Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
10/20/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-024077 10/18/2010

HON. EDWARD O. BURKE

CLERK OF THE COURT
L. Nixon
Deputy

ROSEBUD HOLDINGS L L C, et al. BRIAN M BERGIN

v.

ANTHONY N ZAUGG, et al. JAMES L BLAIR

MINUTE ENTRY

The court has had Plaintiffs' Motion for Partial Summary Judgment on the issue of the limitation of liability clause in Defendants' contract with a non-party, Defendants' Cross Motion for Partial Summary Judgment, and Defendants' Motion for Summary Judgment under advisement and issues the following rulings.

Plaintiffs' Motion for Partial Summary Judgment is DENIED;

Defendants' Cross Motion for Partial Summary Judgment is DENIED; and

Defendants' Motion for Summary Judgment is DENIED.

On October 4, 2005, defendant, Anthony Zaugg, a surveyor with defendant, Allen Consulting Engineers, Inc. ("Allen"), certified an ALTA Survey (the "Survey") of two parcels of land, consisting of approximately 187 acres, in Pinal County (the "Property"). The Survey was certified to "Jay Nicholas, an unmarried man, Picacho Peak Land & Cattle LLC, a Colorado Limited Liability Company, and Commonwealth Land Title Insurance Company."

The Survey was performed pursuant to a contract between Nicholas Farms, LP and defendant, Allen. The contract provided that Allen's total liability to Nicholas Farms, LP for all claims, including negligence, breach of contract or warranty, etc. would not exceed $50,000.

The Survey reported that the Property was situated in a FEMA Flood Zone "C" rather than in a FEMA Flood Zone "A", the most serious flood zone. Plaintiffs also allege that the Survey did not delineate a major wash on the Property known as the "McClellan Wash."

On October 6, 2006, plaintiffs purchased the Property, allegedly in reliance on defendants' Survey, and claim damages in excess of $3,000,000 against defendants on theories of negligence and negligent misrepresentation. Plaintiffs argue that defendants are liable in negligence because they owed a duty to plaintiffs as reasonably foreseeable end users of the Survey and that defendants intended that plaintiffs would rely on the information contained in the Survey.

The primary issue is whether the limitation of liability clause applies to plaintiffs' claim against defendants or only to a claim by Nicholas Farms, LP. Plaintiffs argue that as non-parties without privity they are not intended third party beneficiaries of Allen's contract with Nicholas Farms, LP. This issue turns on whether defendants owed a duty to plaintiffs, non-parties to the Nicholas Farms, LP-Allen contract.

Defendants argue that the economic loss rule bars plaintiffs' recovery. In discussing this issue in the context of an architect's liability our Supreme Court said:

> "This Court held that lack of privity did not bar the claims .… With regard to the negligence claim, the Court noted that 'design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services,' and that 'an action in negligence may be maintained upon the plaintiff's showing that the defendant owed a duty to him, that the duty was breached, and that the breach proximately caused an injury which resulted in actual damages,' … 'we only hold here that design professionals are liable for foreseeable injuries to foreseeable victims, which proximately result from their negligent performance of their professional services …
>
> Without discussing the economic loss doctrine, *Donnelly* correctly implied that it would not apply to negligence claims by a plaintiff who has no contractual relationship with the defendant …

> … Rather than rely on the economic loss doctrine to preclude tort claims by non-contracting parties, courts should instead focus on whether the applicable substantive law allows liability in the particular context. For example, whether a non-contracting party may recover economic losses for a defendant's negligent misrepresentation should depend on whether the elements of that tort are satisfied, including whether the plaintiff is within the limited class of persons to whom the defendant owes a duty." *Flagstaff Affordable Housing Limited. Partnership v. Design Alliance, Inc. 223 Ariz. 320, 223 P.3d 664, 671-672 (2010).*

The question then is not whether the economic loss rule bars plaintiffs from recovering, but rather, whether under Arizona substantive law plaintiffs are in the limited class of persons to whom the defendant surveyor owed a duty.

Although Arizona has decided that an architect can be liable to a contractor on a negligence theory for the increased cost of construction due to the architect's error in plans, *Donnelly Const. Co. v. Oberg/Hunt/Gilleland, 139 Ariz. 184, 677 P.2d 1292 (1984),* our appellate courts have not reached the issue as to whether a surveyor can be liable to third parties.

The liability of a real estate appraiser to a subsequent purchaser of real property is analogous to that of a surveyor to a subsequent purchaser. Both divisions of our Court of Appeals have considered whether a real estate appraiser can be held liable to a third party purchaser for negligence, negligent misrepresentation and breach of implied warranty. Division Two said no in *Hoffman v. Greenberg, 159 Ariz. 377, 767 P.2d 725 (App. 1988).* On the other hand, Division One has found that a real estate appraiser owed a duty of care to a purchaser in *Sage v. Blagg Appraisal Company, Ltd., 221 Ariz. 33, 209 P.3d 169 (App. 2009).*

In *West v. Inter-Financial, Inc., 139 P.3d 1059 (App. Utah 2006),* the court found that a real estate appraiser did owe a duty to non-contract parties. In making this analysis, it mentioned surveyors, saying in part:

> "Moreover, real estate appraisers, similar to accountants or surveyors, cannot assert lack of privity as a defense when they are aware that third parties may reasonably rely on their work." *139 P.3d 1059, 1066.*

Courts in other jurisdictions have held that absent privity of contract and reliance on a survey, third parties did not have a claim against surveyors for negligent misrepresentation. See *DeCapua v. Lambacher, 663 N.E.2d 972 (App. Ohio 1995)*; *Gipson v. Slagle, 820 S.W.2d 595 (App. Mo 1991)* no liability to adjoining landowners; *Lawyers Title Insurance Corporation v.*

Hoffman, 513 N.W.2d 521 (Neb. 1994) subsequent surveyor failed to state a cause of action against original surveyor for negligence in setting pins on boundary of surveyed property; and *Carlotta v. T.R. Stark & Associates, Inc., 470 A.2d 838 (Ct. Spec. App. Md., 1984)* surveyor did not owe duty of care to adjoining landowner who did not contract with surveyor nor rely on survey.

But, see *Cook Consultants, Inc. v. Larson, 700 S.W.2d 231 (App. Tex. 1985),* where a surveyor was found to owe a duty of care to a subsequent purchaser where reliance on the survey was shown, and *Rozny v. Marnul, 250 N.E.2d 656 (Ill. 1969)* holding a surveyor liable for an inaccurate survey under the theory of tortious misrepresentation.

Finally, in *Carr Smith & Associates, Inc. v. Fence Masters, Inc., 512 So. 2d 1027,(Third DCA, Fla. 1987),* the Florida Court of Appeals held that material issues of fact existed as to whether the surveyor had or should have known of the purchaser's intention to rely upon a survey.

The question of whether a duty exists is a question of law for the court to decide. *Gipson v. Kasey, 214 Ariz. 141, 143, 150 P.3d 228 (2007).* There is no doubt that defendants had a duty to Nicholas Farms, LP. The question for decision is whether that duty extended to plaintiffs.

Arizona courts may adopt a rule that a surveyor can be held liable to a non-contracting party if the surveyor knows of the existence of the non-contracting party and the non-contracting party proves reliance on the survey. The determination of this issue in this case involves disputed questions of fact. See defendants' Statement of Facts in Support of Motion for Summary Judgment ¶¶ 5, 6, 7, 9, 22, 25, 26, 27, 28, 29, 30 and 32 and plaintiffs' Controverting and Separate Statement of Facts in Support of its Response to Defendants' Motion for Summary Judgment ¶¶ 5, 7, 9, 17, 25, 47, 48, 49 and 50.

Because the court or jury must first make factual determinations to decide whether the surveyor's duty of care extends to a non-contracting subsequent purchaser before considering the more difficult issue of whether the non-contracting parties plaintiff can obtain a greater recovery from the defendants than the contracting party could have, plaintiffs' motion for partial summary judgment is premature.

The parties have argued in different pleadings that issues of fact prevent the granting of defendants' motions for partial summary judgment and for summary judgment. The court agrees.