



Appellate Division, First Department Affirms Dismissal of Claim against Real Estate Appraiser

By Dianna D. McCarthy and Scott B. Tenenbaum

June 2011

We were retained to represent a real estate appraiser and his company (the "Appraiser") against claims by the Plaintiffs for fraudulent misrepresentation, aiding and abetting fraud and negligence based upon two appraisals on a home purchased by the Plaintiffs. The appraisals were performed after the purchasers entered into a contract of sale but before the closing on the home.

The Plaintiffs alleged that the Appraiser, hired by the bank issuing a mortgage loan to the Plaintiffs, negligently and fraudulently inflated the appraisal value of a home which the Plaintiffs were seeking to purchase. The Plaintiffs alleged that they were fraudulently induced into entering into a mortgage commitment by detrimentally relying upon the fraudulently inflated appraisal which substantially overvalued the premises. The Plaintiffs' contract of sale contained language in the form of a mortgage contingency clause which stated that if the appraisal value did not support the mortgage commitment, the Plaintiffs would be released from the purchase contract.

The Plaintiffs alleged that the prepared appraisal was not performed in accordance with Uniform Standards of Professional Appraisal Practice ("USPAP") because the property was not appraised at its "highest and best use" and the issued report was misleading. Plaintiffs sought damages in the form of the purported difference between the alleged inflated appraisal price and the appraisal price opined on by Plaintiffs' retained expert, as well as the difference in paying this extra amount over the thirty (30) years of their mortgage commitment.

We made a pre-answer motion to dismiss the Complaint asserting that the allegations in the Complaint do not support a cause of action against the Appraiser, which was granted in a thirteen (13) page opinion by Judge O. Peter Sherwood.

Judge Sherwood agreed and specifically dismissed the causes of actions against the Appraiser grounded in fraud based on our argument that there could not have been any reliance on the appraisals since the Plaintiffs had already entered into a contract of sale for the purchase of the home prior to either of the appraisals taking place. Further, Judge Sherwood took extra steps in opining that the Plaintiffs' reliance on the appraisals was not reasonable as they could have discovered the true value of the property with due diligence and Plaintiffs did not sufficiently allege a nexus between the alleged misrepresentations and their reported injuries.

Judge Sherwood also dismissed the remaining cause of action against the Appraiser for negligence. In doing so, Judge Sherwood accepted our argument that the Appraiser owed no duty to Plaintiffs because, in part, they were hired by the mortgage lender for the purpose of determining whether to issue a loan on the property and not by the Plaintiffs. Judge Sherwood also found that there was no sufficient privity between the Plaintiffs and the Appraiser to support a claim for negligence and as such, he determined that this cause of action against the Appraiser must be dismissed as well.

Recently, the Appellate Division, First Department unanimously affirmed Judge Sherwood's Order and upheld the dismissal of the claims asserted against the Appraiser. In doing so, the Court, relying on Mandarin Trading Ltd. v. Widelstein et al., 16 N.Y.3d 173 (Court of Appeals, 2011) opined



that Plaintiffs' claims against the Appraiser are not viable "because they are based on the premise that Plaintiffs detrimentally relied upon inflated appraisals of the home. Appraisals are not actionable because they are matters of opinion" (See also Stuart v. Tomasino, 148 A.D.2d 370, 372 [1989]).

Hence, New York courts are letting potential homeowners know that they must do their due diligence prior to entering into a contract to purchase a home because you will not have the ability to sue an appraiser seeking to recoup any amount at which a property's appraisal may have been inflated because you later determine that you are unsatisfied with the amount you paid. Would the Court's opinion have been different if the Plaintiffs hired the Appraiser to value the property prior to entering into a contract of sale? Maybe or maybe not, but in that circumstance at least the Plaintiffs may have had a basis for a breach of contract claim!!

If you have any questions or would like to discuss this issue, please contact:

Dianna D. McCarthy, Esq.

Partner

Winget Spadafora & Schwartzberg, LLP

45 Broadway, 19th Floor

New York, N.Y. 10006

p: (212) 221-6900

f: (212) 221-6989

Profile: [Dianna D. McCarthy, Esq.](#)

E-mail: Mccarthy.D@wssllp.com

This document has been provided for informational purposes only and is not intended and should not be construed as legal advice. Please consult with counsel in connection with any specific inquiry arising under federal or the applicable state or local laws that may apply to you and your company.