

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-008338

01/18/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

VAL VISTA MELROSE L L C, et al.

JOHN T MOSHIER

v.

MARIETTA B HUSTON

ERIC M JACKSON

UNDER ADVISEMENT RULING

(Defendant/Counterclaimant's Motion for Summary Judgment)

The contract requires that CB Richard Ellis perform the appraisal unless there is a "current appraisal by the lender that issues a *loan commitment ... for construction* of improvements on the [Melrose] Property and the Second Property." The First National Bank loan, which generated the Lyons appraisal, was not for the purpose of constructing improvements on the Melrose property; the Melrose property was merely part of a pool of collateral for the purchase of other, unrelated properties. The First National loan thus cannot be the basis for employing an appraiser other than CB Richard Ellis.

The contract also provides that the valuation must be a "current" one. The contract does not define "current" or specify the appropriate date when the buyout is not effectuated immediately. In this situation, Arizona law permits the Court to supply the omitted term. *AROK Const. Co. v. Indian Const. Services*, 174 Ariz. 291, 298 (App. 1993), *citing* RESTATEMENT (SECOND) OF CONTRACTS § 33(2). This is to take into account "negotiation, prior understanding, subsequent conduct and the like." *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 393 (1984). Had Plaintiff complied with the contract and obtained a valuation from CB Richard Ellis on January 3, 2005, or sufficiently close to that date to be considered

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current, Defendant would have been entitled to that amount. Her right to payment vested on that date. It is therefore the value of the property as of January 3, 2005, as determined by CB Richard Ellis, that determines Defendant's entitlement. (*Kerby Forest Industries, Inc. v. United States*, 467 U.S. 1, 17-18 (1984), does not require a different result. That case is founded on the Takings Clause of the Fifth Amendment, which does not apply to Plaintiff as a private party.) Apparently, a retrospective valuation as of that date was performed by CB Richard Ellis. Plaintiff objects to the methodology employed in reaching it. CB Richard Ellis' valuation methodology thus creates a disputed issue of fact. It is this valuation methodology issue only left for trial.

Therefore, IT IS ORDERED granting Defendant's Motion in part and denying it in part consistent with the above.

Defendant/Counterclaimant's Motion in Limine

There is no relevance either to the Lyons or Lefever valuations, or to the CB Richard Ellis valuation as of January 2006. They would merely confuse the jury for the reasons set forth in the Court's ruling on Defendant's Motion for Summary Judgment. By the same token, the testimony of experts with regard to those valuations is irrelevant. Thus the Court need not address the one expert rule with regard to the Lyons, Lefever and January 2006 CB Richard Ellis valuations. As to the January 3, 2005 CB Richard Ellis valuation, Plaintiff is entitled to have its expert testify as to the valuation methodology utilized by CB Richard Ellis.

Therefore IT IS ORDERED granting Defendant/Counterclaimant's Motions in Limine.