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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MAIN STREET PARTNERS & ASSOCIATES INC., Plaintiff and Appellant, v. PRECISION ASSET MANAGEMENT CORPORATION, Defendant and Respondent.	B281567 (Los Angeles County Super. Ct. No. BC598750)

APPEAL from a judgment of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Reversed.

Ezer Williamson Law, Richard E. Williamson and Robert C. Hayden; Jeffrey Lewis for Plaintiff and Appellant.

Ruzicka, Wallace & Coughlin, Frank J. Coughlin and Steven E. Bolanos for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Main Street Partners & Associates, Inc. appeals from a judgment following an order sustaining a demurrer without leave to amend. Plaintiff and defendant Precision Asset Management Corporation entered into an agreement that required the non-disclosure of contacts without prior approval and an agreement for a referral fee. Defendant allegedly violated these agreements.

Plaintiff filed a first amended complaint against defendant for breach of contract, breach of the implied covenant of good faith and fair dealing (breach of the implied covenant), fraud, concealment, intentional misrepresentation, and misappropriation of trade secrets. Defendant demurred on the grounds that plaintiff was required to have a real estate license pursuant to Business and Professions Code[1] section 10130 to enter into the agreements. Defendant asserted the object of these agreements was therefore illegal. Defendant also argued that: plaintiff failed to allege with specificity the fraud-based causes of action; the entire contract was void as an unlawful restraint of trade; the breach of the implied covenant claim was duplicative of the breach of contract claim; and the first amended complaint was uncertain.

The court found plaintiff was required to have a real estate license to receive compensation under the agreements, which it did not have. The trial court sustained defendant's demurrer without leave to amend on the grounds that the agreements were

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[1] Further statutory references are to the Business and Professions Code unless otherwise indicated.

void as illegal. The court determined the tort causes of action were premised on the illegal agreements and sustained the demurrer as to those claims.

Based on the pleadings, plaintiff was not required to have a real estate license to enter into the agreements alleged in the first amended complaint. We therefore reverse.

II. BACKGROUND

A. *Pleadings*

According to the factual allegations in the first amended complaint, which we accept as true (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6), plaintiff was a California corporation. In Fall 2008, plaintiff began investigating the purchase of portfolios of foreclosed homes in the United States from large mortgage lenders such as Fannie Mae and Freddie Mac. These portfolios, also known as "pools" or "tapes" in the foreclosed property industry, would be held, managed, and sold individually. Large sellers relied on a select group of prequalified bidders, who would agree to purchase the foreclosed properties in bulk, sight unseen, without representations or warranties. Plaintiff referred to these purchasers as primary purchasers.

In or around December 2009, plaintiff met with a representative of a large, national secondary purchaser (secondary purchaser). The secondary purchaser would purchase tapes from a primary purchaser and then offer the tapes to a select group of business partners and investors. Plaintiff was among this select group and able to purchase foreclosed properties in bulk through the secondary purchaser. By

September 2010, plaintiff had purchased 78 homes through the secondary purchaser.

After purchasing the homes, plaintiff would hire property managers to maintain them. Plaintiff began interviewing potential property management companies to manage its Southern California properties. One such company was defendant, a California corporation based in Southern California.

During the interview process, defendant's operations manager offered to use defendant's investor funds to purchase additional tapes of foreclosed properties. In exchange for plaintiff's disclosure of trade secret information (that is, the identity of the secondary purchaser and the necessary requirements for working with the secondary purchaser), defendant would share the profits from the eventual sale of the properties with plaintiff. Defendant also suggested that it would pay plaintiff a referral fee in exchange for plaintiff's referral of prospective portfolio purchasers to defendant for property management services.

On October 4, 2010, plaintiff and defendant entered into a non-circumvent, non-disclosure, and confidentiality agreement (non-circumvent agreement). In this agreement, plaintiff described itself as "currently in the business of acquiring, repositioning, financing and selling foreclosure properties acquired in bulk from banks, loan brokers and/or loan guarantors, either directly and/or indirectly through brokers or intermediaries." Per the agreement, defendant stated that it "desire[d] to enter into an agreement with [plaintiff] to form a mutually beneficial relationship to take advantage of opportunities that exist in the business of acquiring foreclosure properties." The agreement would initially only pertain to

transactions involving bulk purchases of foreclosed properties from four sources. The non-circumvent agreement provided that the identities of plaintiff's contacts involved in bulk purchases were "exclusive and valuable." The parties agreed to share information about their respective contacts. The parties agreed to keep the names and other information about the contacts confidential and further agreed not to "contact, deal with, negotiate or participate in any transactions with any of the contacts without first entering a written agreement with the Party who provided such information." As to any breach, "the Parties hereby agree that the damages associated with any violation of THIS AGREEMENT shall be determined to be 5 [percent] of the value of any properties purchased as a result of contact and/or other information being used without the consent of the disclosing Parties."

On October 6, 2010, defendant and plaintiff also entered into a referral agreement. The referral agreement was an extension of the October 4, 2010 non-circumvent agreement. Defendant agreed to pay plaintiff a referral fee of $150 per sale that was procured by defendant as a result of the introductions made by plaintiff. Payment would be due upon the sale of each property, but no later than 180 days after the properties came under contract with defendant. Both agreements were in effect for five years from the date of execution of the agreement.

The talks between the parties ultimately did not progress beyond preliminary discussions. In or around September 2013, plaintiff learned that defendant had acquired roughly 300 to 500 homes through the secondary purchaser. Plaintiff discovered that defendant had also introduced the secondary purchaser to numerous other potential investors.

B. *Procedural History*

On October 26, 2015, plaintiff filed a complaint against defendant for: breach of contract; breach of the implied covenant; fraud; concealment; intentional misrepresentation; and misappropriation of trade secrets. Defendant demurred, arguing, inter alia, that both agreements were illegal because plaintiff needed a real estate license to receive compensation under the agreements pursuant to section 10130. Plaintiff did not have a real estate license. Defendant also contended that plaintiff failed to state a misappropriation of trade secrets cause of action because plaintiff did not plead all the elements necessary for a trade secret under Civil Code section 3426.1.

Plaintiff argued it did not need a real estate license because it acted as a middleman or finder. Plaintiff asserted the agreements did not require plaintiff to act as a broker within the meaning of section 10131. Finally, plaintiff argued it had sufficiently pleaded a trade secret.

The trial court sustained defendant's demurrer to the original complaint with leave to amend. The trial court found a real estate license was required because the agreements referred to commissions and damages as a result of the purchase of real property. Plaintiff was given leave to amend to explain its exact role under the agreements. For the trade secret cause of action, the trial court found plaintiff failed to allege a trade secret that had not yet been ascertained by others in the foreclosed property industry.

On July 18, 2016, plaintiff filed its first amended complaint. Plaintiff alleged the same six causes of action. On September 8, 2016, defendant demurred. Defendant and plaintiff

repeated the arguments they raised in the previous demurrer.[2] On October 7, 2016, the trial court sustained the demurrer to the first amended complaint without leave to amend, finding the agreements had an illegal object because plaintiff did not have a required real estate license. The court sustained the demurrer as to all of plaintiff's tort claims because they were premised on the illegal agreements.

III. DISCUSSION

A. *Standard of Review*

On demurrer, we review a complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory and thus to determine whether the trial court erroneously sustained the demurrer as a matter of law. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 791; *Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152.) "The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

B. *Real Estate License and the Agreements*

"It is unlawful for any person to engage in the business of, act in the capacity of, advertise as, or assume to act as a real estate broker . . . within this state without first obtaining a real

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[2] Defendant omitted a prior argument regarding judicial estoppel relating to a bankruptcy proceeding involving plaintiff.

estate license from the department . . . ." (§ 10130; *Greenlake Capital, LLC v. Bingo Investments, LLC* (2010) 185 Cal.App.4th 731, 736 (*Greenlake Capital*).) "A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others: [¶] (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity." (§ 10131, subd. (a).)

Defendant demurred generally (Code Civ. Proc., § 430.10, subd. (e)), arguing that the agreements had an illegal object. (See Civ. Code, § 1598 ["Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void"].) We will examine each agreement to determine whether its object required plaintiff to have a real estate license.

1. Non-circumvent agreement

As noted, the non-circumvent agreement contained language indicating plaintiff was "in the business of acquiring, repositioning, financing and selling foreclosure properties acquired in bulk from banks, loan brokers and/or loan guarantors, either directly and/or indirectly through brokers or intermediaries." The agreement pertained only to "bulk purchases" of foreclosed properties and was limited to properties from certain sources. The agreement also provided for liquidated damages in the form of five percent of the value of any properties

purchased as a result of the contact or other information being used without written consent of the disclosing party. Defendant argues, and the trial court found, that this constituted plaintiff seeking compensation for activities requiring a real estate license.

We disagree. We do not find plaintiff was seeking compensation as a real estate broker under section 10131 in the non-circumvent agreement. "[A] person acts as a broker only if he or she is acting (1) for compensation and (2) on behalf of someone else." (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 204.) As alleged, plaintiff's business was purchasing foreclosed properties. Plaintiff did not require a real estate license for this business because a person acting on his or her own behalf in a real estate transaction is not a broker within the meaning of section 10131 even though he or she is performing activities regulated by the broker licensing statutes. (*Horning v. Shilberg, supra*, 130 Cal.App.4th at p. 204.)

Moreover, although the non-circumvent agreement contained language describing plaintiff's business and the future goals of the agreement, the actual terms of the agreement were not about buying or selling real properties. The non-circumvent agreement provided: each party could learn from the other its respective contacts in the foreclosed property industry; a party would not deal with another party's contact without first entering into a written agreement with the party who provided the contact; and a party would not disclose information revealed during negotiations, nor do business with any revealed contact, without obtaining the written consent of the introducing party. None of these terms involved the purchase and sale of real property for compensation on behalf of another. (See *Horning v.*

Shilberg, supra, 130 Cal.App.4th at p. 204 ["in the context of a real estate transaction, a broker's commission is predicated on an agency or employment relationship with a third party"].)

Defendant also argues the liquidated damages involved the purchase and sale of property because it was valued at "5 percent of the value of any properties purchased as a result of the contact and/or other information being used without the written consent of the disclosing [p]arties." As alleged in the complaint, the liquidated damages were not "compensation" to a real estate broker for any rendered service enumerated in section 10131. Compensation is "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." (Black's Law Dict. (10th ed. 2014) p. 342, col. 2); see also *Horning v. Shilberg, supra*, 130 Cal.App.4th at p. 204 [compensation for real estate broker is typically in form of commission].) By the agreement's terms, plaintiff was not seeking wages or a salary. The liquidated damages were not for plaintiff's selling or purchasing of real property on behalf of another. Rather, they were damages against a party for violating the non-circumvent agreement. Indeed, if a party to the non-circumvent agreement did not violate it, then no liquidated damages would be due.

In conclusion, there were no terms in the non-circumvent agreement that involved plaintiff purchasing or selling real property on behalf of another for compensation under section 10130. Plaintiff did not need a real estate license in order to enter the non-circumvent agreement.

2. Referral agreement

The referral agreement provided that defendant would pay plaintiff a fee of $150 for each property that was procured by defendant as a result of the introductions made by plaintiff in conjunction with the non-circumvent agreement. Payment would be due upon the sale of each property. The trial court found that because the referral agreement was an extension of the non-circumvent agreement, and the non-circumvent agreement had an illegal object, the referral agreement was likewise illegal. However, as indicated, the non-circumvent agreement did not require plaintiff to have a real estate license.

Here, plaintiff specifically sought a payment for each sale procured by defendant based on plaintiff's introduction. Plaintiff contends it was not involved in any real estate transactions, and merely acted as a finder or middleman. (*Rees v. Department of Real Estate* (1977) 76 Cal.App.3d 286, 295.) The finder's exception doctrine provides "that where one simply acts as an intermediary or middleman in finding and introducing two parties to a real estate transaction, he merely acts as a finder and not as a broker within the meaning of the real estate licensing laws." (*Ibid*.) To be a finder, a party's activities must be limited to arranging an introduction; if a party takes part in negotiations in any way, that party is no longer a finder but a broker. (*Ibid*.; *Greenlake Capital, supra*, 185 Cal.App.4th at p. 736.)

Assuming the allegations in the complaint are true, there was no requirement that plaintiff have a real estate license to enter into the referral agreement because there was no indication that plaintiff would act as anything other than, at most, a finder. As alleged by plaintiff, defendant enticed plaintiff to disclose its

contacts in the foreclosed property industry, namely, the secondary purchaser. The referral agreement specifically required payment by defendant for sales procured from introductions of those contacts. This would fall within a finder's exception. Accordingly, the trial court erred by sustaining the demurrer on the grounds that the agreements had an illegal object.

C. *Misappropriation of Trade Secrets*

Defendant additionally argued plaintiff failed to state a cause of action for misappropriation of trade secrets. To state a cause of action, plaintiff must allege: it owned the trade secret; at the time of misappropriation, the information was a trade secret; defendant improperly acquired, used, or disclosed the trade secret; plaintiff was harmed; and defendant's acquisition, use, or disclosure of the trade secret was a substantial factor in causing plaintiff harm. (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 41-42; CACI 4401.) Under Civil Code section 3426.1, subdivision (d), "'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Defendant argued the contacts were not trade secrets because the secondary purchaser was already generally known in the industry. Defendant cited to the allegations that the

secondary purchaser was a "large, national secondary purchaser . . . , who . . . was already making bulk purchases of foreclosed homes through a large, national primary purchaser . . . ." Additionally, "the [s]econdary [p]urchaser would offer the 'tapes' to a select group of business partners and investors. . . . These practical requirements . . . meant that the [s]econd [p]urchaser only conducted business with limited individuals/investors that the [s]econdary [p]urchaser knew could and would be able to make such purchases . . . ." Defendant argued this disclosure to the "limited individuals/investors" meant that many in the foreclosed property industry already knew the secondary purchaser's contact and information.

Plaintiff sufficiently alleged that the identity of the secondary purchaser was not generally known. "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. [Citation.] The first element is the crucial one here: in order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.'" (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251.) Plaintiff alleged that it "invested substantial time and effort to develop a relationship with the [s]econdary [p]urchaser and its representative." As a result, plaintiff acquired the identity of the secondary purchaser and the necessary requirements to work with the secondary purchaser. Consequently, plaintiff had access to the tapes offered by the secondary purchaser. Even though the secondary purchaser had disclosed its identity to several individuals and investors, there were no allegations that indicated these individuals and investors

constituted the majority of the industry such that it was general knowledge to the industry.[3] Thus, we do not find the demurrer should be sustained on this ground.

IV. DISPOSITION

The judgment is reversed. Plaintiff Main Street Partners & Associates, Inc. shall recover costs on appeal from defendant Precision Asset Management Corporation.

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KIM, J.*

We concur:

BAKER, Acting P.J. MOOR, J.

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[3] Defendant asserted in its demurrer that the secondary purchaser's information had been published in national publications, internet articles, and other media. While publication of such information may render the information "generally known" and thus no longer a trade secret (see *DVD Copy Control Assn. Inc. v. Bunner, supra*, 116 Cal.App.4th at p. 251), the pleadings are devoid of such an allegation.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.