

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-007154

08/09/2005

HON. PAUL A KATZ

CLERK OF THE COURT
D. Caggiano-Sapp
Deputy

FILED: 08/11/2005

BRYAN PERRY

FRANCIS J BALINT JR.

v.

MASTERCARD INTERNATIONAL INC

WILLIAM J MALEDON

RICHARD TODD ARCHIBALD
200 CRESCENT COURT #300
DALLAS TX 75201
YVETTE OSTOLAZA
200 CRESCENT COURT SUITE 300
DALLAS TX 75201

RULING

The Court having taken Defendant's Motion for Reconsideration of Class Certification Decision under advisement; having reviewed the memoranda of the parties and legal authorities cited therein; and good cause appearing,

IT IS ORDERED granting Defendant's Motion for Reconsideration of Class Certification Decision for reasons that follow:

The Arizona Consumer Fraud Act ("ACFA"), A.R.S. section 44-1522, provides in relevant part:

A. The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

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The dispositive issue in the instant litigation is whether the ACFA requires reliance. In other words, the issue is whether, in an action under the ACFA, the Plaintiff must show that he relied on the seller's misrepresentation. This Court faces a dilemma, Division One and Division Two of the Arizona Court of Appeals are diametrically opposed on this issue. For the reasons that follow, the Court believes that Division Two's interpretation of the ACFA is more well reasoned and should be applied to the case at bar.

Division Two holds that reliance is a required element of ACFA. *See Peery v. Hansen*, 120 Ariz. 266, 270 (App. 1978); *See also Kuehn v. Stanley*, 208 Ariz. 124, 129 (App. 2004) (affirming dismissal of action, in part, because Plaintiffs had failed to show reliance on mortgagee's representations) *relying on Peery*, 120 Ariz. at 269-270; *State ex. rel. Grant Woods v. Hameroff*, 180 Ariz. 380, 383 (App. 1994) (overturning the lower court's decision to award damages to attorneys because attorneys were not victims since they did not actually rely on misrepresentations) *relying on Peery*, 120 Ariz. at 269-270.

In *Peery*, the court was clear that a "claimant must show reliance." *Id.* at 269. In reaching this conclusion, the court compared the elements of common law fraud to statutory fraud. The court reasoned that both common law fraud and statutory fraud require proof of reliance. But, the court differentiated between common law fraud and statutory fraud on the element of right to rely. The court held that the "right to rely, though a necessary element in a common law fraud action, is not essential to a statutory fraud action in Arizona." *Id.* at 270. In applying this holding to the facts before it, the court considered whether the plaintiffs actually knew that the defendants' statements were false. The court reasoned that the plaintiffs were damaged if they did not actually know that the defendants lied, even if they should have known. *Id.* at 270. Thus, under *Peery*, a Plaintiff must rely, but that reliance need not be reasonable.

However, courts reviewing the issue of reliance in Division One have reached the opposite conclusion of *Peery*, while ironically relying on this very case. *See Alface v. Nat'l Inv. Co.*, 181 Ariz. 586, 598 (App. 1994) ("[c]onsumer fraud does not contain the reliance element found in common law fraud") *citing Murdock v. Balle*, 144 Ariz. 136, 139 (App. 1985); *But see Murdock*, 144 Ariz. at 139 ("the right to rely, though a necessary element in a common law fraud action, is not essential to a statutory fraud action in Arizona") *quoting Peery*, 120 Ariz. at 270; *See also Corbin v. Tolleson*, 160 Ariz. 385, 398 (App. 1989) ("[r]eliance is not an element of consumer fraud") *citing Babbitt v. Green Acres Trust*, 127 Ariz. 160, 168 (App. 1980); *But see Babbitt*, 127 Ariz. at 168 "the right to rely is not a necessary element in private action under the Consumer Fraud Act") *citing Peery*, 120 Ariz. at 270.

Our federal district court has followed Division Two's interpretation of the ACFA. *See Holeman v. Neils*, 803 F. Supp 237, 243 (D. Ariz. 1992) (reasoning that "[d]amage or injury occurs when the consumer relies on the misrepresentation even though the reliance is not reasonable").

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After considering this issue, the Court believes that Division Two's interpretation of the ACFA is correct and therefore this Court must hold that reliance is a requirement in an action brought under the ACFA. Therefore, class certification cannot occur because each plaintiff would have to make an individualized showing of reliance. The Court's conclusion with respect to the issue of reliance is Plaintiff's only obstacle to demonstrating the appropriateness of certification within the meaning of Rule 23, Ariz. R. Civ. P., but for this obstacle class certification would be a superior remedy to the individual adjudication of nearly identical claims.

The Court having also taken Defendant's Motion To Compel Arbitration and Stay Litigation under advisement; having reviewed the memoranda of the parties and legal authorities cited therein; and good cause appearing,

IT IS ORDERED denying Defendant's Motion To Compel Arbitration and Stay Litigation.