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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-001877 12/24/2013

HON. JOHN REA

CLERK OF THE COURT
L. Gilbert
Deputy

JAN AITKEN, et al. GREGORY G MCGILL

v.

JAMES SMITH, et al.

CLAIR W LANE
JOHN S CRAIGER
COREE ELIZABETH NEUMEYER

MINUTE ENTRY

Under advisement is the Bank of America Defendants' Motion to Dismiss based on no duty. After consideration of the written and oral arguments,

IT IS ORDERED Defendants' Motion to Dismiss is granted.

Discussion

A motion to dismiss for failure to state a claim is not favored. It should not be granted unless it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated. All material allegations of the complaint are taken as true and read in the light most favorable to the plaintiff. However, the court must distinguish between factual allegations and conclusory statements unsupported by factual allegations.

Applying these principles to the present motion is more difficult than usual because the Complaint here reads more like a press release or closing argument than "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a). See, for example, the beginning of paragraph 60, where the Plaintiffs introduce the subparagraphs with the phrase "in order to maximize their ill gotten gains."

(On the other hand, one hopes that the moving Defendants can appreciate the irony perceived when Countrywide, with its checkered history, righteously accuses these Plaintiffs of "greed, misconduct, unreasonable investment expectations, and gaming of the system.")

The analysis begins with the claims asserted against the moving Defendants (the Bank of America ("BOA") Defendants). The majority of the Complaint contains detailed allegations against the Smith Defendants, Snyder Defendants, Dewar/Losch Defendants, and Bates Defendants. The allegations against the BOA Defendants are more meager and center on the "Common Underwriter."

The only claim for relief against the BOA Defendants is in the Seventh Cause of Action – Negligence [sic] Hiring and Supervision as against the Bank Defendants.

The Negligent Hiring and Supervision claim is based on the BOA Defendants alleged failure to adequately train and supervise the Common Underwriter so that the underwriter would be "qualified and fit to perform the 'underwriting and approval' tasks for which she was hired to perform, and follow all the required bank's compliance requirements." Also, the Bank Defendants are allegedly charged with a duty to exercise reasonable care "to ensure that the Common Underwriter would refrain from conduct [sic] themselves [sic] in the manner herein alleged, which foreseeably could result in harm to third party borrowers such as the PLAINTIFFS." Paragraph 167.

It is important to note what is not alleged in the First Amended Complaint. Plaintiffs repeatedly assert, in their Complaint and memorandum, that the BOA Defendants and the Common Underwriter "substantially facilitated" or acted "in furtherance" of the other Defendants' alleged fraudulent scheme. Plaintiffs have not pled either a conspiracy or an aiding and abetting claim against the BOA Defendants or the Common Underwriter, but only a negligent hiring and supervision theory. Nor is it possible to discern any specific factual allegations as to how the BOA Defendants tortuously facilitated the other Defendants' alleged scheme.

The analysis of the duty issue is also obscured by the Complaint's inconsistency in alleging what relationship existed between the BOA Defendants and the Common Underwriter. In paragraph 100, Plaintiffs allege that the BOA Defendants "independently contracted" with the Common Underwriter. In paragraph 167 the Plaintiffs refer to "the BANK DEFENDANTS' respective employment of the Common Underwriter."

The Plaintiffs' theory of liability against the BOA Defendants must be very different depending on whether the Common Underwriter was an independent contractor or an employee.

This ruling assumes that the allegations are made in the alternative and, although inconsistent, treats both as true for purpose of determining whether either theory states a valid claim for relief.

Under the negligent hiring and supervision theory, the only basis of liability for the BOA Defendants originates in the actions of the Common Underwriter. As the Court of Appeals stated in *Kuehn v. Stanley*, 208 Ariz. 124, ¶ 21 (App. 2004): "For an employer to be held liable for the negligent hiring, retention, or supervision of an employee, a court must first find that the employee committed a tort. *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App.1990). If the theory of the employee's underlying tort fails, an employer cannot be negligent as a matter of law for hiring or retaining the employee. *See id.*

The Plaintiffs' allegations concerning the acts of the Common Underwriter are scattered throughout the First Amended Complaint. Paragraph 60(D) alleges that the other Defendants "were handsomely paying this Common Underwriter for each and every loan that was approved and funds." Paragraph 100 states that the Common Underwriter "was being handsomely paid by the SMITH DEFENDANTS and SNYDER DEFENDANTS to illegally approve each of these loans." The allegation of illegal approval is a pure legal conclusion and meaningless in absence of allegation of specific facts.

In the Plaintiffs' RICO claim against the other Defendants, paragraph 110 refers to the "BANK DEFENDANTS' underwriter's participation in the [RICO] enterprise." The BANK DEFENDANTS and the Common Underwriter are referred to in paragraphs 111(E) and 126 of the RICO count. However, since the Bank Defendants are conspicuously omitted from the RICO count, and from all counts other than negligent hiring and supervision, and, as mentioned earlier, there is no conspiracy or aiding and abetting claim against the Bank Defendants, the Court does not interpret these reference to allege that the Common Underwriter conspired with or aided and abetted the other defendants in the alleged illegal enterprise or intentionally participated in any culpable way.

Paragraph 168 alleges that the BOA Defendants negligently failed to ensure that the Common Underwriter "would strictly follow all of the BANK DEFENDANTS' compliance requirements" and would confirm "that each of the Bates Appraisals complied with the Uniform Standards of Professional Appraisals." Finally, the Plaintiffs allege that the BOA Defendants had a duty of reasonable care to ensure "that said Common Underwriter would refrain from

conduct which could foreseeably harm third party borrowers such as the PLAINTIFFS."

As described earlier, the First Amended Complaint cannot be read to allege any intentional tort by the Common Underwriter. The question then becomes what duty of due care does the Common Underwriter owe to the Plaintiffs. The Plaintiffs cite two cases – *Wells Fargo Bank v. Arizona Laborers* and *Sage v. Blagg Appraisal.* Neither is applicable to the allegations made by the Plaintiffs.

Wells Fargo involved intentional tort and contract claims arising from a tri-party agreement. The passage from *Wells Fargo* quoted on page 4 of the Plaintiffs' response is found in the Court's discussion of the bank's contract duty of good faith and fair dealing. There is no similar contract claim in this case. Nor is the simple substitution of the current parties in the quote a substitute for analysis when the facts and claims in *Wells Fargo* are so radically different from those in this case.

Sage involved the application of Restatement (Second) of Torts § 552 to the relationship between a borrower and a real estate appraiser. The Restatement provides that a professional owes a duty to a third party only when the professional either intends to supply information for the benefit of the third party or knows that the recipient of the information intends to supply the information to the third party. None of these allegations appear in the First Amended Complaint.

The Arizona Supreme Court's leading opinion on the existence of duty is *Gibson v. Kasey*, 214 Ariz. 141 (2007). The Court first addressed the issue of foreseeability and emphasized that "foreseeability is not a factor to be considered by courts when making determinations of duty." *Id.*, ¶ 15. Thus, the Plaintiffs' allegation in paragraph 168 that the BOA Defendants had a duty of reasonable care to ensure "that said Common Underwriter would refrain from conduct which could foreseeably harm third party borrowers such as the PLAINTIFFS" is inadequate to establish a duty.

The Court next considered the relationship between the parties and public policy. The Plaintiffs have cited no authority holding that the relationship between a loan underwriter and a borrower is a relationship that creates a duty of due care from the underwriter to the borrower, either based on the nature of the relationship or public policy.