

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2014-011845

03/23/2017

HONORABLE KERSTIN LEMAIRE

CLERK OF THE COURT  
A. Arnold  
Deputy

DONA LISA JOHNSON

JAMES ROBERT ECKLEY

v.

BERNARD POTOFF, et al.

LYN ANNE BAILEY

MARIA R KUPILLAS  
RICHARD V MACK  
ROBERT J SPURLOCK  
THOMAS A STOOPS

UNDER ADVISEMENT RULING

The Court has carefully considered the fully briefed "Motion for Summary Judgment on (I) Consumer Fraud; (II) Constructive Fraud; (III) Common Law Fraud; and (IV) Punitive Damages" filed by Defendants Ashley Van Winkle and John Does Van Winkle, James Dunning and Jane Dow Dunning, and Go Big, LLC dba as Keller Williams Arizona Realty. The Court has benefited from the oral arguments of counsel and has reviewed all the attachments to the pleadings. In reaching its decision, the Court also considered the legal file in this matter, and the applicable rules of court, statutes, and case law.

In deciding this motion, the Court is applying the well-established standard established by *Orme School v. Reeves*, 166 Ariz. 301 (1990). This court will grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of the evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."

As for the Motion for Summary Judgment regarding consumer fraud, given that the standard of proof for the trier of fact is by a preponderance of the evidence, there are sufficient

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facts present in the record, given that inferences are being made in the light most favorable to Plaintiff for purposes of this motion, to present to a jury as to whether an act of consumer fraud occurred. Describing the property as being “free of negatives” and worth \$750,000.00 may have induced Plaintiff into going forward with the purchase of the home. The trier of facts will need to determine Defendants knew the statements were false and intended for Plaintiff to rely upon them. The home’s value and whether it had “negatives” were certainly material to deciding whether to purchase the property.

Likewise, with regard to the claim for constructive fraud, the trier of fact will need to determine whether or not Plaintiff justifiably relied on Ms. Van Winkle’s statements and representations and whether said reliance was to her detriment.

However with regard to the claim for common law fraud, which must be proven by clear and convincing evidence, Plaintiff has failed to meet the burden of proving the requisite nine elements of common law fraud as set forth in *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982). Plaintiff has not clearly set forth in her pleadings, Response to this motion, or within her statement of fact how she can overcome the higher burden of proving that the representations regarding the wash, home value, and desirability of the home were false, that defendants knew they were false, and that they intended for Plaintiff to rely on said representations and that she was injured as a result of said reliance.

Lastly, no evidence has been presented that the KW Defendants acted with an evil mind or were guided by evil motives. Thus, at this juncture, Plaintiff simply cannot meet the standard of proof to show the defendant’s behavior was outrageous or malicious. That being said, should the evidence at trial show that an instruction regarding punitive damages is warranted, the Court will give the jury the requisite instruction regarding punitive damages.

**IT IS ORDERED** denying the Motion for Summary Judgment on (I) Consumer Fraud; (II) Constructive Fraud and **GRANTING** the Motion for Summary Judgment on (III) Common Law Fraud and (IV) Punitive Damages.

The Court declines to award attorney fees at this juncture and will make a decision regarding the appropriate and reasonable amounts to be awarded as attorney’s fees at the end of the litigation in this matter.