Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-024245 01/21/2011

HONORABLE JEANNE GARCIA

CLERK OF THE COURT
A. Melchert
Deputy

MARY HAYDEN

LEONARD W ARAGON

v.

STEVEN PITTENDRIGH, et al.

ROBERT L SCHWARTZ

GEOFFREY S KERCSMAR
J GRANT WOODS
EDM-QC-CCC
MEEDS ADMINISTRATOR

RULING

This Division wishes to correct its error made on January 14, 2011 when, upon departure for Judge Gaines' funeral, Judge Garcia sent the wrong version of the ruling to the Clerk requesting that it be issued. Upon processing the minute entry a few days later, the Judicial Assistant queried why only one motion was ruled on and Judge Garcia realized that she sent the wrong document, an earlier partial draft, rather than the final ruling to be issued. This minute entry is intended to correct the error and replace the previously issued minute entry in its entirety. Therefore,

IT IS ORDERED deleting the minute entry with case number CV2008-024245, dated January 14, 2011, with docket code 19, in its entirety.

IT IS FURTHER ORDERED that the MEEDS Administrator shall remove the minute entry from the Clerk's Office minute entry web site.

IT IS FURTHER ORDERED that EDM-QC shall remove the minute entry from the Clerk's Office Docket and OnBase system.

The court took the following Motions under advisement following oral argument. Having considered the briefing, record, oral argument, and relevant legal authorities, the court now rules as follows.

BACKGROUND

In the parties' dissolution case, FN2005-001394, Defendant Pittendrigh, on July 14, 2005, testified in his deposition that he was not soliciting buyers for the parties' business. On October 13, 2005, Defendant's expert, Pankow, issued a report valuing the business at $4.7 million. On October 31, 2005, Plaintiff's expert, Sierra Consulting Group, LLC, issued its "limited appraisal" valuing the business at $4.8 to $8.8 million. Both valuations were based on documents Defendant Pittendrigh provided.

In December of 2005, Plaintiff and Defendant Pittendrigh entered into a Consent Decree which incorporated but did not merge their Property Settlement Agreement ("PSA") under which Defendant was to pay Plaintiff periodic equalization payments or pay them off in full at the time of any sale of the business. The business was sold on October 5, 2006 for $44.5 million in cash and $13.5 million in debt for a total of $58 million. Defendant Pittendrigh did not pay off the equalization payments to Plaintiff at this time; he continued to make periodic payments until January of 2009.

On May 5, 2007, Plaintiff found out from a friend that the business had been sold and although she immediately contacted her attorney, she filed nothing to address her current claims until October 1, 2008 when she filed her Complaint in this action. She amended her complaint on April 28, 2009 and accomplished service on November 3, 2009. She filed a Rule 60(d) Motion to Set Aside Judgment in Family Court in March, 2009. On March 22, 2010, the Family Court denied Plaintiff's Rule 60 Motion on the basis that she waited an unreasonable length of time to seek relief.

DEFENDANT PITTENDRIGH'S MOTION TO DISMISS

Defendant Pittendrigh seeks dismissal of Plaintiff's Amended Complaint based on forum shopping, asserting that Plaintiff is precluded from a second action attacking the terms of the PSA.[1] Plaintiff argues that this action should proceed because she is not seeking to modify the PSA, rather she is seeking damages for Defendant's wrongful conduct. The court concludes that Plaintiff seeks to achieve essentially the same result in the present case as she unsuccessfully

[1] Defendant asserts other grounds for dismissal, but given the court's ruling, it need not analyze other theories for dismissal.

tried to achieve with her Rule 60 Motion in her Family Court Case: she wants more money than she agreed to receive based on the proceeds from the sale of the business 10 months after the PSA was executed.[2] There is no doubt that Plaintiff feels cheated, but she has already sought relief and has been denied; asking for a remedy under a different theory does not warrant another bite at the apple. In the Family Court, she sought equitable relief from the judgment based on extraordinary circumstances and injustice. She asserts this case is different because it is based on fraud. However, Plaintiff acknowledged that she was too late to seek relief for fraud. In her Rule 60 Motion in the Family Court Case[3], she "recognizes that her ex-husband may have committed a fraud or misrepresentation -- actions covered by section (c)(3) . . . and that her right to relief under [that] section has expired."

A.R.S. §25-327 provides that the terms of property disposition cannot be revoked or modified unless the court finds conditions justifying reopening the judgment. The PSA has already been challenged in the Family Court Case and may not be attacked in **another** proceeding. *Acquanetta v. Ross*, 152 Ariz. 383, 732 P.2d 1121 (App. 1986); *Minderman v. Perry*, 103 Ariz. 91, 95, 437 P.2d 407 411 (1968) (an independent action cannot be used to "collaterally amend and upset the judicial decree of divorce which incorporated by reference the agreement and found it to be just and equitable".) [4]

Even if this court were to disregard the above analysis and allow the claim to proceed in the context of this civil action, Plaintiff is foreclosed from seeking damages because she ratified the PSA. She retained the benefits of the equalization payments for eighteen (18) months after she learned of the sale of the business. "[A] party waives his right to rescind a contract if, with knowledge of the facts entitling him to rescind, he continues to treat the contract as a subsisting obligation and accepts the benefits thereof." *Page Inv. Co. v. Staley*, 105 Ariz. 562, 563, 468 P.3d 589, 590 (1970).

Plaintiff asserts that Defendant Pittendrigh breached the PSA because he failed to pay the equalization payment in full upon the sale of the business. Defendant asserts that this claim is precluded because the PSA provided that Defendant must pay 5% if payment is not timely made

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[2] The prayer in Plaintiff's original as well as the First Amended Complaint in this case requests "an award of her share of the Marital Community's interest in InPulse Response Group, Inc."

[3] See page 9, lines 12-15.

[4] Plaintiff cites *Young v. Burkholder*, 142 Ariz. 415, 418, 690 P.2d 134, 137 (1994) and *LaPrade v. LaPrade*, 189 Ariz. 243, 247, 941 P.2d 1268, 1272 (1997) which hold that where a property settlement agreement is incorporated but not merged into the consent decree, the contract may be enforced as an independent agreement subject to the rights and limitations of contract law. However, they do not involve the situation at hand and do not stand for the proposition that the judgment may be attacked in **two** separate proceedings.

and he has paid the 5%. The court agrees with Defendant's analysis on this issue. Therefore, Plaintiff fails to state a claim for breach of contract.

Based on the foregoing,

IT IS ORDERED granting Defendant Pittendrigh's Motion to Dismiss.

SIERRA CONSULTING GROUP'S MOTION TO DISMISS

Plaintiff's First Amended Complaint asserts three claims against Sierra Consulting: professional malpractice/negligence, breach of contract, and breach of the covenant of good faith and fair dealing. Sierra Consulting seeks dismissal on the basis that Plaintiff's claims against it are barred by the terms of the contract and by the statute of limitations. Defendant also asserts that Plaintiff's tort claim is negligent misrepresentation rather than professional negligence.

Contract

The parties' contract called for a "limited appraisal" defined as an estimated value of the business in "which the appraiser conducts only limited procedures to collect and analyze the information considered necessary to support the conclusion of value." Another provision states that Sierra Consulting anticipated obtaining and relying on information provided by others as appropriate. Additionally, the contract noted that Sierra Consulting anticipated meeting with Company management regarding operations and other items considered necessary, conducting limited research considered necessary, and issuing its limited appraisal using accepted valuation techniques.

Defendant Sierra Consulting argues that the terms of contract expressly limit liability based on information provided by Defendant Pittendrigh or others. While the contract contains such language, as above-noted, it also provides that Sierra Consulting would perform other procedures. Plaintiff notes that her claims against Sierra Consulting are not for relying on Defendant Pittendrigh's information; rather, they are based on Sierra Consulting's failure to independently gather information necessary for its limited appraisal and failure to use an appropriate multiple in providing its valuation. Given that Plaintiff's claims against Sierra Consulting are independent of Defendant Pittendrigh's alleged misstatements and omissions, the limitation of liability does not apply. The fact that a limited appraisal rather than the more definitive "unambiguous opinion" appraisal was conducted does not bar Plaintiff's claims because Sierra Consulting was still obligated to provide an estimated value using procedures that did not require reliance on information from Defendant Pittendrigh.

The court concludes that Plaintiff's claims that are not related to reliance on information provided by Defendant Pittendrigh are viable.[5]

The court agrees with Defendant Sierra Consulting that Plaintiff's claim that it should have identified the errors in Pankow's Report is barred by the contract's limitation that Sierra Consulting would not disclose errors or irregularities in others' data or information. This claim is not viable.

Defendant Sierra Consulting also asserts that the implied covenant of good faith and fair dealing claim should be dismissed because it is duplicative of her breach of contract claim. The court disagrees. Both causes of action are actionable in the same suit[6], but, as Plaintiff concedes, she cannot recover twice.

Based on the foregoing analysis,

IT IS ORDERED denying Defendant Sierra Consulting's Motion to Dismiss the contract claims as noted above.

Negligence

The proper claim against Defendant for an inaccurate appraisal is negligence, not negligent misrepresentation as Defendant asserts. The cases Defendant cites to support its position, *Kuehn v. Stanley*, 208 Ariz. 124, 91 P.3d 346 (App. 2004) and *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 945 P.3d 317 (App. 1996), address an appraiser's liability to third parties, a situation not present here[7]. Therefore,

IT IS ORDERED denying Defendant's Motion as it relates to the dismissal of the negligence claim.

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[5] The court has not considered the expert report attached to Plaintiff's Response. Therefore, there is no need to convert the Motion into one for summary judgment.

[6] *See, e.g*., *Wagenseller v. Scottsdale Memorial Hosp*., 147 Ariz. 370, 382-386, 388, 710 P.2d 1025, 1037-1041 (1985).

[7] As explained in *Sage v. Blagg Appraisal Co., Ltd*., 221 Ariz. 33, 38, ¶ 23, 209 P.3d 169, 174 (App. 2009), the duty imposed to protect a limited scope of third parties pursuant to Restatement (Second) of Torts §552 is the same: when engaged, the appraiser will owe the third party the same standard of care it owes to the party who engaged the appraiser. The *Sage Court* held there is no reason to impose on the parties to a transaction (in that case, the buyer, seller, and lender in a sale of real estate) the burden of paying twice for the same information just so that the third party could join with the party who retained the appraiser within the scope of the appraiser's duty of care. Id. at 39-40, ¶ 25, 209 P.3d at 175-176. In this case, there is no need to analyze bringing the third party within the scope of duty because there is no third party.

Statute of Limitations

The statute of limitations for negligence is two years. Plaintiff asserts that because Defendant Pittendrigh concealed the October 2006 sale of the business, she did not learn of it until May 2007 when her friend told her. Plaintiff's Complaint against Sierra Consulting was filed in April, 2009. Sierra Consulting argues that Plaintiff's Complaint against it is time-barred because the cause of action accrued upon the sale in 2006 and that Plaintiff should have known, through the exercise of reasonable diligence, that the Company was sold. When concealment of an injury is alleged and the parties dispute when a claim accrued, the question of when a party knew or should have known of the injury is for the jury (or trier of fact) to determine. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America*, 182 Ariz. 586, 591, 898 P.2d 964, 969 (1995); *Landgraff v. A.G. Wagner*, 26 Ariz. App. 49, 57, 546 P.2d 26, 34 (1976). The court concludes that a jury must determine when Plaintiff's cause of action against Sierra Consulting accrued. Therefore, Sierra Consulting's Motion to Dismiss based on the statute of limitations is denied.

MOTIONS FOR LEAVE TO AMEND

Given the court's ruling that Plaintiff is foreclosed from seeking relief in this civil action when she has been denied relief in the Family Court Case, any further amendment of Plaintiff's claims against Defendant Pittendrigh would be futile. Therefore,

IT IS ORDERED denying Plaintiff's Motion for Leave to Amend the Complaint against Defendant Pittendrigh.

Based on the ruling above regarding Defendant Sierra Consulting's Motion to Dismiss,

T IS ORDERED denying Plaintiff's Motion for Leave to Amend the Complaint against Sierra Consulting as unnecessary. The court deems further detail of allegations unnecessary in light of Arizona's standard of notice pleading. Although Plaintiff also sought leave to amend to confirm the dismissal of Pankow & Company and to dismiss a number of causes of action, this can be accomplished in other ways. Therefore,

IT IS FURTHER ORDERED that Plaintiff file a Notice of Dismissed Parties and Claims no later than February 18, 2011.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp