

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-011845

09/01/2016

HONORABLE KERSTIN LEMAIRE

CLERK OF THE COURT
A. Arnold
Deputy

DONA LISA JOHNSON

JAMES ROBERT ECKLEY

v.

BERNARD POTOFF, et al.

LYN ANNE BAILEY

CYNTHIA BRUCE
651 AVENIDA DEL NORTE
SARASOTA FL 34242
MARIA R KUPILLAS
RICHARD V MACK
ROBERT J SPURLOCK

UNDER ADVISEMENT RULING

This Court has carefully considered Plaintiffs' "Motion for Leave to File Second Amended Complaint" filed April 13, 2016. The Motion was fully briefed and the Court benefited from the arguments of counsel. The Court has considered the legal file, the applicable case law, statutes and rules of Court.

On Aug 13, 2011 the "Property" was contracted to purchase by Dona Lisa Johnson ("Plaintiff"). The closing date was December 15, 2011. First complaint was filed September 23, 2014. First amended complaint was filed April 17, 2015. Allegations for the second amended complaint include additional claims of Common Law Fraud, and Breach of Contract. Consumer Fraud and Constructive Fraud are part of the first amended claim claims. The allegations are that the Keller Williams agents for Plaintiff (buyer in 2011) were the same agents that helped Mrs. Bruce purchase the property in 2004. Information came to light during discovery that the Keller Williams agents were aware of issues from the original purchase and they failed to disclose these issues to Plaintiff during the sale of the property in 2011. Those issues were material and the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-011845

09/01/2016

reason a claim has been filed. Plaintiff's claim on page 9 section C appears to suggest that Plaintiff was unaware of flooding to the property that may affect the barn. Defendants' reply shows evidence that the Plaintiff knew of the potential defect in September 17, 2011.

Facts

When is it proper to deny a motion for leave for amended complaint? Plaintiff has a right to amend their Complaint "as a matter of course" within 21 days of their having been served with a motion covered by Ariz. R. Civ. P. 15(a)(1)(B). If the amended complaint is not filed within the 21 days, the statute gives two alternatives: by leave of Court or by written consent of the adverse party. Ariz. R. Civ. P. 15(a)(1)(B). Rule 15 directs Courts that leave shall be freely given "when justice so requires." *Id.* The Ninth Circuit has held that this provision should "be applied with extreme liberality" (internal quotations omitted). *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). A motion to amend pleadings should be granted unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment. *Tumacacori Mission Land Development, Ltd. v. Union Pacific R. Co.* (App. Div.2 2013) 231 Ariz. 517, 297 P.3d 923

The Motion for Leave to file Second Amended Complaint was filed 4/13/2016. To stay in compliance with the 21 day limit under Ariz. R. Civ. P. 15(a)(1)(B), the new relevant information would have to have been discovered no earlier than 3/23/2016.

Each new complaint should be analyzed to determine if the amendment would be futile. The Court may deny amendment, if the amendment would be futile. *Bishop v. State Dep't of Corr.*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App.1992). First, has there been a breach of contract with the Buyer's Agent (Ashlie VanWinkle and Keller Williams)? The Purchase contract was signed on 8/13/2011 with Dona Johnson as the buyer and VanWinkle/Keller Williams as the Buyers' Broker. Defendant Keller Williams points to an agency disclosure and election dated 12/15/2011 as not being a contract.

Secondly the matter of common law fraud, information that was material to the buyer's decision to purchase the property was based on misrepresentations or omissions by defendant Scottsdale Desert. Defendant Keller Williams mentions that the Plaintiff's claims are found in tort law, not contract citing Haldiman v. Gosnell Dev. Corp., 155 Ariz. 585, 586-87, 748 P.2d 1209, 1210-11 (Ct. App. 1987), which was an appellate decision regarding whether a real estate agent who is an employee of the seller owes a duty of full and frank disclosure to the buyer in a real estate transaction. A broker has none of fiduciary obligations generally owed to principal absent broker-principal relationship. Plaintiff should have evidence of a broker/principle

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-011845

09/01/2016

agreement, but it has not yet disclosed. This Court agrees that a real estate salesmen and brokers must disclose to their clients information they possess pertaining to transaction involved if there is a broker-principal relationship.

Conclusion

This Court finds that both new claims, breach of contract and common law fraud are areas of dispute and so are not necessarily futile. Based on information provided to the Court, a second amended complaint was not filed within the 21 day requirement under Ariz. R. Civ. P. 15(a)(1)(B). However, this Court finds no undue delay in request, bad faith, undue prejudice.

IT IS ORDERED granting Plaintiff's Motion for Leave to File Second Amended Complaint.