IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	Contested Case No. W1-11-1865 **ORDER DENYING MOTION TO SET ASIDE FEBRUARY 22, 2019 ORDER** Assigned to Special Master Sherri Zendri

CONTESTED CASE NAME: *In re Thomas and Leora Farnsworth*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: Order denying Motion to Set Aside Order Dated February 22, 2019, reopen contested case W1-11-1865, and consolidate case with contested case W1-11-1675.

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On May 3, 2023, Craig Dziadowicz and Danielle Middlebrook (collectively "Claimants") filed a Motion to Set Aside Order Dated February 22, 2019 ("Motion"), seeking to reinstate contested case W1-11-1865.

BACKGROUND

On February 22, 2019, Special Master Harris dismissed Statements of Claimant

Nos. 39-5474, 39-5475, and 39-5476 ("SOCs") because the Farnworths, the landowners at the time and the predecessors in interest to Claimants, failed to appear at two consecutive status conferences scheduled in January and February of 2019. W1-11-1865, Minute Entry (February 25, 2019) ("Order to Dismiss"). The purpose of the conferences was to determine whether the Farnworths intended to pursue the potential water rights set forth in Watershed File Report ("WFR") 112-17-BAA-002 as listed in the November 20, 1991, San Pedro Watershed Hydrographic Survey Report ("HSR"). The Farnsworths failed to appear at either conference; therefore, the Court dismissed the Farnsworths' SOCs and ordered that no further action will be taken on the claims. Order to Dismiss at 2.

On July 6, 2022, Claimants purchased Cochise County Parcel #208-40-005 ("Property") from the estate of Leora Farnsworth. Both Thomas and Leora Farnworth had passed away in early 2022. Motion at 6. In January 2023, Claimants retained counsel to assist with the transfer of the SOCs from the Farnsworths to the Claimants. During the transfer process, Claimants were informed by their counsel of the Order to Dismiss the SOCs associated with the Property. *Id.* Claimants state that they were previously unaware that the water rights appurtenant to the Property were the subject of a case in the Adjudication and that the claims and case had been dismissed and had believed at the time of their purchase that the water rights were settled. *Id.* Thus, Claimants request that the Court set aside the Order to Dismiss, and that this contested case W1-11-1865 be reinstated and consolidated with the St. David Irrigations District's ("SDID") consolidated case W1-11-1675 ("St. David Case"). Salt River Project ("SRP") filed a Response to the Claimant's Motion on May 22, 2023, and Claimants filed a Reply June 5, 2023. Oral arguments for

the Motion were heard on August 15, 2023.

The Claimants' Motion requested relief pursuant to Arizona Rules of Civil Procedure 60(b)(4) by voiding the Order to Dismiss, or in the alternative, Rule 60(b)(6) by finding "[an]other reason justifying relief."

RULE 60(b)(4) IS NOT APPROPRIATE

Claimants' initial argument that the Order to Dismiss should be set aside because the Farnsworths were not properly notified of the proceedings in this matter, thereby making the Order to Dismiss void, Motion at 6 – 9, is erroneous:

1. The Arizona Revised Statutes ("A.R.S.") outlines the requirements for notice at A.R.S. § 45–253. The summons that begins a general stream adjudication is properly served by mail, not personal service. A.R.S. § 45-253(A).[1]
2. Section 18.02 of the Rules for Proceeding Before the Special Master ("Special Master's Rules") requires that service be accomplished as "described in Rule 5(c)" and states that "at a minimum" service means "to send a document, properly addressed and affixed with sufficient postage, by first-class mail to a person at his or her last-known address."
3. Rule 5(c) requires that "a written notice or any similar document" may be served on a person by "mailing it by U.S. mail to the person's last-known address." Ariz. R. Civ. P. 5(c)(2)(C).
4. And finally, Section 6 of Pretrial Order No. 1 makes clear that parties "shall

[1] Affirmed with *In re Matter of Rights to Use of Gila River*, 171 Ariz. 230, 236, 830 P.2d 442, 448 (1992) ("Gila I").

mail a copy of any document [they file] other than a Statement of Claimant Form to all parties listed on the Court's approved mailing list." *In re Gila Adjudication*, Pre-Trial Order No. 1 at 9 (Sup. Ct. May 30, 1986) ("Pre-Trial Order No. 1").

The Court sent notices by regular U.S. mail to the Farnsworths' address in Pomerene, the "last known address on file with the Arizona Department of Water Resources" as required by the Jan. 30, 2019, Minute Entry for contested case W1-11-1865 and section 18.02 of the Rules for Proceeding Before the Special Master. Additionally, when the Farnsworths did not appear at the January 2019 conference, the Court sent a copy of the Order setting the February 22, 2019, hearing by both regular and certified mail. The certified letter was delivered on February 19, 2019, and signed for by E. Chester. Order to Dismiss at 2.

Claimants argue that the Farnsworths should have been served under Arizona Rule of Civil Procedure 4.l(d)(2). However, no law is cited to support the assertion. As explained above, Rule 5 governs service of documents in the Adjudication. Thus, absent any other evidence, Rule 4.1 has no applicability to notices issued in the Adjudication. For these reasons, the Order to Dismiss is not void and relief cannot be granted pursuant to Rule 60(b)(4).

RULE 60(b)(6) IS APPROPRIATE

To obtain relief under Rule 60(b)(6), the Claimants must make two showings:

1. First, the reason for setting aside the order must not be one of the reasons set

forth in the five preceding clauses;

2. Second, the reason advanced under 60(b)(6) must be one that *justifies* relief through extraordinary circumstances of hardship or injustice.

Hilgeman v. Am. Mortg. Sec., Inc., 196 Ariz. 215, 220, 994 P.2d 1030, 1035 (Ct. App. 2000); *see also Davis v. Davis,* 143 Ariz. 74, 691 P.2d 1102 (1982); *Bickerstaff v. Denny's Restaurant,* Inc., 141 Ariz. 629, 632, 688 P.2d 637, 640 (1984); *Webb v. Erickson,* 134 Ariz. 182, 655 P.2d 6 (1982); *Park v. Strick,* 137 Ariz. 100, 669 P.2d 78 (1983).

Can The Order To Dismiss Be Set Aside For Another Reason In Rule 60(B)?

As stated above Rule 60(b)(4) is not appropriate. Subsections 60(b)(1) through 60(b)(3) and subsection 60(b)(5) are not appropriate either for the following reasons:

60(b)(1) - The Court finds there was no "mistake, inadvertence, surprise, or excusable neglect" which resulted in the current or former Claimants' lack of response to the Court orders for appearance.

60(b)(2) - Claimants have not presented any "newly discovered evidence.

60(b)(3) - The Court has received no indication of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party".

60(b)(5) - There was no action in the Order to Dismiss, or any other order from the Court, that could be "satisfied, released, or discharged" or "reversed or vacated." Further, it would not be inequitable to apply the Order to Dismiss prospectively.

Do Claimants Meet The Standard of "Extraordinary Circumstances of Hardship Or Injustice Justifying Relief," Under Rule 60(b)(6)?

The Arizona Supreme Court has held Rule 60(b)(6) requires the Claimants "to assert a meritorious defense," which the Court considered a "burden [that] is minimal." *Gonzalez v. Nguyen*, 243 Ariz. 531, 534, 414 P.3d 1163, 1166 (2018) (citing *Union Oil Co. of Cal. v. Hudson Oil Co.,* 131 Ariz. 285, 289, 640 P.2d 847, 851 (1982) (requiring the movant to show "facts which, if proven at trial, would constitute a meritorious defense")).

The Arizona Supreme Court has also been clear that the evaluation of such is left to the trial court, stating that "[w]e provide no hard-and-fast rules to determine when there are extraordinary circumstances justifying relief from judgment under rule [60(b)(6)]. Normally, we leave such questions to the sound discretion of the trial judge, so long as this discretion is not exercised in clear violation of the principles announced in *Park*." *Davis v. Davis*, 143 Ariz. 54, 59, 691 P.2d 1082, 1087 (1984) (citing *Park v. Strick*, 137 Ariz. 100, 669 P.2d 78 (1983)).

Claimants contend they will suffer "extraordinary hardship, injustice, and substantial prejudice" if the Court does not grant relief. Motion at 10. However, Claimants do not provide specific explanations of such extreme circumstances or outcomes, but rather a generalized statement that their property is "worthless" without water rights. It should be noted here that the vacating of an Order to Dismiss will not necessarily result in a grant of water rights. Such relief, if granted, would merely provide the opportunity to litigate the matter of their potential water rights on the merits. It is possible the Claimants may find themselves with a "worthless" property even if the Court grants their motion. Such a

result in that event would hardly be considered "extraordinary hardship, injustice, and substantial prejudice."

Moreover, the courts have generally recognized two categories of hardship: 1) unreasonable damages against a defaulted defendant; or 2) an obstacle that prevents effective participation in the case, specifically one due to the mistake or misbehavior of the court or other parties. *See generally Davis v. Davis,* 143 Ariz. 54 (1984); *Buckeye Cellulose Corp. v. Braggs Electric Construction Co.,* 569 F.2d 1036 (8th Cir. 1978); *Smith v. Jackson Tool & Die, Inc.,* 426 F.2d 5 (5th Cir. 1970); *Compton v. Alton S.S. Co., Inc.*, 608 F.2d 96 (4th Cir. 1979); *F.D.I.C. v. United Pacific Ins. Co.,* C.A.10 (Utah 1998), 152 F.3d 1266; *Bonneau v. Clifton*, 215 F.R.D. 596 (D. Or. 2003). Here neither situation exists. While an undesired consequence may feel like a hardship to the Claimant, it does not justify setting aside an order under Rule 60(b)(6).

While the Court respects the fact that the Claimants motion is largely unopposed,[2] there are nonetheless ramifications to any step back from a previous decision. This court is not inclined to inadvertently create a "zombie process," bringing new life to dismissed cases because a new property owner did not understand what was being purchased. Any evaluation of Rule 60(b)(6) factors must start with the position that the "compelling interest in the finality of judgments should not lightly be disregarded." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).[3] To determine if Claimants' request "justifies relief" as required

[2] SRP and San Carlos Apache Tribe do oppose the use of Ariz. R. Civ. P. 60(b)(6) for relief and have both expressed concern about the unintended consequence of a multitude of resurrected cases.

[3] While the holding in *Rodgers* has been superseded with respect to the issue of **notice,** due to the addition of Federal Rule of Civil Procedure 4(a)(6), the case provides persuasive authority regarding the judicial preference for finality in judgements.

by Rule 60(b)(6), the Court considers the following factors: [4]

1. Whether the moving party had reasonable notice of the relevant order;
2. Whether other potential water rights holders would be prejudiced by relief;
3. Whether the moving party sought relief promptly;
4. Whether the moving party conducted due diligence, or reason for lack thereof, in attempting to understand the procedural posture of water rights claims appurtenant to their property; and
5. Any other extraordinary, compelling, or unique circumstances.

This court will grant a request to vacate a case dismissal so long as the balance of the factors listed above weigh in the favor of the moving party.

Did The Claimants Have Reasonable Notice Of The Order?

As discussed above, all notices in the contested case W1-11-1865 were appropriately completed and filed. Here the Claimants were not a party to the adjudication at the time of notices, both to appear before the court and of the case dismissal, however that does not render the notice not reasonable. Claimants did not need to be a party to have access to any of the orders or minute entries associated with contested case W1-11-1865. All this information was available on the Maricopa County Superior Court's General Stream Adjudication website. This factor weighs against the Claimants.

[4] This list is an amalgamation of criteria in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc) (first four factors) and *Park v. Strick*, 137 Ariz. 100, 103–04, 669 P.2d 78, 81–82 (1983) (extraordinary circumstances)). The criteria have been appropriately modified to reflect the specific subject matter concerns of the General Stream Adjunction process.

Would Other Potential Water Rights Holders Be Prejudiced By Granting Claimants Relief?

Claimants presented during the oral arguments an explanation regarding the priority of Claimants' potential rights, stating that the Claimants potential rights are generally junior rights and that claims of potential water rights on the San Pedro River, both upstream and downstream of Claimants, are very likely senior to any claims the Claimants may have.[5] However this explanation failed to consider two important points: 1) water from the San Pedro River eventually enters the Gila River, thus making claims in the middle and lower Gila River relevant to this decision; and 2) how this request is evaluated will impact how future cases of a similar nature throughout the General Stream Adjudication are evaluated. The Claimants' review of major SOCs along the San Pedro around the property in question is appreciated. However, given the sheer number of SOCs along the San Pedro, the Middle Gila, and the Lower Gila, the relatively short presentation by Claimants simply cannot be exhaustive. Downstream claims, regardless of whether in the same subwatershed, must be confident in the finality of upstream decisions. This factor weighs against Claimants.

Did The Claimants Promptly Request Relief?

According to the timeline provided by the Claimants, approximately ten months passed from the time they purchased the property, July 6, 2022, until the date at which they filed their request to vacate the Order to Dismiss, May 3, 2023. Claimants did not retain

[5] The Court recognizes that this is somewhat speculation, as none of these claims have been adjudicated. However, based upon the history of Cochise County, it is a reasonable supposition that potential water rights for larger irrigation districts, certain mining operations, and federal reservations in the area may predate and supersede Claimants' potential water rights. Future adjudication proceedings will determine specific priority dates, amount, diversion location and use details for all parties.

counsel to assist with water rights issues until January 2023 – six months after purchase, and at least four years after beginning the search for a property with the "necessary water rights." Motion at 5. It appears somewhat disingenuous to state the Claimants timely requested relief when the motion was filed almost one year after purchase.

Did The Claimants Conduct Due Diligence Of Potential Water Rights Claims, Or Provide A Reason For Lack Thereof, As Would Be Reasonably Expected?

Claimants' joint declaration provides no evidence of legal due diligence with respect to potential water rights for the property prior to purchasing the property. Claimants state that they spent four (4) years looking for the right property, both in size and in ability to irrigate crops and sustain livestock. Motion at 13. However, Claimants have presented no evidence they had the authenticity, or the legality of any water rights documents evaluated prior to purchase of the property, despite the fact that water availability was a major factor in their purchase of this particular property. Motion at 13. Claimants maintain that if they do not have water rights then their property is "worthless." *Id.* Given such a dire consequence to the Claimants it seems reasonable to expect the documents would have been reviewed prior to purchase. While Arizona law does not require an attorney for a real estate transaction such as this,[6] when there appears to be so much on the line, an attorney's review is more than simply prudent, it is necessary.

Claimants identify themselves as the owners of "two wine shops, one café restaurant, and one wine bar in the Phoenix area." Joint Declaration of Craig Dziadowicz and Danielle Middlebrook ("Declaration") at ¶2 (April 28, 2023). With that much

[6] A.R.S. §32-2124 (D) and (E).

commercial real estate in their portfolio, Claimants are surely sophisticated enough property purchasers to have known they should have a comprehensive review of the water rights performed prior to purchase. This factor weighs against the Claimants.

Does This Case Does Have Other Compelling and Unique Circumstances?

This case was previously consolidated into *In re Pomerene Water Users Association*, Contested Case No. Wl-11-1676 ("Pomerene"). The Pomerene case was originally initiated on February 1, 1994, to deal with "water diverted and distributed by the Pomerene Water Users Association." W1-11-1865, Minute Entry at 2 (Jan. 30, 2019). However, on April 24, 1995, the trial date was vacated based on other developments in the General Stream Adjudication and did not proceed again until 22 years later in 2017 when a status conference was scheduled for June 28, 2018. *See* W1-11-1865, *Order Setting Telephonic Status Conference* at 2 (December 24, 2018) (describing case history). In August 2018, the Pomerene Water Users Association ("PWUA") informed the Court that it ceased to exist as an entity and by October 2018, all the cases that would have been litigated under Pomerene were either consolidated with St. David or listed to be "dealt with separately." Minute Entry Case W1-11-21-1676, at 2 (Oct. 5, 2018). The Farnsworths' case was among these "separate" cases.

The Pomerene case created a unique path to get this point, however it is not a singular path and Claimants could have found themselves in this situation through any number of circumstances. Furthermore, the current scenario was not necessarily a destined path. Multiple points along the way would have permitted the Claimants to choose another

property or explore other water sources. Even today, those options are still available to the Claimants. More importantly though, the general issue of a property being transferred after potential water rights have been forfeited or dismissed is not unique. This is not the first time a new property owner realized potential water rights had been forfeited by previous property owners after the purchase of the property, nor will it be the last. The possible "hardship" to the Claimants of either moving forward with the property, or selling it, a not a unique or compelling circumstance such that previous court decisions should be overturned.

CONCLUSION

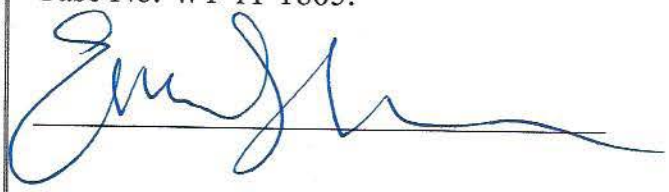
In evaluating the factors relevant to this decision, it is clear the Claimants lacked due diligence and timeliness despite more than adequate notice and information regarding the property in question. The Court has articulated here a clear interest in "the finality of judgments" and in the public trust in that finality and Claimants have not demonstrated a reason for the Court to step away from that interest.

IT IS HEREBY ORDERED denying the motion to set aside the February 22, 2019, Order to Dismiss and Reinstate Contested Case No. W1-11-1865.

Signed this 19 day of September 2023

Sherri L. Zendri
Special Water Master

ORIGINAL of the foregoing delivered to the Clerk of the Maricopa County Superior Court on the 19 day of September, 2023, for filing and distribution to all persons listed on the Court Approved Mailing List for Case No. W1-11-1865.



Court Approved Mailing List
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