

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-015102

04/26/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

FORT MCDOWELL YAVAPAI NATION, et al. LEO R BEUS

v.

STEPTOE & JOHNSON L L P, et al.

GARY L BIRNBAUM

JOHN DANIEL CAMPBELL

HEARING

Courtroom: ECB-512

2:35 p.m. This is the time set for oral argument regarding Defendants Bloom, Schnepf and Ringel Valuation Services, Inc.'s November 30, 2012 Motion for Summary Judgment and Defendants Bloom, Schnepf and Ringel Valuation Services, Inc.'s December 21, 2012 Motion for Partial Summary Judgment re Breach of Fiduciary Duty.

Plaintiffs Fort McDowell Yavapai Nation, Fort McDowell Enterprises, LLC, and We-Ka-Jassa Investment Fund, LLC ("Plaintiffs") are represented by Counsel Leo R. Beus, Abigail M. Terhune, and Linnette R. Flanigan. Defendants Lawrence E. Bloom, Larry D. Schnepf, and Ringel Valuation Services, Inc. (the "Appraiser Defendants") are represented by Counsel John Daniel Campbell, J. Edward Doman, Jr., and Gregory T. Harris. Defendants Steptoe & Johnson, LLP, Nancy White, and Ralph Guerin (the "Steptoe & Johnson Defendants") are represented by Counsel Scot L. Claus (appearing in place of Gary L. Birnbaum).

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

Oral argument is presented.

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IT IS ORDERED taking these matters under advisement.

3:15 p.m. Matter concludes.

Later:

Plaintiffs assert two claims against the Appraiser Defendants, one for negligence and one for breach of fiduciary duty. The Appraiser Defendants' two motions raise four questions.

First, did the Appraiser Defendants owe fiduciary duties to Plaintiffs? They did not. Assuming Plaintiffs trusted the Appraiser Defendants, had less skill and training than they, and placed great reliance on the information they provided, that still does not amount to a fiduciary relationship. "The law does not create a fiduciary relation in every business transaction involving one party with greater knowledge, skill, or training, but requires peculiar intimacy or an express agreement to serve as a fiduciary." *Cook v. Orkin Exterminating Co.*, 227 Ariz. 331, 334, 258 P.3d 149, 152 (App. 2011). The appraisal-client relationship is not one that gives rise to a fiduciary duty.

Second, are Plaintiffs' claims against the Appraiser Defendants barred by the economic loss rule? They are not. Arizona case law holds that an appraiser can be liable for negligence in providing information to guide another in a business transaction, even if it has no contract with that person. *Belen Loan Investors, LLC v. Bradley*, 296 P.3d 984, 991 (App. 2012); *Sage v. Blagg Appraisal Co., Ltd.* 221 Ariz. 33, 40, 209 P.3d 169, 176 (App. 2009); *see also* Restatement (Second) of Torts § 522 (1977). While these cases do not address the economic loss rule, *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, 223 Ariz. 320, 223 P.3d 664 (2010), makes clear that the rule does not preclude a negligence claim against a professional who provides information for the guidance of someone, and with whom the professional has no contractual relationship. 223 Ariz. at 327, 223 P.3d at 671.

Indeed, the court in *Flagstaff Affordable Housing* went out of its way to harmonize the economic loss rule with *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 677 P.2d 1292 (1984), which allowed a contractor to bring a tort claim against an architect with whom it had no contract. 223 Ariz. at 327, 223 P.3d at 671. For the same reason that *Donnelly* is unaffected by the economic loss rule, *Sage* and *Belen Loan Investors* are.

The Appraisal Defendants argue that Plaintiffs were third-party beneficiaries of their contract with the borrowers, thus enabling them to sue in contract and precluding them from suing in tort. No Arizona case has held that the economic loss rule limits not only contracting parties, but third-party beneficiaries. So holding would be contrary to the rule's function of

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“encourage[ing] private ordering of economic relationships.” *Flagstaff Affordable Housing*, 223 Ariz. at 327, 223 P.3d at 671. Because a third-party beneficiary does not negotiate the contract, it has no ability to order its economic relationships like a contracting party.

Third, are Plaintiffs’ damages limited by the limit of liability provision in the appraisals? This provision does not bar Plaintiffs’ tort claims as a matter of law. It was not bargained for, and a jury could find that Plaintiffs did not consent to this provision merely by relying on the appraisals.

Fourth, does the evidence support a claim for punitive damages? It does. At the summary judgment stage, the court is persuaded that a jury could find the Appraiser Defendants acted with “deliberate interference with the rights of others, consciously disregarding the unjustifiably substantial risk of significant harm to them.” *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-332, 723 P.2d 675, 680-681 (1986).

IT IS ORDERED granting the Appraiser Defendants’ December 21, 2012 Motion for Partial Summary Judgment re: Breach of Fiduciary Duty.

IT IS FURTHER ORDERED denying the Appraiser Defendants’ November 30, 2012 Motion for Summary Judgment.

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.