

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-010829

12/20/2004

THE HONORABLE MICHAEL A. YARNELL

CLERK OF THE COURT
M. L. Smith
Deputy

FILED: 12/23/2004

SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT

DOUGLAS G ZIMMERMAN

v.

OLIVE VALLEY L L C, et al.

DALE S ZEITLIN

WILLIAM D RISKE
LEONARD N SOWERS
RUSSELL R REA III

MINUTE ENTRY

4:30 p.m. In the courtroom.

Time set for oral argument on Cross-Motions For Sanctions, Joint Motion To Continue Trial, and Final Pretrial Conference. Counsel, Russell R. Rea III is present for Douglas G. Zimmerman who represents Plaintiff. Counsel, Dale S. Zeitlin, is present for Defendant.

Court Reporter, Mike Benitez, is present.

Oral Argument is heard on the cross-motions for sanctions.

IT IS ORDERED taking these motions under advisement.

Good cause is present for a short continuance of the trial date due to the medical issues relating to Mr. Zeitlin's wife. After discussion, independent of the issues in the cross-motions for sanctions, the first date available for continued trial on counsel's calendars is June 7, 2004.

IT IS ORDERED vacating the trial date of January 11, 2005.

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FURTHER ORDERED setting a continued Final Pretrial Conference at **8:30 a.m., May 31, 2005.**

FURTHER ORDERED setting this matter for a firm trial to a jury at **9:30 a.m., June 7, 2005.** Estimated Time: **Three (3) Days.**

4:50 p.m. Hearing concludes.

LATER:

By minute entry of May 3, 2004, without objection and after consultation with counsel, this court ordered:

DISCLOSURE, MOTIONS AND DISCOVERY

A. Expert Witnesses. Plaintiff has designated by name, subject matter, address and resume all trial experts. Defendant(s) shall designate by name, subject matter, address and resume all trial experts by **5:00 p.m. on August 13, 2004.** Plaintiff shall furnish any supplements by **5:00 p.m. on September 13, 2004.**

B. Pretrial Motions. All pretrial motions, other than *Motions in Limine*, shall be filed no later than **5:00 p.m. on November 12, 2004.**

C. Discovery Cut-Off. All discovery shall be completed by **5:00 p.m. on November 12, 2004.**

D. Non-expert Witnesses Defendant shall disclose non-expert witnesses by **5:00 p.m., August 13, 2004.** Plaintiff shall disclose non-expert witnesses by **5:00 p.m. September 13, 2004.**

This is a condemnation action. It is undisputed on this record Defendant did not produce its initial written appraisal report until September 14, 2004. On or about November 1, 2004, Plaintiff produced a supplemental disclosure by Jan Sell, Plaintiff's appraiser, in rebuttal to Defendant appraiser's discussion of potential zoning changes.

Defendant produced its **initial** Rule 26.1 Disclosure Statement on November 10, 2004. This information included Defendant's intent to produce evidence of any zoning change approved by Queen Creek in December, 2004 (an event that has not yet occurred), and to call previously not listed witnesses Mr. Ralph Pew and Mr. Stacy Brimhall on the zoning issues.

Plaintiff complains that the interjection of zoning issues and the testimony of Ralph Pew and Stacy Brimhall should be excluded as untimely disclosed without excuse and as prejudicial.

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Defendant contends the information was not a surprise, was disclosed in the Defendant's appraisal within the discovery time limits, and its use would not be sufficiently prejudicial to require exclusion. Defendant points out that Plaintiff did not depose Mr. Martori until November 17, 2004, and had an "opportunity" to depose Mr. Brimhall and Mr. Pew. Defendant asserts that should the court exclude the issues of zoning and testimony by Mr. Brimhall and Mr. Pew, the "supplemental" opinions of Mr. Sell disclosed in rebuttal to Defendant's September 14, 2004, appraisal should be excluded.

In this court's view, Defendant has delayed the timely preparation of its case under the prior orders of this court – most likely due to Defendant's appraisers' delay, but perhaps in hopes of obtaining a favorable zoning ruling from Queen Creek. This places Plaintiff in a position of either acquiescing in the delay or asking that the late disclosed evidence be excluded.

The primary issue presented to the court is one of balancing the prejudice to the parties in excluding evidence not timely disclosed, while seeking enforcement of the disclosure rules, all in light of the continued trial date and counsel's failure to timely prepare this case for trial.

IT IS ORDERED partially granting and partially denying Plaintiff's Motion For Sanctions Pursuant To Rule 37(c), Arizona Rules Of Civil Procedure, as follows:

1. No party and no witness at trial may testify concerning, rely upon or in any manner use any decision on zoning made by any authority on and after December 1, 2004. Any and all evidence of any decision on zoning made by any authority on and after December 1, 2004, shall not be admissible at trial in this action.
2. Defendant may, at trial, call witnesses Stacy Brimhall and Ralph Pew, subject to any and all evidentiary objections at trial and subject to the ruling in Paragraph 1 above.
3. Plaintiff may depose Stacy Brimhall and/or Ralph Pew, provided however that such depositions, if noticed, shall and must be completed by **5:00 p.m., March 1, 2005**.
4. Plaintiff's expert Jan Sell may furnish an additional supplement to his opinions for trial, subject always to Paragraph 1 above, and based only upon and after the depositions of Stacy Brimhall and/or Ralph Pew, provided however that any such supplement must be furnished in writing and must be furnished on or before **5:00 p.m., March 15, 2005**. Mr. Sell may not and shall not be re-deposed.
5. The trial opinions of Defendant's appraiser shall and must be limited to all opinions disclosed on or before December 1, 2004.
6. Except as expressly provided above, any and all discovery is and shall be closed from and after December 1, 2004.

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7. Defendant's counsel, Dale S. Zeitlin, is hereby publicly admonished for his unexcused failure to timely prepare and exchange a substantive Rule 26.1 Disclosure Statement in this action.

8. In all other respects Plaintiff's Motion for Sanctions is denied.

FURTHER ORDERED denying Defendant's Cross-motion For Sanctions.