

OPEN MEETING AGENDA ITEM

Docket No: WS-20794A-11-0140, WS-20794A-11-0279 & SW-20851A-12-0226



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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DII-Emerald Springs, LLC
212 E. Rowland Street #423
Covina, CA 91723

October 8 2014

Docket Control Center
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

RE: ORDER DATED September 29, 2014
Docket Nos. WS-20794A-11-0140, WS-20794A-11-0279, and SW-20851A-12-0226

DII-Emerald Springs, LLC ("DII") provides the following response to Order dated 9-29-14:

DII clarifies the following: Page 3, line 5 (item 7) does not reflect the actual facts... If it reads as follows it will represent the actual events: In June 2003, DII purchased 33 lots within the subdivision. In 2004, after the dispute with Mr. Thompson; the HOA asked DII to help with the sewer problem. DII then purchased a sewer treatment plant and eventually started to service the HOA per their request... (DII did not begin constructing a WWTP to serve its properties. DII did not need sewer service for around 2 years after purchasing the 33 lots).

DII motions to postpone scheduled hearing on October 16, 2014 for 90 days or until the civil case is completed-settled (see attached letter from attorney representing DII in civil case). There is a civil lawsuit against the HOA filed at the La Paz Superior Court. This case will negatively impact the HOA and its members. DII believes once the HOA members find out the potential liability to each of them; the HOA may be required by its members to reconsider the sewer situation. ACC has been informed the HOA board has not informed any members of this case or anything else related to the sewer issue.

1. DII is requesting the above motion in consideration and fairness towards DII. The ACC and Staff have been excessively fair and understanding towards Mr. Thompson's lack of response to every single procedural order. In fact, Mr. Thompson took over ONE (1) year to comply with his application, yet staff was very supportive and understanding to the lack of compliance from Mr. Thompson's.
2. The considerations were also extended to the HOA and Robhana by giving them over ONE (1) year to form, a paper district; that does not provide a real solution to the sewer issues at the subdivision.

Based upon the foregoing, DII Respectfully requests the same considerations given to others as mentioned above be also given to DII by granting the requested motion.

If additional information or clarification is required, please contact me at 626-664-0602.

Sincerely;



DII-Emerald Springs, LLC
Henry Melendez, President

THE LAW OFFICE OF ADAM HAUF
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October 8, 2014

Arizona Corporation Commission
Attn: Jodi Jerich
1300 W. Washington St.
Phoenix, AZ 85007

RE: DII Emerald Springs, L.L.C., Docket #WS20794-11-0140

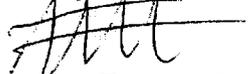
Dear Ms. Jerich,

This firm represents DII Emerald Springs, L.L.C. ("DII") in the litigation now pending in the Superior Court of Arizona, La Paz County, Case No. CV2013-00073 against Emerald Springs Homeowners Association (the "HOA").

DII commenced litigation against the HOA on the 31st day of July, 2013 for breach of contract and specific performance. After a series of motions the court on July 2, 2014 granted DII's Motion to Amend Complaint. A copy of the Court's Minute Entry is attached to this letter and made a part of it by reference. DII through the law firm is presently proceeding with discovery in the litigation.

If you have any questions or wish further information please contact me or my senior paralegal Stanford Lerch at 602-850-0700 extension 218.

Very Truly Yours,



Adam E. Hauf, Esq.

LA PAZ COUNTY
SUPERIOR COURT CLERK
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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF LA PAZ**

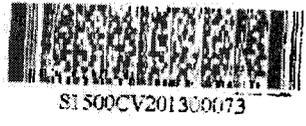
DII EMERALD SPRINGS, LLC, by
Assignment from Dynamic Financial
Investment & Services, Inc. on the 4th day
of October, 2004,
Plaintiff,

vs.

EMERALD SPRINGS HOMEOWNERS
ASSOCIATION, an Arizona nonprofit
corporation,
Defendant.

CASE NO. CV201300073

ORDER UNDER ADVISEMENT
RULING



On May 6, 2014, the Defendant, Emerald Springs Homeowners Association (ESHOA) was heard on its Motion to Dismiss (MTD) and its Motion to Strike (MTS), which were filed on September 6, 2013, and October 16, 2013, respectively, against the Plaintiff, DII Emerald Springs, LLC (DII). In addition to the MTD and MTS, DII was heard on its Motion to Amend (MTA). At the conclusion of the hearing the Court took the matter under advisement. The Court now issues its ruling below.

FACTUAL AND PROCEDURAL HISTORY

On July 31, 2013, DII filed a complaint against ESHOA, that contains two counts, breach of contract and an action for specific performance.

On September 6, 2013, ESHOA filed its answer and moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

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On January 14, 2014, DII filed a motion to amend the complaint to contain an additional count for reformation of contract.

On February 3, 2014, ESHOA filed its response to DII's motion to amend the complaint.

DISCUSSION

DII moves to amend the complaint pursuant to Rule 15(a), *Arizona Rules of Civil Procedure*. Rule 15(a), *Id.* states, "...Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party..." ESHOA does not consent.

Rule 15 further states, "...Leave to amend shall be freely given when justice requires..."

ESHOA moves to dismiss the complaint pursuant to Rule 12(b)(6), *Id.*, failure to state a claim upon which relief can be granted.

"Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof...'" *Coleman v. City of Mesa*, 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012) (internal citation omitted).

"...In determining if a complaint states a claim on which relief can be granted, courts must assure the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient..." *Id.* at 356, 867.

'Courts look only to the pleadings itself ...a complaint's exhibits, or public records regarding matters referenced in a complaint, are not outside the pleadings.' *Id.* at 356, 867.

The Court finds justice requires DII be granted leave to amend the complaint. In its pleadings DII has alleged facts sufficient to state a claim upon which relief can be

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granted. Specifically, at the very least, that the services agreement standing alone does not reflect the intent of the parties.

'When ruling on a motion pursuant to Rule 12(b)(6), the Court does not resolve factual disputes between the parties on the undeveloped record. The issue before the Court is whether the pleading states a sufficient claim to warrant allowing the Plaintiff, DII, to attempt to prove its case. Whether DII can prove a claim for relief will depend on the course of the proceedings at trial.' *Id.* at 363, 874.

On October 16, 2013, ESHOA filed a motion to strike the supplemental response that was filed by DII on October 11, 2013. "...[A] court may order stricken from a pleading 'any redundant, immaterial, impertinent, or scandalous matter,' such motion is not favored and should not be stricken from a pleading unless it is clear that it can have no possible relation to the subject matter of the litigation and the movant can show he is prejudiced by the allegations..." *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 395, 381 P.2d 107, 114 (1963).

The Court finds the supplemental response filed by DII is related to the subject matter of the litigation and that ESHOA has not shown it is prejudiced by the allegations contained in the supplemental response.

CONCLUSION

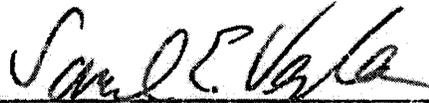
IT IS ORDERED granting DII's motion to amend the complaint pursuant to Rule 15(a), *Arizona Rules of Civil Procedure*.

IT IS ORDERED denying ESHOA's motion to strike the supplemental response filed by DII on October 11, 2013.

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IT IS FURTHER ORDERED denying ESHOA's motion to dismiss the complaint pursuant to Rule 12(b)(6).

DATED this 1 day of July, 2014.



Samuel E. Vederman, Presiding Judge
La Paz County Superior Court

COPIES of the foregoing mailed/delivered
this 2 day of July, 2014 to:

Kenneth R. Pinckard, Esq.
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Attorney for Plaintiff

Julie A. LaBenz
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Parker, Arizona 85344
Attorney for Defendant

By: 
Clerk/Deputy Clerk