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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for INDYMAC BANK, F.S.B.,

Plaintiff,

v.

RICHARD K. VARRASSO doing business as Richard Varrasso and Associates and AppraisalTrust.com, an individual; PREMIER VALLEY, INC. doing business as CENTURY 21 M&M ASSOCIATES, a California corporation; and KAREN BHATTI, an individual,

Defendants.

No. CIV. 2:11-2628 WBS CKD

MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT

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Plaintiff Federal Deposit Insurance Corporation ("FDIC") as receiver for IndyMac Bank, F.S.B. ("IndyMac") brought this action against defendants Richard K. Varrasso, doing business as Richard Varrasso and Associates and AppraisalTrust.com, Premier Valley, Inc. ("Premier"), doing

1 business as Century 21 M&M Associates, and Karen Bhatti, arising
2 out of the sale of two residential properties. Plaintiff alleges
3 that defendants obscured the true value of one of the properties
4 and sold it in a sham transaction to a straw buyer, who defaulted
5 on the purchase loans that plaintiff had later acquired. Premier
6 and Bhatti (collectively, the "moving defendants") now move for
7 summary judgment.

8 I. Factual and Procedural Background

9 In March 2006, Bhatti, working as an agent for Premier,
10 listed for sale on the Multiple Listing Service ("MLS") a
11 property located at 2009 Saint Theresa Way in Modesto, California
12 (the "Weisbly property" or "the Property"). (Bhatti Decl. ¶¶ 1-6
13 (Docket. No. 103-5); Chartrand Decl. Ex. C ("Bhatti Dep.") at
14 19:24-25:12 (Docket No. 103-3).) Bhatti listed the Property on
15 behalf of the seller, Alam Singh, for whom she had sold property
16 before. (Bhatti Dep. at 14:4-16:5, 31:23-32:23.)

17 On multiple occasions over the next few months, Bhatti
18 relisted the Property at various prices between \$449,000.00 and
19 \$480,000.00. (Id. at 23:9-28:3.) Bhatti does not recall whether
20 she received offers for the Property during this period. (Id. at
21 25:13-21.)

22 Bhatti eventually enlisted another agent, Sophie
23 Reisiyannejad (also known as "Sophie Nejad"), to help locate a
24 buyer for the Property. (Bhatti Decl. ¶ 4.) Bhatti sought out
25 Nejad because Nejad had sold several homes in the same
26 neighborhood as the Property for more than \$495,000.00 each.
27 (Id.) Bhatti and Nejad agreed to an uneven commission split,
28 with Nejad receiving the majority of the commission. (Id.)

1 In October 2006, a purchase agreement was signed to
2 sell the Property to Marissa Weisbly for \$499,000.00. (Bhatti
3 Dep. Ex. 5.) The HUD-1 Settlement Statement for the purchase
4 lists \$499,000.00 as the sale price but lists a \$449,000.00 price
5 on the line used to calculate the commission. (Id. Ex. 7 (“HUD-1
6 Statement”).) Based on their arrangement, Bhatti received
7 \$13,470.00 in commission and Nejad received \$17,960.00. (Bhatti
8 Decl. ¶ 6.) Singh, however, paid Bhatti an additional \$25,000.00
9 out of the sale proceeds. (Id. ¶ 7; Bhatti Dep. 37:2-19.)
10 Bhatti explains this was to repay of number of personal loans for
11 thousands of dollars she had made to Singh and his family over
12 the years, but there was no formal note documenting this debt.
13 (Bhatti Decl. ¶ 7; Bhatti Dep. at 37:9-19.)

14 On October 28, 2006, Richard Varrasso conducted an
15 appraisal of the Property, valuing the Property at \$520,000.00
16 (Chartrand Decl. Ex. A (“Varrasso Dep.”) Ex. D.) Varrasso
17 maintains that Bhatti did not have any influence over the
18 appraisal process, although Bhatti did provide Varrasso with the
19 purchase agreement. (Varrasso Dep. at 45:2-5, 46:6-8.) Varrasso
20 did not include the required listing history of the property in
21 his appraisal, as he did not receive the listing history from
22 Bhatti and believed the home was new and built or developed by
23 Bhatti’s husband or family. (Id. at 56:2-24.) Plaintiff
24 contends that the Property was worth only \$400,000.00 as of
25 December 21, 2006. (Paddock Decl. ¶ 3 (Docket No. 108-5).)

26 Weisbly financed the purchase with two mortgage loans
27 (the “Weisbly loans”) totaling \$499,000.00 from Kay-Co
28 Investments, doing business as Pro30 Funding (“Kay-Co”). (Compl.

1 ¶ 11 (Docket No. 1).) Weisbly did not pay the \$1,000.00 down
2 payment on the house and does not know who did. (Chartrand Decl.
3 Ex. D ("Weisbly Dep.") at 29:24-30:7.) At the time she purchased
4 the Property, Weisbly had no intention of moving into the house
5 or making mortgage payments. (Id. at 28:5-7, 29:2-5.) The
6 financial information and employment history on Weisbly's loan
7 application were false. (Id. at 39:8-45:17.)

8 IndyMac subsequently purchased the Weisbly loans from
9 Kay-Co on the secondary market as part of a "bulk acquisition" of
10 multiple loans. (Chartrand Decl. Ex. B ("Gomez Dep.") at 14:8-
11 23; Gomez Decl. ¶¶ 6-10 (Docket No. 108-1).) After Weisbly
12 failed to make any mortgage payments, IndyMac foreclosed on the
13 Property and ultimately sold it on July 29, 2008, for
14 \$140,000.00. (Weisbly Dep. at 46:16-18; Gomez Dep. at 44:8-
15 52:18.) Plaintiff retained IndyMac's legal claims after
16 plaintiff was appointed receiver for IndyMac by the Office of
17 Thrift Supervision. (Compl. ¶ 1.)

18 Plaintiff filed its Complaint in the Northern District
19 of California on July 6, 2011, alleging six claims for relief.
20 That court subsequently transferred the case to the Eastern
21 District of California. (Docket No. 24.) The Complaint names
22 moving defendants in its third and fourth causes of action, for
23 negligence and negligent misrepresentation, respectively.
24 (Compl. ¶¶ 33-44.)

25 On January 21, 2012, the court denied Premier and
26 Bhatti's motion to dismiss plaintiff's claims for negligence and
27 negligent misrepresentation and granted in part and denied in
28 part Premier and Bhatti's motion to strike. (Docket No. 37.)

1 Premier and Bhatti now move for summary judgment or, in the
2 alternative, summary adjudication. (Docket No. 103.)

3 II. Evidentiary Objections

4 On a motion for summary judgment, “[a] party may object
5 that the material cited to support or dispute a fact cannot be
6 presented in a form that would be admissible in evidence.” Fed.
7 R. Civ. P. 56(c)(2). “[T]o survive summary judgment, a party
8 does not necessarily have to produce evidence in a form that
9 would be admissible at trial, as long as the party satisfies the
10 requirements of Federal Rules of Civil Procedure 56.” Fraser v.
11 Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (quoting Block v.
12 City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001))
13 (internal quotation marks omitted). Even if the non-moving
14 party’s evidence is presented in a form that is currently
15 inadmissible, such evidence may be evaluated on a motion for
16 summary judgment so long as the moving party’s objections could
17 be cured at trial. See Burch v. Regents of the Univ. of Cal.,
18 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006) (Shubb, J.).

19 Moving defendants raise eight evidentiary objections
20 (Docket No. 110-2), objecting to portions of two declarations
21 submitted by plaintiff on grounds of relevance, materiality, lack
22 of foundation, improper legal opinion or conclusion, and
23 improperly uncertain expert testimony.

24 Objections to evidence on the ground that the evidence
25 is irrelevant, vague and ambiguous, or constitutes an improper
26 legal conclusion are all duplicative of the summary judgment
27 standard itself. See Burch, 433 F. Supp. 2d at 1119-20. A court
28 can grant summary judgment only when there is no genuine dispute

1 of material fact. Statements based on improper legal conclusions
2 or without personal knowledge are not facts and can only be
3 considered as arguments, not as facts, on a motion for summary
4 judgment. Instead of challenging the admissibility of this
5 evidence, lawyers should challenge its sufficiency. Objections
6 on any of these grounds are superfluous, and the court will
7 overrule them.

8 Because the court does not rely on any remaining
9 evidence objected to in these declarations, the moving
10 defendants' remaining objections are overruled as moot.

11 III. Legal Standard

12 Summary judgment is proper "if the movant shows that
13 there is no genuine dispute as to any material fact and the
14 movant is entitled to judgment as a matter of law." Fed. R. Civ.
15 P. 56(a). A material fact is one that could affect the outcome
16 of the suit, and a genuine issue is one that could permit a
17 reasonable jury to enter a verdict in the non-moving party's
18 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
19 (1986). The party moving for summary judgment bears the initial
20 burden of establishing the absence of a genuine issue of material
21 fact and can satisfy this burden by presenting evidence that
22 negates an essential element of the non-moving party's case.
23 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

24 Alternatively, the moving party can demonstrate that the non-
25 moving party cannot produce evidence to support an essential
26 element upon which it will bear the burden of proof at trial.

27 Id.

28 Once the moving party meets its initial burden, the

1 burden shifts to the non-moving party to "designate 'specific
2 facts showing that there is a genuine issue for trial.'" Id. at
3 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden,
4 the non-moving party must "do more than simply show that there is
5 some metaphysical doubt as to the material facts." Matsushita
6 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
7 "The mere existence of a scintilla of evidence . . . will be
8 insufficient; there must be evidence on which the jury could
9 reasonably find for the [non-moving party]." Anderson, 477 U.S.
10 at 252.

11 In deciding a summary judgment motion, the court must
12 view the evidence in the light most favorable to the non-moving
13 party and draw all justifiable inferences in its favor. Id. at
14 255. "Credibility determinations, the weighing of the evidence,
15 and the drawing of legitimate inferences from the facts are jury
16 functions, not those of a judge . . . ruling on a motion for
17 summary judgment" Id.

18 IV. Analysis

19 A. Negligence

20 To prove a cause of action for negligence, a plaintiff
21 must show "(1) a legal duty to use reasonable care, (2) breach of
22 that duty, and (3) proximate cause between the breach and (4) the
23 plaintiff's injury." Mendoza v. City of Los Angeles, 66 Cal.
24 App. 4th 1333, 1339 (2d Dist. 1998).

25 1. Duty

26 "The existence of a legal duty to use reasonable care
27 in a particular factual situation is a question of law for the
28 court to decide." Vasquez v. Residential Invs., Inc., 118 Cal.

1 App. 4th 269, 278 (4th Dist. 2004). In denying the moving
2 defendants' motion to dismiss, the court previously rejected the
3 moving defendants' contention that they owed no duty to
4 plaintiff. (Jan. 23, 2012 Order at 10:27-11:1 (Docket No. 37).)
5 The moving defendants again raise the issue of duty, but neither
6 cite new precedent nor identify facts sufficient to disturb the
7 court's previous determination.

8 As the court previously noted, a real estate agent owes
9 a duty to deal fairly and honestly with all parties in a
10 transaction, Nguyen v. Scott, 206 Cal. App. 3d 725, 736 (1st
11 Dist. 1988), as well as a general duty to third parties in
12 certain factual situations. See Norman I. Krug Real Estate
13 Invs., Inc. v. Praszker, 220 Cal. App. 3d 35, 42-43 (1st Dist.
14 1990) (applying a five-factor test to determine broker liability
15 to third parties). Here, the moving defendants owed Kay-Co, a
16 party to the transaction, a duty to act fairly and honestly in
17 the transaction. Because plaintiff now "stands in the shoes" of
18 Kay-Co, it may sue to enforce that duty. See Johnson v. County
19 of Fresno, 111 Cal. App. 4th 1087, 1096 (5th Dist. 2003) ("The
20 assignment merely transfers the interest of the assignor. The
21 assignee 'stands in the shoes' of the assignor, taking [its]
22 rights and remedies" (citations omitted)).¹ Moving

23
24 ¹ The moving defendants contend that recognizing a duty
25 to plaintiff would subject real estate brokers to "ongoing
26 duties" to third party strangers after transactions have closed.
27 (See Defs.' Mem. at 13:9-24 (Docket No. 103-1).) The duty at
28 issue here is not "ongoing" but rather stems directly from the
transaction. Plaintiff alleges wrongdoing "in creating the
Purchase Contract and failing to disclose information to Kay-Co.
before the transaction closed." (Pl.'s Mem. of P. & A. at 12:15-
16 (Docket No. 108-1).) Plaintiff does not argue that moving

1 defendants, therefore, are not entitled to summary judgment on
2 the ground that they did not owe a duty to plaintiff.

3 2. Breach

4 “Ordinarily, the issues of breach and causation are
5 questions of fact for the jury.” J.P. ex rel. Balderas v. City
6 of Porterville, 801 F. Supp. 2d 965, 990 (E.D. Cal. 2011) (Ishii,
7 J.) (citing Lindstrom v. Hertz Corp., 81 Cal. App. 4th 644, 652
8 (2d Dist. 2000)). “However, in an appropriate case in which
9 there is insufficient evidence, a defendant’s lack of negligence
10 may be determined on summary judgment.” Id.

11 Although they primarily contest the elements of duty,
12 causation, and damages, the moving defendants essentially argue
13 that there are no facts establishing a dispute about whether
14 Bhatti failed to act fairly and honestly in the transaction. The
15 moving defendants assert they “had absolutely nothing to do with”
16 the fraud of Weisbly, who was represented by her own real estate
17 agent, Nejad. (Defs.’ Mem. at 10:3-5.) During her deposition,
18 Bhatti testified she did not know Weisbly and had not interacted
19 with Nejad prior to selling the Weisbly property. (Bhatti Dep.
20 at 14:2-3, 29:19-24.) Bhatti also testified that the \$25,000.00
21 she received in additional commission from the sale was to pay
22 off a previous debt owed her by Singh, the seller, who was the
23 priest at Bhatti’s church. (Bhatti Dep. at 37:9-19.)

24 Considering the evidence in the light most favorable to
25 plaintiff, however, there are questions of fact as to whether
26 Bhatti, who owed the lender a duty to act fairly and honestly,

27 defendants breached a duty long after escrow closed or after
28 defendants’ duties to their own client ended.

1 knew or should have known that the sale was not legitimate. At
2 best, a jury could reasonably infer that, given Bhatti's previous
3 inability to sell the Property for several months at a lower
4 listing price, (Bhatti Dep. at 23:9-28:3), Bhatti should have
5 known the Property was overvalued and there was a possibility
6 that Weisbly was not a legitimate purchaser.

7 At worst, a jury could infer from Bhatti's commission
8 based on the undocumented loan to the seller that Bhatti had a
9 substantial stake in making the sale, (Bhatti Dep. at 37:14-19),
10 and may have influenced or intentionally withheld information
11 from the Varrasso appraisal to ensure a high price. (Varrasso
12 Dep. at 56:2-24.) A jury could also infer dishonesty in the
13 transaction from the price discrepancy on the HUD-1 Statement, as
14 although moving defendants contend this was a scrivener's error,
15 plaintiff argues such a mistake is "highly irregular."

16 (Deutscher Decl. ¶ 5 (Docket No. 108-4).)

17 These inferences and credibility determinations are
18 best left for the jury to decide. See Anderson, 477 U.S. at 255.
19 Plaintiff, therefore, has established genuine issues of material
20 fact on the element of breach.

21 3. Causation

22 To show causation, a plaintiff must prove: "(1) that
23 the defendant's breach of duty (his negligent act or omission)
24 was a substantial factor in bringing about the plaintiff's harm
25 and (2) that there is no rule of law relieving the defendant of
26 liability." Leslie G. v. Perry & Assocs., 43 Cal. App. 4th 472,
27 481 (2d Dist. 1996). Under California law, the basic causation-
28 related issues involve questions of fact, unless reasonable

1 persons will not dispute the absence of causality. Vickers v.
2 United States, 228 F.3d 944, 953 (9th Cir. 2000) (citing
3 Constance B. v. State of California, 178 Cal. App. 3d 200, 207-08
4 (3d Dist. 1986)). Summary judgment is improper if the question
5 of whether the actor's conduct "was a substantial factor in
6 bringing about the plaintiff's harm is open to reasonable
7 difference of opinion." Id. at 954 (internal citations and
8 quotations omitted).

9 Plaintiff ultimately seeks damages from the Property
10 being overvalued and the loan being under-secured. Plaintiff
11 offers two arguments causally connecting the moving defendants'
12 wrongdoing to plaintiff's harm.

13 First, plaintiff contends that Bhatti sold the Property
14 above its actual value. (Pl.'s Opp'n at 8:18-22.) Had Bhatti
15 disclosed the true value of the property, plaintiff argues, Kay-
16 Co. would have never funded the loans. (Id. at 9:2-6.) At a
17 more fundamental level, had Bhatti not sought out Nejad or
18 approved the sale to Weisbly, the transaction would not have
19 taken place to begin with. (Id. at 8:23-9:3.)

20 Second, plaintiff contends Bhatti's nondisclosure
21 regarding the Property's true value enabled IndyMac to purchase
22 the loans. According to plaintiff, IndyMac purchased the Weisbly
23 loans on the secondary market as part of a bulk package of
24 residential mortgage loans with a maximum loan-to-value ratio.
25 (Gomez Decl. ¶¶ 7-10.) The loan purchase considered a number of
26 "data points" including the purchase price, along with Varrasso's
27 appraisal, allegedly influenced by Bhatti. (Gomez Dep. at 22:9-
28 16, 25:11-19.) Plaintiff argues that if the purchase price had

1 more accurately reflected the value of the Property, IndyMac
2 would not and could not have purchased the loans, given that the
3 loans would have been under-secured according to IndyMac's
4 formula. (Gomez Decl. ¶ 11.)

5 Based on these facts and inferences, whether the moving
6 defendants' negligence in making the sale was a "substantial
7 factor" in causing the lender to suffer losses on the purchase
8 loan is not beyond "reasonable difference of opinion." Vickers,
9 228 F.3d at 954. Moving defendants, therefore, are not entitled
10 to summary judgment on the issue of causation.

11 4. Damages

12 The moving defendants' final argument, that plaintiff
13 did not suffer damages, fails because the argument relies on the
14 Varrasso appraisal valuing the Property at \$520,000.00. (Defs.'
15 Mem. at 7:25-8:7.) Moving defendants contend that because the
16 Varrasso appraisal valued the Property at \$520,000.00, the
17 Property was worth more than the loans purchased by IndyMac at
18 \$499,000.00, and thus IndyMac suffered no loss from the
19 transaction. (Id.) This ignores, however, that the accuracy of
20 the Varrasso appraisal is a factual question at issue in this
21 case. (See Paddock Decl. ¶ 3 (valuing the Property in late 2006
22 at \$400,000.00).) The Varrasso appraisal is insufficient to
23 establish that plaintiff did not suffer damages as a matter of
24 law.²

25 ² Moving defendants also argue that plaintiff's damages
26 were partly the result of market conditions, which resulted in a
27 decline in residential property values across the region.
28 (Defs.' Mem. at 8:8-25.) Other courts invited to follow this
line of reasoning have declined to do so. See F.D.I.C. v. Van
Dellen, No. CV 10-4915 DSF (SHx), 2012 WL 4815159, at *10 (C.D.

1 Accordingly, because a disputed issue of material fact
2 remains with respect to whether Bhatti breached her duty to act
3 fairly and honestly in the transaction, and whether that breach
4 caused damages to plaintiff, the court will deny the moving
5 defendants' motion for summary judgment on plaintiff's negligence
6 claim.

7 B. Negligent Misrepresentation

8 The elements of negligent misrepresentation are: (1)
9 the misrepresentation of a past or existing material fact, (2)
10 without reasonable ground for believing it to be true, (3) with
11 intent to induce another's reliance on the fact misrepresented,
12 (4) justifiable reliance on the misrepresentation, and (5)
13 resulting damage. Apollo Capital Fund, LLC v. Roth Capital
14 Partners, LLC, 158 Cal. App. 4th 226, 243 (2d Dist. 2007).
15 "Liability for negligent misrepresentation must flow from an
16 assertion of material fact, not from an implied representation or
17 nondisclosure." Wilson v. Household Fin. Corp., No. CIV S-12-
18 1413 KJM AC, 2013 WL 1310589, at *4 (E.D. Cal. Mar. 28, 2013)
19 (citing Yanase v. Auto. Club of So. Cal., 212 Cal. App. 3d 468,
20 473 (4th Dist. 1989)).

21 Plaintiff originally contended that Bhatti
22 misrepresented the purchase price of the Property as \$499,000.00,

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Cal. Oct. 5, 2012) ("While evidence on the subject of the
economic downturn is admissible, the downturn is not a
'superseding cause.' The focus of this action is Defendants'
conduct at the time the loans were made."). This argument fails
to establish that plaintiff did not suffer damages attributable
to the moving defendants. The court accordingly declines to take
judicial notice of various economic figures offered by the moving
defendants. (See Req. for Judicial Notice (Docket No. 103-6).)

1 and that the true purchase price was some lower amount. (See
2 Compl. at ¶¶ 40-43.) Plaintiff no longer disputes, however, that
3 the purchase price of the Property was \$499,000.00. (Pl.'s Resp.
4 to Defs.'s Separate Stmt. of Undisputed Facts ¶ 20 (Docket No.
5 108-1).) Plaintiff instead argues that "Bhatti made the
6 representations in creating the Purchase Contract and failing to
7 disclose information to Kay-Co before the transaction closed."
8 (Pl.'s Mem. at 12:15-16.)

9 Other than the purchase contract, which plaintiff
10 contends generally represented the sale as a legitimate
11 transaction, plaintiff does not identify a particular affirmative
12 misrepresentation by Bhatti or Premier. Rather, the heart of
13 plaintiff's case is that "Weisbly's fraudulent purchase of the
14 Property was only possible because of Bhatti's failure to
15 disclose" that the Property was overvalued and under-secured and
16 that "Indymac was damaged as a direct and proximate result of
17 Bhatti's omissions." (Pl.'s Opp'n at 4:21-24 (emphasis added);
18 see also id. at 9:2-3 ("Bhatti never disclosed to Kay-Co that the
19 ultimate purchase price well exceeded the known value of the
20 Property."); id. at 11:19-21 ("[H]ad Defendants accurately
21 disclosed that the Property's known value was less than the
22 amount in the Purchase Contract, the Loans could not have been
23 sold to IndyMac in the first instance"))

24 Although plaintiff suggested at oral argument that
25 defendants affirmatively misrepresented the value of the
26 Property, no documents support this contention. The closest
27 plaintiff comes to an affirmative representation of value is the
28 purchase price, which, as discussed above, plaintiff admits was

1 accurate. At most, the purchase contract impliedly represented
2 that the transaction was legitimate. However, "the doctrine [of
3 negligent misrepresentation] does not apply to implied
4 representations." Yanase, 212 Cal. App. 3d at 473; see also
5 Wilson, 2013 WL 1310589, at *4. Plaintiff's claim therefore
6 fails because implication or omission cannot form the basis of an
7 action for negligent misrepresentation. Accordingly, because
8 plaintiff has failed to establish a triable issue with respect to
9 its negligent misrepresentation claim, the court will grant
10 moving defendants' motion for summary judgment that claim.

11 IT IS THEREFORE ORDERED that Premier and Bhatti's
12 motion for summary judgment be, and the same hereby is, DENIED as
13 to plaintiff's negligence claim and GRANTED as to plaintiff's
14 negligent misrepresentation claim.

15 Dated: September 30, 2013

16 
17 WILLIAM B. SHUBB
18 UNITED STATES DISTRICT JUDGE
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