

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-005362

07/21/2011

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT  
L. Nixon  
Deputy

GUARANTY BANK AND TRUST COMPANY      WILLIAM SCOTT JENKINS JR.

v.

RANCHO TUSCANA L L C, et al.

FRANK L MURRAY

THOMAS E LORDAN

**RULING**

The Court has considered Third-Party Defendant's, C.B. Richard Ellis, Inc. (CBRE), Motion to Dismiss Third-Party Complaint, the Response of Rancho Tuscana, *et al* (collectively, Rancho), and arguments of counsel.

CBRE essentially seeks dismissal of the Third-Party Complaint pursuant to Rule 12(b)(6), Ariz. R. Civ. Pro. for failure to state a claim on the remaining counts.

Rancho concedes in its proposed "First Amended Third-Party Complaint" that Count II (negligence) should be dismissed.

Based on the legal arguments regarding Count II (negligence) and the Plaintiff's concurrence,

**IT IS ORDERED** dismissing Count II (negligence).

The Amended Third-Party Complaint alleges Count I, Negligent Misrepresentation by a Professional Supplying Information (CBRE) and Count II, Civil Conspiracy (Guaranty Bank and CBRE)

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I.

*Count I, Negligent Misrepresentation by a  
Professional Supplying Information (CBRE)*

Rancho maintains that the liability of an appraiser to a third-party expanded significantly in *Sage v. Blagg Appraisal Co. Ltd.*, 221 Ariz. 33 (App. 2009). Specifically, Rancho argues that *Sage* extended the reasoning of *Hoffman v. Greenberg*, 159 Ariz. 337 (App. 1988) and *Kuehn v. Stanley*, 208 Ariz. 124 (App. 2004) so that an appraiser is no longer insulated from liability because an appraisal was not prepared specifically at the third-party's direction.

This litigation arises out of two loan transactions involving Merchant Funding LLC and Rancho. Merchant provided an \$8,500,000 Term Loan for the purchase of real property in Cave Creek, Arizona and a \$10,000,000 Construction Loan for the development of that property by Rancho. The Term Loan closed in approximately January 11, 2007 and the Construction Loan closed on or about October 31, 2007.

In January 2009, Rancho and the Guaranty Bank (successor to Merchants) were negotiating an extension of the two loans and other terms, *i.e.* collateral.

In January 2009, Guaranty Bank retained CBRE to prepare two summary appraisals that included property in Cave Creek (consisting of 44 residential lots plus 4 model units). Retention Letter, dated Jan. 21, 2009. The Retention Letter stated:

Function of the Appraisal: The function of the appraisal shall be to aid in or support decisions relating to encumbering the subject property for the benefit of the bank to loan underwriting.

The Appraisal Report ("Appraisal") issued on or about February 18, 2009 addressed distribution.

25. The report is for the sole use of the client; however, client may provide only complete, final copies of the appraisal report in its entirety (but not component parts) to third parties who shall review such reports in connection with loan underwriting or securitization efforts. . . . We do consent to your submission of the reports to rating agencies, loan participants or your auditors in its entirety (but no component parts) without the need to provide us with an Indemnification Agreement and/or Non-Reliance letter.

Appraisal, Bates GBED0002829.

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After the Appraisal was released, Guaranty Bank maintained that the property value was insufficient to secure the loans and demanded additional collateral. Rancho contended that the Appraisal was fundamentally flawed and that additional collateral was not needed. No loan extensions were granted and Rancho eventually defaulted.

Rancho points to several facts to support *its* justified reliance upon the Appraisal during its discussions with Guaranty Bank. First, Rancho ultimately paid for the Appraisal. Second, Rancho worked to gather information for the Appraisal. Third, Rancho advised CBRE that it was anxious to review the report. Fourth, in the Appraisal Summary Report, CBRE acknowledged that the borrower (Rancho) could receive the Appraisal.

CBRE hereby expressly granted to Client the right to copy this report and distribute it to other parties in the transaction for which this report has been prepared, including employees of Client, other lenders in the transaction, and the borrower, if any.

(Appraisal, at pgs. 2-3)

In *Sage*, the buyer's obligation to complete the purchase of a house was "contingent upon an appraisal of the Premises by an appraiser acceptable to the lender for at least the sales price." 221 Ariz. at 34. Consequently, the buyer's reliance (as well as the seller's) upon the report was fundamental to the transaction.

The *Sage* Court first analyzed the liability under the Restatement (Second) of Torts (1977).

In relevant part, Restatement § 552 provides:

(1) One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) ... [T]he liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

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(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends....

*Sage* at 335.

In this commercial transaction, the Appraisal was prepared as a tool for the Lender. Unlike *Sage*, the parties to this negotiation were not mutually bound by the appraised value to consummate an agreement. Rancho was not constrained by the Appraisal and it was free to dispute it in any way it desired. Although Guaranty Bank and CBRE knew that Rancho would receive a copy of the report for informational purposes on the Bank's position, the Court finds that Rancho falls outside of that "limited group" that is owed a third-party's duty.

**IT IS THEREFORE ORDERED** granting CBRE's Motion for Summary Judgment on Count I.

**II.**

*Count II, Civil Conspiracy (Guaranty Bank and CBRE)*

In its Motion to Dismiss, CBRE maintains that in the Amended Complaint, "negligent misrepresentation" is the tort underlying the conspiracy claim (Count II). CBRE argues that the law does not recognize a conspiracy to commit negligence. An Ohio federal district court in *In re National Century Financial Enterprises, Inc.*, 504 F.Supp.2d 287, 327(S.D. Ohio, 2007), recognized that a majority of courts do not recognize negligence as the type of wrong that can support a conspiracy charge.

**Conspiracy to Commit Negligent Misrepresentation**

The complaint also does not state a claim for conspiracy to commit negligent misrepresentation. It is "impossible to conspire to commit negligence." *Senart v. Mobay Chem. Corp.*, 597 F.Supp. 502, 505 (D.Minn.1984). The "great majority" of courts "agree that conspiracy claims cannot be founded on the tort of negligence." *Ruth v. A.O. Smith Corp.*, No. 1:04-cv-18912, 2005 WL 2978694, at \*3 (N.D. Ohio Oct. 11, 2005); *see also Wright v. Brooke Group Ltd.*, 114 F.Supp.2d 797, 837 (N.D.Iowa 2000) ("[B]ecause conspiracy requires an agreement to commit a wrong, there can hardly be a conspiracy to be negligent-that is, to intend to act negligently."); *Sonnenreich v. Philip Morris Inc.*, 929 F.Supp. 416, 419 (S.D.Fla.1996) ("Logic and case law dictate that conspiracy to commit negligence is a non sequitur."); *Rogers v. Furlow*, 699 F.Supp. 672, 675 (N.D.Ill.1988) ("What the plaintiffs suggest is a conspiracy to commit negligence, a paradox at best.");

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*Bevan Group v. A-Best Prods. Co.*, No. 502694, 2004 WL 1191713, at \*9 (Ohio Ct.Com.Pl. May 17, 2004) (dismissing claim of conspiracy to commit negligence).

Rancho's Response does not address the substance of CBRE's position. This Court finds that Count I fails as a matter of law since negligence cannot be the predicate wrong for a conspiracy count.

**IT IS THEREFORE ORDERED** granting CBRE's Motion for Summary Judgment on Count II.

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.