

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-014605

02/09/2012

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nixon
Deputy

JAMES HOUSE

DANIEL D MAYNARD

v.

DIANE ZUBROD, et al.

DAXTON R WATSON

MARK BAINBRIDGE
HEATHER E BUSHOR

RULING

The Court has considered Defendants, Jay Josephs, and Josephs Appraisal Group Inc.'s (collectively "JAG") Motion to Dismiss, Defendant Maximum Financial Inc.'s, d/b/a Optimum Financial, Joinder and Motion for Judgment on the Pleadings, Defendant Diane Zubrod's Joinder in JAG's Motion to Dismiss and Maximum Financial's Motion for Judgment on the Pleadings (filed January 31, 2012), the Responses, Replies and Affidavit of James House.

Plaintiff essentially contends that he hired Zubrod to represent him in the purchase of a condominium unit. During this relationship, Zubrod recommended Optimum to provide financing. Optimum retained JAG to appraise the unit Plaintiff was considering. Plaintiff contends that the unit was extremely overpriced and that as the result of the parties' fraud or negligent misrepresentation he purchased property that was overvalued.

Plaintiff's seven count Verified Complaint included claims for Fraud (Count 2, Zubrod; Count 3, Josephs and JAG; Count 4, Optimum) and Negligent Misrepresentation¹ Count 5, Zubrod; Count 6, Josephs and JAG; Count 7, Optimum).

¹ Count 1 is Breach of Fiduciary Duty, Zubrod.
Docket Code 019

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SUFFICIENCY OF THE COMPLAINT ALLEGATON

Fraud

Defendants argue that Plaintiff failed to plead fraud with particularity, as required by Ariz. R. Civ. P. 9(b); *see Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 291-92, 229 P.3d 1031, 1033-34 (App. 2010).

The purpose of Rule 9(b) is to eliminate surprise. *Pruitt v. Pavelin*, 141 Ariz. 195, 206, 685 P.2d 1347, 1358 (App. 1984). “[M]agic language is not necessary in pleading fraud, as long as the pleading, considered as a whole, can be construed to plead the nine elements.” *Hall v. Romero*, 141 Ariz. 120, 124, 685 P.2d 757, 761 (App. 1984); *see also Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520, 591 P.2d 1005, 1008 (App. 1979). The Court finds that the allegations in the Complaint, taken as a whole, are sufficiently pled with particularity to state a claim for fraud against Defendants.

Negligent Misrepresentation

In Arizona, the tort of negligent misrepresentation is governed by Restatement (2d) Torts § 552. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 30, 945 P.2d 317, 341 (App. 1996). Section 552(1) provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

See also St. Joseph’s Hosp. & Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 742 P.2d 808 (1987).

“Negligent misrepresentation requires a misrepresentation or omission of a *fact*. A promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation.” *McAlister v. Citibank (Ariz.)*, 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (App. 1992) (emphasis in original); *see Walters v. First Fed. Sav. & Loan Ass’n of Phx.*, 131 Ariz. 321, 325, 641 P.2d 235, 239 (1982).

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Regarding the contention that Plaintiff cannot assert a claim of negligent misrepresentation because he relied upon an opinion, the Restatement (2d) Torts § 552 does not exclude factually based opinions concerning present value. The Court does not believe that an appraisal of current value is an opinion of future worth. *See Nataros v. Fine Arts Gallery of Scottsdale, Inc.* 126 Ariz. 44 (App.1980).

The Court Finds that Plaintiff's claims of fraud and negligent misrepresentation survive Defendants' Motions to Dismiss and Motion for Judgment on the Pleadings. Discovery will further detail these claims.

STATUTE OF LIMITATIONS

The Court is considering the Affidavit of James House and converts the Motions to Dismiss and Motion for Judgment on the Pleadings into Motions for Summary Judgment. The Affidavit of James House raises an issue of when House knew or, under the circumstances, should have known of the alleged fraud and misrepresentations. Rather than require further briefing at this time, the Court believes that discovery will also detail this issue.

IT IS ORDERED denying Defendants' Motions without prejudice.

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.