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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-012200 05/24/2012

HONORABLE EILEEN S. WILLETT

CLERK OF THE COURT
J. Rutledge
Deputy

ABROMOVITZ INVESTMENT PROPERTIES L L C

KEITH L HENDRICKS

v.

RED EYED JACK SPORTS BAR INC, et al.

TIMOTHY J THOMASON

WILLIAM G FAIRBOURN

UNDER ADVISEMENT RULING

The Court has reviewed all of the pleadings, briefs, memoranda, motions, and other documents filed in this matter and has considered all arguments raised, facts presented, and testimony of the parties and witnesses.

The Court has had the opportunity to view the demeanor and apparent candor of the witnesses, to assess the consistency or inconsistency of their testimony, to consider impeachment evidence and testimony, to assess the credentials and analysis of expert witnesses, and generally determine the credibility of the witnesses and evidence.

The findings and conclusions stated herein are not an exhaustive list of every finding and determination made by the Court. In addition to those expressly set forth herein, the Court has, based on its determinations of the credibility of the witnesses, testimony and evidence presented, made all the necessary findings of fact and conclusions of law sufficient to support its determination in this matter.

Findings of Fact:

This case involves the commercial building formerly used as a restaurant/brewery located at 101 East Buchanan Street in Phoenix, Arizona.

In June of 2002, Mr. Jack Galardi ("Galardi") formed Red Eyed Jack Sports Bar, Inc., a Nevada corporation ("REJ"), for purposes of investing in business opportunities, including the purchase of real property.

In 2002, Galardi and Ken Marchiol ("Marchiol") agreed to contribute funds to purchase the property located at 101 East Buchanan Street in Phoenix (the "Property"), which was being sold at a scheduled foreclosure sale.

Galardi and Marchiol further agreed that: a) REJ (a legal corporation then owned solely by Galardi) would hold title to the Property; b) 50% of REJ's shares would be owned by Marchiol; c) Galardi would operate a nightclub on the premises (the "Club"); d) a loan secured by the Property would be taken out to fund improvements and to repay Galardi's and Marchiol's respective investment contributions; and e) the Club's operating profits would pay the monthly loan payment.

On June 2, 2002, the Property was purchased, with Tanya Marchiol's assistance, at the foreclosure sale for $1.2 million. Galardi and Marchiol contributed $623,000.00 and $577,000.00, respectively. Title to the Property was vested in REJ pursuant to a recorded trustee's deed.

Despite the differing amounts of their initial investments, Galardi and Marchiol agreed to share equally in the ownership of the Property.

The Galardi and Marchiol Defendants never came to a complete meeting of the minds as to how the Property was to be managed or controlled. The Defendants did not follow proper corporate formalities in documenting or establishing their joint ownership of the Property. Marchiol's 50% shares in REJ were never issued. However, Galardi recognized that Marchiol should have been issued 50% of the shares of REJ.

The contemplated loan was never obtained.

In August 2002, Galardi and Marchiol obtained an appraisal of the Property at $2,700,000 excluding equipment. This appraisal contains a calculation of the useable area of the building at 14,591.2 sf. for the first floor and 10,844 sf. for the basement.

Tanya Marchiol listed, on the Multiple Listing Service ("MLS"), the Property in August 2002 for $3 million on instructions from Galardi. Tanya Marchiol further testified that Galardi then cancelled this listing in December 2002 because he wanted to put an adult club in the Property.

After REJ purchased the Property, it leased the Property to Country Club Sports, Inc., another entity created and controlled solely by Galardi.

Country Club, Inc. did business as "The Sporting House." The Sporting House was open for business from approximately April 2003 through May 2005. During that time, it never paid any rent, nor did it make any profits.

Neither Galardi nor Country Club, Inc. paid REJ or Marchiol the rental revenue that Marchiol was entitled to receive as 50% owner of the Property.

In addition to the unpaid rental revenue, from June 2002 through mid-April 2004, Marchiol (through the Marchiol Family Limited Partnership ("MFLP")), paid certain taxes and operating expenses. Neither Marchiol nor MFLP were reimbursed.

In April 2004, Galardi and Marchiol discussed Marchiol's 50% ownership interest in the Property and the amounts owed to Marchiol for his ownership and ongoing financial support of REJ and Country Club, Inc., dba The Sporting House. As part of those discussions, Galardi agreed to convey fee simple ownership of the Property to MFLP in satisfaction of the past amounts outstanding and owed to Marchiol and MFLP.

Galardi, on behalf of REJ, signed a warranty deed (hereinafter, the "2004 Deed") on April 27, 2004, conveying outright fee simple title of the property to MFLP.

The Deed was duly acknowledged and notarized by Galardi's employee and commissioned notary public, Ms. Janet Riley. Galardi delivered the Deed to Ms. Tanya Marchiol via Federal Express.

Upon receipt, Ms. Marchiol made attempts to record the Deed on behalf of MFLP; however, the Maricopa County Recorder initially refused to record it. Ms. Marchiol then sent the Deed to her mother, Ms. Sharon Marchiol, for safekeeping.

The Court finds the Marchiols' testimony regarding the warranty deed to be credible.

In July 2005, Tanya Marchiol began listing the Property again on MLS. The listing price was for $3,850,000. Tanya Marchiol is licensed to sell real estate in Arizona. She owns Defendant Team Investments, LLC. Though Tanya Marchiol and Team Investments, LLC kept documents regarding the 2005 listing, the documents were not produced.

Offers were received on the Property, but ultimately the Property was not sold. Marchiol would not accept any offer below $4 million.

Alberto Jauregui ("Jauregui") is a broker licensed in Nevada and the broker and owner of Nevada Land Commercial Real Estate, Inc. ("Nevada Land"). Jauregui has worked for Galardi as his broker for more than 10 years. Jauregui has represented Galardi in more than 10 real estate transactions. Jauregui never has had a written listing agreement or contract with Galardi, but rather conducts business with Galardi on a handshake basis.

At some point before September 21, 2007, Galardi had a meeting with Jauregui and asked him to render a broker's opinion of value for the Property.

Prior to Jauregui's listing of and efforts to sell the Property, Galardi told Jauregui about Marchiol's ownership interest in the Property. Galardi also told Jauregui prior to his efforts to sell the Property that Tanya Marchiol had previously listed the Property but that Marchiol had rejected the offers that came in because he wanted more money.

On or about September 25, 2007, Jauregui and Nevada Land rendered a fair market analysis (also referred to as a broker's opinion of value) that the Property was worth $3 million. After receiving the fair market analysis from Nevada Land, Galardi hired Nevada Land to market and sell the Property.

On or before October 29, 2007, Nevada Land listed the Property for $2,995,000 on LoopNet – a commercial real estate listing service. Galardi approved this listing price. Before listing the property, Nevada Land ordered two large banners and placed them on the Property. These banners said, "REGARDING THIS PROPERTY (702) 274-7755." That phone number belongs to Defendant Nevada Land, which is Jauregui's company.

In March 2008, while out of the country, Marchiol received information that Galardi was in negotiations with Abromovitz Investment Properties, L.L.C. ("Abromovitz") for the sale of the Property.

Marchiol contacted his mother, Ms. Sharon Marchiol, who in turn contacted Marchiol's friend and attorney, James Parr, Esq., and provided him the original 2004 Deed. Mr. Parr, on Marchiol's behalf, retained attorney Kirk Ingebretsen. Mr. Ingebretsen contacted the Maricopa County Recorder's Office to inquire about recording requirements to ensure the Deed could be properly recorded. Subsequently, Mr. Ingebretsen inserted on the face of the Deed: "A.R.S. 11-1134B1". Mr. Ingebretsen then prepared a letter for hand-delivery to Tanya Marchiol dated March 14, 2008, instructing her to record the Deed as early as possible on Monday, March 17, 2008. Ms. Marchiol recorded the Deed on March 17, 2008.

On March 27, 2008, Galardi, on behalf of REJ, but without the consent of Marchiol or MFLP, entered into a contract with Abromovitz for the sale of the Property for $1.5 million. Nevada Land acted as Seller's agent on the transaction for Galardi and REJ. However, as of March 27, 2008, Galardi, per his own admission, was not an officer, director, or shareholder of REJ. Ms. Suzanne Coe was the company's sole officer, director, and shareholder as of that time.

Galardi did not own the Property and did not have authority to sell the Property and enter into a contract with Abromovitz. Nevertheless, Galardi, through REJ, agreed to convey fee simple ownership of the Property to Abromovitz, notwithstanding (i) his prior conveyance of the same Property to MFLP, (ii) his lack of authority to transact business on behalf of REJ or MFLP, and (iii) his own testimony that he needed Mr. Marchiol's approval to sell the Property in order to vitiate the transaction.

Mark Abromovitz and Gary Abromovitz are principals and investors in Abromovitz Investment Properties, LLC ("Abromovitz"). They own a number of properties in downtown Phoenix including, among others, the properties at 102 East Buchanan and 106 Each Buchanan – the buildings directly across the street from the Property. Both of the buildings are currently leased and doing well. The building (106 Buchanan) across the street from the Property was leased in 2010 at an effective rate of $27 per square foot triple net.

Both Mark Abromovitz and his father, Gary Abromovitz, were born and raised in Arizona. Gary's father worked in downtown Phoenix and owned a building in the warehouse district. The building is still owned by the Abromovitz family and is leased for a term of 39 years to Cooperstown and operates as a sports bar and restaurant. The lease has been in effect since 1997.

Mark Abromovitz had a longstanding desire to purchase the Property. He was aware, years prior to the Purchase Contract, that REJ was listed as the owner of the Property on the Maricopa County Assessor's website.

The Court finds the testimony of Mark and Gary Abromovitz to be credible.

On February 14, 2008, Mark Abromovitz called Nevada Land's number listed on banners hanging on the Property. Mark expressed interest in the Property and made arrangements to see the Property.

On February 19, 2008, the Abromovitzes toured the Property. They observed that the building was structurally sound and up to code. Shortly after seeing the Property, Abromovitz submitted a letter of intent to purchase the Property and brewery equipment for $1.24 million. Nevada Land responded by asking for financial proof that Abromovitz had the ability to close.

Abromovitz offered to have Nevada Land call its banker and accountant to verify its financial ability to purchase the Property. Nevada Land soon learned that Abromovitz owned the buildings across the street and could close quickly. Jauregui told Galardi that Abromovitz would be the best buyer for the property.

After his offer was made, Mark Abromovitz expended time and money meeting with (i) bankers and mortgage brokers for financing commitments in place and to determine the best way to finance the project; (ii) investors to discuss equity participation; and (iii) architects and contractors to evaluate the renovation work needed.

In March 2008, Nevada Land contacted Abromovitz with a counteroffer of $1.5 million and a quick close. Abromovitz accepted the counteroffer. Nevada Land then drafted the purchase contract and sent it to Abromovitz. Gary Abromovitz reviewed the contract and requested some changes to conform it to what had been verbally discussed. The requested changes were made, and Mark Abromovitz and Jack Galardi signed the contract (the "Purchase Contract").

The Court finds that the Purchase Contract (i) constitutes a valid and binding contract; (ii) contains definite and certain terms; and (iii) has mutuality of obligation and remedy.

The Purchase Contract provides at Section 6.1 that the seller had an obligation to tender a deed in recordable form into escrow prior to the Closing Date. Closing Date is defined as "15 days after the expiration of the Due Diligence Period but no later than May 15, 2008." The Due Diligence Period ended 30 days from the date of the Purchase Contract. Based on this calculation, the Closing Date was May 12, 2008.

Section 8.1(c) of the Purchase Contract provides that by the Closing Date, "Seller shall have delivered the items described in Section 6.1." The Purchase Contract further has a "[t]ime is of the essence" clause.

On May 9, 2008, Abromovitz Investment Properties, L.L.C., deposited the full purchase price and estimated closing costs (in total $1,515,000) and fully-executed closing documents into escrow in full tender and performance of its obligations under the Purchase Contract.

REJ failed to execute the necessary closing documents or tender marketable title to the Property as required by the Purchase Contract on or before the Closing Date. This is a material contractual breach.

Section 8.1(b) of the Purchase Contract requires "Seller's representations, warranties, and covenants set forth in the Agreement shall be true and correct as of the Closing Date. The

Purchase Contract contains representations that Red Eyed Jack (the "Seller") was the owner of the Property.

Section 14 of the Purchase Contract provides a specific warranty that the Property, including the brewery equipment, was not encumbered.

As of the Closing Date, the contractual representations about ownership of the Property were not true and correct as required by Section 8.1(b).

In April 2008, Abromovitz learned of a warranty deed purporting to transfer title to MFLP dated April 27, 2004, but not recorded until March 17, 2008.

After the issue of the 2004 Deed arose, Jauregui assured Abromovitz that the seller was cleaning up the situation and that the deed had been forged. In an email from Nevada Land dated April 8. 2008, Jauregui admits that they were aware of the "fraudulent deed recorded."

Section 1.1 of the Purchase Contract provides that the terms "Closing Date", "Closing", and "Close of Escrow" have the same meaning. Jauregui testified at trial that the terms "Closing Date" and "Close of Escrow" are used synonymously in the Contract. The escrow agent chosen by the Galardi Defendants sent the parties a timeline that calculated the "Close of Escrow" to be "May 13, 2008 (15 days after the expiration of the Due Diligence Period) but no later than May 15, 2008.

Section 8.1(a) of the Contract provides that if Buyer notifies Seller of defects found in the title report, "Seller shall have until the Close of Escrow in which to advise Buyer that (i) Seller shall remove any objectionable exceptions to title or obtain appropriate endorsements to the Title Policy on or before the Closing Date; or (ii) Seller shall not cause the exceptions to be removed." The permitted exceptions are set forth in Section 7 of the Purchase Contract and do not include complete failure of ownership of title to the Property.

Galardi, through Nevada Land, elected to resolve the 2004 Deed by committing to Abromovitz that it was working on resolving the fraudulent deed recorded. The Court finds that Abromovitz relied on this representation by proceeding with due diligence and incurring additional expenses, depositing additional money into escrow, and allowing its earnest money to go hard.

The Purchase Contract does not give the Seller the right to change its elections once made. Abromovitz relied upon Seller's representations to its detriment.

On May 16, 2008, counsel for Galardi and REJ sent Abromovitz a letter attempting to elect to treat the 2004 Deed as a title exception and to compel Abromovitz to accept title subject to the 2004 Deed. However, by May 16, 2008, the Seller had already materially breached the Purchase Contract by failing to tender a deed in recordable form into escrow prior to the Closing Date as required by Section 6.1 and Section 20.8 (time-is-of-the-essence clause).

The Court finds that the May 16, 2008 letter had no effect on the obligations between the parties.

At the time that Galardi executed the Purchase Contract, Galardi was in a significant dispute with Marchiol and was using the Purchase Contract to leverage a settlement/buyout with Marchiol.

Galardi testified that, if it ever came time to sell the Property, Marchiol would have a 50% say in the sales price. He believed that both he and Marchiol would have to agree to be able to sell the Property and that neither he nor Marchiol could sell the Property without the other's permission. Galardi told Jauregui that he needed Marchiol's permission to sell the Property to Abromovitz. Galardi admitted that he entered into the contract with Abromovitz to force Marchiol to either buy Galardi out or sell the Property and end their joint venture.

Galardi and Nevada Land knew that Marchiol did not consent to sell the Property, but Nevada Land intentionally drafted and Galardi intentionally executed the Purchase Contract.

In the meantime, Galardi contacted Marchiol and continued to negotiate with Marchiol concerning the Property. Marchiol rejected Galardi's offer.

The Court finds that the most plausible and consistent explanation of why Galardi signed the contract with Abromovitz despite not having Marchiol's consent was because Galardi was attempting to leverage or pressure Marchiol into buying him out.

Neither Galardi nor Nevada Land told Abromovitz anything other than that the 2004 Deed was a forgery and that they were resolving it. Galardi and Jauregui acted in bad faith by leading Abromovitz to believe that the 2004 Deed was a forgery and that they were working on resolving it while at the same time working on a deal inconsistent with the Contract in which the Property would be transferred to Marchiol leaving Abromovitz without the Property.

At the same time Galardi and Jauregui were assuring Abromovitz that, among other things, the 2004 Deed was forged and would be resolved The credible evidence is that Galardi was trying to leverage a deal whereby Marchiol would buy out Galardi on the Property. The existence of these negotiations was not told to Abromovitz and is inconsistent with what

Abromovitz was being told until after his earnest money went hard. Abromovitz completed the due diligence and allowed his earnest money to go hard at the expiration of the Due Diligence Period.

Before the expiration of this Due Diligence Period, Mark Abromovitz had offered to extend the period to provide more time to clear up the title issue. Galardi never responded to this offer, leading Abromovitz to believe that the fraudulent deed would be resolved. The Galardi Defendants did not inform Abromovitz that they were not working on curing the purported "fraudulent deed" and had actually been working on negotiations that would leave Abromovitz without the Property.

Weeks after the earnest money went hard, Galardi, through Nevada Land, sent Abromovitz a draft amendment to extend the Purchase Contract for 30 days. The amendment proposed to extend the Closing Date and Close of Escrow to June 15, 2008 purportedly to allow Seller time to resolve title matters. But the amendment also limited Abromovitz's remedies, providing merely that "if these matters cannot be resolved prior to the Close of Escrow, escrow shall be cancelled and all deposits shall be refunded."

Abromovitz responded with two draft amendments allowing for an extension but without this limiting language. The Galardi Defendants rejected these proposed amendments.

As the Close of Escrow Date drew near, Abromovitz sent counsel for the Galardi Defendants a third proposed amendment to simply extend the Closing Date by one week to give the parties more time to negotiate an acceptable amendment. The Galardi Defendants failed to acknowledge the proposed interim extension sent by counsel for Abromovitz until days after Abromovitz had fully performed the Purchase Contract by putting the $1.5 million contract price into escrow.

Mark Abromovitz testified that shortly before putting up the $1.5 million contract price into escrow, he called Jauregui numerous times over several days but Jauregui never responded and, in his words, "went dark."

The parties did not reach an agreement to extend the Closing Date or amend the Purchase Contract.

The Court finds that Abromovitz was damaged by the conduct of the Galardi Defendants and Nevada Land.

Conclusions of Law:

Abromovitz and REJ's burden to set aside the 2004 Deed requires clear and convincing evidence. *Stewart v. Woodruff*, 19 Ariz. App. 190, 194, 505 P.2d 1081, 1085 (Ct. App. 1973) ("A deed will not be set aside because of invalidity except on a showing of clear and convincing proof."). Clear and convincing evidence requires the finder of fact to "be persuaded that the truth of the contention is 'highly probable.'" *State v. Roque*, 213 Ariz. 193, 215, 141 P.3d 368, 390 (2006).

The statutory requirements governing conveyances of real property, as prescribed under A.R.S. § 33-401, require: (i) a writing, (ii) subscribed by the grantor, (iii) acknowledged by a notary, and (iv) delivered.

A deed between the grantor and grantee does not have to be recorded to convey property. *See, 3502 Lending, LLC v. CTC Real Estate Service*, 224 Ariz. 274, 277, 229 P.3d 1016, 1019 (Ct. App. 2010) ("We first note that even an unrecorded instrument is fully enforceable between the parties to the transaction."); *see also*, A.R.S § 33-412(B) (stating that an unrecorded instrument "as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall be valid and binding.")

Delivery is to be construed as of the time the deed is given, not after. *State ex rel. Goddard v. Coerver*, 100 Ariz. 135, 143, 412 P.2d 259, 264 (1966) ("[A] deed must be construed as of the time it is given and not as of a later date.").

As articulated by Arizona's Supreme Court in plain terms: "The simplest mode of delivering a deed is by manual transfer of it by the grantor to the grantee, with the intention of relinquishing all control over the instrument and of passing title to the property. This delivery is defined as an 'absolute delivery,' **and undoubtedly it constitutes a consummation of the deed**." *Pass v. Stephens*, 22 Ariz. 461, 468, 198 P. 712, 715 (1921) (emphasis added).

The Ninth Circuit, applying Arizona law, summarizes this principle:

> While there is some confusion in the cases, we understand the general rule in this country to be that **if a deed absolute on its face be delivered to the grantee, it becomes presently operative, freed from any condition not expressed in the instrument itself, and vests title in the grantee though the parties may not so intend** . . . Decisions of the Arizona Supreme Court in *Hutton v. Cramer*, 10 Ariz. 110, 85 P. 483, 103 P. 497, *Pass v. Stephens*, 22 Ariz. 461, 198 P. 712, and *Shornick v. Shornick*, 25 Ariz. 563, 220 P. 397, 401, 31 A.L.R. 159, indicate the attitude of that court on the general subject to be in conformity with the traditional doctrine.

Collins v. Dye, 94 F.2d 799, 801 (9th Cir. 1938) (emphasis added) (applying Arizona law) *certiorari denied*, 305 U.S. 601, 59 S.Ct. 62 (1938).

Applying the law to the evidence, the 2004 Deed at issue, absolute on its face as of the time of conveyance, transferred the Property outright to MFLP.

The 2004 Deed is a writing. Abromovitz's expert, Mr. Lotardo, testified that the form used is a standard form of instrument for conveying real property. Galardi, on behalf of REJ, signed it. Ms. Riley notarized and acknowledged Galardi's signature. Galardi, on behalf of REJ, delivered the Deed via Federal Express to Ms. Marchiol for the benefit of MFLP, who then arranged for the Deed to be recorded.

The 2004 Deed from REJ to MFLP, construed at the time it was delivered, transferred the Property outright in satisfaction of the formal statutory requirements governing conveyances of real property set forth in A.R.S. § 33-401.

The 2004 Deed at the time of conveyance unambiguously conveyed the Property to MFLP: "Red Eyed Jack Sports Bar, Inc., a Nevada corporation, do[es] hereby convey to Marchiol Family Limited Partnership, a Colorado limited partnership, the following described real property situated in Maricopa County, Arizona[.]"

There is no persuasive evidence in the record that the conveyance was made conditionally and not as an absolute conveyance.

Specifically, the face of the Deed speaks clearly to Galardi's and MFLP's intent. The statutory language of the Deed and Galardi's signature on it are dispositive of Mr. Galardi's and MFLP's intent: "[t]he fundamental rule is that the intention of the parties is arrived at by the language contained within the instrument." *Corn v. Branche*, 74 Ariz. 356, 358, 249 P.2d 537, 538 (1952); *See also, Spurlock v. Santa Fe Pacific R. Co.*, 143 Ariz. 469, 474, 694 P.2d 299, 304 (Ct. App. 1984) (citing *Pass*) (construing a deed to real property) ("If the instrument is unambiguous, **the intent of the parties must be discerned from the four corners of the document**.") (emphasis added)

The Court finds that Galardi signed the 2004 Deed. His signature was duly acknowledged by a notary public of Georgia, Ms. Riley. He caused the 2004 Deed to be manually delivered to Marchiol. The Deed contained the requisite language under the statute.

The language of the 2004 Deed expressly stated an intent to convey ownership of the Property. The language of the original 2004 Deed is clear and unambiguous as of the time of the conveyance. Therefore, the Court looks no farther than the face of the Deed itself to determine

the intent of the grantor. The 2004 Deed constitutes as irrevocable transfer of the Property from REJ to MFLP.

The Court concludes that as between the grantor and the grantee the 2004 Deed transferred ownership of the entire property to MFLP and did not need to be recorded to effectuate the legal transfer. *3502 Leasing LLC v. CTC Real Estate Service*, 224 Ariz 274, 229 P.3d 1016 (App. 2010). Therefore, the Court concludes that the 2004 Deed meets all the statutory requirements for a valid and enforceable deed as set forth in A.R.S. § 33-401, properly conveying the Property to MFLP.

MFLP's and Ken Marchiol's Amended Counterclaim against Abromovitz Investment Properties, LLC and Amended Cross Claim against Jack Galardi, REJ Sports Bar, Inc. and Alberto Jauregui

The Court hereby quiets title of the Property in favor of MFLP.

IT IS ORDERED that MFLP has a full, valid and lawful fee simple ownership interest in the Property. Galardi did not have legal authority to sell the Property to Plaintiff in 2008. Under the Marchiol Defendants' First Counterclaim, MFLP is granted relief.

Under the Defendants' First Cross Claim, MFLP is granted relief set forth herein.

The Court finds in favor of Plaintiff on the Marchiol Defendants' Second Counterclaim. Based upon the facts of this case, the Plaintiff had no way of knowing, nor did Plaintiff have reason to know, that the Property was, in fact, owned by MFLP.

Marchiol Defendants' Third Counterclaim was presented as an alternative theory and is rendered moot and denied.

The Court finds that Galardi did not have Marchiol's consent or permission on behalf of Defendants to sell the Property to Plaintiff. Nor did Marchiol intend to sell the Property through Galardi to the Plaintiff. Galardi was not acting as an agent of Marchiol Defendants, nor was Galardi acting on behalf of a partnership inclusive of Marchiol or the MFLP. No legal partnership existed as constructive owner of the Property.

That Galardi did not remember executing the 2004 Warranty Deed is of no legal significance. That the signature was his is undisputed. The Deed is clear on its face. Parole evidence as to the intent of the parties regarding conveyance of title is inadmissible.

The nature of the business or personal relationship between Galardi and Marchiol does not work to invalidate the 2004 Warranty Deed and the conveyance of the Property to MFLP in 2004. Though parole evidence is admissible for purposes of proving delivery, delivery is determined as of 2004. Evidence of the Defendants' communications in 2008 is not relevant as to the Quiet Title claim.

The Court further finds that Galardi failed or refused to have the 2004 Warranty Deed timely recorded in accordance with A.R.S. § 33-411.01. Therefore, Galardi must indemnify the interests of MFLP in this action, inclusive of attorneys' fees and costs incurred.

IT IS ORDERED finding in favor of MFLP on the Second Cross Claim for indemnification and attorneys' fees.

The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Cross Claims are presented as alternative counts, are rendered moot by the Court's findings, and are denied.

Defendants REJ Sports Bar, Inc., Jack Galardi, Alberto Jauregui, Nevada Land Commercial Real Estate, Inc.'s First Amended Cross-Claim

On Galardi Defendants' First Claim for Relief, the Court finds in favor of MFLP. The Court quiets title to the Property in MFLP and declares that MFLP owns full fee simple interest in the Property.

On the Second Claim for Relief, the Court finds in favor of MFLP and Marchiol. At the time the 2004 Warranty Deed was executed and delivered, title passed from REJ to MFLP. By asserting their legitimate ownership interest, MFLP and Marchiol cannot be found to have placed wrongful cloud on the title.

On the Third Claim for Relief, the Court finds in favor of the Marchiol Defendants. Any contract Galardi and Marchiol entered into was breached by Galardi prior to execution of the 2004 Warranty Deed. No legal partnership existed or continued after transfer of ownership in the Property in 2004. No partnership exists to dissolve. No sale of the Property in 2008 occurred from which profits are to be distributed.

On the Fourth Claim for Relief, the Court finds for the Marchiol Defendants. No agreement existed that the Sporting House would not pay rent while it operated on the Property. The 2004 Deed transferring the Property to MFLP was, in fact, payment by Galardi for damages incurred by Marchiol, inclusive of rents owed to Marchiol, reimbursement for expenses incurred on the Property by Marchiol, and the value of Marchiol's 50% share ownership interest in REJ. Marchiol was not unjustly enriched by the Deed transfer.

On the Fifth Claim for Relief, the evidence presented supports ownership of 2116 Stout Street, Denver, Colorado 80205 (Denver Property) by Country Club Grill, Inc., now LLC, which is owned by Galardi. However, Marchiol's testimony is credible on this issue. The Court finds in favor of Marchiol. Galardi has failed to meet his burden of proof.

Plaintiff's Second Amended Complaint

As to Count I (Declaratory Judgment and Quiet Title),

IT IS ORDERED quieting title of the Property with MFLP. The Court decrees that neither Plaintiff nor the Galardi Defendants have any legal interest in the Property.

As to Count II (Breach of Contract/Specific Performance),

The Court finds that REJ breached the contract entered into with Abromovitz for purchase of the Property. It is further found that Plaintiff was damaged by the breach. Plaintiff has withdrawn its claim for specific performance. Plaintiff's lost profits caused by the breach are found to be reasonably certain. The testimony of Dwight Duncan is credible. The Court awards Plaintiff $2,924,800 for its breach of contract claim. Plaintiff is further awarded its reasonable attorneys' fees and costs incurred, and interest pre- and post-judgment.

As to Count III (Breach of Covenant of Good Faith and Fair Dealing),

The Court finds that REJ breached the covenant of good faith and fair dealing implied in the Purchase Contract. This breach damaged Plaintiff in the amount set forth in Count II.

As to Count IV (Consumer Fraud),

The Court finds that the Galardi Defendants intentionally provided Plaintiff with false and misleading information upon which Plaintiff relied to its detriment and which induced Plaintiff to enter the Purchase Contract and allow its earnest money to go hard. The offer itself contained false and misleading information. The Galardi Defendants ratified these misrepresentations by signing the Contract. Jauregui and Nevada Land knowingly failed to disclose material information to Plaintiff and concealed the true facts regarding title and the Seller's intent. Galardi and Nevada Land engaged in deceptive practices in the sale and advertising of the Property to Plaintiff. Plaintiff reasonably relied thereon and was damaged as a result. Galardi Defendants knew the misrepresentations, lack of disclosure, and omissions when made and proceeded to execute the Contract. Plaintiff has met its burden of proof as to all Galardi Defendants and Nevada Land for consumer fraud pursuant to ARS § 44-1522(A).

As to Count V (Negligent Misrepresentation),

The Court concludes that Galardi Defendants and Nevada Land Commercial Real Estate, Inc., negligently misrepresented and failed to disclose material facts and failed to exercise reasonable care in communicating material facts and disclosing them. Plaintiff reasonably relied on these misrepresentations and non-disclosures. The Galardi Defendants and Nevada Land knew of each other's misrepresentations and non-disclosures. The misrepresentations proximately caused damage to Plaintiff. Plaintiff has met its burden of proof for negligent misrepresentation as to Galardi Defendants and Nevada Land.

As to Count VI (Fraud),

Plaintiff has also met its burden of proof as to fraud committed by Galardi and Nevada Land.

The Purchase Contract expressly states that Seller acknowledges that Abromovitz "shall rely" on the Seller's representations in acquiring the Property.

Galardi and Nevada Land are liable for fraud for making fraudulent statements that they knew were false and made to influence Abromovitz in reliance on them and on which Abromovitz did reasonably rely not knowing that the statements were false.

Galardi and Nevada Land are liable for fraud in conveying a false impression by the disclosure of some material facts to Abromovitz and the concealment of others, which concealment was in effect a false representation that what was disclosed was the whole truth. Galardi and Nevada Land were aware of the concealment of the material facts and intended to mislead Abromovitz thereby. Abromovitz reasonably relied on the information and statements it had received as the whole truth and did not know any differently.

Arizona law provides where a person "conveys false impression by the disclosure of some facts and the concealment of others, such concealment is in effect a false representation that what is disclosed is the whole truth." *Hill v. Jones*, 151 Ariz 81 (App. 1986).

Galardi and Nevada Land's intentional omissions and false statements were the proximate cause of Plaintiff's damages.

As to Count VII (Breach of Fiduciary Duty),

Jauregui is the president of and owns 100% of the shares of Nevada Land. As its president and owner, Jauregui's knowledge and conduct was imputed to Nevada Land. Nevada Land is vicariously liable for the tortious conduct of Jauregui in marketing and selling the Property to Abromovitz.

Nevada Land took on the role of and acted as an Arizona broker in listing and marketing the Property for sale in Arizona. Nevada Land is subject to liability for breach of duties set out in Arizona's administrative regulations and case law. *See, Lombardo v. Albu,* 199 Ariz. 97 (2000). Nevada Land is subject to these standards of care even though they acted without a license. *See*, A.R.S. § 32-2122(C) and A.R.S. § 32-2101(8).

Arizona Administrative Code § 4-28-1101(B) requires brokers to "disclose in writing to all other parties any information the licensee possesses that materially or adversely affects the consideration to be paid by any party to the transaction including: (1) Any information that the seller or lessor is or may be unable to perform; . . . (3) material defect existing in the property being transferred; and (4) the existence of a lien or encumbrance on the property being transferred."

Beyond these duties imposed by regulation, Nevada Land assumed other duties to Abromovitz. At the time of execution of the Purchase Contract, Jauregui had Abromovitz sign a document acknowledging that Jauregui and Nevada Land assumed the duty to:

1. Not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent, or dishonest;
2. Exercise reasonable skill and care with respect to all parties to the real estate transaction;
3. Disclose to each party to the real estate transaction as soon as practicable [a]ny material and relevant facts, data, or information which licensee knows, or with reasonable care and diligence should know about the property.

Nevada Land owed Abromovitz a duty to disclose the information that it possessed or with reasonable care and diligence should have possessed about Galardi's interest in the Property and inability or unwillingness to close the transaction.

Nevada Land knew that (i) Galardi had no intention of performing the Purchase Contract without Marchiol's permission; (ii) Marchiol had never agreed to sell the Property for the $1.5 million sales price in the Purchase Contract; and (iii) Marchiol had rejected higher offers made on the Property because he wanted more money. By failing to disclose these material facts to Abromovitz, Nevada Land breached its duties as a real estate broker owed to Abromovitz.

Nevada Land drafted the Purchase Contract and represented therein (i) that REJ is the owner of the Property, (ii) that Seller has not entered into any lease or other agreement with any person or entity pursuant to which such person or entity has any current or future right or interest in the Property; and (iii) that on or before the Closing Date, Seller shall deliver into escrow a deed duly executed conveying the Property to Abromovitz. These statements were materially misleading because they gave the false impression that Galardi would convey clear title to the Property regardless of whether Marchiol agreed to the sales price. By failing to correct these materially misleading statements, Nevada Land breached its duties as a real estate broker owed to Abromovitz.

It was fraudulent and materially misleading for Jauregui to tell Abromovitz that the 2004 Deed was a forgery and that they were working on resolving it while at the same time working on a deal to transfer the Property to Marchiol. Nevada Land breached its duties as a real estate broker owed to Abromovitz by conveying this fraudulent and materially misleading information.

Unaware of this material information, Abromovitz acted in reasonable reliance on the representations and disclosures made by (i) entering into the Purchase Contract; (ii) putting $250,000 in non-refundable earnest money into escrow; (iii) incurring significant expense inspecting the Property; (iv) tying up Abromovitz's seed money toward the purchase of the Property; (v) incurring legal expenses; (vi) obtaining and earmarking favorable financing for the capitalization of the Property; and (vii) spending considerable time with architects, real estate professionals, bankers, and attorneys to work on obtaining the Property. Beyond this, Abromovitz spent considerable resources in pursuing claims against the Marchiol Defendants in reliance on the veracity of the Galardi Defendants' untrue and misleading statements.

The breach of Nevada Land's duties as a real estate broker owed to Abromovitz as described above in misrepresenting and concealing information that went to the core of the transaction was a proximate cause of the damages that Abromovitz is entitled to recover in losing the prospect of owning the Property.

The Court finds in favor of Plaintiff and against Defendant Nevada Land Commercial Real Estate, Inc. and Alberto Jauregui on Plaintiff's count for breach of fiduciary duty. The Court is informed that a bankruptcy stay is in effect as to Defendant Jauregui and, therefore, does not enter judgment against him.

As to Count VIII (Wrongful Cloud against Title),

On Plaintiff's claim against the Marchiol Defendants for wrongful cloud against title, the Court finds for Defendants. Defendants cannot be faulted for their efforts to record the valid 2004 Deed and stop the unauthorized sale of MLFP's own property.

As to Count IX (Tortious Interference with Contract or Business Expectancy),

The Court finds in favor of Marchiol Defendants on Count IX. Plaintiff has failed to meet its burden of proof.

As to Count X (Civil Conspiracy),

The Court finds in favor of Defendants on Count X. Plaintiff has failed to prove the existence of a civil conspiracy among the Defendants.

Damages:

The Court was persuaded by Plaintiff's evidence of damages sustained as a result of the Galardi Defendants and Nevada Land's conduct. The testimony of Dwight Duncan is credible. Had Plaintiff been able to purchase the Property in accordance with the Purchase Contract, Plaintiff would have reasonably realized lost rental profits of $2,924,800. The calculations and assumptions forming the foundation of those calculations are reasonably certain and adopted by the Court. The Court finds that REJ's refusal to release Plaintiff's earnest money deposited in escrow significantly damaged Plaintiff's business, causing Plaintiff to lose excellent financing, brewery equipment worth over $100,000, significant sums of money expended in due diligence costs, expenses and borrowing costs. Plaintiff is entitled to consequential damages as a result of this action.

IT IS ORDERED awarding Plaintiff $2,924,800 in contract damages against REJ and Galardi for Counts II and III as previously set forth in Count II herein, with reasonable attorneys' fees, costs, and interest.

IT IS FURTHER ORDERED awarding Plaintiff the same $2,924,800 in damages proven by the evidence as to REJ, Galardi, and Nevada Land on Counts IV, V, and VI. The Court allocates fault at 90% REJ and Galardi and 10% Nevada Land.

IT IS FURTHER ORDERED awarding Plaintiff the same $2,294,800 against Nevada Land as set forth above on Count VII.

Plaintiff takes nothing for Count VIII, IX, and X.

Prevailing parties shall file applications for attorneys' fees, statement of costs, and lodge proposed forms of judgment within **ten (10) business days** of the filing of this Minute Entry.

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.