DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL J. PERRY and MARY LOU PERRY, husband and wife; JON M. PERRY, a single man; GERALD W. BRACK, II, and VANESSA L. BRACK, husband and wife; MICHAEL GARDNER, a single man; FRANCIS X. IRR and MAUREEN A. IRR, husband and wife, Plaintiffs/Appellees, v. RANCHO DEL SOL, L.L.C., an Arizona limited liability company, Defendant/Appellant.	No. 1 CA-CV 09-0737 DEPARTMENT B **MEMORANDUM DECISION** Not for Publication - (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. No. S1400CV200500396

The Honorable Mark W. Reeves, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 This appeal involves five contracts for the purchase of five lots to be created from one ten-acre parcel. Rancho Del Sol, L.L.C. ("Seller") appeals the grant of summary judgment awarding specific performance to the Buyers. Seller argues that a roadway -- intended to provide access to the five lots -- was dedicated to the public under the common law doctrine of dedication by plat. We recognize the doctrine of dedication by plat but find it inapplicable here. We agree with the trial court and therefore affirm the summary judgment.

BACKGROUND

¶2 In December 2004, Seller recorded a document entitled the "Stephens Lot Split" in the Yuma County Recorder's Office. The Stephens Lot Split (hereinafter "Lot Split") designated the division of a ten-acre parcel into five separate lots. The Lot Split provided a north-south access road, in the form of a cul-de-sac carved out of the interior of each of the five lots, designated by the language: "50' Access & Utility Easement." The Lot Split also designated an east-west road along the southern edge of the property (County 14½ Street) that was marked with the following reference: "New 40' Road ROW To Be Dedicated By This Plat To Yuma County."

¶3 Mary Lou and Michael Perry, Jon Perry, Vanessa and

Gerald Brack, Michael Gardner, and Maureen and Francis Irr (collectively "Buyers") entered into purchase contracts for the five lots. Although escrow was set to close on January 12, 2005, no sales transaction took place then, and the parties did not agree to extend the close of escrow date. On February 15, 2005, Sandra and J.R. Stephens, two of Seller's owners, sent their real estate agent, Robert Woodman, a letter stating that they wished to cancel escrow on the 10-acre parcel.

¶4 In April 2005, Buyers filed a complaint against Seller for breach of contract. The complaint alleged that Seller "agreed to properly record documentation to split the ten acre parcel into five residential lots," and Seller was in breach of contract because Seller "failed to include appropriate easements providing for access, utilities and irrigation for the five lots." Buyers further alleged that, in January 2005, Yuma Title and Trust ("Yuma Title") discovered that the Lot Split did not create the easements necessary for access to the five lots. According to Buyers, Yuma Title declined to accept their purchase money due to the incomplete easements. Specifically, Debra Feller, an escrow agent for Yuma Title, testified that the north-south road in the Lot Split was "not an insured easement as far as [Yuma Title] [was] concerned." Feller further explained that "the title company would view" the north-south road "not [as] a dedicated easement . . . [but rather as] a

drawing on a lot split." The complaint sought specific performance of the sale of the five lots (including the execution by Seller of appropriate documents creating the access easement or roadway).

¶5 Buyers filed a motion for summary judgment in February 2008, arguing that because Seller "failed to create [the] five lots and access to them, then [Seller] failed to accomplish the very essence of the contracts at issue in this case and is in breach." In April 2008, Seller filed a cross-motion for summary judgment. Seller alleged that, at the time of the signing of the purchase contract, there existed "no legal requirement that written approval had to be secured by [Seller] from Yuma County establishing that the lot split map and development plan for this platted land were 'acceptable' to Yuma County," and, therefore, Seller had "completed its contractual obligations." Evidence was presented to establish that in Yuma County prior to September 2006, a parcel could be split into five or fewer parcels merely by recording separate deeds for the new parcels; formal approval from the County was not required.

¶6 Following a hearing on the motions in November 2008, the trial court ordered the parties to answer thirteen additional questions. In response to a question regarding the effect of the filing of the Lot Split, Seller argued the recording of the Lot Split, and a forthcoming acceptance by the

Buyers if the parties had closed escrow on the agreed upon date, would result in a dedication of the roadway to the public under the common law doctrine of dedication by plat.

¶7 In May 2009, the trial court found that Seller had failed to satisfy the condition that the five lots be legally and effectively split. Furthermore, the court found that recording the Lot Split did not provide marketable title to the five lots. Finding Seller had breached the contract, the court granted Buyers' motion for summary judgment.

¶8 Seller timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003), 12-2101 (2003).

DISCUSSION

¶9 We review a grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment may be granted when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Summary judgment is appropriate only "if the facts produced in support of the [other party's] claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Id.* Each side claims that judgment should

be entered in its favor as a matter of law. Neither side claims that there are genuine issues of material fact precluding summary judgment.

¶10 Seller argues that the trial court committed reversible error by failing to apply the common law doctrine of dedication by plat to the uncontested facts of this case. Buyers counter that Seller failed to meet its obligations under the lot purchase contracts and those obligations were not excused or satisfied by virtue of the doctrine of dedication by plat.

¶11 Dedication of private land for public use requires both "an offer by the owner of the land to dedicate" and an "acceptance by the general public." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 423-24, ¶ 21, 87 P.3d 831, 836-37 (2004) (citations omitted). Dedication requires a full demonstration of the intent of the donor to dedicate. *Id.* "Dedication is not presumed nor does a presumption of an intent to dedicate arise unless it is clearly shown by the owner's acts and declarations." *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 386, 227 P.2d 1011, 1013 (1951). Additionally, the party asserting the dedication has the burden of proof to establish it. *Id.*

¶12 We look first to the language and content of the Lot Split to determine if it establishes the intent of the Seller to

dedicate the proposed cul-de-sac. *See US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996) ("The purpose of contract interpretation is to determine and enforce the parties' intent."). We conclude, as did the trial court, that the Lot Split fails to clearly express such an intent. We find no general language of dedication set forth in the Lot Split that might be applicable to the cul-de-sac. The specific language in the Lot Split regarding the cul-de-sac is simply "50' Access & Utility Easement." This language is insufficient to constitute a dedication to the public of the proposed roadway.

¶13 Our conclusion in this regard is supported by contrasting the language of the Lot Split referring to the east-west roadway designated as County 14½ Street: "New 40' Road ROW To Be Dedicated By This Plat To Yuma County." This language at least references the concept of dedication of this roadway to the County.[1] The brief reference "50' Access & Utility Easement" says nothing about dedication of the roadway to the County or otherwise to the public.

¶14 Seller cites *Pleak* as support for its argument that

[1] We express no opinion whether the words "New 40' Road ROW To Be Dedicated By This Plat To Yuma County" would be sufficient in a plat, without more, to accomplish a dedication to the public of such roadway. In addition, we recognize that Seller does not make an argument on appeal that such language created the required access.

the cul-de-sac was dedicated by plat. *Pleak* is distinguishable, however. In *Pleak*, a title company recorded a record of survey for a land development in Pima County. 209 Ariz. at 420, ¶ 2, 87 P.3d at 833. The recorded instrument included a "Grant of Roadway and Utility Easement" stating that "the owner of record of the property included in the easements shown hereon[,] *hereby dedicate[s] these easements to the public* for the use as such." *Id.* (emphasis added). Years later, property owners from a neighboring development brought suit against the owners of the original land development, arguing that a roadway at the edge of the land development had been dedicated to the public, therefore enabling them to use the roadway. *Id.* at ¶ 5. Our supreme court concluded that the common law doctrine of dedication of roadway easements for public use was a viable doctrine in Arizona and, additionally, that a valid dedication had been made under the *Pleak* facts. *Id.* at 425, ¶ 28, 87 P.3d at 838. As already noted, the Lot Split does not contain any specific language indicating intent to dedicate the cul-de-sac to the public.

¶15 Seller's reliance on *Kadlec v. Dorsey*, 224 Ariz. 551, 233 P.3d 1130 (2010), is also misplaced. Although our supreme court did affirm the application of the doctrine of dedication to roadways in that case, the court ultimately held that "the mere creation of a roadway easement does not raise a presumption

that the road has been dedicated for public use." *Id.* at 552, ¶ 1, 233 P.3d at 1131. Specifically, the court found no dedication had occurred because "no language in [the] deeds or survey map suggests that the easement was dedicated to the public." *Id.* at 553, ¶ 12, 233 P.3d at 1132. Similarly, the Lot Split is devoid of any words of dedication indicating the cul-de-sac was dedicated -- or was intended to be dedicated -- to the public.

¶16 Finally, Seller argues that Buyers waived the right to complain about insufficient access by failing to object within the fifteen-day inspection period under the contract. We reject Seller's argument because the fifteen-day inspection provision relates to potential defects in the property discoverable upon inspection, not to Seller's breach of covenants requiring necessary legal access by the time of closing.

CONCLUSION

¶17 We agree with the trial court that Seller had not completed the task of preparing and documenting the access easement or roadway for the five lots. We reject Seller's argument that the doctrine of dedication by plat applies to the Lot Split. Accordingly, Seller was in breach of the purchase contracts and summary judgment in favor of Buyers was properly entered.

¶18 Both parties request attorneys' fees and costs on

appeal. Pursuant to the purchase contracts, "[i]f Buyer or Seller files suit against the other to enforce any provision of this Contract . . . all parties prevailing on such action, on trial and appeal, shall receive reasonable attorneys' fees and costs." We will therefore award Buyers an amount of reasonable attorneys' fees and costs incurred on appeal, upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

¶19 For these reasons, we affirm the trial court's grant of summary judgment to Buyers.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
MICHAEL J. BROWN, Judge