Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-006977 10/04/2021

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

KELLY SARBER

PAUL L STOLLER

v.

LA PAZ COUNTY

CHARLES W WIRKEN

ASHLEY CARRINGTON CROWELL
JUDGE THOMASON

MINUTE ENTRY

La Paz County (the "County") has moved for summary judgment. The Court has considered the Motion, Response and Reply, along with the arguments of counsel.[1]

INTRODUCTION

Plaintiff Kelly Sarber ("Sarber") claims that she entered into an enforceable agreement with La Paz County. Ms. Sarber alleges that the County agreed to pay her compensation for services she provided to the County for the development of a renewable energy project. County officials allegedly promised that plaintiff would be compensated under a written agreement, which would pay her 10% of the host fees paid by a third-party operator.

[1] The Court was curious why the 2012 Consulting Agreement, discussed below, that plaintiff now relies on, was produced so late in the case. As such, the Court ordered that supplemental memoranda be submitted "regarding the circumstances of the production of the 2012 agreement." Plaintiff's submission really sheds no further light on why the 2012 Consulting Agreement, which was in plaintiff's own files, was not produced until April of 2021, or why plaintiff did not even rely on this document until responding to the Motion for Summary Judgment. Plaintiff did, however, take the opportunity to use the supplemental brief to present additional arguments on the merits of the dispute, which was not the purpose of the supplemental briefs.

In the Motion, La Paz County argues that the public was never given notice that a contract with Sarber was going to be discussed at a County Board of Supervisors ("BOS") meeting. As such, no agreement was allegedly ever approved by the BOS at a public meeting. The County Administrator was also allegedly never authorized by the BOS at a public meeting to make the agreement with Sarber. Accordingly, the County contends that there is no enforceable contract with Sarber under Arizona's Open Meeting Law.

THE HISTORY OF PLAINTIFF'S CLAIM AND THE PENDING MOTION

In 2018, Sarber submitted a Notice of Claim. Sarber's Notice of Claim was based on a 2013 oral promise of a later written agreement. The Notice of Claim mentions two written agreements -- a February 2013 Consulting Agreement and an August 2013 Fee Agreement.

The Complaint, First Amended Complaint and Second Amended Complaint are consistent with the Notice of Claim. The pleadings allege that the County first asked Sarber in 2013 to look for additional economic development possibilities. The pleadings allege an oral agreement in 2013. The only specific agreements mentioned were the 2013 Consulting Agreement and the 2013 Fee Agreement.

Sarber's sworn Rule 26.1 Disclosure Statement alleges that the County BOS authorized the 2013 Consulting Agreement and the 2013 Fee Agreement at a meeting in September of 2012. No mention was made of a 2012 Consulting Agreement. Sarber's sworn Supplemental Disclosure Statement asserted an oral agreement in 2011. No mention was made of a 2012 Consulting Agreement.

The Motion for Summary Judgment before the Court was filed in December of 2019. Sarber was allowed to proceed with extensive discovery before responding. A 2012 Consulting Agreement was not disclosed by Sarber until April of 2021. The Response now relies extensively on the 2012 Consulting Agreement.

It is incomprehensible to the Court that Ms. Sarber apparently forgot about the 2012 Consulting Agreement. While she tries to blame the County for the late disclosure, she has to admit that the document came from her own files. There is no signed 2012 Consulting Agreement in the County's files. In fact, the County suggests that Ms. Sarber never signed and returned the 2012 Consulting Agreement.

The Motion pending before the Court was based on the allegations as they existed at the time of the filing. There is no question that the County is entitled to summary judgment, based on the record in December of 2019. The County objects to the Court's consideration of Sarber's theory based on the newly disclosed 2012 Consulting Agreement. The Court will, however, consider that agreement and the arguments raised in the Response. The County has adequately addressed the 2012 Consulting Agreement in its Reply and there was extensive argument on the same.

The Court notes that the Response does not contain a declaration from Sarber. Nowhere is there a statement from Sarber confirming that she signed the 2012 Consulting Agreement and that the 2012 Consulting Agreement is the contract on which she is suing. In fact, her Statement of Facts states that "Sarber countersigned the agreement and returned it to Field." There is no evidence supporting this statement. The statement is ostensibly supported only by a copy of the Agreement itself.

The Court would be justified giving no consideration to the 2012 Consulting Agreement. Nonetheless, the Court will consider it.

LEGAL PRINCIPLES

The Open Meeting Law defines "legal action" as a "collective decision, commitment or promise made by a public body pursuant to . . . the laws of this state." A.R.S. § 38-431. Plaintiff alleges that a collective decision was made by the County to pay her pursuant to a written agreement. She also contends that the County made a commitment or promise to pay her money. As such, this case clearly involves a "legal action."

A.R.S. § 38-431.01 provides that, "(a)ll legal action of public bodies shall occur during a public meeting." The law does not require the public body to "disclose every fact, theory, or argument pro or con raised in its deliberations, or every detail of the recommended decision on which a vote is about to occur." *Karol v. Board of Ed. Trustee, Florence Unified Sch. Dist. No. 1,* 122 Ariz. 95, 98 (1979). Thus, a "technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting, when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature[.]" *Id.* The legal standard is "substantial compliance;" the courts look at the entire proceeding to determine whether the meeting was open and the public had adequate opportunity to be informed. *Carefree Imp. Ass'n v. City of Scottsdale*, 133 Ariz. 106, 112 (App. 1982). Any delegation of authority to enter into an agreement must be made at a public meeting of the BOS. *Porta House, Inc. v. Scottsdale Auto Lease, Inc*., 120 Ariz. 115 (App. 1978).

Notices of BOS meetings have to be posted in advance. A.R.S. § 38-431.02(A)(2)(b). The notice must contain an agenda of material to be discussed at the meeting. A.R.S. § 38-431.02(G).

Any legal action taken in violation of the Open Meeting Law is null and void and of no legal effect. *Long v. City of Glendale*, 208 Ariz. 319, 331 (App. 2004). A contract can, however, be later ratified by the BOS. A.R.S. § 38-431.05(B).

PLAINTIFF'S POSITION IN HER RESPONSE

Plaintiff contends that, on September 17, 2012, at an open, regular, meeting of the La Paz County BOS, the Board "authorize[d] [La Paz] County Administrator [Dan Field] to enter into a consulting agreement with Kelly Sarber of Strategic Management Group" to include, among other things, Sarber "marketing economic development opportunities" for the County. The Board further authorized Sarber's "compensation for these services to be paid in the form of commission, not to exceed 10%," to be paid by the operator or developer of the project. Mr. Field subsequently negotiated and entered into a Consulting Agreement between the County and Sarber.

On September 12, 2012 the Board's office posted a notice and an agenda stating the Board would hold a regular open meeting on September 17, 2012. The agenda stated that the Board would discuss and take possible action for the approval of the "landfill consulting agreement with Kelly Sarber of [SMG] for negotiating third-party landfill operation agreement, consulting on landfill matters, and economic development opportunities." On September 17, the Board held the meeting. All three County Supervisors were present. The official minutes of the meeting state that the potential agreement would encompass economic development opportunities and that the County would pay no more than 10% of the total revenue of any project involved. The Board unanimously authorized Field to enter into a consulting agreement with Sarber. Former County Administrator Field, and both living Supervisors from that meeting (Drum and Irwin), have testified that the Board authorized Field to enter into such an agreement. The agreement was later signed.

Accordingly, the Board did provide notice and an agenda, which included the potential agreement with Sarber. A.R.S. § 38-431.02 (G), (H). The Board posted the public notice more than twenty-four hours before the meeting. The notice included an agenda. The Board approved an agreement with Sarber and gave Field authority to enter into the agreement. *Bone v. Bowen*, 20 Ariz. 592, 595 (1919). The minutes were appropriately prepared. A.R.S. § 38-431.01 (B). The agreement was subsequently signed. Irwin and Field have testified that the work in question was covered by the 2012 Consulting Agreement.

In sum, plaintiff contends that the requirements of the Open Meeting Law have been met. Therefore, she has an enforceable contract.

DEFENDANT'S POSITION

Assuming that the 2012 Consulting Agreement was in fact signed by Sarber and Field, the County nonetheless contends that plaintiff's claim is barred by the Open Meeting Law.[2] The County points out that Field's authority granted at the September 2012 meeting was limited in nature. Specifically, it was limited to a contract with Sarber dealing with a landfill and "County owned land contiguous to the Landfill." The authorization of the Board at the September 2012 meeting provided that Field was authorized only to "marketing economic development opportunities on contiguous Landfill land…"

The Open Meeting Law requires that the minutes include "[a]n accurate description of all legal actions proposed, discussed or taken…" A.R.S. § 38-431.01(B)(4). The minutes clearly refer to "contiguous Landfill lands." As such, the authority given was limited to contracts dealing with contiguous lands. Accordingly, the 2012 Consulting Agreement is limited to the County Landfill "and the contiguous 480 acres of land owned by the County…"

The County argues that the renewable energy project location that is the subject of Sarber's claim is not located on "contiguous landfill lands." Rather, it is located some distance from the landfill on property later acquired by the County.

The reference in the 2012 Consulting Agreement to "other types of economic development activities" is limited to activities "related or complementary to the Landfill operations." As such, this provision is not applicable here.

The County further argues that the fact that Field and Irwin may have thought the 2012 Consulting Agreement covered the renewal energy project is irrelevant. Rather, such a project had to be authorized at an open meeting. No authorization was given for a contract dealing with something outside the landfill or the contiguous property. The 2012 Consulting Agreement's plain terms do not cover such a project.

The 2012 Consulting Agreement is expressly limited in scope to the County landfill and "the contiguous 480 acres of land owned by the County." The renewable energy project is not operated on the landfill or the continuous acreage. As such, the contract simply does not apply to the subject of the claim.

[2] The County disputes that the 2012 Agreement was signed and returned by Sarber.

DISCUSSION BASED ON THE BRIEFING

This case comes down to whether the BOS provided Mr. Field authority to enter into a project covering the renewable energy project and if that project was covered by the 2012 Consulting Agreement. There is absolutely no question that the BOS appropriately gave Mr. Field authority to enter into a consulting agreement with Sarber that included "marketing economic development opportunities." That same authorization, however, was limited to opportunities on "contiguous Landfill lands." The project in question is not located on land contiguous to the landfill.

The 2012 Consulting Agreement was limited to the landfill and "the contiguous 480 acres of land owned by the County," which is referred to in the agreement as the "Additional Land." Once again, the renewable energy project is not operated on the landfill or the contiguous 480 acres.

Ms. Sarber was also authorized under the 2012 Consulting Agreement to identify and secure other economic development activities "related or complementary to the Landfill operations…" The renewable energy project has nothing to do with landfill operations. The compensation provisions referred to compensation for "work hereunder," limiting compensation to landfill and contiguous land matters.

Plaintiff cites a portion of Exhibit A to the 2012 Consulting Agreement as providing that Ms. Sarber "shall also provide strategic guidance to the County of the many potential uses and beneficial projects…that could provide additional revenues…" Plaintiff omits, however, key language that provides that the uses and projects must be "related to the Landfill."

In 2013, the BOS and the County asked Ms. Sarber to turn her attention to "looking for other streams of income, outside revenue that could come in." (Field depo. at 135:21-25) Plaintiff does not dispute that the BOS asked her to work on the development of a renewable energy project after the 2012 Consulting Agreement. There does not appear to be any doubt that Ms. Sarber, in reliance on what she was asked to do, spent significant time over a five-year period developing a renewable energy project. She operated a Request for Proposal project for applicants to officially apply for such a project.

There was never a meeting, however, where the BOS authorized or approved compensation for such a renewable energy project, at least if it was not operated on the landfill or the contiguous land. Moreover, there was no contract written and signed that covered such a project.

In 2016, Mr. Field wrote a letter that said, "Kelly Sarber of Strategic Management Group is contracted with La Paz County as a consultant and has been since the board of supervisors approved a consulting agreement in September of 2012." (Irwin depo. at 37:14-17.) The letter went on to provide that Sarber "plays a wide role in developing economic opportunities for the county as it relates to renewable energy resources." (*Id*. at 20:23) Mr. Irwin testified that he "assumed" that the BOS understood that Ms. Sarber was continuing to operate under the 2012 Consulting Agreement. (*Id*. at 38:10-16) Plaintiff points out that Supervisor Irwin and Mr. Field both testified that they believed that the renewable energy project in question was covered by the 2012 Consulting Agreement.

In 2017, the BOS approved a project for solar power with 174 Power Global. This deal will likely result in compensation to the County of over $500,000,000. There is no dispute that this project is not being conducted at land next to or contiguous to the landfill. Ms. Sarber claims that she is entitled to compensation of 10% of the amounts paid to the County under the 2012 Consulting Agreement.

It appears as if Mr. Field and Mr. Irwin may have believed that Ms. Sarber's efforts in connection with the solar project would be covered under the 2012 Consulting Agreement. The problem is that this project is actually not covered by that Agreement. That Agreement is clearly limited to the landfill and the "contiguous" land. The solar project is not on contiguous land. (Field depo at 210:9-211:2) Rather, it is several miles away from the Landfill. Although his testimony was not clear, Mr. Field suggested that the project was 26 miles away from the Landfill. (Field depo at 210:19-22)[3]

Moreover, there was never an open meeting where the BOS approved a renewable energy project. Rather, the authorization given at the September 2012 meeting was clear and unequivocal. The minutes of the meeting clearly limit the authority give to Mr. Field to services regarding the landfill and contiguous land.

It does not matter what Mr. Field or Mr. Irwin may have subjectively thought. The Open Meeting Law is a reflection of strong and sound public policy. The minutes of the September 2012 meeting contain an "accurate description" of any "legal action" taken. Any delegation of authority to Mr. Field had to be specifically authorized by the BOS. The delegation of authority here was clearly limited to the landfill and contiguous land. Even if the 2012 Consulting Agreement covered the work in question, it would be unenforceable under the Open Meeting Law.

[3] It appears as if the land used for the renewable energy project was not even owned by the County in 2012.

In any event, the renewable energy project was clearly not covered by the 2012 Consulting Agreement. No sensible reading of the 2012 Consulting Agreement would result in that contract covering the renewable energy project because it is not being conducted on the landfill or the contiguous 480 acres. Indeed, the Response to the Motion provides no sensible explanation as to how the Consulting Agreement can be reasonably construed to cover the project at issue.

THE BELATED FIELD DECLARATION

After having approximately a year and a half to file the Response to the Motion for Summary Judgment, plaintiff submitted a declaration from Mr. Field, after the briefing was complete, and moved the Court to supplement the record. There is absolutely no reason why the Field declaration could not have been submitted with the Response. [4]The Court would be fully justified in not considering the Field declaration. Nonetheless, the Court will consider the Field declaration. It does not change the outcome.

Field's declaration tells a story that has heretofore not been in any materials submitted to the Court. Field now, for the first time, directly contradicts the language in the 2012 Consulting Agreement, a document that Field wrote. He also contradicts the language in the authorization provided to Field at the September 2020 BOS meeting.

Field even directly contradicts his prior sworn testimony. In essence, Field now contends that "contiguous" really does not mean "contiguous."[5]

Field's declaration actually states that the discussion at the September 17, 2012 BOS meeting was that Sarber's services for "economic development opportunities was not limited to the land contiguous to the landfill." Rather, Field says that the discussion was that Sarber would not work on development of other then-owned encumbered properties of the County. He says that "contiguous Landfill lands" was a proxy for or shorthand "for all County-owned land other than the other encumbered properties then owned by the County on which development was not feasible."

It is difficult to even understand what this means. Apparently, according to Field, "contiguous" meant ALL County lands except some County lands.

Field then goes on to state that the authorization given to him regarding "contiguous Landfill lands" was understood by him and the BOS members "to limit the contract with respect

[4] The Court concludes that the Field declaration was submitted in recognition of the fact that the Response provided no sensible way to construe the 2012 Consulting Agreement in such a manner as to cover the project in question.
[5] "Contiguous" is defined in Webster's Encyclopedic Dictionary of the English Language as "(s)ituated so as to touch; meeting or joining at the surface or border; close together; neighboring; bordering or adjoining."

to the then-owned, encumbered properties of the County and that Ms. Sarber's services for economic development opportunities would include anything available to the County in the future that did not encompass the excluded then-owned, encumbered properties of the County." In other words, a property does not have to be "contiguous" to the landfill at all, in order to be covered by the authorization. In essence, Field says that "contiguous" means anything but contiguous.

There are several problems with Field's newly disclosed story. First of all, it is utterly inconsistent with his sworn deposition. Field testified that minutes accurately reflected the motion that was made and the authorization that was given to him on September 17. (Field depo. at 183:19-22) Field now claims that the minutes do not accurately reflect the authorization given to him.

Field was asked by Sarber's counsel at deposition "so what was the county owned land contiguous to the landfill?" His answer was the "480 acres we obtained from the Bureau of Land Management," which is the 480 acres. (Field depo at 64-65) He now claims that contiguous has a completely different meaning.

Field himself drafted the 2012 Consulting Agreement, under the authority provided to him by the BOS. He used the language "and the contiguous 480 acres owned by the County." The language that Field used is very specific. He referred to 480 acres of contiguous land. In his deposition, he confirmed that "the additional land is the land that is contiguous to the landfill." (Field depo at 192)

Field now contradicts this deposition testimony as well. He now submits that the contiguous land does not have to actually be contiguous as all, in order to be covered by the Agreement.

Field's declaration cannot be reconciled with his sworn deposition. The Court would be fully justified in ignoring the "sham" declaration.[6] *Wright v. Hills*, 161 Ariz. 583 (App. 1989). Nonetheless, the Court has considered it.

This is not just a matter of contract interpretation. The Open Meeting Law clearly requires a delegation of authority to be given at an open meeting. The authority, of course, is limited to that given. The minutes are required to contain an "accurate description of all legal actions proposed, discussed or taken…" A.R.S. § 38-431.01(B)(4).

[6] The contention made by plaintiff at oral argument that the "sham" affidavit or declaration rule only applies to parties who change their own testimony, and should not apply to an agent of the opposing party, is rejected by the Court. There is no logical reason why non-parties should be allowed to directly contradict their depositions, while parties cannot.

The authorization given was limited to "contiguous Landfill lands." As such, Field was not authorized to enter into a contract that he now claims he entered into. As such, the contract plaintiff claims was entered is legally unenforceable.

Moreover, the 2012 Consulting Agreement cannot be reasonably read in the manner that plaintiff now proposes. As noted above, the contract is very specifically limited to "contiguous 480 acres." Not only is the word "contiguous" clear and precise, but the contract language makes it very clear that it is referring to the 480 acre tract that is right next to the landfill. No tenable reading of the contract can result in the contract covering projects on land that is miles away from the landfill. Mr. Field himself wrote the contract. The plea that the contract does not mean what he wrote is singularly unconvincing.

The Court has considered the declaration of Mr. Field as part of its attempt to determine the intent of the parties to the 2012 Agreement and the meaning of contract language. *Taylor v. State Farm Mutual Automobile Insurance Co.*, 175 Ariz. 148, 153-54 (1993). The Court may ultimately decide not to consider certain evidence because it varies or contradicts the written words. *Id*. This can occur when the asserted meaning is "unreasonable or extraordinary." *Id*. At some point, a judge can stop "listening to testimony that white is black and that a dollar is fifty cents…" *Id*., citing 3 CORBIN on CONTRACTS at § 579 at 420 (1960). These are matters for "sound judicial discretion and common sense." *Id.*

The Court, after considering the evidence, must determine if the contract language is reasonably susceptible to the interpretation proposed. *Id*. at 154. The judge "need not waste much time if the asserted interpretation is unreasonable or the offered evidence is not persuasive." *Id*. at 155. If the proffered interpretation is highly improbable, "the judge might quickly decide that the contract language is not reasonably susceptible to the asserted meaning…" *Id*.

Mr. Field now says that contiguous does not mean contiguous. Rather, he gives a nonsensical definition to the word he used in the contract. He apparently claims that contiguous means "anything available to the County in the future that did not encompass the excluded then-owned, encumbered properties of the County." As such, according to Field, a property does not have to actually be contiguous to the landfill at all, in order to be covered. The fact that the property where the renewable energy project is located was apparently not even owned by the County in 2012 renders Field's interpretation even more unfathomable.

Field essentially writes the word "contiguous" out of the contract he wrote. His interpretation is even more nonsensical when one considers that the contract is quite precise in referring to a specific 480 acre contiguous parcel. Field's interpretation just ignores the specific contract language.

Mr. Field wants the Court to construe this contract to essentially cover projects on ANY land, contiguous or not, except certain encumbered properties. Mr. Field is directly contradicting the contract language. He is trying to change the contract language. He is writing specific words out of the contract. The contract language is clearly not reasonably susceptible to the meaning now given to it by Field.

Field wrote the contract. He now contends that the contract means something vastly different than the words he used. He submits that contiguous does not mean contiguous.

The Court is empowered to stop listening to testimony that white is black. Mr. Field is doing the same thing as saying "white is black." The Court can stop listening to testimony that contiguous does not mean contiguous.

Not even plaintiff Sarber has presented a declaration supporting the bizarre interpretation to the contract given by Field. The Court rejects the definition given to the contract by Field. The contract cannot be reasonably construed in the manner proposed by Field.

The project in question is not being operated on land that is contiguous to the landfill. Summary judgment is in order.

DISPOSITION

This Court is compelled to follow the law, irrespective of how unfair the outcome may be. The County's Motion is granted, and this case is dismissed. The County should lodge a form of judgment and submit any fee applications within ten days from the date of entry of this Order.