

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-092749

03/27/2006

HONORABLE HELENE ABRAMS

CLERK OF THE COURT
M. Brady
Deputy

FILED: 03/29/2006

MICHAEL J JESSE, et al.

RICHARD D HOLPER

v.

JOHN SANDERS, et al.

MICHAEL J FRAZELLE

KENT S BERK
PAUL F DOWDELL
SCOTT B HUMBLE

MINUTE ENTRY

On March 24, 2006, at the conclusion of the trial in this case, the court took this matter under advisement. After a review of the evidence and arguments of counsel and the court file, as to the ruling on the individual claims, the court will not require the parties to provide separate findings of fact or conclusions of law. Therefore, the court finds as follows:

On Plaintiffs' claim for specific performance, the court finds that the plaintiffs failed to prove this claim by a preponderance of the evidence. For example, the plaintiffs did not meet all the prerequisites necessary to close the transactions on either the 9/30/04 or the 10/25/04 closing dates.

On Plaintiffs' claim for breach of contract, the court finds that the plaintiffs failed to prove this claim by a preponderance of the evidence. For example, the items that needed to be completed by the sellers could have been done before closing or on the day of the closing. As to the settlement statement (HUD 1), this could have been signed at the closing. As to the signing by Asset Preservation, Exhibit 159, indicates that the sellers signed the document entitled "Exchange Agreement and Supplemental Closing Instructions", and, on page 2, that the responsibility for obtaining API's signature on sellers statements/closing documents prior to closing was on the Closing Agent. This too could have been done on the day of the closing.

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For the above stated reasons, on Plaintiff's claim for declaratory judgment, the Plaintiffs have not established a right to purchase the properties under the Purchase Contracts.

On Plaintiffs' claim for Tortious Interference with Existing Contracts, the court finds that the plaintiffs' failed to prove this claim by a preponderance of the evidence. For example, the court does not find sufficient evidence of an intentional interference with contractual relations with Plaintiff and Emerald Pacific that was designed to induce a breach of the contract or terminate the relationship. In addition, there was no evidence of damages or evil motive by the defendants.

On Defendants' counterclaim for fraud/fraud by non-disclosure, negligent misrepresentation and consumer fraud, the defendants failed to prove these claims by a preponderance of the evidence. For example, the pre-approval letter was not fraudulent and no misrepresentation was provided in the letter. The plaintiffs did not need to sell any property in California to close on these properties and therefore they did not fail to disclose any material fact.

On Defendants' counterclaim for breach of contract, the court finds for the defendants. Specifically, on 10/13/2004, in an e-mail, it was confirmed that plaintiffs had formal loan approval and the intent was to close on 10/25/2004. The following day, Addendum #2 was signed by Mrs. Jesse and the Sanders indicating that "buyer" would place an additional \$24,500 per property in escrow as consideration for an October 25, 2004 closing date. Mr. Jesse wired \$24,500 on the 15th of October for the 1818 North Spring property. Plaintiffs did not wire any additional funds for the 1823 North Spring or the 1926 North Spring properties. In addition, Mr. Jesse only signed Addendum #2 as to 1818 North Spring. Plaintiffs were "out of contract" and in breach of contract as to the two properties for which they sent no additional funds.

Plaintiffs further breached the contract by failing to close on October 25, 2004 and by failing to finalize any other addenda to close at a later date. In addition, plaintiffs did not have an insurance policy in place on October 25, 2004 for the 1818 North Spring property and that was a further breach of the contract and closing conditions.

The language in Addendum #2 must be interpreted to determine if Plaintiffs must pay an additional \$24,500 per property as liquidated damages for the breach of the 1823 and 1926 North Spring properties contracts. Because Mr. Jesse did not sign these contracts and because the parties knew he needed to do that for the contract to be valid, the court finds that the liquidated damages are \$2,000 per property.

As to the 1818 North Spring property, Addendum #2 clearly states:

"Buyer agrees that the \$24,500, plus the \$2,000 earnest money is now non-refundable making the total of non-refundable funds \$26,500. These funds will be the property of the seller should buyer fail to close on October 25, 2004."

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Therefore, the court finds that the total amount of liquidated damages for the 1818 North Spring property is \$26,500. The total award is for defendants in the amount of \$30,500.

Grain Dealer Mutual Insurance Company provided the court with special interrogatories and special verdicts. Because the court did not find for the plaintiffs on any claims, the answer to all special interrogatories and special verdicts is "no".

Defendant will prepare a Proposed Form of Judgment by April 15, 2006 for the court's consideration. A copy will be provided to Plaintiff as well as to counsel for all other parties. Any objections to the form of Judgment will be filed by April 25, 2006.

/ s / HONORABLE HELENE ABRAMS

JUDICIAL OFFICER OF THE SUPERIOR COURT