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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-008962 12/21/2015

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT
T. DeRaddo
Deputy

CAMELBACK PLAZA WEST L L C WILLIAM A MILLER

v.

C B R E INC KENT S BERK

UNDER ADVISEMENT RULING

The Court has considered Defendant's Motion for Summary Judgment, Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment, Plaintiff Camelback Plaza West, LLC's Response in Opposition to Defendant's Motion for Summary Judgment, Plaintiff Camelback Plaza West, LLC's Controverting Statement of Facts in Support of Response in Opposition to Defendant's Motion for Summary Judgment, Defendant's Reply Memorandum in Support of Motion for Summary Judgment, Defendant's Response to Camelback Plaza West, LLC's Controverting Statement of Facts in Support of Response in Opposition to Defendant's Motion for Summary Judgment –and- Defendant's Supplemental Statement of Facts in Support of Motion for Summary Judgment –and- Defendant's Motion to Strike Portions of Plaintiff's Controverting Statement of Facts[1], and the oral argument of counsel.

Defendant seeks summary judgment on all claims alleged by Plaintiff: Negligence, Negligent Misrepresentation, and Intentional Interference with Business Expectancies. Plaintiff's Negligence claim is based on the allegations that Defendant owed Plaintiff "a duty to perform its

[1] The Court ruled on the Motion to Strike at oral argument; those rulings are not restated herein.

appraisals in accordance with the highest applicable industry standards" and breached that duty by "failing to provide the appraisal reports in a timely fashion, and then failing to comply with industry standards in the preparation of the appraisals, such that the appraisals were littered with error and contained false and/or inaccurate valuations." *Complaint*, ¶¶52, 53. Plaintiff's Negligent Misrepresentation claim is based on the allegation that Defendant provided "either false or incorrect information, or omitted or failed to disclose material information" which was "intended to guide Plaintiff in its business decisions." *Id*., ¶¶57, 58. Lastly, Plaintiff's Intentional Interference with Business Expectancies is based on the allegations that the intentional acts described in the Complaint "have caused breaches in [Plaintiff's] contractual relationships and business expectancies." Id., ¶¶64, 66.

I. Negligence and Negligent Misrepresentation

The following material facts are undisputed: In April 2011, Plaintiff defaulted on four loans made by Desert Schools Federal Credit Union ("Credit Union"), secured in part by real property known as Camelback Plaza, and Credit Union began foreclosure proceedings. *Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment* ("*DSOF*"), ¶¶1, 3; *Plaintiff Camelback Plaza West, LLC's Controverting Statement of Facts in Support of Response in Opposition to Defendant's Motion for Summary Judgment* ("*PSOF*"), ¶¶1, 3. Plaintiff filed bankruptcy in August 2011. *DSOF*, ¶4; *PSOF*, ¶4.

On April 2, 2012, Plaintiff obtained a Letter of Interest from Commercial Financial Services ("CFS") to refinance Camelback Plaza "upon completion of underwriting and review of third party report." *DSOF*, ¶5; *PSOF*, ¶5. In June 2012, Plaintiff and Credit Union entered into a settlement agreement wherein Plaintiff agreed to pay off the Camelback Plaza loan in the amount of $5,989,680.24 by no later than August 15, 2012, later extended to August 21, 2012, and finally August 29, 2012. *DSOF*, ¶¶6, 11; *PSOF*, ¶¶6, 11, 90. In order to refinance this loan, Plaintiff would also have to pay off the overdue property taxes on Camelback Plaza in the amount of $1,168,921.93 by August 29, 2012. *DSOF*, ¶8; *PSOF*, ¶8. The total financial commitment Plaintiff needed to retain the Camelback Plaza property through this settlement agreement was $7,894,557.[2] *PSOF*, ¶75. Plaintiff admits that CFS's commitment to loan money was always contingent on the properties appraising for an amount sufficient to cover the settlement amount. *PSOF*, ¶84.

CFS engaged Defendant to appraise Camelback Plaza for a fee of $14,000. *DSOF*, ¶10; *PSOF*, ¶10. The engagement letter between CFS and Defendant states, in pertinent part:

Intended Use: Internal Decision Making purposes

[2] This figure was corrected from $7,158,000 to $7,894,557 during oral argument. This difference is immaterial to the Court's ruling.

> Intended User: The intended user is COMMERCIAL FINANCIAL SERVICES and Guggenheim Partners. Reliance on any reports produced by [Defendant] under this Agreement is extended solely to the Client [Commercial Financial Servies] signing below and to any other Intended User identified in this Agreement. Other parties or entities who obtain a copy of the report may not rely upon any opinions or conclusions contained in the report unless such party or entity has expressly been identified by [Defendant] as an Intended User.
> Reliance Language: None

Id., at bates no. CBRE-CLANCY-0430.

At the start of the appraisal assignment, CFS introduced Joan Clancey, manager of Plaintiff Camelback Plaza West, LLC to Todd Lamb, who actually conducted the appraisal on behalf of Defendant, and explained that Ms. Clancey would be coordinating all of the information Mr. Lamb needed to complete the appraisal. *PSOF*, ¶¶91, 92. Mr. Lamb and Ms. Clancey met at her office and she thoroughly explained the circumstances surround the need for the appraisals, including that Plaintiff was seeking take-out financing to replace the loans from Credit Union. *PSOF*, ¶93. Mr. Lamb asked Ms. Clancey questions and she escorted him as he inspected and photographed the property. *PSOF*, ¶94. Ms. Clancey later provided Mr. Lamb with rent rolls and other documents pertaining to Camelback Plaza. *PSOF*, ¶95.

On August 4, 2012, Defendant sent its appraisal of the Camelback Plaza to CFS. *DSOF*, ¶14; *PSOF*, ¶14. The Appraisal Report set forth the "As Is" value of Camelback Plaza at $4,150,000. *Id*. The cover letter to the Appraisal states, in pertinent part:

> The intended use and user of our report is specifically named in our report as agreed upon in our contract for services and/or reliance language found in the report. No other use or user of the report is permitted by any other party for any other purpose. Dissemination of this report by any party to non-client, non[-] intended users does not extend reliance to any other party and [Defendant] will not be responsible for unauthorized use of the report, its conclusions or contents used partially or in its entirety.

Id., at bates no. CBRE-CLANCY-0240. There is no evidence that Defendant sent a copy of its Appraisal Report to Plaintiff, however Plaintiff did receive a copy of the Appraisal Report from CFS. *PSOF*, ¶96.

Both Ms. Clancey and Defendant were surprised by the value set forth in the Appraisal Report. After CFS received the Appraisal Report, it emailed Defendant on August 9, 2012 stating that it was "very shocked on the low values" and thereafter exchanged several emails with Defendant during August wherein CFS forwarded additional information to Defendant,

including an old appraisal on the property and additional comparable property values in an apparent effort to obtain a higher appraised value. *DSOF*, ¶¶15-25; *PSOF*, ¶¶15-25. There are no emails directly between CFS and Plaintiff, although some of the information provided to Defendant by CFS was obtained by CFS from Plaintiff. *Id*.

On August 18, 2012, CFS advised Plaintiff that based on Defendant's Appraisal Report and the required 75% loan-to-value ratio, the maximum amount Plaintiff could borrow was $3,112,500. *DSOF*, ¶44; *PSOF*, ¶44. Plaintiff did not obtain any funding from CFS to refinance the loan with Credit Union and Credit Union sold Camelback Plaza at a trustee's sale on August 29, 2012. *DSOF*, ¶¶28, 29; *PSOF*, ¶¶28, 29.

Defendant argues that summary judgment is appropriate on Plaintiff's Negligence and Negligent Misrepresentation claims[3] because Defendant owed no duty to Plaintiff as a matter of law, Plaintiff did not reasonably rely on the appraisal, and Defendant did not cause any damage to Plaintiff.

To state a claim for relief for negligent misrepresentation, a plaintiff must allege, among other elements, that he was owed a duty of care by the defendant. *Belen Loan Investors, LLC v. Bradley*, 231 Ariz. 448, ¶ 8, 296 P.3d 984, 989 (App. 2012). When considering the duty of care in this context, Arizona courts follow the law of negligent misrepresentation set forth in Restatement § 552(1), which provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

[3] This Court considers Plaintiff's claims for Negligence and Negligent Misrepresentation as one. In *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 30, 945 P.2d 317, 341 (App.1996), the court held that the gravamen of a claim of negligence against a provider of professional information is negligent misrepresentation and that a party may not pursue a claim for negligence separate and distinct from a negligent misrepresentation claim. The court noted that the drafters of the Restatement did not narrow the range of liability for negligent misrepresentation "in the expectation that a plaintiff could escape such limitations merely by attacking the same conduct in an ordinary negligence count." *Id.* at 31, 945 P.2d at 342. Thus, the court said, to allow a plaintiff to pursue a negligence claim separate and distinct from negligent misrepresentation would "sanction an end-run around Restatement (Second) § 552." *Id.* at 30, 945 P.2d at 341. Notably, Plaintiff does not dispute in its Response that the tort of negligent misrepresentation, as defined in the Restatement (Second) of Torts, § 552, encompasses negligence both in gathering and communicating information, and therefore Plaintiff has waived any objection that its negligence and negligent misrepresentation claims are separate and distinct.

Kuehn v. Stanley, 208 Ariz. 124, 127-28, 91 P.3d 346, 349-50 (Ct. App. 2004); *see also Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 188–89, 677 P.2d 1292, 1296–97 (1984) and *Hoffman*, 159 Ariz. at 379–80, 767 P.2d at 727–28 (applying § 552 to a claim of damage from a negligent real estate appraisal).

Under the Restatement, the liability resulting from a claim for negligent misrepresentation is limited to losses suffered:

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement § 552(2). Comment h to § 552 further notes that a claim would succeed so long as the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. The drafters of the Restatement justified this limited liability for negligent misrepresentation claims "because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it." *Restatement § 552*, cmt. a.

The evolution of the interpretation of these Restatement provisions in Arizona is instructive. In *Hoffman v. Greenberg*, 159 Ariz. 377, 767 P.2d 725, (App. 1988), the Court of Appeals held that an appraiser hired by the seller of parcels of vacant land owed no duty to the third-party purchaser of the property. *Id.*, 159 Ariz. at 380, 767 P.2d at 728. In that case, the seller had refused to inform the appraiser how he intended to use his report, and the report itself stated "[t]he function of this report is to aid our client" and it "may [not] be used for any purpose other than its intended use." *Id.* at 378–79, 767 P.2d at 726–27 (second alteration in *Hoffman).* Although it may have been reasonably foreseeable that the owner might show an appraisal to prospective buyers, the Court declined to measure liability by the reasonable-foreseeability standard. *Id.* at 379–80, 767 P.2d at 727–28.

In *Kuehn v. Stanley*, 208 Ariz. 124, 91 P.3d 346 (App. 2004), an appraiser was hired by a lender to determine the value of a residential parcel for use by the lender for a mortgage finance transaction only. The short form appraisal was prepared for lending purposes, not for the guidance of the homebuyers. *Id.* 208 Ariz. at 128, 91 P.3d at 350. Additionally, the buyers were contractually bound to purchase the property before they received the appraisal and thus had not

relied on the appraisal to close the sale. *Id.* Although it was foreseeable that interested parties including the purchasers might rely on the information in the appraisal, the borrowers were not part of the "limited group of persons" protected by the Restatement, and the Court of Appeals thus held that the appraiser owed no duty to them. *Id.* 208 Ariz. at 129, 91 P.3d at 351, *quoting Restatement § 552(2)(a).*

In *Belen Loan Investors, LLC v. Bradley*, 231 Ariz. 448, 296 P.3d 984 (App. 2012), the Court considered a negligent misrepresentation claim made by a lender against an appraiser in the context of a motion to dismiss. The lender alleged that the borrowers, who hired the appraiser, made false representations about the property value in induce the lender to provide excess loan funds and that the appraiser falsely inflated its appraisals upon which the lender relied. *Id*., 231 Ariz. at 450-51, 296 P.3d at 986-87. The question before the Court was whether the appraiser had a duty to the lender. As in previous case law, the Court relied upon the Restatement §522 in reciting the law to be applied:

> Just as in *Sage, Kuehn,* and *Hoffman,* to ascertain whether a duty exists, the circumstances and relationships between the parties will determine whether [lender] was an entity "for whose benefit and guidance [the appraiser] intend[ed] to supply the information or kn[ew] that [borrower's guarantor] intend[ed] to supply it." *See* Restatement § 552(2)(a); *see generally Gipson*, 214 Ariz. 141, ¶¶ 18–20, 150 P.3d at 231–32 (duty of care may arise out of relationship between parties). In sum, if [the appraiser] intended to supply his appraisals to [borrower], or knew [borrower's guarantor] intended to supply them to [borrower] specifically or to a limited class of persons including [borrower], [borrower's guarantor] owed a duty to [lender]. *See Standard Chartered PLC*, 190 Ariz. at 31–32, 945 P.2d at 342–43; Restatement §552(2)(a). Alternatively, if [the appraiser and borrower's guarantor] regarded the recipient's identity as "important and material" and, thus, [the appraiser] understood that his liability was to be restricted to [borrower's guarantor] alone, he owed no duty to [lender]. *See* Restatement § 552 cmt. h.

Id., 231 Ariz. at 455, 296 P.3d at 991. The complaint alleged that the appraiser knew the appraisal reports were going to be relied upon by the lender and intended that they be so relied upon by the lender. *Id*., 231 Ariz. at 455-56, 296 P.3d at 991-92. The Court found that these allegations were sufficient to support a duty to the lender, even though the borrower hired the appraiser.[4]

[4] The issue of duty in *Belen* was quite narrow. The Court of Appeals held that the trial court applied *Sage* too stringently and that Sage did not foreclose liability to third parties in other factual contexts, such as that presented in *Belen*.

In *Sage v. Blagg Appraisal Company, Ltd*., 221 Ariz. 33, 209 P.3d 169 (App. 2013), the Court of Appeals clarified § 552, holding that "an appraiser retained by a lender to appraise a home in connection with the granting of a purchase-money mortgage may be liable to the prospective buyer for failure to exercise reasonable care in performing the appraisal." *Id*., 221 Ariz. at 39, 209 P.3d at 175. In that case, an appraiser prepared a report for a mortgage lender at the request of a homebuyer. *Id*., 221 Ariz. at 33, 209 P.3d at 169. Even though the homebuyer was not the appraiser's named client, the Court found the appraiser owed her a duty of care because he knew that she had the right to request a copy of the appraisal report from the lender, that the lender was obligated by law to provide her with a copy upon request, and that her contract entitled her to forego the sale if the appraisal was unfavorable. *Id*., 221 Ariz. at 36, 209 P.3d at 172. The buyer received the report prior to closing and the form appraisal stated that the homebuyer was likely to rely on the report in purchasing her home. *Id*., 221 Ariz. at 39, 209 P.3d at 175. In accordance with the Restatement, the Court concluded that, to be held to owe a duty of reasonable care to a third-party home-buyer, an appraiser need not know for certain that the appraisal will be furnished to the homebuyer, but need know only that the recipient of the report intends to furnish the statement to the homebuyer. *Id*., 221 Ariz. at 38, 209 P.3d at 174.

The most recent case is *Southwest Non-Profit Housing Corp. v. Nowak*, 234 Ariz. 387, 322 P.3d 204 (App. 2014). In *Southwest*, a seller entered into sales contracts with three separate buyers; all of the sales contracts were subject to the property appraising for the contracted sales prices. *Id*., 234 Ariz. at 389-91, 322 P.3d at 206-8. The lenders required an appraisal to underwrite the loans and three separate appraisers performed those appraisals for the lenders. *Id*. All of the appraisals were lower than the contracted sales price. *Id*. In the first case, the lender refused to fund the loan due to the low appraised value. In the second case, the buyer was unable to renegotiate a lower sales price and thus withdrew from the contract. *Id*. And in the third case, the third buyer exercised his right to cancel the contract due to the low appraisal. *Id*. The Court of Appeals dismissed the first case finding that the Complaint did not set forth facts that the appraiser intended at any point to influence Southwest, thereby assuming a duty of care to it. The Court explained:

> In applying § 552, "[i]ntent to influence is a threshold issue." [citation omitted]; *see* Restatement § 552, cmt. j. ("the liability of the maker of a negligent misrepresentation is limited to the transaction that he intends, or knows that the recipient intends, to influence, or to a substantially similar transaction"). Under the facts as pled, it is undisputed that Southwest's contract with its buyer preceded the appraisal and that the appraisal was performed for the lender. As such, the trial court could not reasonably find that [the appraiser] had intended to influence Southwest, which had already committed to the sale price. *See Wingate Land, LLC v. ValueFirst, Inc.,* 314 Ga.App. 24, 722 S.E.2d 868, 870 (2012) (no attempt to induce seller of property to rely where appraiser performed appraisal for lender after seller and buyer entered into sales contracts for previously

> agreed upon prices). Because no reasonable interpretation of the facts alleged allows for a finding that [the appraiser] intended to influence Southwest, [citation omitted], dismissal was warranted [citation omitted].

Id., 234 Ariz. at 392, 322 P.3d at 209.

In our case, Plaintiff's contract with Credit Union preceded CFS's retention of Defendant to perform the appraisal. CFS retained Defendant to perform an audit to be used by CFS, not by Plaintiff, in deciding whether or not to lend Plaintiff an amount that would have allowed Plaintiff to repay its loan to Credit Union pursuant to its settlement agreement with Credit Union and thus avoid any trustee's sale. Thus, the appraisal provided a benefit and guidance only to Credit Union in making its final lending decision, and not to Plaintiff who was already obligated to the new loan amount in the settlement agreement. Like *Kuehn* and *Sage*, Plaintiff here had already entered into the settlement agreement with Credit Union and that agreement fixed the new loan amount Credit Union was willing to accept in settlement of Plaintiff's prior loan, provided that the value of the property securing the new loan amount loan was supported by the appraisal. In short, there was no action or inaction for Plaintiff to take based upon the appraisal; there was no term in the settlement agreement that would have allowed Plaintiff to withdraw or amend the terms of its agreement with Credit Union based upon the appraisal report.

In addition, the engagement letter between CFS and Defendant specifically limited the intended user to CFS (and Guggenheim Partners who may have funded the loan for CFS). And while *Belen* recognized that the express language of the appraiser's engagement letter does not always preclude the imposition of a broader duty as a matter of law if the surrounding circumstances are otherwise, there are no facts here that support an extension of that duty to Plaintiff beyond the engagement letter. Again, there is no provision in the settlement agreement between Plaintiff and Credit Union that would have allowed Plaintiff to withdraw or otherwise modify the agreed upon new loan amount based upon the appraisal of the Camelback Plaza property. The fact that Ms. Clancey initially showed the property to Defendant or that Defendant knew that the lending decision CFS was making involved property managed by Ms. Clancey establish at best that Defendant interacted with Ms. Clancey in gathering information about the property for the appraisal. These facts do not, however, establish that the appraisal was in any way for the benefit and guidance of Plaintiff. Indeed, Defendant's knowledge of these surrounding circumstances further support the conclusion that the appraisal report would offer guidance solely to Credit Union and not to Plaintiff.

The foregoing analysis is consistent with: *Southwest* (finding no duty when an appraisal performed for the lender could not have influenced the buyer who had already committed to the sale by signing a sales contract); *Sage* (finding a duty was owed to a buyer for an appraisal performed for a mortgage lender because the appraiser knew the buyer had the right to request

and receive a copy of the appraisal report from the lender and the buyer's contract entitled her to forego the sale if the appraisal was unfavorable); *Belen* (a cause of action is stated if the complaint alleges that the appraiser knew the appraisal reports were going to be relied upon by the lender and intended that they be so relied upon by the lender); and *Kuehn* (finding no duty for an appraisal performed for a lender that was prepared for lending purposes, not for the guidance of the homebuyers, who were contractually bound to purchase the property before they received the appraisal and thus had not relied on the appraisal to close the sale).

For the foregoing reasons, Defendant did not owe a duty to Plaintiff as a matter of law based upon the undisputed material facts.

The Court also finds that there are no material facts supporting the element of reliance. The individual who conducted the appraisal testified in deposition that he did not know a copy of the appraisal would be provided to Plaintiff or that it would be a user of the information. *DSOF*, ¶34. While Plaintiff purports to dispute this fact, the only facts offered establish only that Defendant interacted with Ms. Clancey in gathering information about the property for the appraisal. *PSOF*, ¶34. And the only additional facts offered by Plaintiff on the issue of reliance are that Ms. Clancey relied on Defendant to perform the appraisals in a non-negligent manner and in accordance with appraisal standards. *PSOF*, ¶¶102, 103. However, reliance in the context of negligence misrepresentation cannot be established by the circuitous claim by a party that it relied on the other party performing in a non-negligent manner.

For the foregoing reasons, Plaintiff cannot establish reliance as a matter of law based upon the undisputed material facts. Given this finding, the Court does not consider the other arguments made by Defendant on this Claim.

II. Intentional Interference with Business Expectancies

Defendant argues that summary judgment is appropriate on Plaintiff's claim for Intentional Interference with Business Expectancies because Plaintiff had no business expectancy, Defendant did not interfere, Defendant did not act with intent, and Defendant did not cause damages.

In its Response, Plaintiff states that "[t]he basis for [Plaintiff's] claim for intentional interference is the improper manipulation of the appraisal values" and that Defendant "intentionally appraised the properties too low because [Defendant's] other client, Fenway Properties wanted to purchase the Camelback Plaza Building." *Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment*, at p. 12, fnt. 18.

The undisputed material facts reveal that Chris Ackel, one of Defendant's real estate agents, tendered to Credit Union a letter of intent to purchase Camelback Plaza by Fenway Properties on July 24, 2012, and that the offer expired two days later on July 26, 2012 without being accepted. *DSOF*, ¶¶12, 13; PSOF, ¶¶12, 13. The appraisal report was issued by Defendant on August 4, 2012. Thus, despite the facts submitted by Plaintiff concerning the details of the offer made by Mr. Ackel on behalf of Fenway Properties, *PSOF*, ¶¶109-116, there could not have been any interference given that the offer was in effect only two days and expired without acceptance before the appraisal was even completed by Defendant. Given this finding, the Court does not consider the other arguments made by Defendant on this Claim.

The Court finds that Plaintiff cannot establish its Intentional Interference with Business Expectancies Claim as a matter of law based on the undisputed facts.

IT IS ORDERED granting Defendant's Motion for Summary Judgment against Plaintiff on all claims.