

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-004568

03/07/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
L. Nelson
Deputy

DARRELL HULSING, et al.

LOREN R UNGAR

v.

TOWN OF CAVE CREEK, et al.

LISA T HAUSER

WILLIAM H DOYLE

RULING

The Court has considered the following: (1) Defendants' Motion for Partial Summary Judgment and Statement of Facts filed on September 30, 2016; (2) Plaintiffs' Response and Statement of Facts; (3) Defendants' Reply; (4) Plaintiffs' Objections to Defendants' Controverting Statement of Facts; and (5) the arguments of counsel presented at the January 9, 2017 hearing. It now makes the following findings and orders.

Factual Background

In 2008, the Town of Cave Creek ("the Town") performed certain work in the Galloway Wash. Plaintiffs allege that the work was not authorized and caused realignment of a tributary, changed the water flow pattern, and increased turbulence and erosion conditions. These conditions, in turn, caused damage to Plaintiffs' abutting property during an unusually heavy rainfall on August 19, 2014.

Plaintiffs filed a Complaint against the Town and Usama Abujbarah, the former Town Manager, on June 2, 2015, asserting the following causes of action: (1) violation of A.R.S. §48-3613; (2) violation of A.R.S. §12-1134 – Proposition 207; (3) inverse eminent domain; (4) negligence; (5) negligence *per se*; (6) trespass; and (7) nuisance. Defendants' Motion for Partial Summary Judgment is directed to Count 2, violation of A.R.S. §12-1134 (Proposition 207).

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Legal Analysis

Defendants argue that they are entitled to summary judgment on Count 2 because: (1) Plaintiffs have failed to identify a qualifying “land use law” under §12-1134; and (2) Plaintiffs failed to comply with the notice provision set forth in §12-1134(e).¹

A. Failure to Identify a “Land Use Law”

A.R.S. §12-1134, titled “Diminution in value; just compensation,” reads in relevant part as follows:²

A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

The definition of “land use law” is provided in A.R.S. §12-1136(3):

“Land use law” means any statute, rule, ordinance, resolution or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land or that regulates accepted farming or forestry practices.

In their Response, Plaintiffs, apparently for the first time, cite the Town’s adoption of “erosion hazard zones” as the qualifying land use law, relying on Defendants’ expert report. They argue:

Defendants’ own expert . . . references an “officially designated erosion hazard zone mapped as part of the FCDMC Cave Creek Drainage Master Plan,” which effects [sic] the Plaintiffs’ Properties and would require certain action on the part of Plaintiffs. [Citation omitted]. Further during the depositions of Darrell Hulsing and TC Thorstenson, Defendants’ counsel questioned Plaintiff about Plaintiffs’ proximity to an officially-designated erosion hazard zone. [Citation omitted]. In order for such an “official designation” to arise, the Town would have had to

¹ Defendants also argued that Darrell and Meridy Hulsing had no standing to bring the claim because the Blackbird Trust (of which they are trustees) is the legal owner of the property. The Court allowed Plaintiffs to amend the Complaint to name the Hulsings as Trustees of the Blackbird Trust. Thus, this issue is moot.

² This law is also known as the Arizona Private Property Rights Protection Act.

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adopt or implement the FCDMC Cave Creek Drainage Master Plan. Such adoption and implementation would give rise to Defendants' "officially designated" zones, and constituted a "land use law" as defined by A.R.S. §12-1136(3), and Plaintiffs' Prop 207 claim.

However, Plaintiffs fail to explain how the designation of any erosion hazard zones has reduced their right "to use, divide, sell or possess" their property or how it has resulted in a diminution of the property's fair market value. In the Court's view, that Plaintiffs did not identify the land use law until filing their Response to the Motion for Partial Summary Judgment demonstrates that they had not fully evaluated the claim, particularly as it relates to their other causes of action.

Even more telling, however, is Plaintiffs' argument in their own Motion *in Limine* Number 5 seeking to exclude Defendants' expert's "speculative assertion that Plaintiffs' Properties [were] in an 'officially designated' or other official 'erosion hazard zone' as inadmissible hearsay, speculative, would cause unfair prejudice, confuse the issues, mislead the jury and should be excluded under A.R.E. 403." Mot. at 1. Yet, this is the exact testimony Plaintiffs rely on as a basis for the land use law under Count 2. Moreover, at the February 24, 2017 hearing, after the Court advised the parties that it intended to grant Defendants' Motion for Partial Summary Judgment, Plaintiffs' counsel stated that his clients had wanted to stipulate to withdraw the claim. Defense counsel objected to any withdrawal/dismissal of the claim and asked the Court to issue its written ruling.

B. Failure to Comply with Notice Provision Set Forth in A.R.S. § 12-1134(e)

As the Court has determined that Defendants are entitled to summary judgment on Count 2 due to Plaintiffs' failure to identify a qualifying "land use law," it declines to address Defendants' arguments regarding Plaintiffs' failure to comply with the statutory notice provision.

For these reasons,

IT IS ORDERED granting Defendants' Motion for Partial Summary Judgment on Count 2 of the Complaint (Violation of A.R.S. §12-1134 – Proposition 207).