

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2004-000197

03/05/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA BIGELOW LIMITED LIABILITY
COMPANY IV, et al.

JAMES R NEARHOOD

v.

MARICOPA COUNTY, et al.

MARY L HARRISS

UNDER ADVISEMENT RULING

Plaintiff's Motion For Sanctions

Whether Judge Armstrong's minute entry order of November 15, 2005 that "the parties shall attempt to mediate the dispute using a private mediator" required a formal Rule 16.1 mandatory settlement conference or something less formal is largely a non-issue. Implicit in any mediation, whether or not it falls under the auspices of Rule 16.1, is a requirement that the parties participate in good faith. The Rule requires that the defendant have a representative present with actual authority to enter into a binding settlement agreement; nothing less can be considered good faith participation. The County takes the position that A.R.S. § 11-251 trumps the Rule, preventing any agent from exercising the authority to bind the Board of Supervisors and thus completely negating the Rule as to it. While the Court acknowledges, as it must, the ultimate authority of the people's elected officials, it does not believe the Rule, or the inherent power of the Court, must be construed so narrowly. When the Court has ordered mediation, whether or not it has expressly invoked Rule 16.1, the requirement of good faith binds the County as well as all other parties. This means more than merely reciting the County's position and treating the negotiation as nothing more than agreeing on informal "discussion points." It means the persons selected to participate must make their *best* efforts to reach a settlement that in their judgment would be accepted by the Board as being in the best interests of the County, *and*, assuming some agreement is reached, acting on that basis after the mediation is concluded by

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presenting the agreement to the Board as a settlement reached in the best interests of the County. A.R.S. § 11-251(14) gives the Board of Supervisors the power to direct, control, and compromise all actions to which the County is a party. Nothing in that or any other statute gives a similar power to the Assessor or prevents him from being bound by the actions of his agents in a Court-ordered mediation. Should the Assessor not wish to participate in person, he must either make himself available for immediate consultation by his delegates or empower those delegates to reach an agreement binding on his office, subject to the final determination of the Board. If an agreement is reached by the Assessor's delegates, the Assessor is bound by the same duty of good faith support. With these observations in mind, the Court turns to the facts of the case.

On November 15, 2005, Judge Armstrong issued a scheduling minute entry. Among other orders, he ordered that "the parties shall attempt to mediate the dispute using a private mediator." The mediation conference was held on June 14, 2006. Bigelow was represented by its officers Mr. Golightly and Mr. Stefani, who had full authority to settle, and counsel Mr. Nearhood and Mr. Bergin. The County was represented by Mr. Martinez and Ms. Skowronski of the Assessor's Office and Mr. Riske of the County Attorney's Office. At the conference, which was conducted by Mr. Kerrick, the parties' representatives signed a document that was hand-labeled by Mr. Riske "**Bigelow Settlement 6-14-06.**" Because of Ms. Skowronski, the document began circulating within the Assessor's Office. On July 14, Mr. Riske telephoned Mr. Nearhood and informed him that the Assessor objected to the agreement and consequently that it would not be submitted to the Board for its approval. On August 11, after a personal meeting with Mr. Riske, Plaintiff filed its Motion to Enforce Settlement Agreement. It appears that as a result of this motion (as late as September 6, the date the County filed its Response to the Motion to Enforce, there was no mention of plans for the Board to act), the proposal was placed before the Board, first at an executive session on October 2, then at its public meeting of October 4; the Board rejected the proposal.

Of the County's representatives at the mediation, Mr. Martinez acted properly. The evidence shows that he negotiated in good faith, but almost immediately found himself prevented by his superiors from following through. Mr. Riske acted properly at the mediation. As he was outside the Assessor's Office chain of command, he was not prevented from presenting the agreement to the Board. Upon learning of the Assessor's opposition, he delayed presenting the agreement (that far the evidence is established; the attorney-client privilege prevents the Court from ascertaining whether or not he advocated for the agreement before the Board). The Court cannot, therefore, determine whether he did in fact breach the duty of good faith and fair dealing under the Court's order. Ms. Skowronski's conduct, while no doubt due to her lack of sophistication, did breach her legal duty of good faith. After presenting the County's initial position, she said nothing, despite her strong reservations that what Mr. Martinez and Mr. Riske were agreeing to conflicted with existing policy and would not (or should not) be approved by the Assessor and/or the Board. (As noted above, the Assessor was bound to support the actions

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of his delegates and therefore lacked the right to disapprove.) As soon as the meeting was over, she did not stand behind the proposed agreement; instead, she faxed a copy, apparently with an expression of concern, to a co-worker. That fax reached a supervisor in the Assessor's Office, who expressed her position to Messrs. Martinez and Riske that they had reached an agreement in conflict with existing policy. As to the Assessor, the Court observed earlier that he should have made himself available to resolve potential issues such as this. He frankly conceded that he and his office lacked experience with Court-ordered mediation, and stated that new procedures have been implemented which should prevent a repetition of this situation. That said, it was his responsibility to ensure prior to the mediation that he and his office would be in compliance; he failed to do so, and the result was that his office did not conform to the duty of good faith.

While the Court welcomes the remedial measures taken by the Assessor, they do not resolve this case. Plaintiff participated in good faith, in *full* compliance with the Court's order. If Plaintiff is not entitled to enforce the agreement against the County, it is at least entitled not to be placed in a worse situation by its compliance. Plaintiff moved to vacate its established trial date based on its belief in the County's good faith. The County did not oppose the motion to place the case on the inactive calendar, and did not until after the motion had been granted inform the Court that it believed the case had not been resolved.

The deadlines for discovery and depositions and the date for submitting the final list of exhibits and witnesses had already passed by the time the motion to place on the inactive calendar was granted on August 22, 2006. As of that time, the County's last filing was its Rule 26.1 disclosure statement of March 27, 2006. That disclosure failed to identify any expert witnesses for the County and failed to disclose its defense based on the *Katz* decision. Had Plaintiff's motion not been granted, the County would have been limited at trial to those witnesses and defenses already disclosed. The Court does not believe it appropriate that the County, by its conduct, should gain the ability to make further disclosures, and therefore as a sanction, the County's trial presentation shall be limited to those witnesses, exhibits, and defenses disclosed and discovery completed prior to June 1, 2006.

Therefore, IT IS ORDERED Granting Plaintiff's Motion for Sanctions: Defendant's trial presentation shall be limited to those witnesses, exhibits, and defenses disclosed and discovery completed prior to June 1, 2006. IT IS FURTHER ORDERED Denying Plaintiff's Request to Strike Defendant's Answer and Plaintiff's request for award of attorney's fees and costs as sanctions.