

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000707

06/24/2013

HONORABLE MARIA DEL MAR VERDIN

CLERK OF THE COURT
L. Bee
Deputy

MARKHAM CONTRACTING CO INC

KAREN A PALECEK

v.

PINNACLE POINT DEVELOPERS L L C, et al.

PINNACLE POINT DEVELOPERS L L C
NO ADDRESS ON RECORD

TROON NORTH ASSOCIATION
NO ADDRESS ON RECORD
RICHARD Q NYE
FRANK S TOMKINS

UNDER ADVISEMENT RULING

This matter came before the Court for Oral Argument May 6, 2013 regarding various pending Motions for Summary Judgment. All issues presented were taken under advisement.

The Court has considered the matters presented including the Motions, Responses and Replies filed; the authorities cited and the argument of Counsel.

Summary Judgment is appropriate if, after reviewing the facts in the light most favorable to the non-moving party, no genuine issues of material fact remain. *Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 571 (App 1976). A “genuine” issue of material fact is the one that a reasonable jury, on the record before the Court, could resolve in favor of either party.” *Southwest Pet Products, Inc v. Koch Ind.*, 273 F. Supp. 2d 1041, 1050 (D. Ariz. 2003) (citations omitted). Even where the facts are undisputed, a genuine dispute as to conflicting inferences to be drawn from them precludes an award of summary judgment. *Executive Towers v. Leonard*, 7 Ariz. App. 331, 439 P.2d 303 (1968). Evidence creating even the “slightest doubt” about the facts may be insufficient to withstand a motion for summary judgment. *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990).

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Defendant FDIC's Motion for Summary Judgment on Count Two of its Amended Complaint, and on First and Second Claims for Relief in FDIC's Amended Counterclaim, filed November 6, 2012; and

Plaintiff's Cross-Motion regarding Count Two (Equitable Subrogation), filed December 11, 2012; and

Defendant FDIC's Motion for Summary Judgment Regarding Equitable Subrogation, filed November 30, 2012.

On May 14, 2012 the Court ruled that FDIC and PrimeAZ/Libra were entitled to be equitably subrogated to the lien position enjoyed by the 2006 Deed of Trust "to the extent of the amount of the first Deed of Trust in 2006." The Court also indicated that prejudice remains a factor to consider in equitable subrogation. The Court clarifies that it considered this factor to the extent that it was presented in finding that equitable subrogation applied. Specifically, the Court ruled that: "Allowing it to apply to anything more than that amount would result in prejudice to the Plaintiff. Equitable subrogation up to and only to the extent of the payoff amount will allow the Plaintiff to be in the same position he was in prior to the new lender stepping in."

The Court held as argued by the Defendants that FDIC is entitled to priority as to the amount of the payoff sum to satisfy the 2006 Deed of Trust only. In reaching the conclusion for equitable subrogation, the Court considered the prejudice to the Plaintiff and found none.

The Defendants have been able to factually support and present evidence of a payment made to satisfy the First Arizona Deed of Trust in the amount of \$2,816,728.50, and interest in the amount of \$95,845.94 from August 1, 2009 through the date of the trustee sale of February 23, 2010.

IT IS ORDERED granting the Defendants' request for Summary Judgment only to show they are equitably subrogated to the lien priority of the 2006 Deed of Trust in the amount of \$2,912,574.44.

IT IS FURTHER ORDERED denying the Plaintiff's Cross-Motion.

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Defendant FDIC's Motion for Summary Judgment on Count Seven of Plaintiff's First Amended Complaint, Filed November 8, 2012.

The Defendants' request Summary Judgment on Count Seven because it fails to state a claim upon which relief can be granted. Specifically, they argue that the claim for excess funds is based on A.R.S. s 33-812 (A) and that the statute governs the conduct of the Trustee not that of the credit bidder. The Defendants argue they did not have responsibility to give notice of or to distribute any funds from the Trustee sale which occurred.

The Plaintiff argues that the Defendants are entitled to no more than the subrogation amount of the 2006 Deed of Trust and that any excess proceeds from the Trustee's sale should have been distributed to them. The Court cannot disagree with this assertion.

Lien holders are entitled to excess proceeds pursuant to priority placement under A.R.S. s33-812. The statute imposes the responsibility of giving notice for distribution duty on the Trustee. Accordingly, any interested parties would have been given notice of any excess proceeds of a sale pursuant to the statute. Failure to receive notice would have been an omission on the part of the Trustee not the subsequent owner.

There is nothing in A.R.S. s33-812 (A) serves as grounds for a claim against the Defendants.

IT IS ORDERED granting the Defendants' Motion for Summary Judgment on Count Seven of Plaintiff's First Amended Complaint filed November 8, 2012

Defendant FDIC's Motion for Summary Judgment on Count Five of Plaintiff's First Amended Complaint filed November 9, 2013

The Parties agree that the Plaintiff entered into a contract with Pinnacle for construction work. The Parties also agree that the Defendants were not a party to that contract between the Plaintiff and Pinnacle. Plaintiff seeks to recover against FDIC based on an alleged verbal communication by FDIC's predecessor (Az Savings and Loan), that the Plaintiff would be paid in the amounts already owed by Pinnacle pursuant to the existing construction contract. The Defendants deny that an oral representation to this effect was ever made.

The Defendants' position pursuant to the Statute of Frauds, (A.R.S. s 44-101), is that the Plaintiff cannot prevail unless they can show: either the existence of a written promise to pay; or

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an applicable exception to the Statute. The Plaintiffs concede there is no executed written agreement showing an obligation by the Defendants to pay the Plaintiff. Instead they rely on the theory of promissory estoppel as an exception to the Statute found in *Tiffany Inc. v. W.M.K. Transit Mix, Inc.*, 16Ariz.App. 415, 493 P.2d 1220, (1972). Plaintiff attempts to show that the *Tiffany* criteria is present in this case. Specifically the Plaintiff argues that: there was a promise by Az Savings and Loan to pay; they relied on the representations of Az Savings and Loan to their detriment by continuing to do work; the promise was put in writing; and the Plaintiff has damages.

The Defendants distinguish the *Tiffany* factors from the ones in this case. In Arizona, the doctrine of promissory estoppel applies to a contract otherwise barred by the Statute of Frauds only “where a promise has been made not to rely on the Statute,” that is, where the party asserting the Statute of Frauds defense has misrepresented that the statute’s requirements have been met or promises to put the agreement in writing [citation omitted]. Promissory estoppel is applied to defeat the Statute of Frauds only where there is a second promise not to rely on the statute. *Mullins v. Southern Pacific Transportation Co.*, 174 Ariz. 540, 542, 851 P.2d 839, 841 (App. 1992). The assertion of promissory estoppel to the defense of the Statute of Frauds would require a promise by the parties to operate outside of the Statute requirements.

Assuming in the light most favorable to the Plaintiff that a verbal representation did occur and work was done in reliance of the promise, to the detriment of the Plaintiff and resulting in damages, in Arizona a second promise by the parties not to rely on the Statute of Fraud is necessary for the promissory estoppel theory to successfully apply. There is nothing to show that any work done by the Plaintiff was under the written agreement with the Defendants. The Plaintiff drafted an agreement, which may have been contemplated by the Parties, but was ultimately not signed. The existence of the writing shows that although there may have been discussion, the parties purposefully fell short of memorializing any agreement. Nothing has been presented to show that the second promise was made to forgo any requirement for writing and to operate outside of the Statute of Frauds.

IT IS ORDERED granting Defendant FDIC’s Motion for Summary Judgment on Count Five of Plaintiff’s First Amended Complaint filed November 9, 2013.

Defendant FDIC’s Motion for Summary Judgment against Markham on Count Four of its First Amended Complaint re Unjust Enrichment filed December 12, 2012

The Defendants deny that the Plaintiff can show any unjust enrichment. The facts show that the Defendants foreclosed on the property after monies had been loaned to Pinnacle and as a

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result of the borrowers default on the loan. The Defendants were legally entitled to pursue this course of action under their loan agreement with the borrower and the 2008 Deed of Trust.

The Plaintiff argues that the Defendants were unjustly enriched by the retention of the excess proceeds from the trustee sale in excess of the payoff amount. They seek the difference between the sale price and the amount they were owed in their priority position to satisfy the Plaintiff's lien. The Court is persuaded by the Plaintiff's position on this point. However the Plaintiff must satisfy all the elements of unjust enrichment to recover.

In order to recover on an unjust enrichment claim, a claimant must show “:(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment and (5) the absence of a remedy provided by law.” *Freeman v. Sorchych*, 226 Ariz. 242, 251, 245 P.3d 927, 936 (App. 2011). *Wang Electric, Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 319, 283 P.3d 45, 50 (App. 2012).

In considering this issue, most compelling to the Court is the Defendants' position that the Plaintiff had an adequate remedy at law under A.R.S. s33-812(A) (5) which it failed to pursue. Clearly the Plaintiff could have sought payment on the existing lien from the trustee at the time of the sale of the property. Having failed to show at least one of the factors for unjust enrichment, the Court need not address the others. The Defendants are entitled to summary judgment as a matter of law.

IT IS ORDERED granting Defendant FDIC's Motion for Summary Judgment against Markham on Count Four of its First Amended Complaint re Unjust Enrichment filed December 12, 2012.

Defendant FDIC's Second Motion for Summary Judgment on Counts Four and Five of Plaintiff's First Amended Complaint filed December 7, 2012

The Court has already considered the arguments for summary judgment made on Counts Four and Five and has ruled in favor of the Defendants on these issues. The Court deems the pending motion moot at this time.

IT IS ORDERED denying the Defendant FDIC's Second Motion for Summary Judgment on Counts Four and Five of Plaintiff's First Amended Complaint filed December 7, 2012 as moot at this time.

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IT IS ORDERED the Defendants shall lodge an order form for the Court's consideration no later than July 29, 2013.

IT IS FURTHER ORDERED that the parties shall submit a Joint Pretrial Memorandum as set forth below.

The Court will review the Joint Pretrial Memorandum and proposed Scheduling Order prescribed herein. The Court may adopt or modify the discovery and disclosure schedule order and set a scheduling conference for purposes of setting a trial date. If counsel still believe that a pretrial conference is necessary at this stage of the litigation, they should address the reasons for the need for a pretrial conference in the first paragraph of the Joint Pretrial Memorandum.

If the parties fail to file a timely memorandum, sanctions may issue pursuant to Rule 16(f).

IT IS FURTHER ORDERED:

All counsel are directed to meet personally to discuss all of the matters set forth in Rule 16(b). Counsel shall prepare and file with the Court by **5 p.m. on July 24, 2013**, a Joint Pretrial Memorandum, and prepare a proposed order for Discovery and Disclosure deadlines. The proposed order shall include dates for the following items and conform substantially with the attached sample order.

1. **A date or dates for initial disclosures** and/or to supplement disclosures made to date.
2. **An initial and final date to propound written discovery requests** that shall include, as far as can reasonably be anticipated, any and all medical examinations which may be required of any of the parties; the person or persons to conduct such examinations; and all tangible evidence to be disclosed or exchanged.
3. **A date for the initial and final disclosure of all non-expert witnesses**, and/or to supplement disclosures made to date.
4. **A date for the initial and final disclosure of the identities, subject matter, and reports of expert witnesses**, and/or to supplement disclosures made to date.
5. **A date for the completion of all depositions.**
6. **A date by which any motions to amend the pleadings will be filed.**

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7. **A date by which all discovery motions will be filed.**
8. **A date by which all dispositive or partially dispositive motions shall be filed.**
9. **A proposed date for a Mandatory Settlement Conference pursuant to Rule 16.1. Alternatively, the parties may propose a deadline by which they will participate in private mediation.**
10. The anticipated length of trial.

If counsel are unable to agree on any of the items set forth in the attached form of order, the reasons for their inability to agree shall be set forth in the Pretrial Memorandum and each shall prepare a separate proposed order. **All proposed deadlines shall be set forth as calendar dates, and not in the form “XX days before trial.”**

IT IS FURTHER ORDERED that counsel shall notify the Court of any agreed-upon extension of any time period provided by the Rules of Civil Procedure. The purpose of this order is not to discourage extensions as a matter of professionalism, but to ensure that no party suffers summary disposition of any issue by virtue of an extension of which the Court is not aware.

NOTE: COUNSEL SHALL UPLOAD AND E-FILE ALL PROPOSED ORDERS IN WORD FORMAT ONLY TO ALLOW FOR POSSIBLE MODIFICATIONS BY THE COURT.

PLEASE NOTE: If/when a party files a pleading within 48 hours of a scheduled event, the party should also e-mail same to the Court's Judicial Assistant at the following:
mgabel@superiorcourt.maricopa.gov

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[Proposed] Scheduling Order

The Court having received the parties' Joint Comprehensive Pretrial Conference Memorandum,

IT IS ORDERED entering the following schedule for disclosure as set forth unless the parties obtain written modifications by the Court:

- (1) Initial disclosures shall be exchanged by: **(MM/DD/YYYY)**
- (2) Written discovery shall be propounded by: **(MM/DD/YYYY)**
- (3) Written discovery shall be completed by: **(MM/DD/YYYY)**
- (4) Final non-expert disclosures shall be exchanged by: **(MM/DD/YYYY)**
- (5) The identities and subject areas of expert testimony shall be disclosed by: **(MM/DD/YYYY)**
- (6) Plaintiff's final expert disclosures shall be served by: **(MM/DD/YYYY)**
Defendant's final expert disclosures shall be exchanged by: **(MM/DD/YYYY)**
Rebuttal expert disclosures shall be exchanged by: **(MM/DD/YYYY)**
- (7) Depositions shall be completed by: **(MM/DD/YYYY)**
- (8) All discovery motions shall be filed by: **(MM/DD/YYYY)**
- (9) Any motions to amend pleadings shall be filed by: **(MM/DD/YYYY)**
- (10) Dispositive Motions shall be filed by: **(MM/DD/YYYY)**
- (11) The parties remaining in this action shall participate in private mediation by **(MM/DD/YYYY)** **OR** The parties remaining in this action shall participate in a Mandatory Settlement Conference (ADR) by **(MM/DD/YYYY)** **(Note: only one of the preceding two options shall be included in the proposed order)**

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(12) The following number of days will be required to pick a jury and try this matter:

IT IS ORDERED setting a telephonic Status Conference to be initiated by the Plaintiff in this matter on [counsel to leave this date blank], (time allotted: 15 minutes), in this Division.

**THE HONORABLE MARIA DEL MAR VERDIN
MARICOPA COUNTY SUPERIOR COURT
OLD COURTHOUSE
125 WEST WASHINGTON
3RD FLOOR, COURTROOM 303
PHOENIX, AZ 85003
602-506-2603 TEL**

IT IS FURTHER ORDERED that in no less than **five days** prior to the Status Conference set herein, the parties shall submit a Joint Statement pursuant to ARCP 16(d) and report to the Court the history and status of the efforts at Alternative Dispute Resolution pursuant to ARCP Rule 16(g).

DISCOVERY DISPUTES: In the event of any dispute concerning discovery, counsel are directed to confer pursuant to ARCP 26(g). Any discovery motion filed that does not indicate what recent efforts have been made to resolve the dispute will be rejected.

Dated: _____

HONORABLE MARIA DEL MAR VERDIN
JUDICIAL OFFICER OF THE SUPERIOR COURT

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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.