

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-013398

06/14/2012

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

NATIONAL BANK OF ARIZONA

MICHAEL J FARRELL

v.

AARON A MUTH

KENNETH W SCHUTT JR.

MINUTE ENTRY

The Court received and considered Plaintiff National Bank of Arizona's Motion to Dismiss Counterclaim (Plaintiff), Defendant Aaron A. Muth's (Defendant) responsive pleading and the reply submitted in support of the original motion filed by Plaintiff.

In the interest of expediting the business of this Court and pursuant to Ariz. R. Civ. P. Rule 7.1(c)(2) oral arguments are waived. The parties' pleadings adequately frame the issues presented for this Court's consideration.

General Background. This is a breach of contract/deficiency action filed by Plaintiff against Defendant arising from a loan secured by Defendant to purchase real property. In his response to this action, Defendant has filed a counterclaim. The counterclaim alleges that a defective appraisal was performed by a non-party professional appraiser retained by Plaintiff and further asserts liability against Plaintiff on the basis of this defective appraisal. It is undisputed that the appraiser retained by Plaintiff was not an employee of Plaintiff but rather privately retained as an appraiser to conduct the valuation of this property. The claims asserted although somewhat ambiguous can be grouped into three separate areas, (a) a claim that Plaintiff (through the defective appraisal) negligently misrepresented the value of the real property, (b) that Plaintiff failed to take affirmative action to protect Defendant from a defective appraisal

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prepared by a negligent appraiser and (c) that as a consequence, Plaintiff breached the implied duty of good faith and fair dealing implied in all contractual agreements. However, in its response to this motion, Defendant appears to abandon some of these claims and relies on its claim for negligent misrepresentation.

Plaintiff alleges that Defendants counterclaim(s) fails as a matter of law and thus fail to state a claim for relief. This Court concurs.

Motion to Dismiss Standards. Plaintiff seeks a dismissal of Defendant's counterclaims pursuant to Ariz. R. Civ. P. Rule 12(b)(6), that is for failure to state a claim upon which relief may be granted. A motion to dismiss tests the formal sufficiency of a claim for relief. The motion is not favored and should not be granted unless it appears that a party would not be entitled to relief under any state of facts susceptible of proof under the claims stated.¹ Defendant/counterclaimant's factual allegations must be assumed as true and all reasonable inferences drawn in the light most favorable to him.² Dismissal is appropriate only if the defendant/counterclaimant's claim would not be entitled to relief under any facts susceptible of proof in the statement of claim.³

Discussion. As stated in its responsive pleading, Defendant does not dispute that as a general rule, an opinion of value cannot form the basis of a claim for negligent misrepresentation.⁴ However, Defendant asserts that an exception to this long established rule is found in the application of Restatement (Second of Torts) §552. Briefly stated, this provision imposes a duty of reasonable care on professional, like this appraiser, who supply information to others for use in making business judgments in commercial transactions. This provision is inapplicable under these circumstances, as the appraiser was a non-party appraiser not employed by this Plaintiff. There has been no authority cited which would impose liability under this provision to entities who themselves do not perform evaluations of value but merely pass the information along to others.

As a consequence, this Court finds as a matter of law that Defendant's counterclaim fails under the general rule that passing along opinions of value cannot form the basis for a claim for negligent misrepresentation.

IT IS ORDERED granting Plaintiff's Motion to Dismiss Counterclaim;

¹ *Logan v. Forever Living Products, Int'l*, 203 Ariz. 191, 36 P.3d 761 (App. 2002).

² *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344 (2008).

³ *Dressler v. Morrison*, 212 Ariz. 279, 130 P. 3d 978 (2006).

⁴ *Sorrells v. Clifford*, 23 Ariz. 448, 204 P. 1013 (1922).

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IT IS FURTHER ORDERED dismissing the Counterclaim filed in this matter with prejudice.

Date: June 18, 2012

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.