

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-005860

02/19/2013

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

J G D, L L C

JOSEPH A SCHENK

v.

AMERICAN TITLE SERVICE AGENCY L L C DENISE J WACHHOLZ

UNDER ADVISEMENT RULING

The Court took under advisement the matter of the Motion for Summary Judgment filed by the Plaintiff in this matter and the Motion for Summary Judgment filed by the Defendant. The Plaintiff's motion seeks summary judgment that the Defendant breached its fiduciary duty. The Defendant's motion seeks summary judgment that the Plaintiff cannot prove damages in the form of a diminution in value and that in any event that issue is precluded by virtue of a ruling in an earlier matter.

The Court has considered the motions, the responses, and the replies and the arguments of counsel and finds as follows.

The Plaintiff's Motion for Summary Judgment must be denied. The motion argues that the Defendant breached its fiduciary duty to take reasonable steps to ascertain whether the loan in question was properly approved by the borrower. The essential argument is that the Defendant took no steps to ascertain the identity. Whether it was reasonable or not is generally a fact issue for a jury or trier of fact. Here, the argument is that the record contains no objective evidence that the Defendant did anything the Plaintiff claims it should have done.

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Part of the matter is in hindsight given the earlier litigation where it was opined that one of the essential signatures was forged. However, this is not dispositive. The Defendant did more than nothing. The question is whether it was enough. Again, this is a jury question. Orme School cautions the trial bench not to substitute its belief or understanding where it invades the province of the jury. For this Court to say that the Defendant's actions were insufficient as a matter of law invades that province.

IT IS ORDERED denying Plaintiff's Motion for Summary Judgment.

The Defendant's Motion for Summary Judgment alleges the absence of proof of the diminution of value of the property in question. The argument includes the notion that collateral stopple applies in this case. The Court disagrees. The statement by Judge Kreamer of his belief that damages may be speculative was not part of his ruling and it was not an issue specifically considered or decided on appeal. In this case, the Plaintiff attempts to support the matter of the diminution in value by attaching to the memoranda the report of the expert witness. The document is hearsay and is not accompanied by an affidavit of the expert. The latter is allowed under the rule to support a claim or defense on summary judgment but the former is not. Nevertheless, the declaration of Mr. Leroy appears to address the issue. The Court finds it sufficient to preserve the issue for trial.

IT IS ORDERED denying the Defendant's Motion for Summary Judgment.

The foregoing is all in accordance with the formal written Order signed by the Court on February 19, 2013 and filed (entered) by the Clerk on March 11, 2013.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.