

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2018-007840

01/31/2019

HONORABLE COLLEEN L. FRENCH

CLERK OF THE COURT  
G. Verbil  
Deputy

MOHAMMAD A JAMEEL, et al.

PATRICK R MACQUEEN

v.

FRANKLIN T GROSS, et al.

JOSEPH A VELEZ

ROSARY HERNANDEZ  
JOSHUA J MCCLATCHEY  
ROBERT B ZELMS  
COMM. FRENCH

UNDER ADVISEMENT RULING

The Court has read and considered the following:

- Defendant Frank Gross' Motion to Dismiss;
- Plaintiffs' Response to Defendant Frank Gross' Motion to Dismiss;
- Defendant Frank Gross' Reply in Support of Motion to Dismiss;
- Defendants Jill Bittner and Tukee Homes Realty, LLC's Amended Motion for Summary Judgment, with related documents;
- Plaintiffs' Response to Defendants' Tukee Homes Realty, LLC and Jill Bittner's Motion for Summary Judgment, with related documents; and
- Defendants Jill Bittner and Tukee Homes Realty, LLC's Reply in Support of the Amended Motion for Summary Judgment, with related documents.

This Court has also considered the arguments of counsel, and all relevant statutes, procedural rules and case law.

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**1. Factual Background**

In July, 2013, Defendant Bittner, on behalf of Tukee Homes Realty, listed a home for sale owned by Defendants Frank Gross and Denise Herman. The list price was \$995,000. In October, 2013, the price was reduced to \$939,000. The MLS information at that time stated that the home had “Approx SqFt: 5,719/Appraiser.” That MLS listing also specifically stated, in both the “Private Rmks” and “Semi-Private Remarks” sections that “[s]quare footage to be verified by Buyer during the inspection period.” The MLS listing referred to Defendants Bittner and Tukee Homes Realty as the listing agent. Defendants Gross and Herman cancelled the listing in November, 2013.

In February, 2014, Defendant Bittner, on behalf of the Tukee Homes Realty, again listed the home for sale, for \$939,000. The MLS information at that time stated that the home had “Approx SqFt: 6,513/Appraiser.” That MLS listing stated in the “Private Rmks” section that “[s]quare footage to be verified by Buyer during inspection period, listed per the tax records original square footage and added square footage.” The “Semi-Private Remarks” section stated “[s]quare footage to be verified by the buyer during inspection period. Listed per the tax records original square footage & added square footage.” That MLS listing also referred to Defendants Bittner and Tukee Homes Realty as the listing agent.

In March, 2014, Plaintiffs entered into a Residential Resale Real Estate Purchase Contract (the “Purchase Contract”) to purchase this home for \$939,000. Paragraph 6(b) of that contract stated:

**Square footage: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE PREMISES, BOTH REAL PROPERTY (LAND) AND IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS A MATERIAL MATTER TO THE BUYER, IT MUST BE INVESTIGATED DURING THE INSPECTION PERIOD.**

Paragraph 6(h) of the Purchase Contract stated:

**BUYER ACKNOWLEDGMENT: BUYER RECOGNIZES, ACKNOWLEDGES, AND AGREES THAT BROKER(S) ARE NOT QUALIFIED, NOR LICENSED, TO CONDUCT DUE DILIGENCE WITH RESPECT TO THE PREMISES OR THE SURROUNDING AREA. BUYER IS INSTRUCTED TO CONSULT WITH QUALIFIED LICENSED PROFESSIONALS TO ASSIST IN BUYER’S DUE DILIGENCE EFFORTS. BECAUSE CONDUCTING DUE DILIGENCE WITH RESPECT TO THE PREMISES AND THE SURROUNDING AREA IS**

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**BEYOND THE SCOPE OF BROKER'S EXPERTISE AND LICENSING,  
BUYER EXPRESSLY RELEASES AND HOLDS HARMLESS BROKER(S)  
FROM LIABILITY FOR ANY DEFECTS OR CONDITIONS THAT  
COULD HAVE BEEN DISCOVERED BY INSPECTION OR  
INVESTIGATION.**

Paragraph 8(o) of the Purchase Contract stated in pertinent part:

**Release of Broker(s): Seller and Buyer hereby expressly release, hold harmless and indemnify Broker(s) in this transaction from any and all liability and responsibility regarding ... square footage...or any other matter relating to the value or condition of the Premises....**

Plaintiffs each initialed each of the above-referenced paragraphs of the Purchase Contract.

In March, 2014, Defendants Gross and Herman executed a Residential Seller's Property Disclosure Statement (SPDS), in preparation of the sale to Plaintiffs. In line 135, Defendants disclosed that they had remodeled the home in 2010, and put an addition on the home in 2011. Square footage of the home was not addressed. Lines 232-233 stated that the Defendants Gross and Herman were not aware of "other material (important) information ... concerning the Property that might affect the buyer's decision-making process, the value of the Property, or its use." Also, Lines 242-244 of the SPDS stated:

**BUYER'S ACKNOWLEDGMENT:** Buyer acknowledges that the information contained herein is based only on the Seller's actual knowledge and is not a warranty of any kind. Buyer acknowledges Buyer's obligation to investigate any material (important) facts in regard to the Property....

Before closing, the property was appraised. That appraisal assessed the square footage to be 6,539. After purchasing the property, Plaintiffs added 104 square feet.

In 2018, another appraisal assessed the property's square footage to be 5,865. Another appraisal thereafter assessed the square footage to be 5,670.

As a result of the square footage discrepancies, Plaintiff has sued Defendants Gross and Herman for breach of contract, breach of the covenant of good faith and fair dealing, consumer fraud, negligent misrepresentation, and intentional misrepresentation. Plaintiff has sued Defendant Bittner and Tukee Homes Realty for consumer fraud, negligent misrepresentation and intentional misrepresentation.

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**2. Defendant Gross' Motion to Dismiss**

It is well established that, in ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6), ARCP, this Court must consider all material allegations contained in the complaint to be true, and must read them in a light most favorable to the plaintiff. *Logan v. Forever Living Products International, Inc.*, 203 Ariz. 191, ¶ 2, 52 P.3d 760, ¶2 (2002). Motions to dismiss for failure to state a claim should not be granted unless it appears that the plaintiff would not be entitled to relief under any interpretation of the facts susceptible to proof under the pleadings. *See, Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 2, 24 P.3d 1269, ¶ 2 (2001).

**a. Breach of contract/breach of covenant of good faith and fair dealing**

Defendant Gross has moved to dismiss Plaintiffs' claims for breach of contract and breach of the covenant of good faith and fair dealing. Defendant claims that the square footage discrepancies cannot form the basis of a breach of contract or breach of the covenant of good faith and fair dealing claim because the square footage was not a term of the Purchase Contract, nor was it referenced anywhere in the SPDS. Defendant further claims that the square footage discrepancies cannot support a claim of breach of warranty, citing *Elm Retirement Center LP v. Callaway*, 226 Ariz. 287, 246 P.3d 938 (App. 2010).

During oral argument, Plaintiff claimed that the square footage is brought into the Purchase Contract under paragraph 5(b) which concerns warranties that survive closing. In that paragraph, the Seller warrants that he/she has disclosed to Buyer and Broker(s) "all material latent defects and any information concerning the Premises known to Seller...which materially and adversely affect the consideration to be paid by Buyer." In their response and at oral argument, Plaintiffs' also attempt to distinguish this case from *Elm*.

The Court finds that the square footage was not a term of the Purchase Contract. Paragraph 6(b) of the Purchase Contract makes this clear. Paragraph 6(b) also indicates that the Seller makes no representations regarding the true square footage of the property. Therefore, the square footage cannot constitute a "latent defect" or other information within Defendant Gross' knowledge that can materially and adversely affect the consideration paid by the Plaintiffs, pursuant to paragraph 5(b).

Additionally, contrary to Plaintiffs' claims, this case is analogous to *Elm*. Paragraph 6(b) constituted a disclaimer of liability for any representation by Defendant Gross regarding the square footage of the property. Under the clear terms of the contract, and pursuant to *Elm*, the square footage of the property cannot form the basis of a breach of warranty claim against Defendant Gross.

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Regarding Plaintiffs' claim for breach of the covenant of good faith and fair dealing, Arizona law implies a covenant of good faith and fair dealing in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986). The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent the other contracting parties from receiving the benefits of the agreement. *Id.*

The square footage was not part of the Purchase Contract between the parties. That fact and given that Defendant Gross specifically disclaimed any liability regarding the square footage calculation, demonstrates that the square footage discrepancies cannot constitute a breach of the covenant of good faith and fair dealing against him.

Based upon the forgoing, Plaintiffs' claims for breach of contract/breach of the covenant of good faith and fair dealing do not state a claim for relief under Rule 12(b)(6), ARCP against Defendant Gross.

**b. Tort claims**

Defendant Gross claims that Plaintiffs' claims for consumer fraud, negligent misrepresentation and intentional misrepresentation should be dismissed because none were pled with sufficient particularity. Defendant Gross also claims that none of these claims state a valid claim for relief under the facts presented as he made no representations regarding the square footage. Defendant Gross also claims that these claims are time-barred. Plaintiffs contend that their tort claims are not time-barred, and that the Sellers omissions constituted representations regarding the square footage. Plaintiffs also contend that claims that the tort claims were pled sufficiently, but requests that the Court permit them to amend their complaint in the event the Court finds otherwise.

First, the Court finds that these tort claims are not time-barred. Plaintiffs were not aware of the approximately 800 square foot discrepancy until the appraisal in April, 2018. It is reasonable that they did not discover the discrepancies earlier. Plaintiffs filed this lawsuit approximately one month later.

The Court agrees that Plaintiffs' tort claims are not pled with sufficient particularity as to Defendant Gross. It is unclear, from the Complaint, what material information Defendant Gross allegedly misrepresented. The Court declines to grant Plaintiffs leave to amend their Complaint, as Plaintiffs cannot demonstrate any misrepresentation or deception by Defendant Gross, given the disclaimer language in the Purchase Contract.

Therefore, Plaintiffs' tort claims against Defendant Gross fail to state claims upon which relief can be granted under Rule 12(b)(6), ARCP.

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**3. Defendants Jill Bittner and Tukee Homes Realty, LLC's Amended Motion for Summary Judgment**

Defendants Bittner and Tukee Homes Realty contend that they are entitled to summary judgment on Plaintiffs claims against them for consumer fraud, negligent misrepresentation and intentional misrepresentation because Plaintiffs waived their ability to recover against them for any issues relating to square footage. This argument is based upon the language pertaining to square footage contained in the MLS listings, the Purchase Contract, and an email purportedly sent from Plaintiffs' real estate agent to Defendant Bittner.<sup>1</sup> Defendants also claim that Plaintiffs' claims are not pled with sufficient particularity. Plaintiffs dispute these claims.

The Court finds that the MLS listings and the Purchase Contract made it clear that, if Plaintiffs believed square footage to be a material term, they had the burden of verifying that calculation. Plaintiffs' appraisal before closing actually revealed a slightly *higher* square footage than contained in the MLS listings. The Purchase Contract also clearly provided that Plaintiffs acknowledged that Defendants Bittner and Tukee Homes Realty had no obligation to conduct "due diligence" with respect to the property, and also stated that Plaintiffs released Defendants Bittner and Tukee Homes Realty from any liability relating the square footage of the property.

Based upon the foregoing, Plaintiff has not demonstrated any misrepresentation or deception on behalf of Defendants Bittner and Tukee Homes Realty. Therefore, the Court finds no disputed issues of material fact and that Defendants Bittner and Tukee Homes Realty are entitled to summary judgment as a matter of law.

IT IS ORDERED granting Defendant Frank Gross' Motion to Dismiss.

IT IS FURTHER ORDERED granting Defendants Jill Bittner and Tukee Homes Realty, LLC's Amended Motion for Summary Judgment.

IT IS FURTHER ORDERED that Defendants submit proposed forms of Judgment to this Court within 10 days of the receipt of this minute entry.

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<sup>1</sup> The Court disregards Defendants' claims about the email, as it does not state which property/sale it is referring to.