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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EMILE YOUNAN,

Plaintiff and Appellant,

v.

VICTOR F. IBRAHIM et al.,

Defendants and
Respondents.

B261179

(Los Angeles County
Super. Ct. No. LC099958)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Jr., Judge. Affirmed as modified.

Simone & Roos and Martin Simone for Plaintiff and Appellant.

Lee Green & Stewart and Noah Green for Defendants
and Respondents.

After a bench trial, the trial court awarded Emile Younan an interest in real property of which Victor F. Ibrahim is the record owner, and also required Younan to pay past due obligations to Ibrahim. Younan appeals, and we affirm the judgment as modified.

BACKGROUND

Evidence at trial

Younan testified that in 2009 he moved into 8520 Woodley Avenue in North Hills (the Woodley property) which also served as an office for a business Younan owned with Arej and Zeina Zeitouni.¹ Younan contributed money to help Nazek and Arej Zeitouni, who were in default on the mortgage secured by the Woodley property. Younan had lived there previously in 1998, when he originally bought the property.

Younan proposed to his old friend Ibrahim that they partner to buy the Woodley Property at a short sale. The two reached an oral agreement that Ibrahim would use his

¹ There is no reporter's transcript. Younan did not include his complaint or Ibrahim's unlawful detainer cross-complaint in the record on appeal. We therefore must base our description of the facts on the parties' settled statement approved January 29, 2016, which lacks some clarifying details, and the trial court's October 6, 2014 statement of decision.

good credit to negotiate the short sale with a conventional mortgage of up to \$400,000, with Younan paying any amount over \$400,000. Because Younan had bad credit Ibrahim would take title in his name alone, but Younan and Ibrahim would be equal fifty-fifty partners, with Ibrahim holding Younan's 50 percent ownership interest in trust. Younan agreed to pay a 10 percent down payment, and Ibrahim agreed to obtain a conventional mortgage for the balance. Younan would pay the real property taxes, insurance, and mortgage payments. They agreed to hold the Woodley property for at least five years until the market regained value.

Ibrahim convinced Younan to allow Linda Giovacchini, Ibrahim's girlfriend and a licensed real estate agent, to represent Nazek and Arej Zeitouni in the short sale negotiations, with Younan as an intermediary. Younan gave Ibrahim \$5,000 toward the down payment. While Younan was on a trip to Egypt, Ibrahim told him the short sale price was \$400,000, but the bank now required a 20 percent down payment (of which Ibrahim promised to pay half), and Ibrahim would have to get a hard money loan. On August 20, 2010, Giovacchini emailed Younan that Ibrahim had a hard money loan for \$325,000 and had deposited \$80,000 into escrow as a down payment. After Ibrahim told Younan that escrow would close as soon as Younan paid an additional \$5,000 to clear title, Younan had \$5,000 in cash hand delivered to Ibrahim. Younan contributed a total of \$40,000 (advanced to him by Ibrahim) to the down payment.

When Younan returned from Egypt in September 2010, Ibrahim told him escrow had just closed. Younan paid Ibrahim \$4,150 each month (\$3,250 in interest on the hard money loan and \$900 for taxes and insurance) until October 2012. In addition to the \$40,000 down payment, Younan contributed \$15,000 to clear a second lien, and \$5,000 to the Zeitounis' business, all in cash.

In March and May 2011, Ibrahim loaned Younan a total of \$40,000, which Younan used for his business payroll. Younan paid \$19,600 in interest. Younan also asked Ibrahim to refinance the hard money loan, but Ibrahim claimed he had money issues and could not refinance.

In October 2012, Younan learned that the taxes due on the Woodley property were \$3,000 less than Ibrahim had told him. He also learned from a property profile that the short sale price for the Woodley property was \$325,000, not \$400,000; in January 2011, Ibrahim had opened a home equity line of credit for \$203,500; and escrow had closed on August 17, 2010 (before Younan had the \$5,000 in cash hand delivered). Younan told Ibrahim he would stop his monthly payments until Ibrahim gave him all the paperwork on the Woodley property.

In January 2013, Ibrahim told Younan he had not taken out a mortgage to buy the Woodley property, but instead paid \$325,000 out of his personal funds for the short sale.

Younan testified he was never a tenant paying rent, and he and Ibrahim always agreed they owned the Woodley property fifty-fifty.

In stark contrast, Ibrahim testified that he purchased the Woodley property for himself alone, and he alone owned it. He had no joint ownership agreement with Younan. Instead, he had proposed that Younan lease the property with a \$40,000 option to buy it for \$400,000 within a year. Younan did not fully pay for the option until February 2011, after which Ibrahim loaned Younan \$40,000, which Younan repaid (without interest) by October 2012. Ibrahim rented the property to Younan for \$4,150 a month. He never told Younan he bought the Woodley property outright. In 2011, Ibrahim obtained the \$203,500 home equity line of credit, drew down the entire amount, and kept the money for himself.

Linda Giovacchini testified that she represented only the Zeitounis with regard to the property; her August 20, 2011 email to Younan recounted Ibrahim's² statements to her and she did not know if they were true; and she knew nothing about any agreement.

Younan's girlfriend testified she delivered \$40,000 to Ibrahim in August 2010 before escrow closed. She knew

² The settled statement states that Giovacchini recounted Younan's words in her email *to Younan*, but it is clear the trial court meant to state that the description of the purported loan and down payment came from her boyfriend Ibrahim.

about the agreement between Younan and Ibrahim, and she lived at the Woodley property, paying no rent.

Another woman (Younan's ex-girlfriend) testified that she had lived at the Woodley property since 2011. She loaned Younan \$20,000 to give to Ibrahim as a down payment for the short sale. She paid \$1,100 in rent to Younan, which Younan included in his monthly payment to Ibrahim.

Statement of decision (October 6, 2014)

After considering objections, the trial court filed an 11-page statement of decision on October 6, 2014.

Facts

Younan's complaint alleged causes of action for breach of fiduciary duty, fraud, constructive fraud, conversion, breach of contract, accounting, declaratory and injunctive relief, a violation of Penal Code section 496, subdivision (a),³ and constructive trust. Ibrahim filed an unlawful detainer cross-complaint against Younan and unnamed tenants, seeking possession of the Woodley property and unpaid rents.

In 2010, Younan was about to be evicted from the Woodley property, then owned by the Zeitounis, who faced foreclosure. Younan convinced Ibrahim to agree to use his good credit to negotiate a short sale, with a conventional mortgage for less than the outstanding balance. Younan

³ All further statutory references are to the Penal Code.

agreed to contribute a 10 percent down payment, escrow costs, taxes, and insurance (\$900), and \$1,100 toward the \$3,250 monthly mortgage payment, with the rest to come from tenant rents. In exchange, Younan would reside in and work at the Woodley property with the option to buy Ibrahim out after a year for not more than \$400,000, with Younan and Ibrahim splitting fifty-fifty any equity in excess of \$400,000 or the amount paid by Ibrahim.

“[A] fairly sordid series of double-crosses, intentional and unintentional misunderstandings, and the eventual collapse of all relations between the parties” followed. Ibrahim convinced Younan to use Giovacchini to represent the Zeitounis. In August 2010, Ibrahim bought the property not with a mortgage loan but with \$325,000 of his own resources. Escrow was delayed until Z&Z, Inc. paid \$5,000 or \$5,400 owed to the secretary of state. Younan paid Ibrahim \$4,150 a month (tenant rents, Younan’s contribution toward the purported mortgage, and taxes and insurance).

At trial, Ibrahim first denied any agreement with Younan, contending he was Younan’s landlord and Younan was delinquent on the rent. Ibrahim then acknowledged (with no documentary support) that he and Younan had an understanding or “‘plans,’ ” and Younan was a tenant, a tenant with a side option to buy, or someone to find a straw buyer to purchase the Woodley property from Ibrahim.

Ibrahim did not tell Younan or Giovacchini that he bought the property outright, and inflated the amount due on taxes and insurance to make income from the property.

Younan paid Ibrahim \$20,000 for what he believed were escrow costs, liens, and the amount the Zeitounis owed to the secretary of state. He also paid Ibrahim \$40,000 toward what he believed was the required 20 percent down payment. When Younan had cash flow problems, he twice borrowed \$20,000 from Ibrahim at usurious interest rates (lying about why he needed the money), which he eventually paid back in full.

When Ibrahim could not refinance, Younan learned that Ibrahim had obtained the \$205,000 home equity line of credit. Younan also discovered that he was overpaying for taxes and insurance and that the purchase price was \$325,000 without any loan. Younan stopped all payments to Ibrahim in October 2012.⁴

⁴ The trial court stated: “Younan’s decision to stop payment closely resembles Younan’s past efforts to avoid payments to others Younan had convinced to serve as straw purchasers of the property, including the Zeitounis, Simon Abdelmalek and Sameh Abo Hemila. Each of these straw purchasers appeared to the court to have been less than credible and nefarious characters in their own right. In each case, Younan stopped paying his obligations to the home purchaser. All of these failed transactions occurred after Younan, a previous owner of the property, nearly lost the home to foreclosure. Since Ibrahim offered testimony from two of these characters, the court infers that he was aware of

Ibrahim initiated eviction proceedings and an unlawful detainer action. Younan gave no good reason for failing to forward the other tenants' rents to Ibrahim.

"[W]hile Younan and Ibrahim play fast and loose with the truth, the court finds a string of truth (with contemporaneous emails and other documentary support) in the Younan scenario that render Younan more credible than Ibrahim, and proves his case by clear and convincing evidence."

Legal conclusions

"[S]eek[ing] to do equity," given the terms of the joint venture agreement and its undermining by both parties, the court concluded: *Ibrahim breached his fiduciary duty.* Ibrahim and Younan formed a joint venture to purchase and sell the Woodley property for a profit to be divided equally. Each had an ownership interest and shared control, with Younan in charge of collecting rents, improving the property, and selecting tenants. Ibrahim breached the fiduciary duty he owed to Younan as a joint venture member.

Ibrahim defrauded Younan. Ibrahim lied to Younan about the hard money loan, the 20 percent down payment, and the amount of taxes and interest due. Younan relied on these misrepresentations to his detriment. There was no oppression or malice and therefore no punitive damages.

their history with Younan before Ibrahim agreed to undertake the transaction at issue in this case."

Ibrahim committed constructive fraud when he breached his fiduciary duty to gain an advantage and misled Younan to his prejudice.

Ibrahim converted Younan's interest in the joint venture by making the misrepresentations. Younan's interest was not 50 percent, however, because he paid only \$60,000 in lump sum payments, with additional equity of \$15,360, the amount of the excess Younan paid each month for taxes and insurance (\$320) over 48 monthly payments from October 1, 2010 to September 30, 2014. His total equity was \$75,360, or 23.19 percent of the \$325,000 paid for the Woodley property.

Ibrahim breached material terms of the joint venture agreement, as described above.

Declaratory relief: Younan and Ibrahim were the members of a joint venture whose asset was the property. Younan's interest in the property was 23.19 percent (to be held in a constructive trust), and Ibrahim's 76.81 percent. If the parties did not buy each other out within 90 days, the court ordered that a receiver sell the property with the first \$265,000 to Ibrahim, the next \$60,000 to Younan, and the remainder split 76.81 percent (Ibrahim) and 23.19 percent (Younan). Each of the two tenants was to pay \$1,100 monthly rent to Younan, and Younan was to pay \$1,050 "for rent going forward," for deposit into a lockbox account. Ibrahim alone was entitled to the payments, although Younan would continue to accrue a proportionate share in

the property consistent with his monthly payments of \$1,050.

Injunctive relief: The court enjoined Ibrahim and Younan from encumbering the property, except as necessary to allow Ibrahim to purchase Younan's interest. Younan owed \$47,350 to Ibrahim as payment for unpaid rents and sums due.

Section 496, subdivision (a) is not applicable.

Ibrahim's unlawful detainer action: The court ruled in favor of Ibrahim on unpaid rent but in favor of Younan on possession. Ibrahim could not evict Younan or any other tenants in the absence of future nonpayment. Younan owed Ibrahim unpaid rents or agreed payment obligations of \$60,850; after the release to Ibrahim's attorney's trust account of a \$47,350 bond (for unpaid rent) posted in August 2013, Younan must pay the remaining balance upon the sale of the property or within 180 days, whichever first occurred.

Giovacchini: The court found that Giovacchini did not owe a fiduciary duty to Younan, so her statements protecting Ibrahim's version of the facts were not actionable. The court found in favor of Giovacchini on all causes of action.

Judgment consistent with these legal conclusions was filed on October 21, 2014, and Younan filed this timely appeal.

DISCUSSION

I. Damages award

A. *23.19 percent to 76.81 percent split*

Younan argues that the court found that a joint venture existed, which initially provided for a fifty-fifty division of any equity in excess of \$400,000 if Younan exercised his option to buy out Ibrahim's interest in the Woodley property after a year. He contends that finding required the court to award him as contract damages a half-interest in the Woodley property, and it was legal error to award him an interest only in proportion to his investment (23.19 percent). We disagree.

To recover damages for a breach of an oral contract, a plaintiff must prove his performance of his obligations or an excuse for nonperformance. (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 445, 447.) Younan did not do so. He characterizes himself as having fully performed his joint venture obligations until he discovered Ibrahim's fraud, and claims thereafter his noncompliance was "legally excused and justified." But the trial court found that when Younan stopped making the agreed-upon monthly payments, he kept the \$2,200 a month rent paid to him by the subtenants with no justification, and characterized both parties as undermining the joint venture agreement. As Younan did not perform or excuse his nonperformance, he was not entitled to the full benefit of the oral bargain, and the court was entitled to make an equitable division.

B. *Home equity line of credit*

Younan points out, and Ibrahim concedes, that the trial court statement of decision and judgment failed to account for the home equity line of credit on the Woodley property Ibrahim took out without Younan's knowledge. Ibrahim states that the line of credit is his sole and separate responsibility and the outstanding balance is the full amount of \$203,500, but acknowledges no evidence was presented on this issue at trial. At oral argument, Ibrahim's counsel agreed that the outstanding balance of the home equity line of credit should be taken into account in the division of the profits in the event of sale of the Woodley property by a receiver. No new factual findings or discretionary decisions by the trial court are necessary. We therefore will direct the trial court to modify the judgment to provide that in the event the Woodley property is sold by a receiver, Younan shall recover his 23.19 percent share of the final pre-sale balance of the home equity line of credit before any other distribution is made to the parties as provided in the judgment. This is consistent with the trial court's decision to do equity.⁵

II. Section 496, subdivision (a)

Younan argues that the trial court was wrong to find

⁵ We agree with Younan that paragraph (L) of the judgment contains a mathematical error. The judgment also must be modified to provide that Younan's continuing monthly payments due to Ibrahim total \$3,830 rather than \$3,880.

section 496 inapplicable, citing *Bell v. Feibush* (2013) 212 Cal.App.4th 1041 (*Bell*). The trial court was correct.

Section 496, subdivision (a) provides: “Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained” shall be punished by imprisonment. Subdivision (c) provides: “Any person who has been injured by a violation of subdivision (a) . . . may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney fees.”

In *Bell, supra*, 212 Cal.App.4th 1041 the plaintiff presented evidence that the defendant induced her to loan him \$202,500 on the false pretense that he owned a trademark and needed the money to settle a lawsuit so he could make millions with a business using the trademark. His representations were false and the “business was a scam. When Bell asked for her money back, Feibush gave her a ‘litany of excuses,’ and never repaid her.” (*Id.* at pp. 1043–1044.) The trial court entered a default judgment in Bell’s favor, awarding (among other damages) treble damages under subdivision (c). *Bell* affirmed the award of treble damages, holding that a “criminal conviction . . . is not a prerequisite to recovery of treble damages by any person injured by a violation of section 496[, subdivision] (a).” (*Id.* at p. 1046.) *Bell* also concluded that section 484 provides that any person is guilty of “theft” who “shall knowingly and designedly, by any false or fraudulent

representation or pretence, defraud any other person of money, labor or real or personal property,” (*id.* at p. 1048, italics omitted) and “[s]ection 484 thus defines theft to include theft by false pretense.” (*Ibid.*) Bell could not, however, recover damages for breach of contract and fraud when she also received treble damages under section 496, subdivision (c) for theft by false pretenses, as that would constitute a double recovery. (*Id.* at p. 1049.)

Bell, supra, 212 Cal.App.4th 1041 analyzed the legislative history of section 496, subdivision (c), concluding that the legislature believed criminal sanctions alone were inadequate to deter theft, and it would “dry up the market for stolen goods [to] permit[] treble damage recovery by ‘any person’ injured by the knowing purchase, receipt, concealment, or withholding of property stolen or obtained by theft.” (*Id.* at p. 1047.) Treble damages therefore could be awarded for theft by false pretenses. The appellate court acknowledged the concern that “‘any collecting creditor [could] claim that a breach of contract action constitutes a fraud, and in turn constitutes a theft, under . . . [section] 496[, subdivision] (a).” (*Ibid.*) We share that concern and agree with Ibrahim that *Bell*’s reasoning does not apply to the circumstances of this case.

The trial court found doublecrossing by both Ibrahim and Younan. While Ibrahim represented that he would get a mortgage to purchase the Woodley property, and Younan contributed \$40,000 for a down payment, Ibrahim actually purchased the property outright. Further, Ibrahim

misrepresented how much the taxes and insurance were so that Younan paid more than was due each month until he discovered the correct amount due. Younan did, however, receive the benefit of the bargain (residing and working in the Woodley property), including after he stopped making any payments to Ibrahim in October 2012 (as the court found he had done before with other straw purchasers). Younan had no good reason to keep the monthly rents paid to him by the other tenants. The court found the parties entered into an oral joint venture that later went bad, as both parties made misrepresentations and violated its terms.

In *Bell, supra*, 212 Cal.App.4th 1041 the evidence showed that the defendant perpetrated a true scam, and “violated section 496[, subdivision] (a) not only by receiving property from Bell by false pretense, but also by withholding that property when she asked for it back.” (*Id.* at p. 1049.) The defendant lied to Bell to get her to give him \$202,500 (constituting theft by false pretenses), and then refused to return it on her demand (constituting a violation of section 496, subdivision (a)). Further, Bell was an entirely innocent party. The same cannot be said of Younan. This shady deal between long-time friends is a far cry from the outright scam in *Bell*, where the defendant obtained a large amount of cash from an unwitting victim and then refused to return the money on demand. We do not believe the legislature intended to award treble damages in a situation such as this, where both parties violated the terms of a joint venture (although Ibrahim’s breaches were more severe).

III. Unpaid rents

Younan argues that the trial court erred in requiring him to pay “unpaid rents” to Ibrahim because there was no rental agreement and Younan did not agree to pay “rent.” The statement of decision requires Younan to pay Ibrahim unpaid “rents, agreed payments from Younan to Ibrahim, and tax and insurance obligations.” Rents refers to the subtenants’ rents, and agreed payments from Younan refers to Younan’s monthly \$1,100 payments under the original joint venture agreement. The judgment orders Younan to make *future* payments of “1,050.00 monthly rent.” The trial court did not characterize Younan’s past due payments as rent, but as monthly agreed payments of \$1,100 under the joint venture. No rental agreement was necessary.

IV. Giovacchini’s liability

The trial court found in favor of Giovacchini on the causes of action for fraud and constructive fraud. (Younan does not appeal the court’s earlier grant of Giovacchini’s motion for judgment on the pleadings on the other causes of action.) Younan argues the evidence showed that she made misrepresentations that caused him to rely on Ibrahim’s misrepresentations. But the trial court found that Ibrahim also told Giovacchini that he had obtained a hard money loan, and she was not aware that he had purchased the property outright. Giovacchini’s and Ibrahim’s testimony is substantial evidence supporting this conclusion. Without intentional misrepresentation, Giovacchini cannot be liable

for fraud. (*Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1084.)

Further, Giovacchini represented the Zeitounis, not Younan, who served only as an intermediary. As a result, she was the Zeitounis' agent, and did not owe Younan the fiduciary duty required for a finding of constructive fraud, which does not require that a fiduciary intend to deceive. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.)

DISPOSITION

The trial court is directed to modify paragraph (H) of the judgment to provide that Emile Younan shall recover an amount equal to his 23.19 percent share of the final pre-sale balance of the home equity line of credit, before any other distribution as provided in the judgment is made to the parties. Paragraph (L) of the judgment shall be modified by deleting “\$3,880.00” and inserting “\$3,830.00” in its place. In all other respects, the judgment is affirmed. Victor F. Ibrahim and Linda Giovacchini are awarded their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.