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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-014605 07/18/2013

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nelson
Deputy

JAMES HOUSE

DANIEL D MAYNARD

v.

DIANE ZUBROD, et al.

DAXTON R WATSON

HEATHER E BUSHOR

RULING

The Court has had under advisement Defendant Zubrod's Motion for Summary Judgment re: Statute of Limitations; Defendant Zubrod's Motion for Partial Summary Judgment re: Fraud and Negligent Misrepresentation; and Defendants Jay A. Josephs and Josephs Appraisal Arizona Group, Inc.'s (collectively, "JAG") Motion for Summary Judgment. Having read and considered the briefing and having heard oral argument, the Court issues the following rulings.

In March 2006, Plaintiff purchased a condominium unit for $696,700 (the "Property") in a project known as the Tapestry Condominiums ("Tapestry"). In August 2011, Plaintiff filed a Complaint against Zubrod (Plaintiff's real estate agent) and JAG (the appraiser retained by Plaintiff's lender), essentially alleging that Plaintiff paid twice what the Property was worth.[1]

Defendants argue the claims are barred by the statute of limitations.[2] JAG posits an accrual date the close of escrow in March 2006; Zubrod posits an accrual date of no later than January 2007, when a second appraisal valued the Property at $650,000. Plaintiff argues that the discovery rule tolled accrual until October 2010, when he was told that other properties at

[1] Plaintiff alleged claims for negligent misrepresentation and fraud (Zubrod and JAG) and breach of fiduciary duty (Zubrod).
[2] *See* A.R.S. § 12-542(3) (two years, negligent misrepresentation and breach of fiduciary duty); A.R.S. § 12-543(3) (three years, fraud).

Tapestry sold for less than half what he paid for the Property in the same time period he purchased it.

Under the discovery rule, a cause of action accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, the facts underlying the cause. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588 (1995). "A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual." *Doe v. Roe*, 191 Ariz. 313, 323 (1998) (emphasis in original). Rather, a plaintiff must possess "a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Id.* A plaintiff must be able to "connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault." *Walk v. Ring*, 202 Ariz. 310, 316 (2002), *citing Doe, id.* at 323-24.

> The discovery rule, however, does not permit a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim. Instead, a tort claim accrues when a plaintiff knows or "with reasonable diligence should know" of the defendant's wrongful conduct. Consequently, most cases applying the discovery rule share a "common thread": "The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect."

ELM Ret. Ctr., LP v. Callaway, 226 Ariz. 287, 290 (App. 2010) (citations and internal quotations omitted). The discovery rule does not favor plaintiffs who "have slept on their rights"; it favors plaintiffs who remain unaware of a cause of action despite their best efforts. *Gust*, 182 Ariz. at 590; *see Doe*, 191 Ariz. at 322.

The crux of the issue is whether Plaintiff with reasonable diligence should have known the "what" -- i.e., that he paid more for the Property than it (allegedly) was worth -- prior to August 2008 (fraud claims) or August 2009 (negligence-based claims).

Plaintiff is a sophisticated real estate investor. He knew prior to the close of escrow that the March 2006 appraisal came in at $675,000, almost $25,000 under the purchase price. On September 7, 2006, Zubrod emailed Plaintiff, attaching "comps" at Tapestry that reflected list and sale prices lower than Plaintiff's purchase price and informing Plaintiff that "the offering price of the units has been lowered because they bought lower."[3] On October 26, 2006, Zubrod emailed Plaintiff, again attaching comparables at Tapestry post-July 2006 that reflected list and

[3] Plaintiff does not deny receiving the September 7, 2006 email, but disputes whether bate stamp ZUB 000053 was attached to it. Again, the email itself indicated that other units at Tapestry were "bought lower." The email indicated that "comps" were attached, and a link was provided. Plaintiff does not contend he was unable to open the link, or that link opened comparables other than bate stamp ZUB 000053.

sale prices lower than Plaintiff's purchase price.[4] Then in January 2007, the Property reappraised at $650,000, almost $50,000 under the purchase price. For his part, Plaintiff disputes that these facts, individually or collectively, alerted him that he paid twice as much as others did for comparable units at Tapestry. Accrual is not triggered, however, when Plaintiff knew *all* the facts underlying the cause of action. *See Doe,* 191 Ariz. at 323. At least by January 2007, a reasonable person would be put on notice to investigate whether the Property was worth what he bargained for.

The Court finds that Plaintiff had the minimum requisite knowledge no later than January 2007 to identify that a wrong occurred and caused injury. *See ELM Ret.*, 226 Ariz. at 290; *Silva v. Menderson,* 41 Ariz. 258, 263-64 (1933). Plaintiff contends this is an issue of fact for the jury. *See Gust,* 182 Ariz. at 591 (when discovery occurs and cause of action accrues usually questions of fact for jury). The Court disagrees. *See Thompson v. Pima Cnty.*, 226 Ariz. 42, 46-47 (App. 2010) (accrual may be determined as a matter of law when no genuine issue of material fact exists). Because Plaintiffs' claims accrued no later than January 2007, this action filed in August 2011 is untimely.

Accordingly, based on the foregoing,

IT IS ORDERED granting Defendant Zubrod's Motion for Summary Judgment re: Statute of Limitations and Defendants Jay A. Josephs and Josephs Appraisal Arizona Group, Inc.'s Motion for Summary Judgment (as to statute of limitations).

IT IS FURTHER ORDERED denying as moot Defendant Zubrod's Motion for Partial Summary Judgment re: Fraud and Negligent Misrepresentation and Defendants Jay A. Josephs and Josephs Appraisal Arizona Group, Inc.'s Motion for Summary Judgment (as to fraud and negligent misrepresentation).

IT IS FURTHER ORDERED vacating trial set Monday, July 22, 2013, in this Division.

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.

[4] Plaintiff states he "is not sure" if he received the October 26, 2006 email or the attachment. He does not deny the email was sent to his correct email address.