

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-011929

02/09/2018

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

JAMES S EDWARDS

WILLIAM T LUZADER III

v.

STEPHEN ALLGOOD, et al.

SPENCER T PROFFITT

RULING

The Court has reviewed the Sonoran Desert Lifestyles Defendants’¹ Motion to Dismiss filed on October 26, 2017; Plaintiff’s Response filed on November 22, 2017 and Defendants’ Reply filed on December 11, 2017. The Court denies the request for oral argument, finding that it would not be of assistance in deciding the issues presented.

Factual Background²

In February 2017, Plaintiff entered into a Purchase Contract for New Home with Lot (the “Purchase Contract”) with Defendant AB Hospitality, LLC (“ABH”) as the seller and Defendant Hidden Rock, LLC as the builder, for the construction of a home in the Hidden Rock Development. Defendant Stephen Allgood is a member and manager of ABH, and he and Defendant James Deskus are the only members of Hidden Rock. Defendant Patrick Jones is a licensed real estate broker who worked for Defendant Desert Lifestyles, LLC dba Sonoran Desert Lifestyles, a licensed real estate brokerage firm (collectively “the SDL Defendants”). The SDL Defendants were the listing brokers for the homes in the Hidden Rock Development.

¹ These Defendants include Patrick Jones and Desert Lifestyles, LLC dba Sonoran Desert Lifestyles.

² The facts set forth in this section are those alleged by Plaintiff and not findings of fact by the Court. They shall have no preclusive effect in future proceedings.

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Under the Purchase Contract, any deposits or advance payments by Plaintiff were to go to ABH or Allgood (not to a neutral escrow account), and ABH was not permitted to use the funds for any purpose other than the construction of the home. From January to March 2017, Plaintiff made advance payments of approximately \$144,000. Ultimately, however, ABH and Hidden Rock defaulted, and Plaintiff lost his funds.

Plaintiff claims that Defendants Allgood, Deskus, ABH and Hidden Rock (the “ABH Defendants”) perpetrated a fraud upon him by inducing him to enter the Purchase Contract through false representations that ABH and Hidden Rock had the financial wherewithal to perform the Purchase Contract and continued the fraud, including inducing him to make advance payments, by failing to inform him of ABH’s and Hidden Rock’s financial distress and the suspension of Hidden Rock’s contractor license.

In Count 7 of the Complaint, Plaintiff alleges that the SDL Defendants aided and abetted the fraud. Plaintiff’s other claims against the SDL Defendants include negligence (Count 5) and negligent misrepresentation (Count 6). The SDL Defendants seek dismissal of the aiding and abetting and negligence claims.

Legal Analysis

A. The Negligence Claim

Relying on *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6 (App. 1996), and *Kuehn v Stanley*, 208 Ariz. 124 (App. 2004), the SDL Defendants argue that because they are “providers of professional information,” the only negligence-based claim Plaintiff can assert against them is negligent misrepresentation. The holdings in these cases were predicated on §552 of the Restatement (Second) of Torts,³ which subjects a negligent provider of professional

³ Section 552 reads in relevant part:

- (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
- (2) . . . the liability stated in Subsection (1) is limited to loss suffered
 - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
 - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

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information to liability “only to those persons for whose guidance he knows the information to be supplied, and to them only for loss incurred in the kind of transaction in which it is expected to influence them, or a transaction of a substantially similar kind.” Cmt. (i). Reliance on the misinformation is also required.

Both *Kuehn* and *Standard Chartered* held that when the gravamen of a negligence claim against a provider of professional information is negligent misrepresentation, a plaintiff cannot also bring a claim for negligence. *Standard Chartered*, 190 Ariz. at 30; *Kuehn*, 208 Ariz. at 128. Here, Plaintiff claims that the SDL Defendants knew, but failed to disclose, the following: (1) that ABH was in financial distress; (2) that Hidden Rock’s contractor license had been suspended; (3) that the Risk Disclosure Statement in the Purchase Contract was more narrow than the version prescribed by the State Real Estate Department; and (4) that the loans secured by the Hidden Rock Development were in default. All of these allegations relate to the SDL Defendants’ failure to provide material information they had a duty to provide, thereby making the gravamen of Plaintiff’s negligence claim negligent misrepresentation.

Plaintiff tries to distinguish this case from *Kuehn* and *Standard Chartered* by arguing that his negligence claim is based on the SDL Defendants’ failure to comply with the following duties imposed upon them by the Arizona Administrative Code: (1) to deal fairly with all parties to a transaction; (2) to provide written disclosures of any material information that a seller may not be able to perform; and (3) to ensure that sales contracts include specific risk-of-loss language when deposits are not placed into a neutral escrow. Resp. at 5-6. But, while these regulations could arguably establish a duty and a standard of care, they do not change the gravamen of Plaintiff’s negligence claim.

Furthermore, other providers of professional information, such as the appraiser in *Kuehn*, are also subject to duties and standards set forth in statutes and/or the Arizona Administrative Code. See e.g., A.R.S. §32-610 (establishing the Uniform Standards of Professional Practice as the standard for appraisal practice in Arizona). If §552 of the Restatement did not apply simply because state regulations existed governing the practice of the particular provider of professional information, it would be largely nullified.

In addition, limiting a plaintiff to a negligent misrepresentation claim becomes relevant only when he or she cannot meet the elements of §552. In other words, §552 limits the class of persons to whom a supplier of information can be liable. If a plaintiff falls within that class and can show reliance, the same damages are available under a negligent misrepresentation claim as under a negligence claim.

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In *Kuehn*, for example, purchasers of real estate sued an appraiser for negligence when he appraised the real estate at higher than fair market value. The Court first found that because the claim was based on the negligent provision of information, plaintiffs' negligence claim failed. *Id.* The Court then found that the plaintiffs could not recover on a negligent misrepresentation claim. First, they failed to show reliance. Second, they failed to show that the appraiser provided the appraisal for *their* guidance because the lender, not the plaintiffs, hired the appraiser, and the lender did so for purposes of evaluating the financing transaction. *Id.* at 128-29. Under circumstances like these, the court determined that allowing plaintiffs to bring a negligence claim would constitute an end-run around the limitations set forth in §552. Plaintiffs were therefore left with no negligence-based remedy. *Id.* at 128.

That is not the case here. The SDL Defendants have not challenged Plaintiff's negligent misrepresentation claim. Therefore, dismissing the negligence claim will not eliminate the possibility of Plaintiff recovering on a negligence theory.

B. Aiding and Abetting Fraud

To establish an aiding and abetting claim, a plaintiff must show that: (1) the primary tortfeasor committed a tort that caused injury to the plaintiff; (2) the defendant knew the primary tortfeasor's conduct constituted a breach of its duty; and (3) the defendant substantially assisted or encouraged the conduct. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 38 P.3d 12 (2002).

The SDL Defendants argue that Plaintiff's aiding and abetting fraud claim must be dismissed because: (1) Plaintiff has failed to allege sufficient facts to infer actual knowledge; (2) the only conduct alleged is the failure to prevent fraud, which is not "substantial assistance or encouragement;" and (3) the SDL Defendants, as agents of the ABH Defendants, cannot be held liable for aiding and abetting a tort committed by the ABH Defendants..

1. Agency

The SDL Defendants rely on the "agent's immunity rule" adopted by California courts, which provides that an agent cannot be liable for conspiring with its principal or aiding and abetting its principal in committing a tort when the agent is acting on behalf of the principal. *Berg & Berg Enterprises*. 32 Cal. Rptr. 3d 325, 335 (App. 2005). However, this rule does not apply when: (1) "the [agent] violates a duty that he or she independently owes to the plaintiff; and (2) . . . the [agent's] acts go beyond the performance of a professional duty the [principal] and are, in addition, done for his or her own personal financial gain." *Id.* Here, the SDL Defendants have not challenged Plaintiff's assertion that they owed him an independent duty as listing brokers. The Court therefore rejects the SDL Defendants' agency argument.

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2. Actual Knowledge and “Substantial Assistance” or “Encouragement”

In arguing that Plaintiff has failed to adequately plead knowledge and substantial assistance or encouragement, the SDL Defendants have lost sight of the standard applicable to motions to dismiss--that the Court must assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom, *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175, and that it may not dismiss a claim unless the plaintiff “would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Fidelity Security Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, 224, 954 P.2d 580, 582 (1998).

Here, Plaintiff alleged upon information and belief that the SDL Defendants knew about ABH’s financial distress and that they knew AB was behind on other projects at least as early as March 2017. Yet, they nonetheless told him he could make an additional deposit in late March. Compl. at ¶¶41, 43, 50. Given the close relationship between the ABH Defendants and the SDL Defendants, and considering the SDL Defendants’ argument that they were the agents of the ABH Defendants, a reasonable inference of actual knowledge can be drawn. The Court also finds that the allegation that the SDL Defendants advised Plaintiff to make a deposit when they knew ABH and Hidden Rock were in financial distress supports a reasonable inference of substantial assistance and/or encouragement.

For these reasons,

IT IS ORDERED granting in part and denying in part the Sonoran Desert Lifestyles Defendants’ Motion to Dismiss as follows:

1. Dismissing the negligence claim (Count 5) without prejudice; and
2. Denying the Motion as to the aiding and abetting claim (Count 7).