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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RAMA SOU; TAI BUI; and SCOTT
ZIMMERMAN,

Plaintiffs,

v.

MICHAEL BASH; JEREMY BASH;
BERKLEY ENTERPRISES, INC.;
PEPPERDINE ENTERPRISES, INC.;
NINETY-FIVE FORT APACHE COMPLEX,
LLC; and ROYAL VIEW, LLC,

Defendants.

Case No. 2:15-cv-00698-APG-VCF

**ORDER DENYING MOTIONS FOR
SUMMARY JUDGMENT**

(ECF Nos. 103, 105)

12 In 2010, defendants Michael and Jeremy Bash pitched plaintiffs Rama Sou, Tai Bui, and
13 Scott Zimmerman, on investing in two companies that owned property in Las Vegas: Ninety-Five
14 Fort Apache Complex, LLC (Fort Apache) and Royal View, LLC (Royal View). The defendants
15 allegedly told the plaintiffs of their intent to develop the properties on a certain timetable. All
16 three plaintiffs invested in Fort Apache, and Sou and Bui invested in Royal View, for a total of
17 \$300,000. The properties remain undeveloped.

18 In this lawsuit, the plaintiffs allege fraudulent inducement, false promise, and negligent
19 misrepresentation. They move for summary judgment as to Jeremy Bash, arguing he made
20 specific representations about construction plans (pursuant to which they made their investments)
21 that were false because the properties remain undeveloped. The defendants respond that Bash's
22 representations were not false, as the defendants intended (and still intend) to develop the
23 properties but have been stymied by politics and a bad economy. Further, the defendants contend
24 that optimistic statements by Bash about the properties are not actionable. Bash moves for
25 summary judgment on the claims against him on these same grounds.

26 The parties are familiar with the facts of this case so I will not repeat them here except
27 where necessary. I deny the plaintiffs' motion for summary judgment. There are genuine
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1 disputes whether Bash’s statements about the properties were false or negligently made. I also
2 deny Bash’s motion for summary judgment as untimely. Even if I considered it, disputed facts
3 would lead me to deny the motion.

4 **I. ANALYSIS**

5 Summary judgment is appropriate if the pleadings, discovery responses, and affidavits
6 demonstrate “there is no genuine dispute as to any material fact and the movant is entitled to
7 judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). A fact is material if it “might affect the
8 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
9 (1986). An issue is genuine if “the evidence is such that a reasonable jury could return a verdict
10 for the nonmoving party.” *Id.*

11 The party seeking summary judgment bears the initial burden of informing the court of the
12 basis for its motion and identifying those portions of the record that demonstrate the absence of a
13 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden
14 then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine
15 issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.
16 2000). I view the evidence and draw reasonable inferences in the light most favorable to the non-
17 moving party. *James River Ins. Co. v. Hebert Schenck, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

18 **a. Fraudulent inducement**

19 Under Nevada law, the plaintiff must prove the following to sustain a claim of fraudulent
20 inducement:

- 21 (1) A false representation made by the defendant; (2) defendant’s knowledge or
22 belief that its representation was false or that defendant has an insufficient basis of
23 information for making the representation; (3) defendant intended to induce
24 plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage
25 to the plaintiff as a result of relying on the misrepresentation.

26 *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998). “Fraud is never presumed; it
27 must be clearly and satisfactorily proven.” *Havas v. Alger*, 461 P.2d 857, 860 (Nev. 1969).

28 The plaintiffs argue that Bash represented to them in 2010 that the defendants were
seeking final investments on the Fort Apache property and that a retail plaza would be

1 constructed within eighteen months. The plaintiffs also argue that the defendants represented that
2 the Royal View property would be developed as a commercial property with construction
3 commencing “immediately.” ECF No. 103 at 8. Yet both properties remain undeveloped.
4 According to the plaintiffs, these facts show that Bash’s representations in 2010 must have been
5 false and that Bash intended to deceitfully induce them into investing in companies he knew
6 would not develop the properties.

7 Bash contends that any statements by him were mere puffery, which is not actionable as a
8 misrepresentation. He also argues that at the time he was pitching the property to the plaintiffs,
9 the defendants intended to develop and rezone the properties, so this representation was accurate
10 at the time it was made. Bash contends that economic and political difficulties resulted in the
11 defendants’ inability to develop the properties on their intended timetable.

12 The plaintiffs have not met their burden of demonstrating the absence of disputes of
13 material fact regarding whether Bash’s statements about the development plans were false when
14 made and that the defendants never intended to develop the properties. The plaintiffs do not point
15 to any evidence showing that Bash’s 2010 statements about the plans to construct the properties
16 were false. Meanwhile, in Bash’s response to interrogatories he states that the intent was to
17 commercially develop the properties but this intent has been “put on temporary hold.” ECF
18 No. 103-5 at 5–6.

19 The fact that the properties were not developed on the original timetable does not on its
20 own prove fraud. Therefore, I deny the plaintiffs’ motion for summary judgment on the
21 fraudulent inducement claim.

22 **b. Negligent misrepresentation**

23 Nevada has adopted the definition of negligent misrepresentation contained in the
24 Restatement (Second) of Torts § 552:

25 One who, in the course of his business, profession or employment, or in any
26 other action in which he has a pecuniary interest, supplies false information
27 for the guidance of others in their business transactions, is subject to liability
28 for pecuniary loss caused to them by their justifiable reliance upon the
information, if he fails to exercise reasonable care or competence in
obtaining or communicating the information.

1 *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 575 P.2d 938, 940 (Nev. 1978).

2 The plaintiffs make the same argument for negligent misrepresentation as fraudulent
3 inducement. In response, the defendants argue that Bash made no false representations, the
4 plaintiffs have not demonstrated any damages as a result of Bash's representations, and that Bash
5 exercised reasonable care in communicating with the plaintiffs, as he honestly believed his
6 representations were true.

7 The plaintiffs have not met their burden of showing an absence of genuine dispute
8 whether Bash's representations were false and whether Bash exercised reasonable care or
9 competence in communicating the information. The plaintiffs' argument relies primarily on the
10 fact that Bash told them in 2010 that the properties would be developed in a certain amount of
11 time, which has not come to pass. However, they point to no evidence showing the defendants
12 did not intend to develop the properties as represented, or that Bash failed to exercise reasonable
13 care or competence in representing the defendants' intent to develop the properties within
14 eighteen months. Meanwhile, the defendants produced a lease agreement for the Fort Apache
15 property and evidence of the successful rezoning of the Royal View property, as well as
16 declaration testimony that efforts were and continue to be made to develop the properties at
17 issue. ECF Nos. 105-1, 105-2, 105-8, 105-13. Because the plaintiffs have not met their
18 evidentiary burden, I deny their motion for summary judgment on the negligent
19 misrepresentation claim.

20 **c. False promise**

21 The plaintiffs also bring a claim for false promise, but their argument in their summary
22 judgment motion consists only of a footnote stating that adjudication of either of the other claims
23 would result in their prevailing on the false promise claim. The plaintiffs did not properly
24 support their motion for summary judgment on this claim. LR 7-2(a). In addition, I am denying
25 the motion for summary judgment on the fraudulent inducement and negligent misrepresentation
26 claims. Therefore, I deny the plaintiffs' motion for summary judgment on this claim.

1 **d. Bash’s motion for summary judgment**

2 In addition to opposing the plaintiffs’ motion for summary judgment, Bash asks for
3 summary judgment in his favor on all claims. The plaintiffs respond that the magistrate judge
4 ordered all dispositive motions be filed by March 20, 2017, and that this motion, filed on April 5,
5 is untimely and should not be considered.

6 Under Federal Rule of Civil Procedure 16(b)(4), a scheduling order may be modified
7 only for good cause. This good cause standard “primarily considers the diligence of the party
8 seeking” to amend the order or file a motion after a scheduled deadline. *Johnson v. Mammoth*
9 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992); *see also U.S. Dominator, Inc. v. Factory*
10 *Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985) (holding a district court may deny as
11 untimely a motion filed after the scheduling order deadline when no modification request has
12 been made), *superseded by statute on other grounds*. “If [the] party was not diligent, the inquiry
13 should end.” *Mammoth Recreations, Inc.*, 975 F.2d at 609.

14 At the pretrial conference on December 12, 2016, Magistrate Judge Ferenbach ordered
15 that dispositive motions be filed by March 20, 2017. ECF No. 102. The plaintiffs timely filed
16 their motion for summary judgment. Bash filed his response and motion for summary judgment
17 on April 5, 2017. As a response to the plaintiffs’ motion for summary judgment, the brief was
18 filed within the 21-day deadline. LR 7-2(b). However, as a dispositive motion for summary
19 judgment, the brief was filed after the scheduled deadline with no explanation or request for
20 extension.

21 Bash has failed to establish good cause for considering his motion for summary
22 judgment, as he provides no explanation for the untimely filing or why it should still be
23 considered. “A scheduling order ‘is not a frivolous piece of paper, idly entered, which can be
24 cavalierly disregarded by counsel without peril.’” *Mammoth Recreations*, 975 F.2d at 610
25 (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Therefore, I
26 deny as untimely Bash’s motion for summary judgment.

1 Even if I were to consider the motion, I would deny it, as there remain genuine issues of
2 material fact. Bash argues that he represented to the plaintiffs generally the defendants' intent to
3 purchase, develop, and rezone the two properties. The plaintiffs have produced evidence,
4 however, of more particular, apparently false, statements that induced their investment. For
5 example, the plaintiffs state in affidavits that Bash informed them the defendants had already
6 procured leases for the Fort Apache retail site with Trader Joe's, Seven-Eleven, and Circle K.
7 ECF Nos. 103-1, 103-2, 103-3. These statements appear to be false, as Fort Apache states in its
8 interrogatory response that the only tenant lease procured for the site was with Green Valley
9 Grocery. ECF No. 103-7 at 5. A jury could find that the representations Bash made to the
10 plaintiffs about secured tenants were false and made in order to induce their investment.
11 Moreover, Bash's argument that he cannot be liable as the officer of a corporation is unavailing.
12 *See Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 688 (Nev. 1995) ("An officer of a
13 corporation may be individually liable for any tort which he commits . . .").

14 **II. CONCLUSION**

15 IT IS THEREFORE ORDERED that the plaintiffs' motion for summary judgment (**ECF**
16 **No. 103**) is **DENIED**.

17 IT IS FURTHER ORDERED that Jeremy Bash's motion for summary judgment (**ECF**
18 **No. 105**) is **DENIED**.

19 DATED this 21st day of November, 2017.

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22 ANDREW P. GORDON
23 UNITED STATES DISTRICT JUDGE
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