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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-015369 11/10/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

B M O HARRIS BANK NATIONAL ASSOCIATION, et al.

JEFFREY J GOULDER

v.

FIFTY-ONE INC, et al.

GREGORY G MCGILL

REBECA G JIMENEZ
15816 S. 22ND STREET
PHOENIX AZ 85048
RICARDO JIMENEZ
15816 S 22ND ST
PHOENIX AZ 85048
SCOTT A MALM

UNDER ADVISEMENT RULING

The Court took these matters under advisement following oral argument on September 16, 2011 and October 26, 2011. Upon further consideration, the Court finds as follows.

Damages

Dealing first with GCTA's motion for summary judgment on damages (including M&I's joinder: the Court is aware of no requirement that a joinder recognize factual or legal distinctions between the joining party and the original movant) and Mr. Grabois's perfunctory cross-motion for summary judgment on damages, the latter, which includes no legal or factual analysis, can be denied just as perfunctorily without having to examine whether it was timely filed.

"[T]he generally accepted rule of contract law [is] that damages are not recoverable unless they are reasonably certain" and "the modern trend is to allow recovery for … lost profits [to a new business] if they can be proven with reasonable certainty." *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174, 183 (App. 1984). This applies both to the fact of damages and to the amount of damages: while the courts have not been as strict about the amount once the fact is proven, the requirement of reasonable certainty applies with added force when lost profits are alleged. *Felder v. Physiotherapy Associates*, 215 Ariz. 154, 164 ¶ 47 (App. 2007). The application of this standard is highly dependent upon the circumstances of the case. *Id*. ¶ 48. The Court believes that there is enough evidence in the record from which both the fact and the amount of damages may be found by the jury; the adequacy of the evidence goes to its weight. *Id*. ¶ 47.

The Court cannot find in the cross-motion the motion for sanctions promised in its caption; therefore, the summary disposition sought in the reply (because GCTA did not respond to the non-existent motion) is improper. That motion is denied. Also making an improper debut appearance in the reply is a request for a jury instruction on punitive damages; this is denied.

A.R.S. § 33-420[1]

The statute of limitations begins to run upon discovery – that is, when a plaintiff knew or should have known of the tortious act, its cause, and the resulting harm. *Walk v. Ring*, 202 Ariz. 310, 316 ¶ 22 (2002). Here, Mr. Grabois concedes that he knew in March 2007 of the falsely recorded documents, the identity of those who caused them to be filed, and that they were damaging to him. That he may not have known the full extent of his damages does not delay the running of the statute: in an action under A.R.S. § 33-420, damages of at least $5000 exist as a matter of law, *State v. Mabery Ranch Co., L.L.C.*, 216 Ariz. 233, 248-49 ¶ 71 (App. 2007), and in any event it is required only that he be aware of the fact of damage, not its total extent, *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 255 (App. 1995). Nor is the statute equitably tolled by the conduct of M&I and GCTA. "In instances involving equitable tolling, courts have recognized that, as a matter of equity, a defendant whose *affirmative acts of fraud or concealment* have misled a person from either recognizing a legal wrong or seeking timely legal redress may not be entitled to assert the protection of a statute of limitations." *Porter v. Spader*, 225 Ariz. 424, 428 ¶ 11 (App. 2010) (emphasis added). Neither M&I nor GCTA committed any such affirmative act. According to Mr. Grabois, M&I merely referred him to GCTA; GCTA in turn told him on August 20, 2007 that it must refuse to provide him with information because he was not a party to the escrow. Openly refusing to reveal information to which the recipient is believed not to be entitled cannot be considered concealment of the information. But even

[1] It may be noticed that the Court's ruling on this issue tracks the recent memorandum decision of the Court of Appeals in *Kowalczyk v. May*, 1 CA-CV 10-0559 (Oct. 25, 2011). This is so, not because that memorandum decision has any authority as precedent, but because the Court is independently convinced of its legal soundness.

assuming that this refusal had constituted an affirmative act of concealment, it was such an unmistakable red flag that someone else was exercising dominion over the property he believed to be his that no reasonable juror could fail to find that he was obligated by that date at least to conduct a diligent investigation. Finally, Mr. Grabois argues that, until the time he filed his complaint, he lacked the necessary proof to prevail over his deep-pocketed antagonists. But whether and when he could prove his allegations are immaterial to the issue of accrual.

While Mr. Grabois is correct that accrual is normally a question for the jury, *Doe v. Roe*, 191 Ariz. 313, 323 ¶ 32 (1998), given his concessions, there remains no genuine issue of material fact. The motion is granted and the cross-motion is denied.

Deficiency balance – Peoria property

The Court does not revisit the factual findings made previously in this case, and rejects Defendants' allegations of fraud.

Defendants' argument that A.R.S. § 33-814(A) required the Bank to amend its complaint to specifically allege a deficiency claim is wholly without merit. The Court of Appeals resolved this very question in *Valley Natl. Bank of Arizona v. Kohlhase*, 182 Ariz. 436, 439-40 (App. 1995), holding that an action filed before the trustee's sale is "maintained" within 90 days after the trustee's sale.

The Court treats the request for a fair market value hearing, although buried inside the response and cross-motion, to be the "written application" called for by A.R.S. § 33-814(A). The Court will schedule a priority hearing at the trial scheduling conference currently set on December 7, 2011 at 9:00 a.m. The motion is therefore denied; the cross-motion, except for the request for a fair market value hearing, is denied.

Deficiency balance – Lot 54

The form of Mr. Grabois's response and cross-motion is not helpful. The basis for the cross-motion is not even stated: its argument in its entirety is that summary judgment "should be granted because it is based on M&I Bank's own documents." The more typical, and to the Court's mind preferable, practice is to tie together the law and the relevant facts in the body of the motion, using the statement of facts to provide supplemental detail. In addition, Mr. Grabois's affidavit, which makes up the bulk of the statement of facts, contains large amounts of hearsay and outright speculation; paragraph 17, for example, consists entirely of both.

The A.R.S. § 33-814(G) issue can be resolved quickly. Mr. Grabois's affidavit at least twice states that he resided at the relevant time on 76th Street in Scottsdale, not on Lot 54. The

protection of the statute applies only to properties "utilized for" a one- or two-family dwelling. A property not yet used as a dwelling, even if such is its intended use upon completion, does not qualify for anti-deficiency protection. *Mid Kansas Fed. Sav. & Loan Assn. of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, 129 (1991).

The Court does not believe Mr. Grabois has presented more than a scintilla of evidence as to the property's value. The Bank is correct that Mr. Wortendyke's appraisal, prepared in 2008 (at the peak of the real estate market), is hearsay, as it is not accompanied by his affidavit, and that in any event it was "subject to 100% completion per plans and specs": it is undisputed that the house was far from completion at the time of the trustee's sale. The right to cross-examine Mr. Inserra, presumably suggesting that his opinion would be impugned thereby, is not a basis to find a genuine issue of material fact. As to Mr. Grabois's right as owner to testify to the value of the property, assuming that right to apply here, he has not testified (the statement of what he "believes," at paragraph 7 of his controverting statement of facts, is not testimony or otherwise in accordance with the requirements of Rule 56(c)), so his opinion of value is not in the record.

Finally, as to the validity of the guaranty, Mr. Grabois does not differentiate between his ratification of the loan itself, which was found by Judge Myers in his January 3 minute entry, and his liability under the guaranty, which was part of the loan. Instead, he argues that the entire ratification theory was a fraud upon the court. The Court sees no reason to disturb the factual findings already made in this case, and thus that, by ratifying the loan, Mr. Grabois ratified the guaranty.

The motion is granted, the cross-motion is denied.

Credit matter

Mr. Grabois has offered no authorities to the effect that state law claims for submitting a false report to a credit agency are not preempted by the FCRA. The Court must therefore conclude that he agrees with the Bank's authorities, which do so hold. While strictly speaking this leads to the conclusion that the complaint here fails to state a claim upon which relief may be granted, making it more properly subject to dismissal under Rule 12(b)(6), the same result is reached by summary judgment. The motion is granted.

Fountain Hills

The Bank offers no compelling reason for this Court to substitute its judgment for that of Judge Myers, who determined that factual questions prevent entry of summary judgment. This motion is denied.

Lots 55 and 56, Counts 1 through 4

Apparently counsel for Mr. Grabois sees nothing incongruous in complaining that Judge Myers improperly granted a horizontal appeal of Judge Oberbillig's findings and then asking this Court to grant a horizontal appeal of Judge Myers's ruling on ratification. The Court takes the case as it finds it. Judge Myers's ruling is the most recent, while Judge Oberbillig's, strictly speaking, was limited to the context of injunctive relief. Therefore, the Court accepts that ratification occurred.

By the same token, the Court accepts Judge Myers's ruling that factual questions prevent entry of summary judgment. Having made the ruling on ratification, Judge Myers would have been conscious of its ramifications. He plainly believed that resolution of that one issue was insufficient by itself to resolve the remaining issues, and did not invite further dispositive motions to examine its effect. The Bank offers no compelling reason for this Court to substitute its judgment for his. Neither does Mr. Grabois offer a reason for summary judgment in his favor. Both the motion and the cross-motion are denied. The associated motion to strike M&I's second motion is denied.

McDowell, Regents, Ghattas, and Yacoub claims against M&I

The claims in this case are limited to those identified in Grabois' Supplemental Responses to M&I Bank's First Set of Non-Uniform Interrogatories, dated August 20, 2010. In that document, no claim is asserted by Mr. Yacoub. "As to Samir Ghattas, Robert McDowell and Regents Property Group, LLC, their claim against M&I Bank is for Negligent Misrepresentation." *Id*. at 3:15-16. While Rule 15(b) allows amendments to the pleadings to conform to the evidence, they must be denied when they result in prejudice to the defending party. *Bujanda v. Montgomery Ward & Co., Inc.*, 125 Ariz. 314, 316 (App. 1980). The Court considers the prejudice here to be both obvious and extreme: having prepared their case based on the assurance that the only claim was for negligent misrepresentation, literally in the middle of the summary judgment briefing M&I and GCTA are informed for the first time of fraud claims. M&I and GCTA have properly objected. To the extent that the two sentences in the response/cross-motion constitute a motion to conform the pleadings to the evidence, it is denied.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 29-30 (App. 1996), adopts the language of Restatement (Second) of Torts § 552, which extends liability where the maker of a misrepresentation intends for it to "reach and influence" a particular person or group of persons. *Standard Chartered* expressly rejects the conclusion Plaintiffs seek to derive from it, that liability extends to all foreseeable injuries to all foreseeable victims which proximately result from negligent performance of professional services. *Id*. at 29; *see also Sage v. Blagg Appraisal, Ltd.*, 221 Ariz. 33, 38-39 (App. 2009) (imposition of duty pursuant to § 552 does not

impair the Restatement's purpose of delimiting what otherwise might be a boundless number of persons to whom the professional might owe a duty). (The Court, noting that *Standard Chartered* runs more than forty pages in the reporters, urges counsel for Mr. Grabois to in future follow standard legal practice by using pin cites when referring to a specific holding in a case.)

The basis for the negligent misrepresentation claim on behalf of Mr. Ghattas is that, by allowing him to make draws, M&I was somehow representing to him that the loans were being handled properly. Even if authorizing draws can be construed as a representation regarding the status of the underlying loan, a conclusion which is far from evident, Mr. Ghattas does not show that he was relying on that representation or that he was injured by it. His loss of prospective income may be a result of the mishandling of the loans, but it is not the result of what M&I represented to him about the loans. The necessary causal nexus is absent.

The injury to Mr. McDowell and Regents derives from a joint venture in which they were participating with Mr. Grabois. (The Court ignores the fact that, under this theory, the joint venture, not its members, would be the injured party.) There is no suggestion – Mr. McDowell even called it "preposterous" – that M&I had any knowledge of this or of any transactions related to the properties on which it lent. The maker of a misrepresentation can hardly intend for it to "reach and influence" a party of whose existence it is entirely ignorant. The fact pattern is similar to *Hoffman v. Greenberg*, 159 Ariz. 377, 378-80 (App. 1988), in which an appraiser who prepared an allegedly inflated appraisal for a property owner was found not liable to a subsequent purchaser to whom the owner had shown it.

M&I's motion is granted; the cross-motion is denied.

McDowell, Regents, and Ghattas claims against GCTA

Completely absent from Messrs. McDowell and Ghattas's response and cross-motion is any evidence that Grand Canyon knew or had reason to know that the escrow was fraudulent. Mr. Howard's opinion letter is clear that he merely "assume[s] the escrow/title agent knew that he [Jimenez] was not the president when she was dealing with him and that the corporate address was not his address or was willfully ignorant of those facts because the escrow officer had dealt with Mr. Grabois in the past and the corporate records on file with the Corporation Commission (and which I am informed she had in her file) revealed that he was the sole corporate shareholder, director, and officer and that the corporations' addresses were Mr. Grabois' addresses … [and] that she knew that Mr. Grabois was not in agreement with the actions taken by Mr. Jimenez in the name of the corporations and as to the properties which were titled in the corporations until she aided Mr. Jimenez in transferring recorded title to himself and Mr. Yacoub (in part at least until Mr. Grabois had refused to execute the documents to increase the loan amount as to … lot 54)." Thus, even assuming that Mr. Howard's opinion is correct and

admissible (*but see Webb v. Omni Block, Inc.*, 216 Ariz. 349, 354 ¶ 17 (App. 2007) (citing authority from other jurisdictions that ultimate issue testimony couched as legal conclusion is inadmissible)), his conclusion is based on hearsay and mere assumptions, not on personal knowledge; his affidavit must therefore be disregarded. *Portonova v. Wilkinson*, 128 Ariz. 501, 502 (1981); *Cecil Lawter Real Estate School, Inc. v. Town & Country Shopping Center Co., Ltd.*, 143 Ariz. 527, 535 (App. 1984), *disapproved of on other grounds*, *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America*, 182 Ariz. 586, 590 (1995).

In the absence of admissible evidence in opposition, GCTA's motion is granted and the cross-motion is denied.