

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2008-017055

04/07/2009

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT  
C. Castro  
Deputy

MICHAEL T MURRAY

KATHLEEN D FOX

v.

PARADISE L L C, et al.

JOHN R DACEY

GREGORY J GNEPPER

RULING

The Court heard oral argument on April 3, 2009 on three (3) motions which have been fully briefed, Plaintiffs' Motion for Summary Judgment on their claims against Defendant Paradise, LLC (filed December 22, 2008), Plaintiffs' Motion for Summary Judgment on the Counterclaims brought by Paradise, LLC (filed December 22, 2008), and Defendant Paradise's Cross-Motion for Summary Judgment (filed January 22, 2009).

Plaintiff deposited \$400,000.00 in earnest money in connection with their June 2007 contract to purchase a home. The transaction was to close no earlier than July 15, 2008. The purchase was contingent upon acquiring financing which was, in turn, dependant upon the home appraising at or above the purchase price of \$4,300,000.00. On May 12, 2008, the home was appraised for \$4,100,000.00. The lender then withdrew its preliminary loan commitment. Plaintiffs asserted the contract was terminated on June 13, 2008. This lawsuit primarily concerns the Plaintiffs' demand for the \$400,000.00 earnest money deposit which had been released to the seller on October 15, 2007 pursuant to the parties' agreement of that date.

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The controlling Arizona case is Connor v. Cal-AZ Props., Inc., 137 Ariz. 53 (App. 1983). There, the appraisal condition of the parties' contract for sale of real property "was not satisfied" [id. at 54]. Since "the initial appraisal was less than the sales price, the buyers were entitled to enforce the condition and thereby cancel the agreement." Id. at 55.

Here, the Plaintiffs are in the same position as the buyers in Connor and were likewise allowed to terminate the agreement and claim their deposit.

Defendants attempt to raise a plethora of factual issues regarding the Plaintiffs' various attempts to acquire loan financing on this transaction. But the loan history is irrelevant where, as here, the Plaintiffs did acquire satisfactory financing from lender FT Financial. It was this financing that was dependant on the adequate appraisal.

Defendants also assert that the October 15, 2007 "release" of the escrow funds to the sellers extinguished any right the buyers had to make a later claim for the return of those funds. In short, Defendants wish this one line contract addendum to be read as if it contained the word "non-refundable." Defendants rely heavily upon parole evidence to substantiate their "release" theory, however, the contract term in question is not reasonably susceptible to Defendants' interpretation. Therefore, the parole evidence must be rejected. Long v. City of Glendale, 208 Ariz. 319 (App. 2004).

Finally, Defendants have pled a counterclaim for misrepresentation focused on the change of lender history. But they cannot show any damage that resulted from that change. Since damage is a necessary element of the claim, the misrepresentation cause of action must fail.

Accordingly,

**Plaintiffs' Motions are granted and Defendants' Cross-Motion is denied.**