

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-013607

02/07/2022

HON. PAMELA GATES

CLERK OF THE COURT
S. Ortega
Deputy

MARICOPOLY L L C

KYLE A KINNEY

v.

TIERRA SANTA COMMUNITY
ASSOCIATION INC, et al.

EMBER ANN VAN VRANKEN

CHAD M GALLACHER
EDITH I RUDDER
JUDGE GATES

MINUTE ENTRY

Defendant Maxwell & Morgan's Motion to Dismiss Pursuant to Rule 12(b)(6)¹; Joinder of Defendant Tierra Santa Community Association, Inc. in Motion to Dismiss and Supporting Statement of Facts Filed by Maxwell & Morgan, P.C. and all associated pleadings. The court also considered Plaintiff's Motion to for Leave to File First Amended Complaint for Tort Damages.

Rule 56(d) of the Arizona Rules of Civil Procedure affords a party, who "cannot present evidence essential to justify its opposition" to summary judgment, to request the opportunity "to obtain affidavits or to take discovery" before responding to a motion for summary judgment. Granting a request for summary disposition is appropriate if the moving party shows there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(a). To rule on this motion, the court must take all facts in favor of the non-moving party including all reasonable inferences. Therefore, for purposes of ruling on this motion, the court finds the following facts:

¹ The Motion to Dismiss is treated as a Motion for Summary Judgment.
Docket Code 926

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- Prior to March 6, 2019, Maricopoly hired Steve Villarreal as its agent to assist in investigating a sheriff's sale that was set to occur on March 7, 2019 by way of judgment in favor of Tierra Santa Community Association, Inc. for real property located at 8794 East Appaloosa Trail, Scottsdale, Arizona 85258 ("the Property"). See Plaintiff's Statement of Facts Exhibit B at ¶3.
- As part of Mr. Villarreal's due diligence, he discovered that FM Bay foreclosed on the Property on September 27, 2018. *Id.* at ¶ 4.
- Mr. Villarreal discovered that Tierra Santa agreed its then existing HOA lien was subordinate to FM Bay's first position mortgage. *Id.* at ¶7.
- Mr. Villarreal noticed in the Tierra Santa Judgment that Tierra Santa claimed an automatic and continuing statutory lien as part of its judgment that formed the basis for the March 7, 2019 sheriff's sale. *Id.* at ¶8.
- Unable to reconcile the upcoming sheriff's sale with the prior FM Bay foreclosure and finding that the documents created an ambiguity of whether Tierra Santa had a valid lien to foreclose upon for their noticed March 7, 2019 sale, Mr. Villareal called Tierra Santa's lawyers, Maxwell & Morgan on March 6, 2019. *Id.* at ¶¶ 8 & 11.
- Mr. Villareal spoke with Tierra Santa's lawyer for ten minutes. Mr. Villareal asked whether the lien was valid and he was told the lien was valid. This information was false. Instead, the lien had been extinguished and Maxwell was aware that the Tierra Santa lien was invalid.² *Id.* at ¶¶12-20.
- A lawyer for Tierra Santa was present at the sheriff's sale and provided the official with a JIC amount, thus acknowledging the sale should proceed. *Id.* at ¶21. The sale should not have gone forward.
- On March 7, 2019, on behalf of Maricopoly, Mr. Villarreal was the winner bidder for a price of \$44,000.00. *Id.* at ¶22.
- Maxwell knew the Tierra Santa lien was invalid and that the March 7, 2019 sheriff's sale was improper because Maxwell represented Tierra Santa in a separate prior foreclosure action regarding the Property and was aware that Tierra Santa entered a Stipulated Judgment dated March 28, 2018 agreeing to extinguish the HOA lien if FM Bay ultimately obtained title to the Property. Maxwell was aware that FM Bay obtained title and thus, Tierra Santa's lien was extinguished.
- Knowing that Tierra Santa's lien had been extinguished, on August 6, 2018, Maxwell obtained a default judgment of foreclosure on the Property.

² Again, for purposes of ruling on the pending Motion for Summary Judgment, the court takes the facts alleged by the non-moving party as true. The court is not finding that the factual assertions set forth herein constitute an accurate recount of what happened; rather, the court is applying the legal standard required in ruling on this Motion.

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- The court issued a judgment of foreclosure.
- Before the March 7, 2019 sale, and knowing the information was false, Maxwell informed Mr. Villarreal that Tierra Santa had the legal right to foreclose and informed Mr. Villarreal that the successful bidder at the sale would obtain good title to the Property.
- Maxwell made a false representation believing it held the shield of *caveat emptor* to ultimately claim that purchaser was at fault, thus allowing Tierra Santa to keep Maricopoly's money despite knowingly facilitating a sham sale based on an extinguished lien.
- Maxwell's post-sale conduct corroborates Maxwell's intent to fraudulently induce a buyer to purchase the Property. Following the sale, Maricopoly sent a letter to Maxwell, informing it that the sale occurred on an extinguished lien. Rather than acknowledge the error and correct the record with the court, Maxwell threatened to seek attorneys' fees against Maricopoly for attempting to secure a return of their payment. Only after the instant lawsuit was filed did Maxwell agree the Maricopoly's money should be returned.

Lebrecht v. Beckett, 96 Ariz. 389 (1964), establishes that it is incumbent on upon the bidder, and not on the officer, to determine the condition of the title in a judicial sale, and if a bid is made, the bid is made with notice that he will take only whatever interest the execution debtor has in the premises. *Id.* at 393. In *Lebrecht*, the purchasers at the sale had constructive notice of the Lebrecht's interest by recordation of the agreements of the sale. However, in *Nussbaumer v. Superior Court for Yuma Cty.*, 107 Ariz. 504, 508 (1971), the Arizona Supreme Court noted the exception of fraud to the shield of *caveat emptor*. Here, Plaintiff alleges Maxwell committed fraud in informing Maricopoly's agent falsely that the lien remained valid and then pursued the sale knowing Tierra Santa's lien had been completely extinguished. As noted in *Nussbaumer*, the rule of *caveat emptor* is not a shield to an allegation of fraud.

Defendant argues that Mr. Villarreal merely gave incorrect advice and that Maxwell's lawyer did not knowingly provide false information or wrongfully pursue the sheriff's sale. Those facts may be true, however, sufficient dispute exists regarding the material facts in this case. Therefore, summary dismissal is improper.

The court also considered Plaintiff's Motion to Amend. The court permits the amendment of the factual allegations and Counts 1 and 2. Plaintiff also seeks to amend the complaint to add a claim of negligent misrepresentation, wrongful foreclosure, and slander of title.

Rule 15(a)(2) states that "a party may amend its pleading only with leave of court or with the written consent of all opposing parties who have appeared in the action. Leave to amend must be freely given when justice requires." *See* Ariz. R. Civ. P. 15(a)(2). Absent undue delay, dilatory action, or undue prejudice to the adverse party, the policy underlying Rule 15 supports permitting a plaintiff's request to amend its complaint. *See Owen v. Superior Court*, 133 Ariz. 75, 77-80

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(1982)(reversing denial of leave to amend where request to amend was delayed twenty-seven months, but occurred six weeks prior to trial and did not require any additional discovery); *Torstenson v. Valley Nat'l Bank*, 125 Ariz. 373, 376 (App. 1980)(citing *Foman v. Davis*, 371 U.S. 178, 182 (1972)). However, leave to amend should be denied when amendment would be futile. *Stair v. Maricopa Cty.*, 245 Ariz. 357, 366 ¶37 (App. 2018); *Deutsche Bank Nat'l Trust Co. v. Pheasant Grove LLC*, 245 Ariz. 325, 331 ¶19 (App. 2018).

As set forth above, an exception to rule of *caveat emptor* is fraud. However, given the factual allegations in this case, no claim exists if Maxwell was merely mistaken. *Nussbaumer*, 107 Ariz. at 508. Therefore, amendment of the complaint to add a claim for negligent misrepresentation is futile.³

Plaintiff also requested to amend the claim to add a claim for wrongful foreclosure. In *Zubia v. Shapiro*, 243 Ariz. 412, 417, ¶ 29 (2018), the Arizona Supreme Court did not preclude the possibility of a wrongful foreclosure claim. The Arizona Supreme Court cited *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 784 (9th Cir. 2014), as setting forth the elements for a wrongful foreclosure claim: 1) the trustee or mortgagee caused an illegal, fraudulent or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; 2) the party attacking the sale was prejudiced or harmed; 3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering. Here, Plaintiff is not a trustee or mortgagee of the Property. Plaintiff alleges that this claim is proper because FM Bay assigned any wrongful foreclosure related claims to Plaintiff. Even if a wrongful foreclosure claim could be brought in Arizona, it would not exist in this case given the parties or the factual allegations. There was no trustee. There was not recorded mortgage. There was no creditor wrongfully declaring default under a note. Therefore, the court finds Plaintiff's request to amend the complaint to add a claim for wrongful foreclosure to be futile.

Plaintiff also sought leave of court to add a claim for slander of title. "The elements of slander of title . . . are the uttering and publication of the slanderous words by the defendant, the falsity of the words, malice and special damages." *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 363, 527 P.2d 515, 522 (1974). Plaintiff's proposed

³ The initial complaint is unclear on whether a Plaintiff alleged a claim for negligent misrepresentation. If such a claim was alleged, the court grants the request for summary judgment on the negligent misrepresentation claim.

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allegations fail to sufficiently allege a viable claim for slander of title. Therefore, Plaintiff's request to amend the complaint to add a claim for slander of title is denied as futile.

Plaintiff may file an amended complaint to add the permitted factual allegations within ten days of the filing date of this minute entry.

IT IS ORDERED granting Plaintiffs' Motion for Leave to File Third Amended Complaint, in part.

IT IS FURTHER ORDERED denying Defendant's Motion to Dismiss converted to a Motion for Summary Judgment.