

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2010-000308

08/03/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT  
J. Eaton  
Deputy

PIMA COUNTY, et al.

DAVID W KRULA

v.

RAYTHEON COMPANY

GARY W HEIMBACH

TERRI A ROBERTS

UNDER ADVISEMENT RULING

The Court took this matter under advisement following oral argument July 30, 2012. Upon further consideration, the Court rules as follows.

The Court begins by expressing its concern over what strikes the Court as a sharp practice. In Plaintiffs' Motion to Voluntarily Withdraw with Prejudice Pima County as a Party, filed on March 30, their intention was stated explicitly that the litigation would continue with Mr. Staples as plaintiff. Raytheon raised no objection to this proposal. In particular, it made no suggestion of what it is now urging, that Mr. Staples was an improper plaintiff and that consequently dismissal of Pima County would be equivalent to dismissal of the entire action with prejudice, clearly to its advantage. Perhaps, as Raytheon's counsel stated at oral argument, counsel for Mr. Staples should have foreseen the potential difficulty. But literally from the dawn of Arizona jurisprudence, the courts have demanded candor from those appearing before them. *See, e.g., Rush v. French*, 1 Ariz. 99, 127 (Ariz.Terr. 1874) ("A judge presiding at the trial of a cause is not to be burdened with the duty of searching for objections to an inquiry put by counsel which the opposing counsel is himself unable to discover, or which, if apparent to his own mind, he sees fit to conceal for no other purpose apparently than to prevent a full consideration of the objection, and with the ultimate intent of taking advantage of an error, in case of defeat, which might have been avoided if his views of the matter had been fairly and candidly expressed at the proper time."). A professional attorney is not "one who can and will take advantage of other persons' errors at all costs." *Matter of Zang*, 154 Ariz. 134, 151 (1987). If Raytheon's legal theory is correct, the consequences of the motion were unintended and inadvertent, as was plainly known to Raytheon's counsel. It seems professional courtesy if nothing else should have dictated disclosure of the theory to opposing counsel and the Court.

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Be that as it may, subject matter jurisdiction cannot be created by laches. Raytheon raises two arguments. The first is that the Board of Supervisors exercised its authority under A.R.S. § 11-251(14) to settle the case over the head of the assessor. But this is not reflected in the record. According to the March 6, 2012 minutes, the Board of Supervisors voted “to direct the County Attorney to have the Board dismissed as plaintiffs in these cases, and to recommend to the County Assessor that the offer presented by Raytheon be accepted.” Nowhere is it stated that a settlement had been reached to which the Supervisors were prepared to bind the County.<sup>1</sup> The Court sees nothing to indicate that “recommend” was a polite formalism for “require,” as Raytheon argues. Ultimately, Mr. Staples declined to follow the recommendation, and, as evidenced by the Motion to Voluntarily Withdraw, the County accepted his decision to pursue the appeal. It is clear that the Board of Supervisors did not enter into a binding settlement.

Raytheon’s second argument is that Pima County is an indispensable party and so its withdrawal with prejudice was tantamount to dismissal of the appeal with prejudice. This would have the effect of making final the decision of the State Board, A.R.S. § 42-16169; Raytheon’s counsel avowed that his client would voluntarily adhere to the presumably higher value in what could no longer be called a settlement (because, the appeal deadline having passed, there was no litigation to settle), but this commitment would be unenforceable. However, the statutes governing appeals from the State Board are not so stringent. A.R.S. § 42-16203(A) provides that “any party” may appeal an adverse decision by the State Board of Equalization; Mr. Staples was a party to the State Board action. A.R.S. § 42-16208(A)(4) more specifically indicates that either the county or the county assessor may file such an appeal. These statutes do not suggest that the county, as an entity distinct from the county assessor, is an indispensable party. Should a refund be ordered, it may be necessary to bring the County back in; the Court assumes that Raytheon would have no objection.<sup>2</sup>

Based on the foregoing, the Court does not find jurisdiction lacking over this matter. Thus, Raytheon’s Suggestion of Lack of Jurisdiction Pursuant to Rule 12(h), which the Court treats as a motion to dismiss, is hereby denied.

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<sup>1</sup> Although Mr. Staples’s response did not raise the argument, the Court does not believe that the March 6 vote could validly constitute approval of a settlement. The minutes disclose no details of Raytheon’s offer: not when it was made, not how it was made, and of critical importance not what it contained. While A.R.S. § 38-431.01(A)(4) permits a public body to discuss or consult with its attorneys regarding settlement negotiations, subsection D requires that a public vote be taken before a legal action binds it. *Johnson v. Tempe Elementary School Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 569 ¶ 11 (App. 2000). The Court doubts that the Open Meetings Law would countenance adoption of a secret settlement, even if the language of the minutes indicated such intent.

<sup>2</sup> Raytheon has argued that Pima County was dismissed with prejudice and the time to appeal has run. The Court does not believe this to be correct, however, as the order dismissing Pima County only disposes of part of this case and did not contain Rule 54(b) language.

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Arizona Tax Court - ATTENTION: eFiling Notice

Beginning September 29, 2011, the Clerk of the Superior Court will be accepting post-initiation electronic filings in the tax (TX) case type. eFiling will be available only to TX cases at this time and is optional. The current paper filing method remains available. All ST cases must continue to be filed on paper. Tax cases must be initiated using the traditional paper filing method. Once the case has been initiated and assigned a TX case number, subsequent filings can be submitted electronically through the Clerk's eFiling Online website at <http://www.clerkofcourt.maricopa.gov/>

NOTE: Counsel who choose eFiling are strongly encouraged to upload and e-file all proposed orders in Word format to allow for possible modifications by the Court. Orders submitted in .pdf format cannot be easily modified and may result in a delay in ruling.