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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JUAN PADILLA et al.,

Plaintiffs and Appellants,

v.

JEFFREY MARK MILLER et al.,

Defendants and Respondents.

B266824

(Los Angeles County
Super. Ct. No. BC556683)

APPEAL from orders of the Superior Court of Los Angeles County.

Michael L. Stern, Judge. Reversed and remanded with directions.

Schorr Law, Zachary D. Schorr, Brandon P. Brousseau for Plaintiffs and Appellants.

Webb & Beecher, Eric L. Webb, Brian G. Beecher for Defendants and Respondents.

Plaintiffs and appellants Juan and Cecilia Padilla claimed that defendants and respondents, R&LS Investments, Inc., and Jeffrey Mark Miller, breached fiduciary duties respondents owed as real estate agents. The Padillas alleged that they engaged respondents to assist in selling and buying rental properties in a manner that would defer capital gains pursuant to 26 United States Code section 1031 (a section 1031 exchange). The planned section 1031 exchange never occurred because the owner of a property identified as suitable for purchase reneged on his agreement to sell.

The trial court sustained a demurrer without leave to amend, finding that the putative seller's decision not to sell the property was unforeseeable and could not be attributed to respondents. We find that the demurrer was properly sustained because the Padillas did not adequately plead that respondents' alleged breaches caused their injury. However, because plaintiffs on appeal demonstrate a reasonable probability of amending their complaint to state a cause of action, we reverse the judgment in favor of respondents and remand the matter to the trial court.

BACKGROUND

The operative complaint

The Padillas' original complaint and first amended complaint named only the assumed seller, David Brandon, as a defendant. The Padillas pleaded breach of contract and specific performance causes of action. After apparently settling with Brandon, the Padillas dismissed him as a defendant and then filed the operative second amended complaint (SAC), adding respondents as defendants and alleging breach of fiduciary duty and negligence causes of action. The SAC alleged as follows:

In the spring of 2014, the Padillas entered into an agency relationship with respondents to list and sell property owned by the Padillas as part of a section 1031 exchange. Respondent Miller informed the Padillas that he identified a suitable replacement property to effectuate the section 1031 exchange—a property located in Hawthorne, which produced monthly rental income of approximately \$14,000.

With Miller's assistance, the Padillas offered to purchase the Hawthorne property from Brandon for \$1,550,000. Miller disclosed to the Padillas that he previously

represented Brandon in his purchase of the Hawthorne property and that he would be acting as a dual agent, representing both the Padillas and Brandon, in the transaction.

In May 2014, the Padillas reached an agreement with Brandon to sell the property to them for \$1,625,000, with a \$25,000 credit to the Padillas after close of escrow. The parties entered into a corresponding purchase agreement which provided that Brandon would convey title in August 2014.

According to the SAC, respondents then failed to perform several important escrow-related tasks. Respondents allegedly: failed to open escrow, failed to deposit the Padillas' initial deposit into escrow, and failed to inform the Padillas of the need to deposit their funds into escrow.

In June 2014, Miller allegedly recommended to the Padillas that they attempt to get more cash from escrow. He suggested that he approach Brandon with a modification to the purchase agreement reflecting a \$1,650,000 purchase price, with a \$50,000 credit to the Padillas. The Padillas followed Brandon's advice and Miller presented to Brandon an addendum to the purchase agreement reflecting the proposed modification.

Upon receipt of the addendum, Brandon "reneged on the Purchase Agreement" by refusing to sell the property to the Padillas at the price set forth in the purchase agreement. Instead, he "unilaterally raised the purchase price," providing an addendum to the purchase agreement demanding \$1,750,000 for the property.

The SAC alleged that Brandon's addendum was not effective "and therefore the Purchase Agreement with the purchase price of \$1,625,000.00 with a \$25,000.00 credit to the Padillas after the close of escrow remains in full effect." Brandon, however, refused to perform as required by the purchase agreement.

With respect to their cause of action for breach of fiduciary duty, the Padillas alleged that respondents breached fiduciary duties owed to them by: (a) failing to inform Brandon or document in the purchase agreement that the purchase was part of a planned section 1031 exchange and time was of the essence; (b) failing to timely identify alternative properties to purchase to effectuate the section 1031 exchange; (c) failing to use correct forms in connection with the purchase agreement; (d) failing to open escrow;

(e) failing to properly advise and assist the Padillas with transfer of their initial deposit into escrow; (f) engaging in self-dealing by themselves purchasing a different property that they identified as suitable for the Padillas' section 1031 exchange instead of allowing the Padillas to purchase the property; and (g) wrongfully conveying to Brandon that there "was no longer a contract" even though the purchase agreement remained in full force and effect.

The SAC alleged that, as a result of respondents' breaches, the Padillas were unable to consummate the section 1031 exchange and incurred tax liabilities in the amount of \$220,000.¹ Additionally, the Padillas lost approximately \$14,000 in monthly rental income that they would have earned had they been able to purchase the Hawthorne property.

The demurrer

In the demurrer to the SAC, respondents argued that the causes of action failed because the Padillas' alleged injury was caused by Brandon's refusal to sell, not any acts or omissions of respondents. The demurrer further contended that the Padillas' claims for damages were improperly speculative.

The trial court sustained the demurrer without leave to amend, finding that Brandon, not respondents, caused the Padillas' damages.

DISCUSSION

We review the ruling sustaining the demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We give the complaint a reasonable interpretation, assuming that all properly pleaded material facts are true, but not assuming the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

¹ Although the SAC is unclear on the matter, it appears that the Padillas sold the property they intended to sell as part of the section 1031 exchange.

A demurrer tests the legal sufficiency of the complaint. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) Accordingly, we are not concerned with the difficulties plaintiffs may have in proving the claims made in the complaint. (*Desai v. Farmers Ins. Exchange, supra*, 47 Cal.App.4th at p. 1115.) We are also unconcerned with the trial court's reasons for sustaining the demurrer, as it is the ruling, not the rationale, that is reviewable. (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631; *Sackett v. Wyatt* (1973) 32 Cal.App.3d 592, 598, fn. 2.)

I. The demurrer was properly sustained

Although the Padillas alleged two causes of action against respondents (breach of fiduciary duty and negligence), on appeal their argument focuses only on the breach of fiduciary duty claim. They have thereby forfeited any challenge to the trial court's ruling on the negligence cause of action, leaving us only to examine the breach of fiduciary duty claim. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived."].)

Real estate agents owe fiduciary duties to their clients. (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 ["The fiduciary duties of a real estate agent include the duties to obey the instructions of the client, and to provide diligent and faithful service."].) Dual agents, as respondents allegedly were here, owe fiduciary duties to both the buyer and the seller. (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1311-1312; *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414.) The existence of an agency relationship is generally a question of fact. (*Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 401.) The elements of breach of a breach of fiduciary duty claim are: the existence of such a duty, its breach, and damages proximately caused thereby. (*Thomson v. Canyon, supra*, 198 Cal.App.4th at p. 604.)

Respondents assert that the SAC failed to state facts alleging that respondents were a proximate cause of the Padillas' damages. We agree. Proximate cause requires

that a defendant's breach be a ""necessary antecedent"" of the plaintiff's injury, a concept commonly referred to as ""but for' causation." (State Dept. of State Hospitals v. Superior Court (2015) 61 Cal.4th 339, 352.) "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. . . . Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (Weissich v. County of Marin (1990) 224 Cal.App.3d 1069, 1084.)

The allegations in the SAC only identify Brandon's conduct as a cause of the Padillas' injury. According to the SAC, even after respondents' alleged failures to open escrow or deposit funds, the purchase agreement was still "in full effect," Brandon was "contractually obligated" to sell the property to the Padillas, and he "refused to perform as required." Based on the allegations, if Brandon had sold the property as contractually required, the Padillas would not have suffered any damages. The Padillas do not allege that any act or omission by respondents caused Brandon to renege on the purchase agreement or otherwise caused their alleged injury.

The trial court, therefore, properly sustained the demurrer.

II. Leave to amend

When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: . . . The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) "A plaintiff may show for the first time on appeal how amendment would cure the complaint's defects." (Kan v. Guild Mortgage Co. (2014) 230 Cal.App.4th 736, 741; see also Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 711.)

In their appellate brief, the Padillas request leave to amend to allege that respondents' actions caused Brandon to refuse to perform and thereby caused their injury. As the Padillas note, the SAC was the first iteration of the complaint in which claims were made against respondents, and the Padillas were not given the opportunity to amend the SAC.

We find that the Padillas have demonstrated a reasonable possibility of amending their complaint to state a cause of action for breach of fiduciary duty. In the SAC, the Padillas alleged that respondents “[w]rongfully convey[ed] to Brandon that there was no longer a contract when the Purchase Agreement remained in full force and effect.” Although they did not allege causation in the SAC, respondents on remand may be able to allege that respondents’ communications with Brandon caused him not to comply with the purchase agreement. A buyer agent’s act of improperly informing the selling party that an effective agreement is no longer valid could constitute a breach of fiduciary duty, and the seller’s subsequent decision not to abide by the agreement potentially would be foreseeable. (See *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 69 [generally, foreseeability is a question of fact].)

We also find that plaintiffs’ damages allegations do not prevent them from potentially stating a claim, as they have met their obligation at the pleading stage to adequately plead damages. The Padillas alleged that they “suffered monetary damages in an amount to be proven at trial and in excess of the jurisdictional minimum” of the trial court.

Respondents take issue with the SAC’s descriptions of varying measures of damages that the Padillas allegedly suffered, including tax liabilities and lost rental income. To the extent that certain types of damages are not recoverable, the proper method for disposing of the allegations would be by motion to strike, not demurrer. (See Code Civ. Proc., §§ 435, 436.) In any event, respondents’ primary argument with respect to the claimed damages is that they are too speculative. We do not decide on demurrer whether plaintiffs will be able to prove their claims, but only whether they are properly pleaded. (*Desai v. Farmers Ins. Exchange, supra*, 47 Cal.App.4th at p. 1115.) The amount of damages is generally a question of fact. (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.) The Padillas’ allegations do not support a conclusion that—should they plead and prove their case—damages are unrecoverable.

The Padillas, therefore, must be given the opportunity to amend their complaint to plead a breach of fiduciary duty cause of action against respondents.

DISPOSITION

The order of dismissal and the order sustaining without leave to amend respondents' demurrer to the second amended complaint are reversed. The matter is remanded to the trial court with directions to enter a new order (i) sustaining respondents' demurrer to the second amended complaint with leave to amend only the breach of fiduciary duty cause of action and (ii) ordering the Padillas to file their third amended complaint within 20 days.

The parties shall bear their own costs on appeal.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.