

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-022854

01/29/2007

HONORABLE PETER SWANN

CLERK OF THE COURT
L. Firriello
Deputy

RITA C SPIZZIRRI

LARRY J COHEN

v.

TERESA S THAYER, et al.

TIMOTHY J THOMASON

MINUTE ENTRY

Pending before the Court is Plaintiff's Motion for New Trial. The Court has considered the parties' briefing and heard oral argument. For the following reasons,

IT IS ORDERED denying the Motion for New Trial.

Three of the five issues decided in connection with Defendants' Motion for Summary Judgment are presented in the Motion for New Trial. They will be discussed in the order presented.

1. The Tax Refund. Plaintiff's principal contention is that in relying on Judge Foster's earlier ruling concerning the lack of community interest in the tax refund, the Court committed a fundamental logical error of "bootstrapping." The Court disagrees. While Judge Foster mentioned the Property Settlement Agreement drafted by the Defendant in this case, his principal ruling was based upon the evidence, the law and the prenuptial agreement (which Defendant did not draft) that was presented at the hearing before him. The content and effect of the Property Settlement Agreement were not essential to his ruling, and this Court's earlier decision did not suffer from the logical flaw urged by Plaintiff.

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2. The Alaska Property. Plaintiff argues the Court failed to appreciate her claim that Defendant committed malpractice by not providing for security against diminution in the value of her interest in the Alaska property by the actions of third-party creditors. The Court understands the argument, but rejects it as a matter of law. This portion of the negotiated agreement dealt with tenancy by the entireties' property that was already beyond the jurisdiction of the Arizona courts. Plaintiff's interest was preserved to her. While it may have been desirable in retrospect to have every interest not only confirmed but guaranteed by independent security, there is no evidence that this extraordinary protection was practically available to Plaintiff – either through trial or settlement – but for the negligence of her attorney. Had Plaintiff chosen not to settle her divorce case, but to proceed to trial, it is extremely unlikely that anything resembling the security arrangement she now seeks would have been awarded at trial – and no expert testimony has been offered to suggest otherwise. Absent such evidence, it would be reckless of the Court to permit legal malpractice actions to proceed on the notion that in some theoretical world a more advantageous agreement would be imaginable.
3. Nothing in the Motion for New Trial changes the Court's analysis with regard to the alleged malpractice in failing to provide a separate security interest to guarantee Plaintiff's receipt of \$700,000 from the sale of the marital residence. The residence had not sold at the termination of Defendant's work in this case, and Plaintiff was under no obligation to agree to a sale that would provide insufficient funds at closing to satisfy her contractual rights. It strains logic to suggest that Defendant should be liable for failing to provide security for the deficiencies arising from a low-price sale over which *Plaintiff* had control.