

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 FEDERAL DEPOSIT INSURANCE
5 CORPORATION, as receiver for
6 INDYMAC BANK, F.S.B,

7 Plaintiff,

8 v.

9 JUDITH A. WARREN, an individual
10 d/b/a J WARREN APPRAISAL SERVICE,
11 type of entity unknown; PATRICIA
12 L. DENNIS, an individual d/b/a
13 BOHANNON APPRAISAL, type of
14 entity unknown; and DOES 1
15 through 10, inclusive,

16 Defendants.
17
18 _____/

No. C 11-3260 CW

ORDER DENYING
PLAINTIFF'S MOTION
TO STRIKE (Docket
No. 13)

United States District Court
For the Northern District of California

19 Plaintiff Federal Deposit Insurance Corporation, as receiver
20 for IndyMac Bank, F.S.B., has sued Judith A. Warren, an individual
21 doing business as J. Warren Appraisal Service, and Patricia L.
22 Dennis, an individual doing business as Bohannon Appraisal, for
23 claims arising from the appraisal of certain real property. The
24 FDIC's first cause of action alleges that Defendants breached
25 their contracts by failing to describe the property adequately,
26 misrepresenting the property's value, using improper and
27 negligently selected comparable sales, failing to comply with the
28 Uniform Standards of Professional Appraisal Practice and failing
to discuss adequately the fact that the property was a bed-and-
breakfast, not a single family home. The FDIC's second cause of
action alleges that Defendants negligently misrepresented the

1 value of the property. Defendants have filed separate answers to
2 the complaint. Pursuant to Federal Rule of Civil Procedure 12(f),
3 the FDIC moves to strike Warren's second affirmative defense,
4 contributory or comparative negligence, and her ninth affirmative
5 defense, comparative indemnification. Docket No. 13. Having
6 considered all of the parties' submissions, the Court DENIES the
7 motion.

8
9 LEGAL STANDARD

10 Federal Rule of Civil Procedure 12(f) states that a "court
11 may strike from a pleading an insufficient defense or any
12 redundant, immaterial, impertinent, or scandalous matter." Fed.
13 R. Civ. P. 12(f). "The function of a 12(f) motion to strike is
14 to avoid the expenditure of time and money that must arise from
15 litigating spurious issues by dispensing with those issues prior
16 to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th
17 Cir. 1993) (internal alterations and quotation marks omitted),
18 overruled on other grounds by 510 U.S. 517 (1994). Matter is
19 immaterial if it has no essential or important relationship to a
20 claim for relief or defense. Whittlestone, Inc. v. Handi-Craft
21 Co., 618 F.3d 970, 974 (9th Cir. 2010). Impertinent matter is
22 that which does not pertain to issues in question. Id.

23
24 DISCUSSION

25 Warren pleads IndyMac's comparative fault in her second and
26 ninth affirmative defenses in a general manner that appears
27 directed at both causes of action. The FDIC contends that the
28

1 defenses are insufficient as to its breach of contract and
2 negligent misrepresentation claims. The FDIC cites authority
3 indicating that comparative fault, in general, is not a defense to
4 a claim for breach of contract. Kransco v. Am. Empire Surplus
5 Lines Ins. Co., 23 Cal. 4th 390, 402 (2000). Kransco does not
6 establish that comparative fault is never a defense, under
7 California law, to contract claims.

8
9 The FDIC also argues that Van Meter v. Bent Constr. Co., 46
10 Cal. 2d 588, 595 (1956), demonstrates that Warren cannot assert an
11 affirmative defense to the FDIC's negligent misrepresentation
12 claim based on comparative fault. Negligent misrepresentation is
13 a species of the tort of deceit. Bily v. Arthur Young & Co., 3
14 Cal. 4th 370, 407 (1992). "Where the defendant makes false
15 statements, honestly believing that they are true, but without
16 reasonable ground for such belief, he may be liable for negligent
17 misrepresentation, a form of deceit." Id. (internal quotation
18 marks omitted). In Van Meter the California Supreme Court held
19 that a defendant who misrepresents facts and induces the plaintiff
20 to rely on the misrepresentations is barred from asserting that
21 the plaintiff's reliance was negligent unless the plaintiff's
22 conduct, in light of his or her intelligence and information, is
23 preposterous or irrational. 46 Cal. 2d at 595.

24
25
26 Warren's opposition brief makes clear that her comparative
27 negligence defense will challenge IndyMac's conduct and actions in
28 underwriting the loans. Although Warren's answer and brief do not

1 specify what actions will be challenged, she may seek to defend
2 herself by asserting that IndyMac failed to follow underwriting
3 procedures or neglected to review borrower loan applications. The
4 FDIC is correct that Warren cannot prevail if this defense is
5 limited to evidence that IndyMac did not review borrower loan
6 applications. Such an oversight would not make IndyMac's reliance
7 on Warren's appraisal irrational or preposterous. However, the
8 Court does not assume that Warren's defense is so limited.
9
10 Discovery may reveal evidence about what IndyMac knew or did, such
11 that its reliance on the appraisal was irrational or preposterous.
12 If discovery does not produce such evidence, the FDIC may move for
13 summary judgment to dispose of the issue.

14 The district court in FDIC v. Kirkland, 2010 U.S. Dist. LEXIS
15 143691, *5-6 (C.D. Cal.), reached a different conclusion,
16 reasoning that the defendant's affirmative defense of comparative
17 fault was precluded as a matter of law and granting the FDIC's
18 motion to strike the defense. The court cited Van Meter for the
19 proposition that, with respect to an allegation of deceit, the
20 plaintiff's behavior is considered as part of the analysis of
21 whether the plaintiff's reliance was reasonable. The court did
22 not acknowledge Van Meter's holding that a defense based on
23 comparative fault is permissible when the plaintiff's reliance is
24 irrational or preposterous. Therefore, Kirkland overlooked that
25 the defense is cognizable, albeit in limited circumstances.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FDIC v. Munoz, 2011 U.S. Dist. LEXIS 105500 (C.D. Cal.) is also unpersuasive. The court there recognized that a defendant who misrepresents facts and induces the plaintiff's reliance on those facts may assert a defense based on the plaintiff's conduct if the plaintiff's reliance is preposterous or irrational. However, the court then stated that the risk of falsity is on the one who makes a representation, disregarding law that, as a matter of law, the risk is not placed in all circumstances solely on the person who makes a negligent misrepresentation.

Striking Warren's second and ninth affirmative defenses is unwarranted. 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1381 (noting that motions to strike are disfavored and "will not be granted if the insufficiency of the defense is not clearly apparent.").

CONCLUSION

The FDIC's motion, Docket No. 13, is DENIED.

IT IS SO ORDERED.

Dated: 10/25/2011


CLAUDIA WILKEN
United States District Judge