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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-017113 05/23/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

BARRY B YAMRON, et al. JAMES J PALECEK

v.

ENGLE WHITESTONE L L C, et al.

BARBARA K BERRETT
BOOKER T EVANS JR.
ALEXANDRA MIJARES NASH

MINUTE ENTRY

Following oral argument on March 28, 2011, the Court took certain motions under advisement. Following additional consideration, the Court rules on those motions as follows.

The Court begins by clarifying its February 22, 2010 minute entry. It noted that the Complaint, in its claims for racketeering, violated A.R.S. § 13-2314.04(S)(2). However, it also referenced *Encinas v. Pompa*, 189 Ariz. 157, 160 (App. 1997), which held that the statute does not strip the courts of jurisdiction over cases in which racketeering is pled. Confronted with this split in authority, the Court's directive was hortatory rather than mandatory.

Arizona is a notice pleading state, which requires only that the opposing party be given "fair notice of the nature and basis of the claim" and general indication of the type of litigation involved. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008) (construing Rule 8). It is in the context of satisfying Rule 8 that a complaint requires supporting factual allegations. *Id.*, ¶ 7. (In a footnote, RAG and Ranta urge that the Rule 9(b) specificity requirement for pleading fraud should be extended to racketeering claims predicated on fraud. The Court can find no case law supporting this extension of Rule 9(b), and declines to do so.) The complaint is hardly a

model of precision. However, it is evidently clear enough that RAG/Ranta (and before its dismissal, Preferred) are able to intelligently present a defense – clear enough, in fact, that RAG and Ranta are able to compile sufficient evidence to urge conversion of their motion to dismiss into a motion for summary judgment. (The Court will address whether summary judgment is appropriate as to the RICO claims later in this ruling when addressing other summary judgment motions.) The Court finds, however, that the claims as pled are sufficient to survive a motion to dismiss.

Turning to the motion involving Jill Quentzel, the Court does not see a necessity to join Jill Quentzel as a plaintiff. Defendants have not shown that Ms. Quentzel is likely to bring her own action against them or that their interest in having res judicata established in this litigation would be impaired without her participation. *See, Preston v. Kindred Hospitals West, L.L.C.*, 225 Ariz. 223, ¶ 17 (App. 2010). It strikes the Court that defendants are instead interested in Ms. Quentzel as a nonparty at fault: "throughout this case, the Plaintiffs have repeatedly alleged that Ms. Quentzel … was a central part of the purported conspiracy to defraud." Memorandum in Support 2:20-22. The Court does not address whether noticing her as a nonparty at fault would now be timely under Rule 26(b)(5).

Based on the foregoing,

IT IS HEREBY ORDERED denying Preferred Home Mortgage Company's Renewed Motion to Dismiss Counts 2, 3, 8, 9, 14, 15, 20, 21, 26, 27, 32 and 33 (in which the RAG and Ranta defendants joined).[1]

IT IS FURTHER ORDERED denying Roberts Appraisal Group and Eric Ranta's Motion to Dismiss Counts 2, 3, 8, 9, 14, 15, 20, 21, 26, 27, 32 and 33, subject to consideration of whether summary judgment should be granted as to these same counts, which will be addressed below.

IT IS FURTHER ORDERED denying Defendants Roberts Appraisal Group, Eric Ranta's and Preferred Home Mortgage Company's Rule 37(d) Motion to Dismiss, or in the Alternative, Join Jill Quentzel as a Real Party in Interest.

In addition to the foregoing motions, the Court took a number of summary judgment motions under advisement following an oral argument on April 18, 2011. Upon further consideration of the briefing and argument thereon, the Court rules as follows.

[1] The Court acknowledges that Preferred Home Mortgage Company has been dismissed from this case, however, this motion still requires a ruling based on the other defendants' joinder.

The case law governing the transactions differs based on whether Plaintiffs were obligated to follow through with the purchase irrespective of the conclusions of the appraisal. Except for the Marley Park properties, the controlling case is *Kuehn v. Stanley*, 208 Ariz. 124 (App. 2002). For them the absence of privity between Plaintiffs and the Ranta defendants is fatal. A negligent supplier of misinformation is liable only to those persons for whose benefit and guidance the information is supplied. RESTATEMENT (SECOND) OF CONTRACTS § 552 cmt.h. Even for a fraudulent misrepresentation, liability is limited to those persons whom the perpetrator intends or has reason to expect to act in reliance upon the misrepresentation. RESTATEMENT (SECOND) OF CONTRACTS § 531. Here as in *Kuehn*, the contract was unconditional and binding before the appraisal was even finished. Thus, even had the appraisal shown a lower value, that knowledge would have done Plaintiffs no good: Preferred could have held them to the contract regardless. *Compare Kuehn* at 128 ¶ 13; *see also Sage v. Blagg Appraisal Co., Ltd.*, 221 Ariz. 33, 36 ¶ 14 (App. 2009) (describing this as an "important difference[]" between facts of the two cases). It would stretch *Sage* too far to find an injury to Plaintiffs on the ground that, if Preferred had not been deceived, it would have backed out of the deal and incidentally spared them their ultimate loss. Even were this the situation, the injury would have nothing to do with the results of the appraisal being communicated directly or indirectly to Plaintiffs, but rather would turn solely on Preferred's response to the information communicated to it.

For the Marley Park properties, Plaintiffs had the option to back out of the deal by forfeiting their earnest money. At first blush, this would put these claims under the rule of *Sage*. But the facts raise questions of a kind unique to the real estate bubble. *Sage* dealt with what the court called "a traditional home-purchase transaction," *supra* at 36 ¶ 14. Characteristic of such a transaction is that "the appraisal the lender orders typically is the foundation of the home purchase transaction. … A lender … will not finance the buyer's purchase if its appraiser concludes the home is not worth the financed amount," *id*. at 38 ¶ 21. Consequently, the buyer learns from the lender's appraisal at least a minimum value of the property, *id*. at 38 n.8. This, said the court, is adequate to satisfy the requirement contained in RESTATEMENT (SECOND) OF CONTRACTS § 552(2)(a) that the appraiser know that the lender intends to communicate it to the buyer, *id*. at 38 ¶ 22. Where the buyer can act on the appraisal, there is a cause of action.

But this is not Plaintiffs' theory. According to the complaint, Engle Whitestone and Preferred were one and the same, and the appraiser provided inflated appraisals with their knowledge, indeed at their insistence. Thus, unlike the typical *Sage* transaction, Preferred did not base its lending decisions on the appraiser's valuation of the properties, so Plaintiffs could deduce nothing from them. If Ranta and RAG knew that, as is Plaintiffs' theory of the case, what appears to the Court to be a necessary predicate to the application of RESTATEMENT § 552(2)(a) does not exist: they cannot have known that the lender, by its act of approving the loan, would communicate the substance of the appraisal to the buyer if they knew that, to the contrary,

approval of the loan was not based on the appraisal. It may be that the liability of Ranta and RAG exists only if they are entirely sheep or entirely goats. If they knew nothing of the alleged scheme of Engle Whitestone and Preferred, they can be found liable based on the Restatement and *Sage*; if they knew about the scheme and willingly participated, they are accomplices to a fraud (though, given that Preferred was under no obligation to Plaintiffs to have an appraisal done at all, it is difficult to understand why it would go to the unnecessary expense). But if they knew only that Preferred wanted an inflated appraisal which it would not use to qualify Plaintiffs for their loan (perhaps to deceive Countrywide and subsequent purchasers of the mortgages?), then *Kuehn* controls and they owed no duty to Plaintiffs. Which of these three possibilities – or of course the fourth possibility that the appraisals were not inflated – is true is for a jury to decide.

Plaintiffs' waiver of the appraisal, even supposing that Ranta and RAG knew about it, can be taken to waive only their right to have their own appraisal done and their right to insist that Preferred have one done, but not their right to act in accordance with an appraisal done notwithstanding their waiver. It cannot be concluded from the waiver that Plaintiffs did not rely on the appraisal; that will have to be proved at trial. Contrary to Plaintiffs' argument, reliance must be proved for consumer fraud as well as common-law fraud. *Kuehn*, *supra* at 129 ¶ 17. Ranta and RAG are accused of making false representations, not of silence.[2]

The claim for unjust enrichment took a different form at oral argument, where it was limited to the amount actually paid for the appraisals, than it did in the briefing. At page 9 of the Masts' combined response, they claim to be out of pocket $1,106,071.29, which they seek as damages for unjust enrichment; the Yamrons, at page 9 of their combined response, assert an out-of-pocket loss of $350,118.55. This obviously refers to their total loss on the deal, not to the amount Ranta and RAG received. Unjust enrichment requires that one party have and retain money that in justice and equity belongs to another. *Trustmark Ins. Co. v. Bank One, Arizona*, 202 Ariz. 535, 541 (App. 2002). Even if the appraisals caused Plaintiffs to lose money, that money did not go to Ranta or RAG. This version of the claim therefore fails. As the briefs pointed to nothing in the record documenting what sum, if any, Ranta and RAG received from Plaintiffs, summary judgment must be granted on the claim for unjust enrichment.

Plaintiffs dedicate only one sentence of their respective responses to the motion regarding punitive damages: "The actions of RANTA and PREFERRED, as set forth above, create an issue of fact with respect to punitive damages, and it is not a separate claim for relief anyway." Yamron combined response at 16:19-20. "Plaintiffs' evidence set forth herein survives a

[2] The Court is not persuaded by defendants' argument regarding unclean hands, although the Court does not foreclose any opportunity to argue the unclean hands doctrine at the time of trial.

summary judgment motion as to punitive damages." Mast combined response at 19:23-24. The bare assertion that a fact question exists does not suffice to defeat a motion for summary judgment. *Dobson v. Grand International Brotherhood of Locomotive Engineers*, 101 Ariz. 501, 505 (1966). As neither response presents any factual argument or documentation of the evil mind required for punitive damages, this motion is granted.

Turning finally to the RICO claims, the Court agrees with the defendants that the plaintiffs have failed to proffer sufficient evidence such that a reasonable juror could find necessary predicate acts that must be proven to support the RICO claims. The Court agrees with the defendants' analysis that "perjury" is not one of the predicate acts that can support RICO claims. There is also insufficient evidence that the RAG defendants were engaged in an "enterprise" with the other defendants or that the RAG defendants knew that the other defendants were engaged in "racketeering," as is required by Arizona law. A.R.S. § 13-2312(B).

Accordingly,

IT IS HEREBY ORDERED granting summary judgment in favor of defendants on claims for fraud, consumer fraud and misrepresentation as to all transactions, except for those involving the Marley Park properties.

IT IS HEREBY ORDERED granting summary judgment in favor of defendants on all unjust enrichment claims.

IT IS HEREBY ORDERED granting summary judgment in favor of defendants on punitive damages.

IT IS HEREBY ORDERED granting summary judgment in favor of defendants on the RICO claims (Counts 2, 3, 8, 9, 14, 15, 20, 21, 26, 27, 32 and 33).

Additionally, as defendant Preferred Home Mortgage Company was dismissed by order filed May 6, 2011,

IT IS HEREBY ORDERED denying any outstanding motions filed by Preferred Home Mortgage Company as moot.

THE COURT NOTES that although the foregoing ruling has substantially narrowed the scope of this litigation, there remain claims to be tried. Accordingly,

IT IS HEREBY ORDERED setting a telephonic trial scheduling conference on **July 12, 2011 at 11:15 a.m.** The parties should come prepared with their calendars as well as the calendars of any primary witnesses so the Court can set a firm trial date for this matter. Ms Berrett is requested to initiate the conference call to the Court at 602-506-3776.

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.