Filed 9/28/18 Gregg Ziskind & Assocs., Inc. v. Manatt, Phelps & Phillips, LLP CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GREGG ZISKIND & ASSOCIATES, INC., Plaintiff and Respondent, v. MANATT, PHELPS & PHILLIPS, LLP, Defendant and Appellant.	B287922 (Los Angeles County Super. Ct. No. SC121314)

APPEAL from a judgment of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Affirmed.

Robins Kaplan, Roman M. Silberfeld, Bernice Conn for Defendant and Appellant.

Gerard Fox Law, Gerard P. Fox, Marina V. Bogorad, for Plaintiff and Respondent.

INTRODUCTION

Gregg Ziskind (Ziskind), a legal recruiter, ran Gregg Ziskind & Associates, Inc. (GZA), a legal placement firm. Ziskind had a long-term placement relationship with law firm Manatt, Phelps & Phillips LLP (Manatt) and a long-term personal and placement relationship with Manatt partner Barbara Polsky. In 2013, at Polsky's request, Ziskind approached Donna Wilson, a partner at the Buckley Sandler law firm, to determine whether she would like to move her practice to Manatt. Ultimately, Manatt hired Wilson and her "right-hand man," Buckley Sandler counsel John McGuinness, and compensated Bobbie McMorrow, a legal recruiter not associated with GZA, and not GZA for placing the attorneys.

GZA brought an action against Manatt for breach of oral contract, quantum meruit, fraud—false promise, and unjust enrichment, and against Polsky for fraud—false promise and intentional misrepresentation. A jury found in favor of GZA on its breach of oral contract claim, awarding GZA $335,000 in damages; it did not return a verdict on GZA's quantum meruit claim; and it found in favor of Polsky on GZA's intentional misrepresentation claim.[1] Manatt appeals from the judgment and the denial of its motion for judgment notwithstanding the verdict. We affirm.

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[1] GZA withdrew its cause of action for unjust enrichment and the trial court granted non-suit and directed a verdict against GZA on the fraud—false promise causes of action against Manatt and Polsky.

BACKGROUND

Ziskind met Wilson in 2012 when GZA client law firm Baker Hostetler asked him to recruit Wilson as a lateral hire. Wilson met with Baker Hostetler, but ultimately decided to stay at Buckley Sandler.

Wilson met McMorrow in early January 2013 through a law firm consultant who was working with Buckley Sandler. At the time, Wilson was considering leaving Buckley Sandler. Wilson was impressed with McMorrow and decided to work with her in her job search.

McMorrow and Wilson discussed a list of law firms Wilson was considering. Although Manatt was on the list, Wilson prioritized large international law firms. Manatt was not an international law firm.

On February 1, 2013, Ziskind contacted Wilson about Polsky's interest in being considered for hire by Buckley Sandler. Ziskind had known Polsky for at least 30 years. They were very good friends. Three or four times, Polsky left Manatt for other law firms or in-house positions only to return to Manatt. In 1986, Ziskind represented Polsky in one of her job searches, placing her at Occidental Petroleum. Over the years, Ziskind submitted Polsky to a number of law firms as a candidate for hire.

Buckley Sandler was interested in Polsky. While Buckley Sandler was recruiting Polsky, Manatt asked Polsky to be the co-head of its banking department, a "huge" professional development for Polsky. In mid-February, Polsky informed Ziskind of Manatt's offer, saying it "may be too good to turn down."

Polsky told Ziskind she would like to explain to Wilson what was going on. Ziskind agreed, adding that if Polsky thought Wilson would be a good addition to Manatt and would like to solicit her, he would like to be allowed to make the introduction to Manatt as he had introduced Polsky and Wilson. On February 23, 2013, Polsky emailed Wilson and told Wilson of her decision to stay at Manatt.

On April 3, 2013, Polsky called Ziskind and told him that Manatt wanted him to recruit Wilson. She said that Manatt would make Wilson the head of a new practice area. Polsky set up a meeting with Ziskind the next day to provide him with information about Manatt that he could use in his recruitment of Wilson. Ziskind understood his recruitment of Wilson was nonexclusive.

On April 5, 2013, Ziskind sent an email to Wilson stating that Polsky had asked him to approach her about joining Manatt and that Manatt was prepared to create a leadership role for Wilson in a separate firmwide privacy and data security group. Ziskind explained that Polsky knew Wilson was not actively in the market to explore other firms, but Polsky believed Manatt might offer Wilson a better platform than Buckley Sandler to expand her practice. Ziskind said Polsky had suggested that Wilson participate in an initial, informal meeting with Polsky and Manatt managing partner William Quicksilver to discuss Manatt's strategic vision and the role they envisioned for her at the firm. Ziskind concluded by telling Wilson that if she was interested in such a meeting, he would be happy to arrange it.

On April 11, 2013, Ziskind emailed Polsky, informing her of his email soliciting Wilson for Manatt. Because he had not heard back from Wilson, he had called her that day. Wilson seemed to

be extremely busy and apologized for not responding as she had not had a chance to consider his email fully. Ziskind told Polsky he did not know how to interpret his brief conversation with Wilson, but he was encouraged because Wilson had the opportunity to decline to proceed with Manatt, but chose not to do so. The next day Polsky responded, "That's good. Thanks."

On April 15, 2013, Wilson responded to Ziskind's email. Even though she was already working with McMorrow, Wilson stated Ziskind was correct, she was not on the market and was "standing pat" at Buckley Sandler for the foreseeable future. That being said, she would be happy to meet with Polsky and Quicksilver to discuss "networking and referral opportunities" for their two firms.

Wilson had discussed Ziskind's April 5, 2013, email with McMorrow and asked her how to "handle it." McMorrow told her that if she did not want to work with Ziskind, she should "decline it." Wilson testified that she falsely told Ziskind she was staying at Buckley Sandler because she did not want to work with him and did not want to hurt his feelings. She did not want to tell him she was on the market because she did not want Buckley Sandler to find out.

Ziskind viewed Wilson's statement that she would be happy to meet with Polsky and Quicksilver as "standard operating practice" and a "cover" for a partner who is looking to move to another firm. It was for him a "touchdown" and a "home run." He had given Wilson a detailed pitch and she was going to meet with Manatt's managing partner.

Scott Love, Ziskind's expert witness on recruiting, testified that even though Wilson said she was not on the market, "no partner is ever on the market." He explained that partners are

reluctant to say they are looking to move to a new firm because if they are known to be on the market it can cause clients to leave. Also, as a negotiating tactic, it is better to be courted than to court a new firm. He opined that Wilson's statement that she would be happy to meet with the Manatt partners was a "clear indication of interest." Ziskind had succeeded in getting Wilson to agree to a meeting.

Ziskind sent Polsky an email and attached Wilson's response. Ziskind said he was disappointed that Wilson declined to go forward at that time, but he looked at "this as simply the first salvo in an ongoing effort to convince her that she would be well-served in considering Manatt if her thinking and/or circumstances were to change." He explained that in his experience when initial solicitations are unsuccessful, the key to achieving recruiting success ultimately is to develop a strong, trusting relationship. He suggested that an informal meeting between Wilson, Polsky, and Quicksilver was an appropriate next step. He explained, "the key, of course, is to keep the dialogue and the relationship going while you continue to familiarize her with Manatt and inspire her with your vision for her, however subtely [*sic*]." Ziskind asked for Polsky's "thoughts."

Ziskind expected Polsky to contact him about setting up a meeting with Wilson and Quicksilver, but she never did. Polsky did not respond to Ziskind with her "thoughts" because she believed, based on Ziskind's emails, that Wilson was not interested in moving to Manatt.

In May 2013, McMorrow called Quicksilver to tell him about Wilson. McMorrow and Quicksilver were social friends.

On May 5, 2013, Wilson emailed Polsky to invite her to lunch. The purpose of the lunch was to inform Polsky that

Wilson planned to approach Manatt and she was not using Ziskind as her recruiter. Polsky was unavailable and Wilson's email did not lead to a get-together between Polsky and Wilson. Wilson did not speak with Polsky about interviewing with Manatt until before Wilson's on-site interview.

Wilson met with Quicksilver around May 14, 2013. On June 3, 2013, Quicksilver told Polsky that Wilson was interviewing at Manatt and was being represented by McMorrow. Polsky then advised Quicksilver that Ziskind had introduced her to Wilson when she interviewed at Buckley Sandler and that Ziskind subsequently suggested to Polsky that he (Ziskind) could "reach out" to Wilson and convince her to retain him to present her to Manatt.

Wilson accepted a position with Manatt around July 9, 2013. McMorrow helped Wilson fill out her lateral partnership questionnaire and negotiated Wilson's compensation at Manatt.

Within several weeks of Wilson joining Manatt, McGuinness also joined Manatt. McGuinness was working with McMorrow. McGuinness was Wilson's "right-hand man" or "first lieutenant." Although McGuinness's decision to leave Buckley Sandler had nothing to do with Wilson and, to his knowledge, his negotiation with Manatt was not contingent on Wilson joining Manatt, Manatt considered Wilson and McGuinness to be a group for recruiting purposes.

According to McMorrow, although Wilson and McGuinness were separate placements, she sent Manatt a single invoice for both. Manatt paid McMorrow a total of $335,000 for placing Wilson and McGuinness.

On July 10, 2013, before Manatt announced Wilson's hiring, Polsky texted Wilson telling her that she wanted to tell

Ziskind about the hiring, saying, "He should hear it from me." She did not want him to learn about it in the paper. Polsky wanted to let Ziskind know that Wilson had been placed at Manatt by someone else and believed he would be hurt.

Polsky also asked Quicksilver if she could inform Ziskind that Wilson was joining Manatt. Quicksilver gave Polsky permission to inform Ziskind that Wilson was joining Manatt.

Polsky called Ziskind and said, "'I'm calling because there's something that I want to tell you personally. You are going to learn tomorrow in the newspaper, in the Daily Journal, that we have hired Donna Wilson, but not through you, through another recruiter.'" She said it was her fault.

Ziskind responded that he would have to tell Manatt that he was responsible for introducing Wilson to the firm and that it was he who was entitled to a fee. Polsky begged Ziskind not to contact Manatt and not to sue her or the firm. Ziskind responded that he was owed a fee for Wilson's placement. Polsky said, "But they'll be mad at me."

GZA brought an action against Manatt and Polsky. GZA's case was tried to a jury. The jury found that Polsky acted as Manatt's authorized and ostensible agent when she met with Ziskind in April 2013 to discuss Wilson. It further found that GZA and Manatt entered into a contract; that GZA did not do all, or substantially all, of the significant things that the contract required it to do; and that GZA's performance was excused. The jury found that all the conditions that were required for Manatt's performance had occurred and that Manatt failed to do something that the contract required it to do. It found that Polsky did not make a false representation of fact to Ziskind.

DISCUSSION

I. Standards of Review

When a party contends insufficient evidence supports the jury's finding, we apply the substantial evidence standard of review. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 (*Bickel*), superseded by statute on another ground as noted in *DeBerard Properties v. Lim* (1999) 20 Cal.4th 659, 668.) Applying that standard, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Bickel, supra,* 16 Cal.4th at p. 1053; *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 [under the deferential substantial evidence standard of review, we liberally construe findings of fact to support the judgment].)

Our power "'begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.'" (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503.) "A single witness's testimony may constitute substantial evidence to support a finding. [Citation.] It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility." (*Thompson v. Asimos, supra,* 6 Cal.App.5th at p. 981.) "'When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the [jury].'" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

We review de novo the legal adequacy of jury instructions. (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.)

In reviewing a claim that the trial court improperly refused a requested instruction, we review the evidence in the light most favorable to the appellant. (*Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 754 (*Alcala)*.) "In such cases, we assume that the jury might have believed the evidence upon which the instruction favorable to the appellant was predicated. [Citations.]" (*Ibid.*)

II. Substantial Evidence Supports the Jury's Findings That a Contract Was Formed and That All the Conditions for Manatt's Performance Occurred

Manatt contends there is not substantial evidence to support the jury's finding that Manatt and GZA entered into an oral contract and that all the conditions that were required for Manatt's performance of the contract occurred. Manatt argues that Wilson's consent to work with Ziskind was a condition precedent to contract formation. Manatt further argues that Ziskind never introduced Wilson to Manatt as a potential partner candidate, another condition precedent to Manatt's performance. We disagree that Wilson's consent was a condition precedent to contract formation; the jury found that Ziskind's performance of the contract was excused.

A. There is Substantial Evidence That Wilson's Consent Was Not a Condition Precedent to the Formation of a Contract Between Manatt and GZA

Manatt contends that Ziskind had to obtain Wilson's consent to work with him as a condition precedent to the

formation of a contract between Manatt and GZA. When she did not give her consent, "the contract ceased to exist." There is substantial evidence that Wilson's consent was not a condition precedent to contract formation.

When "two parties execute a contract with the understanding that the approval of a third party is necessary for the agreement to take effect, the contract is not complete until the third party has approved. Until that happens neither party is bound by the agreement." (*Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332* (1974) 40 Cal.App.3d 431, 436.)

In the mid-1980s, Ziskind drafted the Code of Ethics for the National Association of Legal Search Consultants (NALSC). The code of ethics includes the following admonition: "Candidates shall be referred to employers only with the candidates' express prior consent." Manatt contends this ethical duty imposed on Ziskind the requirement that he obtain Wilson's consent to be presented to Manatt before he could earn a recruiting fee if Manatt hired Wilson.

Ziskind, however, testified that in a "targeted search," where a law firm hires a recruiter to contact a specific attorney, the prior consent requirement in the NALSC code of ethics does not apply. Thus, when Manatt hired Ziskind to "reach out" to Wilson for employment, he did not need Wilson's consent to contact her. Love confirmed Ziskind's testimony, testifying that the consent requirement in the NALSC ethics code did not apply to the targeted search Manatt hired Ziskind to perform. Ziskind's and Love's testimony is substantial evidence that Wilson's consent was not a condition precedent to the formation of a contract between Manatt and GZA.

Manatt characterizes Ziskind's and Love's testimony as "implausible" and "nothing but 'a mere scintilla of evidence'" that contradicts California law.[2] Ziskind drafted the code of ethics for the NALSC and Love was an expert on legal recruiting. Their testimony was neither implausible nor a mere scintilla of evidence. The jury was entitled to credit Ziskind's and Love's testimony that the prior consent of a candidate is not required when a recruiter performs a targeted search for a law firm.

B. Substantial Evidence Supports the Jury's Finding that Ziskind's Performance of the Contract, Including Any Required Introduction of Wilson to Manatt, Was Excused

Manatt contends Ziskind's failure to introduce Wilson to Manatt as a potential partner candidate relieved it of its duty to perform. Unless and until Ziskind made that introduction, Manatt argues, it had no opportunity to hire Wilson and no obligation to pay GZA.

The jury found that GZA did not do all, or substantially all, of the significant things that its contract with Manatt required it to do. It also found that GZA was excused from doing all, or substantially all, of the significant things the contract required it to do. Thus, to the extent the contract required GZA to introduce Wilson to Manatt, the jury found GZA's performance was

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[2] Manatt does not identify the California authority that Ziskind's and Love's testimony allegedly contradicts. That is, Manatt cites no authority for the proposition that a legal recruiter hired to perform a targeted search must have the consent of the targeted candidate.

excused. We hold below that substantial evidence supports the jury's finding.

III. Substantial Evidence Supports the Jury's Finding That GZA Was Excused From Performing Its Contract With Manatt

Manatt argues that there is not substantial evidence to support the jury's finding that GZA's performance was excused. Substantial evidence supports the finding.

"A party to a contract cannot take advantage of [its] own act or omission to escape liability thereon. Where a party to a contract prevents the fulfillment of a condition or its performance by the adverse party, [it] cannot rely on such condition to defeat [its] liability." (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1006, internal quotation marks and citations omitted.)

The trial court instructed the jury on excuse as follows:

"If you determine that Gregg Ziskind & Associates did not do all or substantially all of the significant things that the contract required Ziskind to do, you should then consider whether Ziskind's failure to do these things should be excused.

"If Manatt prevented, hindered or unfairly interfered with Ziskind's ability to do the things it was required to do, or if Manatt materially breached the contract, or if unforeseen circumstances made it impractical for Ziskind to do the things it was required to do, then Ziskind's failure to do all or substantially all of the significant things that the contract required it to do are excused."

There is substantial evidence that Manatt prevented, hindered, or unfairly interfered with Ziskind's ability to perform under the contract. Through Polsky, Manatt hired Ziskind to recruit Wilson. Ziskind contacted Wilson and told her of Manatt's interest. Wilson expressed a willingness to meet with Polsky and Quicksilver. Ziskind informed Polsky of Wilson's willingness to meet with her and Quicksilver and asked what her thoughts were. Polsky neither set up the meeting herself nor asked Ziskind to do so. Instead, Manatt worked with McMorrow to recruit Wilson. When Polsky learned that Manatt had hired Wilson, she displayed a guilty conscience – she believed Ziskind would be hurt that Wilson had been placed at Manatt by someone else and asked Wilson and Quicksilver if she could inform Ziskind of Wilson's hiring before he heard about it in the paper. When Polsky informed Ziskind of Wilson's hiring at Manatt through another recruiter, she said it was her fault, further displaying a guilty conscience.

Manatt argues that because its contract with Ziskind was nonexclusive it had no duty to disclose to him its work with McMorrow. Manatt also argues that the parties' nonexclusive contract could not prohibit it from working with another recruiter or impose on it a duty to tell Ziskind when another recruiter introduced Wilson to the firm. We agree. None of these points, however, convinces us that there was not substantial evidence supporting the jury's excuse finding.

Manatt points to cases holding that when a real estate broker (citing *Shiro v. Parker* (1955) 137 Cal.App.2d 503 (*Shiro*) and *Elms v. Merryman Fruit, Land & Lumber Co.* (1929) 207 Cal. 747 (*Elms*)) or an entertainment agent (citing *Lichtig & Rothwell, Inc. v. Holubar* (1926) 78 Cal.App. 511 (*Lichtig*)) is given a

nonexclusive contract to achieve some result, that party is not entitled to compensation if someone else achieves the result.

Shiro, *Elms*, and *Lichtig* rely on the holding in *Sessions v. Pacific Improvement Co.* (1922) 57 Cal.App. 1, 17 (*Sessions*) that "[t]o constitute himself the *causa causans*, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his peculiar activities." (*Ibid.*)

The rule stated in *Sessions* remains part of California law. (See *Westside Estate Agency, Inc. v. Randall* (2016) 6 Cal.App.5th 317, 331 ["Westside is not entitled to the commission because it is not the procuring cause of the sale that ultimately went through"], citing *Sessions*, *supra*, 57 Cal.App. at p. 17.) "While the most common type of case to which this rule has been applied is that of a real estate broker or agent [citations], the principle has been applied in other agency situations" including actions "to recover merchandise sales commissions," an "action to recover [a] commission upon obtaining radio advertising contracts," and an "action to recover [a] commission for procuring the professional engagement of an act[or]." (*Chamberlain v. Abeles* (1948) 88 Cal.App.2d 291, 296, citations omitted.)

GZA asserts Manatt's reliance on this line of cases is misplaced because "the legal recruiting industry adheres to its own customs and practices, which set their own standard for one's entitlement to a recruiting fee." It is true that "[u]sage or custom may be looked to, both to explain the meaning of language and to imply terms, where no contrary intent appears

from the terms of the contract." (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114 ["Custom and usage in the entertainment industry . . . may become part of the oral agreement between the parties to explain whether Howard was entitled to receive posttermination compensation"].)

But GZA is incorrect in asserting its expert's testimony about industry custom and practice proved GZA "completed its assignment and thus earned its placement fee . . . ." As noted, the jury found GZA did not "do all, or substantially all, of the significant things that the contract required it to do." The jury found, instead, that GZA's performance was excused. Therefore, the jury evidently rejected the expert's testimony about industry custom and practice concerning the standard for a legal recruiter's entitlement to a placement fee.

Nonetheless, the rule of *Sessions*, *supra*, 57 Cal.App. 1 and its progeny includes an exception that applies here. As *Shiro* explains, "'Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his effort, *without fault or interference of the owner*, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual, at the price and upon the terms which the property was originally offered for sale.'" (*Shiro, supra,* 137 Cal.App.2d at p. 507, italics added.)

Here, unlike in *Shiro*, *Elms*, or *Lichtig*, substantial evidence was presented that GZA failed in its effort due to the

"fault or interference" of Manatt. Accordingly, these cases do not change our conclusion that substantial evidence supports the jury's finding that GZA's performance was excused.

IV. Manatt's Requested Jury Instructions

Manatt contends the trial court erred when it refused Manatt's requested instructions on conditions precedent. The trial court did not err; even if the court erred, no prejudice resulted.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) "The court's duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision. [Citation.] A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the court correctly gives the substance of the applicable law. [Citation.]" (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553; see *Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 743 [a trial court's refusal to give a requested instruction is not error if the subject matter of the requested instruction is substantially covered by the instructions given].)

A judgment may not be reversed on appeal due to instructional error unless the appellant demonstrates the error caused a miscarriage of justice. (Cal. Const., art. VI, § 13; *Soule, supra,* 8 Cal.4th at p. 574.) "'Instructional error in a civil case is prejudicial "[w]here it seems probable" that the error

prejudicially affected the verdict. [Citation.] It is not enough that there may have been a "mere possibility" of prejudice. [Citation].' [Citation.] 'Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' [Citation.]" (*Alcala, supra,* 167 Cal.App.4th at p. 755.)

Manatt asked the trial court to instruct the jury with the following three special instructions:

No. 1: "When a contract is formed with the understanding that the approval of a third person is necessary for the contract to take effect, the contract is not complete until the third person approves it. Until that happens no person is bound by the contract."

No. 2: "Where a defendant's duty to perform under a contract is conditioned on the happening of some event, the plaintiff must prove the event happened."

No. 3: "Where a contract condition, such as approval of a third person, has not come to pass, defendants have no duty to perform the contract."

The trial court refused the instructions. Instead, it instructed the jury with CACI No. 321 as follows:

"Manatt claims that the alleged contract with Ziskind provides that it was not required to pay Ziskind for trying to recruit Donna Wilson unless Donna Wilson consented to having Ziskind as her representative. Manatt must prove that the parties agreed to this condition. If Manatt proves this, then Ziskind must prove that he received consent from Donna Wilson to act as her representative during her recruitment.

"If Ziskind does not prove that he received consent from Donna Wilson to act as her representative during her recruitment, then Manatt was not required to pay Ziskind for recruiting Donna Wilson to Manatt."

Manatt complains that CACI No. 321 did not "tell the jury that if the predicate event—[Wilson]'s consent—does not occur, no contract is formed. It does not instruct the jury that Manatt had no duty to perform if Ziskind never introduced [Wilson] to Manatt."

CACI No. 321 addressed Manatt's consent concerns, making clear to the jury that if it found Wilson's consent was required, then GZA could not prevail without proving Wilson consented. Manatt's contention that Ziskind had to introduce Wilson to Manatt to prevail was addressed in another instruction that provided: "To recover damages from Manatt for breach of contract, Ziskind must prove all of the following: . . . that Ziskind did all or substantially all of the significant things that the oral contract required it to do, except those things that Ziskind was excused from doing . . . ."

Manatt's instructional error argument also fails because it has not explained how the asserted errors were prejudicial. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["[O]ur duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice. [Citations.]"].) Manatt's entire prejudice argument is: "It was prejudicial error for the trial court to refuse Defendants' requested special

instructions on contract formation." This does not prove prejudice.

DISPOSITION

The judgment is affirmed. GZA is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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