

2010

Leslie D. Mower v. David R. Simpson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LESLIE D. MOWER, et al.,

Plaintiffs and Appellants,

vs.

DAVID R. SIMPSON, et al.,

Defendants and Appellees.

Utah Court of Appeals No. 20100532

District Court Civil No. 090403844

MICHAEL AVIANO'S APPELLEE'S BRIEF ON APPEAL

Appeal from the Order of the Fourth District Court,
Utah County, Provo Division, The Honorable Samuel D. McVey

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LIST OF PARTIES TO PROCEEDINGS IN DISTRICT COURT

Plaintiffs/Appellants:

Leslie D. Mower; LD SQ, LLC; LD III, LLC; LD Purpose, LLC; and Navona, LC.

Defendants/Appellees:

David R. Simpson; Nathan R. Simpson; Michael K. Thompson; Todd Dorney; Brandon Dente; ALS Properties, LLC; Mai Ke Kula, LLC; Hanalei Kai Holdings, LLC; Ka Mahina, LLC; He Kiakolu, LLC; Koamalu Plantation, LLC; Landmark Real Estate, Inc.; Wood Springs, LLC; Oak Leaf, LLC; Dente, LLC; Sunny Ridge; KNDJ Development; DN Simpson Holdings; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC; Carnesecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; Maple Mountain Water tank, LLC; Allen Hakes; Lonestar Gutters, LLC; Michael Aviano; Dallas Hakes; Lonestar Builders, Inc.; Chad Carlson; and 2 Brothers Communications; and David Nemelka.

Rule 19 Defendants:

Koamalu Plantation Investments, LLC; and Kathy A. Templeman.

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STATEMENT OF JURISDICTION

This Court's jurisdiction is proper pursuant to UTAH CODE ANN. § 103(2)(j).

ISSUES PRESENTED FOR REVIEW

The Appellee, Michael Aviano ("Mr. Aviano"), notes that the Plaintiffs/Appellants have failed to provide a citation to the record showing that their "Issues Presented for Review" was preserved in the trial court, as required by UTAH R. APP. P. 24(a)(5)(A). However, in the event this Court is still willing to consider the Plaintiffs' appeal, Mr. Aviano submits the following as the issues which are presented for review:

Whether the trial court was correct in holding that the Plaintiffs failed to plead fraud with particularity in their Second Amended Complaint against Mr. Aviano, thus providing the trial court with a sufficient basis for dismissing Plaintiffs' fraud-based causes of action? A district court's grant of a motion to dismiss pursuant to UTAH R. CIV. P. 9(b) presents a question of law that is reviewed for correctness. *Coroles v. Sabey*, 2003 UT App 339, ¶ 15, 79 P.3d 974.

Whether the trial court was correct in dismissing Plaintiffs' fraud-based causes of action without leave to amend when the Plaintiffs already had unsuccessfully attempted multiple times to plead fraud with particularity? A district court's decision to disallow a party leave to amend pleadings is within the sound discretion of the trial court. *See, Westley v. Farmer's Ins. Exchange*, 663 P.3d 93, 94 (Utah 1983). Consequently, the trial court's decision will not be disturbed "absent a clear abuse of discretion." *Coroles*, 2003 UT App 339, ¶ 15.

Whether the trial court was correct in holding that Utah does not recognize causes of action for aiding and abetting breach of fiduciary duty and aiding and abetting fraudulent non-disclosure, thus providing the trial court with a sufficient basis for dismissing said causes of action? A district court's grant of a motion to dismiss pursuant to UTAH R. CIV. P. 12(b)(6) presents a question of law that is reviewed for correctness. *Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, ¶ 14, 203 P.3d 962.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS**

UTAH R. CIV. P. 9(b): “*Fraud, mistake, condition of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of the mind of a person may be averred generally.”

UTAH R. CIV. P. 12(b)(6): “*How Presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a

claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE DISTRICT COURT.

The Plaintiffs filed an action against various individuals, including Mr. Aviano, alleging various acts of fraud. As Plaintiffs action pertains to Mr. Aviano, Plaintiffs’ basis for its allegations involves a single real estate purchase transaction. *See*, Court Record (“Rec.”), 3055-3053, ¶¶ 404-413.

On October 20, 2009, the Plaintiffs filed their initial Complaint. *See generally*, Rec., 461. After being served with various motions to dismiss pursuant to UTAH R. CIV. P. 9(b) and 12(b)(6), the Plaintiffs filed their First Amended Complaint on November 27, 2009. *See generally*, Rec. at 2143. On February 19, 2010, the district court dismissed Plaintiffs’ First Amended Complaint in its entirety with respect to Mr. Aviano, pursuant to, *inter alia*, UTAH R. CIV. P. 9(b). *See*, Rec. at 5009. However, the district court granted Plaintiffs leave to amend, provided Plaintiffs could do so in good faith and with particularity. *See, Id.* As a result, Plaintiffs filed their Second Amended Complaint (which provides the basis for this appeal) on March 5, 2010, as well as lengthy Errata to the Second Amended Complaint on March 15, 2010 (collectively, “Second Amended Complaint”). *See*, Rec. at 4997, and 5048 (also attached as Exhibit “B” to Plaintiffs’

Addendum, on file herein).

Plaintiffs' Second Amended Complaint also alleged various fraud-based causes of action against various individuals, including Mr. Aviano. However, with respect to Mr. Aviano, Plaintiffs' Second Amended Complaint alleges the following causes of action: (1) fraud and intentional misrepresentation; (2) aiding and abetting breach of fiduciary duty; (3) aiding and abetting fraudulent non-disclosure; (4) negligent misrepresentation; (5) conspiracy; (6) and Utah Pattern of Unlawful Activity ("UPUA"). *See*, Rec. at 2978, 2953, 2947, 2945, 2926, and 2923.

The Plaintiffs based the foregoing causes of action against Mr. Aviano on a single real estate purchase transaction between Mr. Aviano and The Preserve at Mapleton Company, LLC, wherein the Plaintiffs¹ suffered absolutely no damage. *See*, Rec., 3055-3053, ¶¶ 404-413. Specifically, Plaintiffs' Second Amended Complaint alleged that Mr. Aviano executed various closing documents evidencing the fact that Mr. Aviano purchased a certain parcel of real property for approximately \$900,000.00. *See*, *Id.* at 3054, ¶¶ 408-409, 2964, ¶ 800, and 2932, ¶ 944. Additionally, the Second Amended Complaint alleged that the aforementioned closing documents represented that the Plaintiffs, as assignees of MagnetBank, would receive approximately \$900,000.00 from the proceeds of the real estate purchase transaction. *See*, *Id.* at 3054, ¶¶409-410. Furthermore, the Second Amended Complaint expressly alleges that the Plaintiffs did, in fact, receive \$900,000.00 from the proceeds of the real estate purchase transaction. *See*,

¹ As successors in interest to MagnetBank.

Id. at ¶ 410. *See also*, Rec., 2964, ¶ 802, and 2931, ¶ 946.

Based upon the foregoing, Mr. Aviano moved to dismiss the above-referenced causes of action pursuant to, *inter alia*, UTAH R. CIV. P. 9(b). *See generally*, Rec., 5110. The district court once again dismissed all fraud-based causes of action with respect to Mr. Aviano, and did not give the Plaintiffs' a fifth² opportunity to properly plead their claims. *See*, Rec., 5606 (also attached as Exhibit "C" to Plaintiffs' Addendum, on file herein).

STATEMENT OF FACTS PERTAINING TO MR. AVIANO

The Plaintiffs/Appellants address their factual allegations against Mr. Aviano in ¶¶ 53-55 of Appellants' Opening Brief on Appeal. Mr. Aviano provides the following additional statement of facts with respect to Plaintiffs' allegations against Mr. Aviano (which the district court held to be insufficient under UTAH R. CIV. P. 9(b)). *See generally*, Rec., 5606:

1. The Plaintiffs alleged "on information and belief" that Mr. Aviano agreed to lend another named Defendant/Appellee, David Simpson ("Mr. Simpson"), \$2,000,000.00. *See*, Rec., 3055, ¶ 405.

2. The Plaintiffs further allege "on information and belief" that as a condition of the alleged \$2,000,000.00 loan, Mr. Simpson would cause The Preserve at Mapleton Company, LLC to sell Mr. Aviano a parcel of real property for \$575,000.00. *See, Id.* at ¶

² Counting Plaintiffs' lengthy Errata as one attempt, in addition to the original complaint, the first amended complaint, and the second amended complaint.

405(a).

3. Despite the foregoing allegations of a \$575,000.00 purchase price, the Plaintiffs allege that Mr. Simpson and Mr. Aviano executed closing documents showing that Mr. Aviano would purchase the parcel of real property from The Preserve at Mapleton Company, LLC for approximately \$900,000.00 (not \$575,000.00). *See, Rec.*, 3054, ¶ 408.

4. Moreover, the Plaintiffs allege that pursuant to the aforementioned closing documents, the Plaintiffs were to receive approximately \$900,000.00 from the proceeds of the real estate purchase transaction described immediately above. *See, Id.* at ¶ 409.

5. Finally, the Plaintiffs allege that they did, in fact, receive approximately \$900,000.00 from the proceeds of the above-described real estate purchase transaction. *See, Rec.*, 3054, ¶ 410, 2964, ¶ 802, and 2931, ¶ 946.

6. Based upon the single real estate purchase transaction, described above, Plaintiffs' Second Amended Complaint alleged the following causes of action against Mr. Aviano: (1) fraud and intentional misrepresentation; (2) aiding and abetting breach of fiduciary duty; (3) aiding and abetting fraudulent non-disclosure; (4) negligent misrepresentation; (5) conspiracy; (6) and UPUA. *See, Rec.*, 2978, 2953, 2947, 2945, 2926, and 2923.

7. The district court dismissed all of Plaintiffs' fraud-based claims against Mr. Aviano, as well as Plaintiffs' UPUA to the extent Plaintiffs' UPUA claim was based on allegations of fraud, and did so "for failure to plead with particularity as required by Utah

Rule of Civil Procedure 9(b)...without leave to amend.” *See*, Rec., 5605. However, the district court allowed the Plaintiffs to pursue their UPUA claim against Mr. Aviano to the extent “that claim is not based on allegations of fraud.” *See*, Rec., 5604.

8. The district court further dismissed Plaintiffs’ aiding and abetting claims “for failure to state a claim under UTAH R. CIV. P. 12(b)(6).” *See*, Rec., 5604. In dismissing Plaintiffs’ aiding and abetting claims, the district court held that “[t]he Utah Supreme Court has not yet recognized a claim for aiding and abetting under Utah law.” *See, Id.*

9. The district court did, however, deny Mr. Aviano’s motion with respect to Plaintiffs’ conspiracy cause of action “to the extent such claim is based on alleged breaches of fiduciary duties, which are not subject to the particularity requirements of UTAH R. CIV. P. 9(b).” Additionally, the district court denied Mr. Aviano’s motion to dismiss with respect to Plaintiffs’ negligent misrepresentation cause of action, finding that said cause of action “is not subject to the particularity requirements of UTAH R. CIV. P. 9(b).” *See, Id.*

SUMMARY OF ARGUMENT

UTAH R. CIV. P. 9(b) requires the Plaintiffs to plead their fraudulent allegations against Mr. Aviano with particularity. However, with respect to Plaintiffs’ allegations and causes of action against Mr. Aviano, the Plaintiffs’ Second Amended Complaint failed to satisfy the heightened pleading requirements of UTAH R. CIV. P. 9(b). Even if Plaintiffs’ allegations did satisfy the requirements of UTAH R. CIV. P. 9(b), Plaintiffs’

causes of action, nevertheless, fail to state a claim against Mr. Aviano. Consequently, the district court was correct in dismissing any fraud-based cause of action alleged against Mr. Aviano, and the district court's ruling should be affirmed.

Furthermore, although the Rules of Procedure tend to favor granting a party leave to amend its pleadings, "the matter remains in the sound discretion of the trial court." *Westley*, 663 P.2d at 94. A district court is well within its discretion to deny a party leave to amend its pleadings when doing so would cause unnecessary delay, and when the party seeking leave has had an adequate opportunity to properly draft its pleadings. *See, Id.* Consequently, under the circumstances of the present case, where the case had been pending for eight months and the Plaintiffs had already been given four opportunities to properly plead their allegations, the district court was correct in dismissing Plaintiffs' fraud-based claims against Mr. Aviano without leave to amend. Consequently, the district court's ruling should be affirmed.

Finally, under UTAH R. CIV. P. 12(b)(6), a defendant "admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts." *Helf*, 2009 UT 11, ¶ 14, 203 P.3d at 967. Because Utah does not recognize the aiding and abetting causes of action contained in Plaintiffs' Second Amended Complaint, the district court was also correct in dismissing Plaintiffs' aiding and abetting causes of action, pursuant to UTAH R. CIV. P. 12(b)(6). However, even if Utah did recognize Plaintiffs' aiding and abetting causes of action, in light of the Plaintiffs' allegations in connection with those causes of action, the district court was, nevertheless, correct in dismissing the

same pursuant to UTAH R. CIV. P. 12(b)(6), with respect to Mr. Aviano. Therefore, the district court's ruling should be affirmed.

ARGUMENT

I. PLAINTIFFS FAILED TO PLEAD FRAUD WITH PARTICULARITY AGAINST MR. AVIANO.

“In *all* averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” UTAH R. CIV. P. 9(b)(emphasis added). Furthermore, “the Rule 9(b) requirement should not be understood as limited to allegations of common-law fraud...[I]t reach[es] all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term ‘fraud’ in its broadest dimension.” *Coroles*, 2003 UT App 339, ¶ 39 (alterations in original, citing *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982)). Moreover, “where fraud lies at the core of the action, Rule 9(b) applies...The requirements of Rule 9(b) apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.” *Coroles*, *supra* (citing *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985), and *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D.Md. 2000)). Additionally, an allegation of fraud asserted upon “information and belief” is only adequate under UTAH R. CIV. P. 9(b) if such allegation “includes the facts upon which the belief is based.” *Kuhre v. Goodfellow*, 2003 UT App 85, ¶ 24, 69 P.3d 286 (citing *Arena Land & Inv. Co. v. Petty*, 906 F. Supp. 1470, 1476 (D.Utah 1994)). However, conclusory and conjectural statements are

insufficient. *Daines v. Vincent*, 2008 UT 51, ¶ 39, 190 P.3d 1269.

Even in light of Utah's liberal pleading rules, Plaintiffs' Second Amended Complaint, nevertheless, fails to allege any fraud-based cause of action against Mr. Aviano with the particularity required by UTAH R. CIV. P. 9(b). Consequently, the district court was correct in dismissing all such fraud-based causes of action with respect to Mr. Aviano.

In order to state a claim for fraud, the Plaintiffs must have pleaded each of the following elements with particularity:

(1) a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

See, Maack v. Res. Design & Constr., 875 P.2d 570 (Ut. Ct. App. 1994), and *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060 (Utah 1996). As noted above, however, Plaintiffs' base their claims of fraud on a single real estate purchase transaction, whereby the Plaintiff, as an assignee of MagnetBank, suffered no damage. Specifically, Plaintiffs allege that Mr. Aviano executed various closing documents, evidencing the fact that Mr. Aviano purchased a certain parcel of real property for \$900,000.00. *See, Rec.*, 3054, ¶¶ 408-409, 2964, ¶ 800, and 2032, ¶ 944. In addition, Plaintiffs allege that the aforementioned closing documents represented that the Plaintiffs, as assignees of MagnetBank, would receive approximately \$900,000.00 from the proceeds of the sale of

the above-referenced parcel of real property, and that the Plaintiffs actually did receive approximately \$900,000.00 from the proceeds thereof. *See*, Rec., 3054, ¶ 410, 2964, ¶ 802, and 2931, ¶ 946. Therefore, based upon the Plaintiffs' express allegations, Mr. Aviano is unable to see exactly how such a transaction can be deemed fraudulent when the representations that were made were actually true and fulfilled, and where Plaintiffs did not suffer any damage.

Notwithstanding the foregoing, in an attempt to state a fraud-based claim against Mr. Aviano, the Plaintiffs make the confusing, unsubstantiated, and speculative conclusion that the aforementioned real estate transaction involved fraud because the sales price of the real property was allegedly only \$575,000.00, rather than \$900,000.00, despite what the aforementioned closing documents provided and despite the proceeds actually received by MagnetBank. *See*, Rec., 3055, ¶ 405(a). Plaintiffs also allege an unsubstantiated conclusion that the difference of \$325,000.00 ($\$900,000.00 - \$575,000.00 = \$325,000.00$) was paid to Plaintiffs by Mr. Simpson. *See*, Rec., 2964, ¶ 802. Plaintiffs, however, provide no factual allegations in support of these speculative conclusions, not to mention failing to plead such factual allegations with any degree of particularity as required by UTAH R. CIV. P. 9(b). Even if the Plaintiffs' allegations concerning Mr. Simpson's alleged payment of a portion of the purchase price were true, Plaintiffs still fail to explain or allege exactly how those actions can be deemed fraudulent – especially in light of the fact that the Plaintiffs actually admit that they received the \$900,000.00 represented in the closing documents. *See*, Rec., 3054, ¶ 410.

Therefore, based upon the foregoing, the district court was correct in dismissing Plaintiffs' fraud-based causes of action, including Plaintiffs' cause of action for intentional misrepresentation, with respect to Mr. Aviano.

In addition to the foregoing, even if Plaintiffs' allegations against Mr. Aviano were sufficient under UTAH R. CIV. P. 9(b), the district court was still correct in dismissing Plaintiffs' intentional misrepresentation claim against Mr. Aviano pursuant to the UTAH R. CIV. P. 12(b)(6) portion of Mr. Aviano's Motion to Dismiss, as Plaintiffs have suffered no damages. Consequently, the district court's decision should still be affirmed. *See, Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225 (“[A]n appellate court may affirm the judgment appealed from ‘if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action.’”(citing *Limb v. Federated Milk Producers Ass’n*, 23 Utah 2d 222, 461 P.2d 290, 293 n.2 (1969)(plurality opinion)).

“[I]n ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all *reasonable* inferences in his favor.” *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991)(emphasis added). However, mere legal conclusions will not will not provide a sufficient basis to withstand a Rule 12(b)(6) motion, as such conclusions “are stillborn for all purposes, when they are stated in the place of ultimate facts.” *Chesney v. Chesney*, 94 P. 989, 992 (Utah 1903). In short, “[m]atters of substance, which are necessary to be alleged in a complaint, *cannot be left out.*” *Id.* at 993 (emphasis

added). Furthermore, the objective of Utah's liberal pleading rules "is to require that the *essential* facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed." *Coroles*, 2003 UT App 339, ¶ 23 (emphasis added).

In the present case, an essential element in pleading fraud is that of damages. *See, Maack*, 875 P.2d 570. While Plaintiffs alleged that their predecessor in interest, MagnetBank, "reasonably relied on the contents of the closing documents," *See, Rec.*, 2963, ¶ 809, which provide that MagnetBank was to receive approximately \$900,000.00 from the proceeds of the aforementioned real estate transaction, Plaintiffs also allege that MagnetBank actually did receive "just under \$900,000.00" *Id.* at 3054, ¶ 410, and 2964, ¶ 802. Simply stated, Plaintiffs allege that they relied on the closing documents, which represented that Plaintiffs would receive a certain sum of money, and Plaintiffs did, in fact, receive that certain sum of money, regardless of where that money came from. Therefore, by their own allegations, accepting such allegations as true for the purposes of UTAH R. CIV. P. 12(b)(6), Plaintiffs received exactly what they thought and agreed they would receive and, thus, have suffered no damage thereby. Consequently, Plaintiffs' fraud-based causes of action fail to state a claim against Mr. Aviano. Consequently, the district court was also correct in dismissing such claims against Mr. Aviano pursuant to UTAH R. CIV. P. 12(b)(6).

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II. THE DISTRICT COURT WAS ALSO CORRECT IN DENYING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT AGAIN.

Although the Rules of Procedure tend to favor granting a party leave to amend its pleadings, “the matter remains in the sound discretion of the trial court.” *Westley*, 663 P.2d at 94. A district court is well within its discretion to deny a party leave to amend its pleadings when doing so would cause unnecessary delay, and when the party seeking leave has had an adequate opportunity to properly draft its pleadings. *See, Id.* Furthermore, Utah courts typically focus on three factors when considering whether to allow a party leave to amend its pleadings. *See, Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, 87 P.3d 734. First, “the timeliness of the motion.” *Id.* at ¶ 26. Second, “the justification given by the movant for the delay.” *Id.* And finally, “the resulting prejudice to the responding party.” *Id.*

Under the circumstances of the present case, the district court was correct in not allowing the Plaintiffs leave to amend their complaint. For example, after eight months, the Plaintiffs had already been allowed to amend their complaint four times prior to the district court’s dismissal without leave to amend. For example, Plaintiffs filed their original complaint on October 20, 2009. *See, Rec.*, 461. The Plaintiffs filed their First Amended Complaint on November 27, 2009, thus having their second chance to properly plead their claims. *See, Rec.*, 2143. Plaintiffs filed their Second Amended Complaint on March 5, 2010 (third chance), as well as lengthy Errata to the Second Amended Complaint on March 15, 2010 (fourth chance). *See, Rec.*, 4997 and 5048.

Notwithstanding Plaintiffs' multiple attempts to properly plead their claims, the Plaintiffs still had failed to plead fraud with particularity against Mr. Aviano, as explained in greater detail, above. Consequently, the Plaintiffs caused at least eight months of delay, and sought to potentially cause even more delay by trying a fifth time to properly plead their causes of action. Therefore, because of the delay alone caused by the Plaintiffs, the district court was correct in not allowing Plaintiffs leave to amend their Second Amended Complaint.

In addition to the foregoing, each time the Plaintiffs attempted to amend their pleadings, Mr. Aviano would necessarily expend a substantial amount of time, resources, and attorneys fees, in responding to Plaintiffs' inadequate pleadings. Moreover, the longer this case continued, the longer Mr. Aviano would be forced to conduct his life and his business under the constant stigma of being named as a defendant in a seemingly never-ending lawsuit. Consequently, Mr. Aviano, as well as many other named Defendants/Appellees, were being severely prejudiced, thus providing further justification for the district court's decision not to allow Plaintiffs leave to amend again.

Based upon the foregoing, the district court was correct in its decision not to allow the Plaintiffs leave to amend their Second Amended Complaint.

III. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT UTAH DOES NOT RECOGNIZE AIDING AND ABETTING AS VALID CAUSES OF ACTION.

The Utah Court of Appeals has not recognized civil causes of action for aiding and abetting. *See, Coroles*, 2003 UT App 339 at n. 19. Consequently, the district court was

correct in dismissing Plaintiffs' aiding and abetting causes of action pursuant to UTAH R. CIV. P. 12(b)(6).

Even if this Court were to recognize civil causes of action for aiding and abetting, the district court was still correct, on at least three separate grounds, in dismissing said causes of action with respect to Mr. Aviano. Either way, the district court's decision should be affirmed. *See, Dipoma v. McPhie*, 2001 UT 61, ¶ 18.

First, because the only allegations contained in the Second Amended Complaint against Mr. Aviano deal with the aforementioned real estate purchase transaction, and because Plaintiffs' attempted basis for such allegations against Mr. Aviano rest in fraud, and because Plaintiffs have failed to plead fraud with the requisite particularity against Mr. Aviano, Plaintiffs' aiding and abetting claims were also properly dismissed. *See, Coroles*, 2003 UT App 339, ¶ 39 (“[W]here fraud lies at the core of the action, Rule 9(b) applies...The requirements of Rule 9(b) apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.” (citing *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985), and *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D.Md. 2000))). Therefore, because the Plaintiffs generally failed to adequately plead fraud against Mr. Aviano, the district court was correct in dismissing Plaintiffs' aiding and abetting claims (which used the same allegations as their basis) with respect to Mr. Aviano.

Second, even if this Court were to recognize Plaintiffs' aiding and abetting causes of action, said causes of action must necessarily fail as “[w]e only hold that *if* this cause

of action is cognizable in Utah, it includes damages as an essential element.” *Coroles*, 2003 UT App 339 at n. 19 (emphasis added). As described in greater detail, above, even taking the Plaintiffs’ allegations against Mr. Aviano as true, Plaintiffs suffered no damage as a result of any of Mr. Aviano’s alleged actions. More particularly, the Plaintiffs allege that Mr. Aviano executed closing documents which stated that the Plaintiffs would receive approximately \$900,000.00 from the proceeds of a certain real estate purchase transaction. *See, Rec.*, 3054, ¶¶ 408-409. Plaintiffs further allege that they relied on Mr. Aviano’s representations made in said closing documents, and that the Plaintiffs actually received the approximately \$900,000.00 which they were supposed to receive and which they expected to receive. *See, Id.* at ¶ 410. Consequently, the Plaintiffs have suffered no damages as a result of any of Mr. Aviano’s alleged actions. Without suffering damages, Plaintiffs’ aiding and abetting claims (if valid) must necessarily fail. Therefore, the district court was correct in dismissing the same with respect to Mr. Aviano.

Finally, even if this Court were to recognize Plaintiffs’ aiding and abetting claims as being valid, Plaintiffs’ claims, nevertheless, fail to state a claim against Mr. Aviano and, therefore, the district court was correct in dismissing the same with respect to Mr. Aviano. Specifically, this Court has held that “the gravamen of the claim [of aiding and abetting...] is the defendant’s *knowing* participation.” *Russell/Packard Development, Inc. v. Carson*, 2003 UT App 316, ¶ 33 78 P.3d 616 (emphasis added)(internal quotations omitted, alterations in original)(citing *Future Group, II v. Nationsbank*, 478 S.E.2d 45 (S.C. 1996). *See also*, Restatement (Second) Torts, § 874. However, nowhere in

Plaintiffs' Second Amended Complaint does the Plaintiff allege, that Mr. Aviano knew that Mr. Simpson allegedly owed the Plaintiffs any type of fiduciary duty (or that Mr. Aviano knew that he was allegedly helping Mr. Simpson to breach his fiduciary duty owed to the Plaintiffs). Nor does the Second Amended Complaint allege (especially with any particularity as required by UTAH R. CIV. P. 9(b)) that Mr. Aviano *knew* that Mr. Simpson was allegedly perpetrating a fraud upon the Plaintiffs, or that Mr. Aviano's arms-length purchase of real property wherein the Plaintiffs suffered no damages, was a part of Mr. Simpson's alleged fraud.

Without any allegation, or at the very least a reasonable presumption, of Mr. Aviano's scienter with respect to the Plaintiffs' aiding and abetting causes of action, Plaintiffs' aiding and abetting causes of action fail to state a claim against Mr. Aviano. Consequently, the district court was correct in dismissing the same with respect to Mr. Aviano.

CONCLUSION

The district court properly concluded that the Plaintiffs failed to plead fraud with the particularity required by UTAH R. CIV. P. 9(b) in their Second Amended Complaint, with respect to Mr. Aviano. Even if Plaintiffs had properly plead their fraud-based cause of action against Mr. Aviano with particularity, Plaintiffs' claims, nevertheless, failed to state a claim against Mr. Aviano. Consequently, the district court's dismissal of Plaintiffs' fraud-based claims against Mr. Aviano was proper. Therefore, Mr. Aviano respectfully requests this Court to affirm the district court's ruling as it pertains to Mr.

Aviano.

Furthermore, based upon the facts and circumstances of this case, including the fact that Plaintiffs previously had four opportunities to amend their complaint, as well as the resulting prejudice and delay suffered by Mr. Aviano and the other Defendants/Appellees, the district court was correct in refusing Plaintiffs leave to amend their Second Amended Complaint. Therefore, Mr. Aviano respectfully requests this Court to affirm the district court's ruling as it pertains to Mr. Aviano.

Finally, because Plaintiffs' aiding and abetting claims are not recognized causes of action in Utah, the district court was correct in dismissing the same. Even if Plaintiffs' aiding and abetting claims were validly recognized causes of action, Plaintiffs' claims, nevertheless, failed to state a claim against Mr. Aviano. Therefore, Mr. Aviano respectfully requests this Court to affirm the district court's ruling as it pertains to Mr. Aviano.

DATED this 21st day of March, 2011.

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UTAH R. APP. P. 24(a)(11) STATEMENT

Pursuant to UTAH R. APP. P. 24(a)(11), no addendum is necessary.

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing **MICHAEL AVIANO'S APPELLEE'S BRIEF ON APPEAL**, postage prepaid by first-class mail, on this 21st day of March, 2011, to the following:

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