UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Martin S. Rood, Plaintiff, vs. Arthur F. Nelson; Don Foster Scoggins; Jack P. Gillespie; and Appraisers of Las Vegas, Defendants.	Case No.: 2:12-cv-00893-GMN-NJK **ORDER**

Pending before the Court is a Motion for Summary Judgment, (ECF No. 40), filed by Plaintiff Martin S. Rood on August 20, 2013, and a Counter Motion for Summary Judgment, (ECF No. 48), filed by Defendant Jack P. Gillespie on September 18, 2013. Plaintiff subsequently filed his Response to Defendant Gillespie's Motion, (ECF No. 50), on October 15, 2013, and Defendant Gillespie filed his Reply, (ECF. No. 55), on November 1, 2013.

I. BACKGROUND

On May 25, 2012, Plaintiff filed the instant action against Defendants Arthur F. Nelson, Don Foster Scoggins, Jack P. Gillespie, and Appraisers of Las Vegas ("ALV") (collectively, "Defendants"), alleging claims for negligence and professional malpractice arising out of a real estate appraisal ("the Appraisal") prepared by Defendants in August 2006 for two contiguous parcels of property located in Las Vegas, Nevada ("the Property"). (Am. Compl., ECF No. 17.)

Plaintiff alleges that the Appraisal was commissioned in 2006 by Gary Ryno, principal of Hallock Ryno Investments, Inc. ("HRI"), and was subsequently featured within a Specific Offering Circular distributed by HRI to solicit investors for shares of HRI's interest in the $1,600,000 mortgage loan HRI had issued to the owner of the Property, Cielo Vista, LLC. (Rood Aff., 2:¶¶4-6, Ex. A to Pl.'s Mot., ECF No. 40-1.) Plaintiff alleges that he relied on the

Appraisal's conclusion that the property had a value of $5,490,000 when he invested $800,000.00 to acquire a 50% interest in the Cielo Vista loan in 2007. (*Id*. at 2:¶¶6-8.)

The publicly recorded documents submitted to the Court indicate that in June 2009 the property was sold at a Trustee's Sale after Cielo Vista, LLC defaulted on the loan. (*See* Trustee's Deed Upon Sale, Ex. H to Pl.'s Mot., ECF No. 40-5.) At that time, Plaintiff maintained his 50% interest; HRI owned a 32.8125% interest; and the remaining investors, including Gary Ryno, owned interests between 1.5% and 3.1%. (*Id*.) At the Trustee's Sale, Plaintiff, HRI, and the remaining investors purchased the property for $1,200,000 in satisfaction of the loan. (*Id*.)

Plaintiff alleges that HRI was subsequently "taken over by a receiver." (Rood Aff. at 3:¶¶12-13.) In June 2010, the court-appointed receiver conveyed HRI's interest by quitclaim deed to Regal Financial Bank for no monetary consideration. (*See* Quitclaim Deed, Ex. I to Pl.'s Mot., ECF No. 40-5.) Plaintiff alleges that he recovered only $153,000 of his $800,000 investment when Regal Financial Bank sold the property for $330,000 in February 2012. (Rood Aff. at 3:¶14.)

Plaintiff alleges that the actual value of the property as of the date of the Appraisal was $2,260,000, and claims that if he had known this at the time, he would not have invested in the Cielo Vista Loan. (*Id*. at 3:¶¶10-11.)

On December 30, 2013, the Court ordered that default be entered as to Defendants Nelson and Scoggins, as both failed to answer, respond, or otherwise appear in this action after process was properly served upon them. (ECF No. 57.) At that time, the Court declined to order that default be entered as to Defendant ALV based on uncertainty as to whether Plaintiff had properly effected service. (*Id*.) To date, Defendant ALV has not made any filings or appearances in this action.

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II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and

the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. DISCUSSION

As an initial matter, the Court finds it necessary to construe Plaintiff's first claim for relief pursuant to Nevada law. While the Amended Complaint describes this as a claim for "negligence," (Am. Compl. 4:20, ECF No. 17), Plaintiff's Motion discusses the elements of both professional negligence and the separate but related tort of negligent misrepresentation. (*See* Pl.'s Mot. 9:2-10:2, ECF No. 40.) An examination of Nevada precedent reveals that negligent misrepresentation is the proper vehicle for claims, such as Plaintiff's, seeking

recovery for damages caused by reliance on a false appraisal whose creator failed to exercise reasonable care. *See Goodrich & Pennington Mortgage Fund, Inc. v. J.R. Woolard, Inc.*, 101 P.3d 792, 793-95 (Nev. 2004). Accordingly, the Court will construe Plaintiff's first cause of action as seeking recovery under a theory of negligent misrepresentation.

A. Defendant Gillespie's Motion for Summary Judgment

Defendant Gillespie argues that summary judgment in his favor is warranted because: (1) Plaintiff's claims are barred by the applicable statute of limitations; (2) Plaintiff has failed to produce evidence demonstrating that his reliance on the Appraisal was foreseeable; and (3) that the economic loss doctrine bars recovery under the causes of action set forth in the Amended Complaint. The Court will address each of these arguments in turn.

1. Statute of Limitations

Defendant first argues that this action is barred by the relevant statute of limitations, because six years elapsed between the time Plaintiff first viewed the Appraisal and the filing of the instant action. (Def.'s Mot. 8:16-28, ECF No. 47.) Indeed, claims for negligent misrepresentation are subject to a three-year statute of limitations under Nevada law. *Kancilia v. Claymore & Dirk Ltd. P'ship*, 2014 WL 3731862, at *1 (Nev. 2014) (citing *Nevada State Bank v. Jamison Family P'ship*, 801 P.2d 1377, 1382 (Nev. 1990)). Similarly, as Plaintiff's claim for professional malpractice is based on alleged mistakes in the Appraisal, a three-year limitation period applies to this claim as well. *See Millspaugh v. Millspaugh*, 611 P.2d 201, 202 (Nev. 1980) (holding that a three-year limitations period applies to all actions grounded in fraud or mistake under Nevada law).

However, Defendant Gillespie fails to consider that the statute of limitations regarding these claims began running, not at the moment that Plaintiff first set eyes upon the Appraisal, but instead "upon [Plaintiff's] discovery of the facts constituting the fraud or mistake." *See* Nev. Rev. Stat. § 11.190(3)(d). Plaintiff claims, and Defendant Gillespie does not dispute, that

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