Filed 5/30/12 Bliszcz v. Goldberg CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JUDITH BLISZCZ et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

ALBERT M. GOLDBERG,

Defendant, Cross-complainant and Appellant;

SHARON PALMER,

Cross-defendant and Respondent.

2d Civil No. B225949
(Super. Ct. No. CIV 234437)
(Ventura County)

Albert M. Goldberg appeals a judgment entered in favor of Judith Bliszcz, Jennifer Prince, and Sharon Palmer following a jury trial.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

777 Hopper Canyon is a 31-acre agricultural property in Fillmore that was originally developed by Robert Asimow. The property contains 20 useable acres, including seven acres of Valencia orange groves, a large residence, trailer, barn, and other structures. Water for the property was supplied by a well on an adjacent parcel that Asimow also owned.

[1] We shall refer to plaintiffs Bliszcz and Prince and cross-defendant Palmer as "Bliszcz" except where clarity demands that we draw a distinction.

In June 2000, Asimow sold the property to Salmon, Inc. and its principal, Sandor Racz (collectively "Racz"), for $450,000. Real estate broker Kay Wilson Bolton represented Asimow in the real estate transaction. Racz did not enter into a water-use agreement with Asimow, however, and approximately two years later, Asimow cut off the water supply to the property. At the time, Racz was using the property to raise livestock and chickens and grow oranges.

In June 2002, Racz retained Goldberg, a licensed real estate broker, to sell the property. On July 11, 2002, Asimow wrote Goldberg and stated: "Please fulfill your legal obligations and inform any prospective buyer that there is no source of water on the property. Currently Sandor Racz is receiving water from the adjacent property (678 Hopper Canyon) but I have informed him that this service will be discontinued shortly unless an agreement is reached. You should also know that a number of trial wells were drilled on the property but none were successful."

When real estate broker Bolton learned that the Hopper Canyon property was for sale again, she telephoned Goldberg and informed him that the property does not have "a reliable water source." Bolton had concerns that litigation might ensue from the property's lack of a water supply.

Shortly thereafter, Racz filed a petition for bankruptcy. Goldberg sought approval of the bankruptcy trustee to sell the property for $950,000, and informed the trustee that he had been advised that the property did not have a water source. The bankruptcy court ultimately approved the property's sale to Robert Hanson, a New Jersey contractor, and Goldberg's mother (as an investor) for $800,000. Goldberg represented all parties to the January 2003 transaction.

After taking possession of the property, Hanson attempted to drill a water well on the property without success. For irrigation and household purposes, he used a water delivery service to fill a water tank on the property.

Hanson's purpose in purchasing the property was to repair and resell the property, or "reflip[]" it. He performed little remedial work on the property, however, and

seven months after his purchase, he employed Goldberg to sell it. The listing price was $1.2 million.

In 2004, Sharon Palmer, her mother Judith Bliszcz, and her daughter Jennifer Prince decided to begin a hydroponic farming business and grow organic fruits and vegetables. They researched the business, visited hydroponic farming operations, including a tomato grower in Fillmore, and contacted AgVisions, a business that sold turnkey hydroponic farming greenhouses and provided a business plan. Palmer and her son-in-law attended two weeks of training to learn the hydroponic farming process.

Through an advertisement, Palmer learned that the Hopper Canyon property was for sale. Palmer visited the property, learned that its orange trees were certified as organic, and saw remnants of Racz's chicken and egg production. She later met with Goldberg who stated that wells provided non-potable water to the water tanks and the household. Following that meeting, Palmer made a full price offer on the property and used Goldberg as her broker. Throughout the transaction, Palmer believed that the property had non-potable well water that would support irrigation and household plumbing. She stated at trial, "It's quite difficult to build a hydroponic greenhouse and operate a business without no water." Goldberg did not disclose that Asimov originally provided a water supply to the property, that Hanson had unsuccessfully attempted to locate water, or that the existing water wells on the property were not functioning.

Ultimately, Bliszcz and Prince purchased the property for $1,450,000, with seller-provided financing on a second trust deed. (Palmer was not a purchaser due to personal credit issues.) Escrow closed on May 12, 2004, and the purchasers obtained an organic recertification as "Healthy Family Farms."

Shortly after moving onto the property, the purchasers learned that the property's wells were not functioning and that the property had no water. They obtained water delivery by truck for irrigation and household needs. Later, they connected to a temporary water source and began organic farming operations, including chickens, eggs, goat milk, turkeys, lavender, and Valencia oranges. They were unable to refinance the property to obtain a permanent water supply to commence hydroponic greenhouse

gardening, however, and in March 2008, lost the property to foreclosure. Following the foreclosure, they operated a profitable and larger organic farm in Wheeler Canyon.

Expert Testimony Regarding Lost Profits

Jerrel John, a certified public accountant, testified as an expert witness regarding the purchasers' lost profits in operating a farming business on the Hopper Canyon property for four years. John had prepared tax returns for approximately 10 to 12 farming clients for 15 years. He characterized Healthy Family Farms as "profitable" and a "going business." John opined that the farm could sell all the produce it could grow. He testified that Healthy Family Farms was involved in a dozen farmers' markets, and he visited one such market to verify the farm's claim of profitable sales. John also visited the farm and verified that it involved production of chickens, eggs, ducks, turkeys, lavender, and organic oranges. He opined that the lost profits from all the farming operations, excluding interest, amounted to $2,720,623.

Bliszcz brought this lawsuit against Goldberg alleging causes of action for fraud, breach of fiduciary duty, and negligence, among other causes of action. Following trial, the jury found that Goldberg breached his fiduciary duty to Bliszcz and also acted negligently. It found that he did not commit fraud. The jury awarded Bliszcz $21,000 damages for the cost of obtaining a temporary water source, $300,000 damages for diminution in value of the property, and $1,525,108 in lost profits. The special verdict form agreed to by the parties inquired regarding the parties' comparative negligence; the jury responded that Bliszcz was 50 percent negligent.

Through post-verdict motions, Goldberg challenged the verdict on the same grounds that he raises here. The trial court rejected Goldberg's contentions and concerning the award for lost profits stated that "Mr. John . . . was a very good witness, and he did have a good background, actually, in the farming business because he was a CPA for the farming business and did tax returns for small and large farms for over 15 years" and that the jury verdict was less than half of John's opinion of lost profits.

Goldberg appeals and contends that: 1) the award of lost profits is speculative and not supported by sufficient evidence; 2) the special verdicts are inconsistent; and 3) the trial court erred by not apportioning damages to account for comparative fault.

DISCUSSION

I.

Goldberg argues that the award of lost profits is speculative and not supported by substantial evidence because expert witness John ignored unpaid operating expenses in calculating lost profits. (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1180 [damage awards in injury to business cases rest on net profits].) He asserts that John did not take into account $11,000 monthly mortgage payments or property tax on the property when calculating lost profits. He adds that the hydroponics venture was an untested new enterprise and the purchasers did not provide evidence of operating histories of comparable businesses. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 887 [insufficient evidence that plaintiffs would have earned net profits from "unlaunched" Internet business].)

Sufficient evidence supports the $1,525,108 damages. The purchasers had four years of successful non-hydroponic farming experience with a temporary water source, and following foreclosure of the Hopper Canyon property, a successful organic farm in Wheeler Canyon. They sold their produce at a dozen farmers' markets and John visited one market in Ojai to verify sales. John concluded that the purchasers had an outlet to sell all the crops they could produce with hydroponic farming. He also contacted a hydroponic farmer in Fillmore who stated that he was selling all the crops he could produce and informed John regarding the sales prices. In addition, John discounted his figures by 20 percent to account for business risks.

The jury also could properly consider that the purchasers' families resided on the Hopper Canyon property and that it was their personal residence, not solely a commercial venture. The mortgage and property tax expenses thus would be personal expenses.

Moreover, to the extent that Goldberg did not object to evidence of the hydroponics business plan, he has forfeited his argument on appeal regarding the

speculative and untested nature of the plan. (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346 [by failing to object, defendant waived claim that expert witness's testimony regarding future profits was speculative].)

It is true that the evidence as to lost profits may be lacking in exactness. However, it is well settled that plaintiff need not prove his damages with exactitude: "'[T]he courts have been reluctant to reverse a reasonable damage award because the precise amount of damage was not definitely ascertainable. [I]t appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. . . . The law only requires that the best evidence be adduced of which the nature of the case is capable . . . and the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. . . .'" (*Bertero v. National General Corp.* (1967) 254 Cal.App.2d 126, 150-151, citations omitted.)

II.

Goldberg asserts that the special verdict is inconsistent as a matter of law, requiring a new trial on both liability and damages. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682 ["Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law"].) He points out that the jury expressly found that he did not make a false representation to the purchasers, yet it awarded damages for lost profits.

For several reasons, there is no inconsistency or error. First, the parties agreed that the benefit of the bargain measure of damages rather than out-of-pocket damages applied to the lawsuit. The trial court also instructed with a modified version of CACI No. 1920 ("Buyer's Damages for Purchase of Acquisition of Property") to allow an award of lost profits for fraud, fraudulent concealment, negligence, and breach of fiduciary duty. Moreover, the parties agreed with the trial court that the special verdict regarding the award of damages would be placed "at the end" of the special verdict form. Goldberg responded,

"That's fine, Your Honor," following the court's statement regarding placement of the damages question. Goldberg may not now complain on appeal. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1090-1091 [discussion of invited error rule in context of instructions in civil case].)

III.

Goldberg argues that the trial court erred by not applying the jury's finding of comparative fault to the damages awarded for his breach of fiduciary duty to Bliszcz. He points out that breach of fiduciary duty may sound in either fraud or negligence. (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415 ["Breach of a real estate agent's fiduciary duty to his or her client may constitute negligence or fraud, depending on the circumstances of the case"].) Goldberg reasons that because the jury rejected the causes of action for fraud and intentional misrepresentation, liability must rest upon negligent breach of fiduciary duty.

The trial court did not err. During the conference with the court regarding jury instructions, Goldberg agreed that contributory negligence applied only to the negligence claim. The court and the parties then drafted the special verdict with that agreement in mind. Goldberg cannot now change his theory of trial on appeal. (*Durkee v. Chino Land & Water Co.* (1907) 151 Cal. 561, 569 [defendant must object to the measurement-of-damages rule adopted in trial court to preserve claim on appeal].)

Moreover, the trial court instructed the jury that a real estate broker owes his principal three fiduciary duties: the duty to use reasonable care; the duty of undivided loyalty; and the duty to inspect, disclose and advise. The jury may have found that Goldberg violated the duty of undivided loyalty or the duty to inspect and disclose. "Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud." (*Assilzadeh v. California Federal Bank, supra,* 82 Cal.App.4th 399, 415 [careless misstatement may constitute constructive fraud although

there is no fraudulent intent].) Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship. (*Ibid.*)

In many ordinary business transactions, comparative negligence has no place. "Business ethics justify reliance upon the accuracy of information imparted in buying and selling, and the risk of falsity is on the one who makes a representation. [Citation.] This straightforward approach provides an essential predictability to parties in the multitude of everyday exchanges; application of comparative fault principles, designed to mitigate the often catastrophic consequences of personal injury, would only create unnecessary confusion and complexity in such transactions." (*Carroll v. Gava* (1979) 98 Cal.App.3d 892, 897 [sellers made negligent misrepresentation in sale of property].)

In certain circumstances, principles of comparative negligence may apply to claims against a fiduciary. For example, a client may not heed his attorney's advice, may fail to answer discovery requests, or may lose documents or fail to sign them. Here comparative negligence has no application to the claims against Goldberg, however.

To the extent Goldberg argues new matters in his reply brief, we do not consider them.

The judgment is affirmed. All respondents shall recover costs of appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.*

PERREN, J.

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Barbara A. Lane, Judge

Superior Court County of Ventura

Horvitz & Levy LLP, H. Thomas Watson, Robert H. Wright; Spile, Siegal, Leff & Goor LLP, Jeffrey E. Lerman for Defendant, Cross-complainant and Appellant.

Lang, Hanigan & Carvalho, LLP, Arthur Carvalho, Jr. for Plaintiffs, Cross-defendants and Respondents.