

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2006-003458

05/23/2007

HON. EDWARD O. BURKE

CLERK OF THE COURT  
E. Parrish  
Deputy

FIRST NATIONAL BANK OF ARIZONA

STEVEN J LIPPMAN

v.

MID-ISLAND MORTGAGE CORPORATION

REBECCA K SETLOW

RULING

The Court has had Defendant Mid-Island Mortgage Corporation's ("Mid-Island") Motion for Summary Judgment Against Plaintiff's First Amended Complaint under advisement and issues the following ruling.

Mid-Island's Motion for Summary Judgment is GRANTED.

Plaintiff, First National Bank of Arizona ("FNBA"), entered into a thirteen paragraph Broker Agreement with Mid-Island. Paragraphs 1(a), (b), (c), (d), (e), 4, 8, 9, and 11 contain warranties. Of these paragraphs 1 and 4 provide remedies. Paragraph 4 requires the Broker to indemnify and hold Lender harmless against any loss arising out of any violation or alleged violation of any laws or regulations.

Paragraph 1(c) provides that if Broker submits any false or misleading information in connection with any loan to Lender and the Broker knew or should have known of its false, fraudulent, or misleading nature, Lender will have the right to rescind the purchase of such loan and require Broker to reimburse Lender for all expenses, losses, or damages in connection with the repurchase of the loan.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2006-003458

05/23/2007

FNBA claims that Mid-Island submitted a loan package which FNBA funded which included an inaccurate property appraisal which caused FNBA money damages for losses incurred in the resale of the package to a third party. FNBA does not seek rescission because the loan has been resold to a third party.

Mid-Island claims that the only remedy available under the contract for this alleged breach is rescission because FNBA agreed to limit its remedy for breach to a rescission of FNBA's purchase of the loan. Mid-Island argues that this limitation of FNBA's remedy significantly protected Mid-Island if it submitted a loan package with inaccurate information because Mid-Island could broker the loan to another party to protect itself from damages. Mid-Island further argues that Plaintiff cannot recover both in contract and tort.

FNBA sued Mid-Island for money damages contending that the property appraisal submitted by Mid-Island did not meet USPAP standards in violation of paragraph 1(d) of the agreement and normal contract remedies for a breach of that provision apply.

In Green v. Snodgrass, 79 Ariz. 319, 289 P 2d 191 (1955), our Supreme Court said:

“We have held that where a contract provides the remedy in event of a breach, the terms of the contract will control....

... this court is committed to the proposition that where the contract provides what the rights of the parties to the contract shall be in the event of a breach, the court will enforce the contract as written.” 79 Ariz. 319, 322.

The Duval appraisal submitted by Defendant can hardly be called anything other than “information” as referenced in paragraph 1 (c) of the Broker Agreement. The appraisal report states on its face that it was “PREPARED FOR: Mid-Island Mortgage Corp. Its Successors and or Assigns.” The Duval appraisal was also misleading information under paragraph 1(c) of the Broker Agreement which the Broker knew or in the exercise of reasonable diligence should have known of its false, fraudulent, or misleading nature. The appraisal was prepared for Broker for submission to Lender. Under these circumstances, Broker certainly should have known whether the subject property contained four or eight units. Because paragraph 1(c) provides for a specific remedy, i.e., rescission, which is no longer possible, Plaintiff's claim for contract damages fails.

Defendants are also GRANTED summary judgment on Plaintiff's tort claims. Camelback Land & Inv. Co. v. Phoenix Entertainment Corp., 2 Ariz. App. 250, 255-56, 407 P 2d 791 (1965). The contract provided a specific remedy for breach. It did not include tort liability. Salt River Project and Power Dist. v. Westinghouse Electric Corp., 143 Ariz. 368, 383 694 P 2d 198, (1984) and Isler v. Texas Oil & Gas Corp. 749 F 2<sup>nd</sup> 22 (10<sup>th</sup> Cir. 1984).

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2006-003458

05/23/2007

**Counsel is advised that the Clerk of the Maricopa County Superior Court has converted its case files to an electronic format and case files are no longer made available to the divisions. Therefore it is imperative that counsel follow Maricopa County Local Rule 3.2 which requires counsel to deliver copies of motions and responses to the division.**