

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008667

08/04/2022

HONORABLE JAY RYAN ADLEMAN

CLERK OF THE COURT
K. Ballard
Deputy

JAMES RYAN, et al.

JOHN DOUGLAS WILENCHIK

v.

TOWN OF CAREFREE, et al.

MICHAEL W WRIGHT

DALE S ZEITLIN
BRIAN IMBORNONI
DOCKET-CIVIL-CCC
JUDGE ADLEMAN

JUDGMENT

Courtroom: East Court Building – 712

9:02 a.m. This is the time set for Oral Argument on **(1)** Defendant Town of Carefree's Motion to Dismiss, and **(2)** Defendant Town of Carefree's Motion for Attorneys' Fees Pursuant to A.R.S. § 12-349, both filed May 17, 2022. All appearances are virtual and/or telephonic via Court Connect/Microsoft Teams and are as follows.

- Plaintiffs James and Anne Ryan are represented by Counsel Timothy R. Grimm (appearing in place of John "Jack" Douglas Wilenchik).
- Defendants Town of Carefree and Carefree Water Company Inc. are represented by Counsel Michael W. Wright and Brian Imbornoni. Also present as client representatives are Les Peterson, Mayor of the Town of Carefree; Gary Neiss, the Town Administrator; and John Crane, Vice Mayor of the Town of Carefree (Mr. Crane's appearance was not announced but recorded via the Team platform).

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- Real-Party-In-Interest The Boulders Homeowners Association is represented, in a limited scope representation, by Counsel Dale S. Zeitlin.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court has reviewed the pending motions, the associated filings, the procedural history of the case, the related case litigated mostly before Judge Martin, and the appellate history of that case.

Oral argument is presented on the pending motions.

IT IS ORDERED taking these matters under advisement.

9:51 a.m. Matter concludes.

LATER:

The Court has reviewed **(1)** Defendant's Motion to Dismiss; and **(2)** Defendant's Motion for Attorney's Fees Pursuant to A.R.S § 12-349. The Court has further considered the procedural history associated with this case and the related proceedings in CV2021-006704.

The Court has also considered the arguments of the parties at the time of the hearing on August 2, 2022. At the conclusion of the hearing, the Court took these matters under advisement and promised to issue a ruling in due course. This is that ruling.

* * * * *

MOTION TO DISMISS

Plaintiffs James and Anne Ryan filed this action in July 2020, purportedly seeking declaratory and injunctive relief arising out of Defendant Town of Carefree's efforts to construct a water tank near the southwest corner of the Boulders Homeowners Association. The parties later agreed upon a temporary restraining order that went into effect as of August 25, 2020.

On April 23, 2021, Defendant Town of Carefree subsequently filed an eminent domain case in CV2021-006704. The eminent domain case sought possession for the same property at issue in the CV2020-008667 matter. After briefing and argument on multiple motions, the Court in the CV2021-006704 matter granted the Town of Carefree's Application for Immediate

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Possession in a ruling issued on September 29, 2021. The Town posted the required possession bond on the following day.¹

Defendant Town of Carefree now asserts that this matter ought to be dismissed because the issues were mooted in the condemnation/ eminent domain matter. It is fundamental that there must be a justiciable issue between the parties before a declaratory judgment will be granted. *See, e.g., Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App. 1991)(citing *Arizona State Board of Directors for Junior Colleges v. Phoenix Union High School District*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967)). Courts will not hear cases that are advisory or answer moot or abstract questions. *Id.*

In the present case, Defendant Town of Carefree properly points out that the zoning considerations raised in this action have been entirely mooted by the eminent domain action already litigated in CV2021-006704. *See Tovrea v. Trails End Improvement Association*, 130 Ariz. 108, 109, 634 P.2d 396, 397 (App. 1981); *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 397, 368 P.2d 637, 641 (1962).

In short, the Court agrees that this case is ripe for dismissal on the basis that the sought after relief is moot. *See, e.g., Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App. 1991); *Arizona State Board of Directors for Junior Colleges v. Phoenix Union High School District*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967).

Accordingly,

IT IS ORDERED GRANTING Defendant's motion to dismiss and dismissing this case with prejudice;² and

IT IS FURTHER ORDERED DENYING Plaintiffs' claim for attorney's fees in its entirety.³

¹ The Boulders sought appellate relief to no avail. A request for an interlocutory stay was denied on December 2, 2021 (*see* COA order dated 12/2/21; 1 CA-SA 21-0233). An appeal was voluntarily dismissed on May 11, 2022 (*see* COA order dated 5/11/22; 1 CA-CV 21-0695).

² Given the mootness of Plaintiffs' claims, the Court sees no legal or factual basis for a dismissal without prejudice here.

³ Plaintiffs' request for attorney's fees is based on the private attorney general doctrine set forth in *Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989)(disagreed with on other grounds by *Ansley v. Banner Health Network*, 248 Ariz. 143, 459

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MOTION FOR ATTORNEY'S FEES PURSUANT TO A.R.S § 12-349

The Court has reviewed all of the filings associated with Defendant Town of Carefree's Motion for Attorney's Fees Pursuant to A.R.S § 12-349.

This Court may impose attorney's fees under A.R.S § 12-349 when a party brings or defends a claim "without substantial justification." *See generally Rogone v. Correia*, 236 Ariz. 43, 50, 335 P.3d 1122, 1129 (App. 2014)(discussing assessment of attorney's fees pursuant to A.R.S. § 12-349).

The Court has considered the arguments of the parties, as well as the applicable factors delineated within A.R.S. § 12-350. *See also Harris v. Reserve Life Insurance Co.*, 158 Ariz. 380, 382, 762 P.2d 1334, 1336 (App. 1988).

Having done so,

IT IS ORDERED DENYING Defendant Town of Carefree's Motion for Attorney's Fees Pursuant to A.R.S § 12-349.

This minute entry disposes of all outstanding claims and issues in this case. Because no further matters remain pending, the Court signs this minute entry as a final judgment entered pursuant to Ariz. R. Civ. P. 54(c).

8/4/22

/s/ HONORABLE JAY R. ADLEMAN

DATE

HONORABLE JAY R. ADLEMAN
JUDICIAL OFFICER OF THE SUPERIOR COURT

P.3d 55 (2020)). In this case, however, the Court finds that the factors identified in *Arnold* are entirely lacking, especially insofar as Plaintiffs brought this action in their own interest. In that regard, the case was not intended to benefit a large number of people and/or to litigate issues of societal importance. *Id.*