

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
09/11/2001

09/10/2001

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-008741

FILED: _____

AKH DEVELOPMENT CORPORATION

LEONARD J MCDONALD

v.

RAYMOND J TIEDJE, et al.

MICHAEL E HENSLEY

TIMOTHY H BARNES
JOHN C DOYLE
RAYMOND AVER
WEINTRAUB & AVER
12424 WILSHIRE BLVD #1030
LOS ANGELES CA 90025
JOSEPH J POPOLIZIO
JONES, SKELTON & HOCHULI
2901 N CENTRAL
SUITE 800
PHOENIX AZ 85012

MINUTE ENTRY

Counsel having argued Plaintiff's Motion for Summary Judgment, this matter having been under advisement on August 20, 2001,

THE COURT FINDS and ORDERS as follows:

Plaintiff's action is one to enforce a guarantee, 51% Tiedje and 49% to Swenson.

Defendants argue duress in signing the guarantee. Johnson v. American National Ins. Co., 126 AZ 219 (AZ App. 1980), holds

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that the requirement of a guarantee itself is not duress. Plaintiff argues that the issue of duress comes late after the benefit was extended. There are no facts supporting duress, other than those of the nature raised as argument and dismissed in Johnson.

As a matter of law, Plaintiff's motion must be granted on the issue of duress.

Defendants next argue the plaintiff lied about the status of the zoning. The defendants were the purchasers of the property and had an appraisal indicating the property was SRO and not multi-family. All parties believed the zoning would not be an issue, but all knew the actual status as of the time the defendants entered into the guarantee. There is no dispute of fact on this issue.

Defendants argue misrepresentation was perpetrated by the lack of a hookup for power and sewage. Bullhead City allegedly had requirements, which caused the defendants to expend additional funds. These were actions of Bullhead City, not Plaintiff. Power and sewer were known to not be immediately available, and Plaintiff and Defendants thought a stand-alone facility would suffice, but the City changed the requirements. Defendants' case claims that the plaintiff knew the City would change the rules or should have known, and should not have made a representation that an expenditure of \$60,000 would work for Defendants at the time Plaintiff demanded the guarantee. Defendants offer no facts in support of this contention. It is not disputed that the facility had an eventual cost of \$200,000.

Defendants argue waiver as the guarantee was extended pursuant to the contract. **THE COURT FINDS** the contract provisions bind all parties to the agreement. There was no waiver of contract terms.

Defendants argue that Plaintiff represented these units would be low income housing available for tax credits.

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Defendant argues the whole deal was driven by the availability of tax credits. None of this is disputed. However, Plaintiff argues the problems arose when Bullhead City made additional demands which added costs to the project.

There were delays in obtaining zoning and delays due to the greater costs in obtaining power and sewer. None of these are alleged to be caused by Plaintiff, but Defendant argues Plaintiffs should have known and should have absorbed Defendants' risk.

Defendants argue either the zoning or the power and sewer hookups were material issues of misrepresentation. The delays related to either caused the demise of the project. Defendants argue the agreement is evidence of misrepresentation.

THE COURT FURTHER FINDS that the parties agree on the material facts. The issue in dispute is whether the purchase agreement is a representation by the plaintiff that certain circumstances existed and warranted certain events would and could occur when the Plaintiff knew or should have known that they would not or could not occur, thus leaving Defendants in default with their project. Defendants point to paragraph 9.6 of the agreement as the point of dissention. Defendants argue the agreement is evidence of Plaintiff's misrepresentation.

Paragraph 9.6 warrants the property status given the records available at the time of sale. Defendants do not allege or supply evidence of hidden documents or information then existing and not disclosed. Nothing in paragraph 9.6 represents that the seller warrants certain changes in property status will occur, occur timely, or that non-party, the City, will not require certain additional facilities. Nothing in paragraph 9.6 indicates that the seller, Plaintiff herein, agrees that the buyer may transfer the risk of development delays to Plaintiff.

There is no evidence of knowing or willful conduct of Plaintiff upon which a jury could reasonably find a dispute of

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fact between these parties. Defendants have the burden of providing some evidence to support their claims.

Defendants' argument in equity fails for lack of a basis to show unclean hands of Plaintiff and Defendants' lack of knowledge or complicity in the activity complained of.

THE COURT FURTHER FINDS that adequacy of consideration will not be considered in the absence of an unconscionable disparity which does not exist herein.

As a matter of law, the allegation of waiver lacks merit.

IT IS ORDERED granting Plaintiff's Motion for Summary Judgment and directing that judgment issue as to both Defendants Raymond J. Tiedje and Linda M. Swenson.