Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-039634 06/01/2010

HONORABLE HUGH HEGYI

CLERK OF THE COURT
K. Ballard
Deputy

ARIZONA PUBLIC SERVICE COMPANY ROBERT J MOON

v.

DEER VALLEY LODGING INVESTORS L L C, et al. DALE S ZEITLIN

MARY COLLINS CRONIN

RULING

This matter came on for oral argument before the Court on May 18, 2010 with regard to the January 15, 2010 Motion to Dismiss (hereafter referred to as the "Motion") by Defendant Deer Valley Lodging Investors, LLC ("Defendant" or "Deer Valley"). Following argument the Court took the matters presented under advisement. Having further considered these matters,

IT IS ORDERED denying the Motion.

Defendant alleges Plaintiff failed to comply with A.R.S. § 12-1116(A) by:

1. Joining the underlying property owner, the State of Arizona Land Department, and two lessees, Deer Valley Hotel Investors II, LLC ("Hotel") and Deer Valley Restaurant Investors, LLC ("Restaurant"). Both the Hotel and Restaurant LLCs are Wisconsin LLCs.

2. Not delivering the property owner and lessee a written offer and appraisal at least 20 days before it begins the action.

Its Motion must be denied unless it appears that Plaintiff would not be entitled to relief under any state of facts susceptible of proof under the pleadings. Dressler v. Morrison, 212 Ariz. 279, 130 P.3d 978 (2006).

Plaintiff has attempted to join the Hotel and Restaurant LLCs as Defendants through its January 14, 2010 Notice of Filing Amended Complaint (the "Notice"), albeit ineffectively. Since Plaintiff filed its Motion before the Notice,

IT IS ORDERED Plaintiff shall move to amend its Complaint to add these entities as Defendants within 30 days. If the entities are not added as Defendants, Defendant may renew its Motion to Dismiss for Plaintiff's failure to join these Defendants.

As to Defendant's contention that the Complaint should be dismissed because Plaintiff failed to deliver the State Land Department ("Land Department" or the "State") a written offer and appraisal before beginning this action, that request is denied without prejudice to Defendant raising it in a motion for summary judgment or requesting an evidentiary hearing. Although Plaintiff's Complaint does not expressly allege service, Defendant has not argued that such an allegation was required, and the Complaint is susceptible of proof that the service occurred.

The parties' principal disagreement is whether the State, as the fee simple owner of the property in question, must be joined as indispensable party. For the reasons stated in Plaintiff's February 8, 2010 Response to the Motion, the Court finds the State need not be joined.

In addition, this issue depends in part on the meaning of A.R.S. § 12-1113, which provides:

> The interests, estates and rights in lands subject to be taken for public use, are:
>
> 1. A fee simple, when taken for public buildings or grounds or for permanent buildings, for use in connection with a right-of-way or for an outlet for the flow or a place for the deposit of tailings or refuse from a mine or for irrigating ditches. A leasehold interest in a building may be taken only if the underlying property is taken in fee title or easement.
>
> 2. An easement when taken for any use other than those set forth in paragraph 1.
>
> 3. A right of entry on and occupation of lands, and the right to take from the lands earth, gravel, stone, trees and timber necessary for a public use.
>
> 4. A use in the water of a stream, river of spring.

Defendant agrees that Plaintiff may take a concurrent use of the land underlying the transmission lines crossing the property. (Defendant's February 18, 2010 Reply in support of the Motion at 2 ll. 1-4.) However, it argues that the taking Plaintiff proposes for the exclusive use embodied by its transmission towers can be had only by a fee simple taking pursuant to A.R.S. § 12-1113(1).

The Court does not agree. The areas on which the towers are to be located are not "public … grounds," and the Court finds the towers are not "building[s]" or "permanent buildings" within the meaning of the section. "Building" in common parlance is used to denote a structure that is enclosed on at least three, and normally four, sides, and that is usually enclosed on the top. The uses to which such structures are put normally create more value and many more management issues than a simple structure supporting utility lines. Had the Legislature intended to require a fee simple taking for any man made structure, it would have used language stating that intent.

Thus, the statute permits condemnation for the towers' location as an easement. An easement is the right to use property for a limited purpose. The rights of any person having an easement in the land of another are measured and defined by the purpose and character of the easement; and the right to use the land remains in the owner of the fee so far as that right is consistent with the purpose and character of the easement. See, Hunt v. Richardson, 216 Ariz. 114, 123 (App. 2007). Through Sections 7 and 15 of the lease, the Land Department has clearly vested in Defendant, as lessee, the ability to allow utility easements for the duration of the ninety-nine year lease.

Defendant argues, however, that permitting a complete taking of the area on which the towers' footing stands must, as a matter of constitutional law, constitute the taking of a fee simple interest, since Defendant may no longer make use of that surface area. The Court does not agree. Although Defendant may no longer use the surface area, it may use the area above and below that area. As it conceded with regard to the area below the transmission lines, this means the property has not been taken in its totality, and that concurrent use is still possible.

Moreover, Defendant lacks standing to complain that the taking must be permanent. Only the Land Department, the owner of the property, will be affected by that issue. If it is concerned, its concerns may be addressed in a damages action or otherwise at the time the property is returned to it.

FILED: Exhibit Worksheet