188 Ariz. at 18, 932 P.2d at 283. The interpretation of an unambiguous easement is a question of law for the court to decide. *Squaw Peak Cmty. Covenant Church of Phoenix v. Anozira Dev., Inc.*, 149 Ariz. 409, 412, 719 P.2d 295, 298 (App. 1986). The superior court may consider only evidence which would be admissible at trial, and may not consider

evidence which would violate the parol evidence rule. *Mason v. Bulleri*, 25 Ariz. App. 357, 359, 543 P.2d 478, 480 (1975).

¶12 The superior court properly granted summary judgment on the scope of Hays' easement because the express unambiguous terms of the easement do not allow use of all airport facilities or the airstrip without the right of KAA to require a licensing agreement. When the language creating the easement is clear and unambiguous, its express terms govern the scope of the easement. *Squaw Peak*, 149 Ariz. at 412, 719 P.2d at 298. The language creating the easement is in the CC&Rs and a resolution of the Mohave County Board of Supervisors. The language creating the easement merely says that the road is an aircraft easement and that traffic on the road must yield to aircraft. The relevant resolution sets aside Flightline Drive as an "airport access roadway".¹ The clear intent of these documents is to create a road that enables vehicles and aircraft to travel on the designated roadways. It does not create a right to use the airport generally, or use the airstrip, unrestricted by the right of KAA to require a licensing agreement. Therefore, we affirm the superior court's grant of summary judgment on the scope of Hays' easement.

¹ It is undisputed that Flightline Drive is actually on airport property.

¶13 Hays contends that the language creating his easement is ambiguous on its face because his deed requires him to build "an aircraft restoration and warehousing facility" and an aircraft easement without runway access would create a mere "bridge to nowhere" that no rational real estate purchaser would accept. We disagree. The unambiguous language of the easement creates a right more like a bridge to a toll road than a bridge to nowhere. The right to access a portion of the airport on the roadway permits M-14P's aircraft restoration business to continue operating on Hays' property; the fact that further airport access would be provided subject to a reasonable fee and a licensing agreement is not so unreasonable that no rational purchaser would accept it.²

¶14 Hays also contends that parol evidence of a contrary intent creates a genuine issue of material fact and precludes summary judgment. We hold that the easement rights created by the CC&Rs are not reasonably susceptible to the interpretation supported by Hays' parol evidence. The parol evidence is therefore inadmissible and does not create a genuine issue of material fact precluding summary judgment.

² In a motion filed in this Court, Hays contended that the only issue before the trial court was the extent of the easement and not Hays' counterclaims. Hays correctly points out a proposed licensing agreement is not in the record, but ignores his stipulation with KAA and the trial court's acceptance thereof that if this Court affirms the judgment, Hays will stipulate to dismiss his counterclaims.

¶15 The parol evidence rule applies to an easement created in CC&Rs because CC&Rs are primarily contractual in nature. See *Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006); *Restatement (Third) of Property (Servitudes)* § 4.1 cmt.d (2009) (incorporating the parol evidence rule from the *Restatement (Second) of Contracts* when interpreting restrictive covenants). The parol evidence rule is particularly important when construing CC&Rs, because they run with the land and will eventually bind individuals who were not parties to the original agreement and do not know the circumstances of its creation. *Id.*

¶16 The parol evidence rule governs attempts to use extrinsic evidence to alter or vary the meaning of an express easement. *Gulotta v. Triano*, 125 Ariz. 144, 145, 608 P.2d 81, 82 (1980). When a party offers parol evidence, the superior court considers the parol evidence and the language of the easement and determines whether the easement language is “reasonably susceptible” to the meaning supported by the proffered parol evidence. *Taylor v. State Farm. Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993). This determination is a question of law. See *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005) (“Although determination of the intent of contracting parties from extrinsic evidence may require fact finding,

whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is even admissible is a question of law for the court."); *Hartford v. Indus. Comm'n*, 178 Ariz. 106, 111, 870 P.2d 1202, 1207 (App. 1994) ("Whether a contract is ambiguous is a question of law.") (citations omitted). If the judge determines that the contract is not reasonably susceptible to the view supported by the extrinsic evidence, then the extrinsic evidence is not admissible and does not create a genuine issue of fact to preclude summary judgment. *Taylor*, 175 Ariz. at 152, 154, 854 P.2d at 1138, 1140; *Mason*, 25 Ariz. App. at 359, 543 P.2d at 480.

¶17 The documents creating the easement are not reasonably susceptible to the view favored by the parol evidence. Resolution 1272, which created the easement on Flightline Drive, stated that Mohave County and the KAA were negotiating with industries for development of the industrial park and "certain roadway right-of-ways are necessary to provide access to the airport facilities and to serve utilities to the incoming industries [to the Industrial Park]". It then provided a limited right-of-way on Flightline Drive, described as "Airport Access Roads" for the purpose of a "public roadway right-of-way with uses normally attributed to a Dedication of right-of-way for public road and utility purposes," and clarifying that the

road was a part of the airport facilities. The CC&R's provided, in pertinent part, that Flightline Drive within the Industrial Park was "designated as aircraft easements and as such vehicular traffic is required to yield right of way when aircraft are present in the easement." At most, the documents merely permit aircraft access on a road within the airport and give the aircraft the right of way on the road; they do not state that as part of the easement, an owner in the industrial park would have access to all airport facilities including the airstrip without further agreement by the KAA. Hays relies on evidence that including access to the runway in the scope of the easement comports with the purpose for which the easement was created, that KAA has regularly allowed unrestricted access to the runway, and that KAA represented that the easement existed when he purchased the property. This evidence all supports the contention that the scope of the easement includes access to the airport runway without further permission of the KAA. However, the language creating the easement is not reasonably susceptible to the view supported by this evidence, so it is inadmissible parol evidence. See *Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. Because it was not admissible, it does not create a genuine issue of fact precluding summary judgment. See *Mason*, 25 Ariz. App. at 359, 543 P.2d at 480.

¶18 The superior court correctly construed the unambiguous easement language as a matter of law. The language creates an easement over Flightline Drive, allowing aircraft access to and from a certain portion of the airport. It does not create a right to use all the airport facilities, including the airstrip, without further agreement of the KAA. We affirm the superior court's entry of summary judgment based on the unambiguous terms of the easement.

¶19 Hays also appeals the entry of the preliminary injunction. However, we lack jurisdiction to consider the preliminary injunction because Hays did not timely file a notice of appeal. An order granting a preliminary injunction is appealable pursuant to A.R.S. § 12-2101(F)(2). A party must file a notice of appeal within thirty days of the appealable order. Arizona Rule of Civil Appellate Procedure 9(a). Because Hays failed to file a timely notice of appeal, we lack jurisdiction to review the preliminary injunction. Further, because our decision to affirm the summary judgment moots the appeal from the preliminary injunction, we need not address it. See *Brethauer v. Gen. Motors Corp.*, 221 Ariz. 192, 201, ¶ 33, 211 P.3d 1176, 1185 (App. 2009).

III. KAA Is Not Entitled To Attorneys' Fees On Appeal

¶20 KAA request attorneys' fees pursuant to A.R.S. § 12-341.01(A) (2003) and costs pursuant to A.R.S. § 12-341 (2003).

In our exercise of discretion, we decline to award attorneys' fees to KAA. KAA is entitled to costs on appeal pursuant to A.R.S. §§ 12-341, -342 (2003) upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).

CONCLUSION

¶21 For the foregoing reasons we affirm the superior court's grant of summary judgment in favor of KAA.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PHILIP HALL, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge