

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-005362

01/30/2012

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT  
L. Nixon  
Deputy

GUARANTY BANK AND TRUST COMPANY      WILLIAM SCOTT JENKINS JR.

v.

RANCHO TUSCANA L L C, et al.

FRANK L MURRAY

DENNIS I WILENCHIK

**RULING**

The Court has had Defendants/Counterclaimants/Third-Party Plaintiffs' Motion for Leave to File Second Amended Counterclaim and First Amended Third-Party Complaint under advisement following oral argument on December 16, 2011. Having read and considered the briefing and having heard oral argument, the Court issues the following ruling.

Defendants/Counterclaimants/Third-Party Plaintiffs (collectively, "Rancho Tuscana") seek leave to amend to add a claim for consumer fraud against Plaintiff/Counterdefendant ("Guaranty Bank") and Third-Party Defendant ("CBRE").<sup>1</sup> Leave to amend should be "freely given when justice requires." Ariz. R. Civ. P. 15(a); *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292, 246 P.3d 938, 943 (App. 2010). However, this Court may deny a motion for leave to amend if it finds "undue delay in the request, bad faith, undue prejudice, or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). An amendment is futile if it could not affect the outcome of the litigation, i.e., "when on its face it is legally insufficient." *Matter of Torstenson's Estate*, 125 Ariz. 373, 377, 609 P.2d 1073, 1077 (App. 1980) (citation omitted); see also *Callaway, id.*; *Bishop v. State, Dep't of Corr.*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992).

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<sup>1</sup> Guaranty Bank joined in CBRE's Response to Rancho Tuscana's Motion. For purpose of this ruling, Guaranty Bank and CBRE will be referred to collectively as "Defendants," unless the context otherwise requires.

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Defendants argue such amendment would be futile because the claim is barred by the one-year statute of limitations. A.R.S. § 12-541(3); *see Murry v. W. Am. Mortg. Co.*, 124 Ariz. 387, 390, 604 P.2d 651, 654 (App. 1979); *Alaface v. Nat'l Inv. Co.*, 181 Ariz. 586, 591, 892 P.2d 1375, 1380 (App. 1994). The statute begins running on an action for consumer fraud “when the defrauded party discovers or with reasonable diligence could have discovered the fraud.” *Alaface, id.*, quoting *Mister Donut of Am., Inc. v. Harris*, 150 Ariz. 321, 323, 723 P.2d 670, 672 (1986). A plaintiff need not know all of the underlying details of the misrepresentation before the cause of action accrued. *Alaface, id.* “All that is required is that [the plaintiff] should have known such facts that would have prompted a reasonable person to investigate and discover the fraud.” *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 264, 266, 678 P.2d 449, 451 (App. 1983), *vacated in part on other grounds*, 139 Ariz. 242, 678 P.2d 427 (1984).

The Court agrees with Defendants that a reasonable person acting with diligence would have been prompted by the 2/18/09 Appraisal to investigate and discover the alleged fraud. After the Appraisal was released, Rancho Tuscana contended it was fundamentally flawed and no additional collateral was needed. (7/21/11 Minute Entry at 3.) Rancho Tuscana “questioned” the Appraisal, was “concerned” about it, and “believed” the property’s value to be higher. (Reply at 2-3.) It is not required that Rancho Tuscana know all the details regarding additional appraisals or its expert’s opinion that the Appraisal skewed the accrual period for the cause of action to accrue. *Alaface, supra*. Rancho Tuscana knew shortly after 2/18/09 that a wrong allegedly had occurred and caused injury. *See Doe v. Roe*, 191 Ariz. 313, 323, 955 P.2d 951, 961 (1998). At that point, a reasonable investigation would have alerted it to its claim. *See Callaway*, 226 Ariz. at 290, 246 P.3d at 941.

Rancho Tuscana asserts that consumer fraud is a continuing tort, but does not provide citation to authority or argue application of law to this case. (Reply at 9.) Thus, the Court declines to address this assertion further. The Court rejects Rancho Tuscana’s argument that the consumer fraud cause of action relates back to its 4/2/10 Answer and Counterclaim. *See Ariz. R. Civ. P. 15(c)*. Relation back is inapplicable when the amendment seeks relief with respect to a transaction or event that was not the basis of the original complaint. *Marshall v. Super. Ct.*, 131 Ariz. 379, 383, 641 P.2d 867, 871 (1982). The basis of the Answer and Counterclaim was in contract against Guaranty Bank.<sup>2</sup>

Defendants also argue futility because Rancho Tuscana was not a buyer of CBRE’s services under the Arizona Consumer Fraud Act. *See A.R.S. § 44-1522(A)*; *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9<sup>th</sup> Cir. 1992). “The purpose of the Arizona Consumer Fraud Act is to eliminate unlawful practices in merchant-consumer

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<sup>2</sup> The Court also notes that the Answer and Counterclaim was filed over 13 months after the Appraisal was prepared.

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transactions.” *Enyart v. Transam. Ins. Co.*, 195 Ariz. 71, 78, 985 P.2d 556, 563 (App. 1998). The Act gives injured consumers “a remedy to counteract the disproportionate bargaining power often present in consumer transactions.” *Waste Mfg. & Leasing Corp. v. Hambicki*, 183 Ariz. 84, 88, 900 P.2d 1220, 1224 (App. 1995).

Defendants contend that, even though Rancho Tuscana might have paid for the Appraisal, the intended “consumer” of the Appraisal was Guaranty Bank, not Rancho Tuscana. The Court agrees. CBRE owed no duty to Rancho Tuscana. (7/21/11 Minute Entry at 4.) The Appraisal was prepared as a tool for Guaranty Bank. (*Id.*) Rancho Tuscana received a copy of it for informational purposes. (*Id.*) “[T]he parties to this negotiation were not mutually bound by the appraised value to consummate an agreement. Rancho [Tuscana] was not constrained by the Appraisal and it was free to dispute it in any way it desired.” (*Id.*) Rancho Tuscana’s contention to the contrary, it was not the “target” of the alleged deceptive Appraisal. *See Sutter Home, id.*

Based on the foregoing,

IT IS ORDERED denying Rancho Tuscana’s Motion for Leave to File Second Amended Counterclaim and First Amended Third-Party Complaint.

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.