

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-017195

05/08/2012

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

BEAL BANK NEVADA

MICHAEL R SCHEURICH

v.

PAUL T CLIFTON, et al.

SEAN E BREARCLIFFE

**UNDER ADVISEMENT RULING
FAIR MARKET VALUE HEARING SET**

The Court took under advisement the matter of the Motion for Partial Summary Judgment filed by the Plaintiff and the Motion to Amend (Second) filed by the Defendants. The Court has considered the motions and the respective responses and replies and the arguments of counsel and finds as follows.

The Plaintiff seeks summary judgment on the matter of the default by the Defendants under a promissory note secured by a Deed of Trust. The original note amount was \$4,695,000.00.

The Plaintiff alleges that the Defendants defaulted by their failure to pay the note when due. The Plaintiff alleges that it properly notified the borrower and the guarantors regarding the default and it was not cured. Accordingly, the Plaintiff noticed and conducted a trustee's sale on November 24, 2010. The Plaintiff also alleges that the Defendants were indebted to the Plaintiff in the amount of \$3,901,613.45. A credit bid was tendered at the sale in the amount of \$1,400,700. The Plaintiff seeks partial summary judgment that the Defendants defaulted and the amount owed.

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The Defendants filed a motion under Rule 56, ARCP which the Court previously denied. The Court did grant the Defendants leave to respond to the allegations in the Plaintiff's motion. The response that was filed offered no controverting facts or law. Rather, the Defendants relied on a second motion to amend to allege certain affirmative defenses and a counterclaim, presumably in an effort to make a record that an issue of fact and law exists to preclude summary judgment.

The essence of the affirmative defenses and the counterclaim is that the predecessor bank to the Plaintiff provided an appraisal to the Defendants that they allege that bank required them to rely upon in the acquisition of the property in question. The essential claim is for fraud in that the appraisal, upon which the Defendants were allegedly made to rely on by the Plaintiff's predecessor, was allegedly materially wrong as to value.

The entire case turns upon whether the Defendants have a proper cause of action or defense that would defeat summary judgment. The Court finds that the amendment would be futile because the alleged fraud, whether asserted as an affirmative defense or a counterclaim, is not a fraud at all. A statement of opinion as to the value of a property is not the proper basis for a fraud. [*Bus. Realty of Ariz., Inc. v. Maricopa County*, 181 Ariz. 551, 892 P.2d 1340, 1346 \(Ariz.1995\)](#) (stating an "appraisal of real estate is an art, not a science.... Although the use of such guidelines may be mandatory in appraisal work, their application to various situations calls upon the exercise of judgment"). [*Frazier v Southwest Savings and Loan Ass'n*, 134 Ariz. 12, 653 P.2d 362 \(App. 1982\)](#)(Mere representations as to value are generally considered expressions of opinion and will not support a claim for fraud. [*Page Investment Company v. Staley*, 105 Ariz. 562, 468 P.2d 589 \(1970\)](#); [*Reese v. Cradit*, 12 Ariz.App. 233, 469 P.2d 467 \(1970\)](#). See also [*Fifty Associates v. Prudential Insurance Company of America*, 450 F.2d 1007 \(9th Cir.1971\)](#) (the question of land value is generally a matter of opinion only)). The case law universally holds that opinions of value are not the kind of statements upon which a party can rely to assert fraud because it is not an affirmative representation. Nor will such statements constitute an affirmative representation upon which a claim will lie for negligent misrepresentation. *Frazier, supra*.

Thus, even if the Court were to allow the amendment to the answer to allege a counterclaim and affirmative defenses, based on the facts alleged, the Defendants would not be entitled to relief as a matter of law. Inasmuch as the Defendants have otherwise produced no facts or law that would address the facts alleged by the Plaintiff, i.e. facts that would challenge the existence of a default or the amount due under the note, the Plaintiff is entitled to partial summary judgment on the fact of the default and the amount of the indebtedness at the time of the trustee's sale.

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The Defendants also argued that they desired to assert a claim for rescission. However, nothing in the record shows that they have offered or have any ability to place the Plaintiff back in the status quo ante. And, the basis for the rescission would be the alleged fraud which, as noted above, cannot be based on the appraisal.

IT IS ORDERED granting Plaintiff's Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED denying the Defendants' Motion (Second) to Amend.

IT IS FURTHER ORDERED setting the matter for a trial to the bench on the matter of any deficiency based on the fair market value of the property at the time of the sale on **July 6, 2012 at 9:45 o'clock a.m.** in this Division. The hearing is set for **2 hours**.

The foregoing ruling is in accordance with the formal written Order signed by the Court on May 8, 2012 and filed (entered) by the Clerk on May 9, 2012.

Based on the Fair Market Value Hearing set herein,

Marking exhibits, if any. Counsel shall present all exhibits with a list of exhibit descriptions to the Clerk of this Court **no less than ten (10) judicial days before the hearing**. Counsel shall make sure that the Clerk does not receive duplicate exhibits from Plaintiff and Defendant. **Exhibits should be separated by a colored sheet of paper or a tabbed divider sheet. The colored sheet or tabbed divider shall reflect the number of the exhibit and should be placed on top of the exhibit, but NOT stapled or paper clipped to it.** Each exhibit should be stapled in the upper left hand corner, or bound in some fashion if too large to be stapled, to prevent separation of the exhibit during trial. It is preferred that exhibits not be "bound" with binder clips as the clips are often removed during testimony causing the exhibit to become separated and out of order. Blow-ups and large items may only be used for demonstrative purposes. If you would like the item to be marked as an exhibit, please submit an 8 ½ x 11 version of the exhibit. Counsel shall also present original depositions for filing at that time. Original depositions are provided to the Clerk for the record and **are not marked** as exhibits. The Division Clerk should be contacted directly regarding exhibits at (602) 506-8145.

A Court Reporter may be requested by contacting the Court's Judicial Assistant by e-mail at dshinaba@superiorcourt.maricopa.gov. Requests will ONLY be accepted by e-mail. Please do not call the Division.

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NOTE: All Court proceedings are recorded by audio method and not by a court reporter. Any party may request the presence of a court reporter by contacting the division three (3) court business days before the scheduled hearing.

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.