

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017284

08/16/2019

HON. ROSA MROZ

CLERK OF THE COURT
D. Charbagi
Deputy

RHESA FOWLIS

SCOTT F FRERICHS

v.

VICTORIA HAYES, et al.

R COREY HILL

NEAL H BOOKSPAN
MICHAEL H ORCUTT
ROBERT B ZELMS
JUDGE MROZ

MINUTE ENTRY

The Court has considered Ellis Defendants' Motion for Summary Judgment Against Plaintiff filed on April 1, 2019, Plaintiff's Response, and Ellis Defendants' Reply. The Court notes that Inspect-It First Defendants' and Hayes Defendants filed Joinders to Ellis Defendants' argument on the issue of diminution of value damages.

Ellis Defendants argue that Plaintiff's negligence claim against them fails because Ellis disclosed all known defects, that he was not required to investigate the Property for other latent defects; that Plaintiff took title with actual knowledge of the underground duct defect, and assumed the risks associated with that defect; that Ellis did not owe a duty to verify the repairs performed by Side Jobs, and that Plaintiff did not rely on Ellis for that purpose. Ellis Defendants argue that a listing agent owes a duty to "deal fairly with all other parties to the transaction," including the buyer, but that "[t]he duty of fair dealing does not include investigations to discover defects in the sellers' property", citing *Aranki v. RKP Investments, Inc.*, 194 Ariz. 206, 208, 979 P.2d 534, 536 (App. 1999) and A.A.C. R4-28-1101(A).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017284

08/16/2019

Plaintiff argues that the duty Frank Ellis allegedly breached is set forth in section R4-28-1101(B), which requires that a licensed real estate agent must disclose to “all other parties any information the licensee possess that materially or adversely affects the consideration to be paid by any party to the transaction . . .”

The Court agrees with Plaintiff’s argument. The Court finds that there is a genuine issue of material fact as to whether Ellis fell below the applicable standard of care by allegedly failing to disclose the significance of the discovery of the water in the underground air return during the home inspection based on Frank Ellis’ alleged knowledge of other similar situation in the Gainey Ranch Community, and the extent of the necessary fix.

Ellis Defendants, Inspect-It First Defendants, and Hayes Defendants next argue that there is no evidence to support the diminution in value of the Property.

The Court previously ruled that “Plaintiff’s damages are limited to the lesser of the diminution of value or the cost to repair the damage”. At oral argument, Plaintiff indicates that based on the Court’s ruling, he did not want to waste his client’s money in obtaining an expert to opine about the diminution of value because the cost of repair is not going to be greater than the diminution of value. For purposes of trial, Plaintiff will be presenting the cost of repair as damages, instead of diminution of value.

Ellis Defendants next argue that there is no basis for Plaintiff to recover attorneys’ fees because Plaintiff’s negligence claim against Ellis does not arise out of contract within the meaning of A.R.S. § 12-341.01(A), but rather from a separate legal duty independent from the Listing Agreement between Ellis and Hayes Defendants, citing *Haldiman v. Gosnell Dev. Corp.*, 155 Ariz. 585, 587, 748 P.2d 1209, 1211 (App. 1987) (citing *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 36, 725 P.2d 736, 743); *Coleman v. Watts*, 87 F. Supp.2d 944 (D. Ariz. 1998). At oral argument, Plaintiff concedes this issue.

Based on the above,

IT IS ORDERED denying Ellis Defendants’ Motion for Summary Judgment Against Plaintiff filed on April 1, 2019, on the issue of breach of duty.

IT IS FURTHER ORDERED granting Ellis Defendants’ Motion for Summary Judgment Against Plaintiff filed on April 1, 2019, on the issues of diminution in value damages, and attorneys’ fees.

Defendants previously requested that the Court transfer this case to mandatory arbitration under Rule 72(e)(6) of the Arizona Rules of Civil Procedure, because the damages potentially

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017284

08/16/2019

recoverable by Plaintiff are less than \$50,000. Defendants had argued that no further repairs are necessary and that Plaintiff's cost to repair the underground duct condition is only \$16,722.50. The Court denied that request when it denied Inspect-It First Defendants' Motion for Summary Judgment filed on September 26, 2018. However, because of the position now taken by Plaintiff based on the Court's ruling, the Court is inclined to grant the request. The Court will give the parties an opportunity to oppose the Court's inclination to refer this case to mandatory arbitration.

IT IS ORDERED that this case will be referred to mandatory arbitration on **August 30, 2019**, unless prior to that date, any party files an objection. If an objection is filed, the other parties may file a response to that objection within the time limits set forth in Civil Rule 7.1(a)(3). No replies are allowed unless the Court orders otherwise.