

06/03/2002

CLERK OF THE COURT  
FORM V000A

HONORABLE J. KENNETH MANGUM

T. Melius  
Deputy

CV 1999-016121

FILED: \_\_\_\_\_

MARK SAWKO, et al.

KENT S BERK

v.

JACKSON PROPERTIES INC, et al.

RICK D SHERMAN

RICHARD V MACK  
DAPHNE REAUME  
DENISE HLJ TROY

MINUTE ENTRY

This matter having been under advisement,

The following constitute the Courts findings of fact and conclusions of law in the trial to the bench held on March 25-29 and April 1, 2, 2002. In addition, the Court, counsel, and the parties visited the home and area on April 2, 2002.

Mark and Bridget Sawko married in Colorado where each of them were working. Soon thereafter, Mark agreed to manage the factory owned by his parents and located near the freeway and east of Awahtukee. Before they visited Arizona, they were told by friends in Denver to Look at Jackson Properties subdivisions, as they were a quality builder. When they contacted a realtor in the Scottsdale area, they told her they wanted to look at the Jackson subdivisions.

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Plaintiffs liked Pecos Ranch Estates but did not favor the model houses on display there. However when they were advised that Jackson would build at Pecos Ranch Estates homes that were featured at other subdivisions, Plaintiffs decided to buy a home at Pecos Ranch.

Pecos Ranch Estates consists of approximately 100 homes built on a quarter square mile just east of Price Road and south of the right of way for the San Tan Freeway. The subdivision was new and Jackson was requiring that homes be sold on the west and south first. The lot that Plaintiffs selected was located along the south subdivision line and was the 3<sup>rd</sup> one in from the west edge. Across the street to the west of Plaintiffs' westernmost neighbor was a storage pond for diluted bovine feces and urine from the several hundred head dairy farm that was generally the equivalent of a block west of the subdivision. Before making their commitment to purchase, Plaintiffs objected to the stench from the dairy farm. Specifically, they discussed the matter with the two salesmen they dealt with, Mr. Larsen and Mr. Anselmo. Each of the salesmen learned that the dairy owner was committed to staying and had absolutely no plans on leaving. Indeed, while the owner, Mr. Kuiper, testified at trial that he would sell for the right price, it would have to be the "awfully right price". Obviously, no one had ever offered the "awfully right price" as the family consistently told anyone who asked that they had no intentions of moving.

Mr. Larsen and Mr. Anselmo didn't remember exactly what they told the Sawkos about the dairy but their standard response was that the area was changing and that the dairy was going to be zoned light industrial or commercial.

Mr. Larsen had learned from a visit to the dairy farm, at about the time that the Sawkos bought, that indeed, the dairy was not leaving. But he never told the Sawkos or others what he had learned.

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The Sawkos testified that the issue of the dairy farm was a deal breaker for them, but they understood from the Jackson salesmen that the farm would be gone prior to the completion of their home in about 9 months. Specifically Mr. Larsen told the Sawkos not to "worry" and that "the dairy will be gone".

The issue of the dairy farm was a matter of frequent discussion by other prospective buyers and was the subject of some of the weekly sales meetings of all the Jackson subdivisions. The dairy was listed as a nuisance in the real estate disclosure report and Mr. Jackson, owner of Jackson Properties, admitted that the preferable home sites were further away from the dairy. There was a horse farm or horse pasture between the subdivision and the dairy (except for the southern portion of the dairy that contained the overflow feces and urine pond that extended east to the north-south road that was contiguous to Pecos Ranch Estates). However, most of those who testified said the horses were not the nuisance. Instead, it was the dairy farm in general and principally the overflow pond.

Indeed, the overflow pond is not filled but several times a year and this is when the odor and flies are the worst. However, when it is filled the odor is unbearable for the neighbors; the odor kept the model homes from having their doors left open even though they were many blocks away. In addition these malodorous times are accompanied by swarms of houseflies that make life difficult for the families living near the pond. Patricia Corcoran testified that the smell was so bad at times that her adult children wouldn't visit them and they couldn't use their yard although they had spent \$20,000.00 on landscaping.

In addition to the Sawkos being told about the dairy moving soon, Jackson Property salesmen also told others the same thing. For example, Mr. Anselmo told Patricia Corcoran that homes would replace the horse farm and it was a matter of time before the dairy left because it had been offered \$1,000,000.00. The former point was untrue in import and the latter point was unquestionably false.

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Richard Jeppesen, having grown up on a dairy farm, was more bothered by the horse farm. Mr. Anselmo told him that the horse farm had been condemned, which of course, has never been true.

Later, when Bridget Sawko was working as a salesperson for Pecos Ranch, she over heard Mr. Larsen and Mr. Anselmo give false information to other prospective purchasers about the dairy. The Sawkos did not learn of the deception until the time they closed on the house.

Cynthia Hartman, a sales manager for Jackson heard Mr. Jackson, owner of Jackson Properties, say to her and a salesman that the dairy farm was for sale and would be replaced by homes. This was obviously stated to help overcome the objections to the dairy and horse farm and to promote sales at Pecos Ranch whose sales had been disappointingly slow.

Plaintiffs have sued under various misrepresentation theories: fraud, fraud by non-disclosure, innocent misrepresentation, negligent misrepresentation, and consumer fraud. The two fraud theories require proof by clear and convincing evidence, the balance of the theories by a preponderance of the evidence. Because of the conflicting evidence this Court is satisfied that Plaintiffs have proved their case to a preponderance of evidence but not to the level of clear and convincing. Thus, this Court is satisfied that Plaintiffs have prevailed in both of their misrepresentation and also their consumer fraud claims.

Because the Sawkos seek rescission, the Court finds that they have met the proof necessary for such relief. The appropriate figure is \$339,443.84, pursuant to the Consumer Fraud Act. See, Peery v. Hansen, 120 Ariz. 266, 270, 585, P.2d 574, 578 (1978); Parks v. Macro-Dynamics, Inc., 121 Ariz. 517, 591, P.2d 1005 (1979). Under the theories of misrepresentation, Plaintiffs are eligible for the recovery of the contract price plus homeowners association fees and upgrades that total.

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The Court does not find a RICO violation under ARS §23-2301 et seq. and even if there were a RICO violation, this Court would decline to award treble damages, a discretionary option. See, ARS §13-2314.04 (D) and (D)(4).

Plaintiff seeks damages for emotional distress and aggravation. This Court agrees that Plaintiffs have been put to distress and aggravation because of this, their first joint home purchase, which should have been a felicitous event. Instead, it turned into a quagmire of dashed hopes and frustrated dreams. When relief was sought, only dead ends and limited options were the results. Plaintiffs have had to wait more than three years for relief and have been tied weekly to this house for quick maintenance visits to ensure that plumbing fixtures did not seize and obvious deterioration did not take place. (They lived in the home for only about 10 days soon after purchase in order to accommodate out-of-town visitors who stayed in the Sawkos' current residence.)

On the other hand, this lawsuit and the frustrations with Jackson Properties are not the only stresses on the marriage. The Court finds that \$15,000.00 is sufficient as an award for emotional distress.

Plaintiffs have also asked for breach of contract, i.e., the failure to construct the house in conformance with substantial conformance with the plans and standards of proper workmanship. Not all complaints by the Sawkos would merit rescission, but there are serious deficiencies that are not easily remedied. (1) The most obvious visually is the expansion joint that meanders from the front of the house to the back and destroying the tile placed over it. There is no guarantee that slip-sheets placed underneath new tile would solve the problem. (2) The failure of the stairway banister to maintain a gradual change from the curved to the straight was supposedly no worse than the model home. If so, then little thought must have been given to the design or the execution of the banister. The

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quality was not what any first class home should have. (3) The most serious aural problem was the absolute failure to fully insulate the 4" sewer drain that ran between the dining room and the Kitchen. Plaintiffs had been promised a "quiet zone" inside a 6" wall, but instead got a sounding board reverberation from a 4" internal diameter pipe inside a 4" wall. (4) The most serious interior hazard was the failure to install 5/8" gypsum board surrounding the stairway instead of the 1/2" that is otherwise satisfactory. (The thicker wallboard ensures the stairway will resist fire longer so that one may leave the upstairs without having to flee through the windows or master balcony.) (5) The most serious structural issue is the apparent failure to install all of the required hold-downs, i.e., straps that give strength to the outside walls to resist lateral wind stresses. Mr. Cuppola's testimony and cutaways on behalf of Plaintiffs were more convincing than Mr. Klinger's contrary testimony. The fact that Chandler building inspectors missed the safety issue of the stairway gypsum board means that their approval of the hold-downs is not the final say. (6) Other problems include the weep screed and vapor barriers, but the validity of rescission was demonstrated by earlier listed problems.

Whether under the contract claim or misrepresentation claims, Plaintiffs deserve recovery of attorneys' fees, the amount of which will be decided by motion.

The Court has not listed much of the evidence presented by the Defense. Suffice it to say, Defendant objected to most of Plaintiffs' evidence. For example, Mr. Jackson denied stating that the dairy farm had an offer for sale and would be replaced by homes. Defense witnesses emphasized their willingness to repair most of the claimed deficiencies in the home and Plaintiffs denied Defendant some opportunities to make repairs. Defendant also disputed the cost of most repairs suggested by Plaintiffs. Regardless, this Court found Plaintiffs' evidence to generally be more believable.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

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The above constitute the findings and conclusions. If a finding of fact is more properly to be a conclusion of law or vice versa, it shall be so construed.

If the parties desire more specific findings and conclusions, they may propose the same.