

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

HONORABLE BETHANY G. HICKS

CLERK OF THE COURT
M. Sahli
Deputy

PLUTO PROPERTIES L L C

THOMAS A STOOPS

v.

CORE BUILDERS INC, et al.

ROBERT A SHULL

JOHN A KLECAN
JOHN M O'NEAL

MINUTE ENTRY

FACTS

Plaintiff Pluto Properties LLC has filed a *Complaint* against Defendants Core Builders, Inc. ("CB"), CB's representative Hendricks & Partners, Inc., and Plaintiff's real estate agent David Schultz. Plaintiff alleges that CB breached the parties' contract, committed fraud, and made negligent misrepresentations on which Plaintiff justifiably relied to its detriment when it purchased the Pinchot Towers in Phoenix, Arizona. (Pl.'s Compl. 4-5.) In response, CB has filed a *Motion for Summary Judgment*, seeking dismissal of all claims against it. (Def.'s Mot. for Summ. J.) CB's *Motion* maintains that it provided records and financial information to Plaintiff during the due diligence period but Plaintiff's agent failed to review the received items. *Id.* at 4. The *Motion* also says that Plaintiff's agent failed to thoroughly inspect the property even though he had the opportunity to do so and therefore Plaintiff bears responsibility for any inaccurate information on which it relied because 1.) Plaintiff's agent had the opportunity to inspect the property and property-related information and 2.) because the information on which Plaintiff

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

relied came from Schultz and not CB. *Id.* at 5-6. CB relies on the principle that a seller has no duty to disclose information in an arm's length transaction unless a special relationship between the parties exists. *Id.* at 8. CB also states that the "as is" provision in the subject contract and the rule of *caveat emptor* bar Plaintiff's claims. *Id.* at 8-9. Lastly, CB argues that Plaintiff waived any claims based on receipt of insufficient information when it accepted the provided disclosures and proceeded to close escrow. *Id.* at 15.

Questions Presented:

- I. Whether Plaintiff was justified in relying on records and financial information provided by CB without conducting an independent investigation as to the documents' accuracy.
- II. Whether the determination that a misrepresentation of fact is material is a question of fact for the finder of fact or the jury.
- III. Whether the "as is" provision included in the contract and the rule of *caveat emptor* operate to preclude any claims Plaintiff may have against CB.

Brief Answers:

- I. When a seller provides records and documents to a prospective buyer, the buyer is legally entitled to rely on the information without conducting an additional investigation as to the accuracy of the provided information when making its decision to purchase the real estate property.
- II. When a misrepresentation of fact is alleged, whether the misrepresentation is material, whether the buyer justifiably relied on the misrepresentation, and whether the seller intended to induce the buyer by providing the false or misleading information are questions of fact for the finder of fact or the jury.
- III. A seller of property is not absolved from liability if the seller provides false or misleading information regarding the property, even if an "as is" provision is included in a given contract. The "as is" provision only puts the buyer on notice that the property may be defective. Similarly, the rule of *caveat emptor* simply ensures that a buyer asks questions in an effort to protect its interests when contemplating an arm's length transaction. It does not suspend the seller's

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

obligation to answer these questions truthfully so that the buyer can make an informed decision about the contemplated exchange.

DISCUSSION

I. Plaintiff was not required to conduct an independent investigation to verify the accuracy of the information provided by CB.

In *Carrel v. Lux*, Plaintiff property purchasers asked vendors for an income statement in connection with a piece of real estate property. *Carrel v. Lux*, 101 Ariz. 430, 434, 420 P.2d 564, 568 (1966). The income statement provided to Plaintiffs was later found to be inconsistent with the income information on the tax return for the same year. *Id.* at 435, 569. The Arizona Supreme Court held that the Plaintiffs were not required to verify the data contained in the income statement. *Id.* at 436, 570. The court reasoned that when specific information is requested and provided by the party “whom we might assume to have complete knowledge of all the facts,” when the information appears to reflect authentic records, and when the information is presented in a manner that would make the prospective buyer believe it to be true, if the prospective buyer then “refrain[s] from making a more extensive investigation... the buyer should not be prevented from recovering by a failure to investigate.” *Id.* at 435-436, 569-570. The court also found that because Plaintiffs relied on the income statement in determining the value of the property, they were entitled to the difference between the real value and the value if the representation had been true under the “benefit of the bargain rule.” *Id.*

Here, it is unclear whether Plaintiff ever specifically requested documents regarding CB’s renovations and the associated costs. Plaintiff alleges that CB indicated that it (and not the prior owner) spent approximately a million dollars in renovation costs and a sum of \$800,000.00 was used by the appraiser to arrive at the property’s value. CB denies providing these figures to Plaintiff. Although Plaintiff’s agents were aware that the prior owner had started renovation, it is unclear what CB represented to them regarding what improvements were financed by it and the exact amount of its renovation expenditures. If CB provided an inaccurate account of its role in upgrading the property and the false sum was used to compute the property’s value, a jury would need to determine whether the misrepresentation was material. If this question was answered in the affirmative, CB would likely be responsible to the difference in value in damages to Plaintiff.

CB also says that it provided Plaintiff’s agent with tenant ledger documents and information concerning the property’s operating expenses. If these documents did not accurately

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

reflect the rents, incomes, or expenses relating to the purchase but were used to estimate the property's value, CB would similarly be responsible to the difference in value in damages to Plaintiff. The *Carrel* court pointed out that, "[a]s a general rule, a false representation as to past or present rents, profits, or income is held to constitute a sufficient basis for an action for damages or a rescission on the ground of fraud" if plaintiffs rely on its truth. *Carrel v. Lux*, 101 Ariz. at 434, 420 P.2d at 568. The "as is" provision in the parties' contract and the clause assigning assumption of risk to Plaintiff with respect to discovering the physical and financial state of the property are to be read in conjunction with the requirement that CB provide Plaintiff with "true and correct" information. Therefore, even though certain documents were made available to Plaintiff's agents for their unfettered inspection, if the data contained therein was false or misleading, a jury could find that CB is required to compensate Plaintiff.

II. If the tenant ledger records or documents regarding CB's renovation costs contained inaccurate sums or misleading statements, whether these misrepresentations were material and whether Plaintiff justifiably relied on them in making its decision to purchase the property is a question of fact.

The elements necessary to establish fraudulent misrepresentation are...: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.

Carrel v. Lux, 101 Ariz. at 434, 420 P.2d at 568 (citation omitted).

"The existence of fraud is generally a question of fact which should be determined either by a jury or by the court when sitting as the trier of fact. Particular issues that are considered questions of fact include the existence of a material, negligent, or fraudulent misrepresentation, scienter, reasonable or justifiable reliance, and damages." 37 Am. Jur. 2d Fraud and Deceit § 502 (West 2009). If this Court finds that, on balance, sufficient evidence exists as to each of the nine elements of fraudulent misrepresentation so that a reasonable jury could conclude that CB is liable to Plaintiff, summary judgment for CB is improper.

In the *Carrel* case, the plaintiff presented testimony of an appraisal witness who gave his opinion that the value of the property was affected by the misstated acreage and operating income supplied by the seller. *Carrel v. Lux*, 101 Ariz. at 436, 420 P.2d at 570. Similarly, the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

Plaintiff in this case filed declarations saying that CB's stated renovation expenditures were used to calculate the property's value. Plaintiff contends that the property's value increased substantially from the purchase price paid by CB as a result of the property improvements supposedly financed by CB. This evidence alone probably is sufficient to defeat CB's request for summary judgment.

III. Neither an "as is" clause nor the rule of caveat emptor bar Plaintiff's claims in this case. The "as is" provision generally only suspends liability for breach of warranty claims and not tort claims, such as the one for fraud alleged here.

The Arizona Court of Appeals held in *S Development Co. v. Pima Capital Management Co.*, 201 Ariz. 10, 15, 31 P.3d 123, 128 (Ariz.App. 2001), that "as is" provisions only precludes breach of warranty claims, and not tort claims. In support of this proposition, the court quoted *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995): "A buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller." Therefore, the "as is" clause does not operate to dismiss Plaintiff's claims based on CB's allegedly fraudulent conduct.

CB admittedly relies heavily on the "as is" clause. However, this emphasis lacks merit because even CB's controlling case law does not suggest that the clause absolves the seller of liability for fraud. For example, although the court in *La Placita Partners v. Northwestern Mut. Life Ins. Co.*, 766 F.Supp. 1454 (N.D. Ohio 1990), held that an "as is" clause "puts the buyer on notice that the property may be defective," the court goes on to say that the buyer cannot justifiably rely "on the seller's silence as a warranty of fitness." The present case is distinguishable because it appears that CB did not remain silent but provided Plaintiff with false information. Thus, summary judgment for failure to state a claim is inappropriate.

CONCLUSION

IT IS ORDERED denying CB's Motion for Summary Judgment. CB and Plaintiff disagree on several points of genuine fact, such as what amount, if any, was represented to Plaintiff regarding CB's renovation expenses. In addition, sufficient evidence of fraudulent misrepresentation exists that a trier of fact could find CB liable to Plaintiff based on CB providing false or inaccurate information that induced Plaintiff to purchase the property. In spite of the contractual clause regarding to Plaintiff's assumption of risk and the "as is" provision, Plaintiff maintains a cause of action if CB breached the clause requiring that it provide Plaintiff with "true and correct" records about the property. Because questions of fact exist as to whether

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

CB complied with this contract clause and because its arguments for summary judgment fail, the request is denied.

IT IS ORDERED setting a telephonic Status Conference for **September 23, 2009 at 9:15 a.m.** with **Plaintiff to initiate** call to this Division, telephone number 602-506-2139.

IT IS FURTHER ORDERED that **3 days prior** to the Status Conference, the parties shall submit a written **Joint Notice of Statement of the Case** indicating the following:

- The status of the case;
- Compliance with the Court's deadlines,
- Issue(s) that they have resolved; and
- Any problems or motions to address.

NOTE: Counsel are directed to provide the Court with a hard copy of the Notice as well as any document efiled that exceeds a 10-page limit.

Suggestions to conference call attendees calling from outside the court system:

- Do not use a speaker phone.
- Do not use a cell phone. If possible, use a desk phone.
- Avoid noisy areas.
- Mute phone when not speaking.
- State your name every time you address the Court.

Counsel are advised that the Court is available to discuss, by joint telephone call, discovery disputes or any other matter that may impact the parties' ability to resolve this case in a just, speedy, and inexpensive manner. See Rule 1, Ariz.R.Civ.P.

With respect to discovery disputes, counsel are also advised that, as the Court interprets Civil Rule 37(a)(2)(c), an exchange of correspondence between counsel is not sufficient to satisfy the "personal consultation" requirement of the Rule, except in extraordinary circumstances. At a minimum, counsel must speak to each other by telephone to attempt to resolve the dispute in good faith before involving the Court.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-004874

08/24/2009

NOTE: The parties are advised that failure to appear at a hearing may result in sanctions, including a Default Judgment.

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