

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-028389

04/22/2011

HONORABLE JEANNE GARCIA

CLERK OF THE COURT
T. Nosker
Deputy

GUARANTY SOLUTIONS L L C, et al.

v.

VOYAGER AT WHITE MOUNTAIN LAKES L L C, et al. SALLY M DARCY

WILLIAM SCOTT JENKINS
EVAN L THOMPSON

ORAL ARGUMENT/
HEARING SET

Courtroom 303 – Old Courthouse

10:34 a.m. This is the time set for Status Conference and Oral Argument. Plaintiff is represented by counsel, William Scott Jenkins. Defendant, Voyager at White Mountain Lakes LLC, is represented by counsel, Sally M. Darcy. Defendants, Smith and Wright, are represented by counsel, Evan L. Thompson.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Court and the parties discuss the status of the case and scheduling.

Argument is heard on Plaintiff's Motion for Reconsideration.

11:02 a.m. Court stands at recess.

11:35 a.m. Court reconvenes with the parties and respective counsel present.

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A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Argument is continued on Plaintiff's Motion for Reconsideration.

IT IS ORDERED taking this matter under advisement.

IT IS FURTHER ORDERED setting a 3-day Evidentiary Hearing for **August 5, 2011, September 9, 2011 and October 27, 2011 at 9:30 a.m.** in this Division before:

**The Honorable Jeanne Garcia
Maricopa County Superior Court
Old Courthouse, Third Floor
125 West Washington, Courtroom 303
Phoenix, AZ 85003
Phone: 602-372-0610**

IT IS FURTHER ORDERED counsel shall exchange their list of witnesses and exhibits no later than **July 21, 2011**.

IT IS FURTHER ORDERED that exhibits to be offered at the hearing shall be delivered to this Division's clerk for marking no later than **July 21, 2011** along with a brief description of each exhibit. Exhibits shall be marked numerically and consecutively. *Do not skip numbers.* Numbers will not be skipped or saved in anticipation of additional exhibits to be submitted. Additional exhibits, if necessary, may be marked during the course of the hearing. Exhibits should be submitted to the clerk in a three-ring binder, each separated by a tabbed numbered divider. If exhibits are submitted without a binder, then they shall be separated by a colored sheet of paper with the exhibit number written on front. Each exhibit shall be clipped or bound if too large to be stapled. *Please provide a separate copy of exhibits to the court to be referenced by the Judge during the hearing.*

NOTE: All court proceedings are recorded by audio method and not by a court reporter. Any party may request the presence of a court reporter by calling this Division five (5) judicial days before the scheduled hearing.

11:56 a.m. Hearing concludes.

LATER:

The Court having reflected on the briefing, argument, and relevant legal authority, now grants Plaintiff's Motion for Reconsideration for the reasons that follow.

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The Court previously determined that the temporal aspect of the appraisal weighed heavily in its ruling that the KS Appraisals should be considered at the upcoming evidentiary hearing on fair market value. However, it appears that historical data is available to each expert, so there is nothing unique about the data gathered by the KS appraisers.

Plaintiff also asserts that the appraisals are protected from disclosure because they were prepared in anticipation of litigation. There is no single test to determine whether material was prepared in anticipation of litigation. *Brown v. Superior Court In and For Maricopa County*, 137 Ariz. 327, 335, 670 P.2d 725, 733 (1983). Rather, relevant factors such as the following, and others, may be considered. *Id.*

1) Whether the nature of the event that prompted preparation of the materials is likely to lead to litigation. In this case, the event of default of the payments due under the promissory note is likely to lead to litigation since most creditors seek relief for breach of contract. Thus, this factor supports a finding that the appraisals were prepared in anticipation of litigation.

2) Whether the materials contain facts as opposed to analysis and opinions. In this case, the appraisal has both facts and the ultimate opinions of the appraisers. Thus, this factor is minimally helpful to the analysis.

3) Whether the materials were requested or prepared by the party or their representative. If the party or counsel is involved, litigation is anticipated. In this case, neither Plaintiff nor counsel prepared the appraisals, so the materials are less likely in anticipation of litigation.

4) Whether the materials are routinely prepared and the purposes served by the routine preparation. If the materials are routinely prepared, it is assumed the purpose is not for litigation because they are prepared regardless of whether litigation is anticipated. In this case, appraisals are routinely prepared to assist the Plaintiff in determining the bid amount for the trustee sale. This factor leads to a conclusion that the appraisals were not prepared in anticipation of litigation.

5) The timing of the preparation and whether claims were then present or negotiations had occurred when the materials were prepared. While a deficiency claim may not have been in existence at the time of the appraisals, Defendants were certainly in default at the time of the appraisals; otherwise, a trustee sale would not have been contemplated. Because a claim for breach of contract was present when the appraisal was prepared, the appraisal was prepared in anticipation of litigation.

On balance of these factors, the Court concludes that the appraisals were prepared in anticipation of litigation. Therefore, pursuant to Rule 26(b)(3), Ariz. R. Civ. P., they are

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discoverable only upon a showing of substantial need and lack of substantial equivalent by other means. As noted above, the historical data is available to Defendants' experts. During oral argument, Plaintiff's counsel welcomed Defendants' expert to utilize the facts contained in the KS Appraisals. The Court concludes that Defendants have not established substantial need because their own experts are able to provide an opinion on value using historical information.

Plaintiff also asserts the appraisals should not be produced because the appraisers enjoy the protection of consulting experts rather than testifying experts. Although the Court believes that the more information the better for its determination of value, it concludes that the role of the consulting expert must be respected as required by Rule 26(b)(4)(B), Ariz. R. Civ. P. Thus, even if Defendants accurately characterize Plaintiff's actions (in retaining a different appraiser to testify) as shopping for a deficiency, that is a protection afforded to a consulting expert.

Based on the foregoing,

IT IS ORDERED granting Plaintiff's Motion for Reconsideration. The Court will not allow the KS Appraisals nor their authors to be considered at the fair market value hearing.

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