

SIGNED.



Dated: October 26, 2009

*Randolph J. Haines*

RANDOLPH J. HAINES  
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 11
JAKE'S GRANITE SUPPLIES, L.L.C.,	)	CASE NO. 2:05-bk-10601-RJH
Debtor.	)	
_____	)	
JAKE'S GRANITE SUPPLIES, L.L.C.,	)	ADVERSARY NO. 2:07-ap-00145-RJH
Plaintiff,	)	
v.	)	
JOHN BEAVER, et al.,	)	MEMORANDUM DECISION
Defendants.	)	
_____	)	

This matter is before the Court on cross motions for summary judgment filed by the parties, SNS Civil Design Group and Kimball Siegfried (collectively "SNS") and Jake's Granite Supplies ("Jake's"), on March 23, 2009 on the breach of contract, negligent misrepresentation, and promissory estoppel claims alleged in Jake's first amended complaint dated October 24, 2008. At the status hearing held September 21, 2009, the Court took the respective motions for summary judgment under advisement. For the reasons set forth below, the Court concludes no genuine issues of material fact remain, and SNS is entitled to judgment as a matter of law on all three claims.

**Background**

Jake's, the former owner of a sand and gravel operation near Buckeye, Arizona, filed for Chapter 11 bankruptcy on June 13, 2005. On February 23, 2006, John and Vicki Beaver (the "Beavers") filed a claim in the bankruptcy case alleging they have title through adverse possession to fourteen acres of real property previously owned by Jake's. Under their claim, the Beavers

1 contend they are allowed to recover \$700,000 from the proceeds of Jake’s sale of the property to  
2 Cemex Construction Materials L. P. (“Cemex”) that closed on November 27, 2005.<sup>1</sup>

3 In September and October 2003, Jake’s entered into purchase agreements for three  
4 parcels referred to as the Quackenbush, Stone, and Dycus parcels. Fidelity National Title Insurance  
5 Company (“Fidelity”) served as the escrow agent for the purchases and issued ALTA Extended  
6 Owner’s Title Insurance Policies (“ALTA extended owner’s policies”) to Jake’s for the parcels.<sup>2</sup>  
7 According to Jake’s closing instructions, Fidelity was to close escrow only upon its unconditional  
8 agreement to issue an ALTA extended owner’s policy with a survey endorsement for each of the  
9 parcels.<sup>3</sup> In order to obtain the ALTA extended owner’s policies, Jake’s was required to provide  
10 Fidelity a survey<sup>4</sup> of the property that complied with ALTA/ACSM standards.<sup>5</sup>

11 Clay Sourant (“Sourant”), Jake’s principal, asked General Engineering (“General”)  
12 to provide an ALTA survey. General contacted SNS and provided SNS and Siegfried with a  
13 “Commitment for Title Insurance” (the “title commitments”) prepared by Fidelity for each of the  
14 properties.<sup>6</sup> Siegfried, a surveyor employed by SNS, prepared and signed a survey entitled  
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16 <sup>1</sup> Pursuant to this Court’s order confirming Jake’s Chapter 11 plan, Jake’s reserved \$700,000 of the proceeds from  
17 the Cemex transaction on account of the Beavers’ claim.

18 <sup>2</sup> “ALTA” is an acronym for the American Land Title Association. An ALTA extended owner’s policy insures the  
19 purchaser against unrecorded liens, encumbrances, and other unrecorded matters that might affect title ownership to the  
property. An ALTA standard owner’s policy only insures against recorded encumbrances.

20 <sup>3</sup> A survey endorsement is a commitment by a title insurer that it will insure against loss or damage the insured may  
21 sustain if the condition of the property is not the same as delineated on a survey of the property. Obtaining extended owner’s  
policies with survey endorsements for each parcel was a condition Jake’s lender required in order to fund the loans.

22 <sup>4</sup> Although Fidelity noted in the escrow file, “3.19 sv waived per Shannon,” which apparently meant that Jake’s real  
estate agent, Shannon Everett, had waived the survey requirement in the purchase agreements, the sole consequence of this  
23 waiver was that Jake’s could not cancel the purchase contracts and seek a refund of its earnest money if Jake’s later  
performed a survey that revealed something objectionable about the property.

24 <sup>5</sup> Paragraph 5f of the ALTA/ACSM standards provides: “The character of any and all evidence of possession shall  
25 be stated and the location of such evidence carefully given in relation to both the measured boundary lines and those  
established by the record. An absence of notation on the survey shall be presumptive of no observable evidence of  
possession.”

26 <sup>6</sup> The title commitments provided a legal description of each of the parcels, identified Jake’s as the purchaser of the  
27 parcels, and indicated that Jake’s had ordered ALTA extended owner’s policies and required an ALTA/ACSM survey.  
Although the title commitment for the Quackenbush parcel was for standard insurance, this appears to have been an error. The  
28 parties do not dispute that Jake’s ordered extended policies for all three parcels, and the policies ultimately issued were for  
extended coverage.

1 “ALTA/ACSM Land Title Survey”<sup>7</sup> in July 2004. The survey identifies the parcels purchased by  
2 Jake’s and references the title commitments’ order numbers and certain of the Schedule B title  
3 exceptions listed in the title commitments. The survey certification provides: “This is to certify that  
4 this map or plat and the survey on which it is based were made (I) in accordance with ‘Minimum  
5 Standard Detail Requirements for ALTA/ACSM Land Title Surveys’” and “The premises surveyed  
6 have no known discrepancies, boundary line conflicts, encroachments, overlapping of  
7 improvements, easements or right-of-ways except as shown, and has access to or from a dedicated  
8 roadway.”

9 The survey did not reveal the encroachments and visible appropriations that form the  
10 basis of the Beavers’ adverse possession claim. Siegfried testified during deposition that he did not  
11 disagree with the conclusion of Jake’s expert that the survey failed to comply with ALTA/ACSM  
12 standards and that the survey certification was inaccurate. He also agreed that it would be  
13 reasonable for someone looking at the survey to conclude that it was an ALTA survey.<sup>8</sup>

14 Before issuing the title policies, Fidelity conducted its own inspection of the  
15 properties. The inspectors noted locked gates and questioned whether they had access to the  
16 parcels, but Fidelity apparently did not conduct a follow-up investigation. Following its inspection,  
17 Fidelity issued ALTA extended owner’s policies<sup>9</sup> and closed escrow on the transactions in October  
18 2004.

### 19 Analysis

20 Summary judgment may be granted when there is no genuine issue as to any material  
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22 <sup>7</sup> The record does not reflect how the survey was transmitted to Fidelity and Jake’s, but the parties do not dispute  
23 that both Fidelity and Jake’s received it prior to the close of escrow. The record is also unclear as to how SNS was paid for the  
work, but it appears that Jake’s paid General, and General paid SNS.

24 <sup>8</sup> Siegfried, however, inserted a paragraph on the survey separate from the certification section that read: “The  
25 purpose of this survey is to retrace the boundaries of the subject properties and to indicate the location of easements of record  
in accordance with ALTA/ACSM standards.” Siegfried testified that someone at Fidelity instructed him not to perform an  
26 ALTA survey to cut costs, although he does not remember with whom he spoke. Barbara Teel, the Fidelity escrow officer, and  
Jane Magruder, the Fidelity title officer, testified that they never spoke with Siegfried or anyone else at SNS.

27 <sup>9</sup> The title policies contain the following survey endorsements: “The Company assures the Insured that said land is  
28 the same as that delineated on the plat of survey made by SNS Civil Design Group on July 23, 2004, designated Job No.  
040413. The Company hereby insures said Assured against loss which said Assured shall sustain in the event that the  
assurance herein shall prove to be incorrect.”

1 fact, and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1).

## 2 **Breach of Contract**

3 Jake's asserts that it was a third-party beneficiary of a contract between General and  
4 SNS to provide an ALTA/ACSM survey for Jake's purchase of the properties. To prevail on a  
5 breach of contract claim as a third-party beneficiary in Arizona, "an intention to benefit that person  
6 must be indicated in the contract itself." *Norton v. First Federal Savings*, 128 Ariz. 176, 178, 624  
7 P.2d 854, 856 (1981) (citing *Irwin v. Murphey*, 81 Ariz. 148, 302 P.2d 534 (1956)). "[T]he benefit  
8 contemplated must be intentional and direct," *Irwin*, 81 Ariz. at 153, 302 P.2d at 537 (citing  
9 *Treadway v. Western Cotton Oil & Ginning Co.*, 40 Ariz. 125, 139, 10 P.2d 371, 376 (1932)), and  
10 "it definitely must appear that the parties intend to recognize the third party as the primary party in  
11 interest," *Norton*, 128 Ariz. at 178, 624 P.2d at 856 (quoting *Irwin*, 81 Ariz. at 154, 302 P.2d at  
12 538). Here, there is no single, written contract; instead the contract must be pieced together

13 from the telephone and fax communications between General and SNS and the survey prepared by  
14 SNS. Despite SNS's argument that there is no contract, the record reflects that General's telephone  
15 call to Siegfried and the faxes General sent SNS containing the title commitments prepared by  
16 Fidelity formed General's offer, and the survey formed SNS' acceptance. The record suggests  
17 Jake's paid General for the survey, and General paid SNS.

18 SNS received the title commitments prior to surveying the parcels, which named  
19 Jake's as the purchaser and indicated that Jake's required an ALTA survey to obtain ALTA  
20 extended owner's policies from Fidelity. The survey prepared by SNS references the legal  
21 description provided by Fidelity, the Fidelity title commitment report numbers, and certain of the  
22 title exceptions contained in the title commitments, but does not reference Jake's.

23 Mere knowledge that Jake's was the purchaser and required an ALTA survey to obtain  
24 ALTA extended owner's policies for the property is not sufficient to establish Jake's as the intended  
25 third-party beneficiary of the contract between SNS and General under Arizona law. While Jake's  
26 may have been an incidental beneficiary of the contract, the record does not support a conclusion  
27 that SNS provided the survey with the expressed intent to directly benefit Jake's as the primary  
28 party in interest of the contract when the survey references only Fidelity and not Jake's. Because

1 Jake's cannot establish that it was a third-party beneficiary of the contract between General and  
2 SNS under Arizona law, summary judgment is appropriate in favor of SNS on the breach of contract  
3 claim.

#### 4 **Negligent Misrepresentation**

5 Jake's negligent misrepresentation claim alleges Siegfried failed to note the visible  
6 appropriations that form the basis of the Beavers' adverse possession claim on a survey he certified  
7 was in compliance with ALTA/ACSM standards. Arizona recognizes the tort of negligent  
8 misrepresentation as defined by the Restatement (Second) of Torts § 552(1) (1977):

9 One who, in the course of his business, profession or employment .  
10 . . . supplies false information for the guidance of others in their  
11 business transactions, is subject to liability for pecuniary loss caused  
12 to them by their justifiable reliance upon the information, if he fails  
13 to exercise reasonable care or competence in obtaining or  
14 communicating the information.

15 *Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, 610, 5 P.3d 940, 944 (Ct. App. 2000). Restatement §  
16 552(2)(a) further provides that liability for loss due to negligent misrepresentation is limited to "the  
17 person or one of a limited group of persons for whose benefit and guidance [the professional]  
18 intends to supply the information or knows that the recipient intends to supply it." *See Sage v. Blagg*  
19 *Appraisal Co.*, 221 Ariz. 33, 209 P.3d 169 (Ct. App. 2009) (holding that an appraiser retained by  
20 a lender to appraise a home in connection with a mortgage transaction may be liable to the  
21 prospective buyer for failure to exercise reasonable care in performing the appraisal if the appraiser  
22 knew the recipient intended to provide the appraisal to the homebuyer).

23 The parties do not dispute that Siegfried and SNS in the course of their business  
24 supplied false information for the guidance of others in their business transactions. Siegfried  
25 conceded that the survey he sealed failed to comply with ALTA/ACSM standards and that the  
26 survey certification was inaccurate. Siegfried also admitted it would be reasonable for a person  
27 looking at the survey to conclude that it was an ALTA survey.

28 Sourant testified, however, that Jake's relied on the survey certification only to the  
extent that an ALTA survey was a necessary condition to obtain the ALTA extended owner's  
policies its bank required to fund the loans and close escrow on the properties. Sourant also



1 acceptance was through performance. Even if the record suggested that the contract was bilateral,  
2 and the survey certification constituted a promise, that promise could only be directed to Fidelity,  
3 not to Jake's, because the survey references only Fidelity.

4 Even if the survey certification constituted a promise to Jake's, it could not prove that  
5 it relied on the promise to its detriment. To the extent that Jake's relied on the survey's certification  
6 that it complied with ALTA/ACSM standards, Sourant testified it was merely as a condition to  
7 obtain the ALTA extended owner's policies that Jake's needed to close escrow. Jake's obtained  
8 the extended policies and closed escrow on the properties. Jake's reliance on the survey did not  
9 cause its damages; it received extended coverage against claims such as the Beavers' and suffered  
10 no harm.

11 Jake's further argues that Fidelity's reliance, as an agent of Jake's, should be imputed  
12 to Jake's, as the principal. An agent's knowledge can be imputed to the principal, and Jake's argues  
13 that the *Chicago Title & Trust* case extends this imputation to the agent's reliance. It does not,  
14 however, extend imputation to the agent's *detrimental* reliance. This Court is aware of no authority,  
15 and none has been cited, extending an agent's detrimental reliance to the principal, where the  
16 detriment was only to the agent and not to the principal. In short, where only the agent  
17 detrimentally relied, the cause of action belongs to the agent, not to the principal.

18 Finally, from the record it is clear that Fidelity acted as Jake's agent only with respect  
19 to the escrow transaction, not with respect to the issuance of the ALTA title insurance policy.  
20 While Fidelity acted as Jake's agent in the escrow transaction, Fidelity was not subject to Jake's  
21 control in its issuance of the title policies. *Urias v. PCS Health Systems, Inc.*, 211 Ariz. 81, 88, 118  
22 P.3d 29, 36 (Ct. App. 2005) ("In determining whether an agency relationship existed between two  
23 parties, a court must find that the principal had the right to control the purported agent's conduct  
24 for the transaction at issue."). Therefore, Fidelity's reliance in issuing the ALTA title policy, if any,  
25 cannot be imputed to Jake's. Fidelity was harmed by reliance on the surveyor's false certification  
26 only by its issuance of the title policy, not by its closing of escrow. But the title-issuer's reliance  
27 is not imputed to Jake's.

28 Because SNS did not make a promise to Jake's, and Fidelity's reliance, if any, cannot

1 be imputed to Jake's, summary judgement on Jake's promissory estoppel claim is granted in favor  
2 of SNS.

3 **Conclusion**

4 For the foregoing reasons, the Court finds that summary judgment is appropriate in  
5 favor of SNS on all three of Jake's claims.

6 DATED AND SIGNED ABOVE

7  
8 Copy of the foregoing e-mailed/mailed  
9 this 27th day of October, 2009, to:

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