SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-002659 03/01/2004

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
M. Johnson
Deputy

FILED: 03/03/2004

ACE PARKING MANAGEMENT INC

v.

SOUTHWESTERN PARKING COMPANY, et al. ROBERT D MITCHELL

TOM DARWIN
3700 E WASHINGTON
PHOENIX AZ 85034
JAMES J FARLEY
LARRY MURNANE PRO HAC VICE
PETERSON & PRICE
530 B ST STE 1700
SAN DIEGO CA 92101

MINUTE ENTRY

This matter having been under advisement the court now, for reasons as hereafter stated, denies all relief requested by designated plaintiffs John Costabile and Anita Costabile, husband and wife, and Phoenix Airport Parking Company, an Arizona Corporation, on all claims asserted against designated defendants Southwestern Parking Co., Inc., an Arizona Corporation, dba Park and Travel, W. Al Pasley and Veva Pasley, husband and wife, Pasley Company, L.L.C. an Arizona Limited Liability Company, the court finding and concluding that plaintiffs have not proven Counts I (indemnity), III (breach of implied covenant of good faith and fair dealing), and IV (breach of contract) by a preponderance of the evidence, and have not proven Count II (fraud and deceit; fraud in the inducement) by clear and convincing evidence. This court's decision is based on a failure of proof and also in connection with Count II, there could be no reasonable reliance on any alleged misrepresentation.

The court Finds, Determines and Orders as follows:

1. The court has conducted a Taylor (175 Ariz. 148)/Darner (140 Ariz. 383) hearing at the same time as this bench trial. The court has admitted extrinsic evidence to

determine the meaning of language in the Asset Purchase and Sale Agreement (Exh. 32) and found such evidence to be relevant on the issue of the parties' intent. None of such evidence was precluded by the parol evidence rule. Plaintiffs' claims were not barred by the "Full Integration" clause of paragraph 9 (E) of the aforesaid Agreement. Lusk (85 Ariz. 90, 332 P.2d 493), cited by plaintiffs. The case of Carrell (101 Ariz. 430, 420 P.2d 564), also cited by plaintiffs, is applicable because this court agrees that the circumstances of the instant case presented fact issues for a trier of fact, as they did in Carrel. This court, however, has decided those issues in favor of defendants based on this record. This court further agrees with plaintiffs' excellent analysis of Pinnacle Peak Developers (129 Ariz. 385, 631 P.2d 540) found in their Supplemental Trial Memorandum. Thus this decision is not based, as defendants argue, on the view that certain provisions of the Agreement (Exh. 32) between the parties (see paragraph called "Miscellaneous", para 9, beginning at 14; 9E at 15; 9 Q at 17) preclude admission of certain testimony because barred by the parol evidence rule.

2. Defendants did not breach the aforesaid Agreement (Count IV).
3. Defendants did not breach the implied covenant of good faith and fair dealing (Count III).
4. Defendants are not obligated to indemnify plaintiffs for costs, legal fees or any amount incurred in the defense of the Ace Parking Case (Count I).
5. Plaintiffs have not proven defendants committed fraud and/or deceit by clear and convincing evidence (Count II) on any of the grounds put forth by plaintiffs the court specifically finding that defendants did not misrepresent to plaintiffs (a) that the operation of the business would generate sufficient revenues to support debt service; (b)that the real property on which the business was located contained 2000 or more parking places; (c) that the business of Park and Travel generated net income of $738,000; (d) or the amount of rental income attributable to industrial property on the property leased to a third party.
6. Mr. Costabile admits that Pasley never made the four above alleged misrepresentation to him personally but alleges that Pasley indirectly made the representations by providing Tom Darwin, who the court finds was plaintiffs' agent, with an MAI appraisal by the Burke Hansen firm (Exh. 54) which allegedly contained the aforesaid misrepresentations. It is undisputed Pasley gave Darwin the MAI appraisal.
7. But assuming these representations are found in the MAI appraisal, and that such representations are material and could, under other circumstances, be relied on by plaintiffs as factual assertions even if in the nature of reasonable estimations, plaintiffs in the instant case could not reasonably rely on the assertions in the MAI appraisal or as claimed also by plaintiffs, on the assertions in the Ace Parking pro forma (Exh. 25) for the following reasons:

   -Tom Darwin, plaintiffs' agent who was going to buy the airport parking facility for himself before he realized he could not come up with the financing had full access to, and indeed worked on defendants' premises for many months prior to

the April 2000 Costabile closing and inexplicably never counted the parking spaces.
-the evidence shows (through the testimony of Mr. Pasley and his longtime operation manager Ted Kimura, Jr.) that if you counted the striped and unstriped parking spaces where cars could be parked on the red area of Exhibit 1 (without taking any car keys) the number of cars which could be parked approached 2000 which was consistent with the 1970 spaces set forth in the MAI appraisal.
-plaintiffs after taking over control of the airport parking business made the egregious marketing decisions to stop direct mailing of parking coupons (see in this connection Exh. 87 where Pasley writes Costabile after the closing of his dismay that direct mailing had stopped and gave figures to show why it should by reinstituted) and stopped soliciting travel agents and corporate accounts. Direct mailing and solicitation of travel agents and corporate accounts accounted for much of the success of the Pasley business when he ran it prior to the sale to plaintiffs and as can be seen by Pasley's similar success in again operating the business after Pasley took back the business from the defaulting plaintiffs. These marketing decisions by plaintiffs accounted more for plaintiffs' failure in operating the parking lot business than any assertion in the MAI appraisal.
-after taking over the business at the end of April 2000 and the shuttle buses which went with it and which Pasley had used to ferry people back and forth from the yard to the airport, the buses eventually fell into disrepair and were not kept running. There were constant breakdowns and many had no air conditioning which impacted the service to customers.
-the industrial buildings which were part of the sale and which generated monthly income were not maintained and tenants were lost and Costabile used one of the buildings for another of his businesses.
-Mr. Cole, plaintiffs' expert never evaluated the Ace pro forma (Exh. 25) although plaintiffs asserted they relied on it in going through with the sale. Cole did evaluate the MAI appraisal and actually counted 1684 spaces (Exh. 55-Exh.A, reduced to 1643 spaces to park buses and employee vehicles) but conceded these were solely lined spaces and that he never counted unstriped parking spaces. Cole also conceded the 280 spaces on the D'Velco property (green area, Exh. 1) could be in the MAI tally of 1970 spaces.
-in any event the MAI appraisal estimated that it would take 59% occupancy of the 1970 spaces to pay the monthly debt service or in round numbers 1200 filled spaces. Pasley and Kimura both testified that prior to the sale 1200 cars were constantly and consistently parked each day and this was the case after plaintiffs defaulted and Pasley again operated the lot with Kimura's assistance [see lot count sheets (Exh. 29)].
-Plaintiffs had an attorney throughout the process of the negotiations for the sale and the closing was held at that lawyer's office. Pasley did not have a lawyer and copied paragraphs from prior sale agreements (he had sold 9 travel agencies in the past) in doing the first draft of the Agreement (Exh. 32).

-significantly and importantly neither the MAI appraisal (Exh. 54) nor the Ace pro forma (Exh. 25), the two documents on which Costabile said he relied, were not part of the sales documents (Exh. 32) for the parking lot.
-plaintiffs always understood that the D'Velco lease (280 to 311 spaces depending on who is counting the spaces in the green area of Exh. 1) was only a month to month lease and that those spaces were in addition to the spaces in the fee simple or red area (1970 spaces according to the MAI appraisal, Exh. 54). This court has found the 1970 spaces is a close approximation of the red area spaces, both striped and unstriped and without taking car keys (a blow up of the Exh. 1 aerial photo was used throughout the trial by both sides).
-Pasley did not prepare the Ace pro forma (Exh. 25), on which Costabile claims he relied, but Pasley made significant corrections to it especially on the operating expense side and the amount needed for promotion and advertising raising the Ace proposed figure from $96,000 to $120,000, which is not the action of an individual seeking to mislead.
-Any suggestion by plaintiffs that they never received the last three years tax returns when requested July 1, 1998 (Exh. 58) and corresponding operating statements is belied by Mr. Pasley's testimony and the letter of July 23, 1998 to Mr. Darwin (Exh. 15) where the items are said to be specifically enclosed. If plaintiffs, as they claim, never received these documents prior to the closing, if was unreasonable for them to proceed. Plaintiffs should also have received updated financials before proceeding with the closing which they claim they did not receive.
-The Agreement (Exh. 32, 4 n at 7) states the "financial statements and all financial data delivered to Buyer by Seller are true, correct and complete in all material respects as of the date thereof". It also significantly states "which include Business Financial records through February 29, 2000". If these were not included then plaintiffs should not have closed the sale.
-The court accepts Mr. Pasley's testimony that he gave copies of the consolidated tax returns (Park and Travel, executive division, and rental division) to plaintiffs in 1998 when the same were requested.
-the MAI appraised value of $8.4 million (Exh. 54, at 2 and 75) for the fee simple parking lot property (red area) (which plaintiff's claim is probably 50% too high because of defendants misrepresentations), was a valuation as of December 22, 1998, and is not out of line with the defendants' Loper appraisal of $7.7 million (Exh. 39, Bates 000473) which was a valuation after the closing (April 2000) and as of January 16, 2001.
-The MAI appraisal of December 22, 1998 was stale after 6 months (testimony of plaintiff's expert Mr. Cole) and should not have been relied on by plaintiffs for a sale taking place in April 2000.
-Darwin admittedly was going to recover his $100,000 (Exh. 19) previously paid to defendants (for 50% of the stock of Park and Travel) if the sale to Costabile

went through, which may have influenced his decision to proceed as plaintiff's agent with the sale to his principal Costabile.
-In making the foregoing findings, conclusions and analysis this court has assumed that Pasley gave information to the MAI appraiser and that it was used to prepare Table 14 (Exh. 54 at p.62) which plaintiffs claim contained misrepresentations and set forth $738,000 estimated net income. Tables 13 (pg. 60) and 14 are the operating history of Park and Travel and this court concedes could only come from defendants. It is also understood that Wells Fargo bank agreed to loan Costabile $1.4 million, used to purchase the assets of the parking business and that Costabile leased the business property and had an option to buy the real property (402 S. 40th St. Phoenix) for $8.4 million.

8. In summation this court has found insufficient evidence of misrepresentations by defendants, unreasonable reliance thereon in any event, and that the real cause of plaintiffs failure to operate the lot profitably was inappropriate marketing decisions made by defendants after the sale and inattention to the business (Costabile spent 50-60 hours a week running another business and rarely was on the premises and the court accepts Kimura's testimony that Darwin was constantly on the premises for about three months after the closing but not often after that). This court further rejects plaintiffs' view that defendants are at least liable for negligent misrepresentation. So this ruling is clear, the court also holds that under the circumstances of this case neither Costabile nor his agent Darwin had a right to rely on the MAI appraisal or the Ace pro forma.

Accordingly and in summation this court determines and Orders that plaintiffs shall take nothing by their complaint (i.e. the former cross claim) and that defendants are entitled in this contract matter to their reasonable attorney's fees and taxable costs to be submitted by affidavit and statement of costs.