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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-017113 02/18/2010

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

BARRY B YAMRON, et al.

JAMES J PALECEK

v.

ENGLE WHITESTONE L L C, et al.

BARBARA K BERRETT
ALEXANDRA MIJARES NASH
JENNIFER P NORE
BOOKER T EVANS JR.

MINUTE ENTRY

The Court took this matter under advisement following oral argument on January 5, 2010. The Court has considered the separate motions to dismiss filed by PHMCWF, LLC, and Preferred Home Mortgage Company. The Court finds as follows.

The Court first notes that, in violation of A.R.S. § 13-2314.04(S)(2), the Second, Third, Eighth, Ninth, Fourteenth, Fifteenth, Twentieth, Twenty-First, Twenty-Sixth, Twenty-Seventh, Thirty-Second, and Thirty-Third Claims for Relief allege, inter alia, "RICO" violations and "racketeering" instead of the legally required "unlawful acts" or "a pattern of unlawful activity." While this is not fatal to the Court's jurisdiction, *Encinas v. Pompa*, 189 Ariz. 157, 160 (App. 1997) (breach of procedural element of A.R.S. § 13-2314.04 cannot strip courts of jurisdiction), the Complaint should be amended to comply with the statute.

Plaintiffs, blaming a "scrivener error," concede that, as they presently stand, the ninth and fifteenth claims for relief contain no allegation against PHMCWF. Those claims should be dismissed as to PHMCWF without prejudice. As for the remainder, in assessing the sufficiency of a complaint, the Court must assume the truth of the well-pled factual allegations and indulge

all reasonable inferences therefrom. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008). *Cullen* makes it clear that the rule in Arizona remains notice pleading, under which all that is required is that the Complaint "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved. *Id*. at ¶ 6 (quoting *Mackey v. Spangler*, 81 Ariz. 113, 115 (1956)). Paragraph 8 of the Complaint asserts, based upon information and belief, that PHMCWF is the successor in interest to PHMC. PHMCWF asserts that this is merely a conclusion of law requiring further factual allegations in the Complaint. The Court looks, for whatever guidance it can offer, to *Goldfield Mines, Inc. v. Hand*, 147 Ariz. 498, 501-02 (App. 1985), in which absence of successor in interest status was evidently raised in a motion to dismiss. That motion was denied; the plaintiff's subsequent motion for summary judgment was granted. There is no mention of any evidence before the trial court – necessarily evidence presented in the complaint – at the motion to dismiss stage. The Court of Appeals looked to the evidence presented with the summary judgment motion to conclude that denial of the motion to dismiss was proper, while holding that the grant of summary judgment was in part erroneous based on the absence of evidence in the record. It appears to the Court from this example that successor in interest status involves questions of fact as well as law, and is thus not merely conclusory. Claims based on that allegation therefore survive a motion to dismiss. It goes without saying that similarity of names alone is far from enough to establish that PHMCWF is the successor in interest to PHMC, and the Court urges that, should discovery not provide additional support, the allegations against PHMCWF be dismissed at the earliest possible stage.

Plaintiffs' claims for breach of contract and in equity for unjust enrichment appear to the Court to be a pleading in the alternative: either PHMC breached a valid contract, or alternatively, as a result of fraud, there was no valid contract and equitable relief in quasi-contract is appropriate. Obviously, Plaintiffs will not be able to recover under both theories, but both may be alleged. *Trustmark Ins. Co. v. Bank One, Arizona, N.A.*, 202 Ariz. 535, 541 ¶ 31 (App. 2002), sets down the elements Plaintiffs will have to prove at trial, but does not suggest that these elements must be specifically pled in the Complaint.

Finally, as for the statute of limitations, Arizona statutes of limitations do not purport to define when a cause of action accrues, only the length of time the plaintiff has to file after accrual. *Glaze v. Larsen*, 207 Ariz. 26, 28-29 ¶ 9 (2004). PHMCWF has offered no case law indicating that equitable claims are treated differently from claims at law, which accrue when the plaintiff knew or should have known of their existence. In fact, A.R.S. § 12-543(3) specifically provides that, where relief is sought on the ground of fraud or mistake, the period shall not run until the aggrieved party has, or with reasonable diligence could have, discovered the facts constituting the fraud or mistake. *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 358 (App. 1985). Plaintiffs allege, at Paragraph 15, that PHMC and the other defendants successfully schemed to prevent them from obtaining accurate appraisals until 2008. That they did not know

this and could not have known it sooner is a question of fact that will as a foundational matter have to be proved. At this stage, it is sufficiently well pled.

However (and here the Court turns to the Preferred motion), Plaintiffs' theory of the case may be flawed. As expressed in their Response, "the builder/seller, the lender … and the appraiser … were all 'complicit' in a scheme to defraud Plaintiffs into purchasing homes at false and grossly inflated sales prices that would not have been purchased at such prices ***but for*** the approved loan, which could not have been obtained ***but for*** the fraudulent appraisal." The Court questions whether, even if the appraisal was knowingly excessive, it would be actionable against any of the defendants, and in particular against Preferred, which is alleged to have known the appraisals were inflated but not to have itself made any representation as to their correctness. The Supreme Court addressed this question in *Page Inv. Co. v. Staley*, 105 Ariz. 562 (1970). The facts in that case were similar to those here: the plaintiff sued a property seller and his agents on the ground, among others, that the value of the property was asserted to be $7500 per acre when in fact it was worth only $4000 per acre. The Supreme Court held,

> Actionable fraud must be based upon a misrepresentation of material fact, and not upon an expression of opinion. Here the alleged misrepresentation was only that 'the property was worth $7,500.00 per acre.' Such representation of value is generally simply a statement of opinion and not actionable as fraud. The issue must be dealt with on a case by case basis, and there are exceptions to the general rule. For example, if the person making the statement of value stands in a fiduciary relationship to the hearer, the misrepresentation may be actionable. Exceptions to the general rule may also exist where the purchaser has never seen the property or when the representation of value is accompanied by other false representations.

Id. at 564-65 (internal citations omitted). While the Complaint generally alleges that Preferred and the other defendants had a duty to inform Plaintiffs of the true value of the land, it does not appear to allege any basis to find the existence of a *fiduciary* duty. Nor does it appear to allege that any other false representations were made by Preferred (or even by its alleged co-conspirators) or that Plaintiffs bought the properties with no opportunity to view them. Thus, the *Page* test would not seem to be met. The RESTATEMENT (SECOND) OF TORTS § 551 is no more helpful. In general, a party to a business transaction is not liable for his failure to disclose material facts of which he knows the other is ignorant. *Id*., cmt. a. Of the circumstances that impose such a duty, the only one appearing to apply to Preferred is that the other party would reasonably expect him to reveal a mistake as to the basic facts of the transaction "because of the relationship between them, the customs of the trade or other objective circumstances." *Id*., 2(e). That a borrower reasonably expects a lender to act as his financial advisor, warning him if the use to which he proposes to put the loan seems unwise, strikes the Court as doubtful. However,

this can be further briefed in the more suitable context of a motion for summary judgment. Accordingly,

IT IS ORDERED granting PHMCWF's Motion to Dismiss as to the ninth and fifteenth causes of action.

IT IS FURTHER ORDERED denying PHMCWF's Motion to Dismiss as to all other claims.

IT IS FURTHER ORDERED denying Preferred Home Mortgage Company's Motion to Dismiss in its entirety.