

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-015452

10/08/2010

HONORABLE EMMET RONAN

CLERK OF THE COURT
M. Postert
Deputy

J D S CAPITAL VENTURES L L C

SEAN B BERBERIAN

v.

CLIFTON L BURGNER, et al.

LAWRENCE K LYNDE

MINUTE ENTRY

The Court has previously granted summary judgment for Plaintiff on his claim for Breach of Contract in Count I of his Complaint. The Court held an evidentiary hearing over two days on Plaintiff's claim for damages resulting from that breach. The Court has considered the testimony and evidence presented at the hearing and the arguments of counsel. The Court makes the following findings and orders.

Plaintiff was in the business of "flipping and selling" homes. In January 2007, and for several years previous, this was a lucrative business for many experienced investors like Plaintiff. They would buy homes in a certain price range that were in need of repair and would quickly "rehab" them, put them back on the market and sell them for a profit.

In January 2007, Plaintiff purchased a house from Defendant with the express purpose of flipping and selling it. He testified about his normal procedure for placing a value on a piece of property prior to purchasing it. Defendant presented no credible evidence to contradict Plaintiff's opinion as to the value of the property at the time of purchase. We now know, three years later, that all real estate was greatly overvalued in January 2007. However, the Court believes that a calculation of Plaintiff's damages in this case should be determined based on the

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market value at the time he purchased the property from the Defendant because that was the figure he used when he decided to enter into his agreement to purchase the property from the Defendant. The figure from January is further corroborated by the appraisal done in September 2007 which valued the property, after repair, at \$200,000. The difference in value after seven months reflects the on going decline in the market but it also validates Plaintiff's opinion in January.

Plaintiff's opinion as to value is derived from comparable property sales. It is reasonable to assume that those are all improved properties. Therefore, Plaintiff has not included the cost of his initial repairs and improvement into his damage calculation. It is also reasonable to assume, based on the real estate market at the time, that there would be some carrying costs associated with holding the property while "rehabbing" it and placing it on the market for sale. Plaintiff has not included the carrying costs for six months and the Court finds that as reasonable. Plaintiff has also deducted \$8,100 he received in rent and a reasonable amount of profit he might have received (calculated in the form of a standard real estate commission) upon resale of the home.

The remaining damages sought by Plaintiff are the direct result of Defendant's breach of contract. Plaintiff believed he purchased clear title to a piece of real property with a house. His intent was to "flip and sell" the property. However, if he had purchased property with clear title he could have done whatever he wanted with it once the real estate market went south. He could hold it and rent it hoping to ride out the market or he could have sold it at any point in time for any price he chose to recoup some of the money he put into the property. But he didn't have those options because he didn't have clear title as Defendant had promised in the "Title Guarantee" the parties signed on January 5, 2007. The money he spent in an effort to refinance the property, the money he spent to repair portions of the property in 2009 and most importantly, the money he continues to pay for the monthly interest on the equity line of credit that was used to pay the Defendant \$156,500 are all consequential damages of Defendant's breach of contract. As a final irony, he no longer owns any interest in the property because it was sold in foreclosure to satisfy the original lien holder.

THE COURT FINDS Defendant is liable to Plaintiff for damages from his breach of contract in the total amount of \$231,079. plus interest at the legal rate.

This matter arises out of contract. Counsel for Plaintiff may submit an affidavit of attorney's fees and costs.

Plaintiff shall submit a proposed form of Judgment for the Court's review and signature on or before **November 22, 2010**.

FILED: Trial Worksheet

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-015452

10/08/2010

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