

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-011845

03/28/2017

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 “Defendant Karen (Wren) Kelly’s Motion for Partial Summary Judgment on Counts II and IV of Plaintiff’s Verified Second Amended Complaint (Consumer Fraud, Common Law Fraud). 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 with the VanWinkle and Keller William Motion for Summary Judgment re: Consumer Fraud, there are sufficient facts present in the record, given that inferences are being taken in the

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light most favorable to the plaintiff for purposes of this motion, to present to a jury as to whether an act of consumer fraud occurred. Defendant Kelly prepared the marketing materials and MLS listing for the property. Said materials may well have been what drew Plaintiff's interest to the property when she was looking for land to purchase. Likewise Defendant Kelly was to ensure that the materials provided to Plaintiff comported with an agents' requirements to provide open and honest disclosure. There is also a question as to whether Defendant Kelly provided the appropriate attachments to Plaintiff's agent regarding building plans, a flood plain report, and a grading and drainage report.

With regard to the claim of common law fraud, as those claims must be supported by clear and convincing evidence, the Court applies that heightened standard of care to this claim. Plaintiff simply fails to meet the burden of providing the nine elements of common law fraud as set forth in *Echol v. Beauty Built Homes, Inc.* 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982).

IT IS ORDERED granting the motion for summary judgment regarding common law fraud and **denying** the motion for summary judgment regarding consumer fraud.

The Court declines to award attorneys' fees and costs at this juncture in the litigation and will reserve ruling on that request at the end of litigation.