Filed 6/12/18 3405/3407 Slauson Ave. v. Gilleran CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

3405/3407 SLAUSON AVENUE, LLC, Plaintiff and Appellant, v. THOMAS J. GILLERAN et al., Defendants and Appellants.	B265290 Los Angeles County Super. Ct. No. BC425016

APPEALS from a judgment of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Jacob N. Segura for Plaintiff and Appellant.

Marvin Levy for Defendant and Appellant Gilleran Griffin Company.

INTRODUCTION

Plaintiff 3405/3407 Slauson Avenue, LLC (Slauson) agreed to purchase four commercial and residential units from defendant Leslie Alan Stimson for $1,575,000. Defendant Iman Omar, who was working as a real estate agent for defendant Gilleran Griffin Company (GGC), acted as the agent for both Slauson and Stimson. Before escrow closed, Omar represented to Slauson that the four units totaled 4,500 square feet. Slauson obtained financing from Stimson for the purchase. After the sale was finalized, Slauson discovered the four units totaled only 3,036 square feet. Slauson attempted, unsuccessfully, to negotiate a new purchase price for the property, and eventually stopped making payments on the underlying note. Stimson foreclosed on the property.

Slauson sued Stimson's estate,[1] Omar, GGC, GGC's owner (Thomas Gilleran), and a group of defendants who participated in the foreclosure process. After Slauson settled its claims against Stimson's estate and others, the case proceeded to a bench trial against the remaining parties. The court found Omar directly liable, and GGC vicariously liable, for Omar's overstatement of the units' square footage. The court found Gilleran was not personally liable for Omar's conduct, however. The court awarded Slauson $310,000 in compensatory damages and $257,167 in prejudgment interest. GGC appeals, and Slauson cross-appeals,[2] from the judgment, both challenging the court's liability and damages findings. We affirm.

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1 Stimson passed away after he foreclosed on the property.

2 Omar and Gilleran have not participated in the appeals.

FACTUAL AND PROCEDURAL BACKGROUND

1. Slauson Purchases the Property

Thomas Gilleran owns, and is the "responsible broker" for, GGC, a real estate brokerage firm operating out of Los Angeles. In March 2007, Omar worked as a real estate agent for GGC. David Ben Eliyahu is Slauson's managing member; it owns and manages several income-generating mixed-use properties throughout Los Angeles. The property at issue in this lawsuit is located on the 4600 block of Hollywood Boulevard and consists of two residential units and two commercial units (the Property).

In early March 2007, Omar told Eliyahu that Stimson was considering selling the Property. On March 19, 2007, Eliyahu and Stimson signed a "Disclosure Regarding Real Estate Agency Relationships," agreeing to allow Omar to serve as both Slauson's and Stimson's agent in the sale of the Property. The disclosure was signed by Omar and listed "Gilleran Griffin" as the "Agent."

That same day, Eliyahu signed a "Residential Income Property Purchase Agreement and Joint Escrow Instructions" (Purchase Agreement), offering to purchase the Property for $1,575,000.[3] The Purchase Agreement included a clause informing Slauson of its right to inspect the Property, including the right to "conduct an interior inspection of all units and garages." Attached to the Purchase Agreement was also a "Buyer's Inspection Advisory." The advisory informed Eliyahu he had the right to "investigate the Property" and "an affirmative duty to exercise reasonable care to protect [himself], including [the] discovery of the legal, practical and technical implications of

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[3] Although the Purchase Agreement was signed by Eliyahu and makes no reference to Slauson, the parties do not dispute that Eliyahu signed the purchase agreement on Slauson's behalf.

disclosed facts, and the investigation and verification of information and facts that you know or that are within your diligent attention and observation."

On March 23, 2007, Slauson and Stimson opened an escrow account for the sale of the Property. That same day, Omar sent Eliyahu an email with information about the Property's "rent roll," which detailed the amount of rent each of the current tenants were paying compared to the projected rent each unit could be leased for based on the then-current market rates. According to Eliyahu, Slauson was interested in purchasing the Property because it believed Stimson was charging below-market rent for each of the units. Slauson intended to renovate the Property and raise the amount of rent charged for each unit to compete with the then-current market rates for the Property's location.

On March 29, 2007, Omar sent an email to Eliyahu and a mortgage broker that purported to break down the square footage of the Property's units. The email stated the following: "Hello David & KC, [¶] Here are some pictures of 4616 Hollywood. [¶] The squre [*sic*] footage of the houses in the back are [] 1000 sqft/each [¶] The front: [¶] Travel agency / 700 sqft [¶] Monet hair salon is about / 1800 sqft [¶] Hope you have all the information now. [¶] Good luck, [¶] Iman Omar."[4] Omar sent the email using a personal account.[5] Omar did not state in the email, or tell

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[4] Although she did not provide a total square footage for the units in her email, the parties do not dispute that based on Omar's email, Slauson believed the total size of the four units was 4,500 square feet.

[5] We note that, in the portion of the Purchase Agreement listing the contact information for GGC, Omar listed the same personal email account as GGC's email account.

Slauson at any point before the purchase was finalized, how she determined the square footage of the Property's units.

Slauson decided to proceed with the purchase of the Property based on the square footage figures provided by Omar. According to Eliyahu, the units' square footage was a "very important" factor for Slauson because the amount of rent Slauson could charge prospective tenants and the amount of income it could generate from the Property were dependent on the size of the units.

Around the middle of May 2007, Slauson and Stimson finalized the sale of the Property. Slauson paid Stimson a $424,393.59 down payment. Because Stimson wanted to expedite the sale of the Property, Slauson did not obtain financing from a bank to fund the remainder of the purchase price. Instead, Slauson executed an installment note in the amount of $1,102,500, agreeing to pay Stimson the remainder of the purchase price through monthly payments. Slauson also executed a deed of trust in favor of Stimson, securing the note against the Property. Slauson never conducted its own inspection of the Property before the sale was completed.

2. Slauson Discovers the Property's True Square Footage

About four months after purchasing the Property, a prospective tenant informed Slauson that the square footage of one of the units was less than what Slauson had advertised. Slauson then had all of the units measured. The total square footage of the units was actually about 3,036 square feet, or about two-thirds the size that Omar had claimed them to be in her March 29, 2007 email.

After discovering the Property's true square footage, Slauson tried to renegotiate the Property's purchase price and asked Stimson to reduce the interest and outstanding principal

on the installment note. Although Stimson offered Slauson a reduction of about $250,000, the parties never reached an agreement.

Around May 2009, Slauson stopped making payments on the installment note. As a result, Stimson foreclosed on the Property under the deed of trust.

3. Slauson's Lawsuit

On August 16, 2011, Slauson filed the operative third amended complaint, naming as defendants Russell A.S. Stimson (Russell) in his capacities as the executor and successor trustee of Stimson's estate, Omar, GGC, and Gilleran. The complaint also names as defendants Witkin & Eisinger, LLC, Richard G. Witkin, and Carol Eisinger, who were alleged to have engaged in tortious conduct with respect to the Property's foreclosure.

The complaint alleges the following causes of action: (1) material misrepresentation against Stimson, Omar, GGC, and Gilleran; (2) suppression and concealment against Stimson, Omar, GGC, and Gilleran; (3) negligent misrepresentation against Stimson, Omar, GGC, and Gilleran; (4) rescission based on fraud or mistake against Stimson, Russell, Omar, GGC, and Gilleran; (5) rescission based on mistake of material fact against Stimson, Russell, Omar, GGC, and Gilleran; (6) breach of fiduciary duty and constructive fraud against Omar, GGC, and Gilleran; (7) imposition of a constructive trust and equitable lien against all defendants; (8) restitution against all defendants; (9) an order vacating and cancelling void recorded instruments against all defendants; (10) breach of contract and reformation of written instruments against Stimson; and (11) "official notarial misconduct" against "Defendants Witkin." The complaint also alleges that all of its causes of action are based on allegations

that Stimson, Omar, GGC, and Gilleran "jointly conspired" to induce Slauson to purchase the Property.

Around May 2013, Slauson settled its claims against Stimson's estate and Witkin. Stimson's estate paid Slauson about $190,000, and Witkin paid Slauson about $15,000, to settle Slauson's claims against them. On May 7, 2013, Slauson dismissed Russell Stimson, Richard Witkin, Carol Eisinger, and Witkin & Eisinger from its lawsuit.

3.1. The Trial

The court conducted a four-day bench trial in June 2014. We summarize some of the witnesses' testimony below.

Slauson presented Stimson's videotaped deposition testimony. According to Stimson, he met with Omar on a Sunday afternoon to discuss the square footage of the Property's units. When Stimson told Omar that he did not know the Property's square footage, she stated she only needed an estimate and suggested that Stimson measure the units by pacing their exterior perimeters "heel-to-toe" and counting off his steps. As Stimson "paced off" the perimeters, he counted his steps aloud to Omar while she inputted the numbers into a calculator. Stimson used this method to measure the exteriors of the two commercial units and one of the residential units. After Stimson paced off the residential unit, Omar looked at the other residential unit, stated they looked identical, and used the same square footage figure for both units. Once Stimson finished pacing off the Property, Omar left and never discussed the Property's square footage with Stimson again.

Jeffrey Dabbs, a licensed real estate broker, testified for Slauson as an expert in real estate transactions. Dabbs testified about the standard of care for, and standard practices of, real estate agents. It is standard practice for agents to disclose to a

potential buyer how a property's square footage was derived. A real estate agent is also obligated to make accurate representations to potential buyers about a property's condition.

According to Dabbs, Omar's conduct in representing Slauson during the sale of the Property fell below these standards in two ways. First, Omar relied on an inaccurate method of determining the Property's square footage. Second, Omar failed to disclose to Slauson how the square footage was derived. Since Omar failed to disclose how she obtained the Property's square footage, Slauson would have had no reason to doubt the accuracy of her representation, and would have been entitled to rely on that representation even though Slauson did not independently verify the Property's square footage. Omar's failure to disclose how she obtained the square footage also would have superseded the various disclaimers and waivers Eliyahu read and signed that discussed a buyer's responsibility to conduct its own property inspections and not to rely on an agent's or seller's representations about the condition of a piece of property.

Dabbs also testified about the importance of a property's square footage to a prospective buyer. According to Dabbs, the value of property is usually tied to its square footage. For example, a piece of property that is about 3,000 square feet would be worth less than a piece of property in the same location that is 4,500 square feet. Dabbs opined that Omar's overstatement of the Property's square footage by about 33 percent would have been a material factor in Slauson's decision to purchase the Property. According to Dabbs, Slauson should have paid about 66 percent of the amount it agreed to pay Stimson for the Property.

Eliyahu testified that had he been aware of the true square footage before the sale was finalized, he would not have agreed to pay more than $1 million for the Property. Had Stimson refused

to reduce the purchase price, Eliyahu would have cancelled the Purchase Agreement.

Omar denied ever calculating the square footage of the Property's units, instead claiming that Eliyahu and Stimson had paced off the square footage together. She also initially denied informing Eliyahu about the Property's square footage, stating that GGC had trained her and its other agents not to make misrepresentations concerning a property's square footage to their clients. She later acknowledged, however, that she sent the March 29, 2007 email containing the overstated square footage figures to Eliyahu. Omar also testified that she had known the actual square footage of the Property as early as March 19, 2007, when Eliyahu offered to purchase the Property, but nevertheless included the inaccurate figures in the March 29, 2007 email.

3.2. The Statement of Decision

On March 9, 2015, the court issued its final statement of decision. The court found "GGC is a real estate brokerage company owned by Gilleran, who has over 100 agents acting under his brokers' license," including Omar. The court also found Omar acted as the agent for both Slauson and Stimson in the sale of the Property.

The court determined Omar acted negligently, but not fraudulently, when she misrepresented the Property's square footage to Slauson. The court noted the parties presented conflicting evidence concerning whether Slauson reasonably relied on Omar's overstatement of the square footage of the Property's improvements. The court concluded Slauson could have been more diligent in ascertaining the Property's true square footage before agreeing to purchase the Property, but nevertheless found Slauson reasonably relied on Omar's statements in the March 29 email. Citing Dabbs's testimony, the

court found Omar had a duty to disclose to Slauson how she derived the Property's square footage. Because Omar failed to do so, Slauson was entitled to believe the square footage Omar presented was accurate.

The court held GGC was vicariously liable for Omar's negligent misrepresentation "based on established agency principles," but concluded there was insufficient evidence to establish that GGC or Gilleran were directly liable for failing to supervise Omar. According to the court, Gilleran would not have been aware of Omar's statements to Eliyahu concerning the Property's square footage. The court also held that Gilleran could not be held personally liable for Omar's conduct because Omar was employed by GGC, not Gilleran in his personal capacity.

The court based its compensatory damages calculation on the amount Slauson overpaid for the Property as a result of Omar's overstatement of the square footage, which the court found to be $500,000. This amount was based on Dabbs's testimony that the Property was actually worth two-thirds of what Slauson had paid for it and Eliyahu's testimony that, based on its actual square footage, Slauson should not have paid more than $1 million for the Property. The court noted that defendants did not present any evidence addressing the Property's value.

The court reduced Slauson's damages award by $190,000—i.e., the amount Stimson's estate paid to settle Slauson's claims before trial. Specifically, the court found Stimson, GGC, and Omar were "alleged to have been joint tortfeasors, inasmuch as they were alleged to have each participated in the misrepresentation of the square footage to Slauson." Accordingly, the court awarded Slauson $310,000 in compensatory damages. The court also awarded Slauson $261,635.65 in prejudgment interest dating back to January 7, 2010, the date Slauson lost the Property to foreclosure. The court denied Slauson's request to

recover as " 'tort of another' " damages the attorney's fees it expended in pursuing its claims against Stimson.[6]

3.3. The Judgment and Appeals

On May 14, 2015, the court entered judgment for Slauson and against Omar and GGC, jointly and severally, in the amount of $571,635.65. The court also entered judgment for Gilleran and against Slauson. Notice of entry of judgment was served on June 10, 2015. GGC timely appealed, and Slauson timely cross-appealed, from the judgment.

DISCUSSION

GGC's Appeal

GGC contends the court erred in finding it vicariously liable for Omar's overstatement of the Property's square footage on the following grounds: Slauson's reliance on Omar's misrepresentation was unreasonable; Slauson was not harmed by Omar's misrepresentation because square footage was not a material consideration in Slauson's decision to purchase the Property; Omar exceeded the scope of her authority when she overstated the Property's square footage; and GGC never authorized or ratified Omar's misrepresentation. GGC also contends the court erred in calculating Slauson's compensatory damages and prejudgment interest. All of these contentions are forfeited or lack merit.

1. Defects in GGC's Appeal

There are fundamental rules and principles of appellate practice that govern the types of issues and arguments that may

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[6] Eliyahu testified at trial that Slauson had incurred about $174,000 in attorney's fees pursuing its claims against Stimson.

be raised on appeal, the form in which such arguments should be made, and the manner in which the facts should be stated. As will become evident, GGC's presentation of this case on appeal is inadequate in a number of ways.

We begin with the most fundamental rule of appellate review—the judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) " 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To satisfy this burden, the appellant must, among other things, supply an adequate record of the trial court proceedings (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 (*Maria P.*)); tailor each argument raised in its appeal to the applicable standard of review (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 (*Sonic Manufacturing*)); support each claim with "reasoned argument and citations to authority" (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799 (*Dietz*)); and set forth, discuss, and analyze all the evidence, both favorable and unfavorable to the appellant's position, that supports the trial court's factual findings that are challenged on appeal (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 (*Roman Catholic Archbishop*)). Failure to comply with any one of these requirements may result in a waiver or forfeiture of the appellant's claims on appeal. (See *Maria P.*, at pp. 1295–1296; *Sonic Manufacturing*, at p. 465; *Dietz*, at p. 799; *Roman Catholic Archbishop*, at p. 218.)

The most glaring defect in GGC's opening brief is its failure to adequately, or correctly, identify and address the standards of review that apply to each of GGC's numerous claims of error.

Instead, GGC contends "[t]he issues in this appeal should be at least in some degree subject to independent de novo review." GGC then states that the de novo standard applies to issues involving application of statutes to undisputed facts and "application of facts which are uncontroverted and as to which only one deduction or inference may reasonably be drawn, i.e., whether some element of a claim or defense is met." GGC does not explain, however, why any of its claims of error fall within these scenarios.

In fact, the following claims are subject to either a substantial evidence or abuse of discretion standard of review: (1) whether Slauson reasonably relied on Omar's representations concerning the Property's square footage (see *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1078 (*Furla*) [a buyer's reasonable reliance on an agent's representations of the property's square footage is a question of fact]); (2) whether the square footage of the Property was a material factor in Slauson's decision to purchase the Property (see *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 (*Ortega*) [causation is a question of fact for the jury to decide, unless the facts are undisputed]); (3) whether GGC was vicariously liable for Omar's misrepresentations of the Property's square footage (see *Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 854 [a finding that an employer is vicariously liable for its employee's conduct is reviewed for substantial evidence unless the facts are undisputed]); (4) whether the court properly calculated the basis for Slauson's compensatory damages award (see *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 55 (*Ajaxo*) [a trial court's compensatory damages award is reviewed for substantial evidence]); and (5) whether the court properly granted or denied a settlement credit under Code of Civil Procedure section 877 (see *Wade v. Schrader* (2008) 168

Cal.App.4th 1039, 1044 ["We generally review a ruling granting or denying a section 877 settlement credit under the deferential abuse of discretion standard."].)

By failing to identify and discuss the standards of review that apply to each of its claims and to tailor its arguments to those standards, GGC has forfeited all of its claims on appeal. (See *Sonic Manufacturing*, *supra*, 196 Cal.App.4th at p. 465 ["Failure to acknowledge the proper scope of review is a concession of a lack of merit."].) As we explain in more detail below, GGC's opening brief also suffers from other defects.

2. GGC is vicariously liable for Omar's misrepresentation of the Property's square footage.

2.1. Slauson's Reasonable Reliance

GGC contends Slauson is estopped from asserting it reasonably relied on Omar's misrepresentation concerning the Property's square footage. As noted, whether a buyer reasonably relied on a real estate agent's misrepresentations about a property's square footage or failed to exercise due diligence in ascertaining the property's correct square footage is "ordinarily a question of fact" that we review for substantial evidence. (*Furla*, *supra*, 65 Cal.App.4th at p. 1078.) "A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable." (*Roman Catholic Archbishop*, *supra*, 177 Cal.App.4th at p. 218.) A party who fails to meet this burden waives or forfeits any claim that the court's findings are not supported by substantial evidence. (*Ibid*.)

In its opening brief, GGC discusses evidence showing that Omar and GGC provided Eliyahu several written waivers and disclaimers advising Slauson that it should not rely on a seller's representations about a property's condition, including

statements concerning its square footage, and that a buyer should conduct its own investigation and appraisal of a property before buying it. Based on this evidence, GGC insists the court should have found Slauson's reliance on Omar's statements concerning the Property's square footage was unreasonable.

GGC fails, however, to discuss any of the evidence introduced at trial that supports the court's finding on this issue. For example, GGC ignores all of Dabbs's testimony addressing how Omar's conduct fell below the real estate industry's standard of care; how Omar failed to provide Slauson accurate information about the Property's condition; and how, due to her deficient conduct, it was reasonable for Slauson to rely on Omar's representation of the Property's square footage, despite any waivers and disclaimers Eliyahu may have read and signed. By failing to address any of this evidence, GGC has forfeited its argument that the court erred in finding Slauson reasonably relied on Omar's statements concerning the Property's square footage. (See *Roman Catholic Archbishop*, *supra*, 177 Cal.App.4th at p. 218.) In any event, we conclude Dabbs's testimony constitutes substantial evidence to support the court's finding on this issue.

2.2. Slauson's Harm

GGC also contends Slauson could not have been harmed by Omar's overstatement of the Property's square footage because square footage was not a material factor in Slauson's decision to purchase the Property. According to GGC, regardless of the Property's actual square footage, Slauson would have paid the same price for the Property.

Whether a defendant's negligent conduct caused the plaintiff's harm is ordinarily a question of fact for the trier of fact to decide. (*Ortega*, *supra*, 26 Cal.4th at p. 1205 [causation is a

question of fact for the jury to decide, unless the facts as to causation are undisputed].) Accordingly, we review the record for substantial evidence that supports the court's finding that Omar's overstatement of the Property's square footage harmed Slauson.

In its opening brief, GGC cites evidence that it claims shows the Property's square footage was not a material factor in Slauson's decision to purchase the Property, such as the fact that Slauson offered to purchase the Property before obtaining any information about its square footage. But GGC fails to discuss any of the evidence that supports the court's finding that the square footage of the Property's improvements was a material factor in Slauson's decision to purchase the Property. For example, GGC ignores Eliyahu's testimony that Slauson decided to purchase the Property *based on* the square footage figures Omar provided in her March 29, 2007 email. GGC also ignores Eliyahu's testimony that, had he known the square footage of the Property was less than what Omar had claimed, he either would have tried to re-negotiate the Property's purchase price or cancelled the agreement to purchase the Property before escrow closed. Because GGC has failed to discuss any of this evidence, this argument is also forfeited. (See *Roman Catholic Archbishop*, *supra*, 177 Cal.App.4th at p. 218.) Regardless, Eliyahu's testimony about the materiality of the Property's square footage to Slauson's decision to purchase the Property constitutes substantial evidence to support the court's finding.

2.3. Omar's Scope of Authority

Next, GGC contends the court erred in finding it vicariously liable for Omar's conduct because Omar "exceeded the scope of her authority" when she misrepresented the Property's

square footage. GGC has not adequately developed this argument.

" 'An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. "Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived." [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]' [Citation.]" (*Dietz*, *supra*, 177 Cal.App.4th at p. 799; see also *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700 (*Landry*) [issue that is not supported by pertinent or cognizable legal argument may be deemed abandoned].)

Although GGC discusses evidence it claims shows Omar exceeded the scope of her authority in representing Slauson during its purchase of the Property, GGC does not cite or discuss relevant authority supporting its contention that the court erred in finding it vicariously liable for Omar's conduct. Specifically, GGC does not set forth, much less discuss, the requirements for finding an employer vicariously liable for the acts of its agents or employees.

To be sure, GGC cites a single statute, Civil Code section 2333,[7] and two out-of-state cases, *Walker v. Peake* (S.C. 1929) 150 S.E. 756 (*Walker*) and *Guaranty Trust Co. of New York v. Koehler* (8th Cir. 1912) 195 F. 669 (*Guaranty Trust*), to support its claim

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[7] Civil Code section 2333 provides: "When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized."

that it could not be held vicariously liable for Omar's conduct. GGC fails to explain the relevance of these authorities, however. With respect to *Walker* and *Guaranty Trust*, GGC does not describe their facts or what legal principles they stand for, much less explain why we should find them persuasive when analyzing a principal's or employer's vicarious liability.

As for Civil Code section 2333, that statute addresses when a principal may be bound by the acts of an agent acting on the principal's behalf, such as the agent's execution of a contract with a third party that purports to bind the principal. (See *Lachmiller v. Lachmiller Engineering Co.* (1956) 144 Cal.App.2d 533, 534–535.) But GGC fails to explain the relevance of this statute to the court's finding that it was liable for Omar's tortious conduct. GGC also fails to acknowledge that an employer may be held vicariously liable for its agent's acts even if those acts were not authorized by the employer or violate one of the employer's "express" rules. (See *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 (*Farmers*) [an agent's or employee's tortious conduct may fall within the scope of employment for purposes of finding the employer vicariously liable "even if it contravenes an express company rule and confers no benefit to the employer"].)

Because GGC has not developed this argument with reasoned analysis and citations to relevant authority, we disregard it. (*Landry*, *supra*, 39 Cal.App.4th at pp. 699–700; see also *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 523 ["Conclusory assertions of error are ineffective in raising issues on appeal."].)

2.4. GGC's Approval or Ratification

Finally, GGC contends the court erred in finding it vicariously liable for Omar's overstatement of the Property's

square footage because GGC did not approve or ratify Omar's misrepresentation. Once again, GGC fails to adequately develop its argument. In support of its contention regarding approval or ratification, GGC provides a string cite containing a series of authorities that address when an agency may be created by a prior authorization or subsequent ratification (Civ. Code, § 2307), or when a principal may be deemed to have ratified the prior unauthorized acts of its agent such that the principal may be contractually bound by those acts (See *White v. Moriarty* (1993) 15 Cal.App.4th 1290, 1295–1296; *City of Fresno v. Baboian* (1975) 52 Cal.App.3d 753, 757–761). GGC does not explain, however, why these legal authorities show that it could not be found vicariously liable for Omar's statements.

In fact, it is well established that vicarious liability may be imposed "whether or not the employer was itself negligent, and whether or not the employer had control of the employee." (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 803 .) Thus, an employer is not required to authorize or ratify an agent's tortious conduct before it may be held vicariously liable for that conduct. (See *Farmers*, *supra*, 11 Cal.4th at p. 1004.) All that is required is that the agent's tortious conduct was committed in the course of employment. (*Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431, 1442.) And here the evidence established Omar misrepresented the Property's square footage in the course of her employment with GGC.

In sum, GGC's assertion of error is conclusory, and not supported with reasoned analysis and citations to relevant authority. We therefore disregard this argument.

3. The court properly calculated damages and prejudgment interest.

GGC contends the court erred in calculating Slauson's compensatory damages and prejudgment interest. We review the court's award of damages to Slauson for substantial evidence. (*Ajaxo*, *supra*, 135 Cal.App.4th at p. 55.) As we explain below, substantial evidence supports the court's award.

3.1. Slauson overpaid for the Property.

In calculating Slauson's damages, the court first determined that Slauson paid $500,000 more for the Property than it would have had Omar not misrepresented the Property's square footage. Substantial evidence supports this finding. Eliyahu testified that, based on the actual square footage of the Property's improvements, the Property's purchase price should have been about $1 million, or about $500,000 less than what Slauson paid. (See Evid. Code, § 813, subd. (a)(2) [the owner of property may testify to the value of that property]; see also *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767–768 ["The testimony of one witness may provide substantial evidence."].) Dabbs also testified that the Property was valued 33 percent higher—i.e., about $500,000 higher—than it would have been had Omar not overstated the square footage of the Property's units.

GGC argues the court erred in calculating the amount Slauson overpaid for the Property because: (1) Dabbs was not qualified to testify about the Property's value under Evidence Code section 813, subdivision (a)(1)[8]; (2) Dabbs never expressly

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[8] Evidence Code section 813 provides in relevant part: "(a) The value of property may be shown only by the opinions of any of the following: [¶] (1) Witnesses qualified to express such opinions. [¶] (2) The owner or the spouse of the owner of the property or property

testified that Slauson paid $500,000 more for the Property than it should have; and (3) the court should have used a different formula to determine the amount Slauson overpaid for the Property. These arguments are meritless.

First, GGC forfeited any claim the court should not have relied on Dabbs's testimony to determine the actual value of the Property because GGC never objected to Dabbs's testimony on that issue. (Evid. Code, § 353, subd. (a); see, e.g., *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346 [failure to timely object to expert testimony forfeits issue on appeal].) Second, it is immaterial that Dabbs never expressly testified that Slauson paid $500,000 more for the Property than it should have since Dabbs provided the court with a formula for calculating the Property's true value. Third, GGC never presented any evidence at trial that would have supported the court's use of a different formula to calculate Slauson's damages.[9] In any event, Eliyahu's testimony about the Property's true value, by itself, was a sufficient basis for the court's damages calculation.

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interest being valued. [¶] (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest."

[9] We also disregard GGC's argument that the court should have considered the 2010 Los Angeles County Assessor's record for the Property, which GGC did not introduce at trial, but included as an attachment to a post-trial brief, when it calculated Slauson's compensatory damages. GGC did not include a copy of the assessor's document in the record on appeal (*Maria P.*, *supra*, 43 Cal.3d at p. 1295 [failure to provide an adequate record requires that the issue be resolved against the appellant]), and it has not cited any authority to support its claim of error.

3.2. The court correctly reduced the amount of Slauson's compensatory damages by $190,000.

GGC argues that, in calculating Slauson's compensatory damages, the court should have reduced the amount Slauson overpaid for the Property by $265,000, instead of only $190,000. We disagree.

First, GGC asserts the court should have reduced the amount it found Slauson overpaid for the Property by $250,000, which represents the amount Stimson offered to reduce the purchase price once Slauson discovered the Property's true square footage, rather than by only $190,000, which is the amount Stimson ultimately paid to settle Slauson's claims before trial. GGC cites no authority to support this argument, so we disregard it. (See *Landry*, *supra*, 39 Cal.App.4th at pp. 699–700.)

Second, GGC claims that, under Code of Civil Procedure section 877 (section 877), the court should have reduced the amount Slauson overpaid for the Property by an additional $15,000, which represents the amount Richard Witkin paid Slauson to settle its claims against him before trial. Section 877 provides in relevant part:

> "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or

> the covenant, or in the amount of the consideration paid for it, whichever is the greater."

(Code Civ. Proc., § 877, subd. (a).)

GGC's reliance on section 877 is misplaced because Richard Witkin and GGC are not liable for the same harm. That is, Richard Witkin was not involved in Omar's misrepresentation or Slauson's purchase of the Property in 2007—and the misrepresentation and purchase of the Property are the only bases for the compensatory damages award GGC is challenging. Rather, Richard Witkin was only involved in the loan modification discussions and foreclosure process that began around 2009, *after* Slauson purchased the Property. Accordingly, the court should not have reduced Slauson's compensatory damages award against GGC and Omar by the amount of Richard Witkin's settlement. (See *Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 832 (*Knox*) [to qualify for a damages reduction under section 877, a non-settling defendant must have committed the same tort that the settling defendant was claimed to have committed].)

3.3. Prejudgment Interest

In addition, GGC contends the court erred in calculating the amount of prejudgment interest Slauson was entitled to recover. GGC challenges the court's prejudgment interest calculation only to the extent it claims the court erred in calculating Slauson's compensatory damages. Because we conclude the court properly calculated Slauson's compensatory damages, we reject this argument.

Slauson's Cross-Appeal

1. Slauson did not show Omar's negligent misrepresentation constituted fraud.

Slauson argues the court committed reversible error when it found Omar's overstatement of the Property's square footage was negligent but did not rise to the level of fraud. Slauson explains that, under Civil Code section 1572, the tort of negligent misrepresentation is a form of "actual fraud." This argument is misguided.

Civil Code section 1572 provides in relevant part: "Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: [¶] . . . [¶] The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." (Civ. Code, § 1572, subd. (2); see also *Furla*, *supra*, 65 Cal.App.4th at p. 1077 [negligent misrepresentation is a form of "actual fraud" under Code of Civil Procedure section 1572].) Thus, for a defendant to be liable for "actual fraud" based on a negligent misrepresentation under this statute, the defendant must be a party to the underlying contract and must act with the intent to deceive another or induce another to enter into the contract. (Civ. Code, § 1572, subd. (2).)

But Slauson never alleged, and the court never found, that Omar was a party to the Purchase Agreement between Slauson and Stimson. The court also never found that Omar intended to induce Slauson to enter into the Purchase Agreement when she overstated the Property's square footage. Accordingly, Slauson has failed to show how Omar could be liable for "actual fraud" under Civil Code section 1572.

To the extent Slauson contends the court was required to find Omar engaged in some general form of fraud based on her negligent misrepresentation of the Property's square footage, that argument also lacks merit. The tort of negligent misrepresentation and the tort of fraud, while species of deceit, do not share all of the same elements. (See *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173–174.) "The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) The tort of negligent misrepresentation, on the other hand, "does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (*Ibid.*) Thus, fraud, unlike negligent misrepresentation, requires the defendant to know that her statement or representation is false. (*Small*, at p. 173.) Here, the court never found that Omar knew her overstatement of the Property's square footage was false when she made that representation.

In any event, even if we were to assume the court erred in finding Omar did not engage in fraud, Slauson has failed to show how it was prejudiced by that error. (See Cal. Const., art. VI, § 13 [An appellant has the burden not only to show error but prejudice from that error]; *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 [if an appellant fails to satisfy that burden, its argument will be rejected on appeal].)

2. The court properly denied Slauson's request for tort of another damages.

Slauson contends the court erred in denying its request to recover from Omar and GGC the attorney's fees it expended in pursuing its claims against Stimson as tort of another damages. We disagree.

As a general rule, attorney's fees are not recoverable unless authorized by statute or contract. (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620 (*Prentice*).) One exception to this rule is the doctrine of tort of another damages. Under this exception, "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Ibid.*)

This exception has been used to award attorney's fees in the following types of cases: (1) against an escrow holder whose negligence made it necessary for a seller of land to file a quiet title action against a third party (*Prentice*, *supra*, 59 Cal.2d at pp. 619–622); (2) against a real estate broker who falsely represented to a prospective buyer that the sellers had accepted the buyer's offer to purchase a piece of property, thereby inducing the buyer to pursue an unsuccessful action for specific performance against the sellers (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505–507 (*Gray*)); and (3) against an insurance company for its bad faith failure to pay benefits due under a policy of disability insurance (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817).

This exception does not apply, however, in cases like the one before us, where a plaintiff seeks to recover attorney's fees from one of several joint tortfeasors. (*Vacco Industries, Inc. v.*

Van Den Berg (1992) 5 Cal.App.4th 34, 57 (*Vacco*).) As the court in *Vacco* explained, "If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the '*Prentice* target.' Such a result would be a total emasculation of Code of Civil Procedure section 1021 in tort cases." (*Ibid*.)

Here, Slauson alleged in its operative complaint that each of its causes of action was based on allegations that Stimson, GGC, and Omar "jointly conspired" to induce Slauson to purchase the Property. The court also found that Stimson, GGC, and Omar were "joint tortfeasors, inasmuch as they were alleged to have each participated in the misrepresentation of the square footage to Slauson." Because Stimson, Omar, and GGC were joint tortfeasors, the court properly denied Slauson's request to recover from GGC and Omar the attorney's fees it expended in suing Stimson as " 'tort of another' " damages. (See *Vacco*, *supra*, 5 Cal.App.4th at p. 57.)

For that same reason, this case is distinguishable from *Gray*, which Slauson asserts compels reversal of the court's order denying its request for tort of another damages against GGC and Omar. In *Gray,* a real estate broker falsely represented to a prospective buyer that the sellers had accepted the buyer's offer to purchase a parcel of real property. (*Gray*, *supra*, 35 Cal.3d at p. 502.) After the broker later informed the buyer that the sellers did not intend to sell the property, the buyer sued the sellers and the broker for specific performance and damages for fraud. (*Ibid*.) The trial court found the broker had breached a fiduciary duty owed to the buyer by falsely claiming the sellers had accepted the buyer's offer, but the court denied any recovery against the sellers, finding they had never accepted the buyer's offer or otherwise contracted to sell the property. (*Id*. at pp. 502–503.) The court awarded the buyer the amount of attorney's fees it had

incurred in litigating its claims against the sellers as tort of another damages against the broker. (*Ibid.*)

The California Supreme Court affirmed the trial court's decision to award the buyer tort of another damages. (*Gray*, *supra*, 35 Cal.3d at pp. 507–509.) The court reasoned that such damages were authorized because, had the broker not falsely notified the buyer that the sellers had accepted the buyer's offer, the buyer never would have incurred any attorney's fees against the sellers, who were innocent third parties in the underlying transaction that gave rise to the buyer's lawsuit. (*Id.* at p. 507.)

Unlike the sellers in *Gray*, Stimson was not an innocent third party in the transaction that gave rise to the underlying litigation. Instead, Stimson was alleged by Slauson, and found by the trial court, to be a joint tortfeasor in the misrepresentation of the Property's square footage that convinced Slauson to purchase the Property. It was therefore not just Omar's and GGC's tortious conduct that caused Slauson to sue Stimson, but it was also Stimson's own conduct that contributed to the litigation. As a result, this case falls outside the scope of *Gray* and fits within the type of cases where recovery of tort of another damages is barred based on the third party's status as a joint tortfeasor. (See *Vacco*, *supra*, 5 Cal.App.4th at p. 57.)[10]

3. The court properly reduced Slauson's damages.

Further, Slauson argues the court erred when it reduced Slauson's compensatory damages award by $190,000, the amount of the settlement Stimson paid to Slauson before trial, under

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[10] Because we conclude the court properly denied Slauson's request for tort of another damages, we need not address Slauson's claims that the court's denial of those damages violated Slauson's due process and equal protection rights.

section 877. Slauson insists the court should not have reduced its damages because Stimson did not commit the same torts committed by Omar and GGC.

As we discussed before, "section 877 requires that an offset be given reducing the judgment by the amount of the consideration paid for a dismissal given 'to one or more of a number of tortfeasors *claimed* to be liable for the same tort . . . .' " (*Knox*, *supra*, 109 Cal.App.3d at p. 832.) In this case, Slauson alleged in its operative complaint that Stimson, Omar, and GGC all were liable for Omar's misrepresentation of the Property's square footage because they "jointly conspired" to induce Slauson to purchase the Property. This allegation satisfies the requirements of section 877. (See *Knox*, *supra*, 109 Cal.App.3d at p. 832.)

Slauson also ignores that, in deciding to reduce Slauson's compensatory damages award, the court made an express finding that Stimson, GGC, and Omar were joint tortfeasors for purposes of section 877. In addition, the court never found that Slauson suffered additional damages as a result of any tort that GGC and Omar may have committed independent of Stimson.[11] Under these circumstances, the court properly reduced Slauson's compensatory damages award against Omar and GGC by the amount of Stimson's settlement.

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[11] For this reason, we need not address Slauson's argument that, in addition to finding Omar and GGC jointly and severally liable for negligent misrepresentation based on Omar's overstatement of the Property's square footage, the court also found Omar and GGC jointly and severally liable for other torts, such as breach of fiduciary duty and constructive fraud.

4. Gilleran was not personally liable for Omar's misrepresentation.

Finally, Slauson contends the court erred in finding Gilleran was not personally liable for Omar's overstatement of the Property's square footage. According to Slauson, Gilleran was personally liable for Omar's conduct because Gilleran held himself out to the public as Omar's personal employer.

For a principal to be liable for the conduct of its agent, " '[t]he person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence. [Citation.]' [Citations.]" (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399–400 (*Associated Creditors' Agency*).) Thus, to support a finding that Gilleran was liable for Omar's conduct, Slauson was required to present evidence that Slauson reasonably believed Omar was acting as Gilleran's agent when she misrepresented the Property's square footage.

In support of its argument, Slauson relies on two exhibits that are not included in the record on appeal. Specifically, Slauson cites exhibit number 35, which is the "Bureau of Real Estate Records" for Gilleran, in which Gilleran apparently referred to his "real estate brokerage sole proprietorship" as "Thomas J. Gilleran doing business as Gilleran Griffin Company," and exhibit number 36, the "Bureau of Real Estate Records" for GGC, in which Gilleran allegedly identified himself as "Gilleran Griffin Company." Because Slauson has not supplied us with these exhibits on appeal, we cannot evaluate this argument and deem it forfeited. (See *Maria P.*, *supra*, 43 Cal.3d at p. 1295 [failure to provide an adequate record requires that the

issue be resolved against the appellant].) In any event, Slauson does not cite any evidence that shows Slauson was aware Gilleran was holding himself out as Omar's personal employer while she represented Slauson during the sale of the Property. (See *Associated Creditors' Agency*, *supra*, 13 Cal.3d at pp. 399–400.)[12]

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.

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[12] We also reject Slauson's claim that Gilleran's status as GGC's "responsible broker" necessarily rendered him personally liable for Omar's conduct. Slauson does not cite any case or statute to support this claim. Instead, it provides only a single quote from a multipage document found on the Bureau of Real Estate's website. Slauson never presented this document at trial. It also does not explain why we should rely on the document to conclude the court erred when it found Gilleran was not personally liable for Omar's conduct.